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Labor & Employment Alert

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EEOC provides new insight regarding workplace COVID-19 testing requirements and data collection practices

By Alice Kwak, Shelagh C.N. Michaud, and Rachel L. Conn

COVID-19 testing in the workplace must be a "business necessity" under the ADA standard for medical examinations, and employers are prohibited from seeking information on employees' family members' COVID-19 status and/or test results.

What's the Impact?

- EEOC revised guidance requires employers to meet ADA "business necessity" test before using COVID-19 screening testing for employees
- EEOC settlement in recent case clarifies that employers may *not* request or collect information on employees' family members' COVID-19 status or test results

As the pandemic continues to impact the workplace, employment policies and practices must continue to shift and evolve. Here's the latest information from the EEOC for employers on how COVID-19 testing and information requests involving employees' family members should be managed.

Under new EEOC guidance, COVID-19 testing in the workplace must be a "business necessity"

On July 12, 2022, in response to the ever-evolving status of the COVID-19 pandemic, the U.S. Equal Employment Opportunity Commission (EEOC) updated its guidance for employers on COVID-19 in the workplace.

Pursuant to this newest update, the EEOC announced that employers seeking to implement screening testing for employees must meet the "business necessity" standard under the Americans with Disabilities Act (ADA). The EEOC had previously stated that a COVID-19 viral test is a "medical examination" within the meaning of the ADA, but, based on the pandemic and the need for an immediate response to COVID-19 transmission in the workplace, COVID-19 testing for on-site employees was permissible—essentially, that the state of the pandemic justified the need for testing in the workplace. In this revised guidance, the EEOC reiterated that a COVID-19 viral test is a "medical examination," however, based on the evolution of the pandemic, the EEOC now states that an employer must show that the COVID-19 testing is "job-related and consistent with business necessity." The "business necessity" standard requires individualized assessment by employers to determine whether such testing is warranted and can be based on factors like community transmission, employees' vaccination status, the ease of transmissibility of the current variant(s), the possible severity of illness from the current variant, or certain working conditions.

The guidance also continues to make clear that employers may not require an antibody test from employees as a requirement for returning to the workplace. The EEOC noted that the Centers for Disease Control and Prevention (CDC) guidance states that these tests may not show whether someone has a current COVID-19 infection or establish that a person has immunity from COVID-19. Therefore, "at this time, such testing does not meet the ADA's "business necessity" standard for medical examinations or inquiries for employees." Employers may require that potential new employees test for COVID-19 after making a conditional offer, as long as that policy is executed uniformly and in a non-discriminatory manner. Before an employer may rescind an offer based on a positive COVID-19 test, it must be able to demonstrate that "(1) the job requires an immediate start date, (2) CDC guidance recommends the person not be in proximity to others, **and** (3) the job requires such proximity to others, whether at the workplace or elsewhere." (Emphasis in original.)

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.

Employers are not permitted to request or collect employees' family members' COVID-19 test results

A recent settlement in an EEOC case against a Florida medical practice highlighted the implications of prior EEOC guidance, stating that employers may not ask their employees whether they have family members with COVID-19 or COVID-19 symptoms. As part of its effort to

fight the COVID-19 pandemic, the medical practice collected employees' family members' COVID-19 test results. The EEOC challenged this process under the Genetic Information Non-Discrimination Act (GINA), which prohibits employers from discriminating against employees or applicants based on genetic information. GINA specifically prohibits employers from requesting or obtaining an employee's genetic test results, the genetic test results of an employee's family members, or an employee's family medical history.

While employers may not request information on family members' COVID-19 status or test results, employers are permitted to ask employees if they have had exposure to anyone diagnosed with COVID-19 or with anyone who may have symptoms associated with COVID-19. Thus, while employers need to be careful how they request information on COVID-19 exposure, they can still obtain the information needed to evaluate an employee's exposure risk and determine whether an employee's COVID-19 infection may be the result of workplace transmission.

Additionally, GINA contains limited exceptions under which employers may request or obtain genetic information, including family medical history. For example, employers may request medical information as part of the certification process for a Family Medical Leave Act request or other state or local leave, such as Paid Family Medical Leave. An employer is also not liable if it obtains medical information through a publically or commercially available source, such as newspapers or publically accessible websites, or a voluntary wellness program.

As the pandemic continues to evolve, updated EEOC guidance will continue to impact employment policies and practices. Accordingly, employers should stay updated on the latest EEOC guidance, as well as any state and local requirements and guidance. As part of its COVID-19 coverage, Nixon Peabody will continue to provide updates on these and other issues facing employers.

For more information on the content of this alert, please contact your Nixon Peabody attorney or:

Alice Kwak
213.629.6004
akwak@nixonpeabody.com

Shelagh C.N. Michaud
401.454.1133
smichaud@nixonpeabody.com

Rachel L. Conn
415.984.8216
rconn@nixonpeabody.com