



# SARS-CoV-2 Occupational Health and Safety Regulation: Mandatory testing offer

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After weeks of tough wrangling, the Federal Cabinet has decided to oblige companies throughout Germany to offer coronavirus tests to their employees. This obligation will be included in the SARS-CoV-2 Occupational Health and Safety Regulation and will come into force this week. Employers must then offer to their employees a coronavirus test at least once a week, unless they work from home without exception. For certain employees, employers must even ensure such an offer twice a week.

At the beginning of March, the Federal Government and federal state governments had already decided to supplement the national testing strategy with tests in companies. The economy had initially succeeded in preventing the introduction of such an obligation at federal level by agreeing to ensure test offers to employees by way of a voluntary commitment. For some federal states, this was not sufficient and they obliged employers to offer tests to their employees. Saxony was the pioneer, followed by Berlin and Brandenburg.

The Federal Government has now concluded that the number of test offers made so far is insufficient to contain the pandemic. Against this background,

employers nationwide will be **obliged to offer testing** to their employees from the middle of this week.

In order to support you in implementing the obligation to offer tests, we have compiled practical tips for you below.

## Which tests can be used?

You can use tests for direct pathogen detection. These are PCR and antigen tests:

- PCR tests: PCR tests are usually tests that are evaluated in a laboratory. A sample is taken from the patient or they take it themselves and it

is then analysed in a laboratory. PCR tests are the golden standard, i.e. the most reliable test method. However, it usually takes a few hours to get a test result.

- Rapid antigen tests: With rapid antigen tests, no laboratory is required to evaluate a sample. The result is determined immediately after the sample is taken (often in the presence of the patient) and is available quickly (15-30 minutes).

A distinction is made between rapid antigen tests for professional use (also called point-of-care or **PoC tests**) and tests for self-use (**self-tests**). PoC tests are carried out by trained staff, whereby the patients can also take the sample themselves under the supervision of the staff. Antigen self-tests are tests intended for self application by individuals.

**Cave:** You cannot use antibody tests as these are not intended for direct pathogen detection. Antibody tests are not suitable for detecting an acute infection.

### What do you need to consider when ordering the tests?

The different tests are subject to different regulations and you should make sure that the tests are "marketable" when ordering them:

- PCR test: If you choose PCR tests, you will provide your staff with a sampling kit – the test evaluation will be carried out in the laboratory. Please make sure that the kit is CE marked.
- Rapid antigen tests: Rapid antigen tests consist of a sampling kit and an analysis kit. Different requirements apply depending on whether the tests are PoC tests or self-tests.

For PoC tests, please pay attention to the CE marking.

Self-tests must either have a special CE marking, which is followed by a number, or have received special approval from the Federal Institute for Drugs and Medical Devices (**BfArM**). The BfArM has granted a temporary special approval for a large number of self-tests. Currently, 44 tests are approved (please see [here](#)). Currently, mainly

tests with special approval are available on the market.

### How often do you have to offer tests?

In principle, you are obliged to offer a test once a week to every employee who does not work exclusively from home. Certain groups of employees who are at higher risk of infection must be offered a test twice a week. This includes, for example, employees who work indoor under climatic conditions that favor transmission of the virus or employees who have frequently changing contact with others due to the nature of their work.

### Can the test be made compulsory for your employees?

The performance of a self-test or participation in a PCR/antigen test remains voluntary.

Only in individual cases may the employee be obliged to take the test. However, the interference with the physical integrity and the general personal rights of the employee must be weighed against the employer's interest in carrying out the test (also taking into consideration the employer's duty of care towards the rest of the workforce). Against this background, a compulsory test order should probably exceptionally be possible from an employment law and data protection law point of view if, for example, the employee has symptoms such as a cough or fever and is/has been in the workplace. A compulsory test would also probably be possible for employees who had proven contact with a suspected or infected person. In addition, a justified employer's interest in mandatory testing may be assumed especially in the case of activities with close physical contact to persons and a high risk of infection for third parties, such as in hospitals and care facilities.

