CLIENT ALERT: EEOC Updates Guidance on COVID-19 Testing in the Workplace

On July 12, 2022, the Equal Employment Opportunity Commission ("EEOC") once again updated its Technical Assistance Questions and Answers. In this update, the EEOC addressed whether an employer may administer a test to detect the presence of the COVID-19 virus (a "COVID test") when evaluating an employee's initial or continued presence in the workplace. In its updated guidance, the EEOC makes clear that "going forward, employers will need to assess whether current pandemic circumstances and individual workplace circumstances justify a viral screening testing of employees to prevent workplace transmission of COVID-19." For prior updates by the EEOC, please MBJ's prior client alerts dated March 20, 2020, May 11, 2020, June 15, 2020, December 21, 2020, June 1, 2021, December 16, 2021, and March 17, 2022.

Under EEOC guidance, a COVID-19 test is a "medical examination" within the meaning of the Americans with Disabilities Act ("ADA"). As a medical examination, the ADA requires that any mandatory medical test of employees be "job related and consistent with business necessity." Applying this standard to the state of the COVID-19 pandemic in its prior guidance, the EEOC advised that in order to protect the health of its employees, employers had an unconditional right to screen employees for COVID-19. This right applied to testing both before permitting employees to enter the workplace and periodically to determine "whether their continued presence in the workplace posed a direct threat to others." Under its prior guidance, the EEOC viewed screening for COVID-19 as "job related and consistent with business necessity" in virtually all cases.

Given the evolution of pandemic conditions, the EEOC has again updated its guidance. As of July 12, 2022, the EEOC now opines that the burden is on the employer to show that COVID-19 testing is "job related and consistent with business necessity." The July 12, 2022 guidance calls for employers to make a fact-specific assessment to determine if screening for COVID-19 is a "business necessity," providing the following "possible considerations":

- 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;
- what 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.

The EEOC advises employers to consult the most recent CDC guidance to determine whether

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screening is appropriate.

Notably, the EEOC advises that employers *may* screen applicants for symptoms of COVID-19, so long as it: 1) follows a conditional job offer and the employer is doing the same for all potential employees entering the same type of job; or 2) if the employer is screening *everyone* (i.e., employees, contractors, visitors, etc…) before permitting entry to the workplace.

Likewise, the EEOC advises that, in certain situations, an employer may *withdraw* a job offer to an applicant that has contracted COVID-19; displays symptoms of COVID-19; or was recently exposed to COVID-19. Such withdrawal is permitted if: 1) the job requires an immediate start date; 2) CDC guidance recommends that the person not be in proximity to others; and 3) that job requires such proximity to others, whether at the workplace or elsewhere.

The EEOC's guidance reaffirms its position that testing for COVID-19 *antibodies* is not permissible under the ADA because antibody testing is not consistent with business necessity given its inability to show whether an employee has a current infection or establish immunity.

Finally, the EEOC states that when an employee returns to the workplace after being out with COVID-19, the ADA allows employers to require a note from a qualified medical professional that the individual is able to safely return to work. The EEOC notes that an employer may also elect to follow the CDC guidance for determining when an employee may return to the workplace, noting that it may not be practical to expect doctors and healthcare professionals to provide timely documentation.

Employers should be mindful that these are evolving issues and should ensure that decisions are made based on the most recent information available. Employers with questions about this information should consult with their MBJ attorney.

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