



Episode 34: “Highlights From the EEOC’s Updated Guidance on COVID-19 Testing in the Workplace”

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[Ari Kwiatowski]: Hi, everyone, this is a Barclay Damon live broadcast where we discuss all things L&E, labor and employment. I’m Ari. Let’s dig in.

[Ari]: Hey, everyone, welcome to “Highlights from the EEOC Updated Guidance on COVID-19 Testing in the Workplace.” This is a solo episode this week. The purpose of this episode is really just to tell you guys what’s up with the EEOC’s new guidance back on July 12 of this year, so a couple of weeks ago, the EEOC issued some updates to its guidance, which we have talked about a few times over the course of the podcast. The guidance is called “What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws.” As we talked about before, the guidance is available on the EEOC’s website. So it’s EEOC.gov. Let’s talk about the purpose of the updated guidance, you guys. The EEOC is essentially providing additional information for employers and employees with respect to what the parties need to know when it comes to testing for COVID-19 in the workplace, returning to work, whether testing—antibody or otherwise viral testing—qualifies as a medical examination under the Americans with Disabilities Act or the ADA, things of that nature.

[Ari]: There’s a bunch to unpack here, but I’m hitting you with a quick episode just to give you the highlights. Before I dig in, you guys, I want to give you my fun fact about myself. I haven’t had a solo episode in a while, so I’ve had a little time to think; my fun fact that I want to share with you is one of my hobbies is gardening. I love gardening. I love flowers. I moved into a new house a couple of years ago, a lot of gardens to tend to. So that is one of my highlights and I’m usually on the weekends, at least spending a little bit of time in one or more of the gardens that are at our new house. So. Okay, guys.

[Ari]: So let’s dig into the substance of what the EEOC is now saying about COVID-19 and testing in the workplace. Like I mentioned, there’s a bunch to unpack in this updated guidance, and I am coming at you with a quick highlight episode just to kind of give you the rundown. And you know, the most important things are some of the most significant things the EEOC has said. So first, return to work and doctor’s notes under the Americans with Disabilities Act. And I just wanted to back up a little bit because if you’re listening to the podcast, if you’re an employer, if you’re an employee, and you haven’t checked out the EEOC guidance, I would definitely recommend that you do so. Basically, the format of the guidance, it’s the question-and-answer format. Like I mentioned, it’s on the EEOC gov website. So basically the EEOC will put a question on the guidance and then it will give a response. So really helpful, super easy to unpack, super easy to read. So if you haven’t checked it out, you definitely should. So basically one of the first things or first questions the EEOC has provided an update on is whether if you are an employer and you have an employee who had COVID and they are ready to return to the workplace, whether you can provide or, excuse me, whether you can request a doctor’s note from the particular employee.

[Ari]: So the EEOC has come out and said, yes, you can you can ask for a doctor’s note. The EEOC encourages employers to follow the CDC guidance with respect to return to work and what’s appropriate and things like that. We talked about this a bunch on the podcast, the CDC’s guidance with respect to quarantine/isolation guidelines, particularly back in November, December, January, February, when these issues

were really at the forefront. But as a general rule, it's a really good idea for all employers to continue to keep abreast of the CDC's updated guidance. So basically, the EEOC is saying that employers should follow the CDC guidance and basically said under the ADA, COVID-19 is not always a disability. We talked about this before. The EEOC is saying even if an employee's bout with COVID qualifies as a disability under the ADA, an employer may request a doctor's note provided that the request satisfies the ADA standard, which we have talked about before, which is that an employee inquiry be job-related and consistent with business necessity. So that's the standard under the ADA. As I mentioned, we talked about this before. All right, guys.

[Ari]: So let's talk about the next topic that I wanted to chat with you about today and bring to your attention, which is COVID-19 testing in the workplace. So the EEOC in this updated guidance has basically acknowledged that, you know, in the peak of the pandemic, when the pandemic started, it was almost to some extent a carte blanche for employers to conduct testing in the workplace, whether it's, you know, requiring all employees who are entering the workplace to test or requiring an employee who's returning to work after suffering from COVID to test.

