

EEOC Places Further Limits on When an Employer May Require an Employee to Undergo Testing for COVID-19

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On July 12, 2022, the federal Equal Employment Opportunity Commission (EEOC) quietly updated its Q&A instructing employers as to when they may require an employee to undergo COVID-19 viral testing (*i.e.*, a test, such as an antigen test, that reveals whether you have an infection at the time of the test). The EEOC now states that like other employer-required medical tests under the Americans with Disabilities Act (ADA), such testing is only allowed in situations where the employer can show it is job-related and consistent with “business necessity.”

So, what does this mean? First, if such testing of employees within the workplace is consistent with guidance from the Centers for Disease Control and Prevention (CDC), the Food and Drug Administration (FDA), and/or state/local public health authorities at the time of the testing, it will be deemed by the EEOC to satisfy the business necessity requirement. This standard requires employers to keep track of the ever-changing guidance from the CDC/FDA and other public health authorities related to testing for COVID-19, or risk potential liability under the ADA moving forward.

Second, the EEOC articulated considerations an employer should use in determining whether COVID testing is a business necessity even if it is not required by CDC/FDA guidance. These include (1) the level of community transmission, (2) the vaccination status of employees, (3) the accuracy and speed of processing the tests, (4) the degree to which breakthrough infections are possible for employees who are “up to date” on vaccinations, (5) the ease of transmissibility of the current COVID-19 variant(s), (6) the possible severity of illness from the current variant, (7) what types of contacts employees may have with others in the workplace or elsewhere that they are required to work, and (8) the potential impact on operations if an employee enters the workplace with COVID-19. All of this results in a situation where employers must make day-to-day decisions about testing based on a variety of ever-changing criteria.

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What is clear is that an employer may not require an employee to undergo an antibody test (as opposed to a viral test) prior to entering or re-entering the workplace. Such a test neither shows whether an employee has a current infection nor establishes that the employee is immune to infection and thus there would be no business necessity for an employer to require an antibody test. The updates to the Q&A do not address COVID-19 vaccines, and the EEOC's prior guidance on that issue is still valid.

Finally, the EEOC reiterated its stance that an employer has the right to ask all employees who are physically entering the workplace whether they have COVID-19 or symptoms associated with COVID-19. This should be based on the CDC's current list of symptoms. And, an employer may exclude employees with COVID-19 and/or COVID-19 symptoms from the workplace because the EEOC has stated that their presence in the workplace would pose a direct threat to the health or safety of others. The EEOC cautions, however, that for employees teleworking and/or not physically interacting with others, an employer would not be allowed to ask these questions.

COVID-19 in the workplace continues to be a fluid situation with the rules of engagement changing rapidly. Employers need to keep up with the current CDC and other health agency guidance in order to avoid inadvertently running afoul of the ADA and other discrimination laws while trying to minimize the risk of COVID-19 in the workplace.

If you have any questions on COVID-19 policies and best practices, please contact any of our Labor and Employment attorneys.

Posted in Centers for Disease Control (CDC), COVID-19, Vaccine

Tags: Americans with Disabilities Act (ADA), COVID and the Workplace, COVID-19 Testing, Equal Employment Opportunity Commission (EEOC), U.S. Food and Drug Administration (FDA)