

## **FACT SHEET #84: COMPENSABILITY OF TIME SPENT UNDERGOING COVID-19 HEALTH SCREENINGS, TESTING, AND VACCINATIONS UNDER THE FAIR LABOR STANDARDS ACT (FLSA)**

This fact sheet addresses issues that have arisen during the COVID-19 pandemic regarding whether time spent engaged in activities related to COVID-19 health screenings, testing, and vaccination is compensable under the FLSA. This guidance reflects that, on November 5, 2021, the Occupational Safety and Health Administration (OSHA) published an emergency temporary standard (ETS) to address the grave danger of COVID-19 in the workplace (the “OSHA Vaccination and Testing ETS”). This fact sheet addresses how the OSHA Vaccination and Testing ETS factors into the analysis used to examine whether such time must be paid under the FLSA.

Under the FLSA, employers generally must pay employees at least the minimum wage for all hours worked, and at least one and one-half times their regular rate of pay for hours worked exceeding 40 in a workweek. This fact sheet examines whether certain activities occurring during the COVID-19 pandemic constitute compensable hours worked under the FLSA. The analysis used to determine the compensability of such time is fact-specific and depends, in part, on whether the activity occurs during, or outside of, an employee’s normal working hours.

### **Activities That Occur During Normal Working Hours**

Under the FLSA, all time between the start and finish of an employee’s workday must be paid unless it falls within one of the exceptions stated in 29 C.F.R. Part 785, such as bona fide meal breaks and off-duty time. Employer-required activities during normal working hours are therefore generally compensable.

More specifically, 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. Therefore, 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. Employees must be paid for such time during normal working hours, regardless of where the activity occurs. This is true regardless of whether the employer is subject to the OSHA Vaccination and Testing ETS.

**Example:** Employer has a mandatory COVID-19 vaccination policy for all employees. Employee spends two hours obtaining their first dose of the COVID-19 vaccine during normal working hours. Employer is required to pay Employee for time needed to receive the mandatory vaccine dose during normal working hours.

**Example:** Employer requires Employee to undergo a COVID-19 test during Employee’s normal working hours. Employer is required to pay Employee for the time needed to receive the COVID-19 test during normal working hours.

**Example:** Employer requires Employee to have a temperature check onsite to screen for people who might have COVID-19 after Employee has started work for the day. Employer must pay for the time needed to undergo the temperature check related to COVID-19 during normal working hours.

## Activities That Occur Outside of Normal Working Hours

Under the FLSA, employers are required to pay employees for all hours worked, including for time outside of normal working hours if the task that the employee is required to perform is necessary for the work they are paid to do. As a general matter, 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. For example, if a health care professional is required to put on and take off personal protective equipment (PPE) prior to and after a work shift to protect that worker from COVID-19 exposure, such time spent putting on and taking off the PPE is compensable under the FLSA because it is necessary to the safe and effective performance of that worker’s job.

As reflected in the OSHA Vaccination and Testing ETS, the Federal Government has determined that vaccination is the most effective and efficient control available to protect employees from becoming seriously ill and dying due to occupational exposures to COVID-19. Employers must pay employees who report to a workplace where other individuals are present and who do not work exclusively outdoors for time spent going to, waiting for, and obtaining a mandatory COVID-19 vaccine dose because it is necessary that employees be able to perform their jobs safely and effectively during the pandemic.<sup>1</sup>

**Example:** Employer is a small manufacturing company, not covered by OSHA’s Vaccination and Testing ETS, that has implemented a mandatory COVID-19 vaccination policy for all employees. Employer is unable to provide time to receive vaccines during the normal shifts of assembly line workers, so Employer requires those employees to receive their COVID-19 vaccine doses after their shifts or on weekends. Employer is required to pay the assembly line workers for the time that they spend receiving their COVID-19 vaccine doses because the vaccine is necessary for them to safely and effectively perform their assembly line jobs.

Where an 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 under federal civil rights laws, the time spent undergoing regular employer-required COVID-19 testing outside of normal working hours is “integral and indispensable” to the employee’s work and therefore compensable. In this circumstance, mandatory COVID-19 testing is necessary for such employees to perform their jobs safely and effectively during the pandemic, given that vaccination is not a viable option for such employees.

