

COVID-19 – WHAT EMPLOYERS SHOULD KNOW NOW August 2021

In 2021, the number of COVID-19 cases were dropping and vaccinations were available. Lifted COVID mandates allowed employers to return employees to the workplace. The Delta variant may cause federal, state, and local governments to reverse course. Employers need to prepare for the reversal by reviewing the current guidelines.

RETURN TO WORK

Currently, an employer can require employees to return to work. An employer will have to consider reasonable accommodations for employees who are high-risk due to *an employee's disability*. This determination is medical in nature and employers should follow the determination of medical professionals with respect to this issue.

An employer does not have to consider reasonable accommodation for an employee's refusal to return to work due to fear of exposing other individuals – including household members. It is the employee's disabled status, not the status of the household member, which controls. An employer may terminate an employee who does not have a high-risk disability who refuses to return to work.

1. Negative COVID test to return to work

An employer can require medical certification of a recent negative **VIRAL** COVID test for an employee to return to work. The employer **cannot** require a negative **antibody** test.

If an employer elects not to require a negative viral test result, it can ask returning employees about test results, symptoms, and possible recent exposure. An employer can terminate or bar an employee from returning to work for the refusal to provide COVID-19 related information.

An employer can require ill employees to remain away from work without pay until the employer allows the employee to return to work. Although not required, a wise employer would allow an employee to use accrued but unused paid time off (vacation, sick leave, and paid personal leave) during the time off.

2. Accommodating high-risk employees

If an employee refuses to return to work because he or she has a disability causing him or her to be high-risk, an employer must consider reasonable accommodations that may mitigate the risk of COVID contraction. A reasonable accommodation inquiry revolves around efforts to reduce the disabled / high-risk employee's exposure to other employees.

Federal guidance expressly states that remote work is a possible accommodation. If an employee has been working remotely successfully, the employer must **consider** allowing the high-risk employee to continue working remotely even if the employer has required other remote worker to return to work. The continuance of remote work is not the default

accommodation, but the EEOC takes the position that past remote work is a *strong indicator* that continued remote work is a reasonable accommodation.

EEOC guidance also states that flex schedules may be a reasonable accommodation. The thought is that flex schedules will allow the high-risk employee to reduce the number of employees and the amount of time to which he or she is exposed during a workday.

An employer should also examine re-location of work areas, acrylic barriers, altering the paths of travel (similar to one-way aisles in supermarkets), personal protective equipment - masks, etc., and sanitation.

An employer may decline a requested accommodation if it imposes an undue hardship - "significant difficulty or expense." For example, if an employee has not worked remotely in the past, the purchase of new equipment and software, and establishing cyber-security protections and protocols probably would constitute an undue hardship. Similarly, allowing a disabled employee to work outside normal business hours would probably constitute an undue hardship if the employer would be required to keep office / facilities open or altering the work schedules of other employees who work with the disabled / high-risk employee.

3. Vaccination

An employer may require an employee to have received a COVID vaccination prior to returning to the workplace. With a couple of exceptions discussed below, an employer may bar an unvaccinated employee from the workplace. An employer may require an employee to present proof of vaccination to return to work.

Employers should expect to encounter employees who believe they have the right to refuse vaccination for any reason. ***Absent a required accommodation, an employee may not refuse an employer's vaccination mandate and continue to work.***

a. Disability accommodation

An employer may not mandate vaccination if it is inadvisable due to the employee's disability, for example, severe allergies. This is a medical determination and employers should follow the determination of health care professionals. The question has been, and will remain, does an employer have to accept a "determination" from a single visit to a curbside health clinic.

An employer may require a disabled employee to have received a vaccination before returning to work **IF** the disabled employee's presence in the workplace presents a direct threat to the safety and health of others. The employer must make the determination that a direct threat exists by examining the following:

The number of employees in the workplace and the ability to maintain social distancing and other preventative measures.

The number of employees in the workplace who have received the vaccine and the rate of vaccination in the community.

The amount of involvement / contact with customers or vendors.

The number of active COVID-19 cases in the community.

The Delta variant and governmental focus on vaccination substantially lowers an employer's burden of establishing an unvaccinated disabled employee presents a direct threat.

However, as with return to work in general, the employer must consider whether there is a reasonable accommodation that will alleviate the danger of exposure. If an unvaccinated employee has been successfully working remotely, the EEOC considers past remote work as a strong indicator the continued remote work is a reasonable accommodation. However, purchasing equipment and software for setting up remote when the disabled high-risk employee has not worked remotely before will probably constitute an undue burden.

