

HEALTH FREEDOM

DEFENSE FUND

FREQUENTLY ASKED QUESTIONS RE TESTS

1. Q: Can my employer force me to take a COVID-19 test at this time?

A: Currently, all COVID-19 tests are authorized for use by the general public as “investigational products” under one of the 346 Emergency Use Authorizations (“EUA”) that have been issued by the FDA. They are not an approved product, and are referred to in the law as “unapproved products” because they have not been fully tested and approved for use by the FDA. Under the federal law that allows the FDA to issue EUAs (21 U.S.C. § 360bbb-3), you cannot be forced to take any of these tests. The law provides that recipients of a product authorized for use under and EUA can refuse to take the product. In this instance, the test is the product.

2. Q: Can my employer fire me for refusing to take a test?

A: This issue has yet to be decided by the courts. Some attorneys take the position that employers can fire employees who refuse to be tested. However, this conclusion conflicts with the language of the critical statute, 21 U.S.C. § 360bbb-3, which provides that an unapproved product authorized for emergency use only, such as all of the existing tests, can only be used if:

(i) Appropriate conditions designed to ensure that health care professionals administering the product are informed—

(I) that the Secretary has authorized the emergency use of the product;

(II) of the significant known and potential benefits and risks of the emergency use of the product, and of the extent to which such benefits and risks are unknown; and

(III) of the alternatives to the product that are available, and of their benefits and risks.

(ii) Appropriate conditions designed to ensure that **individuals to whom the product is administered are informed—**

(I) that the Secretary has authorized the emergency use of the product;

(II) of the significant known and potential benefits and risks of such use, and of the extent to which such benefits and risks are unknown; and

(III) of the option to accept or refuse administration of the product, of the consequences, if any, of refusing administration of the product, and of the alternatives to the product that are available and of their benefits and risks.

(iii) Appropriate conditions for the monitoring and reporting of adverse events associated with the emergency use of the product.

(emphasis added)

Note that the recipient of the product (the test) must be informed of the option to refuse administration of the product. An employer who fires an employee for refusing to take a test would therefore be firing an employee for asserting a right guaranteed under federal law. Moreover, the health care professionals administering the test would be administering the test in violation of federal law, and beyond the scope of the authorized use of the test. We therefore conclude that employers may not fire employees who refuse to be tested at this time.

3. Q: Can my employer subject me to special treatment, such as forcing me to work from home, or work in separate areas should I refuse to be tested?

A: This question has not been addressed by any court to date. An employer taking actions of nature noted above would seem to be punishing an employee for asserting the federally protected right of refusing to submit to testing with an emergency test that has yet to be approved by the FDA. The employer subjecting a healthy person, exhibiting no signs of illness or contagion, differently than other employees simply because that person asserted the federally protected right to refuse to be tested could be seen as attempting to coerce that employee into being tested against their will, a violation of the federal law quoted above.

4. Q: What should I do if my employer tries to force me to get tested?

A: You should provide your employer with the HFDF Employer COVID-19 Test Notice, that can be downloaded [HERE](#). If your employer continues to insist that you be tested, please contact us by email, and we will attempt to refer you to a lawyer in your area who has been educated on this issue who may be able to assist you. We cannot guarantee that we will be able to assist every person who contacts us, but we will do our best to try to help you.

5. Q: I have seen news reports about schools and universities requiring mandatory testing for students to attend classes. If schools and universities can require mandatory testing, why can't my employer?

A: We are aware of these instances, and are putting various schools and universities on notice of the law noted above. To date, there has not been a court ruling addressing the law we have reviewed above. Accordingly, until this issue is finally resolved, we assert that our position is the correct one, and will take steps to have a court rule on this in our favor. In the meantime, relying on the language of the statute cited above is your best course of action.