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EEOC Issues New Workplace Guidance Regarding COVID-19 Testing

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On July 12, 2022, the Equal Employment Opportunity Commission ("EEOC") – the agency which investigates and enforces federal antidiscrimination laws in the workplace – updated its guidance across several different areas relating to COVID-19 and the workplace, including when employees can be required to undergo COVID-19 testing, reasonable accommodations, and parameters around mandatory vaccination programs.

COVID-19 Screening Tests in the Workplace

The EEOC's prior guidance stated that conducting mandatory worksite COVID-19 testing always met the Americans with Disabilities Act ("ADA") standard that any mandatory medical test be "job related and consistent with business necessity." The new guidance states that going forward, COVID-19 workplace testing is no longer automatically compliant with this ADA standard. Instead, employers will now need to assess whether testing is job-related and consistent with business necessity based on current pandemic and individual workplace circumstances.

The EEOC identified several "possible considerations" employers may use when making this assessment:

- "the level of community transmission;"
- "what types of contacts employees may have with others in the workplace or elsewhere that they are required to work (e.g., working with medically vulnerable individuals);"
- "the vaccination status of employees;"
- "the degree to which breakthrough infections are possible for employees who are 'up to date' on vaccinations;"
- "the ease of transmissibility of the current variant(s);"
- "the possible severity of illness from the current variant;"

- “the accuracy and speed of processing for different types of COVID-19 viral tests;” and
- “the potential impact on operations if an employee enters the workplace with COVID-19.”

The guidance further states that mandatory COVID-19 testing will meet the “business necessity” standard when it is consistent with current guidance from the Centers for Disease Control and Protection (“CDC”), Food and Drug Administration (“FDA”), and/or state or local public health authorities but notes that each of those entities may periodically revise and update its guidance based on new information and changing conditions.

The updates additionally clarify that this analysis only applies to COVID-19 viral testing and not to antibody testing. Antibody testing, otherwise known as serology testing, is a blood test conducted to determine if an individual has COVID-19 antibodies. Since the CDC’s July guidance clarified that antibody testing may not show whether an employee has a current infection nor whether the employee is protected from being re-infected, the EEOC’s updated guidance states that antibody testing would not meet the business necessity standard.

EEOC guidance did not change regarding other COVID-19 screening methods. Employers may still ask all employees who will be physically entering the workplace if they have tested positive for COVID-19 or have symptoms associated with COVID-19, and may exclude individuals from entering the workplace based on their answers to those questions. Further, in guidance that remains unchanged, if an employer wants to ask an individual employee (as opposed to general screening methods applied to all employees) questions regarding symptoms associated with COVID-19 or request the individual undergo a temperature screening or testing, the employer must have a reasonable belief based on objective evidence that the individual may have COVID-19.

COVID-19 Screening During Hiring

The EEOC included new guidance regarding when COVID-19 screenings can occur during the job application process (e.g., for a job interview). It states that if the employer screens everyone for COVID-19 before permitting entry to the worksite, such as applicants, employees, contractors, visitors, they may screen job applicants as well.

Withdrawing Job Offers

The EEOC additionally provided expanded guidance on when employers can withdraw job offers if an applicant has or has been exposed to COVID-19. The new guidance states that employers may withdraw the job offer if: (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 proximity to others.

However, employers may not postpone a start date or withdraw a job offer due to a concern that the individual is older, pregnant, or has an underlying medical condition.

Impact on Reasonable Accommodation Process

The updated guidance now includes a statement that some of the initial pandemic-created issues that resulted in justifiable delays in engaging in the interactive process or providing reasonable accommodations may no longer exist. However, it further notes that there may be new issues that have arisen that could have an impact on timing, such as a higher number of accommodation requests due to reopening of a workplace. If a delay occurs, employers must show specific pandemic-related circumstances justified the delay in providing a reasonable accommodation and are encouraged to use interim solutions if possible.

PPE and Other Infection Control Practices in the Workplace

The guidance regarding when employers may require personal protective equipment ("PPE") and other infection control practices was also updated. Whereas previous guidance stated employers could definitely require such control measures, the new guidance states that "[i]n most instances" the federal Equal Employment Opportunity ("EEO") laws allow employers to require PPE and other infection control measures, though the guidance does not provide examples of where such requirements may not be permissible. The guidance as to disability-related or religious accommodation requests remained the same – employers should discuss the request and provide accommodation if it does not cause an undue hardship on the operation of the business.

The updated guidance additionally adds use of High Efficiency Particulate Air (HEPA) filtration systems and telework as examples of possible reasonable accommodations which had not been included as examples in the previous guidance.

Age Considerations

The revised guidance now includes clarification that the Age Discrimination in Employment Act ("ADEA") – which prohibits employment discrimination against individuals age 40 and older – does not include a right to reasonable accommodation due to age unlike the ADA. However, if older workers have medical conditions that bring them under the protection of the ADA, reasonable accommodation considerations would apply. The guidance also notes that employers are free to provide flexibility to older workers as the ADEA does not prohibit such treatment even if it results in younger workers being treated less favorably based on age in comparison.

Vaccination

The new guidance now provides further clarification as to the interaction between mandatory employer vaccination programs and employees seeking exemptions based on disability. Consistent with prior guidance, an employer may require an individual with a disability meet a safety-related standard requiring COVID-19 vaccination if the standard is job-related and consistent with business necessity as applied to that employee. The new guidance now clarifies that the employer does not have to show that the vaccination requirement meets the ADA's "business necessity" standard in general (i.e., as applied to all employees), but only as applied to the employee informing the employer of a disability preventing compliance.

The updated guidance relating to vaccination further notes that where employers require mandatory vaccination among workers, the federal EEO laws do not prevent employers from requiring documentation or other confirmation that employees are up to date on their vaccinations but that the laws may require exceptions to be made depending on the employee and accommodation requested.

The updated guidance also provides more information as to when COVID-19 vaccination information can be shared. While the ADA requires employers to maintain the confidentiality of employee medical information, the EEOC has clarified that this information may be shared with employees who need it to perform their job duties. Examples included an administrative employee assigned to perform recordkeeping of vaccination documentation, an employee assigned to permit building entry only to employees in compliance with a mandatory vaccination policy, testing, and/or masking, or an employee tasked to ensure compliance with a testing requirement. In all circumstances, the employees must still maintain the information confidentially.

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