

New EEOC Guidance Complicates Virus Testing Landscape

By **Anne Cullen**

Law360 (July 19, 2022, 6:06 PM EDT) -- Guidance the U.S. Equal Employment Opportunity Commission issued last week rolling back a blanket clearance for businesses to test employees for COVID-19 muddies the legal waters around this safety protocol, experts said.

In a revision to earlier guidance that said mandatory virus testing was automatically justified by the pandemic, the EEOC told employers in a July 12 update that it's now up to them to make their case to conduct this kind of screening. Unless it's "job-related" and a "business necessity," viral testing of employees could run afoul of the Americans with Disabilities Act, the agency said.

Employment lawyers said the update saddles businesses with another pandemic-related administrative burden, one for which the rules are hazy.

"I understand the reasoning behind the guidance, but in the circumstances, I think it is going to lead to less clarity, not more," said Epstein Becker Green member Maxine Neuhauser, who advises employers. "Employers like bright lines, and this guidance is not helpful that way."

The rescission of the default justification requires company leaders to make individual decisions on whether to test a worker for COVID-19, an endeavor experts said will be involved.

"Instead of being able to say, we're going to have a blanket, national policy, [now] it should be evaluated location by location, and employee by employee," said Morgan Lewis & Bockius LLP employment law litigator and counselor Daryl Landy. "It's a lot of work for employers."

For company leaders wondering if they meet the legal requirements for testing their workforce for COVID-19, here are five tips for making the call.

Follow the CDC's Lead

The EEOC repeatedly emphasized in its update that company leaders should lean on the most updated information from the Centers for Disease Control and Prevention to determine what safety protocols make sense in their facilities, like viral tests.

Similar to the commission's running bulletin of pandemic guidance, the information promulgated by the CDC has evolved alongside the health crisis, and continues to be adapted to new circumstances. If they're trying to justify a reason to test, company leaders should frequently check the agency's webpage

for updates and adjust their policies accordingly, experts said.

"The EEOC has certainly made the CDC king of the hill in terms of when testing may or may not be permitted," Epstein Becker's Neuhauser said. "Employers are constantly going to be needing to check the CDC."

"The decisions an employer makes today based on CDC guidance and information could change tomorrow," she said.

If an employer determines testing is justified based on CDC information, experts suggest that its record of the decision includes the date it pulled the agency recommendations, as that could change down the line.

"I would add that to the to-do list on how you manage and administer your testing requirements," Neuhauser said.

Be Aware of Local Transmission Trends

In the update, the agency laid out a list of possible considerations employers could use in their analysis of whether testing merits the ADA threshold, with the level of community transmission at the top.

Experts took this as a signal that the amount of COVID-19 spread within each county is an important element for businesses to consider in their decision whether to test, and companies with facilities in more than one county may need to implement different approaches.

"It requires employers now to be very location-specific," Morgan Lewis' Landy said. "If you're looking at community transmission, that's going to vary."

At the moment, COVID-19 transmission levels are high countrywide, which experts said gives employers some latitude to keep up any testing policy. But Landy noted that this won't always be the case, and company leaders should keep a sharp eye on the fluctuating transmission levels to ensure their testing decisions remain justifiable.

"If you look at all of the factors that the EEOC suggested that employers consider, it's probably not much of a game-changer when we're in circumstances like we are now, where most of the country under the CDC is in a high or medium level of community transmission," he said. "But if you're in an area with low community transition, it's a different ballgame."

Lean on All the Factors

Community transmission was just one factor the EEOC suggested businesses consider in the decision to test. Also on the agency list was employees' vaccination status, the efficacy of COVID-19 viral tests, the data on breakthrough infections, the nature of the current variant, whether an employee potentially subject to testing had close contact with others at work, and the impact on a company's operations if an infected worker comes on-site.

While community transmission level could play a big role in a company's testing decision, Landy said smart employers will run down the rest of the list to cover their bases.

"They don't say any of these factors are determinative, so if you're an employer, I would keep going down the list and look at the other factors that the EEOC has provided," he said.

The EEOC said in its guidance that "an individualized assessment" is required from employers to determine whether COVID-19 testing clears the legal hurdles of the ADA. Landy said this language implies a big-picture approach.

"To me, the word 'assessment' in individualized assessment means looking at the whole picture," Landy added. "From an employer's perspective, you're in a more defensible position if you consider as many of those factors as possible."

Designate Decision Makers

Monitoring the fluctuating pandemic circumstances — especially the ever-changing transmission levels — and keeping company policies in line with them is a difficult task, experts said.

"You're going to have to check — is it high, is it medium, is it low?" said Epstein Becker's Neuhauser. "It's a little bit Goldilocks, without knowing which porridge is just right."

To keep on top of the information, employment attorneys said it's key that businesses designate a person or a group to constantly evaluate whether testing meets the legal bar under the ADA.

"You need someone, or a group or a team, who are smart and sophisticated in really deliberating and understanding the decision-making process and the factors to consider, and really understand how things change on a minute-by-minute basis," according to Haynes and Boone LLP partner Jason Habinsky, who heads the firm's labor and employment practice.

"What might be OK now legally might not be OK a few weeks from now, when things are better," Habinsky added. "So it's really important to have an appropriately staffed team who are making these decisions and discussing these decisions."

Keep Workers in the Know

If a company is going to switch its testing policy, it needs to inform its workforce of the change and the rationale behind it, according to Katharine C. Weber, a Jackson Lewis PC principal who co-leads the firm's disability, leave and health management practice group.

"When you sit down and decide you're going to make changes, you have to tell your employees why," Weber said. "You need to be a good communicator."

Especially with all the fear surrounding COVID-19, it's crucial that team members aren't left in the dark about any new company rules, Weber said.

"Explain the protocols and explain the why of it," she said. "It's all about communication, and it's going to continue to be about communication."

--Additional reporting by Amanda Ottaway. Editing by Bruce Goldman.