



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 re-enter the workplace is not allowed under 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

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 try to claim they are not vaccinated and should instead be permitted to work from home, while those who have been vaccinated may bristle at losing this option. 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.

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.

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).

Information contained in this publication is intended for informational purposes only and does not constitute legal advice or opinion, nor is it a substitute for the professional judgment of an attorney.

© 2021 Littler Mendelson P.C.

Littler Mendelson is part of the international legal practice Littler Global which operates worldwide through a number of separate legal entities. Attorney Advertising.



IN-DEPTH DISCUSSION

No Soup for You & Take Your Coffee to Go – Accommodations and the Key to NYC Pass

By Lisa M. Griffith, Devjani H. Mishra and Mark T. Phillis on August 19, 2021

New York City recently implemented the Key to NYC Pass, which requires patrons and employees of certain indoor entertainment, recreation, dining, and fitness establishments to prove that they have received at least one dose of the COVID-19 vaccine to enter the establishment. There is no “testing out” option, so it is possible that some patrons and employees may raise issues of discrimination or request accommodations in relation to the vaccination mandate.

On August 17, 2021, the New York City Commission on Human Rights (NYCCHR) issued “Guidance for Businesses on Equitable Implementation of Key to NYC.”¹ The guidance is aimed at assisting “covered entities”² and employers impacted by the mandatory vaccination requirements with avoiding discrimination claims and managing requests for reasonable accommodations by those who claim they cannot receive the COVID-19 vaccination due to their membership in one or more protected categories under the New York City Human Rights Law (NYCHRL).³ Similar guidance was also issued for customers and employees.

As a reminder, customers under the age of 12 are excused from showing proof of vaccination because they are not currently eligible for any COVID-19 vaccines. The guidance states that businesses can allow customers over age 12 without proof of vaccination into indoor premises for a “quick and limited purpose” (for example, to use the bathroom, place a food order, or pick up membership information) as long as they wear a face mask when they are unable to maintain six feet of distance from other people.

NYCHRL Protects Customers and Employees from Discrimination

Prohibited Acts of Discrimination

The NYCCHR's guidance prohibits a covered entity from discriminating against patrons or employees based on any protected category by engaging in acts such as:

- Scrutinizing proof of vaccination more closely when it is provided by people of a particular race, national origin, or religion based on a perception that people in those groups are less likely to be vaccinated;
- Requiring proof of vaccination only for older people or people with disabilities based on the belief that COVID-19 is more dangerous for them; or
- Refusing to accept certain types of valid proof of vaccination, such as official immunization records from countries outside the United States or photographs of CDC vaccination cards.

Requests for Reasonable Accommodations

An unvaccinated patron or employee can request a reasonable accommodation from complying with the requirements of the Key to NYC Pass. Notably, however, a covered entity or employer need not provide a reasonable accommodation if it would cause a direct threat to other customers or employees of the business or impose an undue hardship on the business.

Requests for Reasonable Accommodations from Customers Due to a Disability

Generally, covered entities must provide reasonable accommodations to customers who request them because of a disability. With regard to the Key to NYC Pass requirements, if a customer is unable to show proof of vaccination due to a disability, a covered entity is required to engage in a cooperative dialogue, or a good-faith discussion, with the patron to see if a reasonable accommodation is possible that would not pose a direct threat or an undue hardship to their business.

Notably, the guidance states that businesses ***should not ask customers for evidence*** that they are unable to show proof of vaccination due to a disability. Instead, businesses should limit their engagement with the customers to the cooperative dialogue.

Reasonable accommodation can take many forms, and the guidance offers the following suggestions: a customer could purchase food to take with them, join a virtual exercise class, or speak with a sales representative by phone.

As an additional example, the guidance explains that if a customer wants to access the interior of a restaurant, but states that they are unable to get vaccinated because of a medical condition, if the customer accepts a take-out menu, returns home, orders food and the restaurant delivers the meal

to the customer's nearby residence "the business has provided a reasonable accommodation."