An employer does not have to accept the accommodation demands a disabled employee may make for remote work / flex schedule or extensive alteration of workspaces. An employer must explore accommodations on a case-by-case basis and there are no hard and fast rules. However, if a disabled high-risk employee rejects an employer's reasonable accommodation offer, the employer may terminate the disabled employee for refusing to receive the vaccination.

b. Religious accommodation

An employer may not mandate an employee receive the vaccine if it violates an employee's sincerely held religious beliefs, unless the refusal imposes an undue burden on the employer. EEOC guidance from December 2020 states that employers should "ordinarily assume" that a request for religious accommodation is based on a sincerely held belief. Possible accommodations are the same as those for a disabled high-risk employee.

An employer is not required to offer an accommodation if it would impose an "undue hardship" - more than a minimal cost or burden on the operations of business. For instance, an accommodation may cause undue hardship if it is costly, compromises workplace safety, decreases workplace efficiency, infringes on the rights of other employees, or requires other employees to do more than their share of potentially hazardous or burdensome work.¹

AFTER RETURN TO WORK

OSHA and CDC Guidance come into play after employees return to work. Employers should keep in mind that it is not mandatory to follow OSHA and CDC guidance. However, employers are likely to see federal, state and local regulations, rules and orders in response to the Delta variant, many of which will adopt CDC guidance.

1. Full vaccinated employees

OSHA states that most employers no longer need to take steps to protect their workers from COVID-19 exposure, including masks, in any workplace where **ALL** employees are fully vaccinated. The CDC issued similar guidance not so long ago. However, CDC guidance issued earlier this week recommends that fully vaccinated employees wear a mask in indoor public places when levels of community transmission are high

2. Unvaccinated employees

The CDC recommends that unvaccinated employees always wear masks when in public indoor spaces. OSHA guidance instructs employers to take multi-layered steps to protect unvaccinated or otherwise at-risk workers in the workplaces.

¹ Note: "Undue hardship" for religious accommodation is easier to establish than "undue burden" for disability accommodation. Religion – more than *de minimus* cost or burden. Disability – significant difficulty and expense.

- Grant paid time off for employees to be vaccinated.
- Instruct workers who are (1) have tested positive, infected, (2) unvaccinated who have come into contact with someone who has tested positive in a viral test, or (3) experiencing symptoms to stay out from work.
- Implement physical distancing for unvaccinated / high risk employees in communal work areas.
- Provide unvaccinated / high risk employees with masks or face coverings.
- Educate / train employees on COVID policies and procedures.
- Suggest that unvaccinated customers, vendors, and visitors wear face coverings.
- Maintain ventilation systems.
- Perform routine cleaning and disinfection.
- Record and report work-related COVID infections to OSHA.

3. Testing

OSHA has no testing guidance. The CDC Guidance provides the following protocols. Regardless of vaccination status:

- Any employee with symptoms of COVID should be tested (viral, not antibody) regardless of vaccination status.
- Wear a mask in public indoor spaces after exposure to an individual who has tested positive for COVID in the previous 10 days.
- Viral test 3 to 5 days after the exposure even if the employee has no symptoms.
- If test result is negative, a vaccinated employee may cease wearing a mask indoors, but an unvaccinated employee should continue to wear mask in indoor public places.
- If test result is negative, then vaccinated and unvaccinated may return to work 7 days after exposure.
- If test result is positive, the employee should isolate at home for 10 days.

Secondary exposure – exposure to a non-infected individual who has been exposed to an infected individual - does not require testing.

As a matter of law, the Paid Sick Leave Act of CARES is no longer in place and employers do not have to pay employees who are absent for testing, pending test results or isolation. Employers are free to do so if they wish and with the problem of finding employees to work at all, pay or partial pay is something an employer should consider.

Remember, COVID protocols are extremely fluid and can change weekly. Talking heads on social media and television do not provide reliable advice or guidance. Your employment attorney will keep you advised of binding laws, regulations, and orders. In the absence of government mandates, employers should look to the most recent OSHA, CDC, and Department of Labor publications to develop protocols and courses of action. While not mandatory, it is hard to place blame on an employer who is adhering to such guidance. If you have questions about federal, state, or local guidance, call your employment attorney. That is why we are here.

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