

EEOC Indicates Testing Employees for COVID-19 Does Not Violate ADA

2 min read

May 22, 2020

As businesses prepare to re-open, many employers will be concerned about the risk of workplace transmission of the COVID-19 disease. Testing employees before allowing them to enter the workplace is one preventative measure employers are considering. However, this measure has been clouded by uncertainty, because a test for COVID-19 could be considered a medical inquiry under the Americans with Disabilities Act (ADA), which is only permitted if the inquiry is job-related and consistent with business necessity.

In an effort to provide clarity, the Equal Employment Opportunity Commission (EEOC) has now issued guidance regarding employer testing of employees for COVID-19 before they enter the workplace. [This guidance](#) states that employers can require employees to undergo a COVID-19 test before entering the workplace without violating the ADA. The EEOC suggests that employers review the Federal Drug Administration's (FDA's) recommendations on testing.



Many laboratories are providing COVID-19 testing. However, it is critical that employers who opt to test employees for COVID-19 use a laboratory that is providing accurate and reliable testing. Generally, COVID-19 testing falls into two categories: diagnostic testing and serology testing. Diagnostic testing checks for the presence of the virus, while serology testing looks for the presence of antibodies that are formed by the body in response to the virus. Serology testing is less certain than diagnostic testing because the body generally takes one to three weeks to develop the antibodies after contracting COVID-19. For instance, a person could undergo a serology test and be found to have no antibodies, even though they could, in fact, be infected with COVID-19. Accordingly, the FDA has stated that serology testing should not be used to diagnose active COVID-19 infections.

Diagnostic testing is generally considered more accurate than serology testing for detecting the presence of the virus. Accordingly, the FDA has issued "Emergency Use Authorizations" (EUA) to certain diagnostic tests of COVID-

19. An EUA essentially gives the FDA the authority to allow unapproved products to be used in emergency situations. Laboratories must submit an application with information regarding the effectiveness of their product in order to obtain EUA certification from the FDA. You can view a list of the [COVID-19 tests that have received EUA certification](#) on the FDA's website.

Employers will welcome the EEOC's guidance confirming they can require COVID-19 testing of their employees without running afoul of the ADA. At the same time, employers considering COVID-19 testing of employees should ensure that they follow the EEOC's guidance and choose reliable and accurate testing. Although the EEOC guidance does not explicitly state that an "accurate and reliable" test must have EUA certification, employers should still consider using diagnostic tests that have received EUA certification, as these should satisfy the EEOC's guidance.

Hinshaw & Culbertson LLP is a U.S.-based law firm with offices nationwide. The firm's national reputation spans the insurance industry, the financial services sector, professional services, and other highly regulated industries. Hinshaw provides holistic legal solutions—from litigation and dispute resolution, and business advisory and transactional services, to regulatory compliance—for clients of all sizes. Visit www.hinshawlaw.com for more information and follow @Hinshaw on LinkedIn and X.

Topics

ADA, Americans With Disabilities Act, Equal Employment Opportunity Commission (EEOC), FDA, COVID-19, Federal Drug Administration

Related Capabilities

Labor & Employment