[Ari]: So the EEOC acknowledges in this updated guidance that, you know, in the peak of the pandemic and of course, this is an evolving situation, it was pretty much acceptable no matter what, for an employer to conduct COVID-19 testing, which I think makes sense and is consistent with what the EEOC has said before. Now, the EEOC is dialing back a little bit on that and basically saying that, yes, an employer can conduct mandatory screening measures such as a COVID-19 viral test. And we'll talk about antibody tests in a minute. But yes, an employer can administer a COVID-19 viral test—provided again that the ADA standard is satisfied or that the test is job-related and consistent with business necessity. So if you're listening to the podcast, you may be wondering what does that mean? And I'm glad we're dissecting this a little bit. But the EEOC has said that a COVID-19 viral test is a medical examination under the ADA. So therefore, the ADA standard does need to be satisfied. But what's helpful about the guidance is that the EEOC basically says that employer use of a COVID-19 viral test under these circumstances will meet that business necessity standard when it's consistent with guidance from the CDC, the FDA, and/or state or local public authorities.

[Ari]: So essentially, without getting too much into interpreting what the EEOC is saying, since that's not necessarily our role, just a plain reading of the guidance essentially says that if you are an employer and you are requiring testing, if what you're doing is consistent with what the CDC says or with what your local or local public authority says, then you're probably going to be able to satisfy that business necessity standard. That being said, the EEOC's updated guidance also provides some additional factors that employers can consider to determine whether that business necessity standard can be met. So possible considerations identified by the EEOC in this updated guidance to determine whether requiring the testing (a viral test) is job-related and consistent with a business necessity includes the following. And I'm just reading from the guidance here because there's a few factors the EEOC has identified, but "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, the ease of transmissibility of the current variant, and the possible severity of illness from the current variant," excuse me, "what types of contacts employees may have with others in the workplace or elsewhere that they are required to work, and the potential impact on operations if an employee enters the workplace with COVID-19." So these are a list of factors that the EEOC is providing employers to kind of weigh when determining whether requiring a mandatory COVID-19 test will satisfy the ADA standard. And I think a lot of these make sense just based on what we've seen before and what the EEOC guidance has really told us or what the EEOC has issued previously about satisfying the ADA standards. So, you know, vaccination status of employees, whether a breakthrough infection is likely, things like that are all factors that an employer can consider to determine whether the COVID-19 testing procedures that an employer wants to implement comply with the ADA. So this is really helpful for employers. Again, I think the EEOC is backtracking a little bit on saying essentially a COVID test will always meet the ADA standard. But it's helpful because the EEOC is giving us a little bit

more information to work with and some specific factors to weigh to determine whether we can meet the standard.

[Ari]: All right, guys, let's move on to the next topic. I just wanted to talk with you briefly about antibody testing. The EEOC has said pretty much throughout the pandemic that testing for COVID-19 antibodies is a medical examination under the ADA. And essentially the EEOC's position has been consistent, which is no, an employer cannot require antibody testing for return to the workplace. And the EEOC position on that has been and continues to be that the CDC has said antibody testing is not necessarily an indicator of whether an individual is currently infected with COVID-19. So requiring that type of test would not satisfy the factors we just talked about. It would not meet that business necessity standard under the ADA. Another thing I wanted to bring to your guys' attention more minor points, but this is about screening and what the EEOC has said about screening of individuals coming into an employer's premises for COVID-19. If you're an employer and you are screening everybody who comes onto the premises, current employees, business visitors, it is permissible for you to also screen applicants who may need to come onto the property to interview or things of that nature. The EEOC has also said that screening measures such as the taking of temperatures are not medical examinations under the statute. So those are still okay if you are screening visitors through the use of temperature checks. There's nothing impermissible about that under the statute.

