

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

COVID-19 TESTING POLICY



JULY 2022

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1. INTRODUCTION

This policy guides the establishment and management of the COVID-19 testing program at the Federal Mine Safety and Health Review Commission (FMSHRC) which covers screening testing and diagnostic testing. The policy on screening testing applies to agency employees and full-time contractors (collectively “agency workforce”) who are considered unvaccinated against COVID-19. Diagnostic testing applies to the entire agency workforce, regardless of vaccination status, although requirements differ for those individuals who are up to date on their vaccinations, those who had confirmed COVID-19 within the last 90 days, and those who are not up to date with vaccines.

2. PURPOSE

This policy is intended to enable the agency to take measures to prevent the transmission of COVID-19 in the workplace by identifying unknown cases among the agency workforce who are considered unvaccinated, who develop symptoms or had a close contact, and who will be working onsite or conducting official travel. The Equal Employment Opportunity Commission (EEOC) has determined that the presence of an individual with COVID-19 in a shared workplace may pose a direct threat to health and safety as defined under the Americans with Disabilities Act at 29 C.F.R. § 1630.2(r), and therefore employers may take steps to determine whether individuals entering the workplace have the virus.¹ This testing process serves the agency’s duty to protect the health and safety of its workforce and members of the public.

3. AUTHORITIES

This policy has been created according to a directive from the Safer Federal Workforce Task Force². The task force was created by the President to provide federal agencies with ongoing guidance to keep the agency workforce safe and agencies operating during the COVID-19 pandemic. It is led by the White House COVID-19 Response Team, the General Services Administration (GSA), and the Office of Personnel Management (OPM).³ This policy applies to contractors according to Executive Order 14042, Ensuring Adequate COVID Safety Protocols for Federal Contractors⁴.

4. DEFINITIONS

- A. **Authorized Approver:** the agency employee responsible for verifying screening and diagnostic test results, approving, or disapproving entry, maintaining testing records, and otherwise coordinating with the agency workforce to meet the requirements of this policy. This may be the agency’s EEO Director and Disability Program Coordinator Michelle Williams, or a direct supervisor, based on individual preference.

¹ See <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws> and <https://www.eeoc.gov/transcript-march-27-2020-outreach-webinar#q1>.

² <https://www.saferfederalworkforce.gov/>

³ *Id.*

⁴ See <https://www.govinfo.gov/content/pkg/FR-2021-09-14/pdf/2021-19924.pdf>

- B. **Covered Individuals:** any federal employee or full-time contractor employed by the agency who is considered unvaccinated (according to Center for Disease Control (CDC) guidelines) against COVID-19.
- C. **Onsite:** an employee or contractor is considered onsite if they are at headquarters, a satellite office, or at another location as part of their official duties (e.g., hearing site or conference).
- D. **Official Travel:** travel conducted by the agency workforce under an official travel authorization on official business⁵.
- E. **Screening Testing:** intended to identify infection with SARS-CoV-2, the virus that causes COVID-19, for people considered unvaccinated who are asymptomatic and do not have known, suspected, or reported exposure to SARS-CoV-2⁶.
- F. **Diagnostic Testing:** intended to identify current infection in individuals and occurs when an individual has signs and symptoms consistent with COVID-19 and/or following recent known or suspected exposure to SARS-CoV-2⁷.
- G. **Close Contact:** defined by the CDC as being within six feet of someone who has probable or confirmed COVID-19 for a cumulative total of 15 minutes or more over a 24-hour period⁸.
- H. **Fully Vaccinated:** individuals who, after two weeks, have received the requisite number of doses of a vaccine approved or authorized for emergency use by the U.S. Food and Drug Administration (FDA) or that has been listed for emergency use by the World Health Organization⁹.
- I. **Considered Unvaccinated:** designation includes individuals who have disclosed that they are unvaccinated, not fully vaccinated, or declined to provide information on their vaccination status.
- J. **Up to Date on Vaccines:** defined by the CDC as individuals who have received all doses in the primary series and all boosters recommended for them, when eligible¹⁰.

