

CLIENT ALERT: Massachusetts Attorney General Updates FAQ on COVID-19 to Address Vaccine or Test Issues

On or about December 10, 2021, the Massachusetts Attorney General's Fair Labor Division ("FLD") updated its set of "[Frequently Asked Questions About COVID-19: Employee Rights and Employer Responsibilities](#)." The update provides answers to three questions related to employer obligations and vaccine mandates. The update supplements the FLD's FAQ, originally published on April 20, 2020, and summarized in a prior [MBJ client alert](#).

The three new FAQs appear to be designed to address questions that have arisen with the promulgation of mandatory vaccination policies. Mandatory vaccination policies have either been adopted by employers voluntarily, or in response to [regulations and orders issued by OSHA and President Biden](#). (Note: the federal private employer, healthcare worker, and government contractor mandates are suspended for various reasons due to legal proceedings as of the date of this alert). With respect to mandatory vaccination policies which have a testing alternative, the FLD explains as follows:

- An employer who permits an employee to obtain weekly COVID-19 testing and wear a face covering as an alternative to being vaccinated likely does not have to pay the employee for the COVID tests, provided the employer does not mandate when, where and how the employee obtains the weekly test. The FLD notes that free testing is "still widely available" in Massachusetts.
- An employer who permits an employee to obtain weekly COVID-19 testing and wear a face covering as an alternative to being vaccinated likely does not have to pay the employee for the cost of the face covering, provided the employer does not mandate the specific type or features of the face covering. The FLD notes that the more prescriptive the employer is about specific face coverings (e.g., with a logo, with a respirator, etc.), the more likely the face covering would be considered a uniform or personal protective equipment which an employer must provide, and not charge an employee to wear.
- An employer who permits an employee to obtain weekly COVID-19 testing and wear a face covering as an alternative to being vaccinated likely does not have to pay the employee for the time it takes the employee to get the COVID test, provided the employer does not mandate when, where and how the employee obtains the COVID test. (FAQ 8). As to the compensability of time it takes employees to get a COVID test, the FLD specifically invites interested parties to seek a formal opinion on this question based on their specific circumstances.

This updated FAQ, while helpful, has limitations. First, the FLD notes that the information is provided for "informational purposes only and is not to be construed as a legal opinion of the Attorney General." Second, the FAQs cited above assume that the employee has voluntarily selected to undergo testing and masking because the employee does not want to become vaccinated. The FLD's

analysis assumes an employee is voluntarily declining the vaccine but is silent on the impact to its analysis (if any) in the more frequent situation where an employee has declined to become vaccinated due to a sincerely held religious belief or a claimed disability. It may be that an employee may be entitled to compensation and/or reimbursement for the costs of testing where the testing option is provided as a reasonable accommodation.

As guidance on required and recommended COVID-19 compliance continues to change on a regular basis, employers are encouraged to work with their MBJ attorney to ensure they are complying with the rapidly-evolving guidance.

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