Facemasks Add New Twist To Reasonable Accommodation Debate, Demonstrated by Latest COVID-19 Lawsuit

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As we are all aware, COVID-19 has added new wrinkles to difficult workplace questions – which sometimes leads to troublesome litigation that could otherwise have been avoided. For example, although federal and state disability law requires employers to address both legal and practical issues relating to reasonable accommodations in connection with employees' disabilities, employers must now be mindful of these statutes' implications on one of COVID-19's most widespread prevention measures: facemasks. Handling this issue incorrectly could lead to a lawsuit, as an Ohio retail establishment recently discovered.

Employers Face Lawsuits about Reasonable Accommodations for Facemasks

One recent example of employers' difficult decisions is demonstrated in the case of *Hatfield v. ELC Beauty, LLC*, which was filed in the Court of Common Pleas in Butler County, Ohio. In this case, a retail employee alleged that her former employer violated the Ohio Civil Rights Act and Ohio common law as a result of its facemask policies and requirements.

Specifically, Nell Hatfield alleged in her Complaint that employees – but not customers – were required to wear facemasks at work. After wearing the facemask throughout her shift, she claimed that she had difficulty breathing, which included bouts of coughing and congestion. Thereafter, Hatfield visited her medical provider, who allegedly opined that she "may be developing" an unidentified condition that would make it difficult for her to wear a facemask for extended periods of time and that she should speak to her employer about wearing alternative personal protective equipment (PPE).

When Hatfield returned to work, she claimed that she suggested to her employer that, as an alternative to a facemask, she could (1) not wear a mask at work or (2) wear a face shield. According to Hatfield's legal filing, her employer denied the requests, did not offer an alternative solution (though the Complaint does not offer significant details concerning her interactions with the employer), and instead terminated her employment several months later.

What Does the Law Require?

As with the federal Americans with Disabilities Act (ADA), Ohio law prohibits discrimination against qualified individuals with disabilities. In a definition that is substantially similar to the ADA, the Ohio

qualified individuals with disabilities. In a definition that is substantially similar to the ADA, the Ohio Civil Rights Act defines a "disability" as a "physical or mental impairment that substantially limits one or more major life activities, including the functions of caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working; a record of a physical or mental impairment; or being regarded as having a physical or mental impairment."

In the event that an employee is a qualified individual (*i.e.*, the employee can perform the essential functions of their job with or without a reasonable accommodation) with a disability, the employee and the employer must engage in an interactive process to determine a reasonable accommodation that would allow the employee to perform the essential functions of their job. The interactive process is a two-way street, as this cannot be a one-sided conversation about what may constitute a reasonable accommodation for the employee.

However, an employer's obligation to provide a reasonable accommodation is not unlimited and an employee is not necessarily entitled to the accommodation of their preference. For example, the ADA does not require that an employer provide a reasonable accommodation if it would constitute a "direct threat," which means a significant risk of substantial harm to the health and safety of the employee or others that cannot be eliminated or reduced by a reasonable accommodation.

Federal regulations identify four factors that encompass the direct threat analysis: (1) the duration of the risk, (2) the nature and severity of the potential harm, (3) the likelihood that the potential harm will occur, and (4) the imminence of the potential harm. In the context of COVID-19, the Equal Employment Opportunity Commission (the federal agency tasked with enforcing antidiscrimination laws) concluded that the virus constitutes a direct threat to individuals in the workplace. As such, accommodations that may facilitate the spread of COVID-19 may not constitute reasonable accommodations and may not be required under the law.

What Should You Do?

As the *Hatfield* case demonstrates, questions about reasonable accommodations are increasingly complex in the context of COVID-19. It is more important than ever for employers to utilize a fact-specific approach to determine whether a reasonable accommodation can be provided to an employee. To address these issues, you should ask several questions to determine if you are taking the necessary steps to comply with the ADA and applicable state law:

1. Are you on notice that the employee may have a disability? Significantly, such notice need not be specific from the employee, but rather whether you have reason to know that the employee is experiencing a condition that substantially limits a major life activity (*e.*, breathing, walking, etc.).
2. What are the employee's essential job functions? You should determine the core or primary duties and requirements that encompass an individual's job. This assessment should not only entail what is in the employee's job description, but rather an analysis of the actual duties performed by the employee.

3. Would a reasonable accommodation allow the employee to perform the essential functions of his or her position? Using *Hatfield* as an example, would the use of a face shield or other PPE instead of a more traditional facemask have allowed the employee to perform the core duties of her position? If so, then it may be a reasonable accommodation under those circumstances.
4. Have you engaged in an interactive process with the employee? As noted above, the conversation to arrive at a reasonable accommodation cannot be one-sided. Both the employer and the employee must provide meaningful input as to an available reasonable accommodation in light of the essential functions of the job, the employee's disability, and the needs of the business. As part of the interactive process, you should not only consider the applicable federal regulations, but also any state or local orders or ordinances that may provide additional guidance as to what may constitute a reasonable accommodation under certain situations involving COVID-19.
5. Would the proposed reasonable accommodation constitute a direct threat to the employee or others? This question is the key consideration with respect to COVID-19. In *Hatfield*, the employee alleged in her Complaint that one possibility offered by her included working without a mask, which the employer rejected. Hatfield further alleged that she recommended using a face shield instead of a traditional facemask, which the employer also rejected. While it is unclear what exactly transpired between the employer and the employee (at the moment, the above-referenced statements are only allegations), a crucial issue in that litigation may be the propriety of alternative PPE in alleviating the threat of COVID-19.

In evaluating whether a proposed accommodation constitutes a direct threat, you should include a thorough assessment of, at minimum, the four factors underlying the direct threat analysis and rely upon the latest-available facts concerning COVID-19. Additionally, several state and local jurisdictions may have implemented orders or ordinances that provide insight into employers' allowance of alternative PPE (*i.e.*, face shields), and you should consider these sources as well.

While this list of questions is not complete, it remains a starting point in determining whether a COVID-19-related accommodation (such as alternative PPE) is feasible and in addressing such issues with legal counsel. You always need to take requests for reasonable accommodations seriously, but the added complexity of COVID-19 only serves to reinforce this fact.

We will keep you updated on any further developments in this or similar cases filed elsewhere the country. For further information about COVID-19-related litigation being filed across the country, you can visit our COVID-19 Employment Litigation Tracker. Our COVID-19 Employment Litigation and Class & Collective Actions section also has a listing of our litigation-related alerts and team members handling these types of cases.

Fisher Phillips will continue to monitor the rapidly developing COVID-19 situation and provide updates as appropriate. Make sure you are subscribed to Fisher Phillips' Insight System to get the most up-to-date information. For further information, contact your Fisher Phillips attorney. You can also review our FP BEYOND THE CURVE: Post-Pandemic Back-To-Business FAQs For Employers and our FP Resource Center For Employers.

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