

## EEOC Warns Against Age Discrimination And Other Workplace Concerns During Back-To-Business Push

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In its latest round of updates to a series of COVID-19 Frequently Asked Questions, the Equal Employment Opportunity Commission just warned employers they cannot prevent older workers from returning to work even if they want to protect such workers from the effects of COVID-19. The updates also provide additional guidance regarding ADA reasonable accommodations, preventing workplace harassment in a remote work environment, and addressing other workplace discrimination concerns. What do employers need to know about this latest agency guidance?

### EEOC Calls Out Age-Related Discriminatory Practices

The latest round of updates to its FAQs saw the EEOC specifically identify age discrimination as a cause for concern given the current state of affairs. The agency acknowledged that public health authorities have identified those age 65 and over as being at higher risk for a severe case of COVID-19 if they contract the virus. However, because the Age Discrimination in Employment Act (ADEA) prohibits employers from discriminating against those 40 and older, the law prohibits you from involuntarily excluding an individual from the workplace based on their being 65 or older – “even if the employer acted for benevolent reasons such as protecting the employee due to higher risk of severe illness from COVID-19.”

The EEOC also discussed the concept of providing flexibility to older workers and the legal considerations to keep in mind. Unlike the Americans with Disabilities Act (ADA), the ADEA doesn't include a right to reasonable accommodation for older workers due to age.

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However, the guidance notes that you are free under federal law to provide flexibility to workers age 65 and older even if it results in younger workers ages 40 to 64 being treated less favorably based on age in comparison. Make sure to check with your legal counsel before taking any steps that would result in such a situation, however, because there may be nuances under state or local law that need to be taken into consideration.

Further, the EEOC notes that workers age 65 and older also may have medical conditions that would separately bring them under the protection of the ADA. If this is the case, you should keep in mind that these workers may request reasonable accommodation for their disability as opposed to their age, and that you should run through your typical interactive process with them.

For further discussion on this topic, you can refer to our recent alert: “NBA Commissioner’s Comments On Older Coaches Is A Lesson To All Employers Returning To Work.”

### **Agency Also Confirms Limits Of Accommodation Obligations**

In other updated portions of the FAQ guidance, the EEOC confirmed that workers are not entitled to an ADA reasonable accommodation simply to avoid exposing a vulnerable family member to a potential case of COVID-19. “Although the ADA prohibits discrimination based on association with an individual with a disability,” the agency said, “that protection is limited to disparate treatment or harassment.” It confirmed that the federal disability rights statute does not require you to accommodate an employee without a disability based on any disability-related needs of a family member or anyone else.

However, employers are certainly permitted to provide such flexibilities if they choose to do so, the agency said. For example, you can allow an employee without a disability to work remotely to protect a family member of theirs who has a disability from potential COVID-19 exposure. You should be careful when doing so, however. Not only does the EEOC warn employers not to engage in disparate treatment on a protected basis when offering such flexibilities, you need to consider whether doing so could require you to offer remote work as an ADA reasonable accommodation to that employees or others similarly situated at some point in the future.

The EEOC also noted that employers may provide information to employees about requesting disability accommodations before employers announce a date for a return to the workplace, so long as they provide it to **all** employees. The notice may include a list of all medical conditions identified by the CDC that may place people at higher risk of serious illness if they contract COVID-19, provide instructions on whom the employees should contact, and suggest that the employer is willing to consider requests for employees who have those conditions on a case-by-case basis.



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The EEOC noted that requests for accommodation may also come in the form of requests for alternative screening methods upon entering the workplace. As always, you should ensure that the individuals receiving the requests for accommodation understand how to handle them in compliance with applicable nondiscrimination laws.

### **EEOC Reminds Employers About Workplace Harassment In Remote Work Era**

The updated guidance also sends a stern warning to employers that illegal harassment is still a viable concern even if your workforce is mostly working on a remote basis. “Harassment may occur using electronic communication tools – regardless of whether employees are in the workplace, teleworking, or on leave,” the agency said. The EEOC reminded employers that your employees are prohibited by law from harassing other employees through emails, calls, video platforms, or chat communications.

The agency recommends that you should ensure your managers understand how to recognize harassment and know how to quickly identify and resolve potential problems. For example, the agency said that if one of your managers learns that a teleworking employee is sending harassing emails to another worker, they should take the same actions it would take if the employee was in the workplace. You may also choose to send a reminder to your entire workforce noting your harassment prohibitions, reminding them that harassment will not be tolerated, and inviting anyone who experiences workplace harassment to report it to management.

### **EEOC Includes Special Word About Harassment Against Asian Employees**

The EEOC went out of its way to address how you should respond to “pandemic-related harassment” against employees who are or are perceived to be Asian. The agency recommends that you should be particularly alert at this time to demeaning, derogatory, or hostile remarks directed to employees who are or are perceived to be of Chinese or other Asian national origin, including about the coronavirus or its origins.

### **Other Workplace Discrimination Considerations**

The latest round of updates from the EEOC also covered topics that may find their way to your workplace during these unprecedented times. Specifically:

- **Caregivers/Family Responsibility:** You are permitted to provide flexibilities to workers who are juggling work responsibilities and parenting during this time of school closures and distance learning (such as telework, modified schedules, or other benefits), but need to make sure you are not treating employees differently based on sex or other EEO-protected characteristics. “For example,” the EEOC says, “female employees cannot be given more favorable treatment than male employees because of a gender-based assumption about who



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may have caretaking responsibilities for children.”

- **Pregnancy:** Just as with older workers, you may not involuntarily exclude an employee from the workplace due to pregnancy. “Even if motivated by benevolent concern,” the EEOC says, “an employer is not permitted to single out workers on the basis of pregnancy for adverse employment actions, including involuntary leave, layoff, or furlough. You may also have an obligation to accommodate a pregnant worker under the ADA (if a pregnancy-related medical condition arises) or through the Pregnancy Discrimination Act (which requires you to treat women affected by pregnancy and childbirth the same as others who are similar in their ability or inability to work, which may entitle them to job modifications including telework, changes to work schedules or assignments, and leave).”

### Conclusion

Fisher Phillips will continue to monitor the rapidly developing COVID-19 situation and provide updates as appropriate. Make sure you are subscribed to Fisher Phillips’ Alert System to get the most up-to-date information. For further information, contact your Fisher Phillips attorney or any member of our Post-Pandemic Strategy Group Roster. You can also review our FP BEYOND THE CURVE: Post-Pandemic Back-To-Business FAQs For Employers and our FP Resource Center For Employers.

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*This Legal Alert provides an overview of a specific developing situation. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.*