



NYLPI NONPROFIT TOOLKIT



GUIDANCE FOR NONPROFITS RETURNING TO THE WORKPLACE

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INTRODUCTION

As jurisdictions have eased COVID-19 restrictions, employers and employees continue to adapt to life in the “new normal.” While very few official requirements remain for employers regarding COVID-19 protocols (no more: mandatory masking, testing, or vaccination),

many employers have chosen to implement certain procedures for the safety or comfort of their employees, or because of their relationships with third parties. This Advisory discusses some considerations and “best practices” to help employers manage this “new normal.”

CAN EMPLOYERS STILL REQUIRE EMPLOYEES TO GET VACCINATED?

Yes! The Equal Employment Opportunity Commission (EEOC) has stated that federal civil rights laws related to employment do not preclude employers from mandating COVID-19 vaccines, as long as employers provide reasonable accommodations to those who cannot get the vaccine because of a disability or sincerely held religious

beliefs.¹ Employers in New York City must also consider accommodation requests based on pregnancy, childbirth, lactation, or status as a victim of domestic violence, stalking, or sex offenses.² Multiple courts have confirmed that a private organization can require its employees to be vaccinated.³



However, employers should consider the following when deciding whether to implement a vaccination policy:

- Time spent getting vaccinated may be deemed compensable.
- Employees may push back on the requirement, leading to morale issues in the workplace.
- Accommodation requests, of which there may be many, need to be handled consistently.
- Employees who do not qualify for an accommodation based on disability or religious beliefs may need to be placed on unpaid leave or terminated.⁴

- Certain employees may be more vulnerable to COVID-19 complications (e.g., individuals who are over 65 years of age or have compromised immune systems or underlying illnesses). However, employers should not presume or attempt to identify employees who are at higher risk.

As a best practice, employers should alert employees to any change in vaccination policy with plenty of notice (including dropping a vaccination mandate), so employees can accurately assess their own risk levels.

CAN WE STILL REQUIRE CONTRACTORS VISITING OUR WORKSITE SITE TO GET VACCINATED PRIOR TO VISITING OUR WORKPLACE?

Yes. Nothing prohibits an organization from requiring contractors or third parties entering its premises to be

vaccinated, provided that it has a non-discriminatory policy that is applied consistently.⁵



WHAT IF SOMEONE REQUESTS AN ACCOMMODATION?

Employers who do have vaccine mandates should create a process for employees to apply for accommodations. In designing and implementing an effective accommodations process, organizations should consider the following:

- Have a centralized accommodations committee or identify the individuals who will review accommodations requests. Having a centralized committee or designated individuals (preferably with accommodations experience, often individuals with HR and/or Legal functions) to handle accommodations requests may help to ensure consistency in the process for intake and review of accommodations requests.
- Evaluate each accommodation request on an individualized basis. Make consistent decisions when evaluating accommodation requests of the same type. Document objective business reasons for distinguishing between requests where decisions may differ. Seek input from appropriate organizational representatives who understand the nature of the various jobs at issue and can provide information regarding, e.g., ability to maintain social distance and essential functions of the job. To the greatest extent possible, maintain the confidentiality of the individual requesting the accommodation, as well as the nature of the request. This information should only be shared on a “need to know” basis. Seek outside counsel support for challenging requests, specific counseling, and second opinions. Document who was involved in decision making, date of the decision, and bases for decision making. Maintain all records.
- Consider planning for how the organization intends to respond to the most common types of requests, for example: Fetal cell lines, “Body is a Temple,” Religious Beliefs Dictate Following Conscience/Moral/Ethical Opposition to All Vaccines/Medical Treatment, etc.
- Think through confidentiality issues. When evaluating your organization’s accommodations process, consider determining what information regarding accommodations requests will the organization provide to management, and which specific managers, about vaccination data and anticipated separations (or unpaid leaves).



- Consider whether to provide accommodations to employees who live with immunocompromised family members. While some employers granted temporary policy exemptions to individuals in this circumstance during the height of the pandemic, that decision was discretionary and not required by applicable law. Now, as many employers require individuals to return to work in-person at an office or prescribed off-site location, this issue has come up again. Allowing accommodations for this reason can create risk. Neither the Americans with Disabilities Act nor state law equivalents cover family or household members of an employee. In other words, there is no legal basis to grant an exemption to a policy, such as a return to work policy, to an employee who lives with a person that is immunocompromised (or has any other medical condition putting them at risk for severe infection).

If employers choose to expand these accommodations, they must take care to do it consistently for all employees. Employers may consider time limitations for the policy or connecting the applicability of the policy to concrete public health indicators. Be aware that some employers have reported complications with morale and perceptions of equity. For example, other employees may view such an accommodation as unfair. Granting an exception to a return to work policy, where there is not a legal need to do so (such as when someone requests an accommodation based on a family member's disability), can undermine faith and trust in the Human Resources department because they could be seen as making inconsistent decisions based on perceived favoritism.⁶



ARE EMPLOYEES STILL REQUIRED, BY LAW, TO WEAR MASKS?

