

AN EMPLOYER'S 7-STEP GUIDE TO IMPLEMENTING A COVID-19 TESTING PROGRAM

Insights
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While employers anxiously await [the impending OSHA Emergency Temporary Standard that will require those with 100 or more employees to ensure their employees are vaccinated against COVID-19 or submit to weekly testing](#), many are beginning to develop COVID-19 testing programs to comply with the anticipated ETS, increase vaccination rates, or both. In fact, [in a just-released survey](#) conducted by Fisher Phillips, 43% of employers subject to the ETS said they were considering implementing a testing program instead of a vaccine mandate. And while there are many unanswered questions about a testing regimen – such as who will be responsible for testing, how OSHA is going to regulate this requirement, how employers will confirm vaccination status with OSHA and more – there are some definitive considerations any employer will need to keep in mind when designing a COVID-19 testing program. What do employers need to consider before making the mandate-or-test decision and how should you implement a testing program, regardless of whether you're subject to the ETS? Here is our seven-step plan.

Getting Started

Before getting started, employers should conduct a census of their workforce to determine who is currently vaccinated. In all states except Montana, it is lawful to inquire on the vaccination status of your employees. Once you have determined how many employees are unvaccinated, you can begin to determine how you will allocate resources to this program.

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It is currently unknown whether the OSHA ETS will require employers to foot the bill for COVID-19 tests, but if the enacted [OSHA Healthcare ETS](#) or OSHA precedent that the employer is responsible for the cost of compliance with safety standards is any indication, you will need to cover these costs. Moreover, it is recommended that employers who are not subject to the ETS should cover the cost of testing if you are requiring it of your employees, as some state statutes require that an employer pay for any required medical testing.

Cost of Testing

Under the Families First Coronavirus Response Act (FFCRA), which is part of the Coronavirus Aid, Relief and Economic Security Act (CARES Act) that was passed in March of 2020, [COVID-19 testing which is “medically appropriate for the individual as determined by the individual’s attending health care provider”](#) is available at no cost under group health insurance plans or for those who are uninsured. Surveillance testing such as that required under the ETS or any other preventative testing program may not be considered “medically appropriate” such that employers may be left holding the bag.

COVID-19 testing costs range from \$20 to \$1,419, according to the [Kaiser Family Foundation](#). If only a small segment of your workforce is unvaccinated, offering weekly testing as an alternative may not be a drop in the bucket. For some employers with significantly low vaccination rates, the cost of testing can be in the tens of thousands each week. But the hard costs of testing alone are just one part of the equation. You should also consider the costs associated with properly administering the program – including labor costs, human resources time, and the practical implications of testing interrupting the work day.

Compensation Issues

In addition to the cost of testing, you also need to be aware that [any testing program must comply with applicable wage and hour laws](#) at both the state and federal level. These laws generally provide that time spent or receiving employer-required tests should almost always be treated as compensable time. According to the [U.S. Department of Labor](#), employers are required to pay employees for time spent waiting for and receiving medical attention (including COVID-19 testing) at their direction or on their premises

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during regular working hours under the Fair Labor Standards Act (FLSA). This likely includes required testing occurring on employees' days off if such testing is necessary to perform their jobs safely and effectively during the pandemic.

Additionally, some employers may need to reimburse employees for mileage associated with testing, as some states require reimbursement of all business expenses. To minimize the burden of this expense, you should consider designating specific testing centers within close proximity to the employees' worksite, or contract with a testing provider to perform COVID-19 testing on-site.

Testing Types

Under the OSHA ETS, it is anticipated that only those viral tests which are [approved by the U.S. Food & Drug Administration \(FDA\)](#) will be able to be used to comply with the standard. Currently, there are two types of COVID-19 diagnostic viral tests available to determine whether a current COVID-19 infection is present: a molecular test and an antigen test.

- Molecular tests (which include polymerase chain reaction (RT-PCR) tests) require the specimen to be collected with a nasal or throat swab, or saliva. Depending on the lab processing the test, the results of such tests can take up to five days.
- Antigen tests, on the other hand, require a nasal swab. The results of rapid antigen tests are typically provided within a few hours of the specimen collection.

Historically, [PCR tests are more sensitive than rapid tests](#) and are deemed to be more accurate. On October 4, the [FDA issued an emergency use authorization](#) for ACON Laboratories Flowflex COVID-19 Test, which is an at-home antigen test. According to the announcement, approval of the Flowflex test "should significantly increase to availability of rapid, in-home tests and is expected to double rapid at-home testing capacity in the U.S. over the next several weeks." It is unclear at this point whether at-home testing will be acceptable under the OSHA ETS.

