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SIDLEY UPDATE

# Returning to Work: Employer COVID-19 Testing

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Can testing play a meaningful role in the return to work plans employers are now contemplating? In their efforts to provide a safe return to work and reassure workers that the workplace actually is safe for their return, employers must evaluate this question, based on the testing available, employment and privacy laws and the individual circumstances of their workplaces and workforces. Balancing the risks and rewards of testing will be a part of this important planning, and as the science develops, so too must employers' plans.

**The Intersection of Employment Law and the Science**

A few guiding principles are important to guide employers in thinking through the issues. First, employer-mandated medical examinations are generally prohibited unless they are job-related and consistent with business necessity. Employers, however, may conduct medical examinations if there is a direct threat to the health or safety of the workplace.[1] The World Health Organization (WHO) and the Centers for Disease Control and Prevention (CDC) have recognized that COVID-19 does pose a direct threat.

At the outset of the pandemic, the Equal Employment Opportunity Commission (EEOC) issued a guidance authorizing employers to take the temperatures of essential workers — a form of medical exam — although many sufferers of COVID-19 may not have elevated temperatures and many who do not have COVID-19 may have elevated temperatures.[2] The next step in this process of seeking a more reliable method for maintaining a safe workplace is requiring other kinds of medical tests that could be performed to screen from the workplace workers with COVID-19.

With regard to actual testing, the EEOC has provided some guidance, advising that employers may test but noting that in doing so, "employers should ensure that the tests are accurate and reliable." [3] The EEOC guidance recommends employers consult the Food and Drug Administration (FDA), CDC and other public health authorities to determine which tests are accurate.

The tension between the desire to provide a safe workplace and the task of identifying a test that meets the EEOC standard may be elusive at best. FDA has yet to approve a single test for COVID-19.[4] The tests currently available have been granted emergency use authorization, meaning they "may be effective."[5] It is unclear whether these tests meet the definition of ensuring accuracy and reliability of tests administered.

## Access to Accurate COVID-19 Employee Testing

Public health officials and others focus on testing as a critical aspect of any re-opening plan. Depending on the circumstances, testing may or may not provide actionable information to an employer. COVID-19 testing seeks to identify individuals with either active infection or acquired immunity to the disease. Many COVID-19 diagnostic tests — those that look for individuals who are currently infected — are based on reverse transcriptase-polymerase chain reaction (RT-PCR) technology, which finds genetic material in biological specimens. Serology tests are blood-based tests and examine whether people have been exposed to a particular pathogen by looking at their immune response — that is, the presence of antibodies. Two types of serology tests are available in the United States. Laboratory-performed tests use sample collection at the point of care, with specimens transported under controlled conditions to the test location, which currently must be a CLIA-certified clinical laboratory with the capability to conduct highly complex assays.[6] The other type is rapid testing which is intended to be performed at the point of care where the specimen is collected.

A remarkable number of tests, both diagnostic and serological, have been introduced in the United States to address COVID-19. All of these tests are being marketed pursuant to federal statutory authority known as Emergency Use Authorization (EUA). The EUA pathway allows FDA, in an emergency, to "authorize" unapproved medical products to diagnose, treat or prevent serious or life-threatening diseases where there are no adequate, approved and available alternatives.[7] To grant an EUA, FDA must find that a diagnostic test "may be" effective — a lower standard than in nonemergency circumstances.[8] FDA has granted no COVID-19 test conventional marketing authorization under the normal premarket review provisions for in vitro diagnostic medical devices.

As of May 4, 2020, FDA had authorized fifty-six COVID-19 tests for emergency use, including forty-seven molecular diagnostic tests and nine serological tests.[9] Although FDA policy is to require test developers to validate their tests prior to marketing, significant questions remain regarding the utility of currently available tests. Academic laboratories have been evaluating the accuracy of COVID-19 tests, and those analyses have yielded mixed results.[10] Even favorable findings of test accuracy are open to question because scientists have not yet found a reference standard to which results of new tests can be compared.[11] Moreover, an individual can have negative results in an antibody test even if they carry the virus because the level of an antibody can vary according to time since exposure and variations in individual immune responses. It is also not known whether individuals with accurate positive results in antibody tests actually have acquired immunity. Scientists have not yet been able to confirm that the presence of antibodies in blood specimens necessarily means that the individual is immune from further COVID-19 infection. Nor has the duration of immunity been determined, because of the lack of data from longitudinal studies.[12]

Numerous guidelines and recommendations from public and private entities have highlighted the need for widespread testing to both give employees confidence in the safety of their workplaces and assure the public more broadly that population health will not be threatened by even a partial return to normal activity.

