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CLIENT ALERT: EEOC Issues, Retracts, Then Re-Issues Guidance about "Direct Threat" and COVID-19

Anyone trying to keep up with the onslaught of COVID-19 workplace legal developments understands that solid conclusions tend to be the exception, and the targets are constantly moving. Is there something special about the coronavirus world that warrants a new approach to the law, or must we apply traditional employment law principles even in these extraordinary circumstances? This challenge can flummox even the Equal Employment Opportunity Commission ("EEOC"), the federal enforcement agency responsible for interpreting workplace discrimination law.

On Tuesday, May 5, within a matter of hours, the EEOC issued and then retracted specific guidance for any employer who wants to prevent a "high-risk" employee from working because of increased risk of that employee contracting a possibly deadly COVID-19 infection. The short-lived guidance, seemingly tailored to the COVID-19 world, involved an apparently relaxed interpretation of the "direct threat" defense to discrimination claims under the Americans with Disabilities Act ("ADA"). Then on Thursday, May 8, the agency issued revised guidance, essentially reverting to its traditional position on the "direct threat" defense.

The ADA has always had the narrow "direct threat" defense available for employers charged with disability discrimination. Employers are permitted to take adverse action (termination, involuntary transfer, etc.) even when it is based on someone's disability, or perhaps deny an employee's requested accommodation, where the employee poses a "direct threat," meaning "a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation." This action cannot be based on mere layperson belief, even if well-intended, but must be objectively reasonable and based on medical evidence. The decision also must follow an "individualized assessment" evaluating the person's ability, the nature of the threat, the nature of the possible harm, and the possibility for accommodation to avoid the adverse action.

The "direct threat" defense is a very narrow exception to the usual disability discrimination principles. That was why the EEOC's initial, short-lived guidance on Tuesday, May 5th raised an eyebrow. Although many employers are finding it hard to get people to come to work at all, there are also occasions when employers might prefer to exclude known "high-risk" workers from the workplace. According to public health guidance, people with pre-existing health conditions are at higher risk for very serious health problems if they contract COVID-19.

The guidance tended to imply that COVID-19 had lowered the usual very high bar, allowing employers essentially on good faith to invoke "direct threat" to exclude higher-risk employees from the workplace. Later on Tuesday, this guidance disappeared from the EEOC's website. The EEOC explained that it removed the "direct threat" guidance because it had been subsequently misinterpreted.

So on Thursday, May 8, the EEOC tried again in its publication, "What You Should Know About

COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws." The EEOC issued (at Question G.4) an amended look at the "direct threat" concept and how available it really might be for an employer who wants to prevent a high-risk employee from working.

The short answer is – the "direct threat" defense has the same high bar that it has always had. It will be a rare occasion when an employer can lawfully keep a high-risk employee out of a workplace because the employee has some underlying health condition. The May 8 guidance follows longstanding interpretations of the "direct threat" defense – it is a very high standard; the employer must show that the individual poses a "significant risk of substantial harm" to his or her own health; simply having a high-risk condition is not enough; there must be an "individualized assessment" based on a reasonable medical judgment about the employee's disability, not generalized conclusions, using "current medical knowledge" or the "best available objective evidence;" the usual factors must all be assessed – "the duration of the risk, the nature and severity of the potential harm, the likelihood that the potential harm will occur, and the imminence of the potential harm;" and there always must be consideration of reasonable accommodations to avoid the more adverse action, including "telework, leave, or reassignment." The guidance concludes, "An employer may only bar an employee from the workplace if, after going through all these steps, the facts support the conclusion that the employee poses significant risk of substantial harm to himself that cannot be reduced by reasonable accommodation."

In other words, you probably will not succeed if you invoke "direct threat" to defend against a discrimination charge for pre-emptively taking adverse action against a high-risk employee — which has been the state of the law for decades. But the EEOC's public exercise is still instructive to everyone trying to apply employment law principles to the COVID-19 avalanche of new facts and circumstances. Are we really in a new world, or upon reflection, does existing jurisprudence still govern, in the usual way it always has?

MBJ will continue to monitor the EEOC's postings. The above guidance is based on information available as of the date of this publication.

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