

The EEOC Issues New Guidance Regarding Antibody Testing in the Wake of COVID-19

Working Together

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Not a day seems to go by without the Equal Employment Opportunity Commission (“EEOC”) issuing a new pronouncement about businesses’ nondiscrimination obligations as employees return to work in a COVID-19 world. On June 17, 2020, the EEOC updated an FAQ list with new guidance stating that employers may not use antibody tests in deciding whether to return employees to work. Use of such tests would violate the Americans with Disabilities Act (“ADA”). The EEOC’s statement follows guidance from the Centers for Disease Control. (Our discussions of prior installments of the EEOC’s guidance for employers

concerning COVID-19 and their obligations under the ADA can be accessed [here](#) and [here](#).)

Under the ADA an employer can require an employee to submit to a medical examination if it is “job related and consistent with business necessity.” Since the CDC has declared that antibody test results “should not be used to make decisions about returning persons to the workplace,” the EEOC states that an antibody test, which constitutes a medical examination, does not meet this standard.

This does not mean, however, that employers are categorically precluded by the ADA from testing for COVID-19. The EEOC notes that an antibody test is different from a test which indicates whether an employee has an active case of COVID-19, such as a viral test, or a temperature check. Such tests may be used to determine whether employees can return to work. (Our discussion of the EEOC’s guidance for employers concerning temperature checks can be found [here](#).) Guidance on testing has been constantly developing, and employers should continue to consult the CDC website and the EEOC’s FAQ list regularly for additional guidance.

As we have previously discussed, it is critical for employers to implement adequate policies and protocols to keep employees safe in the workplace both for the employees’ welfare and to reduce employers’ potential exposure to liability as employees return to work.

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The lawyers at Pullman & Comley are dedicated to assisting employers in ensuring compliance with these and other COVID-19 related requirements, and we have policy templates and other useful resources available. Please contact any of our Labor and Employment Law attorneys if you have any questions.

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