# Permissibility of Employer Medical Testing in the Era of COVID-19

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## Introduction

Since the World Health Organization (WHO) declared the coronavirus disease (COVID-19) a pandemic, the way the world works has been completely upended.[1] In this unsettled environment, employers have had to contend with stay-at-home orders, new safety requirements, and other significant workplace changes. Now that governments are lifting "shelter-at-home" orders, employers face difficult decisions relating to the critical, and fundamental, concern of keeping their employees safe. This includes employers' ability, and obligation, to test returning employees for COVID-19 prior to allowing employees to return to the workplace. This article discusses the permissibility of employer testing for COVID-19, whether such testing is mandatory or voluntary, and other issues this situation raises for employers.

## An Employer May Test Employees Prior to Employees Reentering the Workplace

The Equal Employment Opportunity Commission (EEOC) has made clear that employers "may choose to administer COVID-19 testing to employees before they enter the workplace to determine whether they have [COVID-19]."[2] Under normal circumstances, the Americans with Disabilities Act (ADA) generally prohibits any sort of mandatory medical exam by employers unless the medical exams are "job related and consistent with business necessity."[3] An examination is job-related and consistent with business necessity if the employer has reason to believe that the employee may have a medical condition that restricts the employee's ability to perform essential job functions and/or that poses a "direct threat" of harm to others in the workplace. A "direct threat" is defined as a significant risk of substantial harm to the health or safety of the employee or others that cannot be eliminated or sufficiently reduced by a reasonable accommodation.[4] In guidance issued on March 21, 2020, the EEOC explained that the assessments made by the Centers for Disease Control and Prevention (CDC) regarding COVID-19 provide objective evidence that an employee with COVID-19 constitutes a direct threat to the workplace.[5] Therefore, applying this standard to the present COVID-19 pandemic, employers may take steps, such as administering testing, to determine if employees entering the workplace have COVID-19.

While employers are permitted to test employees seeking to re-enter the workplace, doing so will result in a range of practical and legal issues for employers. To start, employers must be sure that the examinations are narrowly tailored to obtain only information related to the purpose of protecting other employees from COVID-19. Moreover, employers should ensure the tests they use are accurate, which may be difficult given the current lack of reliable testing equipment. Employers should review guidance from the U.S. Food and Drug Administration about what tests may or may not be considered safe and accurate, as well as guidance from the CDC or other public health authorities. Further, employers that have the capability to conduct COVID-19 testing in-house will be required to address stringent workplace safety requirements. Employers that turn to a third-party service provider that is a covered entity under the Health Insurance Portability and Accountability Act of 1996 (HIPAA) cannot obtain test results unless employees execute a HIPAA-compliant authorization. Finally, employers should be sure to pay for all time employees spend testing as well as all costs associated with testing as the tests are likely to be considered a business expense.

Employers that choose to require COVID-19 tests prior to employees returning to the workplace should continually follow all government guidance and legal updates and/or seek legal counsel on whether, and when, such testing is no longer permitted. Widespread testing of all

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1 World Health Organization, *WHO Director-General's opening remarks at the media briefing on COVID-19, (March 11, 2020), available at* https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020.

2 U.S. Equal Employment Opportunity Commission, *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws* ("COVID-19 Guidance"), at A.6 (updated June 11, 2020), *available at* https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws.

3 COVID-19 Guidance, *supra* note 2, at A.6.

4 COVID-19 Guidance, *supra* note 2, at A.6.

5 U.S. Equal Employment Opportunity Commission, *Pandemic Preparedness in the Workplace and the Americans*

employees may not be defensible once the CDC and/or public health authorities determine that the threat posed by COVID-19 has diminished. This is because the existence of the virus, standing alone, will no longer constitute objective evidence that any employee could pose a "direct threat" to the workplace, putting the onus on employers to point to objective reasons to believe that a given individual should be tested because they may have COVID-19, and pose a direct threat to the workforce.

**Other Considerations of COVID-19 Testing**

The administering of COVID-19 tests brings various other challenges and considerations of which employers should be aware.

