

FREQUENTLY ASKED QUESTIONS: COVID-19 TESTING AND VACCINE MANDATES FOR P-12 SCHOOL EMPLOYEES*

1. Q: Can P-12 school districts/BOCES compel employees to disclose their COVID-19 vaccination status?

A: Yes. Asking employees for proof of COVID-19 vaccination is not a disability-related inquiry and is permissible; however, asking why an employee did not get vaccinated may be a disability-related inquiry that violates the Americans with Disabilities Act (ADA). If an employee refuses to answer a question regarding vaccination status, they could be considered insubordinate. (See Equal Employment Opportunity Commission, What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws, Section K, available at <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws> (last updated May 28, 2021)(EEOC Guidance)).

2. Q: Can an employer mandate the COVID-19 vaccine for its employees?

A: Likely, Yes. No federal law prohibits an employer from mandating that staff receive a COVID-19 vaccine. Title VII of the Civil Rights Act of 1964 and the Americans with Disabilities Act (ADA) may require an employer to provide reasonable accommodations due to an employee's disability or sincerely held religious belief or practice, so long as the accommodation does not impose an undue burden on the employer. Vaccine mandates have been upheld by the U.S. Supreme Court in the past in response to a public health emergency. (*Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11, 35 (1905)). In 1904, the New York Court of Appeals upheld as constitutional a smallpox vaccination mandate directed at school employees and students. (*Viemeister v. White*, 1 N.Y. 235, 238 (1904)). Although courts have not yet issued many decisions on this issue, federal courts in Texas and Indiana have upheld employer vaccine mandates and relied upon the U.S. Supreme Court's decision in *Jacobson*. Some courts in New York have considered whether to temporarily restrain vaccine mandates, but those cases have not been decided on the merits of the claims.

In terms of labor law, even if the employer's decision to mandate vaccines is not negotiable, the local can demand to bargain the impact or effects of such decision. Locals should consult with their assigned Labor Relations Specialist.

3. Q: Does the employer engage in discrimination if it requires an unvaccinated individual to take COVID-19 screening tests?

A: A vaccine mandate that is neutral and of general applicability should not implicate the Free Exercise of religion clause of the Constitution, provided it has a rational basis. Requiring individuals who have not provided proof of vaccination to be tested is not discriminatory, as vaccination status is not a class protected by Title VII of the Civil Rights Act of 1964, the ADA or the New York Human Rights Law.

4. Q: Can an employer mandate COVID-19 testing for employees?

A: Yes. The EEOC Guidance at Section A.6 notes that "the ADA requires that any mandatory medical test of employees be 'job related and consistent with business necessity.'" The EEOC further states that "applying this standard to the current circumstances of the COVID-19

pandemic, employers may take screening steps to determine if [employees entering the workplace have COVID-19](#) because [an individual with the virus will pose a direct threat](#) to the health of others.” (EEOC Guidance, A.6).

The New York State Department of Health issued emergency regulations pertaining to COVID-19 testing in P-12 schools. (See 10 NYCRR 2.62, available at the following link: [COVID-19 Reporting and Testing.pdf \(ny.gov\)](#)). The Commissioner of Health issued a determination on COVID-19 testing pursuant to the emergency regulation on September 2, 2021 (“COH Determination”), available at the following link: [2.62-determination.pdf \(ny.gov\)](#). Further, the Department of Health issued Interim Guidance for Classroom Instruction in P-12 Schools During the 2021-2022 Academic Year that addresses the implementation of COVID-19 testing for teachers and staff, available at the following link: [school-guidance.pdf \(ny.gov\)](#).

The two types of testing are (1) **Diagnostic Screening Testing** (for individuals who, regardless of vaccination status, are symptomatic or are asymptomatic but have been exposed to someone with COVID-19); and (2) **Mandatory Screening Testing** (testing of asymptomatic employees with no exposure or symptoms). Teachers and staff who have been fully vaccinated AND provide proof of vaccination may be permitted by the employing school district to “opt-out” of the mandatory weekly testing. (See COH Determination).

And, again, the impact or effects of such mandatory testing may be subject to negotiation upon demand. Locals should consult with their assigned Labor Relations Specialist.

5. Q: Can an employee obtain a medical or religious exemption to a COVID-19 testing requirement?

A: Likely, no. See EEOC Guidance at A.6 and response to Question #4, above. While an employee might request a medical or religious accommodation from a testing requirement from the employer, the employer may deny such accommodation and may question the medical need for such accommodation or the sincerity of any religious practice suggesting that the employee could not be tested on religious grounds.

6. Q: What are the diagnostic COVID-19 testing requirements for employees or students who are symptomatic or have been exposed and are asymptomatic?

A: School districts are required to have the capacity (either directly on-site or via referral) to provide diagnostic testing for individuals, including teachers, staff and students, who regardless of vaccination status, are (a) symptomatic or (b) asymptomatic, but have been exposed to someone with COVID-19. (COH Determination, Para. 3).

