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How employers can ensure federal law compliance by following updated EEOC guidance on COVID-19 screening and testing protocols

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10.28.2020

As workplaces in North Carolina and South Carolina are opening back up, employers should make sure they are up to date on their rights and obligations to test or otherwise screen their employees for COVID-19 under the federal anti-discrimination laws governing the workplace.

The Equal Employment Opportunity Commission is the federal agency that enforces federal anti-discrimination laws, including the Americans with Disabilities Act, which applies to private workplaces with 15 or more employees, as well as to state and local governments. Coinciding with many workplaces reopening, the EEOC has updated its technical assistance on COVID-19. The Centers for Disease Control and Prevention also recently updated its guidance on COVID-19 testing, emphasizing among other things that the EEOC allows employers to implement policies for required testing of employees.

Under the ADA, any mandatory medical test of employees must be "job related and consistent with business necessity." The EEOC has concluded, based on guidance from the CDC and public health authorities, that the COVID-19 pandemic meets the "direct threat" standard under the ADA. More specifically, the EEOC provides that individuals with a disability are not protected by the non-discrimination provisions of the ADA if they pose a "direct threat" despite reasonable accommodation. A "direct threat" is defined as a "significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation." Also, testing administered by employers consistent with current CDC guidance will meet the ADA's "business necessity" standard.

All of this means that employers may implement screening and testing protocols of employees that they otherwise might not be permitted to have, as long as they follow the parameters set by the EEOC. Among those

parameters:

- **Employers may ask all employees who will be physically entering the workplace whether they have COVID-19 or symptoms associated with COVID-19, and may ask whether they have been tested for COVID-19.** The EEOC provides that employers may exclude employees with COVID-19, or those with symptoms associated with COVID-19, from the workplace because their presence would pose a direct threat to the health or safety of others.
  - Importantly, however, the EEOC has made clear recently that employers may *not* ask employees who are physically coming into the workplace if they have family members who have COVID-19 or symptoms associated with COVID-19. The Genetic Information Nondiscrimination Act prohibits employers from asking employees medical questions about *family members*, but does *not* prohibit employers from asking employees if they have had contact with *anyone* diagnosed with COVID-19 or who may have symptoms associated with the disease.

- **Employers may choose to test all employees for COVID-19 before initially permitting them to enter the workplace, and may also do so periodically**, to determine if their presence poses a direct threat to others. The EEOC provides that the ADA does not interfere with employers following recommendations by the CDC or other public health authorities regarding whether, when, and for whom testing or other screening is appropriate, but makes clear that they may not condition employees' return to the workplace on undergoing testing for COVID-19 *antibodies*.

- **If employers want to screen or test only certain employees, including answering questions, having their temperatures taken, or undergoing other screening or testing, the ADA requires the employers to have a reasonable belief based on objective evidence that these particular employees might have the disease.** In other words, the EEOC cautions that it is critical that the employers consider why they want to question, screen, or test particular employees, such as a show of COVID-19 symptoms.

- **Employers should ensure that any tests are considered accurate and reliable.** The EEOC suggests that employers review information from the U.S. Food and Drug Administration for example about what may be considered safe and accurate testing, as well as guidance from CDC or other public health authorities, and should consider the incidence of false-positives or false-negatives associated with a particular test.
  - The EEOC also notes that a positive test result means an employee most likely has a current infection and may be contagious, but cautions that a negative result only means the employee does not have detectable COVID-19 *at the time of testing*. In other words, a negative test does not mean the employee will not contract COVID-19 later. Therefore, employers still should require employees to take measures in the workplace to prevent the transmission of the virus, such as social distancing, regular handwashing, and other measures.

- **Employers should maintain medical information confidential to the greatest extent possible and should limit the number of people who learn the names of employees who have COVID-19.** The ADA generally requires employers to keep medical information confidential and in a separate file from employees' regular personnel files. However, the EEOC recently clarified that employees who know that a colleague has COVID-19 symptoms are permitted to report this to a supervisor without violating the ADA. The ADA also does not prevent the manager from reporting to appropriate employer officials so that they can take actions consistent with guidance from the CDC and other public health authorities. The EEOC cautions employers, however, to "make every effort to limit the number of people who

get to know the name of the employee."

- → If employers learn that an employee has or might have COVID-19, the EEOC provides that the employer then is permitted to interview the employee to determine what other individuals might have been exposed. The employer is permitted to notify those individuals, as long as the employer does not reveal the infected employee's identity. Even if other employees learn an employee's identity based on surrounding circumstances, employers may not confirm it.

→ Employers are permitted under the ADA to bar employees from being physically present in the workplace if they refuse to have their temperatures taken, or refuse to answer questions about whether they have COVID-19, have symptoms associated with COVID-19, or have been tested for COVID-19.

The EEOC cautions employers, however, that they might want to ask the reasons for the refusals as employees might be reluctant to provide medical information in fear that the employer will widely spread such personal medical information throughout the workplace. The ADA bars such broad disclosures. Also, if employees request reasonable accommodations with screenings, any usual accommodation processes should be followed.

As workplaces are opening back up, employers in North Carolina and South Carolina should make sure that they train their staff designated to perform screening and testing for COVID-19 on the most current parameters and other guidance provided by the EEOC and the CDC. Ultimately, those parameters and other guidance are there to ensure everyone's health and safety and to make sure that employers do not run afoul of the ADA and other federal non-discrimination laws.