

COVID-19 Alert: Workplace Testing Update

EEOC Releases Updated Guidance

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At the start of the pandemic, the U.S. Equal Opportunity Commission (“EEOC”) released guidance that allowed employers to test and screen employees for COVID-19 without running afoul of the Americans with Disabilities Act (“ADA”). On July 12, 2022, however, the EEOC released **updated guidance** shifting its original position that going forward, “employers will need to assess whether current pandemic circumstances and individual workplace circumstances justify viral screening testing of employees to prevent workplace transmission of COVID-19.”

Under the ADA, employers are generally prohibited from conducting medical examinations of applicants and employees unless the employer can prove the request is “job-related and consistent with business necessity.” With the uncertainty and threat of the COVID-19 pandemic, the EEOC originally concluded that the standard was met when it came to COVID-19 viral screening testing. Now, the EEOC acknowledges that with the “evolving pandemic circumstances” individualized assessments by employers are now warranted.

The EEOC recommends employers rely upon updated guidance from Centers for Disease Control and Prevention (CDC), Food and Drug Administration (FDA), and/or state/local public health authorities. If testing protocols are consistent with such agencies’ current guidance, the business necessity standard will be deemed to have been met.

The EEOC recommends several factors employers should also consider in determining whether testing protocols meet the business necessity standard:

- 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 (e.g., working with medically vulnerable individuals); and,
- the potential impact on operations if an employee enters the workplace with COVID-19.

Employers are urged to review their COVID-19 testing and screening policies to ensure compliance with the new EEOC guidance, and CDC and local board of health advice.

Please contact [Amanda Thibodeau](#) should you have questions concerning this subject, or any other COVID-19 response matters.

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