

Employer COVID-19 Vaccination and/or Testing Mandates: Wage and Hour Considerations

This paper addresses the primary wage and hour considerations implicated when an employer mandates COVID-19 vaccination and/or testing of its employees. Employers considering such mandates must be mindful of corresponding wage and hour obligations, regardless of whether the employer is mandating vaccination and/or testing of its workforce by choice or in compliance with a government directive.¹

Employer COVID-19 vaccination and/or testing mandates present open questions — with jurisdictional variances — regarding whether and to what extent: (1) time spent on these activities is compensable, and (2) costs associated with these activities must be absorbed by the employer.²

Must Employers Pay for Employer-Mandated COVID-19 Testing Under Federal Law?

Under the Fair Labor Standards Act (“FLSA”), there is no requirement for an employer to pay for the costs associated with COVID-19 testing when the employer mandates such testing, unless absorbing the cost of such testing drops the employee’s earnings below minimum wage. *See* 29 C.F.R. § 531.35 (employers are only required to reimburse for work-related expenses when the expenses drop the employee’s earnings below minimum wage).

Beyond the FLSA, guidance from the Equal Employment Opportunity Commission (“EEOC”) may be interpreted as requiring employers to pay the costs of administering mandated COVID-19 tests to employees seeking accommodations for a disability. *See* EEOC Enforcement Guidance

¹ As of this writing, the federal government has issued three vaccination and/or testing mandates applicable to private employers: (1) Executive Order 14042 (“EO 14042”), which requires covered employees of covered federal contractors and subcontractors to be fully vaccinated, subject to limited exceptions for medical and religious reasons; (2) the Centers for Medicare & Medicaid Services (“CMS”) interim final rule that requires staff in most health care settings to be fully vaccinated with limited exceptions, and (3) the Occupational Health and Safety Administration (“OSHA”) COVID-19 Vaccination and Testing Emergency Temporary Standard (“ETS”), which requires private employers with 100 or more employees (who are not otherwise covered by EO 14042 or the CMS interim final rule) to require their employees either to be fully vaccinated or to test weekly for COVID-19, subject to limited exceptions. The legal status of these mandates has been a moving target given multiple challenges pending in various courts. As of January 10, 2022, EO 14042 has been stayed nationwide and the CMS rule has been stayed in 25 states, but the CMS rule is effective in the other 25 states and the OSHA ETS is effective nationwide. The fate of each mandate is likely to be decided by the U.S. Supreme Court, which heard oral arguments regarding the OSHA ETS and CMS rule on January 7, 2022 (but has not yet issued opinions on these matters as of this writing).

² The OSHA ETS requires employers to offer up to four paid hours for vaccination *during* work hours, but not for time getting vaccinated *outside* of work hours. 29 C.F.R. § 1910.501(f). However, the OSHA ETS also notes that other laws (and/or collective bargaining agreements) may require payment for such time. Likewise, the ETS makes clear that it does not require employers to pay for any costs associated with testing, but that other laws, regulations or collective bargaining agreements may require an employer to absorb such costs.

on Disability-Related Inquiries and Medical Examinations of Employees Under the ADA, <https://www.eeoc.gov/laws/guidance/enforcement-guidance-disability-related-inquiries-and-medical-examinations-employees> (last visited Jan. 10, 2022). This Enforcement Guidance states expressly that the Americans with Disabilities Act's ("ADA") requirements regarding disability-related inquiries and medical examinations apply to all of the employees of a covered employer, whether or not they have disabilities. It further states that 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. The EEOC has stated that an individual with COVID-19 will pose a "direct threat" to the health of others. *See* What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws, <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws> (last visited Jan. 10, 2022).

As of this writing, the EEOC has not updated its guidance addressing employer-mandated COVID-19 testing and whether the ADA requires employers to pay all costs associated with such testing.

Must Employers Pay for Time Spent on Employer-Mandated COVID-19 Vaccination and/or Testing Under Federal Law?

Time Spent on These Activities During the Employee's Workday.

Beyond the OSHA ETS provision requiring covered employers to pay up to four hours for vaccination during work hours, federal wage and hour regulations state that time spent by employees waiting for and receiving medical attention on the premises or at the direction of the employer during employees' normal working hours on days when they are working is compensable. *See* 29 C.F.R. § 785.43; *see also* U.S. Department of Labor Wage and Hour Division COVID-19 and the Fair Labor Standards Act Questions and Answers, <https://www.dol.gov/agencies/whd/flsa/pandemic> (last visited Jan. 10, 2022), at Q&A 7 (stating that, if an employer requires COVID-19 testing during the workday, the employee must be paid for the time spent undergoing the testing) and Q&A 5-6 ("[T]ime spent waiting for and undergoing a temperature check related to COVID-19 during the workday must be paid.").

