

EEOC clarifies that ADA prohibits employers from requiring antibody tests for returning employees

June 18, 2020

The Equal Employment Opportunity Commission (EEOC) issued new guidance on June 17, 2020, making clear that employers cannot test returning employees for COVID-19 antibodies without running afoul of the Americans with Disabilities Act (ADA). Below we outline this new guidance and provide key takeaways as organizations continue to plot out their employee screening programs to prevent the spread of COVID-19.

EEOC Guidance

The EEOC's new guidance addresses what type of employee screening tests are permissible under the ADA to prevent the spread of COVID-19 in the workplace. The ADA protects job applicants and employees from disability discrimination by: (1) regulating employers' disability-related inquiries and medical examinations for all applicants and employees, including those who do not have ADA disabilities; (2) prohibiting covered employers from excluding individuals with disabilities from the workplace for health and safety reasons unless they pose a "direct threat" (i.e., a significant risk of substantial harm even with reasonable accommodation); and (3) requiring reasonable accommodations for individuals with disabilities (absent undue hardship).

The EEOC has said employers may generally test employees for COVID-19 and COVID-19 symptoms without violating the ADA under the "direct threat" exception. The new guidance, however, makes clear that employers cannot test returning employees for COVID-19 antibodies (i.e., indicators that the employee had *previously* contracted COVID-19 that cannot accurately diagnose a *current* infection). According to the EEOC, an antibody test constitutes a medical examination under the ADA. Because the Centers for Disease Control stated in its Interim Guidelines that antibody test results "should not be used to make decisions about returning to persons in the workplace," the EEOC concluded that an antibody test "at this time" does not meet the ADA's "job related and consistent with business necessity" standard for medical examinations or inquiries for current employees.

Takeaways

There are two key takeaways coming out of this new guidance. First, employers should examine their employee screening programs carefully to ensure they are not asking questions conducting medical examinations, or recording data that runs afoul of the ADA. Second, the EEOC is continuing to update their COVID-19 guidance, and it is important for employers to stay abreast of the EEOC's developments after employee screening programs are initially rolled out. Similarly, employers should continue to align their programs with state and local guidance.

Dentons COVID-19 Resources

Dentons has been helping clients address the challenges COVID-19 has presented since the outbreak started. We

will continue to do all we can to support our clients and communities at this time. Our **COVID-19 hub** is updated regularly and includes links to a variety of practice and sector insights. We chose to make these resources available to you on a complimentary basis because sharing with those in need is simply the right thing to do.

Our offerings include a **Global Labor & Employment tracker** to provide guidance on what COVID-19 means in countries around the world for employers, including as to employer protection responsibilities, compensation, COVID-19 diagnosed employee response, privacy, and terms adjustment in the event of operational difficulties.

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