

## Publications

### Department of Labor Provides Guidance on Compensability of COVID-Related Health and Safety Measures

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CLIENT ALERT | 1.21.2022

After nearly two years of frustrating uncertainty regarding whether employers are required to pay employees for time spent undergoing COVID testing or health screenings, the United States' Department of Labor (DOL) has finally provided some guidance. This morning, January 21, 2022, the DOL's Wage and Hour Division issued a [fact sheet](#) addressing when employers are required to compensate employees for time spent undergoing COVID-related health and safety measures. In this new guidance, the DOL addressed several of the [uncertainties](#) and [concerns](#) that Vorys attorneys have discussed over the last two years.

#### Activities Occurring During Normal Working Hours

The DOL began by clarifying that health and safety measures that occur during normal working hours *are* compensable. The DOL specifically stated that "employees must be paid for time spent going to, waiting for, and receiving medical attention required by the employer or on the employer's premises during normal working hours." The DOL then addressed this requirement in the context of COVID, explaining that "if an employer requires an employee to obtain a COVID-19 vaccine dose, undergo a COVID-19 test, or engage in a COVID-19 related health screening or temperature check **during the employee's normal working hours**, the time that the employee spends engaged in the activity is compensable." The DOL further clarified that employees "must be paid for such time during normal working hours, regardless of where the activity occurs."

#### Activities Outside of Normal Working Hours

In its guidance, the DOL addressed whether time spent undergoing health and safety measures outside of normal working hours – such as receiving a vaccine – is compensable. The DOL explained that generally "time spent engaged in employer-required activities that are necessary for an employee to safely and effectively perform their job are 'integral and indispensable' to their work and therefore must be paid."

The DOL, accordingly, determined that **where an employer has mandated the COVID-19 vaccine**, the time an employee spends receiving a COVID-19 vaccine dose **is compensable** because the employer has determined that “the vaccine is necessary for them to safely and effectively perform their ... jobs.”

## Compensation for Time Spent Testing

The DOL then addressed whether time spent undergoing testing is compensable. The DOL first addressed those situations in which the employer has a mandatory COVID-19 vaccination policy, “but an employee is unable to receive COVID-19 vaccination (e.g., where a disability or sincerely held religious belief, practice, or observance precludes the employee from being vaccinated) and the employee is entitled to a reasonable accommodation.” The DOL explained that in this situation, the time spent undergoing testing outside of normal working hours **is compensable** “given that vaccination is not a viable option for such employees.”

The DOL, however, determined that *when an employer’s policy provides for regular proof of testing as an alternative to vaccination*, “the employer **is not required** to pay the employee for time spent undergoing testing.” The DOL explained that “where the employee could receive the vaccine but chooses to remain unvaccinated, the time that the employee spends undergoing testing outside of normal working hours is not ‘integral and indispensable’ to that employee’s job.”

## Unresolved Issues and Questions

Although the guidance provides answers to some important questions regarding compensability under the FLSA, several questions remain unaddressed, including when an employee’s “normal working hours” begin in the context of a required health screening. The DOL guidance does not address whether time spent by an employee required to undergo a health screening prior to entering the facility and clocking in is that part of an employee’s “normal working hours” It also does not address when COVID testing or screening is considered part of a “principal activity.”

Ultimately, these questions, and others like them, remain unresolved and require an individualized analysis. Contact your Vorys lawyer to discuss the impact of the DOL’s latest guidance, and for counseling regarding the issues and questions that remain unsettled nearly two years into this pandemic.