

Tips for Compliant, Practical Return-to-Work Policies

Contributed by Margo Wolf O'Donnell , Benesch

As in-person work becomes more prevalent at this stage of the Covid-19 pandemic, employers across most industries are making business decisions regarding what portion of their workforce actually needs to be present in the workplace each day and how to handle the divide between vaccinated and unvaccinated employees.

At the same time, companies must navigate compliance with current laws and guidance relating to leave issues, vaccine policies, and safety. The Equal Employment Opportunity Commission (EEOC), which enforces federal workplace anti-discrimination laws, issued extensive guidance relating to the intersection of pandemic policies and federal employment laws such as the Americans with Disabilities Act (ADA), Title VII of the Civil Rights Act, and the Genetic Information Nondiscrimination Act. The guidance that makes clear that even if employees were previously permitted to telework, most employees can now be required to return to the office.

As companies communicate policies relating to the return to work of certain employees, employers should be aware of the latest health and safety recommendations from the Centers for Disease Control and Prevention (CDC) and the Occupational Safety and Health Administration (OSHA). In addition to these federal recommendations, employers may also be subject to certain state and local laws and regulations depending on the location of their employees.

If your organization is overwhelmed by the complex challenge of complying with laws while still doing business, you are not alone. While navigating back-to-work process is far from simple in this environment, it is possible to implement policies that are legally enforceable and allow your business to be productive.

Setting Policies for In-Person Work

According to the latest CDC guidance, it is no longer necessary for fully vaccinated employees to wear a mask or physically distance in any non-health-care setting, except where required by federal, state or local laws, rules, and regulations, including local business and workplace guidance. The CDC continues to recommend that unvaccinated individuals protect themselves by wearing a mask that covers the nose and mouth, staying six feet apart from others to the extent possible, and avoiding crowds and poorly ventilated indoor spaces.

Likewise, the most recent OSHA guidance provides that “most employers no longer need to take steps to protect their fully vaccinated workers who are not otherwise at risk from Covid-19 exposure.” According to OSHA, employers should encourage all non-vaccinated employees to get

vaccinated, and to take protective measures for the non-vaccinated to the extent possible.

Employers of Unvaccinated Individuals Should Consider:

- Instructing unvaccinated employees to stay home if exposed to someone who has Covid-19
- Suggesting that unvaccinated employees wear face masks
- Continuing to implement social distancing requirements for unvaccinated employees

Additionally, employers are encouraged to train employees regarding company Covid-19 policies, maintain ventilation systems, perform routine cleaning and disinfections, and implement protections from retaliation for employees reporting of violations of safety policies.

The EEOC has similar recommendations for employers. Current EEOC guidance states that unvaccinated employees entering the workplace should “wear a face mask, work at a social distance from coworkers or non-employees, work a modified shift, get periodic tests for Covid-19, be given the opportunity to telework, or finally, accept a reassignment.” The EEOC has not recommended other markers to signify one's vaccinated status. In addition to concerns relating to confidentiality of medical information, there is also a risk that employees could bring claims for violations of the ADA.

Vaccine Incentive Plans

The EEOC also has released guidance permitting employers to offer incentives to employees who voluntarily provide proof of vaccination by a third-party. Employers may offer incentives to employees to receive a vaccine administered by an employer or its agent only if the incentive is not coercive—i.e. it should be a de minimis incentive. Some examples of incentives are one-time cash payments or extra PTO time.

Employers considering incentive programs should also keep in mind that some employees may not choose to be vaccinated due to disability-related reasons or religious objections. To avoid the risk of discrimination claims for incentives available to all vaccinated employees, employers will need to consider offering alternative means by which those employees can earn an incentive if they choose not to be vaccinated due to a disability or sincerely held religious belief. Employers should not offer incentives to employees' family members or require that employee's family members obtain the Covid-19 vaccine.

Vaccine Mandates and Exemptions

The EEOC has made clear that vaccine mandates are permissible in the workplace. However, employers must engage in the interactive process with employees who request exemptions under

the ADA for a disability or Title VII based on a sincerely held religious belief, practice, or observance that would prevent them from complying with a vaccine mandate.

