

**EMPLOYMENT LAW ISSUES ARISING OUT OF COVID-19 VACCINATION AND
TESTING MANDATES**

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February 28, 2022

The Coronavirus Disease 2019 (“COVID-19”) is a contagious, and at times fatal, respiratory disease which has led to a global pandemic.¹ The approved COVID-19 vaccines are highly safe and effective in reducing deaths and hospitalizations in infected individuals. On September 9, 2021, President Biden introduced a COVID-19 Action Plan (Plan), which encompassed multiple executive orders. The Plan instructed the Department of Labor’s Occupational Safety and Health Administration (OSHA) to develop an emergency temporary standard (ETS) that would require employers with 100 or more employees to ensure their employees are fully vaccinated or undergo weekly testing. On January 13, 2022, the United States Supreme Court blocked the ETS from going to effect. The Plan also mandates certain federal contractors to require employee vaccinations, without testing opt-outs. As of now the United States Court of Appeals Eleventh Circuit blocked the federal contractors mandate pending ongoing litigation.

Governor Philip Murphy issued on August 6, 2021 and August 23, 2021 executive orders compelling vaccination or weekly testing for certain workers. To date, all the state mandates remain in effect. The following is information for electrical contractor employers about the federal and state laws implicated by vaccine and testing mandates.² Please note that the

¹ Governor Philip D. Murphy, State of New Jersey, Executive Order 103, March 2, 2020

² This memorandum is for information purposes only and should not be construed as legal advice. Contractors should consult their counsel on how these issues affect their particular workplace practices.

obligations owed to employees may differ depending whether or not the particular contractor employees are covered by a collective bargaining agreement (“CBA”).

A. COVID-19 Vaccine Mandates

President Biden stated that his Plan would “require all employers with 100 or more employees to ensure their workforce is fully vaccinated or require any workers who remain unvaccinated to produce a negative test result on at least a weekly basis before coming to work.”³ On January 13, 2022, the United States Supreme Court blocked the ETS from going into effect. The Supreme Court found that OSHA’s ETS was overly broad and exceeded the powers granted to OSHA. This means that employers with 100+ employees will not be required to mandate vaccines or testing as required under the ETS. Instead, OSHA has issued Covid-19 guidance which they strongly suggest employers follow, but it remains in the discretion of each employer. Still, if the employer falls under any of the other COVID-19 vaccine mandates issued by Governor Murphy (discussed below), they must still comply.

President Biden also issued an Executive Order requiring all federal contractors, regardless of how many employees they have, to require their workforce be vaccinated with no testing option unless a recognized exemption applies. This Executive Order is currently stayed pending ongoing litigation in the Eleventh Circuit Court of Appeals.

It is important to note that any government vaccination and testing mandate sets only the minimal requirements. The United States Equal Employment Opportunity Commission has issued guidance confirming that employers can outright mandate employees be vaccinated, even without offering testing as an alternative. National NECA issued written guidance on August 17,

³ Path out of the Pandemic, President Biden’s COVID-19 Action Plan, <https://www.whitehouse.gov/covidplan/>

2021 confirming that employers do not have to bargain over requiring vaccinations when requesting workers from a local union.

An employer should be aware that it may need to exempt some employees from vaccination mandates. An employee who holds a sincerely held religious belief or has a medical condition which endangers them if vaccinated can be exempt upon presenting adequate information and documentation to the employer. Exempt employees will then be required to undergo testing weekly.

In New Jersey, Governor Murphy issued Executive Order 253, which compels workers in school districts, including contractors performing work on-site, to either be “fully vaccinated” or submit to no less than weekly testing.⁴ Governor Murphy also issued Order 252 which requires all state and private healthcare facilities and other “high-risk congregated settings” to compel workers, including contractors working on site, to be fully vaccinated or undergo weekly testing.

⁵ Schools and healthcare facilities still retain discretion to place higher requirements on contractors, such as not allow testing opt-outs by employees. Governor Murphy issued Order 271 which requires all state contractors and subcontractors entering into agreements with the State of New Jersey to have a vaccine mandate in place for its employees. E.O. 271 does not apply to contracts or subcontracts whose value is less than the State bid advertising threshold under N.J.S.A. 52:34-7 (\$71,000); employees who perform work outside of the State; or contracts solely for the provision of goods.⁶

⁴ Governor Philip D. Murphy, State of New Jersey, Executive Order 253, August 23, 2021

⁵ Governor Philip D. Murphy, State of New Jersey, Executive Order 252, August 6, 2021

