

COVID-19 Legal Update

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SOME IMPORTANT COVID-19 EMPLOYMENT LAW UPDATES

By Jon Vegosen

The federal government recently issued guidance and the City of Chicago issued a new ordinance relating to employment laws that employers need to bear in mind. They cover matters such as antibody testing, pandemic-related harassment, treatment of vulnerable employees, whether employee accommodation is required to avoid exposing a family member to COVID-19, and retaliation against employees.

EEOC GUIDANCE

The Equal Employment Opportunity Commission (the “EEOC”) issued a number of updates this month to its guidance entitled “What You Should Know about COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws” (the “EEOC Guidance”). Here are some of the highlights:

Antibody Testing: Consistent with the CDC’s Guidelines for COVID-19 Antibody Testing, the EEOC Guidance confirms that, under the Americans with Disabilities Act (the “ADA”), an employer may not require antibody testing before permitting employees to re-enter the workplace. This is because an antibody test “does not meet the ADA’s ‘job related and consistent with business necessity’ standard for medical examinations or inquiries for current employees.” The EEOC, however, recognizes that an antibody test is different from a test designed to determine if someone has an active case of COVID-19 (i.e., a viral test). The EEOC has stated that such COVID-19 viral tests are permissible under the ADA.

Pandemic-Related Harassment: The EEOC also provided guidance about how employers may respond to pandemic-related harassment, especially against employees who are, or are perceived to be, Asian. It also advises employers how they can address other forms of harassment, such as sexual or racial harassment, that is committed by remote workers using e-mail or other electronic means.

Treatment of Vulnerable Employees: Another update concerns the return to work of potentially vulnerable employees such as those who are over 65, pregnant, or have underlying medical conditions. The EEOC Guidance recognizes that employers may want to protect such employees during the pandemic. It cautions, however, that not allowing such employees to return to work may violate federal anti-discrimination laws. Of course, an employer remains free to engage in the interactive process with employees who request accommodation or flexibility on an individualized basis. Moreover, employers may be required to provide such accommodations, including possibly job modifications and telework.

Family Member Exposure: The EEOC also advised that an employee is not entitled to an accommodation under the ADA to avoid exposing a family member who is at higher risk of severe illness from COVID-19 due to an underlying medical condition. According to the EEOC, the ADA does not require that an employer accommodate an employee without a disability based on the disability-related needs of a family member or other person with whom he or she is associated.

You can read about these and other developments in the [EEOC Guidance document](#).

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CHICAGO'S COVID-19 ANTI-RETALIATION ORDINANCE

On May 20, 2020, the Chicago City Council passed an anti-retaliation ordinance. It prohibits employers from taking adverse action against employees who stay home to obey a quarantine order, isolation order, or order from public authorities relating to COVID-19, and for taking care of someone subject to such an order. With a few exceptions, the ordinance covers employees who work at least two hours in any two-week period for a “covered employer” while physically present within the geographic boundaries of the City (a “Covered Employee”). A “covered employer” includes an individual or company who maintains a business facility within Chicago’s geographic boundaries or who is subject to at least one of the City’s licensing requirements. These definitions are derived from Chicago’s Paid Sick Leave ordinance.

As summarized in a [poster](#) issued by the City of Chicago Office of Labor Standards, the ordinance applies to five types of orders:

Order	Issued By	Example
Stay at home to minimize the transmission of COVID-19	The Mayor, the Governor, or the Chicago Department of Public Health	You are a non-essential employee, and there is a stay at home order that closes the non-essential business where you work and requires you to stay home
Remain at home while experiencing COVID-19 symptoms or sick with COVID-19	Treating healthcare provider	A doctor tells you to stay home because you have COVID-19 symptoms, such as a fever
Obey a quarantine order issued to the Covered Employee	Treating healthcare provider	A doctor tells you to stay home for a period of time because you might have been exposed to COVID-19
Obey an isolation order issued to the Covered Employee	Treating healthcare provider	A doctor tells you to stay home because you are or might be sick with COVID-19
Obey an order issued by the Commissioner of Health regarding the duties of hospitals and other congregate facilities	Commissioner of Health	You work at a hospital, nursing home, or other congregate facility, and your Employer is not abiding by an order to implement certain public health measures

In addition, a covered employer may not take adverse action against a Covered Employee for caring for an individual subject to any of the first three orders set forth above. Moreover, a Covered Employee may recover in a civil action reinstatement “to either the same position held before the retaliatory action or to an equivalent position, damages equal to three times the full amount of wages that would have been owed had the retaliatory action not taken place, as well as any other actual damages directly caused by the retaliatory action, together with costs and such reasonable attorney’s fees as a court allows.” The ordinance provides an employer with an opportunity to avoid liability if it can demonstrate that it (1) acted in reliance on a reasonable interpretation of an order, and (2) cured the violation within 30 days after learning of it.

Businesses should contact their legal advisors regarding these and other emerging guidelines and restrictions relating to COVID-19.

FVLD publishes updates on legal issues and summaries of legal topics for its clients and friends. They are merely informational and do not constitute legal advice. We welcome comments or questions. If we can be of assistance, please call or write Jon Vegosen, 312.701.6860, jvegosen@fvldlaw.com or your regular FVLD contact.

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