



COVID-19 Discrimination – Should Employers Test Their Global Workforce?

Insights

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As an increasing number of countries are moving toward reopening their economies, many global employers must decide whether to require their employees to undergo COVID-19 tests before they can return to work. Before implementing a testing requirement, employers should carefully consider the potential for unintended consequences, such as discrimination based on testing results and the unreliability of certain tests.

Duties – and “Side Effects”

An employer is obligated to prevent infections at work and protect its workforce from an employee who has tested positive for COVID-19. This often requires the employer to isolate the infected employee and notify the rest of the worksite. Such an action by the employer, though well-intended, often stigmatizes the infected employee and can lead to potential harassment and discrimination by other employees.

With the advancement of antibody testing, discrimination against employees who have not had the coronavirus and thus have not developed the antibody is also on the rise. Employers thinking of requiring employees to have an antibody test result or an immunity passport in order to resume work should plan in advance for the “side effects,” as such a requirement may unintentionally discriminate against employees who have not contracted the virus. Or worse, it may incentivize some employees to deliberately infect themselves so they can return to work. Serious illness or even death may occur as a result.

Employers need to keep in mind that the reliability of testing for COVID-19 is limited. An employee who tested negative may become positive in the coming days and vice versa, so one-time tests are not a solution. As of the date of this alert, the accuracy of many antibody tests is still quite low. Positive tests could give employees a false sense of security about their chances of being re-infected.

Some companies with employees in India and the UK are already facing these challenges. We expect to see similarities in other countries, many of which require employers to fulfill their duty of care toward their workers. The slope is especially slippery for employers with operations in jurisdictions that give companies lots of leeway to test their employees or even require employers to test their workers. Unless well-thought-out and well-executed, a testing policy may not satisfy the employer’s

duty of care and may even result in discrimination complaints, as well as privacy and human rights claims under local law.

Conclusion

Unless COVID-19 testing can be done frequently on a large scale, an employer should prioritize other prevention measures such as physical distancing and increased sanitization and handwashing at worksites.

To prevent those infected and those who have not developed the antibody from being deprived of employment opportunities, companies should make an effort to accommodate those employees to the extent possible, such as reviewing and rearranging their job duties so they can perform most of their duties from home.

Importantly, employers should ensure that their global anti-harassment / anti-discrimination policies cover positive testing results as a protected characteristic. Employees need to be trained on the modified policies and reminded that discrimination based on COVID-19 testing status or results is against company policy, and most likely local law as well.

Related People



Nan Sato, CIPP/E, CIPP/C

Partner

610.230.2148

Email

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