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Benefits**Question of the Day: COVID-19 Antibody Testing****Legal Update**

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By Bridget R. Penick

Question**Can employers require COVID-19 antibody testing before an employee may re-enter the workplace?****Answer****No.**

While the EEOC previously issued guidance permitting employers to test employees for the COVID-19 virus prior to returning to work, the same is not true for antibody testing.

In March 2020, as the COVID-19 pandemic began impacting U.S. workplaces, the Equal Employment Opportunity Commission (EEOC) published a series of technical assistance questions and answers for employers entitled: What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws.

The EEOC has been updating the guidance as the public health emergency progresses. On April 23, the EEOC advised that employers may require employees to be tested for the COVID-19 virus because an individual with the virus will pose a direct threat to the health of others. (See question A.6).

On June 17, the EEOC made clear that employers cannot require workers to undergo COVID-19 antibody testing before returning to work. (See question A.7). The EEOC noted that antibody testing constitutes a medical inquiry under the Americans with Disabilities Act, which must be “job related and consistent with business necessity.”

EEOC cited Centers for Disease Control and Prevention (CDC) guidelines, which state that the results of antibody testing “should not be used to make decisions about returning persons to the workplace.” Such testing does not meet the ADA’s “job related and consistent with business necessity” standard. While a worker who tests positive may pose a direct threat to others, a worker who may or may not have

the antibody does not.

The EEOC reminded readers it will continue to closely monitor CDC's recommendations and could update this discussion if CDC's recommendations change.

If you have questions regarding these obligations or others related to COVID-19, contact your Fredrikson & Byron Employment & Labor attorney.

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