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PRACTICE TIP—COVID-19 antibody testing: Useful screening tool or impermissible medical examination?

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A primary concern about antibody testing is the tests themselves are of varying reliability.

As the United States still struggles with testing capacity for active COVID-19 infections, employers are increasingly asking, "may we require our employees be tested for the presence of COVID-19 antibodies?" This is particularly true following the Equal Employment Opportunity Commission's position that employers were permitted to test for the presence of active COVID-19 infection, set forth in its [What You Should Know About COVID-19 \(https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws\)](https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws) resource (Q&A 6).

The appeal. Antibody testing is appealing because there is widespread availability on the private market, and employees do not need to satisfy certain screening criteria before receiving a test, unlike tests for active COVID-19 infection. If an employee has the antibodies for COVID-19, that means the employee was presumed to have had COVID-19 at some point in the past. According to the CDC, antibodies develop between 1-3 weeks after infection. A positive antibody test does not indicate the presence of an active infection.

The hope. The hope with COVID-19 is that antibodies will confer some immunity for some period of time. In the employment context, the appeal of using antibody testing is that employers and employees can feel safer with an employee who has antibodies being back in the workplace. Perhaps even those with antibodies are placed in a more public-facing role with the notion they cannot contract COVID-19 again. However, this is, after all, the "novel coronavirus" and there are many things scientists simply do not yet know about the disease.

The problem. A primary concern about antibody testing is the tests themselves are of varying reliability. Originally, not all tests that are offered on the private market were authorized by the FDA (the FDA has since ordered those tests off of the market). The tests that have been authorized by the FDA were granted emergency use authorization (EUA). EUA status may be given by the FDA Commissioner to allow unapproved products to be used in an emergency to diagnose, treat, or prevent serious or life-threatening diseases or conditions when there are no adequate, approved, and available alternatives. Although the FDA has authorized use of some antibody tests, it has not independently validated any of them.

The guidance. This leads to the CDC's recently issued [interim guidance \(https://www.cdc.gov/coronavirus/2019-ncov/lab/resources/antibody-tests.html\)](https://www.cdc.gov/coronavirus/2019-ncov/lab/resources/antibody-tests.html) on antibody testing, which severely undermines the assumption of immunity: "**We currently don't have enough information yet to say whether someone will definitely be immune and protected from reinfection if they have antibodies to the virus.**" The CDC also [expressly stated \(https://www.cdc.gov/coronavirus/2019-ncov/lab/resources/antibody-tests-guidelines.html?_cldee=dGVhcmVAc2hhhd2UuY29t&recipientid=contact-1b87befe319be811941ba0d3c1f8c3d1-712d1e3e57aa4c7b93bd5e91e58b0e0b&esid=b5ab1a14-e3a1-ea11-943b-a0d3c1f8c3d1\)](https://www.cdc.gov/coronavirus/2019-ncov/lab/resources/antibody-tests-guidelines.html?_cldee=dGVhcmVAc2hhhd2UuY29t&recipientid=contact-1b87befe319be811941ba0d3c1f8c3d1-712d1e3e57aa4c7b93bd5e91e58b0e0b&esid=b5ab1a14-e3a1-ea11-943b-a0d3c1f8c3d1) "**Serologic test results should not be used to make decisions about returning persons to the workplace.**" This is hardly a ringing endorsement for mandating antibody testing.

All of this brings us back to the initial question—"may we require our employees be tested for the presence of COVID-19 antibodies?" Let's turn back to the EEOC FAQ on testing, which only expressly approves of testing for the active presence of COVID-19 virus and is silent on antibody testing. This portion of the EEOC's response is illustrative:

- Consistent with the ADA standard, employers should ensure that the tests are accurate and reliable. For example, employers may review [guidance \(https://www.fda.gov/medical-devices/emergency-situations-medical-devices/faqs-diagnostic-testing-sars-cov-2\)](https://www.fda.gov/medical-devices/emergency-situations-medical-devices/faqs-diagnostic-testing-sars-cov-2) from the U.S. Food and Drug Administration about what may or may not be considered safe and accurate testing, as well as guidance from CDC or other public health authorities, and check for updates. Employers may wish to consider the incidence of false-positives or false-negatives associated with a particular test. 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 takeaway. What does this all mean for employers? Under the ADA, all mandatory employee testing must be job-related and consistent with business necessity. The EEOC has concluded that because COVID-19 presents a "direct threat" in the workplace, employers may test for the presence of an active infection. By contrast, antibody tests do not detect active infection and therefore do not aid in preventing the spread of COVID-19 in the workplace. In addition, the reliability of the antibody tests themselves is problematic. Thus, antibody tests do not appear job-related and consistent with business necessity, and would likely be viewed as an impermissible medical inquiry—not to mention the potential claims that could arise should employers take employment actions (reassignment, reduction in hours, or loss of overtime, for example) based upon the results of the testing.

As scientists learn more about what the presence of COVID-19 antibodies mean for immunity, and as antibody testing becomes more reliable, it is certainly possible antibody testing may become a permissible medical examination. For now, employers should think twice before mandating antibody testing.

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[Back to Top](#)

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