



ATTORNEYS AT LAW

## CONDUCTING COVID-19 TESTING FOR STAFFING FIRMS UNDER CDC GUIDELINES

Written by: Christopher M. Leddy, Esq.

As staffing firms are familiar with by now, as a condition of entering the workplace, staffing firms and their clients may require COVID-19 testing of employees and temporary workers. However, until recently, the CDC had not fully developed and laid out what consents and disclosures were required to be provided to employees and temporary workers before a business could institute such a program. Well, now the CDC has.

The below outlines what the CDC expects of such testing programs. Therefore, when a client requires COVID-19 testing, staffing firms, as the employer of record, will want to ensure that both the staffing firm and the client are complying with the CDC guidance, especially if the client is the one conducting the testing. Ensuring a client's compliance may require an amendment to the master services agreement as well as visual oversight.

According to the CDC, all testing should only be conducted with an employee's or temporary worker's informed consent which must consist of (1) disclosure, (2) understanding, and (3) free choice. The CDC recommends the following steps be taken when creating a testing program:

- Ensure safeguards are in place to protect an employee's privacy and confidentiality.
- Provide complete and understandable information about how the employer's testing program may impact employees' lives, such as if a positive test result or declination to participate in testing may mean exclusion from work.
- Explain any parts of the testing program an employee would consider especially important when deciding whether to participate. This involves explaining the key reasons that may guide their decision.
- Provide information about the testing program in the employee's preferred language using non-technical terms. Consider obtaining employee input on the readability of the information. Employers can use this tool to create clear messages.
- Encourage supervisors and co-workers to avoid pressuring employees to participate in testing.
- Encourage and answer questions during the consent process. The consent process is active information sharing between an employer or their representative and an employee, in which the employer discloses the information, answers questions to facilitate understanding, and promotes the employee's free choice.

Further, the guidance states disclosures should include those addressed in the FDA's emergency use authorization patient fact sheet, including:

- The manufacturer and name of the test.
- The test's purpose.
- The type of test.
- How the test will be performed.
- Known and potential risks of harm, discomforts, and benefits of the test.
- What it means to have a positive or negative test result, including:
  - Test reliability and limitations
  - Public health guidance to isolate or quarantine at home, if applicable

Finally, the CDC lists a host of questions that employers should be ready to answer, including, but not limited to:

- Why is the employer offering to test employees?
- Will the employer pay for the employee's time and travel?
- Are there any available accommodations or alternatives for an employee who declines to take the test?
- Who pays for the test?
- Who will be administering the test and what are their qualifications?
- When will the results be provided to employees, and in what confidential manner?
- Who will interpret the test and what are their qualifications?
- What is the test provider's obligation to report a positive result to the public health authority.
- What personal information does the employee need to provide (e.g., name, date of birth) to the test provider?
- How will personal information be kept confidential and secure (i.e., restricted from unauthorized access or disclosure)?
- Who to contact to explain an employee's rights?
- Who to contact if assistance is needed (e.g., language translation or transportation to and from the testing site)?

Based on the above, it is imperative that all staffing firms who decide to move forward with COVID-19 testing have a well-documented and prepared testing plan; and in the case of staffing firm clients, staffing firms must ensure the applicable client's plan adheres to the guidance as well. While the CDC guidance is helpful in developing such a plan, it is highly recommended that all plans be run by your legal counsel prior to implementation.



**About Becker LLC:** Becker LLC is a premiere mid-market firm recognized as a leader in the staffing industry. With offices in New York, California, Pennsylvania, and New Jersey, the firm provides forward thinking, mission-critical advice to staffing industry entrepreneurs and management on high stakes, complex legal matters as well as day-to-day matters and long-term plans. The firm are proud to be members of the following Staffing Associations: SIA, ASA, ASG, TempNet, CSP, MSA, NJSA, NYSA and serves as general counsel to the Mid Atlantic Staffing Association.

For more information, call (973) 422-1100, visit us on the web: <https://www.becker.legal/>