⁶ <https://nj.gov/infobank/eo/056murphy/pdf/EO-271.pdf>

The State of New Jersey is encouraging all people eligible to get the COVID-19 vaccines to do so. As to employees not covered by a CBA, the State of New Jersey Department of Labor (NJDOLE) stated that if an “individual is unable to work because they are getting the COVID-19 vaccine or are recovering from side effects, they can use accrued Earned Sick Leave afforded to them through the New Jersey Earned Sick Leave Law.⁷ The NJDOLE further stated that an employee can use accrued paid sick leave to get tested for COVID-19. The NJDOLE guidance is silent as to what happens once the earned sick leave is exhausted.

However, under the New Jersey Earned Sick Leave Law⁸, “Employee” does not include an individual engaged in service for compensation in the construction industry under contract pursuant to a CBA; a per diem health care employee; or a public employee who is provided with sick leave at full pay under any other law or rule of New Jersey. Therefore, employees working under a construction industry CBA are not governed under this law. As such, the CBA-signatory employers are not required to give their CBA-covered employees paid time off to get the vaccine under the NJ Earned Sick Leave Law. They are still required to afford other employees, such as management and clerical staff, available paid time off for vaccination related time.

B. Compensable Time for COVID-19 Testing

Under the Fair Labor Standards Act (FLSA),⁹ employers are required to pay employees for all hours worked. New Jersey’s Wage and Labor Law¹⁰ (NJWHL) tracks the FLSA. NJWHL requires that employees be paid for “all time the employee is required to be at his or her place of

⁷ <https://www.nj.gov/labor/worker-protections/earnedsick/law.shtml>

⁸ New Jersey Earned Sick Leave Law, N.J.S.A. 34:11D-1

⁹ 29 U.S.C. §201 et seq.

¹⁰ N.J.A.C. 12:56-5.2(a)

business.” The FLSA and NJWHL define the term work as “any activity controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business.” These rights are set by law and do not include CBA-specific worker entitlements. The Act states that all hours worked includes all time spent doing “principal activity”.¹¹ An activity is considered principal activity if it is an “integral and indispensable part of the principal activities for which a covered workers is employed” and excludes any time that “is preliminary to” or “postliminary to” the performance of the principal activity.”

As to COVID-19 testing, the United States Department of Labor (DOL) provided guidance to employers. It states “for many employees, undergoing COVID-19 testing may be compensable because the testing is necessary for them to perform their jobs safely and effectively during the pandemic. For example, if a grocery store cashier who has significant interaction with the general public is required by her employer to undergo a COVID-19 test on her day off, such time is likely compensable because it is integral and indispensable to her work during the pandemic.”¹²

Likewise, an electrician who interacts with customers and the general public in the course of the performance of duties may be entitled to compensation for testing time since the testing is “necessary for them to perform their jobs safety and effectively.” The DOL’s use of the term “on their day off” suggests that an electrician who gets a COVID-19 test on the weekend may need to be compensated for their time if it is an integral and indispensable part of their job.

An employee can readily prove the necessity of the testing if the customer requires it or it is otherwise required by law or executive order. An employer can also consider adding the

¹¹ Integrity Staffing Solutions, Inc. v. Busk, 135 S. Ct. 513, 190 L. Ed. 2d 410 (2014)

¹² <https://www.dol.gov/agencies/whd/flsa/pandemic#7>

costs associated with implementing this policy on to the client. In contrast, an employer can reasonably conclude that the electrician is not entitled to testing time being compensable if the electrician does not interact with the general public, the customer does not require it and the work location is not otherwise subject to a vaccine or testing mandate.

Contractors should also note that OSHA is not enforcing 29 CFR 1904's injury or illness recording requirements until May 2022, in an effort to encourage vaccinations. Thereafter, an employer will be required to record if an employee experiences any diverse side effects to the vaccine.

C. Conclusion

It is essential for an electrical contractor to determine whether its workers are subject to a vaccine and testing mandate issued by the Federal or State government, which will depend on several factors, including the outcome of pending vaccine litigation, location of the work and whether the employer is a federal contractor. If the employer is subject to regular testing mandates, the employer should strongly consider making arrangements for the testing to take place during a part of the day that is already compensable time. Testing time on the weekends, for example, may otherwise be compensable.

The laws and rules being applied and enacted during the COVID-19 pandemic are evolving rapidly. It is important that electrical contractors consult counsel regularly to avoid incurring liability risk arising out of the COVID-19 pandemic.