LEGAL UPDATES PUBLISHED: NOVEMBER 10, 2021

State Agency: Wisconsin State Law Does Not Require Employers to Pay for COVID-19 Testing

Service

Labor & Employment

Professional

TOM O'DAY
MADISON:
608.234.6017
MILWAUKEE:
414.273.2100
TOM.ODAY@
HUSCHBLACKWELL.COM

On November 9, 2021, Husch Blackwell's Labor and Employment practice group shared with the attendees of the 2021 Wisconsin Labor & Employment Virtual Series breaking news regarding Wisconsin state law and COVID-19 testing. The Department of Workforce Development (DWD), tasked with enforcing Chapter 103.37 of Wisconsin Statutes, clarified that the statute **does not** require employers to pay the cost of COVID-19 testing where the testing is offered as an alternative to vaccination and where the federal government has issued a soft mandate that requires either testing or vaccination of employees.

Wisconsin statute 103.37(2m) provides that:

No employer may require any employee or applicant for employment to pay the cost of a medical examination required by the employer as a condition of employment.

It is important to note, however, that the DWD guidance is not formal and is not binding on any court of law. A court could disagree with DWD and determine that the statute does require payment.

The Emergency Temporary Standard (ETS) published by OSHA on November 5, 2021 imposes a soft mandate on employers requiring employees either to obtain a COVID-19 vaccination (except for employees receiving a religious or medical exemption) or submit to weekly COVID-19 tests until the employee is fully vaccinated. The Interim Final Rule from the Centers for Medicare & Medicaid Services (CMS) imposes a hard mandate on many healthcare employers that participate in Medicare and/or Medicaid, requiring vaccination or an appropriate religious or medical exemption. The CMS rule does not

© 2026 HUSCH BLACKWELL LLP. ALL RIGHTS RESERVED

require testing, but it is implied for those who obtain an exemption and remain unvaccinated.

Neither the ETS nor CMS rule require employers to pay for any costs associated with testing. Importantly, however, employer payment for testing may be required by other laws or regulations, including state laws. Initially, it was unclear whether Wisconsin statute 103.37 (2m) imposed a duty on employers to pay for COVID-19 periodic testing, and the one attorney general opinion that touched on the statute did not address the issue.

In response to an inquiry by Husch Blackwell, DWD clarified that it interprets "103.37 as not requiring employers to cover the cost of COVID testing where the testing is an alternative to vaccination and where the vaccination/testing requirement is mandated by the federal government." DWD was careful to note that its interpretation was not binding on any court of law.

The statement from the DWD is good news for Wisconsin employers, even though there is some risk that a court may judge differently.

What this means to you

The interpretation of the statute by the DWD provides employers with greater degree of certainty of their obligations and costs associated with implementation OSHA's ETS and the CMS rule. While there is no Wisconsin court that has decided this issue, the DWD statement supports employers' legal position that employers are not obligated to pay for periodic COVID-19 testing.

Contact us

For questions and guidance regarding the latest legal developments relating to COVID-19 issues, contact Tom O'Day, Beth Zewdie or your Husch Blackwell attorney.

Your comprehensive COVID-19 legal resource

Since the pandemic's onset, Husch Blackwell has continually monitored state-by-state orders regarding capacity, masking, vaccines, and more. We regularly address your FAQs and provide you with easy-to-use COVID-19 tools about returning to work and navigating federal programs. Contact our industry-specific legal teams or your Husch Blackwell attorney to plan through and beyond the pandemic.

© 2026 HUSCH BLACKWELL LLP. ALL RIGHTS RESERVED