IT'S COMPLICATED:

TOP 10 ISSUES AFFECTING COVID-19 EMPLOYEE SCREENINGS

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Fredrikson & Byron

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Balancing employees' rights with an employer's desire to keep employees safe during a pandemic is the ultimate employment challenge. Both employers and employees will appreciate how tricky it is to navigate federal and state guidelines. This article addresses top COVID-19 testing guidelines from an employer's perspective. But employees who are subject to testing will find it interesting as well.

Federal Law, Title I of the Americans with Disabilities Act of 1990 (the ADA) limits an employer's ability to make disability related inquiries or require medical examinations during employment. Medical examinations have to be "job-related and consistent with business necessity".

The Equal Employment Opportunity Commission (EEOC) is the federal regulatory agency that enforces sections of the ADA and provides guidance on its application. During the pandemic, the EEOC issued guidance on screenings and testing of employees to assist employers in navigating the rough waters of keeping their businesses open while providing safe working environments for employees.

As employers begin to recall employees to the workplace, many are planning to require employees to submit to medical tests for the purpose of detecting COVID-19. In this regard, it is important to distinguish between viral tests that determine if a person is actively infected with COVID-19 and antibody or serology tests, which determine whether a person was ever infected with COVID-19, even if they are asymptomatic, and built up antibodies to the disease.

Here are 10 considerations employers should be aware of when implementing any COVID-19 related employee screenings or tests:

1. Screenings Must be Required of All Employees. Just as with temperature screening, screening/testing for COVID-19 must be conducted in a non-discriminatory basis, which most likely means that all employees entering the worksite must be tested.

2. Medical Records are Confidential. The basic rule, with limited exceptions, is that employers must keep confidential any medical information they learn about an applicant or employee. Information can be confidential, even if it contains no medical diagnosis or treatment course, and even if it is not generated by a health care professional. For example, a health screening filled out by an employee to ensure they are not coming to work sick is a confidential medical record; it

should be stored separately from the HR file and shared only with managers and supervisors who have a business reason to know that information.

3. Test Has to be Directly Related to Minimizing a Threat. Any screening, test or inquiry that is broader than necessary to address the potential direct threat is prohibited.

4. Test Refusals. Create a plan in advance on how to deal with an employee who refuses to complete a test or complete a screening questionnaire. Make sure to inquire about the employee's reason for refusing to test. If the employee has a medical condition or religious reason that requires an accommodation, the employer will need to assess whether an accommodation may be necessary, and not improperly deny an employee's ability to work if they refuse to cooperate.

5. Wage and Hour Laws. Federal and State laws require employees be paid for time spent working. Depending on your screening program and when the employee has to complete the screening or test and the amount of time involved, there may be a legal requirement to pay employees for time waiting to be tested, completing questionnaires, filing out electronic health apps, or time spent waiting for the results of a test. In addition, North Dakota law requires that the costs of medical examinations required by the employer be paid for by the employer.

6. Employee Privacy during Screening or Testing Results. Employee privacy could be sleeping giant in the COVID-19 pandemic. Employers need to ensure the processes for collecting screening and testing information is done in a private and confidential manner to ensure an employee's medical information is not improperly disclosed to other co-workers. For example, implementing a temperature-taking process, with employees standing in line where temperatures are either displayed or communicated verbally, may result in a violation of an employee's privacy.

In addition, communicating to members of a work group that an employee with whom they have had close contact with has tested positive for COVID-19 must be done without disclosing an employee's identity. Whenever possible, an employee who has been exposed to or tested positive for COVID-19 should be made aware of the employer's need to make certain disclosures to the workforce, and employers should give the employee a reasonable choice whether to permit particular information uses or disclosures.

7. Tests Must be Non-Intrusive. Consider implementing non-invasive screenings of employees (such as body temperature checks or symptom questionnaires). Seek to facilitate testing in the least invasive way possible, including by attempting to procure devices that can register temperature without exposure to bodily fluids (e.g. no-contact thermometers). Devices that measure thermal imaging, in addition to temperatures, may provide the employer with more information than what is job related and consistent with a business necessity.

8. Test Selection. Exercise care in selecting a test to use, particularly in light of well-documented issues with test accuracy.

9. Antibody or Serology Tests Violate the ADA. On June 17, 2020, the EEOC issued guidance declaring that an antibody test is a medical examination, and employers who require employees to submit to antibody tests as a condition of returning to work violate the ADA. The EEOC relied on the latest opinion of the Center for Disease Control and Prevention (the CDC), which concluded that antibody tests are not reliable in determining if a person is immune to the disease or as basis for a decision about allowing persons back to work.

Based on the CDC's opinion, the EEOC has concluded that an antibody test does not meet the ADA's job-related and business-necessary standard for a medical exam. It is important to note that it remains the EEOC's position that viral tests to determine if a person actively suffers from COVID-19 are permissible, and do not violate the ADA. 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. However, since antibody tests identify people who have antibodies or had COVID-19 in the past, a person who tests positive for antibodies cannot be deemed as a direct threat to the workplace.

10. Can an Antibody or Serology Test be Voluntary and Not Violate the ADA? If an employer gives workers access to a voluntary serology or antibody test, it must then decide if they will be provided through an employee assistance program or a group health plan and who will cover the cost of taking them. Also, test results provided directly from a health care provider to the employer will require a medical release of information.

Consider this: Would an employee really believe their consent to an antibody or serology test was voluntary, or optional in name only, since the employee likely feels pressured to complete the test in order to return to work? The pressure could be more acute if the worker or the employee in question has been out of a job for weeks or months and the employer floats the idea of taking a serology test prior to their return to work.

Even voluntary antibody or serology testing can be risky, and employers should be overly cautious when considering this approach, especially if there is any indication that the CDC recommendations or the EEOC guidelines are not being followed. The EEOC was very clear that employers cannot use the antibody test results to make employment decisions. So employers should be very hesitant to use antibody tests, even when voluntary, because it may imply the employer is using those results somehow in making employment decisions.

Given the evolving knowledge regarding COVID-19, and as this article illustrates, employers must regularly monitor medical developments, as well as testing and screening processes, to assess how they may impact legal obligations under the ADA and other applicable state and federal laws. Employees subject to these medical inquiries or medical examinations will benefit from understanding the legal framework surrounding when these activities are permissible as well.