

Key Labor Considerations for Return-to-Office Plans

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06 / 28 / 21

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At this stage of the pandemic in the United States, vaccines are widely accessible, and states and municipalities are rapidly lifting restrictions. However, before employees return to physical work sites, employers must confront a number of legal and practical implications. We highlight some of the crucial issues, from mandatory and voluntary vaccine policies to testing considerations, to customer and client interactions with employees. The issues are evolving in real time.

Mandating or Encouraging Vaccines in the Workplace

The Equal Employment Opportunity Commission (EEOC) has issued guidance implying that employers may lawfully require employees to be vaccinated before returning to work, subject to exceptions. It did not directly address the question of whether employers may mandate vaccines authorized only for emergency use (such as the COVID-19 vaccines) as opposed to those receiving full clearance under the U.S. Food and Drug Administration (FDA) approval process. In light of this guidance, some employers are adopting a more cautious legal approach to requiring vaccines by encouraging employees to get vaccinated on a voluntary basis. However, on June 12, 2021, a federal court in Texas dismissed a case filed by 117 unvaccinated employees at a hospital, challenging their employer's mandatory vaccine policy. The federal court, citing the EEOC's guidance, held that employers may require employees to be vaccinated against COVID-19. Regardless of which policy employers adopt, they should be cautious in asking employees questions surrounding their vaccination status that may lead to the inadvertent disclosure of sensitive medical or religious information.

Also, employers should continue following federal and state health and safety measures, which in some cases require face coverings and social distancing. With the latest guidance from the Centers for Disease Control and Prevention (CDC) relaxing certain requirements, some — but not all — states and municipalities have followed suit; others will likely follow.

Exceptions to Mandatory Vaccine Policies

Employers considering mandatory COVID-19 vaccination policies should weigh the lack of final FDA approval of the vaccine in addition to the possible need for exceptions. On May 28, 2021, the EEOC issued updated guidance stating that employers may require that employees physically entering the workplace be vaccinated for COVID-19. Under the American With Disabilities Act (ADA), employers may require employees to meet qualification standards that are “job-related and consistent with business necessity,” which encompasses COVID-19 vaccinations. However, if an employee cannot meet this qualification standard because of a disability, the employer cannot require compliance without showing that the employee poses a “direct threat” to the health or safety of the employee or others in the workplace. Employers also must consider reasonable accommodations for those unable to get vaccinated because of a disability or sincerely held religious belief.

Under the ADA, if an employer-mandated vaccination policy “screens out or tends to screen out an individual with a disability, the employer must show that an unvaccinated employee would pose a direct threat” that cannot be eliminated or reduced by a reasonable accommodation. If a reasonable accommodation exists, it must be implemented. The “direct threat” analysis revolves around the (1) duration of risk posed by the employee, (2) nature and severity of the potential harm caused by their physical presence at the work site, (3) likelihood of the potential harm, and (4) imminence of the potential harm.

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Title VII requires employers to reasonably accommodate employees who have a “sincerely held religious belief” or practice that prevents them from being vaccinated, unless the accommodation would cause an “undue hardship” for the employer. Accordingly — as with any other mandatory vaccination program, such as for influenza vaccines — employers must allow religious accommodations. According to the EEOC, employers should assume that a sincerely held belief underlies an employee’s request for religious accommodation. However, if an objective basis exists for questioning the religious nature or sincerity of the belief or observance, the employer may request additional information from the employee.

Reasonable accommodations for disabilities or religious belief may involve logistical measures, such as installing plexiglass or other barriers to reduce potential COVID-19 exposure or instituting temporary job restructuring or rescheduling. Employers may also implement reasonable accommodations by modifying already-existing workplace policies or procedures.