⁵ See <https://www.saferfederalworkforce.gov/faq/travel/>

⁶ For more information: <https://www.cdc.gov/coronavirus/2019-ncov/lab/resources/sars-cov2-testing-strategies.html>

⁷ *Id.*

⁸ For more information: <https://www.cdc.gov/coronavirus/2019-ncov/your-health/quarantine-isolation.html#closecontact>

⁹ For more information: <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/reporting-vaccinations.html>

¹⁰ For more information: <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/stay-up-to-date.html>

5. POLICY

A. General Policy

Screening Testing requires covered individuals to be tested at least once during any week that they intend to be onsite before their first arrival of the week. Covered individuals must also be tested during the week they are travelling on official business for the agency.

Diagnostic Testing requires the agency workforce to be tested per quarantine, isolation, and official travel guidelines, if they develop symptoms or have come in close contact with someone with COVID-19.

As described below, the agency workforce may rely on lab-testing or use home self-test kits. Test results shall be reported to a designated agency employee authorized to verify the results and approve or deny onsite access or official travel for the week (“authorized approver”). The process for reporting results depends on the method of testing. The agency will provide reasonable reimbursement for costs associated with compliance and can provide self-test kits at no cost upon request.

The agency workforce is entitled to use a reasonable period of duty time to perform any testing required under this policy, without taking administrative leave. Whether that period is reasonable depends on the method of testing. If it requires more than 30 minutes for a home test or more than 90 minutes for point-of-care testing, then individuals must provide written documentation explaining the need for additional time to their authorized approver. Based on the provided explanation, the authorized approver will determine whether the additional time is reasonable. The agency workforce must use leave for any additional time beyond a reasonable period. Everyone is expected to make good faith efforts to complete tests efficiently.

B. When Screening Testing is Required

If a covered individual plans to be onsite at any point during a given work week, they must be tested (and the result must be available) before the first onsite arrival of that week. Also, if the covered individual is travelling on official business, they must be tested during the week they are conducting official travel. A negative test provides coverage for the full week. Testing should be completed during duty hours.

1. *Example:* A covered individual routinely comes into the office on Wednesdays and Fridays. During a normal week, the individual may complete the required screening during duty hours on Monday, Tuesday, or Wednesday before arrival. They do not have to be tested again between Wednesday and Friday. If the individual takes annual leave from Wednesday to Friday in a certain week, testing is not required for that week.
2. *Example:* A covered individual teleworks full-time but will be in the office for a one-time event on a Tuesday afternoon. They may complete the required screening during duty hours that Monday, or Tuesday before arrival.

C. When Diagnostic Testing is Required

If the agency workforce plans to return onsite or conduct official travel after quarantining or isolating, they must be tested (and the result must be available) before first onsite arrival or official travel date. A negative test provides clearance to leave the required quarantine or isolation period. Testing should be completed during duty hours.

1. *Example:* An individual who is not up to date on vaccines is expected to end quarantine on Tuesday and return to the office on Wednesday, as it has been five days since the last close contact. The individual must complete the diagnostic testing during regular duty hours on Tuesday and receive a negative test result before arrival to the office on Wednesday.
2. *Example:* An individual is expected to end isolation on Thursday and return to the office on Friday, as it has been five days since the onset of symptoms, their symptoms have improved, and they are fever-free for 24 hours without the use of fever-reducing medication. The individual must complete the diagnostic testing during regular duty hours on Thursday and receive a negative test result before arrival to the office on Friday. If they receive a positive test result, they must continue to isolate for five additional days.
3. *Example:* An individual, who is up to date with vaccines, has not had confirmed COVID-19 within the previous 90 days, and had a close contact five days ago, is expected to conduct official travel on Thursday. They must complete the diagnostic testing during regular duty hours on Wednesday and receive a negative test result for official travel to be approved.

D. Approved Tests

The agency workforce may use any FDA-approved viral test. Nucleic Acid Application Tests (“NAATs”) and Antigen tests are both acceptable.¹¹ The NAAT results generally take 1-3 days, while Antigen test results are generally available in under 30 minutes. For this reason, Antigen rapid testing is recommended if a covered individual to enter the office early in the week.

E. Permissible Testing and Reporting Methods

Before the agency workforce first tests under this policy, they should choose an authorized approver and coordinate with that individual regarding the preferred method of diagnostic and screening testing, and the frequency of screening testing. Those who wish to be provided with self-test kits by the agency should also discuss this with the authorized approver as early as possible. The authorized approver may be their supervisor or the EEO Director, Michelle Williams.¹²

¹¹ Viral tests are used to detect the virus that causes COVID-19 and determine whether an individual has an infection. Antibody tests are used to detect antibodies created in response to COVID-19 and may indicate whether an individual has had a past infection. Only viral tests will be accepted for purposes of this screening policy. The two types of viral tests are Antigen tests (most rapid tests) and NAAT tests (most laboratory tests). For more information: <https://www.cdc.gov/coronavirus/2019-ncov/symptoms-testing/testing.html>.

