

Returning to the Office: New Policies and Considerations

By Lauren Kim



As states begin to lift their capacity restrictions and vaccines become more widely available, employees are starting to return to their offices. Companies and employees alike are now considering how to do so in this new post-COVID-19 work environment. Issues regarding vaccinations, accommodations, protective gear and disclosure of health information – which were not even on the radar a year ago – are now major considerations.

Unfortunately, there is no clear-cut answer. Regulatory authority continues to develop and impact these decisions. Most recently, the EEOC released long-anticipated guidance on vaccinations and on June 10, OSHA issued a series of voluntary guidelines. However, these federal regulations are not the whole story. State and other local laws also influence return to work guidelines. Additionally, employees continue to file employment suits challenging these guidelines and the case law will take several years to develop.

Companies should ensure they are reviewing the most recent and applicable governance in developing their return to work policies. Likewise, employers should ensure they have the appropriate insurance in place, including strong terms and limits, to respond to this evolving situation.

We review some of the most recent guidance on these return to work issues, as well as potential liabilities and insurance solutions.



COVID-19 Vaccinations

The Equal Employment Opportunity Commission (EEOC) released new guidance on May 28 regarding vaccinations in the workplace.¹ Per the EEOC, the federal EEO laws do not prevent an employer from requiring all employees physically entering the workplace to be vaccinated for COVID-19, subject to the reasonable accommodation provisions of Title VII and the ADA. These principles apply if an employee gets the vaccine in the community or from the employer.

Companies that do institute a vaccine requirement may need to respond to allegations that the requirement has a disparate impact on – or disproportionately excludes – employees based on their race, color, religion, sex, or national origin under Title VII or age under the Age Discrimination in Employment Act (40+). The EEOC uses as an example the fact that some individuals or demographic groups may face greater barriers to receiving a COVID-19 vaccination than others, and therefore some employees may be more likely to be negatively impacted by a vaccination requirement.

Making the situation even murkier, certain state governments are taking the exact opposite approach to mandatory vaccinations. South Carolina's governor signed an executive order that prohibits state agencies from mandating their employees be vaccinated. Texas Governor Greg Abbott signed a law prohibiting businesses and government entities in the state from requiring digital proof of vaccination. Arkansas and Florida have similar laws.

There are additional legal concerns regarding mandating employee vaccinations. Multiple lawsuits have been filed against employers across the country regarding such mandated policies. For example, over one hundred employees filed suit against Houston Methodist Hospital for their mandatory vaccination policy. Plaintiffs allege that the hospital is "forcing its employees to be human 'guinea pigs' as a condition for continued employment." In its motion to dismiss the complaint, the hospital countered that "[m]andating the vaccine was not a decision we made lightly" and that there is no law or cited legal authority that prohibits a private employer's ability to require vaccinations as a condition of employment. This case is still in its initial pleading stages and we will track it closely.

Other cases include a federal case filed on March 17 against the Los Angeles Unified School District by a group of teachers and other school district workers over its mandatory vaccination policy for school personnel. On June 4, a New York waiter filed against his employer, a catering company, for mandating employee vaccines. These cases are likewise still in their early stages.

With this background, many companies are choosing to not mandate employee COVID vaccinations. According to one survey, 83% of employers responding to the survey indicated that they are neither mandating nor considering mandating that some portion of their workforce receive a COVID-19 vaccine.² In comparison, 75% of employers in that same survey were encouraging their employees to receive the COVID-19 vaccine.

Some companies are requiring vaccinations for new hires but not current employees. For example, both Delta Airlines and United Airlines have announced they will require new hires to be vaccinated.

The EEOC has stated that companies may encourage employees and their family members to be vaccinated if they wish. Employers may also:

- Provide employees and their family members with information to educate them about COVID-19 vaccines
- Raise awareness about the benefits of vaccination
- Address common questions and concerns
- Offer incentives to employees who receive COVID-19 vaccines, although any incentive (which includes both rewards and penalties) cannot be so substantial as to be considered coercive

Regardless of whether a mandatory vaccination policy is put in place or not, employers may ask for proof of vaccination. However, that information – like all medical information – must be kept confidential and stored separately from the employee's personnel files.



Accommodations

In some circumstances, Title VII and the ADA require an employer to provide reasonable accommodations for employees who, because of a disability or a sincerely held religious belief, practice, or observance, do not get vaccinated for COVID-19, unless providing an accommodation would pose an undue hardship on the operation of the employer's business.

