



MEMORANDUM

From: Loveless Law Firm, LLP
Date: April 27, 2020
Re: Employers Can Now Screen for COVID-19

The Equal Employment Opportunity Commission (EEOC) updated its guidance on April 23 on the Americans with Disabilities Act (ADA) and coronavirus, explaining that employers may screen employees for COVID-19. Any mandatory medical test must be job-related and consistent with business necessity, the EEOC explained.

“Applying this standard to the current circumstances of the COVID-19 pandemic, 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,” the agency stated. Consequently, an employer may administer COVID-19 testing to employees before they enter the workplace.

The tests should be accurate and reliable, the agency added, noting that employers should review guidance from the Food and Drug Administration and U.S. Centers for Disease Control and Prevention and check updates.

The EEOC stated that employers still should require that employees engage in social distancing and regular handwashing to the greatest extent possible.

Considerations for Testing

Parameters employers should have in mind when considering whether to screen employees for COVID-19 are:

- (1) Just as with temperature screening, screening/testing for COVID-19 must be conducted on a nondiscriminatory basis, which likely means that all employees entering the worksite must be tested.
- (2) Assuming the results of such testing are retained, they need to be retained as confidential medical records according to the ADA's requirements.
- (3) Any screening, test or inquiry that is broader than necessary to address the potential direct threat is prohibited.
- (4) Although unlikely, it is possible that an employee could have a medical condition that could require the employer to determine whether it can provide the employee with an accommodation.
- (5) Employers will need to consider how to handle an employee's refusal to submit to a test.

Other considerations for employers to include are:

- (6) Being aware that there may be an obligation under wage and hour laws to pay employees for time spent waiting to be tested, as well as time spent waiting for the results of the test, assuming the employee will not be admitted to the workplace until the employer has the results.
- (7) Requiring employees to consent in writing to the screening, including, but not limited to, acknowledging that the test is not a diagnostic test.
- (8) Exercising care in selecting a test to use.
- (9) Determining when and under what conditions an employee who tests positive for COVID-19 will be able to return to the workplace.

Disclaimer: This policy template is meant to provide general guidelines and should be used as a reference.

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