¹² If the authorized approver is a supervisor, that supervisor may coordinate and confer with the EEO Director as necessary.

Permissible testing and reporting methods are as follows:

1. Point-of-Care Testing by a Health Professional: This includes COVID-19 test sites, pharmacies, doctor's offices, or other locations where tests are conducted, and results are read by a health professional. Once the individual receives the official results, they would then provide a copy to the authorized approver.
2. Lab-Tested Self-Collection Kits: This refers to tests in which the individual conducts the nasal swab and then delivers the sample (by mail or drop-off point) to a laboratory for testing. Once the individual receives the official results, they would then provide a copy to the authorized approver.
3. Self-Test Kits (At-Home Rapid Tests): This refers to tests where the sample is collected *and* tested by the individual directly, rather than a health professional. If an individual chooses to self-test, the results must be verified in real-time by the authorized approver. The individual and authorized approver would schedule a video call (ex. Zoom, Microsoft Teams, Facetime) during which the individual shall open the test kit, follow the sample collection and testing instructions, and show the results to the authorized approver.¹³ Where a covered individual expects to have a recurring need for screening testing (e.g., a routine partial telework schedule), the covered individual and authorized approver are encouraged to set up a regularly scheduled time for this verification process.

F. Test Results

Once the authorized approver has received a copy of the lab results or observed the self-test results, the employee or full-time contractor will receive a written notification (by email unless otherwise requested) stating whether the test results have been verified and whether they are approved for onsite access or official travel.

If the test result is negative, onsite access and official travel shall be approved.

If the test result is positive, the individual shall not report to the workplace or conduct official travel. Instead, they shall telework if feasible or take leave if necessary. Consistent with CDC guidance regarding isolation, individuals with a positive test result may test again five full days after the positive test. If the test is negative, then they may be permitted to travel and return onsite but should continue to wear a mask for an additional five days. If the individual develops symptoms at any point during these 10 days, the cycle resets and they must wait five days from the onset of symptoms to retest.¹⁴ A physical return to work and official travel will not be permitted until a test provides a negative result.

¹³ The authorized approver need not directly observe the sample collection, so long as they may reasonably infer that the sample was collected from the individual. For example, the individual may open the kit, briefly step out of view to conduct the nasal swab, then return. The authorized approver must directly observe and confirm the testing of the strip and reading of the results. The individual shall show the test kit serial number to the authorized approver prior to use and at the time of the reading of the results for verification.

¹⁴ Regardless of test results, individuals should not attempt to report onsite if suffering from any symptoms associated with COVID-19. If an individual with a recent positive test result (less than five days old) attempts to report to the workplace, they will be placed on administrative leave until they can provide a negative test result.

In some circumstances, the authorized approver may not be able to verify test results (for example, if lab results are undated or a self-test kit result was unclear). In such cases, the authorized approver will notify the individual that a second test is required. The individual should not enter the workplace or conduct official travel until a clear negative result has been confirmed.

G. Reimbursement and/or Provision of Tests

The agency will cover reasonable costs associated with compliance with this testing policy, either through reimbursement or by providing test kits at no cost to the agency workforce.¹⁵

Examples of reasonable costs that may be reimbursed include home self-test kits, laboratory testing after insurance, and/or local travel for point-of-care testing. Reimbursement requests are to be processed using Concur. Employees may create a reimbursement voucher to submit for approval or may provide the relevant reimbursement documentation to Robert Linton in the Office of the Executive Director for assistance in creating a voucher.

If employees and full-time contractors would like to be provided with test kits, they should inform their authorized approver as early as possible. The covered individual and approver should discuss the expected frequency of screening testing. While some may request tests on a one-time basis, this process is recommended for covered individuals who are expected to have routine or recurring screening needs (e.g., regular onsite work due to a partial telework schedule or monthly onsite meetings). Covered individuals may be provided with one month's supply (up to four tests) at a time. The individual and approver should also discuss the preferred method of delivery. Tests may be mailed, or (*after* the covered individual's negative screening test result) picked up onsite. The authorized approver will then coordinate with Robert Linton in the Office of the Executive Director to arrange the distribution of the test kits according to the discussed schedule and method of delivery.

