

## CLIENT ALERTS & PUBLICATIONS

### EEOC REVISES GUIDANCE ON MANDATORY COVID TESTING AND OTHER COVID-19 ISSUES

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Recently, the Equal Employment Opportunity Commission (EEOC) modified its guidance on when employers may mandate COVID testing in the workplace. As with all medical inquiries, the EEOC requires that testing be “job-related” and a “business necessity.” Previously, mandatory COVID testing was permitted because of COVID-19’s status as a pandemic. Now, the EEOC is requiring individualized assessments prior to requiring employees to take a COVID test to enter or re-enter the workplace.

#### What Has Changed About Mandatory Tests

The EEOC views COVID-19 viral tests as medical examinations for purposes of the Americans with Disabilities Act (ADA). The EEOC has long taken the position that medical examinations can only be required by an employer if the test is “job-related and consistent with business necessity.” Previously, the mere fact that the country was in the midst of a COVID-19 pandemic was sufficient, in the EEOC’s eyes, to demonstrate business necessity. The EEOC’s new position is that this is no longer true, and so the agency now is requiring an individualized assessment of job-relatedness and business necessity before a COVID test can be mandated.

The new guidelines suggest a number of factors that employers may wish to consider in making that determination. These include:

- Current levels of community transmission
- The current variant – how transmissible is it and how severe are the symptoms
- The employee’s vaccination status
- The accuracy and speed of processing for the available COVID-19 viral tests
- How closely the employee must work with other employees
- The impact on business operations if the employee in question comes to work with an infection

Much of the information required for these individualized assessments is available through the CDC. In fact, the EEOC guidance specifically encourages employers to consult the most recent guidance from the CDC and/or state and local public health authorities before requiring COVID testing.

For clarification, the EEOC’s updated guidance notes that unlike viral screening, antibody testing, is always prohibited because it does not reveal an employee’s current infection status or immunity to potential infection.

#### What the Changes Mean to Employers

Life for employers that wish to mandate COVID-19 testing for employees to enter or re-enter the workplace has become much more complicated. Decisions whether to require testing will need to be made location by location, because transmission rates vary among locations. Such rates also change frequently, so once made, decisions to require testing will need to be re-visited periodically.

And in light of the need for individualized assessment, a mandatory test requirement may not apply to all employees, which can result in morale and related issues in the workplace. Transparency as to how and why decisions are being made will be critical.

The guidance is far from clear as to what is and what is not permissible. For example, a nationwide policy requiring all employees to submit to weekly or bi-weekly testing without regard to local transmission rates may prove problematic to the EEOC. On the other hand, requiring a negative test result from an unvaccinated employee who has been out of work for five days due to close contact with a confirmed case seems likely to meet the EEOC's criteria for permissible testing. Situations falling between these two extremes may be harder calls to make.

#### COVID-19 & Hiring

The new EEOC update states that an employer may screen a job applicant for COVID-19 before the employee enters the worksite as long as the employer screens everyone else for entry (employees, contractors, visitors, etc.).

#### COVID-19 & Withdrawing Job Offers

An employer may withdraw an offer when: (1) the job requires an immediate start date; (2) CDC guidance recommends the person not be in proximity of others; and (3) the job requires such proximity, whether at the workplace or elsewhere. Employers are also not permitted to postpone a start date/withdraw an offer because of concern for an applicant's age or any underlying vulnerability that put them at greater risk due to COVID-19.

#### Vaccination

Employers are still permitted to require all employees be vaccinated against COVID-19, allowing of course for the possibility that accommodation may need to be made for persons with disabilities or sincerely held religious beliefs that prevent those persons from complying with the requirement. The EEOC suggests that employers be mindful of certain other barriers that exist for individuals with respect to getting vaccinated, and understand that implementing a vaccine requirement could have disparate impacts on workforce metrics. Further, the EEOC update reinforces the importance of employee vaccination confidentiality: employers should share this information only when it necessary for an employee to perform his or her job duties.

This updated guidance signifies that the EEOC may be poised for a gradual return to pre-pandemic standards, which provided less deference to concerns about controlling the workplace transmission of COVID-19.

Nemeth Law will continue to monitor legislation, regulation, administrative guidance, and litigation in the everchanging COVID landscape. We encourage you to contact any Nemeth Law attorney with your COVID-19 related employment questions.