The NYCCHR's guidance appears to suggest that a reasonable accommodation need not include permitting an unvaccinated person to access indoor premises. It suggests that possible reasonable accommodations to consider for unvaccinated patrons include virtual tours, online entertainment or classes and access to outdoor facilities.

As discussed below, a covered entity does not have to provide an accommodation if it would cause a "direct threat" to other customers or employees of the business or impose an "undue hardship" on the business. The "direct threat" and undue hardship analyses are discussed below.

Unfortunately, the guidance does not provide any examples of how the direct threat and undue hardship standards might apply in this context.

Reasonable Accommodations for Employees

In addition to providing reasonable accommodations to employees due to a disability, covered employers must also provide a reasonable accommodation to employees who require them due to pregnancy, religious belief, or their status as a victim of domestic violence, stalking, or sex offenses. If an employee requests an exception to the vaccine requirement or additional time to provide proof of vaccination for one of these reasons, employers must engage with them in a cooperative dialogue as to whether a reasonable accommodation is possible, or whether such accommodation would pose a direct threat to other customers or employees or an undue hardship on the business.

The guidance provides the following examples of reasonable accommodations for unvaccinated employees who cannot access the indoor spaces of a covered entity due to the Key to NYC Pass: employees could work remotely, perform their job duties outside or in an area isolated from other employees or customers, or take a leave of absence.

The guidance explains that while engaging in a cooperative dialogue, employers can ask for documentation from their employees in the following scenarios:

- If an employee is seeking a reasonable accommodation because of a disability or pregnancy, an employer can request a note from their medical provider supporting their inability to obtain vaccination.
- If an employee is seeking a reasonable accommodation because of their religious beliefs, an employer can request supporting documentation only if the employer has an objective basis to question the sincerity of the stated religious basis for the employee's inability to obtain vaccination.

- If an employee is seeking a reasonable accommodation because of their status as a victim of domestic violence, sex offenses, or stalking, an employer can request a note from a related service provider supporting their inability to show proof of vaccination.

Employers need to provide the person who sought the reasonable accommodation with a written decision as to whether the accommodation was granted or denied.

The guidance notes that in some cases a covered employer may want to allow an unvaccinated employee who is not entitled to a reasonable accommodation to continue working. In that event, the employer can allow the unvaccinated employee into the interior portion of the premises “only if it is for a quick and limited purposes, such as changing clothes in a locker room, and if they wear a face mask at all times they are unable to maintain 6 feet of distance from other people.”

Again, the NYCCHR’s examples do not automatically assume that an unvaccinated employee must be accommodated by working indoors in close proximity to others. There is nothing in the guidance that suggests allowing patrons or employees to access the indoor facility as usual, but with a face covering, is a reasonable alternative. The exclusion of unvaccinated patrons and employees from the covered indoor facilities, while providing reasonable accommodations outside of the facility, appears to be the only option.

With regard to providing reasonable accommodations for employees working in indoor food services facilities, an option may be to assign the unvaccinated employee to the outdoor dining area only or providing a reasonable leave of absence until vaccination can be achieved. Working outdoors only could be problematic for many businesses, however, as the employee maybe required to enter the indoor kitchen or bar area to pick up food and drinks and deliver them outdoors.

Unvaccinated employees can be assigned to outdoor areas only or perhaps provided a reasonable leave of absence until the vaccination can be obtained. Generally, employee leaves of absence that are offered as an accommodation do not need to be paid unless other employees are normally paid for similar leaves.

Direct Threat Analysis

According to the NYCCHR, a “direct threat” is something that poses “a significant risk of substantial harm to the health or safety of others that cannot be eliminated or reduced by reasonable accommodation.”⁴ The determination that an individual with a disability poses a direct threat “shall be based on an individualized assessment of the individual’s present ability to perform safely the

essential functions of the job” and the factors to be considered include: (1) the duration of the risk; (2) the nature and severity of the potential harm; (3) the likelihood that the potential harm will occur; and (4) the imminence of the potential harm.

Importantly, the guidance acknowledges that covered entities and employers may rely on the “direct threat” analysis to exclude unvaccinated patrons and employees from accessing certain indoor entertainment, recreation, dining, and fitness establishments. “Direct threat” is perhaps the strongest argument that a business can make, especially where the threat at issue is the spread of the highly contagious COVID-19 Delta variant among patrons and employees.

