EEOC Gives Employers A Green Light To Test For COVID-19

By **Vin Gurrieri**

Law360 (April 23, 2020, 1:21 PM EDT) -- The U.S. Equal Employment Opportunity Commission said Thursday that employers will be allowed to test employees for COVID-19 before they enter a work site without running afoul of the Americans with Disabilities Act, but some employment law experts noted that the agency's new guidance doesn't shed any light on the legality of businesses using antibody tests.

In its latest add-on to technical assistance guidance for employers dealing with the novel coronavirus pandemic, the EEOC fleshed out its position on testing and medical exams.

In one new entry, the EEOC noted that any medical test that businesses require workers to take must be "job related and consistent with business necessity" under the ADA, a framework that allows businesses to legally screen workers for COVID-19 since those who are carriers will "pose a direct threat to the health of others."

"Therefore, an employer may choose to administer COVID-19 testing to employees before they enter the workplace to determine if they have the virus," the EEOC said.

The EEOC updated its guidance Thursday on the intersection of COVID-19 and federal anti-discrimination law. (Getty)

But the agency warned in its guidance that employers have to "ensure" that any tests are "accurate and reliable," suggesting that businesses review guidance from public health agencies such as the Food and Drug Administration about what constitutes safe and accurate testing and keep in mind that certain types of tests could yield false positives or false negatives.

"Finally, note that accurate testing only reveals if the virus is currently present; a negative test does not mean the employee will not acquire the virus later," the EEOC said in Thursday's guidance. "Based on guidance from medical and public health authorities, employers should still require — to the greatest

extent possible — that employees observe infection control practices (such as social distancing, regular handwashing, and other measures) in the workplace to prevent transmission of COVID-19."

Former EEOC Commissioner Chai Feldblum and her former chief of staff at the commission, Sharon Perley Masling — both of whom are now partners at Morgan Lewis & Bockius LLP — told Law360 in a joint statement that Thursday's guidance is "very helpful" for businesses as they try to navigate workplace safety issues tied to the virus alongside their obligations under the ADA.

"It is very helpful that the EEOC has now issued clear guidance that employers may require COVID-19 tests before allowing employees back into the workplace," Feldblum and Masling said. "This is consistent with the advice we have been giving, since such tests can indicate whether an individual may pose a direct threat to others. The EEOC acknowledges that the test results are not perfect, as there may be some false negatives and false positives, but on balance, that does not negate the utility of the tests for purposes of the ADA."

In recent weeks, the EEOC has updated its Q&A guidance numerous times, including adding a "Return to Work" section that covers topics such as the way businesses should handle requests by workers for accommodations and how to prevent potential harassment and discrimination when workplaces reopen.

Meanwhile, the issue of how far employers can go in screening workers for health risks in order to meet businesses' legal responsibility of providing them with a safe workplace is one that has received plenty of attention as employers have tried to cope with the rapidly spreading virus.

In earlier guidance, the EEOC noted that employers can take employees' temperature to assess whether they have COVID-19 symptoms, but said that is the sort of medical data that must be kept confidential under the ADA.

Michael Oliver Eckard, managing shareholder of Ogletree Deakins Nash Smoak & Stewart PC's Charleston, South Carolina, office, noted that one of the elements in the White House's recently released three-phase plan for reopening America's economy called for employers to develop policies for conducting temperature checks. The plan more broadly also put the onus on employers to monitor workers for COVID-19 symptoms.

"So, I think the expectation is that more and more states and local jurisdictions will potentially be adding varying levels of employee screening recommendations or requirements in some cases that will include temperature screening," Eckard said.

While Thursday's updated guidance by the EEOC "seems to focus on COVID-19 tests" aimed at finding out whether a person actively has the virus, Eckard pointed out that it "doesn't appear to address one way or the other" the use of so-called antibody tests that can detect whether a person has had the virus and built up antibodies to it.

"I think that's potentially still an open issue — the utility and permissibility of employers using antibody tests," he said.

Feldblum and Masling echoed that sentiment, saying that the issue of such tests may be one of the next topics the EEOC tackles.

"The EEOC does still need to address the legality of using serology (antibody) tests," they told Law360. "That will be very helpful to employers as they [are] thinking about reopening the workplace."

--Editing by Jack Karp.

Update: This story has been updated with comments from employment law experts.