

EEOC GIVES GREEN LIGHT TO EMPLOYERS TESTING EMPLOYEES FOR COVID-19

Hodgson Russ Labor & Employment Alert
April 28, 2020

Last week, the U.S. Equal Employment Opportunity Commission (“EEOC”) updated its COVID-19 guidance twice to address reopening of the workplace and testing employees for COVID-19.

According to the new guidance, which applies to employers throughout the United States, management may require the testing of employees for the COVID-19 virus before they enter the workplace. Employers may also check employee temperatures, ask questions about whether an employee is experiencing symptoms of the pandemic virus, and require employees to self-report COVID-19 infection or related symptoms.

When evaluating COVID-19 testing options, employers should:

1. Ensure that the tests are accurate and reliable, and review guidance from the U.S. Food and Drug Administration (“FDA”) and the Centers for Disease Control and Prevention (“CDC”) regarding safe and accurate testing.
2. Consider the incidence of false-positives or false-negatives associated with a particular test.
3. Understand that accurate testing only reveals if the virus is currently present; a negative test does not mean the employee will not acquire the virus later.

All testing of employees should be conducted consistently to ensure that an employer does not engage in unlawful disparate treatment based on protected characteristics.

The EEOC further confirmed that employers may mandate that all employees wear protective equipment, such as masks and gloves, while in the workplace. However, employers must nevertheless continue to engage in the interactive process upon receipt of a request for a related exception due to disability or religious concerns. Further, employers need to provide reasonable accommodations if doing so is feasible and does not pose an undue hardship on its business operations. In recognition of the challenges currently faced by employers, the EEOC noted that the undue hardship standard may be an easier burden to satisfy during the pandemic, because of the pressure on many employers’ financial resources.

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Finally, the new guidance reminds employers that they should “still require . . . that employees observe infection control practices (such as social distancing, regular handwashing, and other measures) in the workplace to prevent transmission of COVID-19.”

Employers are reminded that they are required to maintain confidentiality of information related to an employee’s temperature check and/or testing results. Additionally, the Americans with Disabilities Act (“ADA”) requires that all medical information about a particular employee be stored separately from an employee’s personnel file, thus limiting access to this confidential information.

Please contact John Godwin (716.848.1357) or Lura Bechtel (416.595.2693) if you have any questions about employee testing or return-to-work policies.

Please check our Coronavirus Resource Center and our CARES Act page to access information related to both of these rapidly evolving topics.

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