



A Robinson+Cole Legal Update

Coronavirus (COVID-19)

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Running a Successful COVID-19 Testing Program: Considerations for Employers Using Third-Party Vendors

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As COVID-19 cases continue to surge, many employers have implemented a variety of safeguards to limit the spread of COVID-19 in their workplaces. One safeguard being utilized is a COVID-19 testing program. As a preliminary matter, the Equal Employment Opportunity Commission has advised that “an employer may choose to administer COVID-19 testing to employees before initially permitting them to enter the workplace and/or periodically to determine if their presence in the workplace poses a direct threat to others,” provided such testing is accurate and reliable. When administering a COVID-19 testing program, employers may wish to use licensed professionals. Consequently, many employers have chosen to engage third-party vendors to conduct COVID-19 testing for employees. Utilization of a third-party vendor not only eases the administrative burdens associated with running a COVID-19 testing program, but also reduces potential employer liability. However, utilization of a third-party entity poses a variety of legal and practical implications and, as a result, employers would be well advised to act cautiously when entering into these arrangements.

To ensure an employer is afforded adequate legal protection when entering into such an arrangement with a third-party vendor, it would be prudent for an employer to set forth the terms of the arrangement in a written agreement. There are several key provisions that employers may wish to include in their COVID-19 testing services agreements:

Testing Services: It would be judicious for an employer to define the testing services the third-party vendor will provide. For example, an employer may wish to specify the kind of testing that will be provided, and whether testing samples will be collected by the vendor at the workplace, at the third-party vendor’s testing site, or by employees using an “at-home” method. Employers would be well advised to require that the third-party vendor’s employees who are engaged in testing are licensed and authorized under applicable laws and regulations to provide the testing services, and that the testing will be administered in accordance with federal guidelines. Employers also may wish to define the time frame within which employees will receive their test results.

Public Health Reporting: Employers may wish to include a provision that defines which party will be responsible for reporting test results to the relevant public health authorities; it would be in an employers' best interest to be aware that licensed entities or individuals conducting the testing may have an independent legal obligation to report suspected COVID-19 cases to public health authorities.

Privacy and Confidentiality: Utilization of a third-party vendor to handle employees’ confidential medical information may present privacy concerns for employers. Therefore, employers would be well advised to include provisions on privacy and confidentiality of employee health information, such as test results, in their service agreements with third-party vendors. Specifically, employers may choose to include provisions that protect the confidentiality of any COVID-19 test results and maintain the privacy of employees’ testing

data and results in accordance with the Health Insurance Portability and Accountability Act (HIPAA) and the Americans with Disabilities Act (ADA), including any state equivalent law, if applicable. Moreover, under HIPAA, employers generally cannot receive employee protected health information unless authorized by the employee or otherwise authorized under applicable federal and state privacy laws. If an employer would like to access an employee's COVID-19 test results, the employer can ask that employees sign consent forms authorizing the release of such records as a condition of testing, provided that an employee nonetheless may revoke such authorization under HIPAA prior to disclosure of the results. Under the ADA, once an employer receives an employee's test results, the employer would be well advised to maintain the result as a confidential medical record that is kept separate from the personnel file.

Eligibility for Testing: When developing eligibility criteria for COVID-19 testing, employers must do so in a consistent and non-discriminatory manner. As a general matter, it would be in an employers' best interest to implement a COVID-19 testing program that supports the employer's health screening and return-to-work policies and procedures. For example, if an employer requires one or more negative test result before permitting an employee to return to work after exposure to COVID-19, the employer may want to extend testing capabilities to employees to facilitate that purpose.

Employers may wish to determine which circumstances will trigger the availability of testing. For example, some employers may wish to extend testing to employees who work in the physical workplace but not to employees who are working remotely; to employees who have been exposed in the workplace but not to those employees exposed outside of work or off-duty; or employees who have symptoms or tested positive for COVID-19 but not those that require a test due to travel.

Some employers have chosen to test employees on a regular basis, regardless of whether an employee has been exposed to COVID-19 or displayed symptoms of COVID-19. This is permissible provided such testing is necessary to prevent a direct threat to the employer's workplace, among other considerations.

Reasonable Accommodations: If an employee requests a reasonable accommodation with respect to the employer's COVID-19 testing program, the employer would be well advised to follow an ADA-compliant reasonable accommodation process. Thus, an employer may wish to include a provision regarding reasonable accommodations for employees who are unable to submit to COVID-19 testing due to a disability or a sincerely held religious belief.

Termination: When entering into an agreement with a testing service vendor, employers may also wish to consider options for exiting the arrangement. Employers may wish to include language in the agreement regarding their right to terminate the agreement without cause (or penalty) within a reasonable notice period to allow for completion of scheduled testing and find another vendor, if needed. The agreement can also allow for immediate termination by the employer upon a reasonable determination that the vendor poses a threat to the health or safety of employees, or the vendor loses its license or authorization to perform the testing.

Indemnification and Insurance: Employers may wish to include indemnification language in the third-party vendor agreement as protection should the third-party vendor fail to comply with applicable laws, regulations, or guidance (e.g., misuse of employee health information) or engage in gross negligence or willful misconduct. Employers also can seek to require testing vendors to carry insurance and minimum coverage amounts, including professional and cyber liability, covering the testing services furnished and any liability arising therefrom.

If employers are implementing COVID-19 testing programs in the workplace, they would be well advised to consider the various legal and practical implications associated with such programs, including the use of third-party vendors for COVID-19 testing services. Prior to entering into such arrangements, employers may wish to consult legal counsel.

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