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May 5, 2020

# MEMORANDUM

TO: Donnie Colston

FROM: Victoria L. Bor

RE: Antibody Testing at FPL/NextEra

This is in response to your request for guidance on NextEra's proposed COVID-19 testing. Although your email referred to antibody testing aimed at determining which employees can be kept on-site during future emergencies, NextEra's FAQs describe testing for two distinct purposes: to determine the potential presence of active COVID-19 infections and to determine past exposure, which "may mean . . . at least some immunity." Moreover, the attached consent form only addresses testing to "reveal the presence of COVID-19." As I will explain, an employer's ability to require employees to submit to medical screening is subject to the federal Americans with Disabilities Act (ADA), and these two kinds of testing present different issues under that Act. But whatever the purpose, under the National Labor Relations Act (NLRA), both the testing and the consent form are mandatory subjects of bargaining.

## I. ADA Considerations

While EEI is correct that the tests do not necessarily present HIPPA issues,[1] the ADA restricts the kinds of medical inquiries employers can make and imposes HIPPA-like confidentiality requirements on any medical information employers collect. As a general matter, employers can only require current employees to undergo medical tests that are "job-related and consistent with business necessity." 42 U.S.C. § 12112(d)(4)(A). And, according to the Equal Employment Opportunity Commission (EEOC), medical inquiries will only meet that standard if the employer "has a reasonable belief, based on objective evidence," that: (1) the employee's ability to perform essential job functions will be impaired by a medical condition; or (2) the employee will pose a "direct threat" due to a medical condition.

The EEOC has issued guidance about how these general rules apply to the current pandemic, and has specifically stated that, "[b]ased on guidance of the CDC and public health authorities as of March 2020, the COVID-19 pandemic meets the direct threat standard," that is,

[1] HIPPA imposes confidentiality requirements on healthcare facilities, not employers.

"that a significant risk of substantial harm would be posed by having someone with COVID-19, or symptoms of it, present in the workplace at the current time." EEOC, "Pandemic Preparedness in the Workplace and the ADA," available at https://www.eeoc.gov/sites/default/files/2020-04/pandemic_flu.pdf.

The EEOC has therefore concluded that it is consistent with the ADA for employers to "take steps to determine if employees entering the workplace have COVID-19 because an individual with the virus will pose a direct threat to the health of others. Therefore an employer may choose to administer COVID-19 testing to employees before they enter the workplace to determine if they have the virus."

From an ADA standpoint, employers can therefore require employees to be tested to determine whether they *currently* are infected, to protect other employees from the "direct threat" of contracting the virus. And because the EEOC has also stated (in a webinar) that – again, from an ADA standpoint -- an employer can "bar an employee from physical presence in the workplace if he refuses to answer questions about whether he has COVID-19, symptoms associated with COVID-19, . . . has been tested for COVID-19, [or] refuses to have his temperature taken," the EEOC would presumably similarly permit an employer to bar an employee from the workplace who refuses to be tested for a current infection.

The EEOC has not offered an opinion on testing for antibodies to determine whether someone has been exposed in the past, and in my view, this presents a different set of issues. As stated above, the general rule is that a medical test will be considered to be "job-related and consistent with business necessity" if it is aimed at determining whether the employee has a medical condition that would impair his or her ability to perform an essential job function or that causes the employee to pose a "direct threat" of harm to his or herself or others in the workplace. Given the current state of knowledge about the significance of antibodies, it is unlikely that antibody testing meets either of these criteria.

