

Employment Practice Update

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October 27, 2009

EEOC Provides ADA Compliant Guidance on Pandemic Preparedness in the Workplace

By Toni A. Egan



On Saturday, October 24, 2009, President Obama declared a national emergency to deal with the rapid increase in illness from the H1N1 influenza virus (“H1N1”). In light of recent concerns over the spread of H1N1, the Equal Employment Opportunity Commission (“EEOC”) has issued a technical assistance document entitled “[Pandemic Preparedness in the Workplace and the Americans with Disabilities Act.](#)” The document is intended to provide employers with guidance on implementing strategies for pandemic preparation that are in compliance with the Americans with Disabilities Act (“ADA”). Generally, a non-chronic impairment of short duration with little or no residual effects, such as the common cold or flu, is not considered a disability under the ADA. However, the EEOC points out that the ADA is relevant to pandemic preparation in at least three major ways:

1. The ADA regulates an employer’s disability-related inquiries and medical examinations for all applicants and employees, including those who do not have ADA disabilities;
2. The ADA prohibits covered employees from excluding individuals with disabilities from the workplace for health or safety reasons unless they pose a direct threat (i.e. 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); and
3. Absent undue hardship, the ADA requires reasonable accommodations for individuals with disabilities during a pandemic.

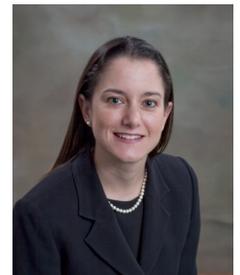
The EEOC’s technical assistance document provides guidance on the types of questions that an employer may ask its employees both before and during an influenza pan-

dem. For example, the EEOC states that it would be inappropriate for an ADA-covered employer to ask an employee to disclose if he or she has a compromised immune system or chronic health condition that may make him or her more susceptible to complications of the flu. Such an inquiry is disability-related because the response is likely to disclose the existence of a disability. However, in what appears to be a somewhat aggressive interpretation, the EEOC has suggested that an employer may make inquiries that are designed to identify potential non-medical reasons for absences during a pandemic on an equal footing with medical reasons. According to the bulletin, the inquiry should be structured so that the employee gives one yes or no answer to the whole question without specifying the factors that apply to him or her.

The EEOC bulletin suggests that employers may ask employees if they are experiencing flu-like symptoms, such as fever or chills and a cough or sore throat. In addition, during a pandemic, an employer may send employees home if they display flu-like symptoms. Employers may encourage or allow employees to telework, as an infection control strategy or as a reasonable accommodation for employees with disabilities that put them at a high risk for complications from the flu. The EEOC also states that employers may require employees to adopt infection-control practices at the workplace, such as regular hand washing, coughing and sneezing etiquette and proper tissue usage and disposal.

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As we approach the traditional flu season, the government anticipates an increase in the number of reported cases of H1N1. Accordingly, employers should act now to ensure safety of their employees, continuity of business operations, and compliance with all federal, state and local laws in the event of a pandemic.



Toni A. Egan

This article is meant to provide a brief overview and points of discussion regarding employment and labor law topics. Should a particular issue arise or should you desire additional consultation to protect your firm, the advice of a competent counsel should be sought.