How to Create a Legally Sound COVID-19 Testing Policy

Mandatory COVID-19 testing is less intrusive than mandatory vaccination

A few months ago, everybody was asking if mandatory vaccination policies were legal; now the question has become whether **not** to having such policies is legal. The short answer: Yes, provided that your company is in the private sector or not otherwise covered by the vaccine mandates that most provinces have now adopted for public service and healthcare employees. In addition, you probably can make vaccination mandatory if you can show it's an essential safety policy and you respect certain privacy and human rights boundaries.

Even so, the concept of requiring employees to get vaccinated remains troubling to many employers. One alternative is to give employees the right to remain unvaccinated as long as they undergo COVID-19 testing instead. But like vaccination, mandatory testing raises tricky legal issues and requires the right testing policy. Here's how to implement a COVID-19 testing policy.

Yes, Mandatory COVID-19 Testing Is Legal

We know from decades of drug testing litigation that mandatory testing is highly problematic, especially when it's performed on employees who don't have symptoms or when there's no ground to suspect impairment. The same thing is true of requiring employees to get vaccinated. The point is that the pandemic has changed the usual rules and given employers leeway to adopt health and safety measures that wouldn't be allowed during normal times.

Accordingly, privacy and human rights commissions across the country have acknowledged that mandatory workplace COVID-19 testing is justifiable as long as it's carried out in a way that minimizes privacy invasion and accommodates persons with disabilities and other personal characteristics that human rights laws protect from discrimination.

Just as importantly, courts and arbitrators have now recognized the right of employers to make employees undergo COVID-19 testing, particularly at nursing, hospital and other elderly care settings. The first case to address this question began when a retirement home unilaterally imposed a new policy requiring staff to be tested every 2 weeks. The union objected, contending the policy was unnecessary and privacy-invasive and urged the Ontario arbitrator to

evaluate it like a drug and alcohol testing policy.

But in the eyes of the arbitrator, comparing COVID-19 to drug testing was apples-to-oranges. The stakes were much more deadly with COVID. While less vulnerable than nursing home residents, people living in retirement communities are still elderly and at great danger if they catch coronavirus. Besides, the arbitrator reasoned, a positive COVID test isn't "culpable conduct" subject to discipline the way a positive drug/alcohol test is [*Christian Labour Association of Canada v. Caressant Care Nursing & Retirement Homes* (D. Randall), December 9, 2020 (unreported)].

How to Create a COVID-19 Testing Policy

The key to compliance is to implement a testing policy that includes the appropriate safeguards and limitations. Like the policy template on the HRI website, your policy should include 10 elements:

1. Policy Statement

According to the regulators, mandatory testing is okay as part of a more comprehensive program to prevent COVID-19 infection in the workplace, provided that the information provided by testing is essential to accomplishing the objectives of that program and there are no less privacy invasive ways to get the information. **The point:** Your organization must make a determination about whether testing meets these criteria and spell this out in the Policy (Policy, Sec. 1).

2. Policy Purpose

State that the purpose of the Policy is to ensure that testing is done fairly, consistently, reasonably, transparently and in a way that's minimally privacy-invasive and compliant with applicable laws and current public health guidelines (Policy, Sec. 2).

3. Test Methods

There are different kinds of COVID-19 testing and your policy should stipulate which you require. The 2 basic options:

Molecular Testing: Molecular, aka, RT-PCR (reverse transcription polymerase chain reaction) tests detect RNA from the virus that causes coronavirus from throat tissue samples collected at the back of the throat using long swabs stuck up the patient's nose. The good news about molecular tests is that they're accurate; the bad news is that they must be performed by a testing lab using specialized equipment and take several days to process.

Rapid Antigen Testing: These tests detect antigens that antibodies to the coronavirus release to fight the virus. Antigen tests can be performed at the point of care and deliver results in as little as 15 minutes, often using samples that a subject self-collects. The problem is that they're less accurate than molecular tests.

Which Tests You Should Require: The unofficial consensus is that antigen tests, while not as reliable as molecular tests, are accurate enough for screening,

provided that tests aren't self-administered. Accordingly, most provincial governments that require unvaccinated workers to undergo testing do accept antigen test results. One problem, though, is that rapid antigen tests are currently in short supply and relatively expensive.

4. Which Workers Must Undergo COVID-19 Testing

Theoretically, testing is needed only for employees who aren't fully vaccinated. The problem is that requiring only unvaccinated employees to be tested could be seen as a form of illegal discrimination. It also requires you to verify each employee's vaccination status. But again, while these practices are highly problematic in normal times, they're a justifiable health and safety measure during the pandemic (Policy, Sec. 9).

5. Reimbursement of Tests and Sample Collection Time

Unlike testing of the symptomatic, COVID-19 screening testing isn't free. Antigen tests costs roughly $5 to $50 apiece. In addition, throat swab samples must be collected by a trained health professional. (Although there are home-collection kits on the market, they're generally not considered reliable enough for screening purposes.) That means employees must travel to an offsite lab or collection site. Although there's no OHS or public health law requiring it, you may have to pay for tests and testing time under the terms of your employment contracts, collective agreements or health benefits plan. And even if it's not required, employers that require testing frequently agree to pay employees' costs (Policy, Sec. 6).

6. When & How Frequently Testing Is Done—the Asymptomatic

The next big thing you need to deal with is the timing and frequency of testing. The goal is to get employees tested before they show up for work—the baseline—and as often as necessary thereafter to give you a level of comfort as to their ongoing status. The US Centers for Disease Control (CDC) recommends considering the following factors in determining the frequency of serial testing:

- Type of workplace;
- Recent experience in your workplace;
- Total number of new cases of COVID-19 per 100,000 people in your community; and
- The percentage of positive molecular COVID-19 tests in the community.

If you rely on molecular testing, you must factor the delay between sample collection and test reporting into the equation (Policy, Sec. 7).

7. When & How Frequently Testing Is Done—the Symptomatic & Recently Exposed

In addition to baseline and regular retesting, employees should undergo immediate molecular testing if they exhibit COVID-19 symptoms or they're found to have had recent exposure to somebody who tested positive or was otherwise confirmed as having the virus. Those employees should immediately leave the workplace and not be permitted to return until their test comes back negative or their symptoms resolve (Policy, Sec. 7).

8. Test Results Protocols

Require employees who test positive to consult a doctor and go into immediate self-isolation for as long as current public health guidelines dictate based on their symptoms and situation. Positive employees shouldn't be allowed to return unless they test negative once under a molecular test or at least twice over a short period using an antigen test (Policy, Sec. 8).

9. Privacy Protections

Require employees to disclose their test results but include the following privacy protections in your testing Policy:

- A promise to limit testing to the question of whether employees have COVID-19 and not seek any other medical information;
- An explanation of how you will disclose positive test results to local health agencies and the recently exposed;
- A commitment to protect and maintain the confidentiality of test records in accordance with your organization's privacy and personal health information policies

(Policy, Sec. 10).

10. Discipline

Make it clear that testing positive COVID-19 is not grounds for termination or discipline but that unreasonable refusal to cooperate and undergo required testing may be (Policy, Sec. 11).