

RAPID TESTING FOR COVID-19

FREQUENTLY ASKED QUESTIONS

This document addresses frequently asked questions pertaining the COVID-19 rapid antigen testing for employees who have not provided proof of being fully immunized to COVID-19 in the Developmental Services Sector (“DS Sector”).

The information provided in this document is for general information purposes only is intended only for internal use amongst DS Sector leaders. DS leaders are strongly recommended to speak to their own legal counsel before implementing vaccination and rapid testing policies and imposing consequences on employees who decline to comply with such policies

1. FAQ: Can employers require employees to disclose whether or not they have been vaccinated against Covid-19 virus?

Several employees in the sector have expressed the opinion that they don’t believe they have to disclose whether or not they have been vaccinated. There are now at least two arbitration decisions related to Covid-19 vaccination and rapid testing policies where the arbitrators have held that employers can likely require disclosure and impose discipline for employees who refuse to do so.

Furthermore, the Letter of Instruction for DS agencies from the Chief Medical Officer of Health (CMOH) indicates that declaration of vaccination status is required.

At the same time, employers need to pick their battles. Some employers have chosen to deem employees who do not disclose if they are vaccinated as “unvaccinated for non-human rights related reasons” and allow them to continue to work so long as they comply with the requirements that apply to employees that have not disclosed if they are vaccinated (such as rapid testing etc.).

2. FAQ: Do DS agencies have the legal authority to require employees that have not disclosed proof of vaccination to be rapid tested?

Government funded DS agencies are required by law to implement vaccination policies that require employees that have not disclosed proof of vaccination to be rapid tested for Covid-19 at least once every seven days.

The legal authority for this is based on Ontario Regulation 364/20 which requires compliance with instructions from the Chief Medical Officer of Health (CMOH). On August 30, 2021, the CMOH issued a letter of instruction to DS agencies mandating policies that require rapid testing of all unvaccinated workers.

3. FAQ: Is it unlawful to force employees to be rapid tested?

While employees might feel that they are being “forced” to rapid test, the fact is that employees have a choice. They can choose to provide proof of being immunized against COVID-19, they can choose to complete rapid antigen tests, or they can accept the employment consequences (whether a leave of absence, suspension or discipline). Employees have choices, but their choices have consequences and they must be prepared to accept the consequences.

4. FAQ: Who is required to undergo rapid testing?

Under the Letter of Instruction from the CMOH, any staff, contractors, students and volunteers performing work for DS agencies who fail to show proof of full vaccination are required to participate in rapid testing.

5. FAQ: Where will rapid testing take place?

DS agencies can determine where testing will take place. The location of testing should consider employees privacy balanced against the need for testing to be appropriately verified. Some public health units are not recommending unsupervised self-testing for agencies in our sector.

6. FAQ: Do employees have to be paid for the time involved in testing?

Generally speaking, there would not be an obligation to pay for the time involved in rapid testing, unless you have a collective agreement provision that indicates otherwise. There is now at least one Arbitration decision supporting the position that employees are not entitled to pay for the time involved in testing.

7. FAQ: Do employers have to cover the cost of testing?

Whether the cost of testing will be the responsibility of the employer or the employee will depend on the circumstances and whether it would be “reasonable” to make employees bear the cost of testing. Where testing kits are available for free from the province (as they currently are) and the cost to test in the community is excessive, it is likely that an employer policy that does not cover the cost of testing will be found to be unreasonable. At least one Arbitration decision has now held that employers should be covering the cost of Covid-19 testing.

8. FAQ: Can anyone be exempted from rapid testing?

Requests for medical and human rights protected exemptions should be assessed on a case-by-case basis in accordance with normal human rights accommodation procedures. This means that there could be human rights related exemptions that employees may seek based on religion or an

medical restriction for instance. Where an employee raises such a request, they would need to establish with supporting evidence that they do in fact have a restriction that prevents them from being rapid tested using the employer's approved testing procedure. Then it would be up to the employer to offer accommodations, which could include the employee cooperating with or showing proof of other forms of testing, such as a saliva-based test or PCR test. The responsibility would then fall back on the employee to demonstrate that they also have a human rights protected restriction that prevents them from cooperating with the other forms of testing proposed or that the alternative is not a reasonable accommodation. Ultimately, if an employee refuses to be vaccinated and cannot be tested on a weekly basis (as required by the CMOH's letter of instruction) or more frequently (in accordance with employer policy) for valid human rights related reasons, then the employer will have to assess whether it would be undue hardship to allow the employee to continue working while being unvaccinated and untested.

