



# Employers Should Monitor Changes to COVID-19 Testing Guidelines

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**E**mployers may struggle to keep up with evolving COVID-19 testing and safety guidelines as the pandemic persists. So it's a good idea to check frequently for updates at the federal, state and local levels. Here are some key compliance tips for employers.

## Look for New Federal and State Directives

In the first few weeks since his inauguration, President Joe Biden has signed a number of executive orders related to the COVID-19 pandemic.

"President Biden is clearly pushing to ensure there's more testing," noted Tracey Diamond, an attorney with Troutman Pepper in Princeton, N.J.

During his campaign, Biden called for "regular, reliable and free access to testing for all, including every worker called back on the job."

The Biden administration has emphasized many existing protocols, such as wearing masks, social distancing and testing. "It is very clear that the Biden administration feels the need for more testing, quicker turnaround time and rapid tests," noted Philip Gordon, an attorney with Littler in Denver.

In a recent executive order (<https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/21/executive-order-establishing-the-covid-19-pandemic-testing-board-and-ensuring-a-sustainable-public-health-workforce-for-covid-19-and-other-biological-threats/>), Biden established the COVID-19 Pandemic Testing Board and a Public Health Workforce Program. Among other objectives, the order aims to "expand equitable access to COVID-19 testing" and "identify barriers to access and use of testing," particularly for health care and other essential workers, and in at-risk settings such as schools, long-term-care facilities and food-processing plants.

Employers in health care and other essential operations will likely have to adjust a variety of employment practices to facilitate additional COVID-19 testing, said Thomas Gies, an attorney with Crowell & Moring in Washington, D.C.

The order suggests that tests should be provided free of charge to certain populations, and that employer-sponsored health insurance plans should be reviewed to clarify COVID-19 testing coverage requirements.

"This directive will impose additional compliance and administrative obligations on company HR and benefits staff," Gies noted.

However, the new directives don't make many changes to how employers should manage their COVID-19 testing programs. So anti-discrimination guidelines from the Equal Employment Opportunity Commission (EEOC) ([www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/eeoc-updates-guidance-on-covid-19-testing.aspx](http://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/eeoc-updates-guidance-on-covid-19-testing.aspx)) and testing protocols from the U.S. Centers for Disease Control and Prevention (CDC) (<https://www.cdc.gov/coronavirus/2019-ncov/communication/toolkits/business-workplaces.html>) will remain in place.

Employers should also check for additional testing recommendations and requirements under state law. In California, for example, employers should be aware of mandatory testing requirements ([www.shrm.org/ResourcesAndTools/legal-and-compliance/state-and-local-updates/Pages/Understanding-Cal-OSHA-COVID-19-Exclusion-Pay-Mandate.aspx](http://www.shrm.org/ResourcesAndTools/legal-and-compliance/state-and-local-updates/Pages/Understanding-Cal-OSHA-COVID-19-Exclusion-Pay-Mandate.aspx)) in certain situations.

### Create a COVID-19 Testing Program

"Employers should think through the mechanics of how the testing is going to take place," Diamond said. Are they going to send employees test kits, perform nasal swabs onsite or at approved testing centers, or ask workers to arrange the testing on their own and provide the results?

"All of these ways can work depending on culture of company and logistics," Diamond said. She recommended that employers develop a written policy addressing what the employee needs to do if the results are positive.

Gordon suggested that employers take a programmatic approach to testing and designate a core group of people in HR, legal and safety who work together to think through the logistics.

"It's all doable but requires some planning," he said.

If tests are performed onsite, he said, the physical space will need to be adapted to keep employees separated for privacy.

Employers will also have to consider whether workers need to be paid for the time associated with collecting the specimen and waiting for results.

"Treat employees consistently," Diamond said. "Make sure you get employee consent to testing in writing." Employers can make COVID-19 testing a condition of employment, but they should have a discussion with employees who refuse a test to determine why. Is the employee's objection religious or disability-related, and can a reasonable accommodation, such as working from home, be made?

"Employers with unionized workforces have additional obligations under federal labor law, which need to be understood in administering COVID testing programs," Gies said.

He also noted that employers will have to decide how to deal with false positives and false negatives. "Another issue is the question of testing frequency," he said. "Some of the professional sports leagues are very aggressive on this point, in some cases testing players and coaches twice a day." But testing can be costly, time-consuming and limited in availability.

Many employers have decided to contract with third parties to coordinate their testing programs. They should note that testing labs may be covered by the Health Insurance Portability and Accountability Act and state laws that protect employee health information and require notification in the event of a data breach.

Employers should review their contracts with testing partners to ensure that they include strong information-security standards (<https://www.littler.com/publication-press/publication/covid-19-resurgent-employers-confront-privacy-and-information-security>) and address the risks associated with a security breach, Gordon said.

## Looking Ahead

The Biden administration is focused on rapid tests, which may provide a faster and less expensive alternative to molecular tests (such as the RT-PCR tests) that are sent to a lab. But the accuracy of rapid tests is still under review.

EEOC guidance on testing recognizes that viral tests, such as the PCR test, are reliable (<https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws#:~:text=The%20EEOC%20has%20already%20stated%2cto%20changes%20in%20CDC%27s%20recommendations.>) enough to use in employment decisions and that antibody tests, which show prior infection, may not be used by employers ([www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/eeoc-says-mandatory-coronavirus-antibody-testing-is-prohibited.aspx](http://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/eeoc-says-mandatory-coronavirus-antibody-testing-is-prohibited.aspx)). The agency hasn't released any guidance, however, on the reliability of rapid, antigen tests in making employment decisions.

The EEOC ultimately may coordinate with the new administration to update its guidance and include antigen testing, Gordon noted.

Additionally, the Occupational Safety and Health Administration (OSHA) is likely to issue an emergency temporary standard ([www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/coronavirus-osh-worker-safety-guidance.aspx](http://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/coronavirus-osh-worker-safety-guidance.aspx)) on COVID-19 and the workplace.

In the meantime, employers should continue to follow guidance issued by the CDC, OSHA and other agencies, while keeping an eye out for more initiatives in response to the president's directives, Gies said. He recommended that employers continue to be active and transparent in their communications with employees as they develop and adapt their testing programs.

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