

GOVERNMENT OF THE DISTRICT OF COLUMBIA
OFFICE OF THE ATTORNEY GENERAL



ATTORNEY GENERAL
KARL A. RACINE

Legal Counsel Division

~~PRIVILEGED AND CONFIDENTIAL~~
~~ATTORNEY CLIENT COMMUNICATION~~

MEMORANDUM

TO: Tarifah Coaxum
Chief Administrative Officer

FROM: Brian K. Flowers *BKF*
Deputy Attorney General
Legal Counsel Division

DATE: January 18, 2022

SUBJECT: Legal Advice Concerning Whether Appropriated Funds May Be Used to
Purchase COVID-19 Rapid Test Kits
(AL-22-069)

This memorandum responds to your request for legal advice concerning whether the Office of the Attorney General (“OAG”) may use appropriated funds to purchase COVID-19 rapid test kits to test OAG employees and visitors to OAG facilities. You have provided the following scenarios in which OAG might find rapid testing desirable: 1) OAG employees and visitors report to the office for a meeting or other event while the current teleworking requirement is in effect; 2) unvaccinated employees use the test kits at home to satisfy their weekly testing requirements; 3) vaccinated employees are subject to testing when they report to work after mandatory teleworking has ended; and 4) visitors are subject to testing when they report to the office after the office is fully staffed. OAG’s need for rapid test kits has resulted from the recent surge in infections by the highly contagious omicron variant, which can infect fully vaccinated individuals, and the current shortage of PCR and over-the-counter rapid tests in our area.

We have concluded that appropriated funds may be used to purchase rapid test kits for all the above uses when the prevalence of COVID-19 requires such testing for OAG to maintain the health and safety of employees and others present on OAG premises. OAG’s use and distribution of the rapid test kits should be governed by a written policy that ensures that the test kits are used to maintain OAG’s operations and protect employees and visitors from infection on OAG premises, and not simply to benefit individuals.

LEGAL ANALYSIS

OAG’s ability to use funds from its operating appropriation for rapid test kits is determined by the application of “necessary expense” doctrine in federal appropriations law.¹ Generally, appropriated funds may only be used for the purposes for which they were appropriated, with the purpose determined by the language and (sometimes) the legislative history of the relevant appropriations act.² Where the purpose of an appropriation is stated generally, an expenditure of appropriated funds will be authorized if the expense is necessarily incident to accomplishing the objective of the appropriation, not otherwise prohibited by law, and not otherwise provided for.³ Appropriated funds may not be used to cover the personal expenses of employees or to make gifts to members of the public.⁴ With respect to employee personal expenses, however, an agency may pay for a personal expense if it constitutes a necessary expense and primarily benefits the government despite incidental benefit to the employee.⁵

Over the years, the Comptroller General of the Government Accountability Office (“GAO”) has issued several opinions relating to the testing and examination of employees for different health conditions. Many of these opinions have been based on proposed expenditures under 5 U.S.C. § 7901, which gives federal agencies broad authority to establish employee health service programs that include medical screenings and examinations and preventive programs relating to health. Unfortunately, this statute does not apply to the District.⁶

GAO has also evaluated whether employee examinations are permissible necessary expenses and has approved these expenditures under a variety of circumstances. For example, payments for periodic physical examinations to detect arsenic poisoning were approved for civilian employees working in an Army chemical warfare laboratory,⁷ as were physical examinations for Department of Agriculture employees who tested repellants and insecticides for use by the armed forces.⁸ Similarly, payments were approved for physical examinations for employees of the

¹ Although the District has formally had local budget autonomy since 2016, Congress continues to appropriate the District’s annual budget. Federal appropriations law therefore applies to District expenditures. In addition, the federal Anti-Deficiency Act applies to the District by its terms and through section 603(e) of the District of Columbia Home Rule Act, approved December 24, 1973 (87 Stat. 814; D.C. Official Code § 1-206.03(e)). *See* 31 U.S.C. § 1341, 1342, 1349-1351 and subchapter II of Chapter 15.

