



# EEOC Clarifies That Employers Cannot Require COVID-19 Antibody Tests

Insights

6.19.20

The EEOC further revised its guidance to employers to clarify that it does not deem workplace antibody testing lawful under the Americans with Disabilities Act (ADA). COVID-19 antibody tests have recently been touted as a way to help prevent infection spread in the workplace, as they could be incredibly useful to employers – if deemed effective and reliable. Unfortunately, we do not yet know if or the extent to which the presence of the relevant antibody means that an individual is completely or partially immune to future COVID-19 infection. While antibody tests have a vital role in analyzing the spread of and our response to COVID-19, so far this testing has not been determined to be a useful mass screening tool for employers – which prompted the EEOC to clarify its stance on the matter.

## What Did The EEOC Say?

According to the recently updated FAQ document, *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*, the EEOC now states:

**A.7. CDC said in its Interim Guidelines that antibody test results “should not be used to make decisions about returning persons to the workplace.” In light of this CDC guidance, under the ADA may an employer require antibody testing before permitting employees to re-enter the workplace? (6/17/20)**

**No. An antibody test constitutes a medical examination under the ADA. In light of CDC’s Interim Guidelines that antibody test results “should not be used to make decisions about returning persons to the workplace,” an antibody test at this time does not meet the ADA’s “job related and consistent with business necessity” standard for medical examinations or inquiries for current employees. Therefore, requiring antibody testing before allowing employees to re-enter the workplace is not allowed under the ADA. Please note that an antibody test is different from a test to determine if someone has an active case of COVID-19 (i.e., a viral test). The EEOC has already stated that COVID-19 viral tests are permissible under the ADA. The EEOC will continue to closely monitor CDC’s recommendations, and could update this discussion in response to changes in CDC’s recommendations.**

It’s important to note that the EEOC continues to find in vitro diagnostic (IVD) testing for the SARS-CoV-2 virus to be business-related and consistent with job necessity, which means employers are able to pursue this path.

## What Are The Takeaways From This Development?

- Medical exams of employees, including antibody and nasal swab virus testing, must be job-related and consistent with business necessity to satisfy ADA requirements.
- The FDA states that, right now, it is unclear whether individuals who may have been exposed to SARS-CoV-2 may be less susceptible to infection.
- The EEOC approved the virus tests because they are effective in determining if employees entering the workplace have COVID-19, and that an individual with the virus will pose a direct threat to others.
- The EEOC and other employment regulators are driven by public health guidance, which is evolving and depends on the seriousness of the pandemic stage. Employers must constantly monitor developments, and these developments will dictate compliance with safety and employment law requirements. Regulators have not broadly relaxed their approach to medical exams and testing.
- The EEOC and other antidiscrimination agencies will continue to require employers to engage in an individualized analysis of each situation and justify the appropriate response.
  - As an example, the pandemic does not eliminate an employer's responsibility to determine if it can reasonably accommodate an employee with a disability condition which may prevent them from safely working onsite.
  - Nor may an employer automatically furlough, terminate employees, or refuse to allow employees because they are in a high-risk group from working.
- To protect employees and defend against legal claims, employers must take a multi-tiered approach:
  - You should employ a Hierarchy of Controls: Engineering – Administrative – Work Practices/Training.
  - As an example, facemasks are an essential tool, but do not obviate the need to maintain social distancing.
  - Screening, temperature checks, social separation, engineering changes, handwashing, and face coverings are all required to survive employee efforts to circumvent the workers' compensation exclusive remedy rule and bring civil actions based on allegedly contracted COVID-19 at work.
- Employees will scrutinize employer efforts to protect them, and any failings may harm morale and breed dissension in the workplace, lawsuits, and harm to a company's hard-won reputation.

## Conclusion

Fisher Phillips will continue to monitor the rapidly developing COVID-19 situation 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 your Fisher Phillips attorney or any member of our Post-Pandemic Strategy Group Roster. You can also review our FP BEYOND THE

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[CURVE: Post-Pandemic Back-To-Business FAQs For Employers](#) and our [FP Resource Center For Employers](#).

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*This Legal Alert provides an overview of a specific developing situation. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.*

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