**Q. My company is beginning to bring back its office staff for in-person work, and my office employees are mostly eager to return. However, several of our office staff are older individuals, and others have underlying health conditions that place them at higher risk for COVID-19. Are we allowed to keep these higher-risk individuals working remotely while we allow the rest of our employees back in our office?**

A. While your motive may be good in attempting to protect your employees’ health, the answer to your question is generally no. Looking first at older employees, the federal Age Discrimination in Employment Act (“ADEA”) makes it illegal to treat employees 40 years of age or older differently because of their age without a convincing business justification. The Equal Employment Opportunity Commission (“EEOC”), which administers the ADEA, has recently issued guidance that the ADEA prohibits an employer from excluding an individual from the workplace based on the individual being 65 or older (the highest-risk age bracket for COVID-19), even if the employer acts for a benevolent reason such as trying to protect the employee’s health.

You may allow your older workers to continue to work remotely, but you may not require them to do so if you are not also requiring your younger employees to do the same. You may also require all employees to undergo temperature checks, require that they stay home if they show symptoms of COVID-19 (such as cough, fever, chills, or loss of sense of taste or smell), administer COVID-19 tests, require returning employees to submit a doctor’s note certifying their fitness for duty, and otherwise follow current CDC health guidance. The key is not to treat older employees less favorably than younger employees.

The EEOC has also stated than the Americans with Disabilities Act (“ADA”) does not allow an employer to exclude an employee from the workplace just because the employee has a health condition that places him at a higher risk for severe illness if he is infected with the novel coronavirus. Under the ADA, the employer cannot take this action unless the employee has a disability that poses a “direct threat” to his health that cannot be eliminated or reduced by making reasonable accommodations.

A “direct threat” is a high standard and requires the employer to show that the individual has a disability that poses a “significant risk of substantial harm” to his own health. A direct threat assessment cannot be based solely on a condition being on the CDC’s COVID-19 list, but instead must be an individualized assessment based on a reasonable medical judgment about this particular employee’s disability using the most current medical knowledge and/or on the best available objective evidence.

Even if the direct threat bar is satisfied, it is more likely that you will be required to allow employees with underlying health conditions to return to your office with reasonable accommodations to protect their health. These may include additional or enhanced protective measures such as erecting a barrier that provides separation between an affected employee and coworkers or the public or increasing the space between the affected employee and other people. Other possible reasonable accommodations may be eliminating the affected employee’s less critical job functions or temporary modification of work schedules if that decreases the affected employee’s contact with coworkers and/or the public when on duty or commuting to the office.

The bottom line is that you should follow CDC, state, and local health guidelines on how to bring back your office workers safely and should be hesitant to treat your employees differently based on their ages or health status. If you have questions about a specific situation, please call me, and I will be glad to discuss it with you.