While testing would help keep workplaces safe, open questions remain about whether testing of any sort can be integrated into a company's return to-work-protocol. Few companies currently have the resources or ability to test their own workers, especially when the tests presumably need to be completed daily to be the most effective. While antibody testing holds great promise, no validated test

is widely available, and, as explained above, we are unable to assess the real-world implications of a positive test.

**The Employer's Dilemma**

Employers may find themselves weighing the risk of challenges to employee testing against the risks of claims that the workplace is not safe should they not test. There is a school of thought among some members of the workforce that the safest course of action is to have a workforce that has been entirely exposed, thereby developing "herd immunity." This may pose some issues related to vulnerable workers who may not have that option.

Of course, if the current political debate ends with passage of an immunity law for employers, the conversation and path would change dramatically. Whether employers would want to rely on such a result let alone have the option of waiting through all of the inevitable court challenges is another matter.

Absent employer immunity, employers will need to consider whether in conducting testing where accuracy may be questioned, they will be alleged to have provided a false sense of comfort, or perhaps what might be deemed a misrepresentation that they are providing a truly safe workplace for returning employees. For example, what happens if an otherwise healthy employee returns to a workplace touted as safe as a result of testing, and more than 14 days later, becomes ill? Given what in some jurisdictions may become a presumption that COVID-19 is a workplace injury under workers' compensation laws, will the employer be deemed to have misled its workforce because by testing per EEOC guidelines, employers are "ensuring" accurate testing? Yet, providing peace of mind for employees that they are returning to a safe workplace could be essential to a productive return to work. The tension here is clear. Employers will also want to consider whether testing only symptomatic workers is more reasonable when it is a condition of returning to work and more possible from a practical standpoint.

The right course of action for employers may vary with the nature of their workplace and the culture of their workforce as well as the jurisdiction(s) in which they operate. For example, testing that may be relatively reliable may be reasonable for those in health care related fields and other businesses that are deemed essential to the operation of the infrastructure where the critical nature of these jobs may justify less reliability and more risk in testing. Yet for other employers, where remote work is possible though less desirable, it may be a different risk analysis. Such factors as the number of employees, the size of the space, the proximity of the working areas, whether the workforce is staggered and how practical repeated cleaning is are all relevant factors. There are countless others.

**Testing and Privacy Law**

Some employers have considered obtaining employee consent to testing. However, whether consent would be deemed to be voluntary if the alternative is not being permitted into the workplace, is an open question. Whether an employer is considering testing employees for COVID-19 or other health screening measures, such as temperature testing, privacy and confidentiality considerations will be key. Again, consent may be a factor. As discussed, the EEOC has taken the position that employee medical information related to the pandemic is confidential medical information under the Americans With Disabilities Act (ADA) both with respect to information obtained in response to a medical

examination or inquiry by the employer (see above) as well as information volunteered by the employee. The EEOC has provided guidance on permissible disclosures of such information in the context of the COVID-19 pandemic specifically.

Confidential medical information under the ADA must be maintained consistent with ADA requirements. More generally, employers should take care when collecting sensitive medical information to maintain, process and store that information consistent with information security requirements and policies.

The manner in which such information is collected is important to the analysis of what conditions and restrictions may attach. Information collected by or derived from healthcare providers can be governed by state medical privacy laws and the Health Insurance Portability and Accountability Act and its implementing regulations.

Employers considering conducting such testing should also consider any other jurisdiction-specific questions, such as whether applicable law or internal compliance policies require specific notification about new forms of information collection. As a general matter, employers should consider how to communicate with employees about these measures and the steps they are taking to implement them appropriately.