Generally, no, employees are not required, by law, to wear masks. Effective September 7, 2022, New York State Department of Health modified their guidance regarding masking in indoor public settings in light of the increased access to COVID-19 information, vaccination, testing, and treatment, as well as to reflect new CDC recommendations. The new guidance provides that mask-wearing is still required in health care facilities and Adult Care facilities in order to protect vulnerable individuals, such as sick persons and the elderly. However, masking requirements in correctional facilities, shelters, public transportations hubs, and transportation conveyances have been rescinded regardless of vaccination status.

While such masking requirements have ended, individuals are still encouraged to assess the risks of COVID-19 in their working environments and social circumstances to determine whether mask-wearing is appropriate. Employers can still, of course, require masking in their workplaces. Thus, employers should consider the risks posed in their office environment to determine whether continuing or discontinuing masking requirements is best for their employees. If exposed to COVID-19, it is still recommended to wear a mask for a full 10-day period, regardless of vaccination status.⁷

CAN EMPLOYERS CONTINUE TO MANDATE TESTING FOR COVID-19?

Yes, in certain circumstances. The Americans with Disabilities Act (ADA) prohibits employers from making disability-related inquiries or requiring medical examinations of employees unless the employer can show that such inquiries or exams are job-related and consistent with business necessity. Prior to July 12, 2022, the Equal

Employment Opportunity Commission (EEOC) advised that mandatory COVID-19 testing met this requirement in all circumstances because employees entering the workplace with the COVID-19 virus posed a direct threat to the health of others. Updated EEOC guidance clarifies that mandatory screening is only acceptable if an employer can show



testing is job related and consistent with business necessity.⁸ This requirement will be met when an employer is following CDC guidance. However, current CDC guidance does not recommend testing when community levels are low. Mandatory testing at low levels may still be lawful given consideration of additional factors outlined by the EEOC, including:

- the level of community transmission
- the vaccination status of employees
- the accuracy and speed of processing for different types of COVID-19 viral tests
- the degree to which breakthrough infections are possible for employees who are “up to date” on their COVID-19 vaccinations
- the ease of transmissibility of the current variant
- the severity of illness from the current variant

- the types of contact employees may have with others in the workplace (e.g., working with immunocompromised or high-risk individuals)
- the potential impact on operations if an employee enters the workplace with COVID-19

Employers should ensure that they have analyzed the continued need for testing in accordance with these factors when choosing to require regular COVID-19 testing at workplaces in areas of low transmission of the virus.

In January, President Biden announced the COVID-19 national and public health emergency declarations will end on May 11, 2023. This change may impact the cost of COVID-19 tests, which are currently covered by insurance companies. Employees may have to pay out-of-pocket for testing if their insurance company chooses to end coverage. Employers should monitor these changes and consider whether they are willing to cover the cost of any required testing for employees.



WHAT IS REQUIRED OF AN EMPLOYER WHEN AN EMPLOYEE CONTRACTS OR IS EXPOSED TO COVID-19?

While employers are not required to monitor or report employees' symptoms, employers should encourage employees to continue to self-monitor for symptoms of COVID-19 or any other potentially infectious disease. If an employee feels ill or has any new or unexplained symptoms of such a disease, employers should encourage them to stay home.

If an employer becomes aware of an employee who tests positive for or is exposed to COVID-19, they should encourage the employee to follow New York State and CDC guidance regarding exposure and isolation. New York State is currently following CDC guidance.⁹ The CDC recommends that individuals who are exposed to COVID-19 wear a mask around others for 10 days. They may test on day 6 after exposure, if possible, but should continue masking even if they test negative.¹⁰ If the individual tests positive, the CDC advises them to stay home for at least 5 days. For individuals who had no symptoms or whose symptoms are improving, they may end their isolation after 5 days. The

CDC recommends individuals to continue masking around others through day 10 of the illness or sooner if they have two negative tests 48 hours apart.¹¹

Employers in New York are no longer required to report known cases of COVID-19 or conduct contact tracing. However, employers may still choose to do so and can require employees to report a positive case. As a best practice, employers may consider notifying either all employees who were at the worksite on the same day as the infected employee, or a subset of employees who would have been in close contact with the employee (for e.g. share a working space, a floor, work in close proximity with, and so forth). Employers should never identify the name or other identifying information of an employee who tests positive. They must ensure any personal health information they receive, such as a positive COVID-19 case, is kept confidential and in a secure location, where access is limited to only those with a bona fide need to view the information. If an employer chooses to no longer track and



report positive cases in the workplace but previously did, it is advisable to notify employees of the change in protocol.