Employer-mandated vaccination and testing that take place during the employee's workday is also likely compensable under the "continuous workday" rule in 29 C.F.R. § 790.6 ("[p]eriods of time between the commencement of the employee's first principal activity and the completion of [the employee's] last principal activity on any workday must be included in the computation of hours worked[.]").

Off-Duty Testing Time.

Less clear is whether time spent undergoing employer-mandated COVID-19 vaccination and/or testing outside of working hours is compensable. Under the FLSA, an employer is not required to pay for time spent in activities that are "preliminary" and "postliminary" to the principal activity or activities the employee is employed to perform, which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any

particular workday at which he ceases, such principal activity or activity. *Id.* at § 254(a)(2). Whether certain activities are preliminary and/or postliminary is the frequent subject of wage and hour litigation, with many of these cases relating to time spent traveling to and from the workplace and time spent donning and doffing. The U.S. Supreme Court addressed this issue most recently in 2014, holding that time is compensable under the FLSA only if the activity at issue is “integral and indispensable” to the principal activities that an employee is employed to perform. *Integrity Staffing Solutions v. Busk*, 574 U.S. 27, 37 (2014). There, the plaintiffs worked in an Amazon shipping warehouse retrieving products from shelves and packaging them for shipment. *Id.* at 29. The Court held that mandated post-shift security screenings were not “integral and indispensable” to the employees’ principal activities of retrieving and packaging products. *Id.* at 35.

While *Busk* opens the door to argue that COVID-19 vaccination and/or testing is not “integral and indispensable” to many jobs, recent guidance from the Department of Labor’s (“DOL’s”) Wage and Hour Division on COVID-19 testing (and screening) muddies the waters. This guidance states that, for many employees, undergoing a temperature check before they begin work must be paid because it is necessary for their jobs. *See* U.S. Department of Labor Wage and Hour Division COVID-19 and the Fair Labor Standards Act Questions and Answers, <https://www.dol.gov/agencies/whd/flsa/pandemic> (last visited Jan. 10, 2022), at Q&A 4. The guidance provides an example of a nurse performing direct patient care services at a hospital who is required to undergo a temperature check upon arrival at the hospital before her shift. According to the DOL, time spent on the temperature check is likely compensable because such task is necessary for the nurse to safely and effectively perform her job during the pandemic.

The DOL has applied a similar analysis with respect to COVID-19 testing, taking the position that the FLSA requires employers to pay for time spent waiting for and receiving a COVID-19 test outside of the employee’s normal working hours (*e.g.*, on their day off before returning to the worksite) if such testing “is necessary for them to perform their job safely and effectively during the pandemic.” *Id.* at Q&A 8. According to the DOL, “[f]or many employees, undergoing COVID-19 testing may be compensable because the testing is necessary for them to perform their jobs safely and effectively during the pandemic.” *Id.* The guidance provides an example of a grocery store cashier who has significant interaction with the general public and is required by her employer to test on her day off. According to the DOL, such time is likely compensable because it is integral and indispensable to her work during the pandemic. *Id.*

These DOL FAQs have served to confuse many employers as to their obligations to pay employees for time spent on mandatory vaccination and/or testing. The DOL’s statements in FAQs 4 and 8 that testing and other screening time may be compensable “for many employees” suggests that there are some jobs for which the agency believes such time is not compensable. It is, however, unclear which job categories the DOL views as not requiring compensation for time spent in employer-mandated vaccination and/or testing — though its examples of a nurse performing direct patient care and a grocery store cashier suggest that this may turn on the extent to which the job requires significant interaction with the general public.

Two pre-pandemic DOL Opinion Letters (from 1997 and 1998) further suggest the DOL may view off-duty COVID-19 testing as compensable. *See* DOL Wage and Hour Division Opinion Letter, 1998 WL 852652 (Jan. 26, 1998); DOL Wage and Hour Division Opinion Letter, 1997 WL 998039

(Sept. 15, 1997). In both letters, the DOL opined that time spent on physical examinations and drug testing mandated by the Department of Transportation must be compensated. In the 1997 Opinion Letter, 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, as would attendance at a licensing physical examination during or outside of normal working hours.” 1997 WL 998039 at *1. The 1998 Opinion Letter also includes the following DOL position:

Generally, whenever an employer imposes special requirements or conditions that an employee must meet before commencing or continuing productive work, the time spent in fulfilling such special conditions is regarded as indispensable to the performance of the principal activity the employee is hired to perform. Included in this general category are required physical exams and drug and alcohol testing. Where the Federal government requires employees to submit to drug and alcohol testing as a condition of the employer's license to operate its business, the drug and alcohol tests are for the benefit of the employer . . .

