

EEOC'S NEW WORKPLACE COVID-19 TESTING RULES MIGHT REQUIRE YOU TO MAKE KEY CHANGES: 7 TAKEAWAYS FOR EMPLOYERS

Insights
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Employers that continue to test workers for COVID-19 should review their policies to ensure they comply with updated guidelines released Tuesday by the Equal Employment Opportunity Commission (EEOC). In prior guidance, the EEOC broadly allowed employers to screen workers for COVID-19 without running afoul of the Americans with Disabilities Act (ADA) due to the state of the pandemic. In [revised guidelines](#), however, the agency said you can continue to administer viral tests as a condition of entering a worksite, so long as you can show your testing practices are job-related and consistent with business necessity. The July 12 update "makes clear that going forward employers will need to assess whether current pandemic circumstances and individual workplace circumstances justify viral screening testing of employees to prevent workplace transmission of COVID-19," the EEOC said. What do you need to know about the latest guidelines? Here are seven key takeaways.

1. Mandatory COVID-19 Screening is Still Permissible If Certain Criteria Are Met

Under the ADA, a COVID-19 viral test is considered a medical examination, which means an employer that requires such testing for employees to enter or remain onsite must ensure that COVID-19 testing is "job-related and consistent with business necessity." This is consistent with [the EEOC's pre-COVID guidance](#) about subjecting employees to medical examinations. In that guidance, the EEOC said an employee medical

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examination may be job-related and consistent with business necessity when objective evidence shows that the employer reasonably believes that either the employee's ability to perform essential job functions will be impaired by a medical condition or the employee will pose a "direct threat" – meaning a significant risk of substantial harm – to themselves or others.

In the EEOC's latest guidance, the agency listed the factors you should consider when evaluating whether your testing program is job related and consistent with business necessity: community transmission levels and the transmissibility of current COVID-19 variants, the accuracy and speed of processing different types of COVID-19 viral test, as well as employees' vaccination status, working conditions, and the potential impact of positive cases on operations.

You should also review guidance from the Centers for Disease Control and Prevention (CDC), the Food and Drug Administration (FDA), and state and local public health authorities. The EEOC cautioned, however, that "CDC and other public health authorities periodically update and revise their recommendations about COVID-19 testing, and FDA may revise its guidance or emergency use authorizations based on new information and changing conditions." Therefore, you should regularly check for updates from the relevant government agencies before implementing a COVID-19 testing protocol or if you already have one in place.

2. Antibody Tests Are Not Permitted as a Condition of Re-Entering the Workplace

Antibody tests are still not considered a good measure of whether an individual has a current COVID-19 infection and shouldn't be used to determine whether an employee can return to the workplace. While a viral test detects whether someone is infected with SARS-CoV-2 (the virus that causes COVID-19), an antibody test measures proteins, which may indicate if an employee had a past infection but should not be used to diagnose a current infection. Current CDC [guidance](#) notes that antibody testing does not establish whether an employee is immune to infection, and therefore, should not be used to determine whether an employee may enter the workplace.

3. COVID-19 Screening Questionnaires Are Still Broadly Permitted

Employers are still allowed to ask all employees who are physically entering a worksite if they have [COVID-19 symptoms](#) or have been diagnosed with or tested positive for COVID-19, according to the EEOC. Symptoms include fever, chills, cough, and shortness of breath.

Employers may exclude employees with COVID-19 or associated symptoms from the workplace because their presence would pose a direct threat to the health and safety of others, the agency said. Be aware, however, that employers generally cannot screen employees who work remotely or otherwise do not have in-person contact with co-workers, customers, or other business partners.

4. You May Require 'Return-to-Work' Confirmation from a Medical Professional

If employees miss work because they tested positive for COVID-19, you can require them to provide a note from a qualified medical professional confirming that they may safely return to the worksite and are able to perform their job duties. However, you are not [required](#) to ask for a doctor's note. Instead, you may opt to follow the latest [CDC guidance](#) or the applicable state or local public health guidance to determine whether an employee can safely return to the workplace once they have met isolation or quarantine criteria.

