On June 17, 2020, the Equal Employment Opportunity Commission (the “EEOC” or “the Commission”) again updated its COVID-19-related technical assistance for employers (“Guidance”). The Commission’s recent updates have focused on return-to-work issues (e.g., see June 11, 2020 Guidance update). This latest update advises employers that, at least for now, requiring employees to undergo antibody testing before re-entering the workplace violates the Americans with Disabilities Act (the “ADA”).

In reaching its conclusion, the EEOC relied on recent Interim Guidelines issued by the Centers for Disease Control and Prevention (the “CDC”), which cautions that
antibody test results “should not be used to make decisions about returning persons
to the workplace.” This is because, as the CDC guidelines warn, antibody testing
“should not be used to determine immune status in individuals,” as the presence and
duration of immunity has not yet been established by the medical community.
Accordingly, the EEOC determined that, at this time, an antibody test does not meet
the ADA’s job-relatedness or business necessity standards for permissible medical
testing. The EEOC acknowledged that antibody testing remains an evolving issue,
and that CDC and EEOC guidance may change, if the testing becomes more reliable.

Although the EEOC’s Guidance does not prohibit employers from providing voluntary
antibody testing to employees – inasmuch as employers may not use the results for
making employment decisions – employers who have been planning to offer antibody
testing, may wish to reconsider doing so. Employers, who nevertheless decide to
embark on such voluntary testing, should carefully review their protocols and
procedures for collecting and reviewing test results.

While banning the use of antibody testing for return-to-work determinations, the
EEOC reiterated its earlier Guidance that diagnostic testing for an active case of
COVID-19 remains permissible under the ADA, as we discussed here.

Specifically, the newly released guidance states:

A.7. CDC said in its Interim Guidelines that antibody test results “should
not be used to make decisions about returning persons to the workplace.”
In light of this CDC guidance, under the ADA may an employer require
antibody testing before permitting employees to re-enter the
workplace? (6/17/20)

No. An antibody test constitutes a medical examination under the ADA. 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. Therefore, requiring antibody
testing before allowing employees to re-enter the workplace is not allowed under the
ADA. Please note that an antibody test is different from a test to determine if someone
has an active case of COVID-19 (i.e., a viral test). The EEOC has already stated that
COVID-19 viral tests are permissible under the ADA.

The EEOC will continue to closely monitor CDC’s recommendations, and could update
this discussion in response to changes in CDC’s recommendations.

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