Time spent in these activities is time during which the employee's freedom of movement is restricted for the purpose of serving the employer and time during which the employee is subject to the employer's discretion and control. It is immaterial whether the time spent in undergoing such testing is during the employee's normal working hours or during nonworking hours. The testing and the time spent undergoing it are essential requirements of the job and thus primarily for the benefit of the employer. Therefore, it is our opinion that the time so spent must be counted as hours worked under the FLSA.

1998 WL 852652, at *1. If time spent submitting to a government-mandated drug test or a physical examination constitutes “hours worked” and is therefore compensable, employers can expect employees to make an argument that follows: that time spent on employer-mandated COVID-19 vaccination and/or testing also counts as “hours worked” that must be compensated, regardless of whether the employer mandates vaccination and/or testing by choice or in compliance with the law.

As of this writing, the DOL’s Wage and Hour Division has not released any additional guidance regarding employer-mandated COVID-19 vaccination and/or testing beyond that discussed above. Until the DOL’s Wage and Hour Division clarifies whether an employer is required to pay for an employee’s time spent on mandatory COVID-19 vaccination and/or testing that takes place off-duty, risk-averse employers mandating such vaccination and/or testing may want to err on the side of caution and pay employees for this time.³

³ Again, the OSHA ETS requires employers to offer up to four paid hours for vaccination *during* work hours, but not for time getting vaccinated *outside* of work hours. 29 C.F.R. § 1910.501(f). However, as discussed herein, less clear is whether other laws require employers who mandate vaccination and/or testing (including those covered by the OSHA ETS) to pay their employees for time spent on these activities.

Must Employers Pay for Employer-Mandated COVID-19 Vaccination and/or Testing Under State or Local Laws?

Beyond these federal wage and hour law considerations, there are jurisdictional variances as to whether and to what extent an employer must pay for employer-mandated COVID-19 testing and/or vaccination and time spent on these activities. By way of example:

- The **California** Department of Industrial Relations takes the position that California law requires employers to pay for all costs associated with employer-mandated testing and vaccination, as well as time spent on such testing and vaccination — including travel time and waiting time. *See* California Dept. of Indus. Relations COVID-19 Testing and Vaccine FAQs, <https://www.dir.ca.gov/dlse/COVID19resources/FAQs-Testing-Vaccine.html> (last visited Jan. 10, 2022).
- The **Illinois** Department of Labor has issued guidance stating that if an employer mandates vaccination, time spent obtaining the vaccination is likely compensable — even if it is non-working time. *See* Illinois Department of Labor, Employer Guidance: Compensation, Paid Leave and the COVID-19 Vaccine, https://www2.illinois.gov/idol/Documents/IDOL_Vaccine%20Leave%20Guidance.pdf (last visited Jan. 10, 2022).
- In contrast, the **Massachusetts** Attorney General’s Fair Labor Division takes the position that employees must be paid for time spent on employer-mandated vaccination only if the employer mandates that the employee receive the vaccine at a specific location and/or on a specific date. If, however, the employer simply requires proof of a vaccine, but does not mandate when, where and how an employee obtains it, this is unlikely to be considered compensable time. *See* Massachusetts Attorney General’s Fair Labor Division Frequently Asked Questions About COVID-19: Employee Rights and Employer Obligations, <https://www.mass.gov/doc/covid-19-employee-rights-and-employer-obligations-faqs-english-12102021/download> (last visited Jan. 10, 2022).
- Some state and local laws expressly require employers who mandate COVID-19 vaccination to pay their employees for such time. For example, **New York** amended its Labor Law to add Section 196-C, requiring all private employers to provide their employees with a sufficient period of time up to four hours of paid leave per vaccination injection at the employee’s regular rate of pay. Likewise, **Cook County, Illinois** Ordinance Sect. 42-122 requires employers who have a primary business location in Cook County and who require their employees to be vaccinated to compensate their employees for up to four hours of paid time per dose at the employee’s regular rate of pay if the employee chooses to get the vaccine during their work shift.

This list is not all-inclusive, but rather illustrates the variations multi-state employers must navigate when considering the wage and hour implications of mandating COVID-19 vaccination and/or testing. Employers that mandate vaccination and/or testing should evaluate whether any state and/or local laws require them to pay for the time spent in and costs of these activities.