

### **EEOC Issues Guidance on the Permissibility of Mandatory COVID-19 Testing in the Workplace**

On April 23, 2020, the U.S. Equal Employment Opportunity Commission (“EEOC”) issued new guidance clarifying that employers may conduct mandatory testing of employees for COVID-19 before they enter the workplace so long as the testing is “job related and consistent with business necessity.”<sup>1</sup> The new guidance explains that employers may choose to test an employee for the virus before entering the workplace because an individual with COVID-19 will pose a direct threat to the health of others. The new guidance also echoes earlier EEOC guidance clarifying that employers may measure an employee’s body temperature because the Centers for Disease Control and Prevention (“CDC”) and other public health authorities have acknowledged community spread of COVID-19 and issued attendant precautions.

Employers are instructed to “ensure that the tests are accurate and reliable” and “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 the CDC and other public health authorities. Employers are also advised to “consider” the frequency with which certain tests produce false-positives or false-negatives. In addition, the new guidance reminds employers that testing only indicates if the COVID-19 virus is *currently* present.

Finally, the new guidance provides that employers “should still require” that employees observe infection control practices, such as social distancing, regular handwashing, and other measures “to the greatest extent possible.”

Employers should keep in mind that the EEOC’s new guidance only clarifies that mandatory testing for COVID-19 within the scope of this guidance would not violate the Americans with Disabilities Act (“ADA”). It remains unclear whether such testing would similarly pass muster under other applicable federal, state, and local laws (e.g., state and local anti-discrimination laws, as well applicable privacy provisions). In addition, an employer’s knowledge of a positive test result may potentially trigger other employer obligations under applicable federal, state, and local laws, including among others, (1) mandatory reporting under OSHA, (2) engaging in an interactive process (as required by the ADA and New York State law)/[cooperative dialogue \(as required by New York City law\) regarding potential accommodations](#), and (3) providing COVID-19-related leave. Employers would also be well-advised to evaluate their recordkeeping protocols to ensure that sensitive employee medical information is segregated from general personnel files.

Significantly, the new guidance does not address a number of questions that might arise in practice, including, but not limited to: what kind of testing would be allowed (e.g., testing for the virus or the antibodies), how often an employer can require employees to undergo testing (e.g., which may be necessary to verify potential false-positives or false-negatives), and what employment-related action an employer may take in response to an employee testing positive.

We will continue to closely monitor federal, state, and local guidance and requirements related to COVID-19 and the implementation of these complex new provisions.

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<sup>1</sup> The new guidance does not alter the ADA’s standards for pre-employment testing at the pre-offer or post-offer stages.