

Employment Law *Trending Now*

Should Employees Be Required to Obtain a Negative COVID-19 Test Before Returning to Work?

With the constant barrage of differing guidance from government agencies, including the Department of Labor (“DOL”) and the Center for Disease Control (“CDC”), employers’ heads are spinning wondering whether they can and should require employees to test negative before returning to work after a positive COVID-19 diagnosis, symptoms consistent with COVID-19, or contact with someone who tested positive for the virus. Newly published guidance from both the DOL and CDC on July 20, 2020, is likely to cause even more confusion.

1. The CDC Suggests That Testing Is Not the Be All and End All

The Evolution of the CDC’s Guidance as to Testing for COVID-19

Near the beginning of the COVID-19 pandemic in the United States, the CDC published guidance as to when an employee in a non-healthcare setting could end home isolation after a positive test result. The guidance contained what the CDC referred to as a “test-based strategy” and a “symptom-based strategy.”

Under the test-based strategy, an employee who tested positive for COVID-19 was recommended to return to work only after the employee no longer had a fever, symptoms improved, and the employee received two consecutive negative COVID-19 test results, with the tests being taken at least 24 hours apart.

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The alternative symptom-based strategy suggested that a similar employee could return to work after at least 72 hours had passed since the employee recovered (no fever without the use of fever reducing medication and improvement of respiratory symptoms) and at least seven days had passed since symptoms first appeared. The CDC later modified the symptom-based strategy by extending the home isolation period from seven to 10 days from the date symptoms first appeared. The CDC also recommended that an individual who had close contact with another who tested positive for COVID-19 self-isolate for 14 days.

Current CDC Testing Guidance

The CDC's July 20, 2020, guidance pivoted away from the test-based strategy, except in limited circumstances, and further modified the symptom-based strategy. This new guidance is based on reports from researchers that people with mild to moderate COVID-19 remain infectious no longer than 10 days after their symptoms began, and those with more severe illness or those who are severely immunocompromised remain infectious no longer than 20 days after their symptoms began. The updated guidance is as follows:

- A.** The test-based strategy is not recommended, except for those who are severely immunocompromised, such as those with cancer, HIV, AIDS, or those with inherited diseases that affect the immune system.
- B.** Under the symptom-based strategy, the CDC recommends that an employee be permitted to return to the workplace after at least 24 hours (down from 72 hours) have passed since the employee recovered (no fever without the use of fever reducing medication and improvement of all symptoms, not just respiratory symptoms as previously recommended), and at least 10 days since symptoms first appeared. Some employees may be required to isolate for up to 20 days depending on the severity of the illness.
- C.** The CDC's guidance as to the isolation period for an employee who had close contact with someone who tested positive for COVID-19 did not change. That employee should quarantine for 14 days, unless the employee exhibits symptoms during that period. In that event, the employee may be advised to quarantine for an extended period based on the test-based or symptom-based strategies, whichever strategy is applicable under the circumstances.
- D.** An employee who tests positive, but who never exhibits symptoms, may discontinue isolation 10 days after the first positive result. The CDC recognized in its July 20, 2020, guidance that a person known to be infected could leave isolation earlier than a person who is quarantined because of the possibility they are infected (as explained in (C) above).

The CDC acknowledged that its recommendations will not completely prevent the spread of COVID-19, and that the best available evidence suggests that recovered persons may continue to shed the virus for up to three months after onset of the illness. This is less than comforting to employers whose

businesses require the physical presence of employees in the workplace, or those that simply want their employees to return to work to resume normal business operations.

2. DOL Guidance Suggests That Testing Is Permitted

On the same day the CDC published its guidance, the DOL issued its own guidance noting that an employer may require an employee who knowingly interacted with a COVID-infected person to remain outside of the workplace until the employee has tested negative for COVID-19. However, the DOL made clear that the employer cannot require the employee to be tested for COVID-19 simply because the employee took leave under the Families First Coronavirus Response Act, which provides paid leave to eligible employees for reasons relating to COVID-19. As noted in separate guidance issued by the Equal Employment Opportunity Commission, an employer is also prohibited from requiring an employee to take an antibody test before allowing the employee to return to the workplace.

Although the DOL's approval of testing does not directly conflict with the CDC's recommendation to avoid the test-based strategy in most circumstances, the DOL's guidance does not appear to be totally aligned with the CDC's recommendations. This leaves most employers with a decision as to whether to require testing before employees are permitted to return to the workplace, or whether to simply rely on the symptom-based strategy.

3. In Light of Current CDC and DOL Guidance, Should Employers Require Testing?

This is a question facing many employers and, unfortunately, there may not be a clear answer. On the one hand, the CDC does not recommend testing as a general matter, but instead, recommends tracking symptoms and requiring isolation based on the time since symptoms first appeared and the time since the employee recovered. On the other hand, the DOL suggests that an employer may require an employee to test negative before returning to the workplace after an exposure to COVID-19. Given that testing appears to be permitted (but not required) in certain circumstances, the relevant question is whether an employer should require testing.

Many employers have testing policies under the guise that such tests provide them with a definitive answer as to whether an employee has the virus. But tests may provide a false sense of security. For example, assume an employee exhibits symptoms of COVID-19 (shortness of breath, coughing, fatigue, etc.), but the employee tests negative for the virus. If the employee is allowed to return to the workplace based on the negative test result, the employee could unknowingly expose others in the workplace to the virus.

On the flip side, what if an employee tests positive for the virus, the employee has fully recovered and has no symptoms, but the employee continues to test positive for weeks or even months after recovering? Should that employee be kept out of the workplace based on the positive test result even though the employee has not exhibited symptoms for a substantial period of time, well beyond the

required isolation period under the symptom-based strategy? This could cause the employee to miss several paychecks (assuming any paid leave was exhausted) and disruption to the employer's business operations, among other things.

Delays in the testing process may also be a downfall of relying on the testing strategy.

The symptom-based approach has its weaknesses as well. It assumes that an employee will be truthful about their symptoms and accurately track when the symptoms started and ended. This is a big assumption and requires the employer to trust and rely on its employees to help keep the entire workplace safe, even when the employee may be motivated to return to work quickly to avoid missing a paycheck.

There may not be a right or wrong answer to the question of whether an employee should be required to test negative for COVID-19 before returning to the workplace. The answer likely will depend on a discussion of the questions and issues raised above, the specific workplace setting, employer needs, preferences and goals, and constantly evolving medical advice and guidance from federal, state and local governments and agencies.

If you have any questions about this Alert, or if you would like assistance in crafting your COVID-19 testing or symptom-based policy, please contact the author listed below or the Aronberg Goldgehn attorney with whom you work.

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