

June 5, 2020

The Honorable Janet Dhillon
Chair
Equal Employment Opportunity Commission
131 M Street, NE
Washington, D.C. 20507

Chair Dhillon,

As a follow up to our conversation last month, SHRM's leadership welcomes the opportunity to share with you the most pressing concerns shared by our membership as they are leading their organizations' response to COVID-19 and the post-pandemic recovery. The issues we believe can be addressed by the EEOC relate to three areas: contact tracing, employee inquiries, and accommodations under the Americans with Disabilities Act.

The topics addressed below relate specifically to questions that remain unanswered by available EEOC and other federal agency guidance. These questions remain top of mind for human resource professionals and many small and large employers as they navigate returning to work during the pandemic. We believe it is especially important to provide employers with guidance on these topics now given the mass reopening of businesses across the country. We thank you for your commitment to ensuring that employers can act confidently with respect to employment decisions and in the best interest of all workers. We respectfully submit the following questions for your consideration:

A. Contact Tracing

1. Can an employer engage in contact tracing? And, specifically:
 - a. Can employers ask employees if they have been in contact with anyone who has tested positive for coronavirus (and date of test).
 - b. Can employers ask employees if a member of their household member, caregiver or someone whom they have had a face-to-face conversation) has tested positive (and date of test).
2. If an employee has tested positive for COVID-19 or COVID-19 antibodies, can the employer engage in contract tracing at least with respect to other employees, customers and third parties related to the workplace for the purpose of notifying those individuals of the positive employee contact, and potential quarantine of the "contacted employees"?

B. Employee Inquiries

1. Employers can engage in employee testing for COVID-19.
 - a. Can employers ask employees if they have taken a COVID-19 test, and if so, the date of the test?

b. Generally, can employers require employees to obtain a COVID-19 test on their own? If so, must the employer pay for the test?

c. Given COVID-19 testing can be mandatory, can an employee be fired (or prohibited from coming to work) for not taking the test, absent a religious or disability-based objection?

- Does the answer depend on the test (i.e. rapid result where the employer receives an indicator of whether the employee posed a direct threat upon entering the workspace versus a test where the swab is sent in 3 days before the start of the employee's shift, and thus has limited utility).

2. Can employers ask employees to submit to testing for COVID-19 antibodies (serology tests)?

a. Relatedly, can an employer use an employee's antibody testing results as a basis for employment decisions (fitness for duty requirement)? For example, can an employer use a positive antibody test result to prioritize the worker to return to the workplace?

b. Can an employer require an employee to pay for the antibody test if it is a requirement?

3. Can employers require employees be tested for the COVID-19 virus on a periodic basis after returning to work?

4. Can employers require employees who are working from home to be tested for COVID-19?

5. Can employers require employees to get vaccinated for COVID-19 when a vaccine is available?

C. Accommodations

1. Under the ADA, does an employer have to provide a reasonable accommodation to an employee who is a senior citizen (no underlying condition) and therefore vulnerable to COVID-19?

a. If the answer is no, and the senior citizen is not covered by the ADA, can an employer provide workers over age 60 or 65 or pregnant workers who have been identified as a higher risk category for COVID-19 complications, with additional accommodations not offered to other employees who don't have those characteristics and who are not covered by the ADA? For example, can employers allow employees over the age of 65 to telework, if they prefer to do so, while requiring employees under age 65 to provide services in the office?

2. How can an employer identify someone who is in a vulnerable condition without discriminating or appearing to do so, if the inquiry is for the purpose of providing additional accommodations to address the vulnerable condition that may be undisclosed?

3. Under the ADA, does an employer have to provide leave as a reasonable accommodation (or other reasonable accommodation) to an employee who is not sick with COVID-19 (and who is not a vulnerable employee (senior citizen or has underlying condition)), but lives with a person who is vulnerable (or has an

underlying condition)? The employee wants to work remotely if possible, or in some other job where there is less or no exposure.

- a. What about if the person at home is a senior citizen but does not have an underlying condition--just vulnerable as a senior citizen?

4. Under the ADA, after an employer engages in the Interactive process with an employee who is vulnerable (has an underlying condition [or is 65 years old?]), who is uncomfortable returning to work, or who wants to work remotely, but no reasonable accommodation is possible, can the employer separate employment or does the employer have to provide leave?

- a. If leave, then for how long? If there is no recovery or treatment available in this situation, and indefinite leave is not a reasonable accommodation, can the employer separate employment?

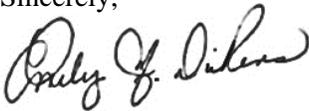
If any of the above situations involve a cohabitant, can the employer require a doctor's certification (not for age 65)?

5. During the pandemic many employees have worked remotely. Employers have noted that in some instances the remote work situation has not provided the same quality or productivity as working at the workplace. If that is the case, in the future, can employers base a rejection of a work from home accommodation on a demonstrated decrease in productivity?

Note: There has been a concern expressed by some employers that the fact that telecommuting has been allowed will create a presumption that such telecommuting is an appropriate "reasonable accommodation" under the ADA, when in fact, these have been special circumstances caused by the coronavirus and it has not worked well in some situations.

SHRM appreciates your continued partnership and the opportunity to submit these critical questions from our membership. We look forward to remaining engaged on these issues.

Sincerely,



Emily M. Dickens, J.D.
Corporate Secretary, Chief of Staff &
Head, Government Affairs