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### Massachusetts AG Releases Guidance for Employers Regarding Costs of COVID-19 Testing and Face Masks

BY TRACY THOMAS BOLAND • DECEMBER 17, 2021

Many Massachusetts employers currently have COVID-19 vaccination policies that permit employees to elect whether to get vaccinated or, alternatively, to wear face coverings and get weekly COVID-19 tests. An open question has been whether employers can pass off the costs of testing and face coverings to the employees who choose the “test and mask” option. For those who attended [Bowditch’s webinar on the OSHA mandate for employers with 100 or more employees](#), you know that Bowditch obtained early guidance from the Massachusetts Attorney General’s office indicating that employers would be permitted to require employees to pay for those costs as long as the employer was not mandating certain aspects of testing. However, the Attorney General’s office had not issued anything memorializing that counsel. The wait is over as the [Massachusetts Attorney General’s Fair Labor Division \(“FLD”\) published an updated FAQ](#) this week containing guidance on this subject. This alert summarizes that guidance.

#### COSTS ASSOCIATED WITH COVID-19 TESTING FOR EMPLOYEES WHO ELECT TO TEST IN LIEU OF VACCINATION

According to the FLD, if an employee has opted to get tested as an alternative to vaccination under an employer’s policy, and the employer simply requires submission of a test result, but does not mandate when, where and how the employee obtains it, then the employer does *not* need to pay for the cost of testing. The FLD also notes that [free testing](#) remains widely available in Massachusetts.

What about the time that such employees spend getting tested? Is that compensable “working time?” Not necessarily. Again, so long as the employer simply requires a test result, but does not mandate when, where and how the employee obtains it, the employee’s time spent getting tested is unlikely to be considered compensable time.

#### COST OF FACE COVERINGS FOR EMPLOYEES WHO ELECT TO WEAR FACE COVERINGS IN LIEU OF

## VACCINATION

What about the cost of face coverings for employees who elect to get tested and wear face coverings in lieu of vaccination under an employer's policy? Do employers have to bear those costs? Possibly, but not in all cases. As a general matter, employers *cannot* charge employees for uniforms or personal protective equipment. However, according to the FLD, so long as an employer does not mandate that the employee wear a specific face covering (such as one that bears a company logo) or any type of face covering with special features (such as a respirator), then it is unlikely that the employer must bear the cost of the face coverings.

As noted by the FLD, the more prescriptive an employer is about mandatory face coverings, the more the face covering may become akin to a uniform or personal protective equipment (and thus the cost cannot be borne by the employee).

## IMPORTANT NOTES REGARDING THE FLD'S NEW GUIDANCE

- The FLD notes that the guidance is “provided for informational purposes and is not to be construed as the legal opinion of the Attorney General.” Having said that, complying with advice from the FLD generally is a good idea as the guidance indicates how the FLD views the issue even though the guidance is not “law,” per se.
- The guidance addresses only the specific circumstance where an employee *chooses* to submit to required testing and mask-wearing as an alternative to vaccination under an employer's policy. It does not, for example, expressly provide any opinion regarding whether (or to what extent) an employer is required to bear test or mask costs for employees with approved medical or religious exemptions from vaccination requirements. It is our counsel that it would create legal risk for employers to require employees, who have no choice but to submit to testing and mask-wearing due to a medical or religious exemption, to bear the associated costs.

Massachusetts employers should carefully review their policies to ensure that relevant costs are allocated in a manner that does not violate applicable law. Please contact a Bowditch labor and employment lawyer with any questions.