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EEOC Makes Clear COVID Concerns No Excuse For Age Bias

By **Vin Gurrieri**

Law360 (June 12, 2020, 9:25 PM EDT) -- Although employers prepping to reopen as the COVID-19 pandemic continues may want to give particularly vulnerable workers special treatment, newly released guidance from the U.S. Equal Employment Opportunity Commission signals that even well-intentioned moves will likely violate age bias law if they single out older employees.

The guidance issued Thursday by the EEOC says that employers are **barred from "involuntarily excluding"** people over 65 who want to go back to work under the Age Discrimination in Employment Act, a law designed to protect workers over 40 from job-related age bias.

But even before the EEOC's guidance, the issue of age bias toward returning employees was one that attorneys say could trip up employers as they formulate plans to reopen businesses and reintegrate their workforce that may include special precautions for people over 65. The Centers for Disease Control and Prevention has identified that age group as being at high risk of becoming severely sick if they are infected with the novel coronavirus.

"It's important for employers to be aware potentially of the vulnerability of that population, but not to specifically make decisions just based on somebody's age," said Kristen Gallagher, a partner at McDonald Carano LLP. "I think a lot of people are being really mindful that, even though things are opening up, the virus hasn't all of a sudden gone away and [you] still need to be protective of those particular groups."

EEOC Dishes Warning

In taking the position that workers can't be forced to stay home because of their age, the EEOC noted that its stance applies even when an employer does so "for benevolent reasons," like protecting workers because they are part of a high-risk population.

But that doesn't mean employers should ignore the needs of older workers entirely. The EEOC said that businesses are still "free to provide flexibility" to employees over 65. It also said the ADEA doesn't preclude such actions even if it means that workers in the 40-64 age range — who are also protected by the statute — get "treated less favorably based on age in comparison."

That said, the EEOC did note that the ADEA doesn't impose any obligation on employers to provide older workers with reasonable accommodations based on their age. While the Americans with Disabilities Act does call on employers to explore accommodations based on workers' disabilities or certain medical conditions, it also doesn't contain a reasonable accommodation requirement based on age.

"If someone is older but otherwise doesn't have any sort of disability and cannot meet the criteria for the ADA or any state or local equivalent, there is no obligation to reasonably accommodate," said Gregory Abrams, a partner at Faegre Drinker Biddle & Reath LLP. "That said, I can understand [if] employers would want to do that."

But more broadly, Abrams said it's important for businesses to set "clear policies regarding returning to work and what kind of precautions the employer will be taking" that include a process for

employees to express concerns about their own situations, adding that it's "risky if employers are singling out certain types of workers for reasons that are not purely job-based."

When formulating those return-to-work plans, Lauren Goetzl of Fisher Phillips said employers "need to be cautious" that the processes they put in place are age-neutral.

"The tendency obviously is to try to protect employees, but employers really need to try to formulate policies that don't take age into consideration," she said.

Beware of 'Across-the-Board' Policies

One way employers might cross the age discrimination line is if they craft broad policies that place different requirements on older workers that aren't imposed on their younger colleagues, attorneys say.

For example, if an employer mandates that workers over 65 work from home or wear masks but doesn't do so for younger workers, the policies might be discriminatory under the ADEA, according to Katie Erno, counsel in Crowell & Moring LLP's labor and employment practice.

"That's a real concern," Erno said. "It's a balance between accommodating employees who come forward and say, 'I'm concerned about this,' versus creating policies even if they're well-intentioned that could be considered discriminatory."

Matthew Damm, counsel in Fenwick & West LLP's litigation department whose practice focuses on labor and employment law issues, similarly believes that the "biggest issue" with workers' returning from an age bias perspective "is going to be employers making across-the-board decisions" that are based on how old people are.

He noted that it would be "impermissible" for employers to say that everyone "can come back to the office and work as part of a team but employees that are 65 or older are required to continue to telework even if they don't want to," an example that lines up with the EEOC guidance.