One issue is the *requirement* by various local governments that employers test employees prior to allowing employees to return to work. For instance, Fresno and Merced Counties, among others, require certain employers to screen employees for symptoms and for COVID-19 itself. Likewise, different sectors of the economy may have different requirements and guidelines to follow, particularly public-facing businesses and the healthcare sector. Employers in the healthcare or nursing home industry, for example, will likely have heightened requirements applicable to their employees. Employers will need to take into account the ever-evolving orders, recommendations, and guidance from state and local authorities when determining whether they want to, or must, test employees for COVID-19.

Another critical challenge of medical testing that employers face are privacy concerns. If an employer requires employees to undergo a medical examination, employers must treat all information relating to the results as separate, confidential medical records. The ADA requires employers to maintain the confidentiality of the results of medical exams and to maintain these records in a file separate from the personnel file. If the employer uses online systems for storing employee information, they must ensure that the health data is stored and transmitted securely and that the online storage incorporates privacy features. At all points of collecting, storing, transmitting, using, and disclosing the screening results, employers must carefully safeguard this information. Several states specifically require employers to provide reasonable data security for health data; employers should be aware of such state and local laws in the areas in which they employ persons. Additionally, only those employees within the company who are managing the threat of COVID-19 should have access to the employee screening results. The ADA generally prohibits employers from sharing the results of a medical examination except in narrow circumstances. For example, the EEOC issued guidance instructing employers that they can release the names of employees diagnosed with COVID-19 to health authorities.[6] Internally, only those who need the employee's diagnosis to prevent the direct threat of COVID-19 to others in the workplace should receive that information. For instance, employers should have one person in charge of tracing an infected employee's contacts to limit who knows such individuals' names. The EEOC has recognized that sometimes people will guess the identity of the infected individual and has stated that, even if the guesses are correct, the company should not confirm the person's name.

Employers should also be aware that while they may seek various ways to reduce the risk of COVID-19 in their workplace, such as testing returning employees for COVID-19 antibodies, the WHO stated that "[t]here is currently no evidence that people who have recovered from COVID-19 and have antibodies are protected from a second infection."[7] Therefore, the EEOC's current guidance on COVID-19 testing does not address the permissibility of employers testing employees for the presence of antibodies. Moreover, antibody testing would likely fail the "job-related and consistent with business necessity" standard since the test does not exclude employees with a medical condition that would pose a direct threat to health or safety of other employees.

Additionally, the CDC has issued guidance discouraging employers from requiring employees to provide a note from a doctor or medical care provider to validate

*with Disabilities Act*, ("Pandemic Preparedness") (updated March 21, 2020), *available at* https://www.eeoc.gov/laws/guidance/pandemic-preparedness-workplace-and-americans-disabilities-act.

[6] U.S. Equal Employment Opportunity Commission, *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*, (updated May 5, 2020), https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws

[7] World Health Organization, "*Immunity passports" in the context of COVID-19*, (April 24, 2020), https://www.who.int/news-room/commentaries/detail/immunity-passports-in-the-context-of-covid-19

they have been tested for COVID-19 in order to return to work as such requirement would increase the burden on the healthcare system. Similarly, certain state and local governments have taken a step further and issued laws restricting employers from requiring employees to provide such medical documents.

Finally, employers should make sure not to engage in unlawful discriminatory treatment in any decisions related to COVID-19 medical testing, as well as to consider all possible wage and hour concerns for any time employees are required to spend in the medical testing.

## Conclusion

These issues and others highlight the need for employers to convene a multidisciplinary team to address COVID-19. However, employers are currently permitted to test employees for COVID-19 prior to returning to the workplace. Due to the host of legal and public health issues employers must consider to ensure the safety and health of employees, employers should continue to monitor federal, state, and local guidance related to COVID-19 and consult with legal counsel when necessary to ensure compliance with all laws while maintaining the health of our workforces. There is no "one-size-fits-all" approach to returning to work and that makes the process all the more challenging for employers.

*Courtney Chambers is an attorney at Littler Mendelson in San Francisco. She represents employers in cases involving labor, wage and hour, discrimination, wrongful termination and other issues. Littler Mendelson, P.C. is a global and leading labor and employment law firm. To address employer concerns, as well as global issues surrounding the outbreak and its effect on the workplace, Littler's COVID-19 task force has compiled a practical compliance solution, which includes an expanded Temperature and Symptom Screening Toolkit that provides detailed guidance and sample protocols, notices, and forms for temperature and/or symptom screening. Ms. Chambers can be contacted at (cchambers@littler.com).*