

EEOC Adds COVID-19 Testing Guidance to Its Technical Assistance on COVID-19 and Anti-Discrimination Laws

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On the heels of adding Return to Work guidance to its technical assistance for employers, “[What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Law](#)” (discussed [here](#)), on April 23, 2020 the Equal Employment Opportunity Commission (“EEOC”) issued an update addressing COVID-19 testing by employers. This latest guidance acknowledges that COVID-19 presents a direct threat to the health of others sufficient to justify testing. It cautions, however, that employers should only use tests that are “accurate and reliable.” Specifically the FAQ states:

A.6. May an employer administer a COVID-19 test (a test to detect the presence of the COVID-19 virus) before permitting employees to enter the workplace?

The ADA requires that any mandatory medical test of employees be “job related and consistent with business necessity.” Applying this standard to the current circumstances of the COVID-19 pandemic, employers may take steps to determine if employees entering the workplace have COVID-19, because an individual with the virus will pose a direct threat to the health of others. Therefore, an employer may choose to administer COVID-19 testing to employees before they enter the workplace to determine if they have the virus.

Consistent with the ADA standard, employers should ensure that the tests are accurate and reliable. For example, employers may review guidance from the U.S. Food and Drug Administration about what may or may not be considered safe and accurate testing, as well as guidance from CDC or other public health authorities, and check for updates. Employers may wish to consider the incidence of false-positives or false-negatives associated with a particular test.

Finally, note that accurate testing only reveals if the virus is currently present; a negative test does not mean the employee will not acquire the virus later. Based on guidance from medical and public health authorities, employers should still require – to the greatest extent possible – that employees observe infection control practices (such as social distancing, regular handwashing, wearing face masks, if required, and other measures) in the workplace to prevent transmission of COVID-19.

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