

## EEOC Drops New Guidance on COVID-19 Testing

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More than two years into the COVID-19 pandemic, and in the face of all sorts of uncertainty amid multiple new variants and waves of infection, employers could at least be confident of one thing – it is generally okay to require employees to take COVID viral tests to come to work. Well, earlier this week, the Equal Employment Opportunity Commission (EEOC) issued new guidance that (in addition to several other changes) upends this long-held principle and will require employers to re-think whether to require COVID testing.

Specifically, on July 12, 2022, the EEOC updated its [What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws](#) (the “Guidance”) for the first time in several months. The Guidance, which covers a number of areas, advises on disability-related inquiries and medical exams, addresses hiring and onboarding protocol, evaluates return-to-workplace procedures, considers employer-mandated vaccine policies, and provides general direction on interactions with protected classes. The EEOC has periodically updated the Guidance on a number of occasions since first issuing it at the start of the pandemic in March 2020.

The updated Guidance addresses several issues, the most significant of which is the EEOC’s new standard for employers who screen/test employees for COVID-19. Some of the significant items covered in the new Guidance include:

### COVID-19 Screening & Testing for Employees

As clarified by the EEOC, an employer’s ability to conduct screening and testing measures will now depend on whether those measures are “job-related and consistent with business necessity.” Previously, the EEOC’s enforcement position was simply that COVID-19 viral testing is permissible for on-site employees. See Questions A.6 and A.7.

Instead, the new Guidance cautions employers who want to screen/test employees for COVID-19 infection that they may still require [viral tests](#) (which are intended to confirm active infection) provided the employer can demonstrate that testing is job-related and consistent with business necessity. Viral testing will meet the business necessity standard based on then-current guidance from the Centers for Disease Control and Prevention (CDC), Food and Drug Administration (FDA), and/or state or local

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public health authorities. Because these public health authorities periodically update and alter their recommendations about COVID-19 testing based on new information and changing conditions, employers who require testing will need to review such agencies' guidance regularly to ensure that their testing requirements meet the business necessity standard.

Possible considerations in this assessment 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, what types of contacts employees may have with others in the workplace or elsewhere that they are required to work (e.g., working with medically vulnerable individuals), and the potential impact on operations if an employee enters the workplace with COVID-19. One significant impact of this change is that employers with a multi-location workforce may need to implement varying testing requirements based on site.

Additionally, the Guidance makes it clear that antibody testing will not meet the standard of job-related and consistent with business necessity. That is because antibody testing only provides information as to whether an individual has ever been exposed to or infected with COVID-19. Since antibody testing may not show whether an employee has a current infection or establish that an employee is immune to infection, the EEOC concludes that antibody testing does not meet the "business necessity" standard and cannot be used to determine whether an employee may enter the workplace.

## **Screening Applicants for COVID-19 Symptoms**

In addition to the new material on testing members of the workforce for COVID-19, the updated Guidance also addresses screening job applicants for symptoms of COVID-19. The EEOC clarifies that employers may screen an applicant after making a conditional job offer, provided they screen/test all employees in the same type of job. This screening/testing of applicants for COVID-19 symptoms is permissible if – as with screening/testing for members of the existing workforce – the screening/testing is "job-related and consistent with business necessity." The EEOC further advises that if the applicant is unable to start based on a COVID-19 positive test/symptoms/exposure, employers must follow current [CDC guidance](#) to determine when and how it would be safe for such individuals to return to the workplace. Employers must also consider accommodations obligations before making any decision. See Questions C.1. C.4 and C.5.

## **Return to Work**

Another significant revision to the Guidance involves when an employer can require a release to return to work post-COVID-19 infection. As it did previously, the Guidance permits employers to require a note from a qualified medical professional explaining that it is safe for the employee to return and that the employee is able to perform their job duties. See Question A.5. However, the updated EEOC guidelines encourage employers to follow [CDC guidance](#) and provide other practical ways to determine whether it is safe to allow an employee to return to the workplace without requiring a written release from a medical professional.

## **Mandatory Vaccines**

The EEOC also clarified the Guidance as to mandatory vaccination policies. When employers

impose such a requirement subject to accommodation obligations under the ADA and Title VII, they may require documentation or other confirmation of employee vaccination status. See Question K.1. The Guidance further advises that when an employee seeks an accommodation from a mandatory vaccination policy, employers must evaluate whether the accommodation would pose a direct threat to the health or safety of the employee or others. A direct threat is a significant risk of harm that cannot be eliminated or reduced by a reasonable accommodation. These accommodations could include wearing a mask, staggering shifts, telework, altering the work environment, or transfer to a different role. See Question K.5.

The Guidance reminds employers that employee vaccination status is confidential medical information under the ADA; as such, an employer must keep its employees' vaccination information confidential and must store it separately from their personnel files. See Question K.4.

## Conclusion

The Guidance provides updated assistance to employers as they continue to navigate COVID-19 and the workplace. It reminds employers of the importance of staying continuously up-to-date on changes in public health guidelines and being ready to reevaluate their policies on dealing with COVID-19 testing and precautions.

*This article was prepared with the assistance of 2022 summer associate Ashley Grabowski*

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