### Is it obligatory to involve the works council?

The works council is to be involved within the framework of co-determination (sec. 87 para. 1, no. 1 and 7 Works Council Constitution Act – questions of company rules and regulations on health protection) regarding the structuring of the test offer as far as the question of the type of test (PCR or rapid antigen test), the performance of the tests (in the case of rapid antigen test: self-test or professional performance by external provider) and the selection of an approved test provider is concerned.

## **May/must the test take place during working hours?**

In the case of voluntary tests, it is up to the employer to regulate details of the testing in the company and whether they want to consider the duration of the testing as working time and remunerate it accordingly. However, in the case of compulsory tests ordered by the employer, the duration of the test and the associated waiting time count as working time and must be remunerated accordingly.

In companies with works councils, they must be involved in the question of testing during working hours.

## **Who does carry out the tests?**

You can use service providers or your own staff to take samples for the PCR test or to carry out the entire PoC test.

Self-tests are carried out by the employees themselves.

## **You involve employees in carrying out the sampling/tests. What qualifications must the personnel involved have?**

According to the **recommendation of the Committee on Biological Agents**, a person taking samples does not have to meet any special qualifications if he or she is supervised by a competent person (e.g. with affiliated training in the medical field) and instructions have been given.

If you use PoC tests, you may only assign persons to use the tests who have the necessary training or knowledge and experience and have been instructed in the PoC test. Therefore, taking into account the instructions for use of the respective test, you must check who can perform the test after appropriate instruction/training with regard to the personnel available to you.

## **You involve employees in carrying out sampling/tests. How do you have to protect these personnel?**

If sampling/testing is carried out by your own employees you must observe special occupational health and safety measures for the benefit of these employees, in particular they must wear an FFP-2

mask together with a face shield/visor that fits tightly against the forehead and extends beyond the chin or together with tightly fitting safety goggles.

## **Is it necessary to obtain data protection consent from the employees before being tested?**

Coronavirus test results are health data, which are so-called special categories of personal data ('sensitive data') and are specially protected as such. Put simplified, health data may only be processed for the fulfillment of a legal obligation under employment law or with the employee's consent.

Since the SARS-CoV-2 Occupational Health and Safety Regulation only establishes an obligation for the employer to *offer* tests but *not to carry them out*, consent must be obtained if the tests are evaluated by the employer as, for example, in case of PoC tests.

If, on the other hand, the employee freely informs the employer of their positive test result, the subsequent mandatory hygiene measures can be based on the fulfillment of the relevant occupational health and safety regulations. Therefore, a distinction must be made as to when and for what purpose health data are processed.

## **How do you organise the testing?**

When organising the testing, you need to keep in mind the health protection of the employees to be tested. In particular, you must prevent congregations at the test stations and ensure regular ventilation of the premises where you carry out the tests.

## **How do you dispose of used rapid tests?**

Recently, a **federal/state recommendation** on the disposal of used rapid tests was published. According to this recommendation, they are not hazardous waste and can generally be disposed of together with municipal waste. They must be packed tightly, in tear-resistant and moisture-resistant. It is recommended that you consult with the disposal company before the first disposal.

## **Do you have to report positive test results to the health department?**

Yes, if you carry out PoC tests as an employer. In the case of PCR tests, there is also a reporting

obligation, but this applies to the laboratory and not to you as the employer.

There is no obligation to report self-tests.

#### **Test certificates**

The new SARS-CoV-2 Occupational Health and Safety Regulation does not contain any statement regarding a certificate on the test result to be issued. This is regulated at federal state level.

#### **Who pays for the costs?**

You, as the employer.

#### **What happens to the regulations at federal state level?**

The regulations at federal state level remain unaffected by the federal regulation. Therefore, if you are active in Berlin, Brandenburg or Saxony, you must currently additionally observe the obligations under federal state law. Federal states that had not yet adopted any regulations on the test (offer) obligation are also free to adopt corresponding regulations in the future.

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