H. Recordkeeping and Medical Privacy

Authorized approvers shall keep a record of the following information (see Appendix A): the name of the employee and full-time contractor, the date and method of testing, the date the result was confirmed, and whether onsite access was granted.

Any medical information gathered during this testing policy (such as the record described above) shall be kept confidential and separate from the agency workforce's official personnel folder. If the authorized approver is the direct supervisor, the supervisor will routinely transfer such records to the EEO Director and then destroy their copy. The EEO Director shall maintain these records in a secure location together with any medical records maintained concerning reasonable accommodation requests. Such records will be accessible only to those individuals with a verifiable need to know the information:

¹⁵ Information regarding participation in the screening policy will be carefully controlled on a need-to-know-basis. A limited number of individuals in the Office of the Executive Director (no more than two in most instances) must necessarily be informed that an individual is covered by the screening policy to process reimbursement vouchers and/or distribute test kits. However, substantive medical information (such as test results or reasonable accommodation documentation) *is not* necessary for reimbursement or provision of tests and shall not be shared with OED employees while processing such requests. Confidentiality of medical records is discussed further below.

accordingly, except in unusual conditions, access will be limited to the authorized approver and/or EEO Director.¹⁶

I. Non-Compliance

1. *Accommodations*: Employees or full-time contractors who believe they are unable to participate in the testing process (in whole or part) due to disability-related concerns or on religious grounds may request an accommodation.¹⁷ While such requests are being processed, the individual may be directed to telework rather than report to the workplace. The agency will give due consideration to all accommodation requests and will work with the requester to find a solution that serves the needs of the requester without posing an undue hardship to the agency (including considerations for the safety of onsite personnel). If the accommodation request is denied and the individual does not comply with this testing policy, or if an individual with an accommodation fails to comply with the terms of the testing policy as modified by that accommodation, they may be subject to disciplinary action (see below).
2. *Missed Tests or Delayed Results*: In the event, that a covered individual is unable to complete a screening test as planned due to unforeseen circumstances, they should coordinate with their authorized approver and make good faith efforts to find an alternate method of screening. For example, if a point-of-care appointment is canceled or a lab-test result is delayed, the covered individual should consider a home self-test. If the individual is unable to complete a screening or diagnostic test before their first scheduled onsite arrival, they must notify their authorized approver and should not report to the workplace.
3. *Intentional Non-Compliance*: Except where an accommodation request is pending if an employee or full-time contractor refuses to comply with some element of the testing process (for example, refusing testing or refusing to report results) they may be subject to disciplinary measures. To protect the safety of others, the individual will not be permitted on site or approved for official travel until any disciplinary actions are resolved or the need for testing no longer applies. They will be expected to work remotely during this time unless their work cannot be completed off-site, in which case the individual will be placed on paid administrative leave.

6. EFFECTIVE PERIOD

This policy is effective immediately upon issuance and shall remain in effect until modified or rescinded.¹⁸

¹⁶ It may be necessary to share certain limited information contained in the screening record for purposes of contact tracing in the event of workplace transmission, or in the event of a disciplinary action resulting from non-compliance. Substantive medical information such as test results or underlying conditions would only be shared in very limited circumstances, such as a medical emergency or a request for reasonable accommodation. In all instances, dissemination will be limited to only those individuals with a need to know, and only the information required for the purpose.

¹⁷ The Commission's Reasonable Accommodation Procedures for disability-related requests are available here: <https://www.fmshrc.gov/documents/reasonable-accommodation-procedures-overview-and-appendixes>. Information on religious accommodation available pursuant to Title VII of the Civil Rights Act is available here: <https://www.eeoc.gov/religious-discrimination>. Requests for accommodation may be made to the individual's supervisor or the EEO Director.

¹⁸ In determining whether this policy shall be modified, or rescinded, due consideration shall be given to CDC and Task Force guidance regarding the level of threat in the workplace posed by COVID-19.

Appendix A: Screening Test Record

Name of Individual: _____

Authorized Approver: _____

Test for Week of:	Date of Test	Test Method	Result Confirmed? (Date)	Entry Approved?

Date record transferred to EEO Director, if applicable: _____

Signature of Authorized Approver