

EEOC Updates Workplace Guidance on COVID-19 Testing

On July 12, 2022, the U.S. Equal Employment Opportunity Commission (“EEOC”) updated its [COVID-19 workplace guidance](#). Most notably, the EEOC now requires that employers assess whether current pandemic circumstances and individual workplace circumstances justify requiring employees to provide negative COVID-19 test results as a condition of entering the workplace. As a result, employers will need to re-examine any COVID-19 testing policies, including those that apply only to unvaccinated workers. The revised guidance also addresses other areas of preventing COVID-19 transmission in the workplace including mandatory COVID-19 screening and infection control, reasonable accommodations, and vaccination requirements.

COVID-19 Viral Testing

A COVID-19 viral test is considered a medical examination under the Americans with Disabilities Act (“ADA”). The ADA requires employers to show that any mandatory medical test of employees be “job-related and consistent with business necessity.” Under the prior guidance, mandatory COVID-19 viral testing of employees automatically met the ADA’s “business necessity” standard. Now, the revised guidance requires that employers meet the “business necessity” standard based on relevant facts.

The updated guidance offers a list of possible considerations employers should weigh when assessing whether implementing mandatory COVID-19 viral testing is a “business necessity”:

- Level of community transmission
- Vaccination status of employees
- Accuracy and speed of processing for different types of COVID-19 viral tests
- Degree to which breakthrough infections are possible for employees who are “[up to date](#)” on vaccinations
- Ease of transmissibility of the current variant(s)
- Possible severity of illness from the current variant
- Types of contact employees may have with others in the workplace or elsewhere that they are required to work (for instance, with medically vulnerable individuals)
- Potential impact on operations if an employee enters the workplace with COVID-19

If an employer wishes to ask only a particular employee – as opposed to asking all employees – questions to determine if the employee has COVID-19, or require that this employee alone undergo COVID-19 viral screening or testing, the employer must have a reasonable belief based on objective evidence that this person might have the disease (e.g., is the employee displaying COVID-19 symptoms?).

Antibody Testing

The updated guidance clarifies that antibody testing may not be required before permitting employees to re-enter the workplace. Recent guidance from the Centers for Disease Control and Prevention (“CDC”) explained that antibody testing may not establish whether an employee is currently infected or is immune to infection, and therefore should not be used to determine whether an employee may enter the workplace.

Protective Equipment

The guidance was also updated as to when employers may require employees to wear personal protective equipment (“PPE”) and observe other infection control practices. Under the prior guidance, consistent with federal Equal Employment Opportunity (“EEO”) laws, employers were permitted to require employees to wear PPE and observe other infection control practices (e.g., hand washing or social distancing). The revised guidance states that “in most instances” employers are still permitted to require such measures; it does not, however, give specific examples of when such requirements may be impermissible (though examples may include where PPE is inconsistent with a medical condition or religious belief).

Testing as Part of Hiring

The updated guidance added language as to when an employer is permitted to require medical exams as part of the job application process. An employer may require COVID-19 screening between the time of a job offer and when the applicant begins work, but not before making a conditional job offer. An employer may screen pre-offer applicants as well (e.g., those who need to visit the worksite for a job interview), so long as it does so for all employees entering the worksite in the same type of job, regardless of whether or not the applicant has a disability.

Withdrawing Job Offers

The updated guidance outlines three situations in which an employer may withdraw a job offer if an employee has been exposed to COVID-19: (1) the job requires an immediate start date, (2) CDC guidance recommends the person not be in proximity to others, and (3) the job requires such proximity to others, whether at the workplace or elsewhere. Employers may be able to adjust a start date or permit telework (if job duties can be performed remotely) while the employee isolates or quarantines.

An employer may not withdraw a job offer because the applicant is older, pregnant, or has an underlying medical condition that puts them at higher risk from COVID-19.

Responding to Disability and Reasonable Accommodation Requests

Although some of the initial issues relating to the pandemic that previously justified an employer's delay in responding to reasonable accommodation requests may no longer exist, new issues due to the pandemic may arise that excuse an employer's delay. For example, as workplaces reopen, employers may face a higher number of requests for accommodation. Employers must show that pandemic-related circumstances justified the delay in providing a reasonable accommodation. Where a decision on a request is delayed due to justifiable pandemic-related circumstances, employers are encouraged to find interim solutions to enable employees to keep working.

An employee seeking a reasonable accommodation because of a medical condition that puts them at higher risk for severe illness from COVID-19 must make the employer aware (either orally or in writing) that they need a change due to a medical condition.

Age and Increased Risk of Severe Illness from COVID-19

The Age Discrimination in Employment Act ("ADEA") prohibits employment discrimination against individuals age 40 and older. The updated guidance clarifies that an employer is not permitted to exclude an individual involuntarily from the workplace based on being older, even if the employer acted in the interest of protecting the employee due to higher risk of severe illness from COVID-19. Although the ADEA does not include a right to reasonable accommodation for workers due to age, employers are permitted to provide flexibility for older workers even if it results in younger workers being treated less favorably based on age in comparison. Older workers may seek reasonable accommodation for a medical condition if it qualifies for protection as a disability under the ADA.

Vaccinations

Employers are permitted to require all employees to be vaccinated against COVID-19, subject to the reasonable accommodation provisions of Title VII and the ADA. The new guidance clarifies how employers can comply with requirements for providing reasonable accommodations to employees seeking exemptions from mandatory vaccination programs based on disability. The employer should follow these two steps to assess whether their vaccine mandate is job-related and a "business necessity" when an employee objects based on disability: (1) determining if the employee's disability poses a "significant risk of substantial harm" to the employee's own health or safety, or that of others in the workplace, and (2) "assessing whether a reasonable accommodation would reduce or eliminate the threat" without undue hardship to the employer. Employers may also be required to provide accommodations based on sincerely held religious beliefs inconsistent with vaccination, and other bases protected by applicable law, and should be cognizant of state and local guidance on vaccine accommodations (e.g., [guidance](#) published by New York City).

Employers are required to maintain the confidentiality of employee medical information, including vaccination records. Those documents must be stored separately from the employee's personnel files. Employers may share confidential medical information, such as vaccination confirmation (or COVID-19 test results) with employees who need it to perform their job duties (e.g., an employee assigned to perform recordkeeping of employees' vaccination documentation; and/or an employee assigned to permit building access only to employees who have been vaccinated against COVID-19). Those employees also must keep such information confidential.

Key Takeaways

The EEOC's recently updated guidance revised and clarified answers to questions regarding employers' mandatory COVID-19 screening tests, along with other areas of COVID-19 prevention measures in the workplace. The updated guidance requires that employers assess whether current pandemic circumstances and individual workplace circumstances justify mandatory COVID-19 viral testing for employees. Employers should bear in mind that state and local law may provide greater protections for employees than federal law.

We will continue to monitor developments related to recommendations of regulatory authorities regarding COVID-19 testing, and the EEOC's guidance on how employers can prevent the spread of COVID-19 in the workplace while complying with workplace anti-discrimination laws. We anticipate providing further updates once more information becomes available.

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