

## EEOC Issues Guidelines on COVID-19 Testing of Employees

On April 23, 2020, the U.S. Equal Employment Opportunity Commission (EEOC) published updates to the Frequently Asked Questions (FAQ) that it originally published on March 17, 2020, to address COVID-19 issues. These FAQs provide guidance to employers for compliance with federal laws in general and specifically as these laws pertain to the unique circumstances presented by COVID-19. Most significantly, the EEOC has clarified that an ADA-covered employer may administer a COVID-19 test to an employee prior to permitting the employee to enter the workplace, without running afoul of EEO laws.

With regard to the permissibility of COVID-19 testing, the EEOC has interpreted long-standing, pre-pandemic guidance and concluded that a COVID-19 test is “job related and consistent with business necessity” because of the direct threat posed to employee health by a co-worker, customer, or vendor who tests positive for COVID-19. The EEOC advises that employers should ensure that any such test is “accurate and reliable,” and may consider the incidence of false-positives and false-negatives associated with a particular test. Cozen O’Connor has previously published guidance on COVID-19 testing, as well as the potential pitfalls of temperature testing. Employers should review this guidance and maintain stringent safety and privacy protocols in any COVID-19 testing.

The FAQs contain additional guidance for employers. The FAQs make it clear that the:

EEO laws, including the ADA and Rehabilitation Act, continue to apply during the time of the COVID-19 pandemic, but they do not interfere with or prevent employers from following the guidelines and suggestions made by the CDC or state/local public health authorities about steps employers should take regarding COVID-19.

In other words, employers may comply with guidance from CDC without running afoul of the ADA. For example, the EEOC advises that ADA-covered employers may take employees’ temperatures and inquire as to whether employees have experienced symptoms of COVID-19 because of the risks of community spread acknowledged by the CDC and other health authorities.

Similarly, the EEOC has stated, the COVID-19 pandemic does not relieve ADA-covered employers of their obligation to provide reasonable accommodations for employees with pre-existing physical and mental disabilities. The EEOC notes that COVID-19 presents increased risks to individuals with certain pre-existing physical disabilities, who therefore may request accommodations to prevent them from potential exposure. “Even with the constraints imposed by a pandemic,” the FAQs provide, “some accommodations may meet an employee’s needs on a temporary basis without causing undue hardship on the employer.” For example, the EEOC has said, employees with mental health diagnoses such as anxiety disorder, obsessive-compulsive disorder, or post-traumatic stress disorder may have more difficulty handling the disruption to daily life that has accompanied the COVID-19 pandemic.

Finally, the EEOC FAQs explain that the ADA and the Rehabilitation Act continue to apply to critical and essential workers, and that employers should consider requests for future accommodations pertaining to a time after employees who are on leave or working from home return to work. As always, employers should evaluate requests for reasonable accommodations carefully and consult with counsel as appropriate.



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