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Blog Post

ALERT! Your COVID-19 policies and procedures need a BOOSTER!

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Employers who are conducting automatic COVID-19 testing of employees or gathering test results of employees' families should beware: the Equal Employment Opportunity Commission ("EEOC") has issued new guidance limiting the former and has penalized a healthcare practice recently for doing the latter.

New Guidance for Workplace COVID-19 Testing

Early in the pandemic, the EEOC issued guidance in the form of FAQs on "What You Should Know About COVID-19, the ADA, Rehabilitation Act and Other EEO Laws" and has periodically updated that guidance as circumstances have changed. The latest update, issued earlier this month, makes clear that employers can no longer assume that their worksite COVID-19 testing automatically meets the required standard for workplace medical examinations and inquiries under the Americans with Disabilities Act ("ADA"). The ADA requires that such exams and inquiries be "job-related and consistent with business necessity." The EEOC notes that employers will meet the "business necessity" standard when such testing is consistent with current guidance from Centers for Disease Control and Prevention ("CDC"), Food and Drug Administration ("FDA"), and/or state/local public health authorities. In determining whether workplace testing meets the

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business necessity standard, employers might consider, for example:

- levels of community transmission;
- the accuracy and speed of processing tests;
- vaccination status of employees;
- degree of breakthrough infections for the fully-vaccinated;
- ease of transmissibility and severity of the current variant;
- types of contacts among employees; and
- potential impact on operations if an employee enters the workplace with COVID-19.

Returning to Work After COVID-19

The new guidance also makes clear that after an employee has been out sick with COVID-19, employers may still require a note from a qualified medical professional confirming that it is safe for the employee to return without transmitting the virus to others. If the employer has objective concerns about the employee's ability to resume working – for example, where the job is physically demanding – the new guidance also affirms that the employer may require confirmation from the medical professional that the employee can do so.

Notably, COVID-19 is not always a disability. Therefore, a request for confirmation from a medical professional may not even fall under the ADA as a disability-related inquiry. If it were, then it would fit under the ADA standard requiring that such inquiries be job-related and consistent with business necessity because it is related to the possibility of transmission and/or to the employer's objective concern about the employee's ability to resume working.

Employers do not have to require a note; the guidance expressly notes that they can simply rely on guidance from the CDC on when employees can

safely return. As of today, that guidance provides that (a) individuals who had symptoms can end isolation after five full days if they are fever-free for 24 hours (without fever reducing medication) and symptoms are improving; (b) individuals who did not have symptoms could end isolation five days after a positive test; and (c) individuals who got very sick from COVID-19 or have weakened immune systems should isolate for at least 10 days and consult a doctor before ending isolation. CDC guidance changes frequently, so employers should monitor the CDC website regularly.

GINA Implications of COVID-19 Tests

Employers who screen employees for COVID-19 should be mindful of their obligations under the Genetic Information Non-Discrimination Act ("GINA"). GINA is not widely known. Indeed, in FY 2021 only 242 charges were filed with the EEOC alleging GINA violations, compared to 20,908 charges alleging race discrimination. Nonetheless, employers should pay attention. A Florida dermatology practice recently ran afoul of GINA by collecting COVID-19 testing results of employees' family members and must pay a hefty price. In addition to restoring leave, back pay, and compensatory damages for affected employees, the practice must revise their policies, conduct training, and post a notice of the violation.

You may be vaguely aware that GINA prohibits discrimination on the basis of genetic information by employers in making employment decisions and by health insurers in determining eligibility, cost, coverage, and benefits. But you may not know that it also prohibits employers from ***simply acquiring*** genetic information of applicants or employees, with six narrow exceptions. And here's the thing: genetic information is broadly defined to include not only information about the genetic tests of an individual and their family members, but also ***family medical history***, which is often used to determine whether someone has an increased risk of getting a disease in the future.

The narrow exceptions to GINA are: (i) when acquired inadvertently, such as where a supervisor overhears an employee talking about a family member's illness; (ii) when it is obtained as part of health or genetic services offered by the employer on a voluntary basis, if certain specific requirements are met; (iii) as part of the certification process under the Family and Medical Leave Act ("FMLA") or similar state leave law where an employee is asking for leave to care for a family member with a serious health condition; (iv) where it is acquired through commercially and publicly available documents like newspapers or websites, as long as the employer is not searching those sources for such information; (v) where it is acquired through a genetic monitoring program that monitors the biological effects of toxic substances in the workplace where the monitoring is required by law or, under certain conditions, is voluntary; or (vi) in the context of DNA analyses for certain law enforcement purposes.

The regulations implementing GINA provide "safe harbor" language, and if employers use that language, any disclosure should be considered inadvertent. Therefore, employers seeking medical information to support a request for leave or other accommodation under the ADA should warn employees not to provide genetic information in response by using the following "safe harbor" language in the request:

> The Genetic Information Nondiscrimination Act of 2008 (GINA) prohibits employers and other entities covered by GINA Title II from requesting or requiring genetic information of an individual or family member of the individual, except as specifically allowed by this law. To comply with this law, we are asking that you not provide any genetic information when responding to this request for medical information. "Genetic information" as defined by GINA, includes an individual's family medical history, the results of an individual's or family member's genetic tests, the fact that an

> individual or an individual's family member sought or received genetic services, and genetic information of a fetus carried by an individual or an individual's family member or an embryo lawfully held by an individual or family member receiving assistive reproductive services.
>
> 29 C.F.R. §1635.8(b)(1)(i)(B).

The Department of Labor has incorporated a similar warning in its FMLA certification forms for healthcare providers: "Do not provide information about genetic tests, as defined in 29 C.F.R. § 1635.3(f), genetic services, as defined in 29 C.F.R. § 1635.3(e), or the manifestation of disease or disorder in the employee's family members, 29 C.F.R. § 1635.3(b)."

Takeaways

Now is the time for employers to update their COVID-19 policies and procedures and train supervisors about their obligations under the ADA, GINA, and other workplace discrimination laws. As with all medical information, genetic information must be maintained as confidential, separate, and apart from an employee's personnel file. For assistance with these and other workplace issues, contact your Akerman attorney.