**Example:** Pursuant to the OSHA Vaccination and Testing ETS, Employer has implemented a mandatory COVID-19 vaccination policy, but Employee, who works as a grocery store cashier, has a disability that precludes Employee from being vaccinated and receives a reasonable accommodation from Employer’s vaccination requirements. Employer therefore requires Employee to wear a face covering at work and to undergo regular COVID-19 testing each weekend before returning to the jobsite on Monday. Under the FLSA, employee must be paid for the time spent going to, waiting for, and undergoing the testing. Because vaccination is not a viable option for Employee, regular COVID-19 testing is necessary for Employee to perform their job safely and effectively during the pandemic.

Where an employee is able to receive the COVID-19 vaccine as an alternative to regular COVID-19 testing, but where the employee has *voluntarily* declined to be vaccinated (e.g., where an employer covered by OSHA’s Vaccination and Testing ETS has a policy allowing employees to choose either to be fully vaccinated or to

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<sup>1</sup> Employers covered by the Vaccination and Testing ETS must, in accordance with paragraph (f)(1) of that standard, support COVID-19 vaccination for each employee by providing reasonable time to each employee during work hours for each of their primary vaccination dose(s), including up to four hours of paid time, at the employee’s regular rate of pay, for the purposes of vaccination. As discussed above, where an employer requires employees to be vaccinated, time spent obtaining a COVID-19 vaccination during normal working hours is compensable under the FLSA even where the employer is not covered by the Vaccination and Testing ETS.

provide proof of regular testing and wear a face covering), the employer is not required to pay the employee for time spent undergoing regular COVID-19 testing. In such a situation, 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. In this circumstance, regular COVID-19 testing is not “integral and indispensable” because the Federal Government has determined that employees who can be vaccinated are better protected by the COVID-19 vaccine than by a COVID-19 test; the vaccine is free and widely available; and the time spent receiving the vaccine would be paid by the employer. Where all of these factors exist, the FLSA would not require employers to pay for time that employees spend in undergoing the more costly, less efficient, and less protective option of regular COVID-19 testing outside of normal working hours.

**Example:** Employer has implemented a policy allowing employees to choose either to be fully vaccinated or to provide proof of regular testing and wear a face covering. Employee is not entitled to a reasonable accommodation under federal civil rights laws due to a disability or sincerely held religious belief, practice, or observance that precludes the employee from being vaccinated. Employee has chosen not to be vaccinated. Employer is therefore requiring Employee to undergo regular COVID-19 testing each weekend before returning to the jobsite on Monday. Employee is not entitled to be paid for the time spent undergoing the testing.

Finally, a critical factor in determining whether time spent engaged in an activity outside of normal working hours must be paid is whether the activity is required by the employer, in addition to being necessary for the employee to perform the job. Where vaccination or testing is not required by an employer, an employee’s choice to engage in such activities outside of normal working hours is generally not compensable.

**Example:** Employer is a small business that is not covered by the OSHA Vaccination and Testing ETS. Although Employer is not requiring employees to be vaccinated, Employee has decided to receive the COVID-19 vaccine at a local pharmacy after work because it is the best method of minimizing serious health risks during the pandemic. Employer is not required to pay for the time that Employee spends voluntarily obtaining the vaccine.

It is important to note, however, that other laws may offer greater protections for workers, and employers must comply with all applicable federal, state, and local laws.

### **Where to Obtain Additional Information**

For additional information, visit our Wage and Hour Division Website: <http://www.wagehour.dol.gov> and/or call our toll-free information and helpline, available

8 a.m. to 5 p.m. in your time zone, 1-866-4USWAGE (1-866-487-9243).

For more information about the Fair Labor Standards Act, including fact sheets, regulations, and other resources, please visit <https://www.dol.gov/agencies/whd>.

For more information about the OSHA Vaccination and Testing ETS, please visit <https://www.osha.gov/coronavirus/ets2>.

For more information about federal civil rights laws that may require employers to provide reasonable accommodations to mandatory COVID-19 vaccination requirements for employees with disabilities and/or sincerely held religious beliefs, practices, or observances, please visit <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eco-laws#L>.

When state law differs from the federal FLSA, an employer must comply with the standard most protective to employees. Links to your state labor department can be found at [www.dol.gov/agencies/whd/state/contacts](http://www.dol.gov/agencies/whd/state/contacts).

This publication is general information and is not to be considered in the same light as official statements of position contained in the regulations.

**U.S. Department of Labor**  
Frances Perkins Building  
200 Constitution Avenue, NW  
Washington, DC 20210

**1-866-4-USWAGE**  
TTY: 1-866-487-9243  
[Contact Us](#)