

EEOC Issues New Guidance on COVID-19 Testing

Labor & Employment Law Update

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On July 12, 2022, the Equal Employment Opportunity Commission (EEOC) - the federal agency responsible for enforcing anti-discrimination laws - issued new guidance on when employers may require employees to screen/test employees for COVID-19. The updated guidance can be found in *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws* (the "Guidance").

Viral Testing

Perhaps the most significant change is that employers who want to screen/test employees for COVID-19 infection must now show that the testing is "job-related and consistent with business necessity" - which is the standard that is applied under the Americans with Disabilities Act (ADA) when an employer mandates a medical test or examination during employment.

Previously, the EEOC's position was that mandatory worksite COVID-19 testing (viral testing) always satisfied that standard. Thus, employers were free to require viral testing for on-site employees without fear of violating the ADA. Now, employers must assess whether mandatory testing is still necessary based on the current state of the pandemic and individual workplace circumstances, taking into consideration for example:

- Community transmission levels
- The types of contacts employees may have with others in the workplace or elsewhere that they are required to work (e.g., working with medically vulnerable persons)
- The vaccination status of employees
- The ease of transmissibility of the current variants
- The possible severity of illness from the current variant
- The degree to which breakthrough infections are possible for employees who are up to date on their vaccinations
- The potential impact on business operation if an employee brings an infection into the workplace

Employers are encouraged to regularly review guidance from the Centers for Disease Control and Prevention (CDC), the Food and Drug Administration (FDA) and state and local public health departments before implementing or updating any testing protocol. Mandatory testing will satisfy the “business necessity” standard if it is consistent with that guidance.

Anti-body Testing

The Guidance reiterates that anti-body (serology) testing does not satisfy the business necessity standard because an anti-body test may not show whether an employee has a current infection or whether the employee is immune to infection. Therefore, employers cannot mandate anti-body testing without running afoul of the ADA.

Screening Questionnaires

Employers may still use screening questionnaires to inquire as to whether employees have any COVID-19 symptoms or have been diagnosed with or tested positive for COVID-19 and may exclude those employees from the workplace based on their answers. Employers should not screen employees who work 100% remotely or who do not have direct contact with others during the course of their job.

The Guidance explains that job applicants may be subject to screening for symptoms of COVID-19 after making a condition job offer, as long as the employer screens all entering employees in the same job position. Job applicants may also be subject to screenings during the application process (e.g., in connection with an in-person job interview) but only if the employer subjects everyone (employees, visitors, contractors) to screening before entering the worksite.

Return-to-Work Note

An employer can require an employee who missed work because of a COVID-19 infection/positive test to provide a return-to-work note (release) from their health care provider stating that the employee may safely return to work and is able to perform their job duties. However, an employer is not required to ask for a release. The Guidance acknowledges that health care providers may not be able to provide a release in a timely manner or at all, therefore, rather than requiring a release, the EEOC is now encouraging employers to follow the CDC guidance (or applicable state or local public health guidance) in assessing whether the employee can safely return to work and consider alternatives such as an email, form, or stamp from a local clinic.

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Withdrawing Job Offers

The Guidance provides that employers may withdraw a job offer to an applicant who has a COVID-19 infection or has been recently exposed to COVID-19 *only if*: (1) the job requires an immediate start date; (2) CDC guidance recommends that the person not be in close proximity to others, and; (3) the job requires the applicant to be in close proximity to others, whether in the workplace or elsewhere. Before withdrawing a job offer, the EEOC encourages an employer to consider adjusting the start day or allowing telework (if possible) until the end of the required isolation or quarantine period.

PPE and Other Infection Control Practices

Previously, the EEOC stated that employers could definitely require infection control practices, such as personal protective equipment (PPE); however, now the EEOC states that “in most instances” employers may require PPE and other infection control practices without running afoul of EEO laws. The Guidance states that employers should follow CDC guidance about who should wear a mask. Regardless of the reason an employer requires the use of PPE (or other infection control measure), employers must address religious and disability accommodations when requested.

Pre-Existing Medical Conditions

The Guidance clarifies what an employer should and should not do if an employer knows an employee has an underlying medical condition (e.g., cancer) that puts them at higher risk to get severely ill if they get COVID-19. First, an employer is not required to take action if the employee has not requested a reasonable accommodation. Furthermore, an employer should not presume that the person has a “disability.” Even if the employee has a disability, the employee generally cannot be excluded from the workplace simply because the employee’s condition may put them at higher risk for severe illness if they get COVID-19. The employee would have to pose a significant “direct threat” to the employee’s health or safety that cannot be removed or abated by a reasonable accommodation. This requires an employer to engage in the interactive process with the employee. Reasonable accommodations may include additional or enhanced PPE or other protective measures (e.g., HEPA filtration system or unit, separation barriers, increased spacing between the employee and others at work, elimination of non-essential job duties).

Age Considerations

The Guidance reminds employers that they cannot discriminate against older workers because the CDC states that older persons are at higher risk for severe illness if they get COVID-19. The Age Discrimination in Employment Act (ADEA) protects persons age 40 or older from discrimination, even if the employer is acting for a benevolent reason.

The Guidance clarifies, however, that there is no right to a reasonable accommodation under the ADEA, like there is under the ADA. Although older workers do not have a right to a reasonable accommodation because of their age, the EEOC nevertheless encourages employers to be flexible. The Guidance clarifies that providing older workers with flexibility or accommodations does not violate the ADEA – even if it results in younger workers being treated less favorably.

Conclusion

Employers must continue to monitor guidance from the EEOC and other federal agencies, as well as state and local agencies, regarding COVID-19 matters, and make sure their current workplace policies and practices remain compliant with applicable laws.

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