

Requiring Antibody Tests Violates the Americans With Disabilities Act

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The Equal Employment Opportunity Commission (the “EEOC”) updated its COVID-19 **guidance** this week and for the first time addressed the question of may an employer require employees to take a test to determine whether an employee has COVID-19 antibodies present in the employee’s system.

In Section A.7 of the Questions and Answers, the EEOC answered “No” to the above question. Citing **guidance** from the Centers for Disease Control (the “CDC”), the EEOC stated that antibody tests should not be used to make decisions about returning employees to the workplace because antibody tests do not meet the American With Disabilities Act (the “ADA”) standard that medical exams be job related and consistent with business necessity. Please note that the EEOC treats COVID-19 viral testing differently and it has already stated that COVID-19 viral tests are **permissible under the ADA**.

The EEOC stated that it will “continue to closely monitor CDC’s recommendations, and could update this discussion in response to changes in CDC’s recommendations.”

COVID-19 Screening Process Compliance Considerations

As our communities are implementing COVID-19 screening procedures for employees, there are multiple considerations that should be addressed. Generally, employee COVID-19 screening processes consist of two

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components: taking temperatures and asking questions about COVID-19 related symptoms. The EEOC has issued guidance stating that, although taking a temperature is considered a medical exam under the Americans with Disabilities Act, during this pandemic, taking an employee's temperature is job related and consistent with business necessity. With regard to the screening questions, a review should be conducted to ensure the information sought does not violate the Title VII or ADA. It is extremely important that the employer also ensures that it is maintaining the confidentiality of the temperature results and responses to questionnaires.

Moreover, if the screening process is being completed prior to employees clocking in, it should be reviewed for a determination of whether the time spent is compensable, in accordance with wage and hour laws.

Further, if using an electronic screening process, it should be evaluated to determine if potentially biometric information (a finger scan, photo, etc.) is being collected and who would have access to that information, particularly if a third-party vendor is being used.

Lastly, for purposes of storage, if the results of the screenings are being maintained, whether in hardcopy or electronically, the employer should ensure that proper protocols are being taken to ensure the information is secure.

We are available to assist in evaluating and assessing the potential benefits and risks of such screening processes or on other labor and employment issues you may have.