

ALERTS

Updated EEOC Guidance on Employer COVID-19 Testing

July 20, 2022

On July 12, 2022, the U.S. Equal Employment Opportunity Commission (“EEOC”) updated its previously published guidance entitled “What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws,” which has been the subject of previous *Alerts*. The updated guidance primarily addresses issues related to disability-related inquiries and medical exams.

Previously, the EEOC’s guidance provided that mandatory COVID-19 testing for on-site employees was legal in virtually any instance. Now, under the EEOC’s interpretation of the Americans with Disabilities Act (“ADA”), an employer may administer a COVID-19 test when evaluating an employee’s initial or continued presence in the workplace only “if the employer can show it is job-related and consistent with business necessity.” Possible considerations in meeting the “business necessity” standard include, but are not limited to, the level of community transmission, the vaccination status of employees, the ease of transmissibility of the current variant and the potential impact on workplace operations. The EEOC further noted that the change in its guidance “acknowledges that evolving pandemic circumstances will require an individualized assessment by employers to determine whether such testing is warranted consistent with the requirements of the ADA.”

Additionally, the EEOC clarified that employers cannot require antibody testing before permitting employees to re-enter the workplace, unless the antibody test is proven to be job-related and consistent with business necessity. As of July 2022, the U.S. Centers for Disease Control and

Prevention has explained that antibody testing should not be used to determine whether an employee may enter the workplace because it “may not show whether an employee has a current infection, nor establish that an employee is immune to infection.”

Settlement in Case Regarding Unlawful Collection of COVID-19 Test Results

Earlier this month, following an investigation, the EEOC reached a settlement with a Florida-based medical practice, Brandon Dermatology, with respect to the employer’s collection of its employees’ family members’ COVID-19 testing results. The EEOC determined that such collection violated the Genetic Information Non-Discrimination Act of 2008 (“GINA”), which prohibits employers from discriminating against employees or applicants based on genetic information. GINA defines “genetic information” to include the “manifestation of a disease or disorder in an employee’s family members.” In connection with this settlement, the employer agreed to: cease collecting employees’ family members’ COVID-19 test results, compensate affected employees, review its COVID-19 policies, conduct training on equal employment opportunity laws as they relate to COVID-19 and post a notice in its workplace.

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If you have any questions concerning this Alert, please contact your attorney at Schulte Roth & Zabel or one of the authors.

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