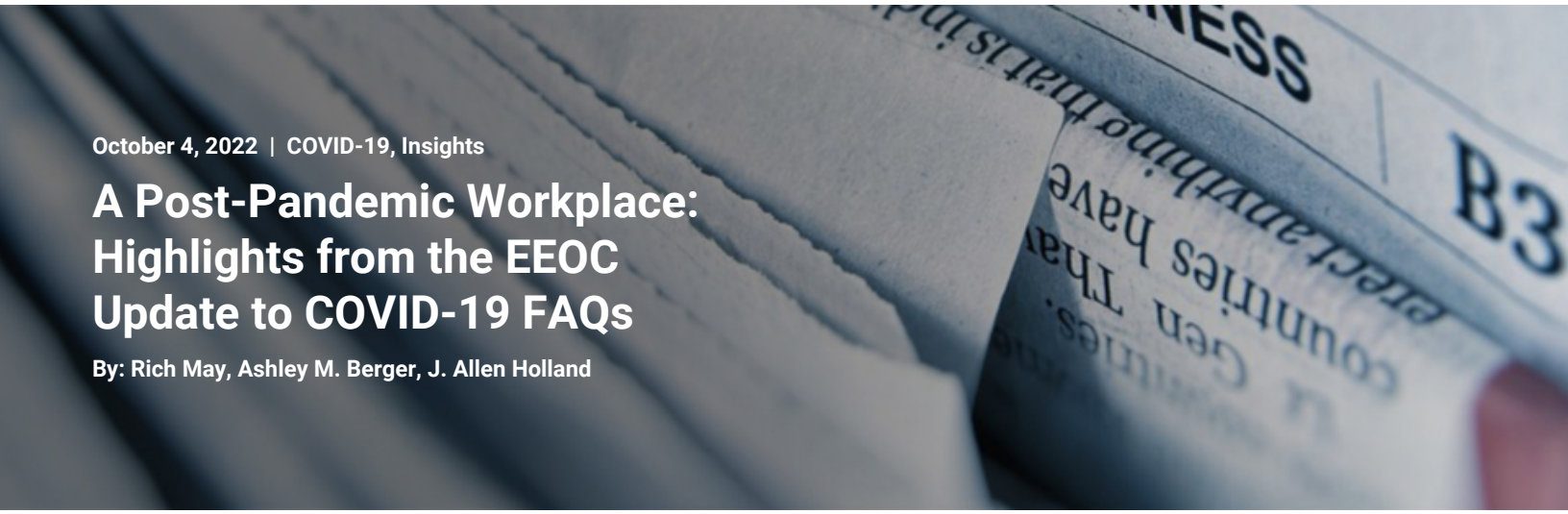
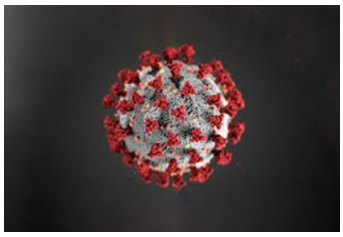


October 4, 2022 | COVID-19, Insights

A Post-Pandemic Workplace: Highlights from the EEOC Update to COVID-19 FAQs

By: Rich May, Ashley M. Berger, J. Allen Holland

In the wake of the COVID-19 pandemic, on July 12, 2022, the Equal Employment Opportunity Commission ("EEOC") released updated guidelines to its frequently asked questions ("FAQs") regarding certain issues related to the COVID-19 pandemic, specifically regarding the application of the Americans with Disabilities Act ("ADA"). The update, as discussed and detailed below, includes updated guidance on mandatory vaccination programs, when employees can be required to undergo testing for COVID-19, and delays to the interactive process by which the employer and employee determine reasonable accommodations for the employee's disability. The full update can be found here.



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Returning to the Workplace and Employee Vaccination Mandates

The updated guidelines provide that federal employment opportunity laws do not prevent an employer from requiring that all employees physically entering a workplace be vaccinated. Information regarding an employee's COVID-19 vaccination status is confidential.

The update provides specific guidelines for employers with respect to employees who have sought an exemption based on a disability. An employer may require an individual with a disability to meet a qualification standard (though that standard must be applied to all employees) such as a safety-related standard requiring COVID-19 vaccination, if the standard is job-related and consistent with business necessity as applied to that employee.

