

EEOC: Mandatory Antibody Testing Is Prohibited

By Allen Smith, J.D.

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As employers grapple with how to screen workers for COVID-19, the Equal Employment Opportunity Commission (EEOC) clarified on June 17 that the Americans with Disabilities Act (ADA) prohibits mandatory antibody testing before allowing employees to return to the worksite.

Even during the pandemic, antibody testing would be considered a medical examination and isn't job-related and consistent with business necessity, the EEOC explained in its updated guidance (https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws?utm_content=&utm_medium=email&utm_name=&utm_source=govdelivery&utm_term=).

"That's completely correct," said David Fram, the National Employment Law Institute's director of ADA services in Golden, Colo. "It would be a very tough argument that [antibody testing] would be job-related and consistent with business necessity. To be job-related, there would have to be problems with performance or concerns about direct threat" to health.

Antibody tests (www.shrm.org/ResourcesAndTools/hr-topics/risk-management/Pages/Antibody-Testing-for-COVID-19-in-the-Workplace.aspx) show whether someone once had COVID-19. But the U.S. Centers for Disease Control and Prevention (CDC) has said that antibody tests shouldn't be used to make decisions about returning individuals to the workplace, and the EEOC adopted the CDC's recommendation.

Lori Armstrong Halber, an attorney with Reed Smith in Philadelphia and Princeton, N.J., noted that because the EEOC based its announcement on the CDC guidance, if the CDC changes its position, so could the EEOC. "If the CDC announced antibody testing is an effective means of preventing the spread [of COVID-19] and could be used to rule out conclusively that someone is contagious, there would be a closer nexus for purposes of job-relatedness and business necessity."

The EEOC guidance comes after some had warned that antibody testing could be problematic (www.shrm.org/resourcesandtools/hr-topics/employee-relations/pages/are-immune-workers-key-to-reopening-the-economy.aspx).

If an employee volunteers that he or she once had COVID-19, could the employer discriminate in favor of someone with coronavirus antibodies? There's a good argument that it wouldn't be illegal under the ADA to discriminate in favor of someone who volunteered that he or she has COVID-19 antibodies, Fram said. "If anything, it's discriminating in favor of someone who has a record of disability," he said. But the employer couldn't pressure someone to tell it whether he or she had coronavirus, Fram added.

Moreover, Amy Epstein Gluck, an attorney with FisherBroyles in Washington, D.C., said, "We do not know what it means yet to have COVID-19 antibodies. We do not know it means [someone] won't get it again."

As for the prohibited mandatory antibody testing, she noted that at this point antibody tests frequently result in false positives.

Temperature Taking Dilemmas

Feedback

Temperature taking (www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/eeoc-coronavirus-temperature.aspx) is frequently used for one of COVID-19's symptoms—fever—and the EEOC has said that temperature taking is allowed during the pandemic. Employers nonetheless are still struggling with the confidentiality provisions of the ADA when they choose to take temperatures, Fram said.

Halber said employers shouldn't take temperatures in front of other employees and shouldn't announce if someone has a temperature before co-workers. She said instead employers should screen in a private room or in a tent outside the facility. If employees aren't taking their own temperatures, the person taking temperatures, preferably using infrared digital thermometers, should wear personal protective equipment, she said. Infrared digital thermometers are less invasive than oral thermometers, noted Christine Walters, J.D., SHRM-SCP, an independent consultant with FiveL Co. in Westminster, Md.

If the person's temperature is 100.4 degrees Fahrenheit or higher, the person should be sent home and proper tracing protocols (www.shrm.org/resourcesandtools/hr-topics/employee-relations/pages/contact-tracing-employers.aspx) put in place. Employees who recently came into contact with that person should be notified that someone they have interacted with has shown symptoms, and the co-workers should get tested and stay away from work for 14 days, she added.

Jonathan Mook, an attorney with DiMuro Ginsberg in Alexandria, Va., prefers a different approach from employers taking temperatures.

He recommends that employers give workers self-screening forms that employees complete each workday and e-mail in. The employees state that they don't have a fever or COVID-19 symptoms (<https://www.cdc.gov/quarantine/air/reporting-deaths-illness/definitions-symptoms-reportable-illnesses.html>), if that's the case. If workers can't e-mail the form in, they might call this information into HR, he said.

There's an administrative burden to this approach, but the priority should be to make sure that employers have a safe workplace, Epstein Gluck said. Just as nonexempt employees must be paid for time waiting for their temperatures to be taken or to answer questions about COVID-19 symptoms at work, they must be paid for the time it takes to fill out these forms.

For Mook, employers taking temperatures raises many thorny questions, including identifying who will take the temperatures, keeping employees six feet apart while waiting to be tested and preventing the spread of the illness when infected people stand in line before they are tested.

On the other hand, self-screening forms rely on employees' honesty and promptness in filling out the forms. Some employees may be tempted to lie when they're ill, and others may resent the added responsibility.

SHRM RESOURCE SPOTLIGHT

Coronavirus and COVID-19 (www.shrm.org/ResourcesAndTools/Pages/communicable-diseases.aspx)

COVID-19 Testing

Some managers don't realize that if someone is showing signs of COVID-19, they can ask individuals to have their temperature taken in a confidential manner or ask the workers to get tested for COVID-19, Epstein Gluck said.

If employees have tested positive for COVID-19, they may be required to test negative before they return to work. Employers occasionally even require workers test negative twice before returning, out of concern that the first test might be a false negative, Mook noted. When an employer adopts this protocol, it should be able to show that it was job-related and consistent with business necessity, he said.

Make sure COVID-19 testing is implemented consistently, Epstein Gluck cautioned.

"Employers should stay within EEOC guidelines and follow the recommendations of the CDC," Mook said. These guidelines and recommendations "are as much of a safe harbor as employers can have in these very uncertain times."

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Feedback