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What COVID-19 Tests Can Employers Require?

As employers begin to recall employees to the workplace, many are planning to require employees to submit to medical tests for the purpose of detecting COVID-19. In this regard, it is important to distinguish between viral tests that determine if a person is actively infected with COVID-19 and antibody or serology tests which determine if a person was ever infected with COVID-19, even if they are asymptomatic and built up antibodies to the disease.

On Wednesday, June 17, the EEOC issued guidance declaring that an antibody test is a medical examination and employers who require employees to submit to antibody tests as a condition of returning to work violate the Americans With Disabilities Act. In support of its guidance, the EEOC relied on the latest opinion of the Center for Disease Control and Prevention (the "CDC") which concluded that antibody tests aren't reliable in determining if a person is immune to the disease or as the basis for a decision about allowing persons back to work. Based upon the CDC's opinion, the EEOC has concluded that an antibody test does not meet the ADA's job related and business necessity standard for a medical exam in order to comply with the ADA. It is important to note that it remains the EEOC's position that viral tests to determine if a person actively suffers from COVID-19 are permissible and do not violate the ADA. Given the evolving knowledge regarding COVID-19 and as this development illustrates, employers must

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regularly monitor medical developments and how they may impact legal obligations under the ADA and other applicable laws.

If you have any questions regarding the updated EEOC Guidance on COVID-19 testing or any other labor and employment issues, please contact Gerald Golden or your Neal Gerber Eisenberg attorney.

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