

Employers May Test Employees for COVID-19 According to New Guidance from EEOC

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The Equal Employment Opportunity Commission (EEOC) enforces the Americans with Disabilities Act (ADA), Title VII (anti-discrimination laws), the Age Discrimination in Employment Act (ADEA) and other employment laws. On April 23, 2020, the EEOC published guidance to assist employers in handling COVID-19 in the workplace, permitting employers to test employees in order to prevent infected individuals from spreading the virus at the workplace.

The ADA allows employers to require an employee medical test only if the test is "job related and consistent with business necessity." The EEOC has concluded that employers may require medical testing for the COVID-19 virus under this standard, because an individual with the virus poses a direct threat to the health of others in the workplace if he/she is allowed to enter the workplace. Therefore, an employer may choose to administer COVID-19 testing to employees before they enter the workplace to determine if they have the virus. The EEOC has not included testing for COVID-19 antibodies to determine whether an employee previously had COVID-19 in this current guidance.

The EEOC cautioned that employers must ensure that COVID-19 tests are accurate. Employers may look to the Food and Drug Administration and Centers for Disease Control for guidance as to the accuracy and safety of tests. Employers must be certain to comply with ADA guidelines when they receive the results of COVID-19 testing, which include: maintaining confidentiality with respect to the results of COVID-19 testing and keeping such records in a secure location, separated from the employee's personnel file. An employer may opt to store all medical information related to COVID-19 testing in existing medical files. Employers may also establish separate medical files for the purpose of storing COVID-19 information about its employees. Any information related to the employer testing other than the test results itself should also be kept in the file. This information may include the employer's notes regarding any discussion with the employee about COVID-19 symptoms or related issues, the employee's statement that he or she suspects or knows that he or she has the disease, or other related documentation. An employer must keep the name(s) of employee(s) who test positive for the virus confidential, except if they choose to report the information to a public health agency.

An employer may also screen job applicants for COVID-19 by requiring a medical test. After a conditional job offer is made to a potential employee, an employer may test the job applicant for COVID-19. An employer that chooses to test candidates for COVID-19 must test all applicants that apply for that job and may not selectively test only certain candidates. The employer may withdraw the job offer to candidates that test positive for COVID-19 or delay the start date of the new employee.

Takeaway: Keep COVID-19-related testing uniform and confidential.

If you are an employer and need help navigating the employment laws during this COVID-19 crisis, contact [Stephanie Gironde](#) or any member of the Wilentz [Employment Law Team](#).

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