Insights

Testing, Testing…The CDC Details When Employers Should Test for COVID-19 and Other Health Screening Reminders

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As employers struggle to navigate the new normal after their workforce returns back to work, the Centers for Disease Control and Prevention ("CDC") published timely **guidance** detailing when employers should test or require employees to complete a viral COVID-19 test. It is important that employers not only follow the CDC guidance, but also comply with relevant laws, such as the Americans with Disabilities Act ("ADA").

Employees undergoing testing for COVID-19 should receive information prior to being tested including the manufacturer, the type of test, the purpose of the test, the reliability of the test, any limitations associated with the test, who will pay for the test, who will receive the results, how the test will be performed, and what the consequences are for refusing a test. After employees results are received, they should be informed of the meaning of their results and any actions they need to take because of their results.

I. Testing is Permissible when Job-Related and Consistent with Business Necessity Because an Employee's Medical Condition Poses a Direct Threat

The main equal employment opportunity ("EEO") law at issue when it comes to health screening is the ADA. The ADA regulates when employers can conduct disability-related inquiries and medical examinations for employees. The Equal Employment Opportunity Commission ("EEOC") enforces the ADA and other EEO laws and recently issued **guidance** on COVID-19 health screening measures and their relation to the ADA.

A "disability-related inquiry" means a question(s) that is intended to uncover or elicit information from an individual about a disability. Generally, questions about whether an employee is experiencing symptoms of COVID-19 do not rise to a disability-related inquiry. A "medical examination" means "a procedure or test that seeks information about an individual's physical or mental impairments or health," which includes measuring an employee's body temperature and would also include a COVID-19 test.

An employer requiring employees to undergo a disability-related inquiry or medical examination is permissible when job-related and consistent with a business necessity. One instance where this arises is when an employer "has a reasonable belief, based on objective evidence that … an employee will pose a direct threat due to a medical condition."[1] Health screening measures related to COVID-19 are job-related and consistent with business necessity because an individual infected with COVID-19 poses a direct threat to the health of others. Therefore, disability-related inquiries and medical examinations conducted prior to an employee's return to the workplace are permissible under the ADA.

II. Determining When to Test Employees

The CDC recently published updated guidance explaining when employers should require employees to be tested for COVID-19, which include the following categories: (1) testing individuals with signs or symptoms consistent with COVID-19; (2) testing asymptomatic individuals with recent known or suspected exposure to COVID-19 to control transmission; (3) testing asymptomatic individuals without known or suspected exposure to COVID-19 for early identification in special settings; (4) testing to determine resolution of infection; and (5) public health surveillance for COVID-19. Each of these categories present unique challenges and considerations that employers must take into account before requiring testing.

a. Individuals with signs or symptoms consistent with COVID-19

Employers may consider or have already implemented daily in-person or virtual health screenings to ensure employees do not have signs or symptoms of COVID-19 while at the workplace. But, what should they do if someone does indicate they have signs or symptoms of COVID-19? The first step is to immediately separate those employees from any other employees, customers, and visitors and either send them home or to a healthcare facility. As discussed in further detail below, these measures and the subsequent action, i.e. whether an employee is sent home or to a healthcare facility, must be kept strictly confidential. After this, an employer should consider whether an employee's symptoms are consistent with COVID-19 symptoms. If the symptoms are consistent, the employee should be referred to a healthcare provider for evaluation and potential testing.

While waiting for test results, an employee should self-isolate at home. If an employee is able to work from home, employers may permit it if symptoms do not prevent them from working. However, if this is not possible, employers should allow employees to either take paid or unpaid sick leave depending on their current policies. Employers should also keep in mind that this decision may implicate leave entitlements under the Emergency Paid Sick Leave Act. If an employee's test results are positive for COVID-19, the employee should continue to remain home for at least 10 days and until they are symptom free for at least 24 hours without medication, or in accordance with the current CDC guidance.[2]

b. Asymptomatic individuals with recent known or suspected exposure to COVID-19 to control transmission

As soon as an employer discovers that an employee has had or is suspected of having been exposed to someone with COVID-19, the employer should isolate the employee from others. Depending on the employee's level of exposure (i.e. the length of time and distance), an employer may refer the employee to a healthcare provider for evaluation and potential testing.

Specifically, an employee should likely be tested if they work in a high-risk setting with demonstrated potential for rapid and widespread dissemination of COVID-19 including: high-density **critical infrastructure workplaces**, workplaces where employees live in congregate settings (e.g., fishing vessels, offshore oil platforms, farmworker housing or wildland firefighter camps), and workplaces with populations at risk for severe illness if infected, such as nursing homes. Employers should consult with state and local health departments to inform their decision-making about such testing.

c. Asymptomatic individuals without known or suspected exposure to COVID-19 for early identification in special settings

The CDC indicates that in areas of moderate to substantial community transmission, viral testing of workers without symptoms may be useful to detect COVID-19 and stop transmission. Such special settings include the following:

- workplaces where physical distancing is difficult and workers are in close contact with each other or the public,

- workplaces in remote settings where medical evaluation or treatment may be delayed,
- workplaces where continuity of operations is a high priority, and
- workplaces providing congregate housing for employees.

