

The EEOC updated its COVID testing guidance for employers

The EEOC has been issuing key guidance to employers ever since the pandemic hit in 2020. But the pandemic is still here, morphing into variants, and the EEOC's guidance is morphing, too. It has now [updated several FAQs](#) clarifying when you can and can't test employees for the virus, whether you can still require employees to get shots, and other matters.

To test or not to test now

The Americans with Disabilities Act limits your ability to test employees by requiring you to show the testing is job-related and consistent with business necessity. At the outset of the pandemic, the EEOC said this standard was always met, so you could conduct covid viral tests on employees without worrying about the ADA.

The pandemic is still with us, but the sense of crisis has abated. In response, the EEOC has put the OK-to-test assumption to bed and reactivated the ADA's regular testing standard.

New FAQs clarify you may require employees to take covid viral tests when evaluating their initial or continued presence in the workplace, but you must show the testing is job-related and consistent with business necessity. Antibody tests, the EEOC says, are off-limits because they may not show whether employees are currently infected or establish whether they're immune to infection.

Meeting the business necessity standard: Your use of covid viral tests to screen employees who are or will be in the workplace meets the business necessity standard when testing is consistent with current guidance from the Centers for Disease Control and Prevention, the Food and Drug Administration, and/or state and local public health authorities.

Possible considerations in determining whether the business necessity standard is met include the following:

- The level of community transmission
- Employees' vaccination status
- The accuracy and speed of processing for different types of covid viral tests
- The degree to which breakthrough infections are possible for employees who are up to date on their vaccinations
- How easily current variants are transmitted
- The possible severity of illness from the current variant
- The types of contacts employees may have with others in the workplace or wherever they're required to work
- The potential impact on business operations if an employee enters the workplace with covid.

Mandatory shot policies still stand up

Yes, you may continue to require employees to get covid vaccinations, subject to reasonable accommodations

for employees who have religious objections or medical impediments to getting the shots. You may also require employees to present documentation or other confirmation to show they're up to date on their shots.

If an employee can't get vaccinated because of a disability, you must accommodate the employee, unless you can show they would pose a direct threat to their own health or safety or the health and safety of other employees. A direct threat is a significant risk of substantial harm that can't be eliminated or reduced by a reasonable accommodation.

Miscellaneous matters

The latest EEOC guidance also clarifies the following:

- You may require employees returning to the workplace after being sick with covid to present doctors' notes. Alternatively, you can follow CDC guidance to determine whether it's safe to allow an employee to return to the workplace.
- You may make information available in advance to all employees about whom to contact to request a reasonable accommodation for a disability or a sincerely held religious belief when they return to the workplace.
- You may test job applicants after making a conditional job offer, provided you test all entering employees in the same type of job.
- You may not postpone the start date or withdraw a job offer because a job applicant is older, pregnant or has an underlying medical condition increasing risk of contracting covid.
- The pandemic might result in excusable delays during the interactive process, but you'll have to show how specific pandemic-related circumstances justified the delay in providing a reasonable accommodation. You're encouraged to use interim solutions to enable employees to keep working as much as possible.