

CLIENT ALERT: New Guidance from the EEOC
June 15, 2020

On Thursday, June 11, the EEOC updated their guidance on COVID-19 and the ADA. Below are the most important takeaways for employers. For more information, or to discuss a specific issue, please contact Peter Lowe at plowe@brannlaw.com or 207-754-5672, or Dan Stockford at dstockford@brannlaw.com or 207-607-3290.

- **Employees concerned about exposing family members to COVID-19:** Employees with family members at high risk for COVID-19 are not entitled to a reasonable accommodation under the ADA to protect those family members. For example, an employer is not required to approve an employee's request for reasonable accommodation, such as telework or a leave of absence, because their family member is particularly vulnerable to COVID-19 because of a disability. Remember the employee cannot be discriminated against based on their association with a disabled individual.
- **Return to work flexibility:** in advance of employees returning to the workplace, employers may invite employees to request flexibility in work arrangements and begin the interactive process. The EEOC suggests: 1) providing contact information so employees may request an accommodation before returning to work, or 2) providing a more comprehensive notice to employees stating the employer will consider requests for accommodation or work flexibility on an individualized basis. The communication should go to all employees, and may include information from the CDC listing medical conditions that place people at high risk for severe illness if they contract COVID-19.
- **Request for alternative COVID-19 screening:** an employee who requests an alternative method of COVID-19 screening may be entitled to a reasonable accommodation. If the employee's disability is not obvious or already known, the employer may request information to establish their medical condition and specific limitations. Alternative screening methods may also be appropriate as a religious accommodation.
- **Accommodations for employees aged 65 and older:** although the CDC has explained that individuals aged 65+ are at higher risk for COVID-19 illness, employers cannot involuntarily exclude individuals from the workplace based on their age. Additionally, the Age Discrimination in Employment Act (ADEA), does not include a right to reasonable accommodation due to age. Of course, older

employees may have medical conditions that would entitle them to reasonable accommodations.

- **Flexible work schedules and sex discrimination:** the EEOC warns against treating female employees more favorably than male employees based on assumptions of caretaking responsibilities. Approach each request on a case-by-case basis.
- **Pregnancy and COVID-19:** employers cannot involuntarily exclude pregnant employees from the workplace due to COVID-19 concerns. While pregnancy is not a disability, there may be pregnancy-related medical conditions that warrant a reasonable accommodation. Furthermore, Title VII requires that women affected by pregnancy, childbirth, and related medical conditions be treated equally, meaning these employees may be entitled to job modifications including telework, changes to work schedules or assignments, and leave, to the extent this has been provided to other employees based on their ability to work.
- **Pandemic-related harassment:** the EEOC encourages employers to be alert to harassing language and behavior towards employees who are, or are perceived to be, of Chinese or other Asian national origin, specifically about COVID-19 and the origins of the virus. If an employee is engaging in harassing behavior while teleworking, employers should take the same action as if the employee was in the workplace.