

 **M E M O R A N D U M**

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| **TO:** | Kari Thurlow |
| **FROM:** | Penelope J. PhillipsGrant T. Collins |
| **DATE:** | June 23, 2020 |
| **RE:** | Updated COVID-19 Testing |
|  | Our File No: 032365.00001 |

**ANTIBODY (SEROLOGY) TESTING OF EMPLOYEES (\*UPDATE\*)**

In our previous FAQs, we left open a definitive answer to the question of whether employers may test employees for COVID-19 antibodies to determine fitness-for-duty. Nevertheless, we noted caution in using such tests as they were still being developed and were having accuracy and reliability issues.

Recently the CDC issued new guidance stating that antibody tests “should ***not*** be used to make decisions about returning persons to the workplace.” In light of the CDC guidance, on June 17, the EEOC issued its own guidance stating that employers are ***not*** allowed to use antibody tests because they do not meet the ADA’s “job related and consistent with a business necessity standard for medical examinations or inquiries for current employees.” However, the EEOC also noted that as CDC guidance changes, its own recommendations may change as well. Therefore, we will keep you apprise of any future developments.

**VIRAL TESTING OF EMPLOYEES IS STILL PERMISSIBLE (AND RECOMMENDED)**

Notwithstanding the above, viral tests (*i.e.*, nasal swab tests) are still permissible under the ADA and may still be utilized. What happens, however, if an employee refuses to have a COVID-19 test?

May employers make COVID-19 tests mandatory – that is, a condition of coming to work? According to the EEOC, the answer is “***yes***.”

**A.6.   May an employer administer a COVID-19 test (a test to detect the presence of the COVID-19 virus) before permitting employees to enter the workplace? *4/23/20***

The Americans with Disabilities Act (ADA) requires that any mandatory medical test of employees be "job related and consistent with business necessity."  Applying this standard to the current circumstances of the COVID-19 pandemic,*employers may take steps to determine if employees entering the workplace have COVID-19 because an individual with the virus will pose a direct threat to the health of others. Therefore,* ***an employer may choose to administer COVID-19 testing to employees before they enter the workplace to determine if they have the virus.*** *. . .*

Developing an effective testing regime is best accomplished in partnership with a medical professional. The medical professional can assist with developing the appropriate cadence for testing (e.g., once per month) as well as additional testing protocol for employees who travel to areas with community spread or who recently recovered from symptoms. Partnership with employment counsel is also essential in order to ensure that all testing is done in accordance with state and federal law. Minnesota law, for example, requires employers to pay for any employment-related testing, employers must obtain the employee’s consent prior to testing, and it requires employers maintain separate confidential medical files.

**CAN EMPLOYEES REFUSE TO BE TESTED FOR COVID-19?**

The answer is simple: of course an employee can refuse to be tested for COVID-19. The real question is whether an employer can discipline or refuse to allow an employee to return to work if the employee refuses to be tested for COVID-19. The answer to this question depends on two factors: (1) the type of test used and (2) whether the test is part of a testing regime developed by the employer to prevent the spread of COVID-19.

As to the first factor, the CDC and EEOC have made clear that viral testing (*i.e.*, nasal swab tests) may be used for mandatory testing. Anti-body tests are not sufficiently accurate to be used for mandatory testing, but voluntary antibody testing may be used to provide information to employees and employers regarding the risks of future infections.

The second factor ensures that testing is conducted in a non-discriminatory manner. For example, a testing regime can be broad based (e.g., across all job classifications or all customer-facing positions) or it can be limited to instances where there is a specific concern that certain employees had prolonged contact with an infected person.

If an employer meets both factors and its employees refuse to be tested for COVID-19, then the employer may lawfully exclude these employees as eligible to work. Rather than utilizing progressive discipline, employers would be better served to place the employee on an unpaid leave of absence, although ultimately, a continued refusal to be tested could result in discipline. If the employer is utilizing a broad-based testing strategy, a refusing employee may be excluded until the need for such testing abates (*e.g.*, the pandemic ends and the EEOC no longer permits mandatory testing). For employers conducting only targeted COVID-19 testing, the employee may be excluded from the workplace for the entire incubation period of 14 days. After that, the employee is arguably able to return if the employer does not require testing of other, non-exposed employees.

If the employee refuses to be tested for COVID-19 and cites religious or medical reasons, the employer may be required to consider additional accommodations (besides an unpaid leave of absence), such as masking or a potential transfer to an open position not subject to COVID-19 testing. Legal counsel should be consulted, however, because it may be sufficient to treat the objecting employee the same as other test refusers, and place the employee on an unpaid leave of absence in order to wait for the pandemic to end or for the incubation period to expire.