As you explained in your note, and as the FAQs make clear, a primary purpose of the proposed testing is to determine whether employees have antibodies "which *may mean* that the person has at least some immunity," and which will permit the company "to make decisions going forward about day-to-day staffing." (Emphasis added.) However, according to the CDC:

> An antibody test looks for the presence of antibodies, which are specific proteins made in response to infections. Antibodies can be found in the blood of people who are tested after infection and show that people have had an immune response to the infection. Antibody test results are especially important for detecting previous infections with few or no symptoms.
>
> ***However, we do not know if the antibodies that result from SARS-CoV-2 infection will provide someone with immunity from a future infection***. If antibodies do provide immunity, we don't know what titer or amount of

> antibodies would be protective or the duration that protection would last. CDC scientists are conducting studies to better understand the level of antibodies needed for protection, the duration of that protection, and the factors associated with whether a person develops a protective antibody response.

CDC, "Serology Testing for COVID-19," https://www.cdc.gov/coronavirus/2019-ncov/lab/serology-testing.html (emphasis added); *see also* New York Times, "FDA Orders Companies to Submit Antibody Test Data," May 4, 2020 (https://www.nytimes.com/2020/05/04/health/fda-antibody-tests-coronavirus.html).

In short, there is no current evidence that antibody testing demonstrates immunity. The tests therefore cannot be justified as "job-related and consistent with business necessity," since they do not serve the company's purported purpose of determining who, because of immunity, can safely be present in the workplace. Accordingly, if NextEra were only administering these tests to determine immunity, I think you would have a strong argument that the testing is prohibited by the ADA.

The problem here, though, is that the FAQs describe the tests as serving two purposes, one of which – testing for current infection – is clearly permissible under the ADA. If you are concerned about the scope of the testing (or if you want to see what their actual intentions are), you could argue that the company is only entitled to test results that show current infection. And/or you could argue that even if the company gets access to results regarding past infection, it is limited in the use to which it can put that information, since the tests do not predict whether people selected to be kept on-site are somehow impaired or are at risk of either being subject to or posing a "direct threat."

II. Workers Comp

You asked whether the test raises workers compensation issues. Workers comp is a state law issue, so the answer will ultimately depend on law in the particular state. However, as a general matter, to qualify for workers comp, an employee has to demonstrate that his or her disease was "work-related." Some states are moving towards creating a presumption that, for some job classifications and/or in certain circumstances, COVID-19 should be considered "work-related." But the mere fact that someone shows up positive on an employer-mandated test would not necessarily demonstrate that the infection was work-related.

However, if an employer requires a medical test as a condition of employment and an employee suffers debilitating side-effects as a result of the test, the side-effects may be considered work-related. That may, in fact, be the kind of liability against which the consent form is intended to provide immunity.

III. NLRA Considerations

The FAQs state that testing is mandatory and "[a] refusal to test can be considered a refusal to work," which may lead to discipline "up to and including termination." The mere fact that testing is permissible under the ADA does not mean that the employer can avoid its bargaining obligations. Instead, because NextEra is making both the test and signing the consent form conditions of employment, both are mandatory subjects of bargaining. See, e.g., *Lockheed Shipbuilding Co.*, 273 NLRB 171, 177 (1984) (medical tests used to make employment decisions are a mandatory subject of bargaining).

I therefore recommend that you demand bargaining on a range of issues about how the test will be administered and used, including:

- the circumstances under which employees will be tested;
- the information the employer intends to secure from the tests;
- the scope of personnel to whom the test results will be disclosed (and promised confidentiality requirements);
- the purposes to which the employer intends to use the information;
- the repercussions for employees who test negative or positive (job protection? sick leave?);
- the options for employees who refuse the test; and
- the content of the consent form.[2]

I also recommend that you begin by making an information request, to force NextEra to explain more specifically the reasons it intends to test and the assumptions on which it is relying. In particular, it is important to put the company in the position of having to demonstrate the link (if any) between the requirement that employees submit to antibody testing and the company's ability to make any kind of decisions "about who can safely work in certain jobs or situations."

Let me know if you would like to discuss this or if you have further questions.

cc: Sherilyn Wright

Jonathan Newman

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[2] Note that the consent form *only* states that it is to determine the current presence of the infection, which is contradicted by the FAQs. And I recommend against agreeing to waiving liability.