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(hace 12 días)

para Lori

I hope this email finds you well. Here is an update from our of counsel employment lawyer Tracey Spruce regarding employer testing for COVID-19. As always, we are here to assist you as you navigate this challenging climate.

Best,
Lori

EEOC Updates Guidance Regarding COVID-19 Testing

Last Thursday (April 23, 2020) the EEOC released the latest version of its guidance, [“What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws.”](#) The update addresses the question of whether an employer may administer a COVID-19 test to detect the presence of the virus before permitting employees to enter the workplace. At this stage in the pandemic, the answer is yes, so long as testing is accurate and reliable. The Americans with Disabilities Act requires any mandatory medical test of employees be “job related and consistent with business necessity.” The EEOC has taken the position this standard is met under the current circumstances because any employee entering the workplace with COVID-19 will pose a direct threat to the health of others. It has directed employers to follow evolving guidance from the federal Centers for Disease Control and state and local public health authorities in determining steps to be taken to maintain workplace safety.

The EEOC guidance addresses related issues for employers who are maintaining an onsite workforce or preparing to return employees to the workplace. In addition to testing, employers are entitled to ask employees if they are experiencing any symptoms associated with COVID-19 such as fever, chills, cough, shortness of breath, sore throat, or other symptoms identified by public health authorities or reputable medical sources. Employers may also take employees’ temperature. These screening measures may be used for new employees, but only after making a conditional job offer, and only if implemented for all employees in the same type of job. All medical information collected in this process must be stored in medical files separate from an employee’s personnel file.

An employee with symptoms of COVID-19 can be required to leave the workplace or to present a note from a health care professional certifying fitness for duty before being allowed to return to work. An employer may withdraw a job offer if it needs an applicant to begin working immediately and the applicant has COVID-19 or symptoms of it.

Employers grappling with how best to maintain a safe workplace during the pandemic continue to contend with the limited availability of COVID-19 testing, as well as the fact that an employee who tests negative may become ill at a later date and that employees may carry the virus while asymptomatic. For now, infection control practices like social distancing and regular handwashing remain the best defense against workplace transmission of the virus. The EEOC guidance at least provides some clarity regarding the extent of an employer's right to make inquiries and conduct testing and signals the Commission's willingness to rely upon developing guidance from public health authorities. The EEOC has not yet addressed potential testing for COVID-19 antibodies or how the results of such a test could be utilized in the workplace. We anticipate this will be an area of growing interest in the coming months.