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## COVID-19: TO TEST OR NOT TO TEST

How to ensure testing procedure is legally compliant, reliable, and effective

- Todd R. Wulffson,  
Carothers DiSante & Freudenberger LLP



**12**

**Workplace Drug And Alcohol Policies In The Era Of COVID-19**

- Wilson S. Jarrell,  
Barran Liebman LLP

**17**

**COVID-19-Related FFCRA Employee Leave**

- Kate Leveque and Kayla Lovelace,  
Husch Blackwell LLP

**25**

**Working From Home And New Policies Are Fueling HR Compliance Concerns**

- Dan Marzullo,  
Professional Copywriter

**31**

**How To Administrate FFCRA's Paid Leave Requirements**

- Eric Raphan and Jamie Moelis,  
Sheppard Mullin Richter & Hampton LLP

# COVID-19: To Test Or Not To Test

How to ensure testing procedure is legally compliant, reliable, and effective

 By **Todd R. Wulffson**

Most businesses across the nation are either in the process or reopening or soon will be. In addition to the myriad of logistical issues confronting employers, in the age of COVID-19, they need to decide whether to screen or to test returning employees for the virus. There is a great deal of information in the news and on the internet about how to perform such testing, which can range from self-administered temperature checks, to blood tests for COVID-19 antibodies.

Unfortunately, the amount of information currently available does not make any testing decision easier; and if they are not careful, employers trying “to do the right thing” may wind up with a nasty lawsuit for their efforts.

Regardless of whether a business is legally required to perform testing on employees entering its facility (some jurisdictions have mandated it for certain professions), or the company simply decides on its own to do so, any testing needs to be done properly, cautiously and applied to all employees equally. Employers should ensure that certain employees (e.g., older, Asian-American<sup>1</sup> or disabled employees) are not being singled out, and are not required to undergo additional testing or other safety precautions.

As far as permissible types of testing, the Equal Employment Opportunity Commission (EEOC) has authorized the touchless taking of employees’

temperatures. This can be self-administered by employees at home, but it is more reliable to do so at work. The generally-accepted COVID-19 threshold for a fever is 100.4 degrees, and it is preferable for the person doing the forehead scans to have a modicum of training. Keep in mind that hourly employees must be paid for the time spent waiting in line to be screened.

The EEOC has also stated that employers may ask all employees who will be physically entering the workplace if they have COVID-19, are experiencing symptoms associated with COVID-19, if they have been tested for COVID-19 recently, or have been in close proximity to someone recently diagnosed. Symptoms associated with COVID-19 include cough, sore throat, fever, chills, shortness of breath, new loss of smell or taste, as well as gastrointestinal problems, such as nausea, diarrhea, and vomiting. Employers may not ask employees who are teleworking these questions.

Employees with symptoms or who fail the temperature check should be sent home to consult with their own healthcare provider.<sup>2</sup> Employees can and should be denied entry into the workplace if they refuse to answer screening questions and/or submit to temperature screening. All medical information obtained from an employee and documented (including whether the employee has COVID-19) must be maintained in a confidential medical file for the employee.



What if the employer wants to go a step further, and actually test to see if employees have the virus in their system, or have antibodies, meaning that they were infected and have potentially recovered? There is a veritable cottage industry sprouting up of firms who claim to be able to administer rapid testing, on site if need be, through the use of mobile labs. The legal rules regarding this sort of testing, however, are about as murky as they are expensive.

It is easier to deal with antibody testing – also known as serology testing – first, as there is currently no guidance from any governmental agency recommending antibody testing. Serology testing determines the presence of antibodies, which are proteins that fight off infections and can often provide immunity against catching the same infection again.

Unfortunately, in addition to being expensive, any COVID-19 antibody testing is unreliable at present, and false positives (meaning antibodies were detected) occur almost 50% of the time in an average of the current rapid tests being offered. On top of that, the presence of antibodies may mean that

the person had COVID and recovered, or that they have COVID right now, and since the serology test does not tell you whether the person is currently infected, the test results are not very helpful for employee screening.

