

LEGAL UPDATES

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Employers May Mandate COVID-19 Viral Tests but Not Antibody Tests Upon Return to Work

Key points

The U.S. Equal Employment Opportunity Commission (EEOC) prohibits employers from requiring employees to undergo COVID-19 antibody testing prior to re-entering the workplace.

The EEOC permits employers to require employees to undergo diagnostic viral tests that detect whether the employee is currently infected with COVID-19.

EEOC update on antibody testing

Facilities offering COVID-19 antibody tests are ubiquitous, offering to provide information on whether individuals have been exposed to COVID-19 and have developed a protective immunity to the virus. However, on June 17, 2020, the EEOC released a statement that antibody tests constitute medical exams and are not permitted under the Americans with Disabilities Act (ADA). The ADA governs disability-related inquiries and medical exams and prohibits employers from excluding employees with a disability from the workplace for health and safety reasons unless the employee poses a direct threat. When an employee poses a direct threat, however, an employer is permitted to make such an inquiry or medical exam because it is job-related and consistent with a business necessity. Any mandated medical exam, however, must be accurate and reliable.

From the beginning of the COVID-19 crisis, the EEOC consistently has directed employers to refer to guidance from the CDC on issues relating to direct threats to the workplace and to follow the most current CDC information to maintain workplace safety. A few weeks ago, the CDC issued

interim guidance regarding antibody testing for exposure to the SARS-CoV-2 virus. While the information in the guidance is largely directed at healthcare entities and practitioners, it also provides useful guidance to employers on the present state of antibody testing. The CDC interim guidance recommends that antibody tests “should not be used to make decisions about returning persons to the workplace.” The CDC’s concern is due in part to the lack of existing scientific information about the existence and effectiveness of an antibody response to prevent reinfection with the SARS-CoV-2 virus.

So it’s not surprising that the EEOC released an update to its Technical Assistance Questions and Answers, stating that the ADA prohibits employers from requiring employees to submit to an antibody test prior to re-entering the workplace. A change in the EEOC’s position may occur if and when new scientific information develops relating to the reliability of antibody tests and the CDC changes its recommendation.

What this means to you

As employees return to work, employers may continue to take employees’ temperatures or mandate that employees submit to a diagnostic viral test that detects whether an employee is currently infected with COVID-19 and would pose a direct threat to the workplace. Despite the numerous facilities offering antibody testing, however, the antibody tests are unreliable at determining whether the presence of antibodies equates with immunity to the virus. As a result, employers must not require employees to submit to antibody testing. Any requirement that employees submit to an antibody test would, at this point in time, run afoul of the ADA and subject an employer to liability.

Contact us

If you have questions about testing your employees for COVID-19 or other return to work issues, contact Barbara Grandjean or your Husch Blackwell attorney.

Tracey Oakes O’Brien, Knowledge Manager, is a co-author of this article.

COVID-19 Return-to-Work Resource

For the many businesses that partially or completely shuttered their on-site operations due to government-mandated COVID-19 orders, transitioning employees back to the workplace is an unprecedented and complex endeavor. Husch Blackwell’s Return-to-Work Resource Center provides best practices, answers to common questions and potential issues to consider.