



## EEOC Challenges TB Testing Practices

Insights

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For years, hospitals and most other healthcare providers have regularly screened new and existing employees for tuberculosis as part of their required infection-control programs. However, the U.S. Equal Employment Opportunity Commission's (EEOC) recent challenge of an employer's TB screening practices may change the way healthcare employers approach this fundamental and long-practiced precaution.

### Expanding Its Approach

On May 30, the EEOC announced a consent decree with a Michigan rehabilitation and nursing company, settling a lawsuit initiated by the Commission. As a result, the company must pay an employee \$25,000.00 and retrain employees involved in its hiring and screening processes. The EEOC contended that the company violated the ADA by not allowing an employee to work after she tested positive during a preliminary TB screening. Specifically, the Commission alleged that the company discriminated by regarding the employee as disabled, even though she was purportedly not contagious and posed no direct health risk to those around her.

The facts of this case are highly specific, but the implications illustrate some challenges of ADA compliance and could have far-reaching implications. According to the U.S. Centers for Disease Control and Prevention (CDC), people who work or receive care in healthcare settings are at higher risk for becoming infected with TB. Therefore, healthcare facilities must have detailed infection-control plans to ensure prompt detection of infectious patients, airborne precautions, and treatment of people with *suspected* or confirmed TB disease. A fundamental goal of these plans is to reduce the risk to uninfected people who may be exposed. Testing of healthcare workers, under the supervision of qualified healthcare professionals, meets these requirements and goals.

In the Michigan case, the tension apparently arises from the contention that a positive result on a preliminary screening test led to an employee being unreasonably kept from working, even though she was purportedly not infectious. Although that analysis ultimately turns on the informed opinions of medical professionals, this scenario makes one powerful point: under the Americans with Disabilities Act, there are virtually no "one size fits all" solutions. In every case, employers must be able to demonstrate that they have conducted an individualized analysis of the employee's

circumstances. Without an analysis tailored to the employee's specific condition, working conditions and duties, simply following "standard" practices or policies will not pass muster.

In other words, an employee who tests positive for an infectious condition can likely be excluded from direct patient contact and perhaps from contact with fellow employees. On the other hand, if the condition is not infectious or may be reliably addressed by the use of "standard precautions," there may be no legitimate reason to remove the employee from the workplace.

Thus, even though the EEOC's action may at first blush seem to be unreasonable or overly-intrusive, the points of controversy are becoming increasingly clear. To avoid potential ADA violations, you must conduct and document individualized evaluations not just when you receive requests for accommodations, but when an employee's medical or mental condition appears to be interfering with the safe performance of the employee's duties.

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*For more information contact the author at [KTroutman@fisherphillips.com](mailto:KTroutman@fisherphillips.com) or (713) 292-0150.*

### ***Related People***



**A. Kevin Troutman**  
Senior Counsel  
713.292.5602  
Email