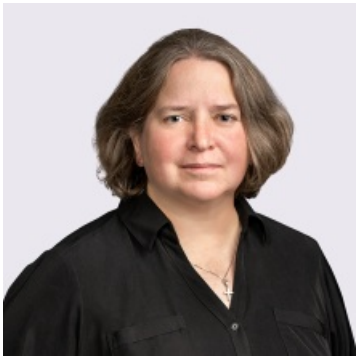


EEOC Updates Its COVID-19 Guidance to Reflect Current State of COVID-19 in the U.S.

By Patricia Anderson Pryor, Jenifer M. Bologna, Katharine C. Weber & Tara K. Burke

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Meet the Authors



Patricia Anderson Pryor
Office Managing Principal
513-322-5035
Patricia.Pryor@jacksonlewis.com



Jenifer M. Bologna
Principal
(914) 872-6869
Jenifer.Bologna@jacksonlewis.com



Katharine C. Weber
Principal

As the pandemic continues to evolve, so does the EEOC's guidance. On July 12, 2022, the EEOC once again updated its COVID-19 guidance: [*What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*](#) to reflect the pandemic's changing state. The updated guidance follows CDC's June 10, 2022 [*statements*](#) regarding the current state of the COVID-19 pandemic.

The COVID-19 pandemic has now shifted to a new phase, due to the widespread uptake of highly effective COVID-19 vaccines, the availability of effective therapeutics, and the accrual of high rates of vaccine- and infection-induced immunity at the population level in the United States. Each of these measures has contributed to lower risk of severe disease and death across the United States.

Here are some highlights and observations from the updated EEOC guidance, with sections noted.

Can Employers Still Require COVID-19 Tests? (A.6 and intro)

“Yes, if the employer can show it is job-related and consistent with business necessity.” According to the EEOC, a COVID-19 viral test is a medical exam under the ADA and an employer must show that it is “job-related and consistent with business necessity.” The EEOC explains that at the outset of the pandemic, “the ADA standard for conducting medical examinations was, at that time, always met for employers to conduct worksite COVID-19 viral screening testing.” Going forward, however, “employers will need to assess whether current pandemic circumstances and individual workplace circumstances justify viral screening testing of employees to prevent workplace transmission of COVID-19.” The EEOC emphasizes the importance of considering the most recent CDC guidance and lists the following “possible considerations” for employers making a “business necessity” assessment:

- [*level of community transmission*](#),
- [*vaccination status of employees*](#),
- accuracy and speed of processing for different types of COVID-19 viral tests,
- [*degree to which breakthrough infections are possible for employees who are “up to date” on vaccinations*](#),
- [*ease of transmissibility of the current variant\(s\), the possible severity of illness from the current variant*](#),
- types of contacts employees may have with others in the workplace or elsewhere that they are required to work (e.g., working with medically vulnerable individuals),
- and potential impact on operations if an employee enters the workplace with COVID-19.

The EEOC also updated guidance about screening for COVID-19 generally, reminding



Tara K. Burke

(She/Her)

KM Attorney

(513) 322-5027

tara.burke@jacksonlewis.com

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employers that all disability-related inquiries and medical exams used for screening employees for COVID-19, must be “job related and consistent with business necessity.” (G.1)

Can Employers Require Employees to Provide a Doctor’s Note Clearing Them to Return to Work after Being Out with COVID-19? (A.5)

According to the EEOC’s updated guidance, employers may require confirmation from a qualified medical professional stating that an employee who has had COVID-19 is safe to return to work.

The EEOC reminds employers of other options too, including following CDC guidance to determine whether it is safe to allow an employee to return to the workplace without confirmation from a medical professional or “employers may wish to consider other ways to determine the safety of allowing an employee to return to work if doctors and other healthcare professionals are unable to provide such documentation either in a timely manner or at all. [Alternatives] might include reliance on local clinics to provide a form, a stamp, or an e-mail to confirm that an individual is no longer infectious and is able to resume working.”

Can Employers Screen Applicants for COVID-19? (C.1)

According to the EEOC, employers can screen applicants for COVID-19 during the pre-offer stage if the employer screens everyone, including visitors and others, for symptoms of COVID-19 before entering the workplace, the applicant for employment needs to be in the workplace as part of the application process, and the screening is limited to the same screening that everyone else undergoes. This is important because under the ADA, disability-related inquiries and medical examinations are generally prohibited before an employer makes a conditional job offer to an applicant.

Can Employers Withdraw Job Offers Because of COVID-19? (C.4)

Under previous guidance, the EEOC said that an employer could withdraw a job offer of an applicant with COVID-19 when that applicant was needed on site immediately. The EEOC now advises that an employer may withdraw the job offer of an applicant because the individual tests positive for the virus, has symptoms of COVID-19, or has been recently exposed, if the following three-part test is met: (1) the job requires an immediate start date, (2) CDC guidance recommends the person not be in proximity to others, and (3) the job requires such proximity to others, whether at the workplace or elsewhere. Given the ongoing labor shortage and the shortened CDC quarantine and isolation periods, employers who have the ability to do so may want to consider adjusting the start date or permitting telework for job candidates who accept a position but get COVID-19 before they start the job.

