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Does an Employer or Employee Pay for COVID Testing When An Owner or Prime Contractor Requires Testing for a Field Worker to Work On Site, authors Andrew Richards and Matthew Cohen, STA Legal Log, October 2021

In guidance that predates the pandemic, the EEOC opined that an employer can require a “medical examination” which is defined as “a procedure or test that seeks information about an individual’s physical or mental health impairments or health,” if such examination “is shown to be job-related and consistent with business necessity.” As such, a COVID-19 test can be analogized to a medical examination.

New York Labor Law Section 201-b(2) provides that “It shall be unlawful for any employer to require an employee, as a condition of employment, to pay the cost of any medical examination . . . where: (a) such examination is not covered by health insurance or the employee’s health insurance does not cover such examination or the employer does not provide qualified medical personnel to conduct such examination without cost to the employee; and (b) such examination . . . is not required pursuant to a state or federal statute or municipal ordinance or local law.”

Accordingly, if a subcontractor requires the testing on its own, then the subcontractor would have to pay for the cost (if any) of conducting a COVID-19 test. If the prime contractor requires the testing, we believe that payment by the prime contractor for testing would be governed by the terms..

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