Instead, when it comes to telework, Damm said employers that want to offer the option of telework even after they can require workers to return to a jobsite is to make it available "on a completely neutral basis," with the thought in mind that people in certain age groups "will be more likely to take advantage" of the opportunity.

"You're not necessarily identifying those people as the beneficiaries of your telecommuting program," he said. "But when you're putting it on the table as an option — not a requirement, but an option — I think that's the best way to incentivize people that are in higher-risk categories to take advantage of those accommodations without necessarily making it the centerpiece of your policies."

Flexibility Is Key

While older employees can't be forced to telework, it can be an option for those who express concern about returning. But many jobs — like cashiers, greeters or retail workers — can't be done remotely, which means employers may have to get more creative if an older employee expresses apprehension.

Even though there may be no legal obligation on employers' part to provide a reasonable accommodation to workers simply on the basis of age, Erno said she's been advising clients that "it's very prudent to do so" if an employee over 65 expresses concerns about contracting the virus, saying that "employers want to be flexible."

Some precautions that businesses might put in place to help older workers include minimizing a person's contact with others by adjusting their shifts or work schedules, moving their workstations to a low-traffic area, or providing them with additional protective gear, she said.

"All of those are things to consider and to talk through with the employee," Erno said. "That way the employer is showing a good faith that they are working with them to address whatever the concern is."

Gallagher also said it behooves employers to be cognizant about whether any paid leave laws apply to workers upon reopening if those individuals may not be able to come back right away.

"You certainly need to be making sure that you're looking at whether or not there's any opportunities for paid leave under the [Emergency Paid Sick Leave Act], which is a relatively new act under the Families First Coronavirus Response Act," Gallagher said. "So, there may be an opportunity depending on if that vulnerable person, if maybe they have some symptoms and are seeking a diagnosis ... for some paid sick leave under that act. The biggest thing I would tell employers is just to have that open dialogue with people."

Check-Ins With Workers

Besides shoddy policies, good intentions can also get employers in legal trouble if they become too pushy in reaching out to older workers or those in at-risk populations who haven't expressed apprehension with any aspect of returning to work to see if any special precautions are needed. Since that behavior can be construed as singling out those workers, it could form the basis of a bias claim.

But since it's still a good idea to gauge where employees are at as far as returning, employers may find themselves on sturdier legal ground if they reach out to all workers to get a sense of everyone's mindset and concerns, as opposed to just quizzing a specific few who may be in high-risk categories, attorneys say.

"One thing that we've seen employers do is send out a kind of survey to all employees — again, you don't want to be singling people out because of their age," Erno said.

Those surveys can be kept confidential and serve as a "good, neutral way" for businesses to give all employees an opportunity to communicate whether they have any health conditions or other reasons why they can't come back to the workplace, like child care issues or concerns about exposing family members to the virus, according to Erno.

"So, you can send a neutral survey with a whole bunch of questions to everybody to try to assess the problems that you're going to have in terms of safely bringing back the workforce" and then "speak and engage" with older workers who communicate concerns, Erno said.

Broader Protections at Play

Although the ADEA protects all workers at covered businesses who are over 40 years old from age discrimination, certain cities and states have laws on the books extending similar protections to all adults, creating a larger pool of people who could pursue an age bias claim under state law that wouldn't be viable under the federal statute.

Goetzl noted that under the ADEA, employers could offer employees over age 65 the option of teleworking even if it results in more favorable treatment for those in the 40-64 age range as outlined in the EEOC's guidance. But if employers have operations in certain jurisdictions where age bias protections are more far reaching, they could be exposed to legal risk if those state statutes aren't taken into account as part of their virus response plan.

So she said it is important that employers "remember ... that state and local laws may provide additional protections" beyond what federal law requires.

"For example, state and city laws in New York as well as [laws] in [Washington, D.C.,] both actually protect employees who are over the age of 18," she said. "So you could not engage in ... activities favoring older employees in those jurisdictions without potentially exposing yourself to some liability."

--Editing by Breda Lund and Brian Baresch.