Equal Employment Opportunity Commission Puts End to Pandemic Justified Viral Screening for COVID-19

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The Equal Employment Opportunity Commission ("EEOC") recently updated its guidance in July of 2022. According to the new guidance, the COVID-19 pandemic no longer automatically meets the business necessity requirement for medical examinations i.e. COVID-19 testing. This means that employers are now required to conduct an individualized assessment to determine whether COVID testing is warranted based on "evolving pandemic circumstances." Previously, employers were not required to conduct an individualized assessment because the pandemic justified viral screening of "employees to prevent workplace transmission of COVID-19." Simply put, employers could conduct COVID-19 testing at any time, for any reason. However, now employers may only utilize COVID-19 testing under the business necessity standard.
A COVID-19 viral test is considered a medical examination within the meaning of the Americans with Disabilities Act ("ADA"). This includes both rapid tests and laboratory tests. Under the ADA, employers are prohibited from conducting medical examinations unless "such screening is 'job-related and consistent with business necessity.'"

The EEOC outlined possible considerations employers may use when conducting the business necessity assessment, which includes:

- the level of community transmission;
- the vaccination status of employees;
- the accuracy and speed of processing for different types of COVID-19 viral tests;
- the degree to which breakthrough infections are possible for employees who are “up to date” on vaccinations,
- the ease of transmissibility of the current variant(s);
- the possible severity of illness from the current variant;
- what types of contacts employees may have with others in the workplace or elsewhere that they are required to work (e.g., working with medically vulnerable individuals); and
- the potential impact on operations if an employee enters the workplace with COVID-19.

Employer’s use of a COVID-19 viral test to screen employees who are or will be in the workplace will meet the “business necessity” standard when it is consistent with guidance from the Centers for Disease Control and Prevention (CDC), Food and Drug Administration (FDA), and/or state/local public health authorities that is current at the time of testing. Non-healthcare employers should utilize the Interim Guidance for SARS-CoV-2 Testing in Non-Healthcare Workplaces when conducting the business necessity assessment. It is important to note that the CDC has continuously updated its guidance over the course of the pandemic and employers should ensure they have the most up-to-date information.

Specifically, employers should utilize this business necessity assessment when they are conducting screening testing. Screening testing means "[t]esting asymptomatic persons without recent known or suspected exposure to SARS-CoV-2 for early identification, isolation, and disease prevention."

The Occupational Safety and Health Administration ("OSHA") is in the process of updating their Guidance on Mitigating and Preventing the Spread of COVID-19 in the Workplace "to reflect developments in science, best practices, and standards." Employers should keep in mind the continuing obligation under the OSHA general duty standard to provide "a place of employment which [is] free from recognized hazards that ... caus[e] or are likely to cause death or serious physical harm to ..."
employees." This is particularly crucial when evaluating quarantine, isolation, and return to work guidance for suspected or confirmed cases of COVID. While the pandemic is ongoing, employers should continue to enforce the disclosure of COVID symptoms. And employers must maintain all illness-related information as a "confidential medical record in compliance with the ADA."

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