**Other Issues for Employers to Consider**

- Discrimination: In the event testing is the path taken, employers should make sure not to engage in unlawful disparate treatment based on protected characteristics when deciding which employees to test or screen and exclude from the workplace.[13] If an employer decides not to test and/or screen all employees, it should be testing employees based on a non-discriminatory business reason. For example, an employer may decide to test employees who interact with customers or other employees but not to test employees who are more isolated or are working from home. However, it may not choose to test employees in a low-income bracket versus those with more discretionary income.
- Wage and Hour: Employers requiring employees to spend time before work waiting in line to take a test or obtain a test result will need to consider whether their state laws require employers to pay for this time. Also to the extent there is equipment involved in testing, employers will need to consider applicable state laws regarding who shall bear the cost of any required equipment required for testing.
- Workers compensation: The Department of Labor has announced that all federal employees who develop COVID-19 while performing their federal duties are entitled to workers' compensation coverage.[14] State laws will vary on whether employees who contract COVID-19 while at work will be eligible for workers' compensation benefits and whether there will be a presumption that COVID-19 is a work-related injury, given that under ordinary circumstances, an employee has the burden of proving that an injury is work related. To the extent testing is involved in the analysis, the cost and burden of proof in these cases should be considered.

**The Law Is Evolving Rapidly**

The speed at which the law has developed and continues to change seems to be as rapid as the spread of COVID-19. While the EEOC and CDC currently allow temperature testing and inquiries into

symptoms, there is no telling how long this type of activity will be allowed. Employers must be alert for changes to the CDC and EEOC guidance as the COVID-19 threat evolves.

As things currently stand, there is much to consider, and no one answer fits all situations. Of course, as testing becomes more reliable and available, the path to return-to-work becomes easier. At present, however, employers should consider testing in their return to work plans, but in doing so, realistically evaluate all of the components testing presents, including the risks, the rewards and how their specific workforce affects the analysis.

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[1] Pandemic Preparedness in the Workplace and the Americans with Disabilities Act (rev. March 21, 2020) **https://www.eeoc.gov/facts/pandemic_flu.html**.
[2] *Id*.
[3] What You Should Know about COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws (rev. April 23, 2020) **https://www.eeoc.gov/eeoc/newsroom/wysk/wysk_ada_rehabilitaion_act_coronavirus.cfm**.
[4] Coronavirus Disease 2019 (COVID-19) (rev. Apr. 30, 2020) **https://bit.ly/2RWD9Y1**.
[5] Emergency Use Authorization of Medical Products and Related Authorities: Guidance for Industry and Other Stakeholders 7-8 (Jan. 2017).
[6] FDA, FAQs on Diagnostic Testing for SARS-Cov-2 (updated Apr. 30, 2020), **https://bit.ly/2KQQahL**. *See also* Tim Herrera, What You Need to Know about the Covid-19 Antibody Test, N.Y. Times (Apr. 30, 2020), **https://nyti.ms/35oNqBy**.
[7] 21 U.S.C. § 360bbb-3.
[8] See FDA, Emergency Use Authorization of Medical Products and Related Authorities: Guidance for Industry and Other Stakeholders 7-8 (Jan. 2017).
[9] FDA, Emergency Use Authorizations (updated Apr. 30, 2020), **http://bit.ly/38NUJTt**.
[10] *See*, *e.g.*, Pete Farley & Robert Sanders, Testing the Tests: COVID-19 Antibody Assays Scrutinized for Accuracy by UCSF, UC Berkeley Researchers (Apr. 27, 2020), **https://bit.ly/2WigUNn**; Alexander Marson et al., COVID-19 Testing Project (last visited May 1, 2020), **https://bit.ly/3bWOijl**; Eran Bendavid et al., COVID-19 Antibody Seroprevalence in Santa Clara County, California, Stanford University (Apr. 27, 2020), **https://bit.ly/2SoXoxR**.
[11] Apoorva Mandavilli, Can Antibody Tests Help End the Coronavirus Pandemic, N.Y. Times (Apr. 26, 2020), **https://nyti.ms/2KSmEIE**; Robert Sanders, What COVID-19 Antibody Tests can Tell Us, and What They Can't (Apr. 27, 2020), **https://bit.ly/2Wg5dqL**.
[12] National Academies of Sciences, Engineering, and Medicine, Rapid Expert Consultation on SARS-CoV-2 Laboratory Testing for the COVID-19 Pandemic (Apr. 8, 2020) (**http://nap.edu/25775**).
[13] What You Should Know about COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws (rev. April 23, 2020) **https://www.eeoc.gov/eeoc/newsroom/wysk/wysk_ada_rehabilitaion_act_coronavirus.cfm**.
[14] Claims under the Federal Employees' Compensation Act due to the 2019 Novel Coronavirus (COVID-19) **https://www.dol.gov/owcp/dfec/InfoFECACoverageCoronavirus.htm**.

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