Voluntary Vaccination Programs

A voluntary vaccination policy circumvents many legal risks that would arise with a mandatory policy, such as potential disparate impact or retaliation claims. Additionally, employers would not have to make reasonable accommodations on the basis of disability or religious beliefs. Nevertheless, a voluntary policy is not free of potential issues or legal liabilities. For example, businesses that choose to incentivize their employees to get vaccinated must avoid claims of unfair coercion. Incentives may include additional paid time off, cash or bonuses, discounted health insurance or permission to access common areas. An employer’s excessively generous incentive program could violate anti-discrimination laws and fuel dissatisfaction in employees who feel penalized for not getting the vaccine. On May 28, 2021, the EEOC issued updated guidance stating that employers can incentivize employees to voluntarily provide proof that they received vaccines from a third party, as long as they do so in a manner “not so substantial as to be coercive.” Documentation about vaccination status constitutes confidential medical information, but requesting it does not count as a disability-related inquiry covered by the ADA.

Proof of Vaccination Status

States and counties vary in their employer obligations, particularly with respect to employees’ vaccination status. For example, on May 18, 2021, Santa Clara County, California, issued a mandatory directive for unvaccinated personnel, requiring all employers to obtain and record employees’ vaccination status by June 1, 2021. Such records may include an employee’s vaccination card or self-certification of full vaccination. On a

national level, the EEOC’s guidance allows employers to obtain “proof of receipt” of vaccination but does not lay out what that proof should look like. Generally, asking employees for proof of vaccination status does not constitute a medical examination. However, under the ADA, any vaccination-related information, regardless of whether the employee divulged it by mandate or voluntarily, must be treated as a confidential medical record.

Masks in the Workplace

Recent [CDC guidance](#) states that fully vaccinated people no longer need to wear a mask or physically distance in any setting, except where required by federal, state and local laws, rules and regulations, including local business and workplace guidance. Some, but not all, states and municipalities have followed suit and relaxed these standards; others will likely follow. As a result, many employers still encourage or require employees to wear masks in the workplace. For example, the New York City Health Department still strongly encourages individuals to wear masks indoors and when the vaccination status of other employees or visitors is unknown. The Occupational Safety and Health Administration is reviewing the recent CDC guidance and preparing to update its own guidance accordingly in the near future, but it currently directs employers to treat unvaccinated employees the same as vaccinated employees, while also referring employers to the CDC guidance.

Testing Considerations

Although vaccination rates are rising, vaccines do not guarantee immunity from contracting or transmitting the virus, and many workplaces have unvaccinated employees on site. Consequently, some employers still require all employees, or all unvaccinated employees, to provide a negative COVID-19 test before entering a workplace. ADA standards allow mandatory medical testing when it is “job related and consistent with business necessity.” The EEOC has advised that “an employer may choose to administer COVID-19 testing to employees before initially permitting them to enter the workplace and/or periodically to determine if their presence in the workplace poses a direct threat to others” on the condition that such testing is accurate and reliable. However, if an employer chooses to implement a COVID-19 testing program, it must proceed cautiously, so it does not overstep the scope of restrictions imposed by the ADA and the safety requirements of the Occupational Health and Safety Administration. Testing should be conducted in a nondiscriminatory manner and paid for by employers, including compensating employees for time spent on mandatory testing, if required by applicable state and wage and hour laws. Additionally, employers must decide whether or not to hire third-party vendors to run their testing programs, which can simplify administrative requirements and mitigate potential liability at a financial cost.

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Customers and Clients in the Private Sector

For as long as COVID-19 exists, businesses will have to consider how to best serve clients and customers while balancing safety and discrimination concerns. On a practical level, [the CDC suggests](#) adjusting business practices to reduce close contact with customers — for example, by providing drive-through service, click-and-collect online shopping, shop-by-phone, curbside pickup and delivery options, where feasible. As another preliminary matter, employers cannot disclose an individual employee’s vaccination status to curious customers. They may, however, make a generalized statement on the estimated percentage of their vaccinated workforce to answer client inquiries.

Under Title III of the ADA, it is unlawful to discriminate against a person on the basis of disability “in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation.” In other words, no individual or class can be denied the chance to participate or benefit from places of public accommodations. As in the employment context, there is an exception “when that individual poses a direct threat to the health or safety of others” that cannot be eliminated by modifying policies and practices. The EEOC has recognized that COVID-19 currently presents such a threat. As more of the population becomes vaccinated and the spread slows, the virus will likely stop being considered a “direct threat.” Until that time, employers may adopt a “safety first” policy, while providing reasonable accommodations to customers and vendors unable to receive a vaccine.