These methods could include testing all employees before entering the workplace, before returning to work, on a periodic basis, or targeted testing of new workers or those returning from a prolonged absence. The frequency of testing will likely be based on a number of factors including, but not limited to, the availability of the tests and the rate or change in infection rate.

Prior to implementing such a wide-spread testing procedure, employers should develop testing policies and introduce such policies to their workforce. Employers must also be prepared to modify operations based on test results.

d. Testing to determine resolution of infection (discontinuation of home isolation)

After an employee tests positive for COVID-19, has isolated themselves at home for the appropriate amount of time, and has been symptom free, an employer may wish to have more concrete evidence that the employee is no longer infected with COVID-19. While the CDC has detailed that employers can request an employee to receive a subsequent COVID-19 test, subject to local, state, and federal laws and guidelines, it discourages doing so as it may not be the best option. Specifically, if healthcare provider offices and medical facilities are busy and may not be able to provide either doctor's notes or subsequent testing. Further, testing may be limited in the area and evidence is lacking as to whether a subsequent test could detect viral RNA in a person's respiratory samples after their recovery from COVID-19. Thus, the CDC warns that employers should not require a healthcare provider's note to validate their COVID-19 illness, qualify for sick leave, or to return to work. Employers should follow CDC recommendations to determine when an employee may discontinue home isolation and return to work.

e. Public health surveillance for COVID-19

Last, the most broad and cumbersome approach to COVID-19 testing is public health surveillance. Testing for COVID-19 can be a surveillance technique that may be conducted to detect transmission hot spots, or to better understand disease trends in the workplace. Specifically, occupational medicine surveillance programs may use testing to assess the burden of COVID-19 on the workforce, assess factors that place employees at risk, or evaluate the effectiveness of workplace infection control measures. This method should only be undertaken if the results have a reasonable likelihood of benefiting employees.

III. Other Health Screening Measures and Employer Precautions

Many employers are adopting one or more methods of health screening for their employees. There are a few things that employers should keep in mind when considering which health screening measures to implement including considerations related to newly-developed methods, such as antibody testing.

a. Antibody Testing

As antibody testing is becoming more widely available, some employers are offering it as an option for their employees. While providing employees with the option to receive antibody testing is consistent with EEO obligations, the EEOC explicitly stated in its **technical publication** that employers cannot require employees to undergo antibody testing prior to their return to work or as a health screening measure.

Here's why. An antibody test is most certainly a medical examination under the ADA; however, **CDC interim guidelines** states that antibody test results "should not be used to make decision about returning persons to the workplace[.]"[3] For this reason, "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."

b. Other Health Measures

In addition to COVID-19 testing and antibody tests, employers have other tools that they can use to maintain a safe workplace. These alternative forms of health screening include but are not limited to temperature checks, symptom questionnaires, travel policies, mask requirements, and social distancing requirements. Employers should use all necessary tactics to keep their employees safe and make their workplace feel safe for employees. As a reminder, any health information collected about an employee, such as their temperature or symptoms, should be done in a confidential manner, and kept in their confidential medical file in order to comply with the ADA and other applicable laws. Employers must make decisions about health screenings, policies, and protective equipment while also being mindful of local and state regulations that may impose additional restrictions.

IV. Information from Health Screening Measures Must Remain Confidential

The ADA also requires employers to keep all medical information about employees confidential, which includes maintaining such information in a separate file from employees' personnel file and limiting the access to such information. Regardless of the health screening measures that employers have in place, it is critical employers limit the number of individuals with access to that information and that any such information is maintained in accordance with the ADA.

Employers should consider selecting one or two key individuals, such as one or two specific Human Resources professionals, to receive and review confidential medical information resulting from health screening measures. Similarly, employers should try to limit the information shared while also keeping in mind the information that would be needed in the event of a workplace exposure to COVID-19 or positive COVID-19 viral test.

Takeaways

It can be overwhelming for employers and Human Resources professionals to stay up-to-date on all of the new developments related to health screening measures, including keeping up with the EEOC's informal guidance. At the same time, doing so is critical to ensure employers are not inadvertently violating EEO laws or creating an unsafe environment for their employees.

If you have questions about the health screening measures you have in place or other concerns related to bringing your employees back to work, please contact **Elizabeth M. Roberson** or any member of our Labor and Employment team for more information.

Disclaimer. The contents of this article should not be construed as legal advice or a legal opinion on any specific facts or circumstances. The contents are intended for general informational purposes only, and you are urged to consult with counsel concerning your situation and specific legal questions you may have.

[1] https://www.eeoc.gov/laws/guidance/enforcement-guidance-disability-related-inquiries-and-medical-examinations-employees
[2] Indiana's executive order dictates employees should remain symptom free for 72 hours without medication.
[3] Question A.7.