



EEOC Now Requires “Business Necessity” for Mandatory Workplace COVID-19 Screening

On July 12, 2022, the U.S. Equal Employment Opportunity Commission (EEOC) updated its [Technical Assistance Questions and Answers](#)¹ regarding COVID-19 (Guidance) to state that under the Americans with Disabilities Act (ADA) an employer may mandate COVID-19 medical testing of employees and applicants as a condition to enter the workplace only if it is “job-related and consistent with business necessity.” This is a change from the EEOC’s prior position that such testing was presumptively considered job-related and consistent with business necessity because of the circumstances of the pandemic. In determining whether the “business necessity” standard for testing employees is met, the EEOC states that employers should consider the following factors:

- Level of COVID-19 transmission in the community;
- Vaccination status of employees;
- Accuracy and speed of processing for different types of COVID-19 viral tests;
- Degree to which breakthrough infections are possible for employees who are “up to date” on vaccinations;
- Ease of transmissibility of the current variant(s);
- Possible severity of illness from the current variant;
- 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
- Potential impact on operations if an employee enters the workplace with COVID-19.

The Guidance directs that, in making the above assessments, employers should check the latest [Centers for Disease Control and Prevention \(CDC\) guidance](#)² (and any other relevant sources) to determine whether screening testing is appropriate for employees.

The Guidance also specifically prohibits employers from requiring employees to undergo a COVID-19 antibody test, as opposed to an antigen test, before re-entering the workplace because an antibody test does not meet the “business necessity” test since the results do not show whether an employee has a current infection, nor establish that an employee is immune to infection.

Despite the EEOC’s about-face on employee screening, its practical effect may be limited. According to the CDC, COVID-19 transmission levels remain high virtually throughout the United States, the current dominant variant is the most transmissible yet, the current available vaccines provide limited protection from the current circulating variant, and mounting evidence shows that immunity levels from vaccination drop significantly after several months. All of which arguably support mandatory screening. Nonetheless, employers that desire to mandate COVID-19 screening should review their testing policies and protocols and revise them as necessary to comply with the Guidance.

Additional Assistance

For further assistance, please contact any of the attorneys on our [Labor & Employment Practice Team](#) or the [Phillips Lytle attorney with whom you have a relationship](#). ■

¹ <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws#A.6>

² <https://www.cdc.gov/coronavirus/2019-ncov/hcp/testing-overview.html>



PHILLIPS LYTLE LLP CLIENT ALERT

LABOR & EMPLOYMENT

JULY 2022



Phillips Lytle LLP

Albany Omni Plaza 30 South Pearl Street Albany, NY 12207-1537 (518) 472-1224

Buffalo One Canalside 125 Main Street Buffalo, NY 14203-2887 (716) 847-8400

Chautauqua 201 West Third Street Suite 205 Jamestown, NY 14701-4907 (716) 664-3906

Garden City 1205 Franklin Avenue Plaza Suite 390 Garden City, NY 11530-1629 (516) 742-5201

New York City 620 Eighth Ave 38th Floor New York, NY 10018-1442 (212) 759-4888

Rochester 28 East Main Street Suite 1400 Rochester, NY 14614-1935 (585) 238-2000

Chicago, IL 161 North Clark Suite 1700 Chicago, IL 60601-3342 (312) 794-7300

Washington, DC 1101 Pennsylvania Avenue NW Suite 300 Washington, DC 20004-2514 (202) 617-2700

Canada The Communitech Hub 151 Charles Street West Suite 100 The Tannery Kitchener, Ontario N2G 1H6 Canada (519) 570-4800

Prior results do not guarantee a future or similar outcome. The foregoing is for informational and advertising purposes only. The information provided is not legal advice for any specific matter and does not create an attorney-client relationship. The recipient of this publication cannot rely on its contents. If legal advice is required for any specific matter, please consult with qualified legal counsel. We would be pleased to assist you.

©2022 Phillips Lytle LLP
Attorney Advertising
PHILLIPSLYTLE.COM