

## Member's Quarterly

## Winter 2022 Edition

### Feature

# COVID-19 Rapid Testing Upheld

*Arbitrator approves COVID-19 testing at open-air construction site*

**A**n Ontario arbitrator has upheld an employer's workplace COVID-19 rapid testing policy for construction sites.

The Labourers' International Union of North America, Local 183 (the "Union") grieved the unilateral implementation of a COVID-19 rapid testing policy (the "Policy") by general contractor, EllisDon Construction Ltd. ("EllisDon"), and framework contractor, Verdi Structures Inc. ("Verdi") (collectively, the "Employers") on a mid-rise residential construction project in Toronto.

The project in question was a 59-floor residential condominium building. At the time the Policy was implemented, there were no walls on the floors of the buildings and there were approximately 100 employees on site. Rapid testing on the project began initially in February 2021 as part of a pilot program by the Ontario Ministry of Health and was expanded in May 2021. Pursuant to the Policy, all individuals attending at the job site are required to submit to a Rapid Antigen Screening Protocol to gain access to the site with those refusing being denied access. EllisDon decided which job sites were subject to the Policy based on various factors, including amongst other things, community spread, case counts and risk of transmission. Around the time of grievance, testing was being conducted at 47 job sites, including the site in question, with some job sites having more than 500 employees on site. The test used was the AP Test, which is a form of rapid test approved by Health Canada. The AP Test was conducted on site, twice weekly in accordance with public health guidance. The AP Test is administered via a throat or a bilateral lower nostril swab rather than through a nasopharyngeal swab and was carried out by third-party healthcare professionals. Testing was only conducted once a screening questionnaire and temperature check had been completed, with results being produced within 15 minutes. Employees provided their name, the name of their employer, phone number and email address in case of a positive result. The information collected was only used by the healthcare professionals and EllisDon management to communicate results to employees and public health authorities. Employees were physically distanced from others apart from the healthcare professionals during testing and could not be observed by others when being swabbed and when test results were read and recorded. The healthcare professionals sanitized before and after each test and all biohazardous waste was disposed of properly. Employees with negative test results were permitted to return to work. Those with positive results, which were considered to be presumptive positive results pending a follow-up confirmatory lab-based PCR test, were required to isolate and seek a confirmatory test. Contact tracing and other measures were taken in accordance with public health guidance. Employees were paid at their regular rate during testing and until results were received. EllisDon direct hires who received a positive test result were paid for time spent obtaining a confirmatory test if the rapid test was a false positive and Verdi direct hires were not paid for time spent obtaining a confirmatory test. Requests for accommodation were dealt with on a case-by-case basis.

In addition to testing, additional health measures were in place, such as: a screening questionnaire; handwashing stations and sanitizer; PPE; prohibition on non-essential visitors to the site; scheduling alterations; social distancing when possible; COVID-19 tracking; temperature checks; and enhanced cleaning.

Around the time of the grievance, 100,237 tests had been conducted pursuant to the Policy, with 179 positive test results, of which 118 were confirmed positive results. There were 20 false positive results



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and 41 presumptive positive results pending confirmatory test results. At the project in question, there had been 9 cases of COVID-19 all of which were detected off site and 2 cases of COVID-19 transmission among non-bargaining unit employees at the project. There were a number of positive test results at other EllisDon sites in Toronto, with 4 active workplace outbreaks around the time of the grievance.

The Union grieved the Policy, alleging that EllisDon and Verdi violated their respective collective agreements with the Union and arguing that the Policy was an unreasonable exercise of management rights and an unreasonable workplace rule. The crux of the Union's argument was that the Policy was unreasonable because, based on the evidence, the Policy was not a proportionate response to mitigate the risk of COVID-19 transmission in the workplace and the less intrusive measures already in place were sufficient. In the Union's view, testing was invasive and violated employee privacy and bodily integrity which was not justified given the safety measures already in place, lack of transmission of COVID-19 amongst its members on the project and the nature of the workplace: an open-air construction site. The Employers argued that the Policy was reasonable because its interests in the safety of its workforce, as well as the safety of the public and preventing the spread of COVID-19 outweighed the privacy interests of employees in the circumstances.

In making his determination, Arbitrator Robert Kitchen considered the essential nature of construction work as well as the transitory nature of the construction industry in which employees regularly move between job sites and employers, thus increasing the risk of transmission. Arbitrator Kitchen also considered that employees cannot always maintain physical distancing, and although the project in question was an open-air job site, there had been COVID-19 cases at the project and a number of other outbreaks at other EllisDon construction sites in Toronto. Arbitrator Kitchen highlighted the steps taken by EllisDon to protect employee privacy throughout the testing process, including the fact that the swabbing was a throat or bilateral nostril swab, rather than nasopharyngeal, and that swabbing and test results could not be observed by anyone apart from the healthcare professionals conducting the testing. He went on to consider two other recent decisions regarding workplace COVID-19 testing: one involving a retirement home and the other involving a food production facility. In both cases, testing was upheld. Arbitrator Kitchen found that the risk of COVID-19 transmission on the project was "not hypothetical or speculative" given there had been cases at the project already and there was no evidence that the other mitigation efforts in place significantly reduced transmission. Ultimately, Arbitrator Kitchen found that in weighing the intrusiveness of the testing against the objectives of the Policy: to prevent the spread of COVID-19, the Policy was reasonable and dismissed the grievance.

Workplace COVID-19 rapid testing is a hot topic across the country. Whether or not workplace COVID-19 testing is appropriate will depend on a number of factors, including: the workplace itself; the nature of the work being performed; the risk of transmission in the workplace; other safety measures in place; the type of testing and the testing process; and whether the workplace is unionized or not.

While this decision turns on the specific circumstances, it may provide some support and guidance for employers considering the implementation of workplace COVID-19 testing.

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