

EEOC Updates COVID-19 Testing Guidance for Employers

Viral Screening Tests are Not Per Se Permissible in the Workplace under the ADA and Must be Job Related and Consistent with Business Necessity

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Throughout the COVID-19 pandemic, the [COVID-19 FAQs](#) published by the U.S. Equal Employment Opportunity Commission (“EEOC”) have been an invaluable resource for employers. On July 12, 2022, the EEOC updated a number of Q&As, and in particular, Q&As relating to COVID-19 testing in the workplace and whether they are permissible under the Americans with Disabilities Act (“ADA”), 42 U.S.C. § 12101, et seq.

With the increase in COVID-19 positivity rates across the United States amidst the prevalence of Omicron subvariant BA.5, employers may be considering implementing, continuing, or reinstating a mandatory testing policy for employees entering the workplace. Employers must take into account some important considerations, however, before mandating testing.

First, there is a critical distinction between a viral screening test, which may be appropriate under certain circumstances, and an antibody test, which is prohibited.

Viral screening tests are designed to detect the presence of COVID-19. Under the ADA, these tests are not per se permissible. Instead, an employer can require such tests prior to an employee entering the premises if the test is “job-related and consistent with business necessity.” According to the EEOC, employers can satisfy this standard if the testing policy is consistent with guidance from the Centers for Disease Control and Prevention (“CDC”), Food and Drug Administration (“FDA”), and/or state and local public health authorities that is current at the time of testing. This guidance, however, is periodically updated, so employers should keep abreast of new changes.

To assist employers, the EEOC identified several possible considerations in making the “business necessity” assessment:

- 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 (g., working with medically vulnerable individuals); and

- the potential impact on operations if an employee enters the workplace with COVID-19.

With respect to antibody tests, as the EEOC explains, current [guidance](#) from the CDC makes clear that antibody testing should not be used to show whether an employee has a current infection or whether the employee is immune to infection. Indeed, it can take one to three weeks after infection for antibodies to generate. As a result, antibody tests do not meet the ADA's "business necessity" standard for medical examinations or inquiries for employees. Thus, requiring antibody tests before an employee is permitted to re-enter the workplace is not permissible under the ADA.

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If you have any questions concerning the updated EEOC guidance, or any other federal or state employment laws, please feel free to contact [Vincent C. Cirilli](#) or [Paola Hemsley](#) of Saiber LLC's Employment and Labor Law practice.