The EEOC also stated in its recent guidance that an employee who does not get vaccinated due to a disability covered by the ADA or a sincerely held religious belief, practice or observance covered by Title VII may be entitled to a reasonable accommodation. Such accommodation should "not pose an undue hardship on the operation of the employer's business." Such reasonable accommodations as suggested by the EEOC include:

- Wearing a face mask
- Additional or enhanced protective gowns, masks, gloves or other gear beyond what the employer may generally provide to employees returning to its workplace
- Working at a social distance from coworkers or nonemployees
- Erecting a barrier that provides separation between an employee with a disability and coworkers/the public
- Increasing the space between an employee with a disability and others
- Working a modified shift
- Being given periodic tests for COVID-19
- The opportunity to telework
- Accepting a reassignment

Employees who are not vaccinated because of pregnancy may be entitled under Title VII to adjustments to keep working, if the employer makes modifications or exceptions for other employees. These modifications may be the same as the accommodations made for an employee based on disability or religion.

The ADA prohibits employers from disclosing that an employee is receiving a reasonable accommodation, including employees receiving an accommodation relating to COVID-19 vaccination.

Protective Gear

The EEOC also released guidance regarding protective gear. In short, an employer may require employees to wear protective gear, such as masks and gloves. Employers may also require employees to observe infection control practices, such as regular hand washing and social distancing protocols.

However, where an employee with a disability needs a related reasonable accommodation the employer should discuss the request and provide the modification or an alternative if feasible and not an undue hardship on the operation of the employer's business under the ADA or Title VII. Such accommodations under the ADA could include non-latex gloves, modified face masks for interpreters or others who communicate with an employee who uses lip reading, or gowns designed for individuals who use wheelchairs. Religious accommodation under Title VII could include modified equipment due to religious garb.

This guidance does seem to conflict with recent CDC guidance that permits fully vaccinated individuals to be excluded from mask mandate and social distancing. Indeed, California regulators are grappling with this very issue. After initially stating that masks could be required by employers, the California Occupational Safety and Health Standards Board's issued a revised rule days later that allows workers to forgo masks if every employee in a room is fully vaccinated against the coronavirus.

COVID-19 Health Screeners

Many companies are instituting health screeners as part of their return to work policies. Nothing in federal nondiscrimination law prevents employers from screening employees entering a worksite for coronavirus-related symptoms. Employers can require a daily temperature check and may ask employees who work on-site and report feeling ill or who call in sick questions about their symptoms as part of workplace screening for COVID-19.



Screeener inquiries do come with limitations. The Genetic Information Nondiscrimination Act (GINA) prohibits employers from asking employees medical questions about family members. GINA, however, does not prohibit an employer from asking employees whether they have had contact with anyone diagnosed with COVID-19 or who may have symptoms associated with the disease. Moreover, from a public health perspective, only asking an employee about his contact with family members would unnecessarily limit the information obtained about an employee's potential exposure to COVID-19.

However, The ADA requires that all medical information about a particular employee be stored separately from the employee's personnel file, thus limiting access to this confidential information. Paper notepads, laptops or other devices should not be left where others can access the protected information. Similarly, documentation must not be stored electronically where others would have access. Employers may even wish to use initials or another code to further ensure confidentiality of the name of an employee.

Medical information related to COVID-19 can be stored with existing medical files. This includes an employee's statement that they have the disease or suspects they have the disease, or the employer's notes or other documentation from questioning an employee about symptoms.

Multiple companies have faced lawsuits regarding the compensation for health screeners. Amazon employees filed suit in California federal court in February, alleging that the company required them to undergo COVID-19 screenings before work for which they were not compensated. The screenings included temperature checks and health-related questionnaires. Plaintiffs argued that the screenings took ten to fifteen minutes and should have been factored in when calculating overtime and regular wages.

In its motion to dismiss the complaint filed on June 3, Amazon responded that "COVID-19 screenings are not conducted primarily for Amazon's benefit, but rather are California-mandated health precautions designed to ensure the wellbeing and safety of all Amazon associates and the community at-large, and thus do not constitute compensable work time." Amazon also argued that even if the screenings primarily benefit Amazon, they are preliminary to the principal activities for which Amazon fulfillment center associates are employed and therefore are not compensable. Amazon also stated that it "does not exercise the requisite level of control over its associates during the screenings to make that time constitute 'hours worked.'"

Other companies have been named as defendants in similar lawsuits. Walmart employees in California and Arizona have also brought suit against Walmart alleging they should be compensated for having to complete a questionnaire, screening and body temperature scan before their shifts. Like the Amazon complaint, the California complaint alleges the process took ten to fifteen uncompensated minutes. Victoria's Secret employees also filed a class action complaint in federal court in California against the company, alleging that Victoria's Secret violated California law by requiring employees to undergo temperature screenings before clocking in.

All of these lawsuits are in their early stages. These are new issues not previously contemplated prior to the pandemic and we will be monitoring any legal developments closely.