FELHABER LARSON

MEMORANDUM

TO: Kari Thurlow

FROM: Penelope J. Phillips
Grant T. Collins

DATE: April 28, 2020

RE: FAQs from LeadingAge MN Members regarding Employer Testing Requirements

FAQ: Can employers test employees for COVID-19?

Yes. As a rule, the Americans with Disabilities Act ("ADA") allow employers to perform medical examinations on current employees ***if*** the medical examination is "***job-related*** and ***consistent with a business necessity***." Generally, a medical examination of an employee is "job-related and consistent with a business necessity" if, among other things, an employee poses a ***direct threat***, meaning that there is "significant risk of substantial harm to the health and safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation." "The direct threat defense must be based on a reasonable medical judgment that relies on the most current medical knowledge and/or the best available objective evidence and upon an expressly individualized assessment of the individual's present ability to safely perform the essential functions of the job." *Chevron U.S.A., Inc. v. Echazabal*, 536 U.S. 73, 86 (2002).

Recently, the EEOC concluded that the current COVID-19 pandemic meets the "direct threat" standard:

> Based on guidance of the CDC and public health authorities as of March 2020***, the COVID-19 pandemic meets the direct threat standard***. The CDC and public health authorities have acknowledged community spread of COVID-19 in the United States and have issued precautions to slow the spread, such as significant restrictions on public gatherings. In addition, numerous state and local authorities have issued closure orders for businesses, entertainment and sport venues, and schools in order to avoid bringing people together in close quarters due to the risk of contagion. ***These facts manifestly support a finding that a significant risk of substantial harm***

> ***would be posed by having someone with COVID-19, or symptoms of it, present in the workplace at the current time***. . . .

See EEOC Enforcement Guidance on Pandemic Preparedness in the Workplace and the Americans with Disabilities Act (emphasis added).

In fact, on April 23, 2020, the EEOC opined that employers may require employees to undergo COVID-19 ***before*** entering the workplace:

> Applying [the "direct threat"] 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***.
>
> Consistent with the ADA standard, employers should ensure that the tests are accurate and reliable. For example, employers may review guidance from the U.S. Food and Drug Administration about what may or may not be considered safe and accurate testing, as well as guidance from CDC or other public health authorities, and check for updates. Employers may wish to consider the incidence of false-positives or false-negatives associated with a particular test. Finally, note that accurate testing only reveals if the virus is currently present; a negative test does not mean the employee will not acquire the virus later.
>
> Based on guidance from medical and public health authorities, employers should still require - to the greatest extent possible - that employees observe infection control practices (such as social distancing, regular handwashing, and other measures) in the workplace to prevent transmission of COVID-19.

See EEOC, Technical Assistance Questions and Answers, What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws (updated April 23, 2020) (emphasis added).

However, it is also important to be aware of state law implications. Under the Minnesota Human Rights Act ("MHRA"), for example, an employer is permitted to conduct medical examinations of employees ***provided that the employee consent before the medical examination or inquiry***. *See* Minn. Stat. § 363A.20, subd. 8(a)(2); *see also Caron v. Multimedia Holdings Corp.*, No. 2006 WL 3593038, at *3 (Minn. Ct. App. Dec. 12, 2006) (stating "Section 363A.20, subdivision 8(a)(2), on the other hand, expressly authorizes post-employment physical examinations *with the consent of the employee* for the purposes of determining the employee's ability to continue to perform the job; . . . ; or for other legitimate business purposes not otherwise prohibited by law."). Employees who

refuse to consent to COVID-19 testing may be placed on leave until the pandemic is over (and they therefore do not pose a direct threat to the workplace).

Remember, employees may be eligible for Emergency Paid Sick Leave or "E-PSL" under the Families First Coronavirus Response Act ("FFCRA") if: (1) the employee tests positive for COVID-19, (2) the employee displays symptoms and is seeking a medical diagnosis, or (3) if the employee been advised by a medical provider to self-quarantine. If the employee does not fit into one of these categories, then the individual would likely not be entitled to E-PSL and would have to use employer-provided entitlements, including paid sick time, vacation, or unpaid time off.

FAQ: Can employers likewise test employees for COVID-19 antibodies?

Yes. Similar to the above analysis, the EEOC has declared that employees with COVID-19 are "direct threats" under the ADA, and as such, employers have broad discretion to perform medical examinations/inquires (*i.e.*, tests) to verify whether an employee is fit-for-duty. In this case, the antibody/serology test would determine whether someone has battled COVID-19 and developed antibodies, which may indicate that the person has developed immunity and is able to return to work.

