CLIENT ALERTS & INSIGHTS

EEOC: Workplace Covid Testing Now Must be "Business Necessity"

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With the COVID-19 pandemic, employers generally had broad discretion to require employees to take COVID-19 tests before entering the workplace. However, the Equal Employment Opportunity Commission ("EEOC") has recently revised its guidelines surrounding workplace testing for COVID-19. In a July 12 update to a series of Q&As, the EEOC explained that employers must assess whether "current pandemic circumstances and individual workplace circumstances justify viral screening testing of employees to prevent workplace transmission of COVID-19." Now, as with other medical testing, employers must demonstrate that any Covid testing requirement is "job-related and consistent with business necessity."

According to the EEOC, employer use of a COVID-19 viral test will be considered a "business necessity" when use of the test is consistent with guidance from the Center for Disease Control, the Food and Drug Administration, and/or state and local public health authorities. The EEOC offers several factors, with accompanying references to the Center for Disease Control, for employers to consider in determining whether the use of a Covid test is a "business necessity." These factors include:

- The level of community transmission;
- The vaccination status of employees;
- The accuracy and speed of processing for different types of COVID-19 viral tests;
- The degree to which breakthrough infections are possible for employees who are "up to date" on vaccinations;
- The ease of transmissibility of the current variant(s);
- The possible severity of illness from the current variant;
- What types of contacts employees may have with others in the workplace or elsewhere that they are required to work; and
- The potential impact on operations if an employee enters the workplace with COVID-19.

The EEOC also makes clear that this updated guidance applies only to viral testing, which is defined as a test that determines whether the employee is currently infected with COVID. Employers are not permitted to use antibody tests as a prerequisite to returning to work after having Covid, as

guidance from the Centers for Disease Control and Prevention indicates that such antibody tests are not determinative of whether or not someone currently has an active case of Covid.

Finally, the updates clarify that employers may use viral COVID-19 tests for job applicants after extending a conditional job offer, so long as the employer does so *uniformly*, requiring all entering employees in the same type of job to take a Covid test.

Employers currently using a mandatory workplace COVID-19 testing policy should consider suspending the policy to assess whether, based upon the above-listed factors, mandatory COVID-19 testing can constitute a "job-related and consistent business necessity." This will be a fact-specific inquiry, unique to each employer.

Benesch attorneys are ready to assist with compliance with the EEOC's updated guidance. For more information, please contact Benesch's Labor & Employment Law attorneys listed below.

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