

## **EEOC ISSUES NEW GUIDANCE ON COVID-19 EMPLOYEE TESTING**

Aug 11, 2022

On July 12, 2022, the Equal Employment Opportunity Commission (EEOC) updated its Technical Assistance Questions and Answers regarding “What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws” (the “Q & A”). The Q & A was first issued at the start of the pandemic in early 2020, and has been updated several times since then.

Among other revisions, this most recent version of the Q & A makes a change regarding the circumstances under which employers may conduct a viral COVID-19 test. Previously, consistent with Americans with Disabilities Act (ADA) requirements, an employer could administer a viral COVID-19 test to any employee entering the workplace because it was concluded that an individual with the virus posed a direct threat to the health of others. Under this new Q & A, a viral test to evaluate an employee’s initial or continued presence in the workplace may only be administered if the employer can show, based on relevant facts, that such a test is “job-related and consistent with business necessity”, *i.e.* the ADA standard required to conduct an employee medical test which was previously satisfied due to the “direct threat” presumption. The use of a COVID-19 viral test to screen employees who are or will be in the workplace will meet the “business necessity” standard when it is consistent with current as of the time of testing guidance from the Centers for Disease Control and Prevention (CDC), Food and Drug Administration (FDA), and/or state/local public health authorities. The EEOC cautions that such agencies and authorities periodically change their COVID-19 testing recommendations so employers will need to regularly monitor these sources to assure compliance with the business necessity standard.

The Q & A identifies several factors to be considered in determining whether the implementation of employee viral screening testing is a “business necessity.” These factors may include:

- the level of community transmission,
- the vaccination status of employees,
- the accuracy and speed of processing for different types of COVID-19 viral tests,

- the degree to which breakthrough infections are possible for employees who are “up to date” on vaccinations,
- the ease of transmissibility of the current variant(s),
- the possible severity of illness from the current variant(s),
- what types of contacts employees may have with others in the workplace or elsewhere that they are required to work (g. working with medically vulnerable individuals), and
- the potential impact on operations if an employee enters the workplace with COVID-19.

The requirement of antibody testing before allowing employees to reenter the workplace continues to not be allowed under the ADA.

This Q & A also restates that the ADA allows employers to require a medical note confirming it is safe for an employee to return to work and that the employee is able to perform their job duties. It also specifically directs that CDC guidance provides an alternative to determine whether an employee may safely return to the workplace.

Given that COVID-19 remains a public health emergency, this fact specific viral testing assessment process may not significantly affect an employers’ current testing requirements. Nevertheless, it is prudent and advisable to review such policies along with agency guidance to ensure compliance with the Q & A. Employers should also be mindful of relevant state law obligations regarding employee testing.

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