The New York State COVID-19 Paid Leave Law also requires employers to provide job protection and leave to employees who are subject to a mandatory or precautionary order of quarantine or isolation issued by a government entity.¹² Whether the leave must be paid or can be unpaid depends on the size of the employer. Employers with fewer than 10 employees and a net annual income less than \$1 million for the previous year may provide unpaid leave for the entire quarantine or isolation period. Employers with 11-99 employees, and employers with 10 or fewer employees and

a net annual income less than \$1 million for the previous year must provide five days of paid sick leave. Employers with 100 or more employees must provide 14 days of paid sick leave.¹³

Employers may mandate that employees who are otherwise not subject to a mandatory quarantine or isolation order remain out of the workplace due to exposure to or contracting COVID-19. However, New York State law requires the employer to pay the employee at the employee's regular rate of pay until the employer allows the employee to return to work.

WHAT IS THE NEW YORK HERO ACT, AND WHAT DOES IT REQUIRE OF EMPLOYERS?

On May 5, 2021, the New York Health and Essential Rights Act (NY HERO Act) became law. The law is intended to protect employees against exposure and disease if there are airborne infectious disease outbreaks in the future. It requires all New York employers to have an

airborne infectious disease exposure prevention plan. This Plan must comply with the minimum requirements set by the New York State Department of Labor and the Department of Health. A list of requirements and a model plan is provided through the New York Department of



Labor’s website: <https://dol.ny.gov/ny-hero-act>. The Plan must go into effect when an airborne infectious disease is designated by the New York State Commissioner of Health as a “highly contagious communicable disease that presents a serious risk of harm to the public health.”¹⁴ Employers must provide this Plan in their Employee Handbook and post the Plan in a visible and prominent location in each of their worksites. While subject to change, on March 17, 2022, the Commissioner of Health ended COVID-19’s designation as an airborne infectious disease that required such a Plan. Therefore, an Exposure Prevention Plan does not currently have to be in effect (but it must still exist and be in the Employee Handbook).¹⁵

Pursuant to Section 2 of the HERO Act (which remains in effect even though the Section 1 designation has expired), employers with 10 or more employees in New York State

must “permit” employees to establish and administer workplace safety committees. At least two-thirds of committee members must be non-supervisory employees, selected by non-supervisory employees. Committee members authorized to: (1) Raise safety and health concerns, to the employer – who must respond; (2) Review and provide feedback related to workplace safety and health issues; (3) Review the adoption of any workplace safety and health policy; (4) Participate in government site visit on workplace safety and health compliance; (5) Review employer-filed reports on workplace safety and health; (6) Regularly schedule a meeting during work hours at least once a quarter for up to two hours; and (7) Attend a paid training of up to four hours on the function of the committee, the workplace safety committee provisions of the HERO Act, and an introduction to occupational safety and health.¹⁶



ENDNOTES

1 <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>

2 <https://www1.nyc.gov/assets/cchr/downloads/pdf/publications/Vax-Employment-Guidance.pdf>

3 Effective November 1, 2022, NYC dropped the requirement that employees working in New York City be vaccinated.

4 <https://www.nylpi.org/wp-content/uploads/2021/06/Covid-19-ReturnToWork-Addendum.pdf>

5 <https://www.nylpi.org/wp-content/uploads/2021/06/Covid-19-ReturnToWork-Addendum.pdf>

6 For example, an employee of a federal contractor wrote to the New York Times to complain and seek advice about the fact that her colleagues, aged 70+, were permitted to work from home, but she was not (<https://www.nytimes.com/2022/09/30/business/roxane-gay-remote-work.html>). For additional considerations related to accommodation requests, please see: Nonprofit Return to the Workplace Advisory; Vaccine Guidance for the Return to the Workplace

7 <https://coronavirus.health.ny.gov/system/files/documents/2022/09/2.60-determination-9.7.22.pdf>

8 <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>

9 <https://coronavirus.health.ny.gov/isolation>

10 <https://www.cdc.gov/coronavirus/2019-ncov/your-health/if-you-were-exposed.html>

11 <https://www.cdc.gov/coronavirus/2019-ncov/if-you-are-sick/index.html>

12 Currently, New York State requires individuals who are exposed to COVID-19 who have not received a COVID-19 primary vaccination series and most recent booster to quarantine and individuals who are confirmed to have COVID-19 to isolate.

13 S.B. S8091 (2020), <https://www.nysenate.gov/legislation/bills/2019/S8091>.

14 <https://dol.ny.gov/ny-hero-act>

15 <https://dol.ny.gov/ny-hero-act>

16 On December 22, 2021, the New York Department of Labor released a new proposed regulation setting forth the workplace safety committee requirements. The proposed regulation is subject to a notice and comment period and a public hearing was held on February 9, 2022. The proposed regulation clarifies that this requirement only applies to employers with ten or more employees in New York State, and confirms that employers do not need to proactively form a committee; rather, they only need to form a committee after receiving two written requests to do so from non-supervisory employees. A final regulation has not yet been issued.



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