Nevertheless, even if antibody/serology tests are lawful, employers may still want to shy away from utilizing them to determine whether someone is "safe" to return to work. The EEOC provided that employers are responsible for ensuring that any test administered is accurate and reliable. In addition, the EEOC direct employers to FDA guidance. But, given the current inconsistencies with antibody/serology tests, it may not be practical to rely upon them just yet. For example, many of these tests are not FDA approved, nor do they accurately predict whether someone has SARS-CoV-2 antibodies. In some reports, many of these tests have over a 5% margin of error, and in some cases, far worse than that. Similarly, some reports indicate that the tests state that an individual has antibodies when, in fact, they do not. Furthermore, there are conflicting reports whether SARS-CoV-2 antibodies even protect someone from getting the disease a second time.

As such, relying upon these tests to determine whether a worker may return-to-work could lead to reinfection, which may expose employers to OSHA, workers' compensation, and other liability. Thus, regardless of testing, the EEOC recommends that employers continue to "require - to the greatest extent possible - that employees observe infection control practices (such as social distancing, regular handwashing, and other measures) in the workplace to prevent transmission of COVID-19." Nevertheless, we realize that things are changing by the day and our advice may change as a result.

FAQ: Can I test everyone or just certain people?

You may test as broadly as you desire. However, you must ensure that all testing is administered in a consistent, non-discriminatory, and confidential manner. Remember, the

ADA requires that results from medical examinations be kept confidential and stored in a secure and separate file from an employee's personnel file.

Testing may be limited to those who display symptoms (including fever, cough, shortness of breath, chills, muscle pain, new loss of taste or smell, vomiting or diarrhea and/or sore throat) or those who report having been in contact with infected persons.

However, recent scholarship suggests that asymptomatic carriers may pose a significant risk to those in congregate housing settings. In one study, more than half the residents of this skilled nursing facility (27 of 48) who had positive tests were asymptomatic at testing. *See* Arons M., et al., Presymptomatic SARS-CoV-2 Infections and Transmission in a Skilled Nursing Facility, New England Journal of Medicine (April 24, 2020). Another study of prison populations in four states found that 96% of 3,277 inmates who tested positive for COVID-19 were asymptomatic. *See* Reuters, In four U.S. state prisons, nearly 3,300 inmates test positive for coronavirus – 96% without symptoms (April 25, 2020).

Obtaining COVID-19 tests for asymptomatic employees may be difficult. At this time, the CDC's testing priorities are focused on workers and residents "with symptoms." Those "without symptoms" are only a "priority" under the CDC's current guidance if they are "prioritized by health departments or clinicians." Thus, establishing a testing regiment for asymptomatic employees should be deployed at the recommendation of the facility's medical director and with the support of state health officials.

FAQ: Can employees who are receiving workers' compensation benefits also qualify for FFCRA benefits?

Not generally, no. According to the DOL's guidance, if an employee receives workers' compensation or temporary disability benefits because the employee is unable to work, then the employee may not take paid leave under the new FFCRA. However, if the employee is able to return to light duty leave prior to taking leave under the FFCRA, then the employee may be able to receive leave benefits under the FFCRA.

FAQ: Are there any guidelines for return-to-work procedures for health care employees who have previously tested positive for COVID-19?

Yes. The CDC has implemented guidelines for returning health care workers with confirmed or suspected COVID-19 cases. The CDC provides that employers may use the Test-Based Strategy or the Non-Test-Based Strategy for determining when an employee may safely return to work.

Test-Based Strategy.

Employers should exclude the employee until: (1) resolution of fever without the use of fever-reducing medications, ***and*** (2) improvement in respiratory symptoms (*e.g.*, cough, shortness of breath, etc.), ***and*** (3) negative results from an FDA Emergency Use Authorized

molecular assay for COVID-19 from ***at least two consecutive nasal swab specimens*** collected less than or equal to 24 hours apart.

While, the Test-Based Strategy is the preferred method for determining when a health care worker may return safely, the CDC also provided an alternative—Non-Test-Based Strategy.

Non-Test-Based Strategy.

If the Test-Based Strategy cannot be used, the employers may use the Non-Test-Based Strategy. Employers should exclude the employee from work ***until*** (1) at least 3 days (72 hours) have passed ***since recovery***, which is defined as resolution of a fever with without the use of fever-reducing medications ***and*** (2) improvement in respiratory symptoms (*e.g.*, cough, shortness of breath, etc.), ***and*** (3) at least 7 days have passed ***since*** symptoms first appeared.

A health care worker who has a confirmed case of COVID-19, but has not had any symptoms, should be excluded from work until 10 days have passed since the date of their first positive COVID-19 diagnostic test (assuming that the worker has not subsequently developed symptoms after the test).

After returning to work, the CDC also recommends that health care workers wear a facemask at all times while in the facility ***until all symptoms are completely resolved or until 14 days after illness onset*** (whichever is longer). The workers should also be restricted from contact with severely immunocompromised patients (the examples provided are transplant patients or hematology-oncology patients) until 14 days after illness onset. Lastly, the CDC recommends that health care workers self-monitor for symptoms and seek reevaluation if symptoms reoccur or worsen.