

# Update to EEOC's Position on Mandatory COVID testing

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## On July 12, 2022, the Equal Employment Opportunity Commission ('EEOC') updated its guidance regarding COVID-19 workplace viral screening testing.

The EEOC's original position on COVID-19 workplace viral screening testing was that it always met the Americans with Disabilities Act ("ADA") standard for conducting

medical examinations.

However, on July 12, 2022, the EEOC explained that going forward, "employers will need to assess whether current pandemic circumstances and individual workplace circumstances justify viral screening testing of employees to prevent workplace transmission of COVID-19."

The EEOC's FAQ A.6 now provides that an employer, as a mandatory screening measure, may administer a COVID-19 viral test "if the employer can show it is job-related and consistent with business necessity."

Fortunately, the EEOC has provided eight factors for businesses to consider in determining whether the new "business necessity" standard is met:

- the level of community transmission;
- the vaccination status of employees;
- the accuracy and speed of processing for different types of COVID-19 viral tests;
- the degree to which breakthrough infections are possible for employees who are "up to date" on vaccinations;
- the ease of transmissibility of the current variant(s);
- the possible severity of illness from the current variant(s);
- what types of contacts employees may have with others in the workplace or elsewhere that they are required to work (e.g., working with medically vulnerable individuals); and,
- the potential impact on operations if an employee enters the workplace with COVID-19.

It is important for business owners to appropriately conduct and document the above analysis.

The EEOC's COVID-19 guidance concerning COVID-19 workplace viral testing may further evolve, so it will be important for business owners to periodically review the EEOC's current FAQs.

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