

# How Employers Can Determine COVID Test Mandate Costs

By **Dawn Peacock** (January 28, 2022, 11:51 AM EST)

When considering COVID-19 vaccinate-or-test rules, employers wonder who covers the cost for employees who test rather than vaccinate. Actually, there are two questions embedded in that concern. The first is whether the time to get tested is compensable time under the Fair Labor Standards Act for nonexempt employees. The second is whether the cost of the test must be reimbursed.



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Even with the Occupational Safety and Health Administration's vaccination and testing emergency temporary standard blocked, these are pressing questions.

Some employers may choose to proceed with such policies as a matter of choice; other employers may be subject to the Centers for Medicare & Medicaid Services health care worker vaccine mandate; and still others may be subject to state or local mandates requiring testing for those employees who are unvaccinated.

For example, Minnesota's OSHA has adopted the now-enjoined federal OSHA standard. Thus, this mandate will now apply to employers within Minnesota regardless of the legal fate of the federal OSHA vaccine mandate. But each such law is unique: New York City's vaccination ordinance requires vaccinations with no option for testing in lieu of vaccinations.

Where testing is required, the twin questions must be faced.

## 1. Is testing time compensable?

That is debatable, albeit only an issue for employees who are not overtime exempt under the FLSA. In Fact Sheet No. 84[1] released on Jan. 20, the U.S. Department of Labor addressed whether time spent engaging in COVID-19 health screenings, testing and vaccination is compensable under the FLSA. The DOL has opined on the following parameters:

- "If an employer requires an employee to obtain a COVID-19 vaccine dose, undergo a COVID-19 test or engage in a COVID-19 related health screening or temperature check during the employee's normal working hours, the time that the employee spends engaged in the activity is compensable."
- "Where an employer has a mandatory COVID-19 vaccination policy, but an employee is unable to receive a COVID-19 vaccination under a medical or religious reason, and the employee is entitled to reasonable accommodation under federal law, the time spent undergoing regular employer-required COVID-19 testing outside of normal working hours is 'integral and indispensable' to the employee's work and therefore compensable."
- "Where an employee is able to receive the COVID-19 vaccine as an alternative to regular COVID-19 testing — but where the employee has voluntarily declined to be vaccinated — the

employer is not required to pay the employee for the time spent undergoing regular COVID-19 testing."

While employers should remember that the DOL guidance is not binding on courts, courts can consider the guidance as persuasive authority. In addition, states with wage and hour laws at the state level may interpret their own laws differently than the DOL interprets the FLSA.

Speaking of courts, some employers have successfully contended that submitting to COVID-19 testing is more akin to a security screening, which was found by the U.S. Supreme Court in 2014 in *Integrity Staffing Solutions Inc. v. Busk*<sup>[2]</sup> to be noncompensable time because the activity — security screening — was not the principle activity that the employees were employed to perform.<sup>[3]</sup>

The Court of Federal Claims' Dec. 30, 2021, ruling in *Adair v. U.S.* and its Oct. 29, 2021, ruling in *Adegbite v. U.S.* also align with this reasoning.

Yet, those cases arose in a context of on-premises temperature-only screening. These were not cases involving off-premises testing nor cases involving either antigen testing or PCR testing for COVID-19. In wage and hour cases, such small factual distinctions of time and place may well be enough to raise questions on the applicability of this case law.

Currently, the Department of Labor is straddling the issue. Its guidance states that "[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." The DOL adds this example:

If a grocery store cashier who has significant interaction with the general public is required by her employer to undergo a COVID-19 test on her day off, such time is likely compensable because it is integral and indispensable to her work during the pandemic.

Such informal guidance is a consideration, but well short of binding. Curiously, the FLSA regulations, which are binding, only make medical testing compensable when it occurs during normal working hours.<sup>[4]</sup>

Conversely, employers may well ask whether off-premises testing — especially PCR testing — isn't the equivalent of off-premises drug testing. That time for incumbent employees is considered to be work time and, thus, must be paid time for nonexempt employees. COVID-19 testing has many comparisons with varying suggested outcomes.

In certain states, there are additional complications under state equivalents of the FLSA. For example, California's Department of Industrial Relations has already issued that same caution:

If the employer requires an employee to obtain a COVID-19 test or vaccination ... then the employer must pay for the time it takes for the testing or vaccination, including travel time.

Ultimately, employers will choose to pay or not based on morale considerations as much as legal considerations. In a tight labor market, a testing mandate will be viewed as a burden and an unpaid burden may cause turnover. Thus, a practical regard for the unintended consequences rule may be more pressing than the niceties of FLSA analysis.