The EEOC explained that requesting confirmation from a qualified medical professional is permitted under the ADA for two reasons. First, COVID-19 is not always considered a disability, so a request for confirmation may not be a disability-related inquiry. Second, if the request is considered a disability-related inquiry, it would meet the ADA's requirement to be job-related and consistent with business necessity due to the risk of COVID-19 transmission in the workplace and objective concerns about the employee's ability to return to work.

"As a practical matter, employers may wish to consider other ways to determine the safety of allowing an employee to return to work if doctors and other healthcare professionals are unable to provide such documentation either in a timely manner or at all," the EEOC said. "This might include reliance on local clinics to

provide a form, a stamp, or an email to confirm that an individual is no longer infectious and is able to resume working.”

5. You May Screen Job Applicants for COVID-19 Symptoms

Under the EEOC’s ADA guidance, you’re allowed to screen individuals with job offers for COVID-19 symptoms before they start work, but consistency is key. Such screening may be done after making a conditional job offer if you screen all employees in the same type of job who are entering the worksite. Additionally, you may screen job applicants who come onsite as part of the interview process if you screen everyone who enters the worksite, such as job applicants, employees, contractors, and visitors.

“The screening is limited to the same screening that everyone else undergoes,” the EEOC explained. “An employer that goes beyond that screening will have engaged in an illegal pre-offer disability-related inquiry and/or medical examination,” according to the agency.

6. You Should Carefully Consider the Circumstances Before Withdrawing a Job Offer

You may need a new hire to start working immediately. So, what options do you have if the worker tests positive for COVID-19, has symptoms, or has recently been exposed? If the new hire must report to a worksite or would otherwise be in the physical presence of others, you may be able to withdraw the job offer in some circumstances.

Start by reviewing – and following – current [CDC guidance](#) that outlines when and how the worker can safely end isolation or quarantine, enter a worksite, or work in the physical presence of others. When following current CDC guidance to address the worker’s specific circumstances, the EEOC said you may withdraw the job offer if:

- The job requires an immediate start date;
- The CDC guidance recommends the person not be in proximity to others, and
- The job requires such proximity to others, whether at the workplace or elsewhere.

The EEOC noted that the isolation or quarantine period may be short for some workers, and therefore, you may be able to briefly delay the start date or allow the new hire to telework if the job duties can be performed remotely.

7. You Should Review Compliance with Other Employment Laws

Employers that continue to test workers for COVID-19 should ensure compliance with additional employment laws beyond the ADA. The EEOC enforces other relevant anti-discrimination laws, including the following:

- Section 501 of the Rehabilitation Act, which prohibits the federal government from discriminating in the employment context against qualified workers with disabilities.
- Section 504 of the Rehabilitation Act, which prohibits recipients of federal financial assistance from excluding or denying individuals with disabilities an equal opportunity to receive program benefits and services;
- Title VII of the Civil Rights Act, which prohibits discrimination based on race, color, national origin, religion, and sex (including pregnancy, gender identity, and sexual orientation); and
- The Age Discrimination in Employment Act, which prohibits discrimination based on age and covers workers who are 40 or older.

Other federal laws, as well as state and local laws, may provide employees with additional protections. So, be sure to consult experienced legal counsel in your industry and geographic location for the latest updates.

Conclusion

The changes to the EEOC's guidance are not meant to suggest whether testing is warranted, the agency noted. "Rather, the revised Q&A acknowledges that evolving pandemic circumstances will require an individualized assessment by employers to determine whether such testing is warranted and consistent with the requirements of the ADA."

As the COVID-19 pandemic evolves, federal agencies will continue to update their guidelines for workplace safety

protocols, and employers should review and potentially revise their policies and practices accordingly. We will continue to monitor these guidelines and provide updates as appropriate. Make sure you are subscribed to [Fisher Phillips' Alert System](#) to get the most up-to-date information. For further information, contact the authors of this Insight, your Fisher Phillips attorney, or any member of our [Workplace Safety Practice Group](#).