

# EEOC: COVID-19 Screening Now Must Meet Business Necessity Test

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Although COVID-19 still poses a threat to businesses and the public, the U.S. Equal Employment Opportunity Commission (EEOC) recently updated its assessment that the COVID-19 pandemic is no longer dire enough to require mandatory employee virus screenings without further justification. Since 2020, businesses have implemented various forms of testing for their employees including questionnaires, rapid and PCR testing, and temperature checks. As of July 12, 2022, the EEOC released new guidance for employers regarding mandatory screenings which can be found [here](#). In order to continue these practices, employers must show mandatory screenings are **"job-related and consistent with business necessity."**

COVID-19 testing is a medical exam under the Americans with Disabilities Act (ADA), so it must be "job-related" and deemed a "business necessity" to be permissible under the ADA. Here are the three main takeaways from the EEOC's new guidance:

## **1. Employers may administer mandatory COVID-19 viral tests to employees if the employer shows it is "job-related and consistent with business necessity."**

Employers should consider numerous factors when determining whether testing is "job-related" and a "business necessity," including:

- vaccination status of employees;
- transmission levels in the community at large according to the Centers for Disease Control and Prevention (CDC);
- types of contact between employees and others in the workplace (i.e., coworkers and visitors);
- accuracy and speed of utilizing different types of tests;
- possible severity of current COVID-19 variant(s);
- probability of fully vaccinated employees becoming infected;
- percentage of remote versus in-person employees;
- number of visitors or clients entering the workplace; and
- feasibility of maintaining physical distance among employees in the workplace.

**2. Employers may require medical documentation from an employee who was out with COVID-19 to ensure a safe and efficient return to the workplace.** The ADA allows employers to ask for a "note from a qualified medical professional" to verify the employee is safe to return from work and able to fulfill all job

responsibilities. This could be especially important, for instance, if a job requires significant physical labor or if employees must be in close proximity in the workplace. This is almost always justified as a "business necessity." Alternatively, employers can look to CDC guidance or local clinics to verify whether the employee may still be infectious or unable to resume working.

### **3. Employers may *not* utilize antibody testing to determine whether an employee can return to work.**

This is not a change to previous guidance from the EEOC, but a reminder. According to the CDC, antibody testing is not a reliable method of determining whether an employee is currently infected with COVID-19. It also cannot show whether an employee is immune to the virus. As such, this type of testing has no "business necessity" under the ADA and is not allowed.

The EEOC emphasized that screening measures and testing measures may still be justifiable and even necessary in many cases, but explained that this new guidance will require an individualized assessment to ensure screening complies with both the ADA and the evolving nature of the COVID-19 pandemic.

If you have any further questions about the EEOC's new guidance for employers' best practices amidst the pandemic, please contact [Jill Sebest Welch](#) or [any member of the Barley Snyder Employment Practice Group](#).

*Note: Summer Associate Elizabeth Vanasse assisted in the drafting of this alert.*

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