WORKPLACE COVID-19 TESTING AND THE LAW

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If 2020 could be summed up in one word, it would be: **unprecedented.**

Employers have navigated a whole new world this year and have continually adapted to changing tides. One unprecedented issue that is suddenly at the forefront of employers' minds is the testing of employees for COVID-19. What laws apply to employers who want to test employees for COVID-19? What can employers do about employees who refuse to be tested or employees who test positive?

Medical testing of employees involves the intersection of disability law, discrimination law and employment law. These laws may have both federal and state law components. Employers need to educate themselves on several fronts to ensure that their workplace policies and COVID-19 testing practices are complying with a multitude of federal and state laws.

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Disability Law and COVID-19 Testing

The Americans with Disabilities Act (ADA) contains several provisions that apply to workplace COVID-19 testing. The Equal Employment Opportunity Commission (EEOC) is the federal agency that enforces federal workplace discrimination laws, including the ADA. The EEOC has provided some guidance to employers about COVID-19 and the workplace.[1]

The ADA permits employers to test employees for COVID-19 so long as this disease remains a direct threat to the health and safety of the public. Medical tests of employees and applicants are not permitted by the ADA across the board, but one exception is if the employee could pose a direct threat in the workplace. As circumstances change, COVID-19 may not always be considered a direct threat. But for the near future, workplace COVID-19 testing will be allowed under the ADA. Under this same logic, however, employees teleworking cannot be required to submit to testing because they do not pose a threat to the workplace. The ADA requires that medical information collected by an employer be kept confidential. Medical information must be kept in a file separate from other personnel records and must be accessed only by authorized personnel. Employers must understand that they are not authorized to disclose the results of an employee's COVID-19 test to other employees without their consent, even if the test is positive. Medical information about a positive test can be disclosed to health authorities, but not to other employees in the workplace. Employers must rely on health authorities or the voluntary consent of the employee who tested positive, to disclose that a particular employee tested positive for COVID-19.

Employers must be cautious about inquiring about employee's risk factors for COVID-19. Many risk factors (especially underlying conditions) can be considered disabilities, and inquiring about employee's disability/ies triggers ADA protections. A better practice is to inquire about symptoms rather than risk factors, and to discuss risk factors only if the information is offered voluntarily by the employee.

Additionally, employers should be cautious if considering terminating employment based on a positive COVID-19 test. The EEOC has not yet determined that COVID-19 patients are or are not considered persons with disabilities for purposes of the ADA. An employer should act carefully and consider whether terminating employment for a positive COVID-19 test could be considered disability discrimination. As well, employers may be required to offer medical leave to employees who test positive.

Discrimination Law

Employers need to avoid policies or practices that target protected demographics such as age, pregnancy or nationality. Anti-discrimination laws prohibit employers from instituting different requirements on employees based on the employee's age or based on an employee's pregnancy. Employers cannot decide to test only employees who are over 65 or who are pregnant, and likewise, employers cannot craft different policies for employees who are over a certain age or who are pregnant. Additionally, employers cannot engage in any kind of discrimination based on an employee's national origin and must address any harassment or discrimination that takes place in the workplace based on an employee's national origin.

Employment Law

When an employee tests positive for COVID-19, an employer's next steps must adhere to state and federal law requirements about medical leave. Some states and municipalities require employers of a certain size to grant employees medical leave, and some such regulations require medical leave to be paid. Some state governments have spelled out specifically that employees who test positive for COVID-19 must be granted medical leave pursuant to state law. New York, for example, has specified:

> "If you send employees home on a precautionary quarantine, they are entitled to job protection, COVID-19 sick leave and/or paid benefits through your Paid Family Leave, and disability benefits insurance provided for the duration of their quarantine, provided they follow the process noted above."[2]

In addition to state medical leave requirements, the federal government also has applicable laws. Congress passed the Families First Coronavirus Response Act (FFCRA) in March 2020. FFCRA requires certain employers to provide employees with paid sick leave for COVID-19. FFCRA is set to expire in December 2020, but it will likely be extended further if COVID-19 remains a threat. Employers should be cognizant of their responsibilities to provide medical leave rather than terminating a COVID-positive employee, especially while FFCRA is in force.
Also pertaining to employment law is the question of whether employers must pay for COVID-19 testing if they require it of employees. Some state laws obligate employers to pay for employees' medical tests if the employer makes the test a requirement of employment.

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An Employer's Rights

So, what can an employer do to maintain a safe and effective workplace without violating this myriad of regulations? The EEOC has confirmed that an employer can test employees who are reporting to the workplace for COVID-19, and can perform temperature checks of employees who are reporting to the workplace, so long as the tests and checks are carried out in a non-discriminatory manner. An employer can terminate an employee who refuses to submit to testing unless the employee is working from home. An employer can send employees home who have tested positive and can bar them from the workplace until they are no longer infected, but must offer medical leave if they are subject to the FFCRA or state medical leave laws.

As employers make plans for the second half of 2020, they should know that testing employees for COVID-19 is legal, and even advisable. When policies regarding testing are crafted correctly, with an eye to various federal and state laws that govern, employers can feel confident that they are steering their workplace with a steady hand during turbulent times.

1. *"What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws." U.S. Equal Employment Opportunity Commission. May 7, 2020. https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws.*
2. *"New Paid Leave for COVID-19." The Official Website of New York State. May 21, 2020. https://paidfamilyleave.ny.gov/COVID19*