EEOC Updates Guidance on Workplace COVID-19 Testing

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Key Takeaways:

- Under updated EEOC guidance, an employer may now conduct mandatory COVID-19 testing only if such testing is "job-related and consistent with business necessity."

- Employers should assess a number of factors before mandating COVID-19 testing, including the level of community transmission, the vaccination status of its employees, and the accuracy and speed of processing for different types of COVID-19 viral tests, among others factors.

- Employers with mandatory COVID-19 testing policies should assess whether their policies comport with the updated guidance.

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On July 12, 2022, the U.S. Equal Employment Opportunity Commission (EEOC) updated its technical assistance guidance relating to COVID-19, revising its guidance on workplace COVID-19 testing. According to the new guidance, an employer that seeks to implement mandatory COVID-19 testing for employees must be able to show that such testing is "job-related and consistent with business-necessity." As such, employers will need to assess current pandemic and individual workplace circumstances prior to mandating COVID-19 testing to avoid running afoul of the Americans with Disabilities Act (ADA).

The guidance sets out a number of factors that employers may consider in assessing "business necessity," including:

- the level of community transmission;

- the vaccination status of employees;

- the accuracy and speed of processing for different types of COVID-19 viral tests;

- 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;

- 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); and

- the potential impact on operations if an employee enters the workplace with COVID-19.

The EEOC also recommends that employers check the latest CDC guidance to determine whether screening testing is appropriate.

The EEOC's updated guidance further provides that an employer may not require antibody testing before permitting employees to re-enter the workplace. However, an employer may require confirmation from a qualified medical professional explaining that an employee is able to safely return to work after being out with COVID-19.

As for job applicants, the updated guidance permits an employer to require an applicant to submit to a COVID-19 viral test after receiving a conditional job offer, provided that the employer tests all employees in the same job type and the testing satisfies the "business necessity" standard. In addition, employers may require viral screening of pre-offer applicants who need to be in the workplace as part of

the application process, so long as the employer uniformly screens anyone entering the workplace.

The updated guidance represents a significant shift in the EEOC's position on mandatory COVID-19 testing, as it had previously permitted mandatory testing without limitation. Employers with existing mandatory COVID-19 testing policies should assess whether such testing comports with the new "business necessity" standard.

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