7. Q: How does an employer maintain and store COVID-19 testing results and vaccination status for its employees?

A: According to EEOC Guidance, testing data and vaccination status is considered medical information and must be kept confidential and maintained in a medical file, stored separately from the personnel file. (EEOC Guidance, B.1). Within this medical file (even if it predated COVID), an employer may store all medical information related to COVID-19. (EEOC Guidance, K.4.). While COVID-19 status is considered confidential, employers may disclose the name of the employee to a public health agency if the employer learns of a positive test. (EEOC Guidance, B.2). If an employee

tests positive, or is displaying symptoms, employers should “make every effort to limit the number of people who get to know the name of the employee.” (EEOC Guidance, B.5). The EEOC recommends using a generic descriptor when providing notice of a positive test to other employees, as to not violate the ADA’s prohibition of disclosing medical information. (EEOC Guidance, B.5). If an employee is working remotely due to contracting COVID-19, the employer may disclose that the employee is telecommuting, but not the reason why. (EEOC Guidance, B.7).

The HIPAA Privacy Rule does not apply to P-12 schools and administrators because they are not covered entities under HIPAA. HIPAA applies to health plans, health care clearinghouses, and to any health care provider who transmits health information in electronic form in connection with transactions for which the Secretary of HHS has adopted standards under HIPAA. (45 CFR §160.103). Although HIPAA does not apply to the COVID-19 testing data and vaccination records, if such records are provided to P-12 schools they must be kept confidential and maintained in a separate file (as noted above).

8. Q: What happens when an employee of a P-12 school refuses to submit to screening testing or provide proof of vaccination status?

A: If an employee in a P-12 school refuses to comply with the COVID-19 screening testing, assuming they have not provided proof of vaccination and therefore opted out of the screening requirement, and the employee does not have an approved accommodation, they can be disciplined for insubordination pursuant to the statutory (*i.e.* Education Law § 3020-a and Civil Service Law § 75) or contract procedures that may apply to the particular employee’s title. (**See response to Question #9, below for additional information*).

NYSUT’s Office of General Counsel represents employees in disciplinary due process proceedings pursuant to Education Law § 3020-a and Civil Service Law § 75 and in contractual disciplinary arbitrations, at the request of the local union.

9. Q: Can a school district or BOCES employer dock an employee’s pay or unilaterally require them to use leave accruals for days out of school because the employee refused testing or to provide proof of vaccination?

A: The answer depends on the statutory or contractual rights that apply to the particular employee. For example, if an employee has due process protections under Education Law §§3020/3020-a (tenured teachers); Civil Service §75; or just cause protections under the contract, the employer may be prohibited from imposing discipline without implementing the applicable disciplinary procedure. These issues may also be an appropriate subject of impact bargaining. The local union may negotiate (or demand to negotiate) the impact or effects of testing or vaccination refusals.

10. Q: Who is responsible for the cost of required testing in P-12 schools?

A: The district should seek available federal funds to cover the costs of the testing. In accordance with the COH Determination (issued pursuant to Emergency Regulation 2.62), all schools must have the capacity to offer COVID-19 testing to teachers, students and staff. (*See* NYSDOH Interim Guidance, [school-guidance.pdf \(ny.gov\)](#), #6). According to the Regulatory Impact Statement for Regulation 2.62, in imposing testing requirements pursuant to the COH Determination, the

Commissioner, in consultation with the NYSDOH, is directed to consider costs and how they may be offset.

For example, the American Rescue Plan allocated \$335 million to support COVID-19 detection and prevention through screening testing in New York Schools (this excludes NYC which received separate funding). These funds were distributed to states by the CDC's Epidemiology and Laboratory Capacity for Infectious Diseases Cooperative (ELC) Agreement and are referred to as "ELC Funds" by the NYSDOH. The NYSDOH passed these funds on to county health departments to distribute to school districts to provide these services directly or contract with labs to provide such services.

Thus, these funds are intended to offset costs associated with the mandated school-related testing. Costs for testing may also be offset by testing that is offered under Operation Expanded Testing which is free testing in K-12 schools and other congregate settings funded by the Department of Health and Human Services (HHS) and Department of Defense (DoD).

For additional information, see: [ELC Reopening Schools Revised Guidance: Support for Screening Testing to Reopen & Keep Schools Operating Safely \(cdc.gov\)](#) (see page 2, Funding Strategy & Support to School Districts) and [Epidemiology Laboratory Capacity \(ELC\) Reopening Schools — Open & Safe Schools \(openandsafeschools.org\)](#) (Guidance & Technical Assistance for Funding Recipients).

And, the unilateral imposition of such costs, or at least the impact of effects of imposing such costs, on bargaining unit members may be subject to negotiation. Locals should consult with their Labor Relations Specialist.

