

Bloomberg Law News 2022-02-01

## Employee Covid-19 Tests—When Must Employers Pay?

Although employers are no longer subject to OSHA’s mandate requiring that their unvaccinated employees test for Covid-19, some may choose to require testing on their own. One factor they should consider is whether they will be obligated to pay the cost of such tests.

Since the early days of the pandemic, the Families First and Coronavirus Aid, Relief, and Economic Security (CARES) Act, laws and regulations have required that group health plans provide first dollar coverage for Covid-19 tests administered under medical supervision. Recently, the U.S. Departments of Health and Human Services, Labor, and Treasury issued [guidance](#) expanding the scope of those regulations to include coverage for over-the-counter (OTC) Covid-19 tests.

By requiring coverage of “at home” tests, the guidance greatly improves access to testing, but like the previous regulations, it does not require coverage of all Covid-19 tests. Specifically, the regulations require coverage only of Covid-19 tests taken for “diagnostic”—not “surveillance”—purposes.

### Testing for Continued Employment

Demonstrating readiness for employment is one such “surveillance” purpose. Although the U.S. Supreme Court recently stopped the Occupational Safety and Health Administration from imposing a “vaccine or test” rule on companies with 100 or more employees, some employers are considering whether to require unvaccinated workers to test as a condition of continued employment.

Relatedly, a [Willis Towers Watson survey](#) (pre-dating the Supreme Court’s OSHA ruling) reported that many employers plan to offer Covid-19 testing on a weekly basis. Some states and local authorities are also considering “vaccinate or test” mandates for employers.

Although the foregoing guidance and previous regulations under the Families First/CARES Act do not require coverage for testing for these purposes, health plans should be aware that they could still be on the hook. In particular, employers that “self-fund” their employees’ health benefits may indirectly pay the cost of testing through their health plans.

First, as a practical matter, it is not necessarily clear whether a test is for “diagnostic” or “surveillance” purposes. Test results do not say why a test was taken.

Given the ease with which employees can identify various symptoms associated with Covid-19, their possible exposure to others suspected of having Covid-19, or their desire to check before visiting relatives—all generally regarded as an adequate basis for coverage—determining whether a test was solely for employment is a challenge.

Exacerbating this challenge, the regulations and guidance under the Family First/CARES Act generally prohibit health plans from using prior authorization, screening and other medical management techniques to find out.

Indeed, the guidance suggests that health plans can rely only on participants’ attestations that their tests were not for employment purposes. Nor does it suggest any means by which health plans can tell whether tests are taken for an employee to be able to travel, access entertainment venues, or for other “surveillance” purposes.

Further adding potential confusion in differentiating between “at home” tests required to be covered and those that are not, health plans typically do not process pharmacy claims for “over the counter” products.

Even apart from the regulations, the actual terms of an employer’s health plan could require coverage for tests taken for employment purposes. Although previous guidance from the DOL stated that a group health plan cannot cover certain types of testing done solely to determine eligibility for work, case law and more recent DOL guidance suggest otherwise.

Finally, some states may require that employers pay for tests that they require their employees to take. At least six states—California, Illinois, Montana, New Hampshire, North Dakota, and South Dakota—have passed laws that, though differing in important details, require employers to reimburse employees for work-related expenses.

## **Traps for Employers Who Cover Tests**

Some employers may not want to pay for tests their employees take as a condition for continued

employment, but others may wish to do so. Reasons include retaining unvaccinated workers, complying with state workplace rules, or meeting collective bargaining obligations.

Providing such coverage, however, can create traps for the unwary. Creating the apparatus to pay testing costs (outside of a group health plan) may create its own ERISA plan, including an “Employee Assistance Plan.” Such plans may then require compliance with complex rules and regulations, some of which may override state laws. Further, if not properly administered, on-site testing programs may raise HIPAA and other privacy concerns.

Regardless of whether self-funded employers mandate testing, they should be on guard for excessive testing fees. Fortunately for employers, the guidance caps liability for OTC tests at \$12/test for eight tests per month for each plan member, provided members can obtain tests from designated pharmacies without any upfront cost.

But similar safeguards do not so clearly apply to tests taken under medical supervision. Although the costs of such tests vary, industry surveys have shown that they average \$130 to \$150, with out-of-network providers charging on average 33% more. A provision in the CARES Act requiring that health plans pay an “amount that equals the cash price for such [testing] service as listed by the provider on a public internet website” has, in the view of some industry observers, made health plans vulnerable to price gouging and abuse.

In fact, relying on this CARES Act language, some out-of-network testing providers have brought lawsuits seeking to recover amounts approaching \$500 per test. If they win, self-funded employers may ultimately be responsible for excessive testing fees. Even at market prices, unanticipated costs for frequent testing may dent an employer’s health care budget.

For these reasons, self-funded employers should pay attention to the testing costs that their health plans pay—especially if they require their unvaccinated employees to test.

In particular, employers should review the provisions of their health plans and state law, carefully follow ERISA’s requirements, and coordinate with their service providers to ensure the proper administration of Covid-19 testing claims.

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