Arguably, given that agencies are legally required by O. Reg. 177/20 to require unvaccinated employees to be tested at least once per week under the Letter of Instruction from the chief medical officer of health, it would be undue hardship for an agency to not enforce or uphold the legally mandated policy. In considering whether undue hardship exists, the employer could also demonstrate that without vaccination or testing the risk to people supported is too great, and there is no other adequate or reasonable measure to reduce the risk associated with the employee continuing to work while unvaccinated and untested.

At the end of the day, given how non-invasive the testing is, it is likely that bona fide exemptions from rapid testing will be very rare. Exemptions related to fears about the medical efficacy, necessity or risk associated with rapid testing are generally not eligible for exemptions or accommodation.

9. FAQ: How can we work with employees who refuse rapid testing to understand the consequences of their decision?

There is now at least one Arbitration decision upholding the employer's right to impose an unpaid leave of absence for employees refusing to comply with rapid testing. This decision also indicated that the eventual termination of an employee for persistent non-compliance with rapid testing requirements would likely be justified and upheld. Employers seeking to implement discipline and potential termination for non-compliance should ensure that their policies clearly contemplate this consequence.

10. FAQ: How long will rapid testing be required?

For DS sector agencies, the legal requirement to maintain rapid testing for unvaccinated employees will remain in force for so long as the Emergency Order (O. Reg. 364/20) and Letter of Instruction of the CMOH remain in place or until an employer opts to move towards a mandatory vaccination policy (test or exclude policy).

At the same time, it's important to note that even if the legal obligation to mandate rapid testing for workers who have not provided proof of being vaccinated were to be removed, the case law

indicates that employers would have the right to implement a rapid testing requirement for workers. Such policies have been upheld in a number of other sectors, even where staff are not in close contact with each other or with vulnerable people. Rapid testing therefore would not have to automatically come to an end just because the government no longer mandates it. Employers would have the ability to maintain a rapid testing requirement for workers who have not provided proof of vaccination so long as it is reasonable based on the risk of COVID-19 in the workplace.

11. FAQ: Is unsupervised self-swabbing an acceptable method of testing instead?

Whether an employer will accept unsupervised self-administered rapid testing is up to an individual agency subject to any legally binding recommendations from public health, the Ministry of Health or the Chief Medical Officer of Health. DS agencies should consult with their local public health officials to determine whether supervision for self-swabbing is recommended.

12. FAQ: Should rapid testing be used for employees who have symptoms or otherwise do not pass screening?

No. Employees who do not pass initial screening should not be permitted to enter the workplace or use rapid testing.

13. FAQ: What is being done with the rapid testing results as personal health information?

DS Agencies should treat rapid test results as confidential information and should not disclose the test results to any person within the workplace or to third parties except as reasonably required to manage the health and safety of the workplace and to comply with the directions and instructions of public health, or as required by law.

14. FAQ: Is requiring rapid testing a violation of employee rights or a basis for threatened liability by employees?

Many DS agencies have now received form letters signed by employees threatening personal and corporate liability against them and their leaders in relation to implementing vaccination and rapid testing policies. These letters are largely based on inaccurate or erroneous application of legal principles, including, among other things, the Nuremberg Code, international human rights principles, the Criminal Code, the Genetic Non-Discrimination Act, the Canadian Human Rights Act, the doctrine of “primacy”.

There are now a number of legal decisions related to Covid-19 vaccination and rapid testing policies that have upheld the legitimacy of rapid testing requirements for employees that have not provided proof of vaccination. These decisions have not imposed any liability against organizations or their leaders for imposing mandatory rapid testing policies. Given how non-invasive rapid

testing is, the likelihood of any liability being imposed on any organization for requiring rapid testing of employees in the DS Sector is exceedingly unlikely. This is particularly the case given the legal obligation to implement rapid testing under the Instructions from the Chief Medical Officer of Health.