

CLIENT ALERT

EEOC Clarifies Today That Employers May Test Employees For COVID-19

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The EEOC today updated its online guidance regarding COVID-19 and the Americans with Disabilities Act (the ADA), stating that employers may now test their employees for the presence of the COVID-19 virus before entering the workplace. The EEOC had previously stated that employers could monitor their employees' body temperatures consistent with the ADA's direct threat principles, but had left open the question of the permissibility of COVID-19 testing. The EEOC's guidance is particularly timely as states begin to take steps to re-open businesses. The EEOC's guidance is [available here](#).

While the EEOC's position gives employers welcome comfort that they can test without running afoul of federal employment law, there are still many practical considerations employers should evaluate before implementing COVID-19 testing measures. Testing kits are still not widely available in many areas. Even where available and when administered properly, current tests may provide limited information to employers and therefore have limited usefulness in helping employers maintain a workplace free from the virus.

There are currently two forms of the test. The first is a swab test that detects whether the virus is currently present in the body on the day the test is administered. The test does not tell whether the person has had the virus or whether they will develop the virus in the future. Such tests would need to be administered daily to effectively mitigate workplace spread. The second is a blood test that detects COVID-19 antibodies. This test can tell whether the person has had COVID-19, but not whether the person is actively contagious. Because both types of tests are novel and have been rapidly developed in response to the COVID-19 crisis, there are still concerns about their accuracy and ongoing reports of false-positive and false-negative testing results. The EEOC therefore cautions employers to ensure that any tests used have been evaluated for accuracy and reliability. The EEOC further directs employers to review the latest guidance from the U.S. Food and Drug Administration before implementing any testing protocol.

Employers should also ensure that tests are conducted in a consistent, non-discriminatory, and confidential manner. Testing should not be used as a substitute for implementing other recommended (or, in some jurisdictions, required) safety measures like social distancing, regular sanitization of the workplace, and good hygiene practices. Before re-opening onsite operations or bringing more employees back to the workplace, employers are well-advised to work with counsel to develop a robust health and safety operational plan that complies with federal, state, and local laws and guidance.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

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