11. Q: Who is responsible for providing the tests, where are they to be provided and when?

A: The school is required to provide the tests, although it is not necessarily required to provide them on-site. According to the COH Determination, schools **must have the capacity** (either directly on-site or via referral) to provide diagnostic testing for any students, teachers and staff, who *regardless of vaccination status*, are symptomatic or asymptomatic following exposure to someone with COVID-19. See NYSDOH Guidance [school-guidance.pdf \(ny.gov\)](#) (p. 3, #6). The NYSDOH Guidance provides that schools can have testing performed "off-site by a laboratory, local health department, pharmacy or other local health care provider partner." See NYSDOH Guidance (p. 7, #2(b)).

With respect to Screening Testing for asymptomatic individuals with no reason to suspect infection, the DOH Guidance for Classroom Instruction similarly provides that "schools **must establish the capability** to conduct or offer screening testing and have flexibility in how they operationalize such testing." See NYSDOH Guidance (p. 6, #2).

When and where such tests will be performed may depend on all the facts and circumstances, including whether the employee is symptomatic or whether there are any time exigencies for getting the test.

Once again, the impact or effects of such testing requirement may be subject to negotiation. Locals should consult with their Labor Relations Specialist.

12. Q: How is the screening testing requirement enforced?

A: Local health departments have the primary, but not exclusive, role in enforcement. According to the Emergency Regulations, Section 2.62 (*COVID-19 Testing Requirements*) and Section 2.9 (*COVID-19 Reporting in Schools*) [COVID-19 Reporting and Testing.pdf \(ny.gov\)](#), local health officers must take steps to assist with enforcement of the mandates. Violations of the provisions of the Regulation are subject to all civil and criminal penalties provided for by law and entities, such as school district employers, who violate the Regulations are subject to a maximum fine of \$1,000 per violation. Each day that the entity operates in a manner inconsistent with the Regulation constitutes separate violations. See 10 NYCRR 2.62(b)(2).

13. Q: What leave time is available for members when exposed to COVID-19?

A: New York State has adopted a COVID leave law that provides fourteen days of paid leave upon someone being subject to a mandatory or precautionary order from the state or local health department. The law authorized the Commissioner of Labor to issue regulations and/or guidance related to the implementation of this law. While the law does not explicitly state the following limitation, on January 20, 2021, the Commissioner of Labor issued guidance stating that employees may draw upon this leave for a total of three times. The first time an employee utilizes the leave, it may be for either a quarantine based on the employee testing positive for COVID-19 or due to the employee being placed in a precautionary quarantine by the department of health. The employee may draw upon the benefit a second, or third time, only if the employee tests positive for COVID-19 and is placed in quarantine by the department of Health. The timeline for utilizing this benefit began on January 1, 2021.

In the public sector, this benefit is only available for use by the employee for the employee's personal quarantine status. There is no NYS benefit for leave to care for family members in quarantine.

For Locals in the private sector, there may be a limited benefit for family care depending on the collective bargaining agreement. Please consult with your LRS to discuss the specific situation. In addition, and as general rule, individual sick leave should be available once the NYS law has been utilized. Locals may also bargain to create COVID leave provisions directly with their employer. Please discuss any questions with your LRS to review the specific situation.

Please note that all other benefits that were provided for under federal Families First Coronavirus Response Act expired on 12/31/20 and are no longer in effect (unless locally bargained to continue).

14. Q: Is antibody testing a permissible alternative to mandated weekly screening testing for P-12 school employees?

A: Likely Not. The emergency regulations provide that the Commissioner of Health "may require routine COVID-19 testing" and that such "testing determination may also include alternatives to testing" 10 NYCRR 2.62(a). The only alternative to mandatory weekly screening testing set forth in the COH Determination is for a school employee to provide proof of vaccination. See COH Determination, Section 2(a). Further, the COH Determination only considers two types of testing, nucleic acid amplification tests (NAAT) or a SARS-CoV-2 point of care antigen test (Antigen Test).

See Section 4(b). Both NAAT and Antigen tests are to detect current COVID-19 infections. The Determination makes no mention of, nor lists as an acceptable alternative, antibody or serology tests.

Finally, the CDC considers antibody tests as only useful to detect whether an individual had a past infection. The CDC also does not currently recommend that antibody testing be used to determine if an individual is immune to COVID-19 following vaccination or to assess the need for vaccination in an unvaccinated person. (See CDC, Interim Guidelines for COVID-19 Antibody Testing in Clinical and Public Health Settings, available at <https://www.cdc.gov/coronavirus/2019-ncov/lab/resources/antibody-tests-guidelines.html> (updated March 17, 2021)). Based on the goal of the emergency regulations and directives in the COH Determination, it does not appear that either intended to allow for antibody testing as a substitute to the mandatory weekly testing requirement.

**This information is intended for general information purposes only. The information in this FAQ does not constitute legal advice and does not create an attorney-client relationship. Local unions and leaders are urged to work closely with their LRS in addressing specific inquiries, and local unions are encouraged to demand impact bargaining to address the impact and logistics of COVID-19 testing and any potential vaccine mandate.*