Can Employers Exclude High-Risk Employees from the Workplace? (G.3, G.4, G.5)

According to the EEOC, “[t]he ADA generally does not allow the employer to exclude the employee – or take any other adverse action – because the employee has a disability that the CDC identifies as potentially placing the employee at higher risk for severe illness if the employee gets COVID-19.” The EEOC reminds employers that not all of the medical conditions that might place individuals at higher risk for COVID-19 complications will automatically satisfy the ADA definition of a disability. Before taking any action when the

employee has a disability, the employer must determine whether the “the employee’s disability poses a “direct threat” to the employee’s health or safety that cannot be eliminated or reduced by reasonable accommodation.”

Even if the employer determines that an employee’s disability poses a “significant risk of substantial harm to the employee’s own health or safety,” the employer cannot exclude the employee from the workplace unless there is no reasonable accommodation that would “eliminate or sufficiently reduce” the threat so that it would be safe for the employee to return to work and perform the essential job functions. The updated guidance emphasizes that employers should first consider whether there are reasonable accommodations that would allow the employee to continue in their current position. The EEOC provides a number of examples of possible reasonable accommodations, including: adding air filtration measures such as High Efficiency Particulate Air (HEPA) filtration systems, modifying work schedules, or providing telework or a leave of absence. In this latest guidance, the EEOC explains that reassignment should be considered “as a last resort.”

Can Employers Exclude Older Workers Who May Be at High Risk? (H.1)

Since the beginning of the pandemic, the CDC has advised that older adults are at highest risk for severe COVID-19. The Age Discrimination in Employment Act (ADEA) prohibits employers from excluding older workers (age 40 and older) from the workplace even if the employer is concerned about the employee’s health. Unlike the ADA, the ADEA does not provide employees with a right to reasonable accommodation. However, the EEOC also reminds employers that older workers may have disabilities that may entitle them to reasonable accommodations under the ADA.

Can Employers Share Employee Vaccination Information? (K.4)

The EEOC updated its guidance regarding the confidentiality of information regarding employees’ COVID-19 vaccination status to identify circumstances under which employers may share that information. According to the EEOC, employers may share confidential medical information such as confirmation of employee vaccinations or COVID-19 test results with employees who need it to perform their job duties, as long as those employees keep the information confidential. The EEOC provides several scenarios under which sharing this information may be appropriate:

- An administrative employee assigned to perform recordkeeping of employees’ documentation of vaccination may receive needed access to the information for this purpose but must keep this information confidential.
- An employee assigned to permit building entry only by employees who are in compliance with a work restriction, such as COVID-19 vaccinations, testing, and/or masking, should only receive a list of the individuals who may (or may not) enter, but not any confidential medical information about why they are on (or not on) the list.
- An employee tasked to ensure compliance with a testing requirement for employees would need to review testing documentation submitted by those employees but must keep that testing information confidential.

Can Employers Require Vaccination of Employees with Disabilities? (K.5)

According to the EEOC, employers may require an employee with a disability to meet a qualification standard that is applied to all employees, such as a safety-related COVID-19

vaccination requirement if the standard is *job-related and consistent with business necessity as applied to that employee*. In the latest guidance, the EEOC clarifies that an employer does not have to show that a qualification standard, in this case a vaccination requirement, meets the “business necessity” standard as applied to all employees – only an employee who (a) has a disability and (b) informs the employer that a disability prevents compliance. If an employee cannot meet the vaccination requirement because of the disability, the employer can only require vaccination if the employee would demonstrate a “direct threat.”

Keep in mind that employers may also have to provide accommodations to a mandatory vaccination program based on disability, sincerely held religious beliefs and, in some cases, pregnancy. In addition, many states have adopted laws that permit employees to be exempted from an employer mandatory vaccination policy.

What should employers do? The latest EEOC guidance is a reminder that what made sense in 2020 or 2021 may no longer be in step with the changing legal and pandemic landscape. While the EEOC continues to state that EEO laws do not interfere with or prevent employers from following current guidance and suggestions made by the CDC and public health authorities about steps employers should take to prevent COVID spread, such guidance has changed since the beginning of the pandemic. Employers should therefore reevaluate their COVID-19 practices to ensure that they are legally compliant with evolving federal and state laws, reasonably necessary to minimize the spread of COVID-19 in the workplace, and make sense for business operations.

Jackson Lewis will continue to monitor changes in COVID-19 guidance and regulations impacting the workplace. If you have questions or need assistance, please reach out to the Jackson Lewis attorney with whom you regularly work.

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