That consideration and the legal outcome may also be impacted on what is asked. If an employer allows employees to take antigen tests either at home or in the locker room before clocking in, there is not only less burden but also a closer parallel to the *Adair* and *Adegbite* cases. Employers who ask for more may need to be prepared — practically if not legally — to pay more.

## **2. Must test costs be reimbursed?**

There are two hurdles here.

The first is the FLSA albeit only for nonexempt employees. Federal law states that an employer only needs to reimburse their employees for work-related expenses that drop their earnings below the minimum wage.<sup>[5]</sup> Courts could ultimately consider COVID-19 testing as a work-related expense

that must be reimbursed.

In real life, this is playing out in cases involving workers such as pizza delivery drivers who are not fully reimbursed for the costs of gas, miles, wear-and-tear repairs that would not occur but for their employment with their employer. In those cases, plaintiffs allege the failure to fully reimbursement amounts to a kickback forbidden by Title 29 of the Code of Federal Regulations, Section 531.35.[6]

The second is state laws explicitly addressing reimbursements, which may encompass both overtime exempt and nonexempt employees. For example, in Illinois, employers must pay for the cost of any medical examination required by employment and must reimburse for all expenditures within the employee's scope of employment.[7]

Other states also impose reimbursement requirements:

<b>California</b>	<b>New York</b>	<b>Minnesota</b>
Under California Labor Code, Section 2802(a), "An employer shall indemnify his or her employee for all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties."	New York State Labor Law 198-C provides that employers who fail, neglect, or refuse to pay benefits or wage supplements to their employees violate the law. The New York Department of Labor has made clear that benefits or wage supplements include reimbursement for business-related expenses.	Minnesota Statute 181.61 makes it unlawful for an employer to require an employee or applicant to pay the cost of a medical examination.

On top of the FLSA and these state laws, there is also the U.S. Equal Employment Opportunity Commission chiming in. Pre-pandemic, its Americans with Disabilities Act guidance stated that, "if an employer requires an employee to go to a health care professional of the employer's choice, the employer must pay all costs associated with the visit(s)."

How that plays with COVID-19 testing is another riddle, wrapped in a mystery, inside an enigma.

To minimize the exposures on cost reimbursement, there are practical considerations worth investigating. First, employers may want to check any available employee health insurance plans to determine whether there is coverage for the cost of testing. Second, employers could also evaluate sending employees only to the free testing sites if those are convenient.

With the Supreme Court effectively eliminating the OSHA mandate, many employers have more freedom to determine what testing policies to implement and how to do so. For all employers who proceed into testing via mandate or choice, it will be important to keep both of these cost concerns in mind. There is no benefit if the cost-savings in testing costs are swallowed by additional compensable time in sending employees farther afield to be tested.

Prudent employers will likely choose one of two approaches: (1) front the cost and avoid the legal risk but design the program to minimize the amount of time and the cost — e.g., testing on site, at close free sites, etc.; or (2) design a policy to create the strongest possible argument that the cost of testing should be borne by the employee and that testing time is noncompensable.

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[1] <https://www.dol.gov/sites/dolgov/files/WHD/fact-sheets/whdfs84.pdf>.

[2] *Integrity Staffing Solutions, Inc. v. Busk*, 574 U.S. 27, 35 (2014).

[3] See also, *Adair, et al. v. United States*, 2021 WL 6163407, at \*5 n. 2 (Fed. Cl. Dec. 30, 2021) (finding that prison security employees would not be entitled to compensation for time spent undergoing COVID-19 screenings under the FLSA because "Plaintiffs' alleged primary duties do not include preventing the spread of COVID-19 or responsibility for inmate health in general" and "such health screenings are not integral to Plaintiffs' alleged principal activity of maintaining safety and security at USP Lee, and, consequently, are non-compensable."); and *Adebite v. United States*, 2021 WL 5045268, at \*8 (Fed. Cl. Oct. 29, 2021) (granting motion to dismiss FLSA complaint seeking compensation for time spent going through COVID-19 health screenings for correctional officers at prison; finding that "preventing the coronavirus from getting into and/or spreading within the Institution is not integral to Plaintiffs' principal activities. Therefore, the Complaint fails to allege that the time spent passing through the Covid-19 screening is integral to the Plaintiffs' principal activities as correctional officers and, therefore, it is non-compensable.").

[4] 29 C.F.R. § 785.43 ("Time spent by an employee in waiting for and receiving medical attention on the premises or at the direction of the employer during the employee's normal working hours on days when he is working constitutes hours worked.").

[5] 29 C.F.R. 531.35.

[6] <https://www.ecfr.gov/current/title-29/subtitle-B/chapter-V/subchapter-A/part-531/subpart-C/subject-group-ECFRd42c2e4b995d7cd/section-531.35>.

[7] 820 ILCS 235/1; 820 ILCS 115/9.5.