Guidance to At-Work COVID-19 Testing Under the Emergency Temporary Standard

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As IRMA members work towards implementing the new vaccine and testing mandates under the COVID-19 Emergency Temporary Standard (ETS), many are considering the option to offer at-work or employer-administered tests to their employees. While it may be easier to obtain these tests due to off-site testing centers seeing surge-related supply limits and extended wait times, there is a specific process to managing weekly testing under the ETS that must be considered. The notes outlined below are a compilation of what is required under the ETS and risk management guidance by IRMA. The referenced ETS FAQ should be reviewed in its entirety as well as the full COVID-19 Emergency Temporary Standard.

Testing Options for Employers

- The ETS allows for employers to decide how the testing will be conducted. A variety of testing options may be necessary due to collective bargaining agreements or the fact that employers may choose to sponsor the testing to help keep employees in a tight labor market. The decision is ultimately left up to the employer.
- The ETS defines what types of tests are acceptable:

  - *COVID-19 test* under the ETS means a test for SARS-CoV-2 that is:

    - Cleared, approved, or authorized, including in an Emergency Use Authorization (EUA), by the FDA to detect current infection with the SARS-CoV-2 virus (e.g., a viral test);

    - Administered in accordance with the authorized instructions; and

    - Not both self-administered and self-read unless observed by the employer or an authorized telehealth proctor. Examples of tests that satisfy this requirement include tests with specimens that are processed by a laboratory (including home or on-site collected specimens which are processed either individually or as pooled specimens), proctored over-the-counter tests, point of care tests, and tests where specimen collection and processing is either done or observed by an employer.

At-Work Testing

- Should employers choose to observe/administer testing at the workplace:
  - See ETS FAQ 6J and 6K – summary of key points below:
    - Antibody tests do not meet the definition of COVID-19 test for the purposes of this ETS.
    - Antigen tests may also meet the definition of COVID-19 test under this standard.
    - To be a valid COVID-19 test under this standard, a test may not be both self-administered and self-read unless observed by the employer or an authorized telehealth proctor. If an OTC test is being used, it must be used in accordance with the authorized instructions. <u>OSHA included the requirement for some type of independent confirmation of the (OTC) test result in order to ensure the integrity of the result. This independent confirmation can be accomplished in multiple ways, including through the</u>

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<u>involvement of a licensed healthcare provider or a point-of-care test provider.</u>
- If self-administered / employer-observed testing will be provided, the proper training must take place and the documentation procedures outlined in the ETS must be followed:
  - o See ETS FAQ 6W: Employer-observers may document the test result through a written statement (e.g., a notation indicating the date and time observed, the observer, and the results), a photograph of the test result, or a video of the test result, if documented and recorded by the employer-observer at the time the test is conducted or observed. This documentation must be preserved by the employer. The employer must make a record of the test result to satisfy (g)(4).
- The selected at-work testing process and documentation requirements should be expressly stated in the employer's COVID-19 Policy.

Ability to Comply During Test Shortages
- If an employer is not able secure weekly test results from workers due to test shortages, there would need to be documentation of their "good faith effort" to comply with the ETS. Employers would need to show that those unvaccinated workers getting weekly tests are still limited in their in-person interaction with others and are continuing with their other mitigation steps.
  - o See ETS FAQ 6L: In the event that an individual employer is unable to comply with paragraph (g) of this ETS due to inadequate test supply or laboratory capacity, OSHA will look at efforts made by the employer to comply, as well as the pattern and practice of the employer's testing program, and consider refraining from enforcement where the facts show good faith in attempting to comply with the standard.
  - o See ETS FAQ 6O: The agency recognizes that where the employee or employer uses an off-site laboratory for testing, there may be delays beyond the employee's or employer's control. In the event that there is a delay in the laboratory reporting results and the employer permits the employee to continue working, OSHA will look at the pattern and practice of the individual employee or the employer's testing verification process and consider refraining from enforcement where the facts show good faith in attempting to comply with the standard.

Incentivizing Vaccinations vs. At-work Testing
- Employers should weigh the burden of following the ETS by allowing at-work weekly testing with the less burdensome possibility of having vaccinated employees.
- Making it easier to "just take a test at work" would be defeating the purpose of the ETS which is to place the burden on the unvaccinated employee to get their weekly test on their own time and at their own expense.
  - o One workable solution may be reserving at-work testing options for when all other testing options off-site have failed.
- While the White House, WHO, etc. aren't discrediting rapid tests and they do meet the requirements of the ETS, the rapid tests are not the most effective at detecting asymptomatic cases.

Please visit the OSHA ETS Landing Page for all information pertaining to this standard. IRMA's Risk Management team will continue to monitor for continued guidance and update the COVID-19 webpage. Our team is also available to answer questions or review policies if needed.