EEOC Changes Position on COVID-19 Testing and Clarifies Other Protocols

Jul 15, 2022

Categories:

Coronavirus Response Team
Publications

Authors:

Anne E. Duprey
Jeffrey S. Shoskin
Catherine F. Burgett
Kyle D. Johnson

On July 12, the EEOC updated its Technical Assistance Guidance concerning COVID-19 testing and vaccines in the workplace. In doing so, the EEOC pivoted from its position that across-the-board COVID-19 viral testing for on-site employees met the ADA standard for conducting medical examinations. It also clarified employers' responsibilities regarding vaccines. Significantly, the EEOC now "makes clear that going forward employers will need to assess whether current pandemic circumstances and individual workplace circumstances justify viral screening testing of employees to prevent workplace transmission of COVID-19." After this course correction by the EEOC, employers requiring COVID-19 testing will only be able to do so if the requirement is "job-related and consistent with business necessity." Which, in some situations, is no small feat.

This article summarizes certain key takeaways from the updated EEOC Guidance:

COVID-19 Testing

- The ADA permits an employer to require confirmation from a qualified medical professional that an employee is able to safely return to work after being out with COVID-19. This inquiry, even if disability-related, meets the "business necessity" standard because it is related to the "possibility of transmission and/or related to an employer's objective concerns about the employee's ability to resume working."
- An employer may administer a COVID-19 viral test when evaluating an employee's initial or continued presence at work if it can show the test is "job-related and consistent with business necessity." The viral test meets the "business necessity" standard when it is consistent with current guidance from the CDC, the FDA, and/or local/state public health authorities. The EEOC recommended employers monitor the above guidances for any relevant

2026 FBT Gibbons LLP. All rights reserved. ADVERTISING MATERIAL.

updates.

- In addition to referencing the above guidances when making assessments for the "business necessity" standard, the EEOC listed the following other possible considerations that the "business necessity" standard may include:

  – 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;

  – the types of contacts employees have with each other in the workplace or wherever they are required to work; and

  – the potential impact on operations if an employee enters the workplace with COVID-19.

- Employers cannot require antibody testing before permitting employees to re-enter the workplace. CDC guidance currently states that antibody testing may not show whether an employee has a current infection or whether the employee is immune to infection. Consequently, such testing does not meet the ADA's "business necessity" standard for medical examinations or inquiries for employees. The EEOC emphasized an antibody test is different than a viral test – discussed above.

COVID-19 Testing in the Hiring Process

- An employer can screen applicants for COVID-19 symptoms after a conditional job offer if it does so

2026 FBT Gibbons LLP. All rights reserved. ADVERTISING MATERIAL.

for all entering employees in the same type of job. Moreover, if the employer screens everyone (e.g., employees, contractors, visitors) before permitting entrance to the workplace, then an applicant in the pre-offer stage who needs to be onsite during the interview process also may be screened for COVID-19.

- The EEOC also addressed an employer's options when an otherwise successful applicant tests positive for COVID-19. The EEOC noted some individuals may only need a relatively short isolation or quarantine period. In those circumstances, employers may explore a new start date or permit remote work – if the job can be performed remotely. Alternatively, an employer may withdraw a job offer from an applicant who tested positive for COVID-19 if the employer complies with current CDC Guidance and in the following circumstance:
  - the job requires an immediate start date;
  - the applicant should not be in proximity to others; and
  - the job requires such proximity to others, whether at the workplace or elsewhere.
- An employer cannot postpone the start date or withdraw a job offer because of concerns the applicant is older, pregnant, or has an underlying medical condition that may place the applicant at an increased health risk. The employer's concern for an applicant's well-being does not excuse an action that is otherwise unlawful discrimination.

Masks, PPE, and Direct Threats to Safety

- In most situations, an employer may require employees to wear personal protective equipment (e.g., masks, gloves) and observe other infection control practices (e.g., regular hand washing, physical distancing protocols). Employers also may need to comply with certain OSHA regulations. The EEOC stressed that "OSHA regulations do not prohibit the use of reasonable accommodations under [equal employment opportunity laws] as long as those accommodations do not violate OSHA requirements." However, when an employee

2026 FBT Gibbons LLP. All rights reserved. ADVERTISING MATERIAL.

needs a reasonable accommodation under the ADA or a religious accommodation under Title VII, the employer must engage in the interactive process to determine whether a reasonable accommodation is warranted.

- Generally, the ADA does not allow the employer to take any adverse action against an employee because the employee has a "disability," including medical conditions identified by the CDC as potentially placing the employee at higher risk for severe illness if the employee were to contract COVID-19. The only exception is if the employee's "disability" poses a "direct threat" to the health or safety of the employee or others that cannot be removed or reduced by a reasonable accommodation. The direct threat assessment cannot be based solely on the disability being identified by the CDC as one that potentially places the employee at a higher health risk. The determination must be individualized based on reasonable medical judgement about the employee's disability – not the disability in general. The EEOC Guidance includes a detailed discussion of the "direct threat" assessment and includes examples of reasonable accommodations that may remove or reduce a "direct threat" — absent undue hardship.

Vaccinations

- If the employer mandates a COVID-19 vaccine, then it can require documentation or other information confirming the employee's current vaccine status. Further, employers can require a COVID-19 vaccination for all employees subject to appropriate religious and disability reasonable accommodations. The EEOC discussed when an employer can require an employee to comply with a COVID-19 vaccine mandate despite seeking a reasonable accommodation.
- A vaccination mandate may trigger allegations that it has a "disparate impact" on (or disproportionately excludes) employees based on their protected group status (e.g., race, color, religion, gender, age, national origin).

2026 FBT Gibbons LLP. All rights reserved. ADVERTISING MATERIAL.

- An employer may share an employee's medical information with certain employees who need it to perform their job. They, in turn, must keep that information confidential. The EEOC provided several examples of employees who may have access to an employee's vaccination status or COVID-19 test results. For example, a security guard assigned to permit workplace entry only to employees who comply with workplace directives (e.g., vaccinations, testing, or masking) should only receive a list of individuals who can or cannot enter. That employee cannot receive medical information revealing why the employee is or is not on the list.

The EEOC underscored its position change is not meant to suggest whether COVID-19 testing is warranted. Rather, the EEOC is acknowledging that evolving pandemic circumstances now require an individualized assessment to determine whether such testing complies with the ADA standard for conducting medical examinations.

As the total reported COVID-19 cases (again) are on the rise, we anticipate employers who still conduct COVID-19 testing may stumble along the way as they attempt to conduct the above individualized assessments. To ensure compliance with this most recent EEOC guidance, employers should review their current COVID-19 testing, safety, and vaccine protocols and adjust them accordingly as the COVID-19 pandemic continues to ebb and flow.

For more information, please contact Frost Brown Todd's Labor & Employment practice group.

© 2026 FBT Gibbons LLP. May be considered attorney advertising in some jurisdictions.

2026 FBT Gibbons LLP. All rights reserved. ADVERTISING MATERIAL.

FBT Gibbons