

COVID-19 and the Workplace: Considerations for Mandatory Testing and Vaccinations

Many employers are beginning to call back employees, who were temporarily allowed to telecommute, furloughed, or laid off in response to the COVID-19 crisis. As a measure to protect the workforce, some employers may be considering mandatory COVID-19 testing of employees as a condition of their return. Can employers require mandatory testing or mandatory vaccinations (if one is later developed)? What should employers do upon employee refusal?

Can employers require testing for COVID-19?

Under the Americans with Disabilities Act (ADA), mandatory medical tests of employees are permitted so long as such tests are job-related and consistent with business necessity. Recently, the Equal Employment Opportunity Commission (EEOC) released guidance regarding this standard as it relates to COVID-19 testing. According to the EEOC, employers may take steps to determine if employees entering the workplace have COVID-19, including testing, because employees with the virus may pose a direct threat to others. The EEOC encourages employers to use reliable and accurate testing based on the most up-to-date testing guidance from public health authorities.

If employers choose to test as a condition of return, they should further make sure to consistently and objectively develop and apply any policy-related to testing. Any testing targeted towards certain groups of employees based on any protected class status, including age, actual or perceived disability, or national origin, could subject an employer to a claim of discrimination.

What happens if an employee refuses to test?

Even though testing is permitted, employers should be prepared that certain employees may resist testing. If an employee refuses, the employer should first ask for the reason supporting refusal. The employer's response may depend on the reason given.

For instance, an employee may cite religious reasons for refusal. Under Title VII of the Civil Rights Act of 1964, employers are required to accommodate the "sincerely held" religious beliefs of employees that can be accommodated without undue hardship. An undue hardship exists if accommodation would cause more than a de minimis cost on operations. A refusal to test may impose an undue hardship because a COVID-19 infection in the workplace poses a direct threat to others. However, other accommodations in the manner or logistics of testing may be possible, depending on the employee's religious beliefs. The employer and employee should engage in a discussion to determine if an accommodation exists.

A similar discussion should occur if an employee cites disability-related concerns for refusal as the ADA requires employers to provide reasonable accommodations to qualified individuals with disabilities, provided the accommodations do not constitute an undue hardship. The threshold for "undue hardship" under the ADA is much higher than religious accommodations. Nonetheless, depending on the employee's disability constraints with testing, accommodations may be possible in the testing process.

Other employees may resist testing for entirely personal reasons. Under these circumstances, employers may remind employees that all medical information obtained will remain confidential. If the employee continues to refuse in violation of a mandatory testing policy, the employer can discipline the employee and/or exclude him from the workplace until he agrees to be tested. Employers should document any refusal to cooperate. Documenting refusal (and the employee's workplace departure) is particularly important in the event of a subsequent Occupational Safety and Health Administration ("OSHA")-related investigation. OSHA has issued a new requirement (reversing previous guidance) that all employers must investigate and determine whether an employee with COVID-19 contracted it at work. Maintaining documentation that supports the employer's efforts to maintain a safe, COVID-free workplace (including documentation that an employee was sent home upon testing refusal) will be important.

Can employers require mandatory vaccinations for COVID-19?

Currently, the medical community is scrambling to develop a COVID-19 vaccine. It remains to be seen when (or if) an effective vaccine will be developed. Assuming one is developed, employers may wonder whether they can require employees to be vaccinated to further protect the workplace.

This question has come up frequently in the context of requiring employees to take the influenza vaccine. In recent guidance, the EEOC indicates that its position related to mandatory flu vaccines would likely apply to a potential COVID-19 vaccine. That is, employees may be entitled to an exemption from any mandatory vaccination requirement based on a disability or religious belief that prevents them from taking the vaccine. To avoid these issues, the EEOC advises employers to simply encourage the vaccine rather than requiring it.

Take-Away

Employers want to ensure healthy, safe workplaces when calling back employees. In supporting these efforts, clear, non-discriminatory policies and practices should be established whenever implementing required testing and/or future vaccinations. In addition, employers should consult with their employment attorneys whenever questions arise.

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