

LABOR AND EMPLOYMENT

ALERT

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EEOC Bans Employers from Requiring Covid-19 Antibody Tests as a Condition of Employment

By Michael J. Wietrzychowski

The U.S. Equal Employment Opportunity Commission (“EEOC”) recently issued new rules distinguishing Covid-19 antibody tests from testing for the virus itself in terms of what employers can require from employees returning to the workplace. The latest policy announcement is one of a number of updates the EEOC has issued, amending its Covid-19 guidance first released in March, 2020: *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws* (“Guidance”).

As part of its ongoing efforts to address employer-employee relations in the workplace in light of Covid-19, the EEOC stated on April 23, 2020 that employers may test employees for Covid-19 before allowing employees to enter the workplace. The EEOC reasoned that “employers may take steps to determine if employees entering the workplace have Covid-19 because an individual with the virus will pose a direct threat to the health of others. Therefore an employer may choose to administer Covid-19 testing to employees before they enter the workplace to determine if they have the virus.”

However, in a June 17, 2020 amendment to its Guidance, the EEOC has, for now, banned employers from requiring employees to test for the Covid-19 *antibody* (as opposed to testing for Covid-19 itself). The EEOC reasoned that “in light of CDC’s Interim Guidelines that antibody test results ‘should not be used to make decisions about returning persons to the workplace,’ an antibody test at this time does not meet the ADA’s ‘job related and consistent with business necessity’ standard for medical examinations or inquiries for current employees.” The EEOC concluded that,

“[t]herefore, requiring antibody testing before allowing employees to re-enter the workplace is not allowed under the ADA.”

The EEOC distinguished a Covid-19 antibody test from the Covid-19 test that determines if an employee has an active case of Covid-19. The EEOC pointed out that tests for active Covid-19 are still allowed. Finally, the EEOC stated that it would “continue to closely monitor CDC’s recommendations, and could update this discussion in response to changes in CDC’s recommendations.”

TAKEAWAYS

Under the June 17, 2020 EEOC Guidance, employers are prohibited from requiring employees to test for Covid-19 antibodies. However, an employer may continue to require Covid-19 testing of employees returning to the workplace – provided that the testing is “job related and consistent with business necessity,” and where the test is limited to detecting whether the employee has an active Covid-19 virus. Such “active” Covid-19 testing also must follow the rules in the Guidance for these kinds of tests, such as ensuring the tests are accurate and reliable, and maintaining the testing process and information in a confidential manner.

See details at:

- *EEOC Issues Updated Covid-19 Technical Assistance Publication Addressing Antibody Testing* (6-17-2020) – <https://www.eeoc.gov/newsroom/eeoc-issues-updated-covid-19-technical-assistance-publication-addressing-antibody-testing>

- *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws* (updated 6-17-2020) – <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws> ◆

This Alert is based on information available at the time of publishing. It is subject to change. Business leaders should consult with counsel and refer to government websites and publications for the most up-to-date information.

For more detailed analysis on a wide range of legal issues, please see Schnader's Covid-19 Resource Center at www.schnader.com/blog/covid-19-coronavirus-resource-center.

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