



Labor and Employment Group

CLIENT ALERT

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NO GOOD DEED GOES UNPUNISHED – DON'T TRY TO PROTECT HIGH RISK EMPLOYEES BY SUMMARILY BARRING THEM FROM THE WORKPLACE



The Equal Employment Opportunity Commission (EEOC) this week underscored the need for employers to be very cautious about action taken to protect employees who are at higher risk of severe illness from COVID-19. Even if an employer acts with a benevolent purpose, such actions may well be unlawful.

The Centers for Disease Control and Prevention (CDC) advises that older adults and people of any age who have serious underlying medical conditions may be at higher risk for severe illness from COVID-19. The CDC advises that this higher risk group includes people who are age 65 or older. The higher risk group also includes people of any age who have a serious underlying medical condition, particularly if not well controlled. The CDC includes in this group:

- People with chronic lung disease or moderate to severe asthma,
- People who have serious heart conditions,
- People who are immunocompromised, which may be caused by many conditions such as cancer treatment, smoking, bone marrow or organ transplantation, immune deficiencies, poorly controlled HIV or AIDS, and prolonged use of corticosteroids and other immune weakening medications,
- People with severe obesity (BMI of 40 or higher),
- People with diabetes,
- People with chronic kidney disease undergoing dialysis, and
- People with liver disease.

While pregnant people are not included on this list, the CDC notes that pregnant people are at greater risk from other respiratory viruses than people who are not pregnant and advises that pregnant people be mindful about reducing their risk of getting sick.

As businesses begin to reopen in Hawaii and across the nation, employers may seek to protect employees who fall within the higher risk group, including pregnant employees, by excluding them from the workplace. While the CDC does encourage employers with higher risk employees to protect them by *supporting and encouraging* options to telework as it recommends that higher risk employees shelter in place during steps 1 and 2 of reopening, *it does not advise employers to exclude such employees from the workplace.*

On June 11th, the EEOC supplemented its Guidance on COVID-19 to make it clear that it is unlawful sex discrimination for an employer to involuntarily exclude an employee from the workplace due to pregnancy. Similarly, the EEOC indicates that it is unlawful age discrimination to involuntarily exclude an employee age 65 or older from the workplace. A benevolent purpose, such as protection of higher risk employees, will not be a defense to such claims.

For employees with underlying medical conditions, the EEOC has also made it clear that such employees should not be excluded from the workplace solely because they have a disability that puts them at higher risk for severe illness from COVID-19. And this is where it gets complicated.

The Americans with Disabilities Act (ADA) may allow an employer to take such action if the employee poses a direct threat to their own health that cannot be eliminated or reduced by a reasonable accommodation. Proving a direct threat is challenging as a “direct threat” is a significant risk of substantial harm that must be determined on an individualized assessment based upon reasonable medical judgment about the individual’s disability. The fact that the employee’s condition is on the CDC’s list is not enough. Even if a direct threat is present, then the reasonable accommodation process with an interactive dialogue needs to take place. Without question, the direct threat assessment and reasonable accommodation process will be an extensive undertaking.

Bottom line, don’t involuntarily exclude pregnant employees and employees who are age 65 or older from the workplace due to their higher risk for severe illness from COVID-19. And for those employees with underlying medical conditions that place them at higher risk, proceed with great caution. Knowledgeable experts such as your employment counsel can assist in guiding you through this difficult assessment.



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