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All in a Day's Work: The Employer's Legal Guide

Employers need to consider whether they must compensate employees for mandatory COVID-19 testing

By Michael E. DeLarco, Tao Leung & Maria Benvenuto on June 9, 2020

As cities and states around the United States are gearing to reopen facilities, employers are tasked with the daunting responsibility of ensuring that their workspaces are safe. As we previously [posted](#), the Equal Employment Opportunity Commission (EEOC) recently issued guidance expressly stating that employers may require employees to be tested for COVID-19 before they are allowed to enter the workplace. While the EEOC offered guidance signaling that employers may only administer COVID-19 tests that are “job related and consistent with business necessity,” the guidance fell short of clarifying certain practical considerations surrounding the testing. One such consideration was whether employers are required to compensate employees for the cost of and time spent undergoing the COVID-19 test. The EEOC has been silent on these points – so has the federal Department of Labor (DOL).

Cost of testing

Employers will likely be required to reimburse employees for the costs associated with taking a mandatory COVID-19 test, with some exceptions. Notably, both the Families First Coronavirus Response Act (FFCRA) and the Coronavirus Aid, Relief, and Economic Security (CARES) Act impose a requirement that group and individual health insurance plans cover COVID-19 diagnostic testing – including the cost of office, urgent care, emergency room, and telehealth visits in order to receive testing – without cost-sharing or prior authorization. The requirement does not apply to retiree-only plans or to excepted benefits, such as dental, vision, and most employee assistance programs. However, all other plans are required to cover items and services relating to COVID-19 diagnostic testing that were furnished on and after March 18, 2020, and to continue to do so through the end of the public health emergency. Employers should contact their health insurance provider to confirm that such testing is covered.

Nevertheless, even if employees are not covered by an applicable insurance plan or the national emergency ends, ADA guidance suggests that employers will still be obligated to pay the costs of administering mandated COVID-19 tests. **Enforcement Guidance** on Disability-Related Inquiries and Medical Examinations of Employees Under the ADA states when an employer requires that an employee, who it reasonably believes will pose a “direct threat,” be examined by a health care professional (usually of the employer’s choice), the employer must pay all costs associated with the employee’s visit to the health care professional. Based on guidance of the Center for Disease Control (CDC) and public health authorities as of March 2020, the COVID-19 pandemic meets the “direct threat” standard. Therefore, employers will likely be required to pay for administering employer-mandated COVID-19 tests. And in the event COVID-19 is no longer deemed a “direct threat,” some states nevertheless require employers to reimburse necessary business-incurred expenses. In states with such requirements, the cost of mandated COVID-19 tests, as well as reimbursement for mileage to and from the testing sites, would also likely need to be reimbursed.

Compensation for taking the test

Additional ambiguity surrounding employer-mandated COVID-19 testing looms around whether employees must be compensated for the time they spend traveling to and from and while at a COVID-19 testing center. Unfortunately, guidance on this point is indistinct. However, in a Fair Labor Standards Act (FLSA) opinion letter regarding employer-mandated drug tests, the DOL opined that “attendance by an employee at a meeting during or outside of working hours for the purpose of submitting to a mandatory drug test imposed by the employer would constitute hours worked for FLSA purposes . . .” The DOL also takes the position that, in addition to the time actually spent undergoing the test, time spent traveling to and from the test and waiting for the test would also likely be deemed hours worked. Employers should assume that requiring their workforce to undergo COVID-19 testing would be deemed similar to requiring an employee to undergo mandatory drug testing. As such, under the FLSA, employers are most likely required to compensate employees for the time spent undergoing COVID-19 tests. Employers should also check their state wage and hour laws for specific compensation requirements regardless of whether a mandated COVID-19 test would be treated similarly to a mandated drug test. For example, in California, all time spent by an employee related to the mandated tests, including travel time, would likely be deemed time spent “subject to the employer’s control,” and thereby deemed compensable time.

We strongly encourage employers to consult counsel prior to implementing any mandatory COVID-19 procedures. Please contact the authors of this article or the Hogan Lovells attorney with whom you work for further advice.

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