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EEOC Revises its Guidance on Viral Testing by Employers

Client Alert

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Several reputable news agencies have reported that the federal government plans to once again extend the COVID-19 public health emergency that was set to expire on Friday, July 15, 2022. An extension would continue measures that have given millions of Americans special access to health insurance and telehealth services. While the Department of Health and Human Services (“DHHS”) has repeatedly renewed the emergency since it was originally declared, the EEOC seems to be paring back an employer’s ability to address the pandemic in the workplace.

On Tuesday, July 12, 2022, US Equal Employment Opportunity Commission issued an update to its technical assistance guidance that “employers will need to assess whether current pandemic circumstances and individual workplace circumstances justify viral screening testing”. At the beginning of the pandemic, the EEOC had said that mandatory COVID-19 testing for on-site employees was legal across the board. Now, however, the EEOC has stated that employers will have to prove that testing employees is a “business necessity,” which can be based on factors such as community transmission, workers’ vaccination status, or certain working conditions.

Why this change by the EEOC when the DHHS seeks to extend the emergency declaration? It appears that the EEOC is reminding employers that generally, regardless of a pandemic, the Americans with Disabilities Act (“ADA”) requires that any mandatory medical test of employees be “job-related and consistent with business necessity” and that a COVID-19 viral test is a medical examination within the meaning of the ADA. Accordingly, if an employer’s screening protocols include a COVID-19 viral testing, the ADA requires that any mandatory medical test of employees be “job-related and consistent with business necessity.” Possible considerations for the “business necessity” assessment may include:

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- 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 other locations where 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.

According to the EEOC, the employer, in making these assessments, “should check the latest CDC guidance (and any other relevant sources) to determine whether screening testing is appropriate for these employees.”

Additionally, the EEOC indicates that “[w]hen an employee returns to the workplace after being out with COVID-19, the ADA allows an employer to require confirmation from a qualified medical professional explaining that the individual is able to safely return.” It further states that that employers “should consult and follow current CDC guidance that explains when and how it would be safe for an individual who currently has COVID-19, symptoms of COVID-19, or has been exposed recently to someone with COVID-19, to end isolation or quarantine and thus safely enter a workplace or otherwise work in the physical presence of others.”

If you have any questions under what conditions your company can continue testing, please contact your Butzel Labor and Employment Attorney.

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