

Services

[Employment Law](#)

[OSHA Compliance & Defense](#)

[Employment Litigation and Arbitration](#)

[FLSA Litigation and Wage and Hour Defense](#)

[Immigration](#)

[Unfair Competition and Trade Secrets](#)

[Labor Law](#)

[Employment Advice, Counseling and Risk Management](#)

EEOC Issues Updated COVID-19 Guidance for Employers

Due to evolving pandemic circumstances, the U.S. Equal Employment Opportunity Commission (“EEOC”) has published updated [guidance](#) for employers related to COVID-19, including administering viral screening tests to prevent workplace transmission and responding to requests for accommodation. Below is an overview of the key substantive changes in the EEOC’s guidance.

Return to Work

According to the EEOC’s new guidance, the Americans with Disabilities Act (“ADA”) permits employers to require confirmation from a qualified medical professional explaining that an employee who had been out with COVID-19 may safely return to work. The EEOC reasoned that “because COVID-19 is not always a disability, a request for confirmation may not be a disability-related inquiry.” Even if the request were considered a disability-related inquiry, it still may be justified under the ADA because the request would meet the “business necessity” standard, as it is related to the possibility of transmission and/or related to an employer’s objective concern about the employee’s ability to return to work.

The EEOC further noted that instead of requiring a note from a medical professional, employers may follow [guidance](#) from the Centers for Disease Control and Prevention (“CDC”) to determine whether it is safe to allow an employee to return to the workplace.

COVID-19 Testing

The EEOC’s updated guidance makes clear that an employer may administer a COVID-19 viral¹ test only if it is job-related and consistent with business necessity, because such testing is considered a medical examination under the ADA. Employer use of a COVID-19 viral test meets the business necessity standard if it is consistent with guidance from the CDC, the Food and Drug Administration

¹ Employers may not require antibody testing, because these tests do not show whether an employee has a current COVID-19 infection, nor do they meet the business necessity standard.

(“FDA”) and other state/local public health authorities. If an employer seeks to implement screening testing for employees, the testing must meet the “business necessity” standard based on relevant factors, including:

- The level of community transmission;
- The vaccination status of employees;
- The accuracy and speed of processing for different types of COVID-19 viral tests;
- The degree to which breakthrough infections are possible for employees who are “up to date” on vaccinations;
- The ease of transmissibility of the current variant(s);
- The possible severity of illness from the current variant;
- The types of contacts employees may have with others in the workplace or elsewhere that they are required to work (e.g., working with medically vulnerable individuals); and
- The potential impact on operations if an employee enters the workplace with COVID-19.

Hiring and Withdrawal of Job Offers

Employers may screen applicants for COVID-19 symptoms after making a conditional job offer, so long as they do so for all entering employees in the same job type. Employers may screen applicants in the pre-offer stage, i.e., before a conditional job offer is made, only if it screens everyone—including employees, contractors and visitors—for COVID-19 before permitting them to enter the workplace. The EEOC cautions that such pre-offer screening is limited to the same screening that everyone else undergoes. If an employer goes beyond that screening, it will be found to have engaged in an illegal pre-offer disability-related inquiry and/or medical examination.

Employers may not withdraw job offers if the applicant has, or has been exposed recently to, COVID-19, unless (1) the job requires an immediate start date, (2) current CDC guidance recommends the applicant not be in proximity to others, and (3) the job requires proximity to others. The EEOC suggests that because some individuals may need to isolate or quarantine for a short period of time, employers may be able to adjust the applicant’s start date or permit telework if the job duties may be performed remotely.

If an employer is concerned that the applicant is pregnant, has an underlying medical condition, or is older, the employer may not unilaterally postpone the applicant’s start date or withdraw a job offer. According to the EEOC, an employer’s concern for an applicant’s well-being is not an excuse for action that otherwise is unlawful discrimination. Further, if the applicant’s underlying medical condition

constitutes a disability, the employer must determine whether the disability poses a “direct threat” by starting work immediately and, if so, whether reasonable accommodation may be provided to lessen or eliminate any risks without causing an undue hardship.

Confidentiality of Vaccination Status and Test Results

Information regarding an employee’s COVID-19 vaccination status or test results must remain confidential and stored separately from the employee’s personnel file. This information may be shared only with employees who need it to perform their jobs. Examples include scenarios where:

- An administrative employee keeping records of employees’ documentation of vaccination may receive necessary access to the information for this purpose but must keep this information confidential.
- An employee assigned to permit entry to the workplace only by employees who are in compliance with a work restriction, such as COVID-19 vaccinations, testing or masking, should receive a list of the individuals who may (or may not) enter, but not any confidential medical information about why they are on (or not on) the list.
- An employee tasked with ensuring compliance with employee testing requirements would need to review testing documentation submitted by employees, but must keep such information confidential.

