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EEOC issues COVID-19 return-to-work and antibody testing guidance

On June 11, the EEOC issued supplemental guidance for employers as businesses begin to reopen and return employees to work. New Q&As provide several critical clarifications on the ADA, accommodations, harassment and other COVID-19 related issues. The guidance was updated on June 17 to make clear that employers may not require antibody testing before allowing employees to re-enter the workplace.

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Background

Since March, the Equal Employment Opportunity Commission (EEOC) has been issuing and updating COVID-19 guidance for employers on a rolling basis. [Q&As](#) released on June 11 addressed a number of hot topics businesses likely will face as they develop return-to-work strategies and begin to reopen. The guidance was updated on June 17 to make clear that employers may not require employees to submit to antibody testing as a condition for re-entering the workplace.

Latest EEOC guidance

The latest EEOC guidance provides additional clarifications on employer obligations with respect to at-risk workers, reasonable accommodations under the Americans with Disabilities Act (ADA), pandemic-related harassment, and antibody testing.

High-risk employees

The guidance confirms that excluding an individual from the workplace due to their age (65 or older) violates the Age Discrimination in Employment Act (ADEA), even if the employer's intent was to protect the employee due to higher risk of severe illness from COVID-19. As the EEOC explains, the ADEA — unlike the ADA — does not include a right to reasonable accommodation. At the same time, the EEOC makes clear that it does not prohibit employers from providing flexibility to older workers even if it results in younger employees being treated less favorably based on age.

The EEOC similarly cautioned that employers may not single out employees based on pregnancy for any adverse employment actions — including involuntary leave, layoff or furlough — or exclude them from the workplace even if based on concern for the employee. While pregnancy itself is not an ADA disability, pregnancy-related medical conditions can be. Thus, the usual ADA rules apply if an employee requests a reasonable accommodation due to such a condition.

Title VII of the Civil Rights Act of 1964 (Title VII), as amended by the Pregnancy Discrimination Act, also provides protections against discrimination on the basis of pregnancy, childbirth, or related medical conditions. Thus, pregnant employees may be entitled to job modifications such as telework, changes to work schedules or assignments, and leave, to the extent those are available to others similar in their ability or inability to work.

Accommodations

The EEOC recommends that employers make information available to employees in advance of reopening about who to contact to request accommodation for a disability, regardless of whether a return-to-work date has been set. The EEOC suggests two options: (1) a notice to all employees, whether they are returning to the physical workplace or not; or (2) a notice only to employees designated to return to the workplace.

In the first option, the EEOC suggests including the Centers for Disease Control & Prevention's (CDC) [list](#) of medical conditions that may place people at higher risk of serious illness if they contract COVID-19, instructions on who to contact to request an accommodation, and a statement that the employer will consider accommodation requests on a case-by-case basis. In the second option, the EEOC recommends including a statement that the employer will consider requests for accommodation or flexibilities on an individual basis and instructions about whom to contact about an accommodation depending on the reason for the request (e.g., disability, pregnancy, age or child care responsibilities).

Screening

The guidance confirms that employees who request an alternative means of screening due to a health or medical condition, or for religious reasons, may be entitled to reasonable accommodation. Employers should treat such a request as they would any other request for accommodation under the ADA or the Rehabilitation Act, and they may request additional information — including medical documentation — absent an obvious or known disability. If, however, a requested change is easy and relatively inexpensive to provide, employers may consider making it available without going through the interactive process.

If an alternative screening method is sought for religious reasons, the employer should follow the same process it uses in evaluating all other requests for religious accommodation to determine whether the accommodation is available under Title VII.

Family members and caregivers

The guidance confirms that the ADA does not require employers to accommodate employees without a disability or entitle an employee to an accommodation in order to avoid exposing a family member who is at higher risk of severe illness from COVID-19 due to an underlying medical condition. As the EEOC explains, the ADA's protection against discrimination based on association with an individual with a disability is limited to disparate treatment or harassment.

While not obligated to provide an accommodation to protect an employee's family member or other person with whom they are associated from potential COVID-19 exposure, employers are free to provide flexible work arrangements (e.g., teleworking, etc.) — as long as they do not engage in disparate treatment based on a protected classification or equal employment opportunity (EEO) basis.

Child care

The guidance confirms that employers can provide telework, modified schedules, or other benefits to employees with school-age children due to school closures or distance learning. However, it stresses that employers must ensure that any such accommodations are offered without regard to sex or other EEO-protected characteristic. For example, Title VII would prohibit giving more favorable treatment to female employees because of gender-based assumptions about who may have caretaking responsibilities at home.

Harassment

The guidance reminds employers that Title VII prohibits harassment on the basis of national origin or race — particularly with respect to any pandemic-related harassment of employees who are or are perceived to be Asian. Employers should communicate and remind employees of both their anti-harassment policy that governs employee conduct whether in or away from the workplace — including while teleworking — and their anti-retaliation policy that protects employees who report workplace harassment.

Antibody tests

Concluding that the direct threat COVID-19 poses meets the ADA's requirement that workplace medical tests be job-related and consistent with business necessity, the EEOC previously gave employers the green light to conduct temperature checks and viral tests to determine whether workers are allowed to enter the workplace. However, it did not address whether businesses could use antibody tests as a screening tool.

In its most recent guidance, the EEOC made clear that antibody tests and viral tests are different. Unlike viral tests for active cases of COVID-19 that present a direct threat to the health of others, antibody tests determine whether a person was previously infected with the virus and may have some immunity. As the CDC has recognized, serologic tests have limitations, including the potential for false positives and uncertainty about the extent of any such immunity.

Relying on interim guidelines from the CDC that antibody test results “should not be used to make decisions about returning persons to the workplace,” the EEOC has now clarified that employers cannot require employees to undergo antibody or serology testing as a condition of re-entering the workplace without running afoul of the ADA. The EEOC explained that antibody tests are medical examinations under the ADA — but they do not currently meet the statute’s “job-related and consistent with business necessity” standard for permissible employee medical examinations or inquiries. According to the EEOC, unlike COVID-19 viral tests that are permitted under the ADA, mandatory antibody tests to re-enter the workplace are prohibited — at least for now. However, the EEOC indicated that it will closely monitor CDC recommendations and may adjust its guidance if they change.

In closing

Employers should expect to see additional guidance from public health authorities and government agencies as the COVID-19 situation continues to evolve. Businesses should be prepared to adapt their reopening and return-to-work strategies accordingly.

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