² *See* U.S. Government Accountability Office (“GAO”), *Principles of Federal Appropriations Law*, Chapter 3, at pp. 3-9 – 3-14 (4th Edition) (2017 Revision) (“Federal Appropriations”).

³ *Id.* at pp. 3-16 – 3-17.

⁴ *Id.* at 3-33, 3-185 – 3-186.

⁵ *Id.* at 3-33 – 3-34.

⁶ The statute provides that “[t]he head of each agency of the Government of the United States” may establish a health service program. 5 U.S.C. § 7901(a).

⁷ *See* GAO Decision B-27022 (July 14, 1942).

⁸ *See* GAO Decision B-101517 (March 29, 1951).

Saint Lawrence Seaway Development Corporation to ensure that these employees remained fit for strenuous labor under difficult weather conditions.⁹ In each of these cases, the Comptroller General found that the expenditures were necessary expenses that primarily benefitted the government.

In addition, the Comptroller General has recognized that appropriated funds may be used to maintain the safety and health of the workplace. Expenditures for bottled water have been approved, even though bottled water is normally a personal expense, where a facility's water supply is tainted or otherwise unfit for employee consumption.¹⁰ Further, in the wake of 9/11, GAO approved its own purchase of protective hoods for use by employees and visitors in the event of a chemical or biological attack.¹¹ This decision establishes that expenditures for the safety of the workplace are not limited to employees.

These decisions support an OAG decision to purchase rapid test kits using its lump sum appropriation under each proposed scenario. At present, even fully vaccinated employees are at risk of contracting COVID-19 if they are exposed to extremely contagious variants of the virus. Infected and exposed employees must quarantine for significant periods, which could cause staffing shortages and disrupt OAG operations if employees in the workplace become infected. The rapid testing of employees and visitors entering OAG premises for COVID-19 is therefore of primary benefit to OAG and directly related to OAG's ability to maintain a safe and healthy workplace. Whether or not most OAG employees are telecommuting does not affect the benefit OAG would receive from requiring the tests if the employees or visitors are in the office and in contact with other employees. Further, the distribution of rapid test kits to a limited number of unvaccinated OAG employees to satisfy their weekly testing requirements under the current policy would also benefit the government. These individuals are more likely to become infected and spread the virus to others at OAG than vaccinated employees and are therefore suitable for more routine testing. The relative scarcity of both PCR tests and rapid test kits since the onset of the omicron variant further supports the expenditure of appropriated funds to ensure that these employees can perform their jobs without endangering additional employees.

The purchase of rapid test kits with appropriated funds should be accompanied by the issuance of a written policy that states when and how they will be used and establishes that the tests are for the benefit of OAG. It would not be appropriate to give test kits to employees upon request to satisfy their personal concerns about their health; this use would involve the expenditure of appropriated fund for a personal employee expense. In developing the policy, OAG should also consider whether to require continued weekly testing of unvaccinated employees who are telecommuting if OAG will require a rapid test of everyone who reports to the office while mandatory telecommuting is in effect. The policy should specify which employees will be required to be tested and when, once in-person attendance resumes, and include measures to

⁹ See GAO Decision B-147883 (February 7, 1962).

¹⁰ See GAO Decision B-324781 (December 17, 2013); B-247871 (April 10, 1982).

¹¹ See GAO Decision B-301152 (May 28, 2003).

ensure that employees use the tests to meet OAG's requirements.¹² This policy will most likely be informed by the cost of the rapid test kits and the virus's risk profile when employees return to in-person work.

If you have any questions about this memorandum, please contact Laurie Ensworth, Senior Assistant Attorney General, Legal Counsel Division, at 724-5537, or me at 724-5524.

BKF/lae

cc: Nadine Chandler Wilburn
Christian Barrera

¹² The OSHA requirement for vaccination and testing of employees of large employers required the employers to proctor the administration of these tests. *See* 29 CFR 1910.501 (struck down by the Supreme Court on Jan. 13, 2022). If this is unmanageable for OAG, there may be alternatives. For example, OAG might require an unvaccinated employee to submit a photograph of his or her test results that also shows the date of the test.