The U.S. Equal Employment Commission ("EEOC") has recently updated its Technical Assistance Questions and Answers, "What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws," ("Q&A") and taken the position that employers may only screen employees for COVID-19 if it is a business necessity that is justified by “current pandemic circumstances and individual workplace circumstances” because a COVID-19 viral test is a medical examination within the meaning of the ADA.

Previously, the EEOC’s position as set forth in the Q&A was that the standard under the ADA for conducting medical examinations was always met for employers who conducted viral screenings in the workplace for COVID-19. Hunton previously posted
about the Q&A and the EEOC’s updates here and here.

In order to prove business necessity, employers must point to factors such as (1) the vaccination status of its workforce; (2) Centers for Disease Control and Prevention information transmission levels in the community at large; (3) types of contact between employees and others in the workplace or other locations where work is performed; (4) accuracy and speed of using different types of tests; (5) possible severity of COVID-19 variants; and (6) the potential impact on operations if an employee enters the workplace with COVID-19.

Further, although this is not new to the Q&A, if an employer does not meet the business necessity test to permit COVID-19 testing, the employer should not use antibody tests as the Center for Disease Control and Prevention has stated that antibody tests are unable to determine whether a person is currently infected or immune.

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