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EEOC Issues Guidance Prohibiting Employers from Requiring COVID-19 Antibody Testing

On June 17, 2020, the U.S. Equal Employment Opportunity Commission (EEOC) updated the "Disability-Related Inquiries and Medical Exams" portion of its publication "*What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws.*" The EEOC has been periodically updating this publication with questions and answers relating to COVID-19 and this time, the EEOC provided guidance on antibody testing by employers.

In the updated publication, the EEOC announced that an employer may not require antibody testing[1] (a.k.a. Serologic testing) before allowing employees to re-enter the workplace. The EEOC based its guidance on the Centers for Disease Control and Prevention (CDC) Interim Guidelines for COVID-19 Antibody Testing. According to the CDC, "Serologic test results should not be used to make decisions about returning persons to the workplace."

In light of the CDC's guidance, the EEOC determined that antibody tests, which constitute a medical examination under the Americans with Disabilities Act (ADA), do not meet "the ADA's 'job-related and consistent with business necessity' standard for medical examinations or inquiries for current employees." Notably, the EEOC stated that it will "closely monitor" the CDC's recommendations, and may update its position based on the future guidance provided by the CDC.

As many employers continue to evaluate options for employee screening and appropriate medical evidence for returning to work, employers should be mindful of the EEOC's guidance and not mandate antibody tests as part of the screening process or returning to work, for the time being. Employers are encouraged to consult with legal counsel before implementing screening programs to ensure compliance with both state and federal laws. BWS will continue to monitor and keep our clients apprised of the dynamic developments with respect to the COVID-19 pandemic.

[1] Please note that an antibody test is different from a COVID-19 test (i.e., a viral test) to determine if someone has an active case of COVID-19. The EEOC has previously stated that COVID-19 viral tests are permissible under the ADA, subject to the EEOC guidance. Employers are encouraged to consult legal counsel before implementing COVID-19 testing to ensure legal compliance with both

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the ADA and other state and federal laws.

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