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EEOC Issues Statement On COVID-19

In Burke's ongoing effort to keep employers updated on resources for addressing concerns about coronavirus disease 2019 (COVID-19) in the workplace, the EEOC issued brief **guidance**, which focuses on the interplay of the ADA and Rehabilitation Act with employers' responses. The EEOC has confirmed that, while the ADA and Rehabilitation Act do apply, "they do not interfere with or prevent employers from following the guidelines and suggestions made by the CDC about steps employers should take regarding the Coronavirus." The EEOC also directed employers to its 2009 guidance on **Pandemic Preparedness in the Workplace and the Americans with Disabilities Act**, which Burke included in our earlier **alert** on this issue as well.

The Pandemic Preparedness guidance will address issues that employers are facing specifically regarding disability-related inquires and protections, as they try to inform employees and protect the workplace from COVID-19. It addresses questions such as:

- How much information may an employer request from an employee who calls in sick, in order to protect the rest of its workforce when an influenza pandemic appears imminent?
- When may an ADA-covered employer take the body temperature of employees during a "pandemic?"
- Does the ADA allow employers to require employees to stay home if they have symptoms of the pandemic influenza virus?
- When employees return to work, does the ADA allow employers to require doctors' notes certifying their fitness for duty?

While this is not new guidance, it does confirm that the EEOC is following its preexisting guidance on pandemic preparedness.

For example, regarding whether or not the "direct threat" concept applies to COVID-19, the guidance reminds employers that the ADA requires that "[a]ssessments of whether an employee poses a direct threat in the workplace must be based on objective, factual information, not on subjective perceptions . . . [or] irrational fears" about a specific disability or disabilities," and that there are "four factors to consider when determining whether an employee poses a direct threat: (1) the duration of the risk; (2) the nature and severity of the potential harm; (3) the likelihood that potential harm will occur; and (4) the imminence of the potential harm. In making this

determination in the context of a pandemic influenza, the EEOC refers employers to the CDC and public health authorities for the necessary objective evidence.

While the EEOC guidance is comprehensive and helpful to employers, California employers should always be sure to consult with legal counsel to evaluate any potential conflicts between California's FEHA and the ADA, and remember that all workplace decisions and communications need to be based on the most current objective data from the CDC and other reputable public health agencies. It is also important to ensure that employers follow all of its internal policies and procedures regarding use of paid leaves and when appropriate permit unpaid time off when requested by the employee.