

Compensation for Time Spent Undergoing COVID-19 Screenings and Vaccinations

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Nearly two years into the pandemic, it has become commonplace for employers to screen employees for symptoms of COVID-19 and require employees to participate in regular testing. It seems likely this will continue for the foreseeable future.

Employers continue to grapple with whether they are required to compensate employees for time spent waiting for and taking COVID-19 tests and screenings, and being vaccinated. The U.S. Dept. of Labor recently released a fact sheet (Fact Sheet 84) addressing these questions. Without explanation DOL abruptly removed Fact Sheet 84, presumably because of the withdrawal of the OSHA ETS. The now withdrawn DOL guidance may still be useful for employers.

Paying for Time Spent Undergoing COVID-19 Health Screenings, Testing, and Vaccinations

In Fact Sheet 84, the U.S. Department of Labor said that in some situations employers should compensate employees for time spent awaiting and undergoing regular testing, as well as getting vaccinated. Here are the details:

- If an employer requires an employee to obtain a COVID-19 vaccine, undergo a COVID-19 test, or complete COVID-19 health screenings or temperature checks during the employee's normal working hours, this time is generally compensable, regardless of where the activity occurs (offsite v. at the work location).
- Time spent going to, waiting for, and obtaining a COVID-19 vaccine to comply with an employer's mandatory vaccine rule, even if done outside of working hours, is likely compensable because doing so is necessary to perform work safely and effectively during the pandemic.
- Time spent undergoing employer-required testing for COVID-19 when testing is performed as a reasonable accommodation (for example based on religious accommodation exception to vaccination) is likely compensable, even if done outside of working hours, because testing is "integral and indispensable" to the employee's work and necessary to perform work safely and effectively during the pandemic.
- Time spent undergoing testing outside of working hours is generally *not* compensable when the employer has a mandatory vaccine or testing program and the employee has voluntarily chosen not to get vaccinated against COVID-19. In this circumstance, the DOL advises that testing is not "integral and indispensable" to that employee's job

because the employee could be vaccinated against COVID-19, would be better protected by the vaccine than by a test, and the time spent obtaining the vaccine would be paid for by their employer.

- Where an employer does *not* require COVID-19 testing or vaccination, an employee's time spent testing or getting vaccinated outside of working hours is generally not compensable.

Takeaways for Maine Employers

The DOL's guidance was premised on the fact that the OSHA ETS would be upheld by the courts as necessary to stop the spread of COVID-19, arguing the virus presents a "grave danger" to the workplace. But as we all know the U.S. Supreme Court ruled against OSHA and stayed the ETS, which OSHA then withdrew. DOL then took down the guidance, and we wait to see what they will replace it with.

We are fortunate to have high vaccination rates across Maine, but vaccinated and unvaccinated individuals continue to test positive for COVID-19. To mitigate potential legal risk, employers with mandatory vaccination, screening and testing programs should evaluate whether to compensate employees for time spent engaged in mandatory COVID-19 protocols. Fact Sheet 84 may still provide some clues how DOL would evaluate an employee complaint.