



IN-DEPTH DISCUSSION

Mandatory Vaccines or Mandatory Testing? A “Soft Approach”

By Philip Berkowitz and Devjani Mishra on August 10, 2021

In its recently amended Technical Assistance Guidance (*What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*), the Equal Employment Opportunity Commission (EEOC) made clear that an employer may require COVID-19 vaccines for employees and exclude those with COVID-19, or symptoms associated with COVID-19, from the workplace, because their presence would pose a direct threat to the health or safety of others.

Many employers may want to avoid drawing a red line between vaccinated and non-vaccinated employees by adopting a “soft” approach—requiring that employees either provide proof of vaccination or periodic proof of a negative COVID test, instead of imposing mandatory vaccines. (Indeed, the EEOC has also said that employers may lawfully choose to test employees for COVID-19 before permitting them to enter the workplace.)

The soft approach, though, raises important questions and issues. We address some of these issues below.

1. **All or one.** Employers may ask all employees who will be physically entering the workplace if they have COVID-19 or symptoms associated with COVID-19, and may require a negative COVID-19 test result. However, since a COVID-19 test is considered a medical examination, if an employer wishes to require only a particular employee to undergo screening or testing, the Americans with Disabilities Act (ADA) requires the employer to have a reasonable belief based on objective evidence that this person might have the virus before requiring the test.
2. **Confidentiality.** With limited exceptions, the ADA requires employers to keep confidential any medical information they learn about any applicant or employee. Medical information includes test results, as well as a diagnosis or treatment, and the fact that an individual has requested or is receiving a reasonable accommodation.

3. **Paying for employee time.** Employers need to consider whether the time employees spend undergoing COVID-19 testing is compensable. The law may require payment if the testing is necessary for them to perform their jobs in person safely and effectively during the pandemic. The U.S. Department of Labor takes the position that if grocery store cashiers who have significant interaction with the public are required by their employer to undergo a COVID-19 test on their day off, such time may be compensable. On the other hand, in many instances, such as in an office environment where in-person interaction is limited, there may be no such requirement. Employers also need to consider *state* laws that might mandate payment for required medical tests or reimbursement for required business expenses.
4. **Paying for the test itself.** In many states, employers may need to pay the fee for the test. Of course, there are many places where individuals can obtain free tests. Insurance may cover tests, particularly if an individual is testing because they are symptomatic or have been exposed. However, employers that adopt an ongoing periodic testing program should not expect that insurance will cover these costs.
5. **Do the tests prove anything?** There can be false positives and negatives, and a person may test positive for a period after they are no longer contagious. Nonetheless, if an employee refuses to get vaccinated, requiring regular negative test results is another way for the employer to try to ensure that employees are not bringing COVID-19 into the workplace and possibly spreading it.
6. **Test meaning.** Note that a positive test result means that an individual most likely has a current infection and may be able to transmit the virus to others. A negative test result means that the individual did not have detectable COVID-19 at the time of testing.
7. **Accuracy of tests.** The EEOC stated in its [Technical Assistance Guidance](#) that employers should ensure that tests being used for employment purposes are considered accurate and reliable, and that it may be helpful to check CDC and FDA websites for updates.
8. **Which test to accept?** An antibody test at this time does not meet the ADA’s “job related and consistent with business necessity” standard for medical examinations or inquiries for current employees. [According to the CDC](#), the test may not reliably detect antibodies in someone with a current infection. In addition, it is not currently known whether and to what extent a positive antibody test result indicates immunity against COVID-19. Therefore, requiring antibody testing before allowing employees to improve your workplace is [not](#) [permitted](#) by the ADA. Please note that an antibody test is different from a test to determine if someone has an active case of COVID-19 (i.e., a viral test). The EEOC has already stated that COVID-19 viral tests are permissible under the ADA if they are accurate and reliable.
9. **What about positive test results?** Employers need to be prepared to initiate exposure control and contact tracing measures when employees who have been in the workplace test positive (i.e., get them out of the workplace and figure out who else needs to get out). Employers also

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should be ready to communicate calmly to the rest of the workforce, which might be quite concerned about their own health upon learning that a co-worker has tested positive.

10. **To mask or not to mask?** Many employers are requiring all employees to remain masked in an office setting, regardless of their vaccination status. Thus far, this is consistent with CDC guidance, so long as employees are socially distanced. However, implementing this approach may deprive the employer of an incentive for employees to become vaccinated—the ability to work without a mask. On the other hand, having two “classes” of employees, the masked and the unmasked, potentially risks fomenting disputes and resentment among employees, as well as the possibility that those masked employees who have declined vaccination for religious or disability-related reasons could claim they are being subjected to discriminatory treatment by virtue of their protected status.
11. **Accommodation issues.** The ADA and Title VII, as well as analogous state and local laws, require employers to engage in the interactive process for employees seeking a reasonable accommodation for their disabilities or sincerely held religious objections. Some employees may object to ongoing tests on religious or disability grounds. Thus, employers should be ready to engage in the interactive process with these employees, and expect to pay for regular testing that forms part of an accommodation.
12. **Other possible complaints.** Employees may raise complaints related to the option of providing a vaccination record or a negative COVID-19 test. For example:
 - Employees may complain that the available COVID-19 vaccines are still subject to emergency use authorization by the FDA.¹
 - Some employees may complain that they don’t have time or transportation to obtain a vaccine or a test. Employers should consider how to reduce the burdens associated with testing in order to increase the effectiveness of a testing program, including, where feasible, offering testing options at or near the workplace.
 - Employees may object to being held out of work pending a negative test. Employers should evaluate whether paid or unpaid leave may apply in such situations (either under applicable law or employer policy) but should not in any event allow symptomatic employees to remain at work.
 - Employees may claim they are not overall web experienced. By using our website you consent to our use of cookies in accordance with our Privacy Policy.

Employers that have made the business decision that employees need to work on-site need to carefully consider how best to deploy their workforce, whether remote work remains an option, and to whom it should be available.

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Littler has resources that may be of assistance to employers facing the difficult task of deciding how to handle testing, vaccines, and return to work.

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¹ Importantly, the fact that the vaccines are only in EUA status does not preclude an employer from mandating the vaccine. In a lengthy July 6, 2021 opinion letter, the U.S. Department of Justice Office of Legal Counsel concludes that EUA status dictates what disclosures must be provided to vaccine recipients, but does not prevent any public or private entity from mandating the vaccine as a condition of employment, education or receipt of services. 45 Op. O.L.C. ____ (July 6, 2021), available at <https://www.justice.gov/olc/file/1415446/download>. In addition, federal courts considering the matter have concluded that EUA status did not prevent Houston Methodist Hospital from imposing a mandate as a condition of employment, or Indiana University from requiring vaccination for students, faculty and staff, in both cases assuming that reasonable accommodations were available to those unable to receive the vaccine for protected reasons. *Klaassen v. Trustees of Indiana University*, No. 1:21-CV-238 DRL, 2021 WL 3073926 (N.D. Ind. July 18, 2021), 2021 *aff'd*, No. 21-2326, 2021 WL 3281209 (7th Cir. Aug. 2, 2021); *Bridges v. Houston Methodist Hosp.*, Civ. A. H-21-1774, 2021 WL 2399994 (S.D. Tex. June 12, 2021).

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