

The Sequel - EEOC Updates COVID Guidance

September 6, 2022

As everyone knows, the sequel is almost always messier than the original. The Equal Employment Opportunity Commission (EEOC) is no exception. On July 12, the **EEOC updated its COVID-19 guidance**, taking already complicated guidance that had no clear direction and making it worse with increased reliance on shifting public health standards.

Public Health Agencies and COVID-19 Processes

The EEOC states specifically that employers should look to the Centers for Disease Control (CDC), Food and Drug Administration (FDA), and other public health agencies in assessing COVID-19 processes. Oddly, the EEOC leaves the Occupational Safety and Health Administration (OSHA) out of its example list - even though OSHA has been active in setting COVID safety guidance for employers. This does not mean that OSHA won't govern employer requirements, just that there may be issues with how each agency's expectations overlap. Employers have seen this before in the EEOC and NLRB **conflicting opinion letters** and decisions regarding handbooks and confidential information.

Note that the EEOC rules remain highly industry-specific. Healthcare and certain other close contact industries remain subject, either under federal rules (Centers for Medicare and Medicaid Services [CMS] for healthcare) or state law (frequently in education), to other more restrictive COVID requirements, such as the vaccination or masking rules promulgated by CMS for many healthcare entities. OSHA continues to expect **secondary COVID logs in addition to the standard 300 logs**. OSHA further continues to indicate that more specific rules will be forthcoming.

Changes in the Questions/Answers issued by the EEOC include testing, onboarding, withdrawing job offers, and PPE.

Doctor Notes and Testing

Question A.5 covers information an employer may request of an employee before returning to work after a COVID diagnosis. Employers may request a medical provider's note, or follow CDC guidance to determine when an employee may return, and if that employee should mask. The EEOC specifically directs employers to changes in Question A.6, regarding when an employer may conduct or require a COVID test. The EEOC states that this is permissible if the employer can show that the test is job-related and "consistent with business necessity," which as many employers know, can be a fluid standard depending on the individual EEOC evaluator. CMS or other regulations mandating testing in industries such as healthcare traditionally meet this test given that healthcare has a long history of testing for diseases, such as TB.

In assessing business necessity, absent a statutory mandate, the EEOC looks to:

- The level of community transmission
- **Employee vaccination status**
- Current science or likelihood of breakthrough infections and if current circulating variants are highly transmissible
- The severity of the current variant: The nature of the industry and the job's ongoing COVID exposure risk, such as significant public contact, close quarters, etc.)
- Special issues such as working with those at high risk (immunocompromised, health issues, those who cannot be vaccinated)

This multifaceted analysis complicates the employer evaluation, and we suggest that you seek the advice of legal counsel on implementing any program.

The guidance goes further in Q&A A.7 prohibiting antibody testing, *but* stating in A.8 that it is permissible to inquire daily if employees have been tested, have symptoms, or have been diagnosed with COVID. A.8 has not changed significantly from its original issue.

Hiring and Onboarding

The EEOC updated the answer to C.1, which continues to state to screen applicants who have received a conditional job offer may be screened if that is true of all employees in the same type of job; and notes that pre-offer applicants may be screened if they the employer is consistent in screening all persons who enter the workplace.

Withdrawing a Job Offer

One question that has cropped up: can an employer withdraw a job offer if the start date would have to be delayed due to a recent COVID infection. The EEOC refers employers to the CDC guidance for quarantines and other limitations (see Q&A C.4) and states that:

- if the job has an immediate start date;
- the CDC limits proximity to offers; and
- the job requires proximity to others; then
- the offer may be withdrawn

Employers clearly need to consider a number of factors including how long it would take to find another candidate to fill the position before deciding to withdraw any offers. If they are delayed two weeks by COVID, but it takes six weeks to fill the position, that might be used in an EEOC claim.

PPE Requirements and Accommodations

For those employers who require PPE such as masks, gloves, or face shields, the EEOC reaffirms that any request for accommodation is part of the reasonable assessment process and that employers *are not* required to violate OSHA requirements as part of an accommodation (see Q/A C.2). The real issue employers will need to assess with legal counsel is when employers place certain safety requirements on employees in an attempt to meet OSHA's

ever-expanding general duty clauses, rather than simply for a specific OSHA requirement.

The Big Picture

For screening, analysis, and critical accommodations, the EEOC has complicated the assessment by directing employers to the CDC and current science on any variant, while making any determination more complex and less consistent. It doesn't look like employers will be able to delete the public health links they have been checking throughout the pandemic, making it more important to seek legal counsel when attempting to develop programs or updated policies.

Related Resource:

Factors Employers Should Consider as the EEOC Revises COVID-19 Testing Guidance

Your Key Contacts



Jo Ellen Whitney

Shareholder, Des Moines

D +1 515 246 7993

M + 1 515 480 4557

joellen.whitney@dentons.com