Additionally, once an employee does return to the workplace, an employer may choose to conduct medical exams and make disability-related inquires, so long as the inquiry is job-related and consistent with business necessity.

The update also suggests that employers may choose to contact all employees returning to the workplace to invite them to request a reasonable accommodation that an employee might need for a disability if the employee believes he or she is at a higher risk for severe illness following COVID-19 or if the employee has a sincerely held religious belief preventing the employee from obtaining the COVID-19 vaccination.

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Consistent with federal laws, an employer may not discriminate against an employee on the basis of age, which may come up if the employee is prevented from returning to the workplace due to a perceived higher risk of becoming severely ill from COVID-19.

Employee Testing Requirements

The EEOC FAQs provide that an employer may administer a COVID-19 viral test to evaluate whether an employee can remain in or come into the workplace so long as the employer can show the test is "job-related and consistent with business necessity." A COVID-19 viral test is considered a medical examination within the meaning of the ADA. However, an employer may not require employees to subject themselves to antibody testing to re-enter the workplace.

Reasonable Accommodations

The EEOC FAQs are clear that the pandemic and resulting impacts of the pandemic may result in excusable delays of the "interactive process": the process by which the employer and employee exchange information to determine reasonable accommodations for the employee's disability. If delays ensue, the employer must show that a specific pandemic-related extenuating circumstance caused the delay.

An employer may generally require employees to wear personal protective equipment. However if any employee has a disability or a sincerely held religious belief that affects the ability to wear personal protective equipment, the employer should discuss this with the employee and provide a reasonable accommodation, so long as it does not cause undue hardship on the operation of the employer's business under the ADA or Title VII.

An employee who has a specific medical condition (that the CDC has deemed may put a person at higher risk for severe illness from COVID-19) must let the employer know that the employee needs a reasonable accommodation related to a medical condition or medical need. After the employee alerts the employer, the employer may inquire or request medical documentation to decide if that individual has a disability within the scope of the ADA. An employer's duty to provide reasonable accommodation applies only if an employee has an actual disability or a record of a disability, as defined in the ADA; this means not every individual with one of the medical conditions that might place them at higher risk of COVID-19 complications will automatically satisfy these ADA definitions of disability.

Employer Incentives for Employees to Obtain Vaccine

The ADA does not limit the incentives (which includes both rewards and penalties) an employer may offer to encourage employees to voluntarily receive a COVID-19 vaccination, or to provide confirmation of vaccination, if the health care provider administering a COVID-19 vaccine is not the employer or its agent. By contrast, if an employer offers an incentive to employees to voluntarily receive a vaccination administered by the employer or its agent, the ADA's rules on disability-related inquiries apply and the value of the incentive may not be so substantial as to be coercive.

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Doctor's Note Request

The FAQs provide that employers may require confirmation from a qualified medical professional that the individual is able to safely return to work. The justification is consistent with the ADA standard that any such employee inquiries be job-related and consistent with business necessity meaning the inquiry is related to either the transmission of the virus to other employees or out of a concern for the employee to be able to complete his or her job. Practically speaking, however, the EEOC also provides that employers may conceive other ways to determine the safety of allowing an employee to return to the workplace, such as email communication from a doctor confirming the individual is no longer infectious and is able to resume working.

Job Offers and COVID-19

An employer may screen job applicants for symptoms of COVID-19 after making a conditional job offer, as long as the employer screens all candidates for the same type of job. An employer should consult any current CDC guidance in determining whether to withdraw a job offer if an applicant is determined to need to start the position immediately and then becomes exposed or positive to COVID-19 weighed against if that position would require such proximity to others and if the position could be performed in a manner as to not be in close proximity to others. An employer may not postpone a start date or withdraw a job offer if the candidate is older, pregnant or has an underlying health condition that the employer perceives puts them at a higher risk of illness from COVID-19.

Disclaimer: This summary is provided for educational and information purposes only and is not legal advice. Any specific questions about these topics should be directed to Attorneys J. Allen Holland, Frank Gaeta, David Glod or Ashley M. Berger.

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