Developing a 7-Step Plan

Even though it is not clear what the ETS will require, there are still actions you can take to ensure you are prepared

should you choose to test instead of mandate the vaccine, or if you would like to implement testing even if not subject to the ETS. Below are seven steps employers can take to develop a COVID-19 testing plan.

1. Determine who will perform the testing. You should consider whether you will offer on-site testing, allow at-home testing (assuming these tests comply with the ETS), or send employees to an off-site third-party location. Each option has its own pros and cons.

- **On-site testing** may create administrative burdens including additional HR costs, designation of a private area for testing, and disposing of medical waste. Still, this testing will likely cause less disruption to operations – and since employees are already on-the-clock, you will not have to pay additional compensation.
- **At-home testing** will require you to rely on employee self-testing and reporting – and testing kits may not be reliable, nor FDA approved. Additionally, you will be required to pay for the time the employee is engaged in the testing. However, this option will likely be less disruptive to operations.
- **Off-site third-party testing** may lessen your administrative burden and you can provide employees a list of low-cost convenient testing sites. Similar to at-home testing, you should anticipate additional costs relating to employee compensation for testing time.

Regardless of who performs the testing, you should prepare for test scarcity and increased test costs as demand for testing increases.

2. Establish policies and best practices. An employee-testing policy should establish practices for collecting and reviewing test results.

- Test results may be tracked through an app or through a company intranet portal.
- You may want to appoint a “testing director” and team of personnel who will receive and review tests results.
- In addition, policies should explain what an employee will need to do if they test positive, set out the procedure for reporting time spent testing outside

scheduled hours, and provide employees an opportunity to discuss why they may have not obtained a weekly test and the procedure for testing on an alternative day.

3. **Anticipate requests for accommodations.** Typically, testing is an accommodation for those who are unable to receive the vaccine due to religious, disability, or medical reasons. Still, employees may seek exemption from testing because of a sincerely held religious belief, disability, or medical condition. An accommodation procedure should be in place and Requests for Medical and Religious Exemption forms should be prepared. If an employee cannot be accommodated, you can consider a temporary unpaid leave of absence depending on the circumstances.
4. **Consider temporary exemptions.** Depending on what the ETS requires, you may want to establish a *temporary* testing exemption period for those employees who have had COVID-19, a previous antibody test for COVID-19, or have received monoclonal antibodies or convalescent plasma in the prior 90 days. This may help alleviate some of the financial and administrative burden.
5. **Review applicable paid sick leave laws.** Determine if there is any supplemental paid sick leave, existing paid sick leave, or other applicable paid time that you may apply to time the employees spend getting tested.
6. **Determine discipline for non-compliance.** Establish disciplinary steps for when an employee fails to obtain a weekly test. For example, you should determine if you intend to terminate an employee for failing to test. You should clearly set forth the discipline steps for not complying with your testing policy and have a procedure in place for enforcing your testing policy. This is important considering that non-compliance with the ETS could potential involve a \$14,000 fine per violation. Moreover, you may face unwanted negative attention in the media or through other reputational sources should you find yourself not in compliance with the OSHA emergency rule.
7. **Maintain confidentiality of test results.** Just like vaccine status, test results constitute confidential medical information. This information should be kept confidential and separate from an employee's personal file.

Final Word of Warning

Some employers (especially those in the healthcare field) may believe they can circumvent many of these hurdles by performing COVID-19 tests on your own employees. Besides the greater ADA-related duties that would be implicated by such a plan raises a number of logistical and compliance challenges that may render the legal risk too great. No matter how simple such a plan may seem, it would shift some significant additional burdens your way (including the risk of liability for any alleged complication or side effect). Before considering such a plan, you should coordinate with your Fisher Phillips counsel to get a full understanding of the issues at play and determine whether this route is truly right for your organization.

Conclusion

While waiting for the release of the ETS, you can begin preparing for the administrative, logistical, and monetary components of implementing a testing program. This seven-step guide can also be used if you aren't subject to the ETS and you still desire to implement a testing program at your workplace.

We will monitor these developments and provide updates as OSHA drafts and implements the Emergency Temporary Standard. Make sure you are subscribed to [Fisher Phillips' Insight system](#) to get the most up-to-date information. If you have questions about how to ensure that your vaccine policies comply with workplace and other applicable laws, visit our [Vaccine Resource Center for Employers](#) or contact your Fisher Phillips attorney, the authors of this Insight, or any attorney on our [FP Vaccine Subcommittee](#).