Reasonable Accommodations and the Interactive Process

The EEOC’s updated guidance recognizes that the pandemic may still cause delays during the interactive process and/or in providing reasonable accommodation. Employers, however, “must show specific pandemic-related circumstances justified the delay.”

The EEOC suggests employers consider other ways to determine the safety of allowing an employee to return to work if doctors and other healthcare professionals are unable to provide such documentation either in a timely manner or at all, such as relying on local clinics to provide a form, stamp or email to confirm that an employee is no longer infectious and may resume working.

PPE and Infection Control

Employers may still require the use of personal protective equipment (“PPE”) and other infection control practices, subject to ADA or religious accommodation. Employers should provide reasonable accommodation unless it would cause an undue hardship on the employer’s business.

Employees at Higher Risk for Severe Illness

Employees with conditions that put them at higher risk for severe illness from COVID-19 may request an accommodation by letting their employer know that they need to change some aspect of their employment for a reason related to their medical condition. These requests may be from the employee or a third party, may be verbal or written, and do not need to use the term “reasonable accommodation” or reference the ADA. After receiving a request for accommodation, employers may ask questions or seek medical documentation to determine if the employee is disabled under the ADA, and whether a reasonable accommodation can be provided barring undue hardship.

If an employer is aware that an employee has a medical condition that is more likely to cause severe illness from COVID-19, but the employee has not requested an accommodation, the EEOC’s guidance clarifies that the ADA does not require the employer to take any action². The employer, however, may not exclude the employee or otherwise take any adverse action unless the employee’s disability poses a “direct threat” that cannot be remedied by reasonable accommodation. The EEOC issued a reminder that the “direct threat” standard is difficult to meet, as the employer must prove that the individual has a disability that poses a “significant risk of substantial harm” to the employee’s own health or safety, or that of others in the workplace, and that there is no way to provide a reasonable accommodation absent undue hardship. The EEOC also provides examples of reasonable accommodations that may eliminate or reduce a direct threat, including protective gowns, masks, gloves, air filtration systems or measures, physical barriers, increasing the space between the employee and others, eliminating some nonessential job functions, teleworking, modifying work schedules, and moving the employee to another work location. The EEOC encourages employers and employees to be “creative and flexible” in identifying effective accommodations.

Mandatory COVID-19 Vaccinations

Employers still are permitted to require employees to be vaccinated against COVID-19, subject to reasonable accommodation for employees with disabilities or sincerely held religious beliefs. However, accommodation requests that impose an undue hardship on the employer’s business operations are not required.

²The EEOC’s updated guidance notes that the risk for severe illness with COVID-19 increases with age. The Age Discrimination in Employment Act (“ADEA”), however, prohibits excluding an individual involuntarily from the workplace based on their age, even if intended to protect the older employer. The ADEA, unlike the ADA, does not include the right to reasonable accommodation for older workers, but employers are free to provide flexibility to older workers even if it means younger workers are treated less favorably. Older workers also may have medical conditions that constitute disabilities for purposes of the ADA, thus permitting them to request reasonable accommodation for such disabilities.

If an employee requests an accommodation from a mandatory vaccination policy due to a disability, the employer must determine if the unvaccinated employee poses a “direct threat” to the workplace, including consideration of relevant factors such as:

- The duration of the risk;
- The nature and severity of the potential harm;
- The likelihood that the potential harm will occur; and
- The imminence of the potential harm.

Employers should use reasonable medical judgement and consider the level of community spread, statements from the CDC or the employee’s healthcare provider, and the work environment. If an exemption from the vaccine policy would cause undue hardship, the employer also must consider whether a reasonable accommodation would reduce or eliminate the threat.

The EEOC’s new guidance further notes that an employer with a mandatory vaccination policy may be subject to allegations that the policy has a disparate impact on employees based on a protected characteristic. The EEOC recommends that employers keep in mind that because some individuals or demographic groups may face barriers to receiving a COVID-19 vaccination, some employees may be more likely to be negatively impacted by a vaccination requirement.

Employers still are permitted to provide incentives (including both rewards and penalties) to employees to encourage vaccination. According to the EEOC’s new guidance, the ADA does not limit the incentives an employer may provide, so long as the healthcare provider administering a COVID-19 vaccine is not the employer or its agent. If, however, the vaccination is administered by the employer or its agent, the value of the incentive may not be so substantial as to be coercive.

If you have any questions about the EEOC’s updated COVID-19 guidance, or how it might impact your organization’s continued management of COVID-19, please contact your Kutak Rock attorney or a member of the firm’s [National Employment Law Group](#). You may also visit us at www.KutakRock.com.

