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Client Alert: EEOC Issues Updated COVID-19 Workplace Guidance

BY TRACY THOMAS BOLAND • JULY 18, 2022

On July 12, 2022, the EEOC issued updated COVID-19 guidance to employers (the "Guidance"). This Guidance, in the form of updated Questions and Answers, addresses various COVID-19 workplace issues, including screening, testing, return to work protocols, and vaccine mandates and incentives.

COVID-19 SCREENING AND TESTING PERMISSIBLE IF JOB-RELATED AND CONSISTENT WITH BUSINESS NECESSITY

In the Guidance, the EEOC notes that a COVID-19 viral test is a "medical examination" within the meaning of the Americans With Disabilities Act ("ADA"). As such, employers may only require COVID-19 screening or testing of employees if it is "job-related and consistent with business necessity." An employer's "business necessity" analysis may consider the local level of COVID-19 community transmission, their employees' vaccination status, the transmissibility or severity of the current variant, and the potential impact on workplace operations. The EEOC notes 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."

APPLICANT SCREENING FOR COVID-19 SYMPTOMS

The Guidance states that, prior to making a conditional job offer, medical exams and disability-related inquiries are generally prohibited. After making a conditional job offer, employers are permitted to screen job applicants for COVID-19 symptoms, so long as the employer screens all such prospective employees in a given job category. Additionally, where employers screen all individuals (i.e., employees, contractors, and visitors) prior to entering a worksite, the employer may screen an applicant in the pre-offer stage if the applicant needs to be in the workplace as part of the application process (i.e., for a job interview), so long as the scope of such screening is consistent with the screening the employer uses for all other individuals. If a candidate tests positive but is needed immediately, the employer may withdraw the offer if CDC guidance recommends the person should not be in proximity to others and the job requires proximity to others. Alternatively, the employer may choose to delay the start date or allow the candidate to work remotely if either is practicable.

RETURN TO WORK ISSUES

The Guidance notes that, under the ADA, employers may require a note from an employee's doctor indicating that it is safe for the employee to return to work and that the employee is able to perform their job duties. Alternatively, employers may rely on CDC Guidance to determine whether it is safe for an employee to return to work without providing such a certification. This revised Guidance gives employers more flexibility in returning their workforce to the workplace.

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ANTIBODY TESTING NOT PERMISSIBLE

As acknowledged by the Centers for Disease Control and Prevention ("CDC"), COVID-19 antibody testing does not show whether an individual has a current COVID-19 infection, nor does it indicate that an individual is immune from reinfection. In light of this, antibody testing may not be used to determine whether employees can return to the workplace.

INCENTIVES FOR VOLUNTARY COVID-19 VACCINATIONS

The ADA does not limit employer incentives for voluntary vaccination so long as the health care provider administering the vaccine is neither the employer nor the employer's agent. Such incentives may include, "both rewards and penalties."

CONCERNS FOR AN APPLICANT'S WELL-BEING IS NO EXCUSE FOR DISCRIMINATION

An employer may not unilaterally postpone or withdraw job offers because of their concern that an individual is older, pregnant, or has an underlying medical condition that could put them at increased risk from COVID-19. As stated by the EEOC, "[a]n employer's concern for an applicant's well-being – an intent to protect them from what it perceives as a risk of illness from COVID-19 – does not excuse an action that is otherwise unlawful discrimination."

STATE AND LOCAL LAW CONSIDERATIONS

The EEOC's Guidance only addresses COVID-19 workplace issues under federal law. Employers also need to be mindful of their obligations under relevant state or local law.

Bowditch will closely monitor any developments on this issue and update you promptly. Employers with questions should consult with their Bowditch Employment & Labor attorney.

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