Finally, any employer reaction to the test, such as sending the employee home, involves a sharing of personal medical information with management (potential HIPAA violation) and may be based on a real or perceived disability (potential violation of the Americans with Disabilities Act (ADA)). For all these reasons, it is likely illegal for employers to require antibody testing of employees, and it is not even advisable at this time to offer such testing, even on a voluntary basis.

The same is not true for COVID-19 testing viral testing, however, as long as it is no more invasive than a nasal swab (i.e. no blood tests). In its [June 17, 2020 updated guidance](#), the EEOC stated it is legal for employers to require its employees to take COVID-19 viral tests.<sup>3</sup> The ADA requires that any mandatory medical test of employees be “job related and consistent with business necessity.” Employers are empowered to determine if employees entering the workplace have an active COVID-19 infection, because an individual with the virus will pose a “direct threat” to the health of others.

If an employer determines that COVID-19 viral testing of employees is either legally mandated, or both permissible and advisable in their jurisdiction, it must ensure that the testing procedure is legally compliant, reliable, and effective.

## 1. Picking the Right Test Is Important

Many medical centers offer testing for a fee, and in large metropolitan centers, there are mobile labs providing testing (for a larger fee). As a general rule, the faster the results are achieved, the less reliable they are. Currently, COVID-19 swab testing has about 80% reliability, meaning that 20% of the time, an employee is infected, but the test tells him or her that they are fine. Unfortunately, higher accuracy from longer turnaround times makes the results less useful, as employees presumably are



not working while they are waiting for their test results – and they may become infected in the time spent waiting. Employers should do their research, obtain something in writing confirming the testing company's reliability percentage, and ensure that reliable employee testing can be achieved within 24 to 48 hours before employees are expected to report to work.

## 2. Document Everything

Whether an employer conducts temperature screens or contracts with a viral testing firm, documenting the process is important. Employers will want to create a testing policy in advance to defend against potential claims of discrimination in the testing process. Without a written policy, employees may claim they were singled out/discriminated against for testing based on illegal considerations.

## 3. Obtain a Proper Authorization from the Employee

For viral testing pursuant to the EEOC guidance, employers must obtain a signed employee authorization form that authorizes the employer to consider the results when determining the employee's eligibility to work. Although it should be obvious, all documentation regarding the results of any testing (even simple temperature checks) must be treated as confidential medical information by the employer.

## 4. Positive Test Results

Unlike an employee failing a temperature check or answering a COVID screening question in the affirmative, viral testing results are unquestionably derived from a medical exam. As such, the employer cannot reveal the infected employee's identity to others in the workplace except those with a legitimate need to know. Carelessness in handling test results or in communicating with an infected employee can lead to HIPAA violations, invasion of privacy claims and allegations of emotional distress.

As should be evident from the foregoing, there are a great deal of land mines in a rapidly-evolving legal landscape that impact any testing decision. Any screening or testing regimen should be reviewed by competent labor counsel in advance. It is also

important to remember both that COVID-19 is a virus, and that testing is by no means a panacea; therefore, regardless of whether an employer opts to do screening or testing, the best defense is still proper hand washing, physical distancing, and proper use of appropriate face coverings.

### Footnotes

<sup>1</sup>There has been a pronounced and unfortunate amount of discrimination against Asian Americans relating to the perception that COVID-19 originated in China.

<sup>2</sup> Many states (including California) have announced that employees who are sent home must be paid "show up pay," which is half of their normal shift, with a minimum of two, and maximum of four, paid hours.

<sup>3</sup> Employers in more employee-friendly states such as California, will definitely want to check with their labor counsel, as California has specifically NOT adopted the EEOC's guidance on testing of employees. In its [Employment Information on COVID-19](#), the California Department of Fair Employment and Housing issued guidance on matters related to testing (such as what an employer may tell other employees about an employee who has tested positive), but does not definitively state whether employer-mandated (or even voluntary) COVID-19 testing is permissible.

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