

DOL Issues, Then Withdraws, Updated Guidance on Compensability of COVID-19 Testing and Vaccine Time

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The list of laws and regulations governing vaccinations and testing is growing and changing at a frenetic pace. Employers can add U.S. Department of Labor (DOL) guidance on the compensability of time spent undergoing testing and vaccinations to that list.

On January 20, 2022, the DOL issued Fact Sheet #84, “Compensability of Time Spent Undergoing COVID-19 Health Screenings, Testing, and Vaccinations Under the Fair Labor Standards Act (FLSA),” finally addressing the circumstances under which employers would be required to pay employees for the time spent obtaining COVID-19 vaccinations and undergoing COVID-19 testing outside of regular work hours.

However, about 24 hours after publication on the DOL’s website, the guidance was suddenly withdrawn without explanation, perhaps because the Fact Sheet cited to and relied upon the Occupational Safety and Health Administration (OSHA) Emergency Temporary Standard (ETS). The U.S. Supreme Court essentially rejected the ETS on January 13, 2022, and, on January 25, 2022, OSHA announced it was officially withdrawing the ETS in the *Federal Register* on January 26, 2022. Thus, the only published guidance from the DOL is that first published in 2020 through a series of FAQs on the agency’s website.

What Did Fact Sheet #84 Say?

Fact Sheet #84 was consistent in some respects with the previous (and still current) DOL guidance, which provides that if an employer requires employees to undergo testing or temperature screenings *during* regular work hours, the time spent doing so must be paid. Fact Sheet #84 treated vaccinations in the same manner.

As to time spent going to, waiting for, and obtaining a mandatory COVID-19 vaccine *outside of* regular work hours, Fact Sheet #84 stated that employers must pay for such time if the employees work in positions where other individuals are present, unless all affected employees work exclusively outdoors. Thus, for all but the small subset of employees, Fact Sheet #84 would have required employers to pay for employee time spent obtaining a required vaccine.

However, Fact Sheet #84 provided an exception for employers that require their employees to *either* be vaccinated *or* undergo testing, and an employee *chose* to be tested in lieu of being vaccinated. In this circumstance, the employer had to pay only for the employee’s time outside of working hours spent getting *vaccinated*, not for such time spent getting *tested*— except, where the employee is being tested rather than vaccinated as a reasonable accommodation for medical or religious reasons, the employer would still need to pay for the time spent getting tested. Finally, Fact Sheet #84 provided that if an

employer did not *require* either vaccinations or testing, and for personal reasons an employee elected to undergo one or both of these, the employer did not have to pay for that time.

Again, this guidance was withdrawn shortly after its publication.

What DOL Guidance Is in Effect?

During the summer of 2020, the DOL published a series of [online FAQs](#) regarding various FLSA issues implicated by the COVID-19 pandemic. The DOL periodically updated those questions and answers in 2021. In that guidance, the DOL states that the compensability of temperature screening or testing *outside of regular work hours* “depends” on whether it is “necessary for the work” performed by the employee and that, “for 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. As examples, the DOL cites the pre-work temperature screening of “a nurse who performs direct patient care services at a hospital” and the COVID-19 testing on an off-day of “a grocery store cashier who has significant interaction with the general public.” The FAQs do *not* address employees whose work interactions are limited only to coworkers, focusing instead only those employees whose roles require direct interaction with the public. The existing guidance also provides that COVID-19 temperature and testing conducted *during* regular work hours always is compensable.

Takeaway

Whether the DOL will publish a revised version of Fact Sheet #84 to provide more detailed guidance remains to be seen. Employers should continue to review the existing guidance set forth by the DOL in its online FAQs to determine, as best as possible, whether they should compensate employees for the time spent getting vaccinated or undergoing testing or temperature screening. Employers also should review state law, which may have additional or different obligations.

Jackson Lewis attorneys will continue to monitor these issues for further developments. In the meantime, if you have any questions about the compensability of COVID-19 vaccine, testing, or temperature screening time, or any other wage and hour issue, please consult the Jackson Lewis attorney(s) with whom you regularly work.

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