

Making Antibody Tests Optional Won't Erase Legal Risks

By **Vin Gurrieri**

Law360 (June 26, 2020, 2:32 PM EDT) -- Although the U.S. Equal Employment Opportunity Commission's recent edict that businesses can't force returning employees to take COVID-19 antibody tests doesn't preclude employers from asking workers to take tests voluntarily, companies risk legal trouble if antibody detection is part of their reopening plan, experts say.

The EEOC issued **updated guidance** June 17 telling employers that they'll be in violation of the Americans with Disabilities Act if they require employees to take antibody or serology tests, which determine whether a person ever had COVID-19 and built up antibodies to the disease even if they were asymptomatic.

However, that guidance doesn't explicitly say that employers couldn't make the tests available on a voluntary basis for workers who want them. Nor does it prevent businesses from asking workers to share their results since the information could, in theory, help them get a sense of how widespread the virus has been within their ranks. That approach, however, comes with significant legal risk since the Centers for Disease Control and Prevention, which the EEOC cited in its guidance, has said the serology tests have numerous limitations, attorneys say.

Amory McAndrew of Hogue Newman Regal & Kenney LLP said there will surely be litigation surrounding employers' back-to-work policies and businesses would be well-served to hew closely to guidance from health officials and regulators.

"To play it close to the line I think is going to be risky," she said. "So I think employers have to be overly cautious when considering reopening policies if there's anything that comes even close to going against the CDC recommendations or EEOC guidelines."

Potential for Bias

As antibody tests have slowly come online over the past few months, employment law observers eagerly anticipated direction from the EEOC about the legality of those tests.

The EEOC's June 17 directive referenced earlier CDC guidance that said antibody tests shouldn't be used to determine if someone is immune to the virus or as a basis for decisions about allowing workers back on the job. More specifically, the EEOC said that antibody tests amount to the sort of medical examination that is prohibited under the ADA unless it is "job related and consistent with business necessity."

Gretchen Harders, a member in Epstein Becker Green's employee benefits and executive compensation practice, said antibody tests could offer certain benefits. For example, the availability of optional antibody tests could give workers some "peace of mind" of knowing whether they have been exposed to the virus, even if the science regarding immunity isn't in yet. But for the most part, the utility of the results is sketchy and there "could be a risk of a discrimination claim" if the information is used in a way the EEOC warns would be illegal, she said.

"It doesn't hurt to offer it, but I'm not sure that necessarily there's a good use for that information at the moment," Harders said. "There's this idea that employers want to take steps to make employees

comfortable in the workplace and to show they're [making] efforts to mitigate risks, but I'm not sure how useful [antibody tests] are going to be for things like contact tracing."

Margo Wolf O'Donnell, co-chair of the labor and employment practice at Benesch Friedlander Coplan & Aronoff LLP, similarly pointed to the risk of workers claiming they were mistreated under civil rights law.

"The EEOC was very clear that employers can't use the antibody test results to make employment decisions," O'Donnell said. "So, I think that employers are hesitant to use antibody tests or to make them even voluntary because if they are used at all, it could be imputed to the employer that they're using those results somehow to make employment decisions."

Voluntary in Name Only

If a business does give workers access to voluntary serology tests, it must then decide if they'll be provided through an employee assistance program or a group health plan and who will cover the cost of taking them, Harders said.

She pointed out that such tests usually involve bloodwork and would have to be done by a health care provider, laboratory or a person licensed to do the test.

If the test is paid for under a group health plan, Harders said it is covered by the Health Insurance Portability and Accountability Act, meaning that the employee "has to consent to whether that information goes to the employer."

"I think that's going to be the tricky issue," she said. "You can make it available, but is the employee going to consent to that information, whether they tested positive or not, to go to the employer?"

According to Hoguet Newman's McAndrew, businesses could run into trouble if workers claim that an antibody test was voluntary or optional in name only — and that their employer pressed them to get it done and submit the test results before they were allowed back to work.

The pressure could be more acute if the worker in question has been out of a job for weeks or months, with McAndrew questioning whether workers in that position will "feel like it's truly volunteering" if their employer floats the idea of taking a serology test ahead of their return.

"It could be a factor that people use themselves to decide if they're ready to come back, but I think it would be problematic if it's any way implied that there's pressure to come back or to get the test," she said.

Viral Tests Still Allowed

Even though the EEOC has staked out its position against mandatory serology testing for returning workers, it has taken the opposite stance when it comes to viral tests that determine if people have an active case of COVID-19.

Several months ago, the commission **gave businesses the green light** to make workers take viral tests before letting them back on a job site. The commission reiterated its position that viral tests are permissible under the ADA in its June 17 guidance, noting that viral tests and serology tests are different.

McAndrew said the EEOC's rationale for allowing viral tests was that people who are carriers of COVID-19 pose a "direct threat" to the health and safety of others. But since antibody tests identify people who have antibodies or had COVID-19 in the past, a person who tests positive for antibodies can't be deemed as a direct threat to the workplace, she said.

But even viral tests come with their share of legal and practical problems, including limited availability of tests and the need to keep any information gleaned from them private.

Benesch Friedlander's O'Donnell said employers that adopt viral tests as part of workplace safety

policies "definitely need to keep that information confidential" and in a separate medical file or risk running afoul of the ADA and state laws.

Employers might also find themselves in a tricky spot when they are informed that one of their workers has tested positive for COVID-19, according to McAndrew.

Since the information should be kept confidential, employers must balance their duty to respect a worker's privacy while also informing their colleagues that they may have been exposed to the virus through contact with the infected individual, a problem that is even more acute for small businesses or departments where only a few people work near one another.

"I think for bigger companies, it's not going to be as big a concern. They can send around a form to a group or a department saying, 'There's a possibility that you've had exposure to someone who tested positive and we ask that you look out for symptoms,'" McAndrew said. "But I think if it's in a small office where [there are] 10 people, then you have to notify the whole office that they've had exposure and you have to do it in a way that isn't going to say who is the person that tested positive and give their name, because obviously it's medical information. I think that's going to be trickier."

--Editing by Kelly Duncan and Abbie Sarfo.