[Ari]: Okay, guys, the last topic I wanted to talk with you about that the EEOC has given us some additional information on is withdrawing of job offers for individuals who have contracted COVID-19. So one of the questions of the guidance is whether an employer can withdraw a job offer that they've given to an applicant if an applicant needs to start working immediately, but unfortunately, that applicant has contracted COVID-19. And the EEOC has come out and said actually that if you're an employer, you're following current CDC guidance. Unfortunately, you have an applicant who you've extended a job offer to who has come down with COVID, that you can actually withdraw the job offer under certain circumstances. And that is if the job requires an immediate start date, CDC guidance recommends that the person not be in proximity to others. So, again, careful to see what the CDC guidance says about currently infected individuals and the job requires such proximity to others and the EEOC is saying whether at the workplace or elsewhere. So basically, the EEOC says here that if you unfortunately have an applicant you've extended an offer to, they contract COVID, you can withdraw the offer provided that, you know, there's an immediate start date under CDC guidelines. You know, the person maybe cannot be in the workplace. There's no telework available and the job requires close proximity to others. So I wanted to bring that to your attention. It's a very specific situation, but it is something new that the EEOC has included in this updated guidance about it.

[Ari]: Okay, guys, the last topic I wanted to bring to your attention, just because I think this is important and we have certainly talked about this on the podcast before over the last few months: the EEOC has answered a question about PPE, personal protective equipment, and what an employer must do for employees who ask for accommodations due to disability or a sincerely held religious belief with respect to PPE and basically how an employer should respond. So we've gone over this before. In a lot of instances, the federal Equal Employment Opportunity Laws permit an employer to require employees to wear PPE. We've talked about it a bunch, but the EEOC is saying again, and they've said this before in their guidance, that if an employee requests an accommodation from a policy of requiring employees to wear PPE, whether on the basis of religion or a medical reason, they can't wear latex gloves because they're allergic to latex, things like that. Basically, the employer has to engage in this dialog with the employee. And if it does not, if granting an accommodation does not cause an undue hardship under the ADA or Title VII, the accommodation should be granted. So I wanted to point that out, you guys, because like I said, we have talked about this on the podcast a lot. We've talked about it in the context of mandatory vaccination programs. We talked about in the context of PPE, and I think it's important because it's here to stay. So if you're an employer and you have a PPE policy and you have an employee who is requesting an accommodation from that policy, it's really important that you take that request seriously and you really try to think if there are any accommodations that the employee can be granted.

[Ari]: So guys, thanks so much for tuning in today. I wanted to, like I said, give you just the highlights from this EEOC updated guidance that we've talked about before. You know, I think the more information that we can get from governmental agencies, the easier it is for us, and for employers and employees to really know how to comply with the law. So thanks so much for tuning in. I hope this was helpful. I think it will be helpful moving forward definitely for us, employers, employees to have this information.

[Ari]: I also wanted to let you guys know that this is the last episode for the summer. We are taking the month of August off. As you guys know, this prior segment, we were talking with the Buffalo Local Office director of the EEOC, Maureen Kielt. We will be back the Thursday after Labor Day, so September 8. And we will really dig in and dive into federal discrimination lawsuits. We'll talk New York State Division of Human Rights Complaints. We'll talk New York City Commission of Human Rights complaints. And we're also going to get into Massachusetts and Connecticut law and tell you what you need to know if you're an employer who has employees there about the anti-discrimination provisions in those states, respective employer employee anti-discrimination agencies. So have a great rest of your summer, everyone, enjoy the month of August. We will pick back up in September right where we left off. And we're really going to dig in to federal, state discrimination charges, complaints, lawsuits. We'll tell you what you need to know. Have a great summer.

[Ari]: The Labor Employment Podcast is available on [barclaydamon.com](https://www.barclaydamon.com) YouTube, LinkedIn, Apple Podcasts, Spotify and Google Podcasts. Like, follow, share, and continue to listen. Thanks.

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