

## HR Tracker, ¶47,076, ADA does not permit COVID-19 antibody testing as return-to-work requirement — AGENCY REGULATION, (Jun. 22, 2020)

On June 17, the EEOC once again updated its technical assistance publication addressing questions arising under federal equal employment opportunity laws in the context of the ongoing COVID-19 pandemic. The federal antidiscrimination agency has added a new Q&A about antibody testing to its guidance, "What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws."

**Antibody testing.** An antibody test is different from a test to determine if someone has an *active* case of COVID-19 (viral testing). The EEOC has already said that COVID-19 *viral* tests may be permissible under the ADA. Antibody tests, on the other hand, check for antibodies in the blood, which can show whether people have had a *past* infection with the virus that causes COVID-19. Antibodies are proteins that help fight off infections and usually provide protection against getting a particular disease again. This EEOC is providing guidance on this type of testing for the first time.

**Cannot be required for workplace re-entry.** In new Q&A No. 7, the EEOC points out that the CDC has said in its Interim Guidelines that antibody test results "should not be used to make decisions about returning persons to the workplace." In view of this guidance, under the ADA employers may *not* require antibody testing before permitting employees to re-enter the workplace, the EEOC said.

An antibody test is a medical examination under the ADA. Given the CDC's Interim Guidelines on antibody testing, an antibody test at this time would not meet the ADA's "job related and consistent with business necessity" standard for medical exams or inquiries for current employees. Accordingly, requiring antibody testing before allowing employees to re-enter the workplace is *not permissible* under the ADA.

The EEOC advised that it will continue to closely monitor the CDC's recommendations and could update this discussion in response to changes in those recommendations.

**Source:** Written by Pamela Wolf, J.D.