Title VII defines religion very broadly to include “not only traditional, organized religions such as Christianity, Judaism, Islam, Hinduism, and Buddhism, but also religious beliefs that are new, uncommon, not part of a formal church or sect, only subscribed to by a small number of people, or that seem illogical or unreasonable to others.” Social, political, or economic philosophies are largely not recognized as a religious belief or practice.

The EEOC also states in its guidance that reasonable accommodations under the ADA may be denied based on a direct threat that an unvaccinated employee might pose in the workplace or under Title VII if allowing the individual to remain unvaccinated would pose an undue burden on the employer. These determinations are driven by the positions held by the individual, job duties, safety concerns, and the particular needs of the employer.

Practical Return-to-Work Plans & Common Issues

Employers have a variety of options for return-to-work plans that contemplate current guidance. Some employers are considering the return of all employees at once and others a more incremental or hybrid approach. Each of these options carries pros and cons, opportunities and risks. As employers decide what type of policy to adopt, they must consider the administrative burden the policy may create, and whether it introduces legal exposure in the face of federal and state laws and regulations. Whatever policy a company ultimately chooses, here are some potential problems employers will need to consider.

Disclosure of Disability Status

The EEOC allows employers to ask to see proof of vaccination, but other questions, such as inquiries regarding why an individual did not receive the vaccine, may elicit employee health information regarding that could violate certain protections under the ADA and/or the Genetic Information Nondiscrimination Act. Unless employers are engaging in the interactive process in connection with a request for accommodation under the ADA, they should limit their inquiry to vaccination status and advise employees not to disclose medical information in response to the inquiry.

Health Information Privacy

Employers may ask to simply view vaccination cards to verify status and then maintain a list of employees who have been cleared to be maskless in the workplace. If employers choose to retain copies of vaccination cards, however, they must treat those documents as confidential medical records. While the EEOC does not consider the administration of a vaccine a medical exam, if an

employer is considering offering vaccines on site, a third-party organization should be responsible for any prescreening questions and administer the vaccines.

Retaliation

The EEOC requires employers to take steps to protect their employees against retaliation, by their superiors or co-workers, for their choice to vaccinate or not, or for requesting an accommodation under the ADA or a religious exemption to a vaccination mandate. Employers can guard against retaliation by clearly communicating rules and expectations, and by holding all employees accountable for complying with and enforcing nondiscrimination policies. Supervisors and managers should be instructed that they cannot treat employees differently due to their status.

Personnel Issues

In addition to navigating thorny interpersonal and legal issues around the return to work, employers face challenges with hiring and retaining enough workers to fully staff their businesses during an acute labor shortage. Covid-19 workplace policies that employees perceive as too burdensome may steer interested job applicants to companies with less stringent policies.

The growing rates of vaccination have allowed employers in all industries to resume in-person work. While employers face many questions about how to balance the rights of their employees with workplace safety, good legal counsel and proactive updates to policies and procedures will pave the way to legally compliant and fair return-to-work policies.

©2021 The Bureau of National Affairs, Inc. All rights reserved. Bloomberg Law Reports[®] is a registered trademark and service mark of The Bureau of National Affairs, Inc.

Disclaimer: This document and any discussions set forth herein are for informational purposes only, and should not be construed as legal advice, which has to be addressed to particular facts and circumstances involved in any given situation. Review or use of the document and any discussions does not create an attorney-client relationship with the author or publisher. To the extent that this document may contain suggested provisions, they will require modification to suit a particular transaction, jurisdiction or situation. Please consult with an attorney with the appropriate level of experience if you have any questions. Any tax information contained in the document or discussions is not intended to be used, and cannot be used, for purposes of avoiding penalties imposed under the United States Internal Revenue Code. Any opinions expressed are those of the author. The Bureau of National Affairs, Inc. and its affiliated entities do not take responsibility for the content in this document or discussions and do not make any representation or warranty as to their completeness or accuracy.

General Information

Date Filed

Tue Jul 27 00:00:00 EDT 2021