Undue Hardship Analysis

An employer or covered entity does not need to make an accommodation if it would cause an undue hardship. The employer or covered entity would have the burden of establishing an undue hardship. The NYCHRL sets forth the following non-exhaustive list of factors to be considered to determine if an undue hardship exists:

a) the nature and cost of the accommodation;

b) the overall financial resources of the facility or the facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility;

c) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and

d) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.⁵

The undue hardship analysis is complex, and it requires a case-by-case assessment. The underlying concept is that a reasonable accommodation cannot be denied just because it involves a monetary cost. Rather, the overall financial resources available to the business will be

considered. Ultimately, employers and covered entities can conduct the undue burden analysis to determine if a requested accommodation is warranted, or if a different accommodation or none at all can be offered to the unvaccinated patron or employee.

Fines, Penalties, Complaints and Civil Litigation

It is imperative that covered entities have a written protocol in place before September 13, 2021 for checking the vaccination status of employees and patrons and for handling requests for accommodations. Covered entities must also post a sign⁶ required by Executive Order No. 225, which directs enforcement of The Key to NYC Pass.

The city will begin enforcing the requirements of The Key to NYC Pass beginning September 13, 2021. Inspectors from various New York City agencies will begin inspections and enforcement on September 13, 2021. Notably, each instance that a covered entity fails to check an individual's vaccination status will constitute a separate violation of Executive Order No. 225. Fines, penalties and forfeiture of not less than \$1,000 can be assessed for the first violation, increasing to \$2,000 for a subsequent violation within 12 months of the first violation, and increasing to \$5,000 for a violation within 12 months of the second violation.

In addition, employees and patrons who believe the business has not engaged in a cooperative dialogue or reasonably accommodated them can file a charge of discrimination with the city, state or federal agency or choose to file a lawsuit in state or federal court. Damages can include compensatory damages, attorneys' fees, costs and liquidated damages.

Conclusion

As businesses embark on complying with their newly established obligations under the Key to NYC Pass, they must be careful to apply its standards uniformly. The NYCCHR's guidance provides some basic guideposts for compliance. Covered entities and employers must also engage in a cooperative dialogue to determine whether and how they can reasonably accommodate unvaccinated patrons or employees and possibly conduct a direct threat or undue burden analysis to determine whether a requested accommodation can be provided. Employers are advised to consult counsel in navigating the cooperative dialogue and accommodation process.

¹ Section 7 of Executive Order No. 225 directs the New York Commission on Human Rights to develop guidance to assist covered entities in complying with the order in an equitable manner.

² “Covered entities” means an entity that operates a “covered premises,” which means a location used for “Indoor Entertainment and Recreational Settings,” “Indoor Food Services,” and “Indoor Gyms and Fitness Settings.” See Lisa M. Griffith and Devjani H. Mishra, *The Key to NYC Pass: Vax Up or Miss Out*, Littler Insight (Aug. 17, 2021).

³ The NYCHRL prohibits all New York City businesses that provide goods or services to the public from discriminating against their customers, and all New York City employers with four or more employees from discriminating against their employees. The categories protected under the NYCHRL in both public accommodation and employment include: age, immigration or citizenship status, color, disability, gender, gender identity, marital status and partnership status, national origin, pregnancy and lactation accommodations, race, religion/creed, sexual orientation, and status as a veteran or active military service member. Additional categories are protected with respect to the employment relationship, namely: arrest or conviction record, caregiver status, credit history, pre-employment marijuana testing, unemployment status, sexual and reproductive health decisions, salary history, and status as a victim of domestic violence, stalking, or sex offenses.

⁴ See NYCCHR’s Legal Enforcement Guidance on Discrimination on the Basis of Disability (2018); see also 41 C.F.R. § 60-741.2(e).

⁵ NYC Commission on Human Rights, *NYC Commission on Human Rights Legal Enforcement Guidance on Discrimination on the Basis of Disability*, at pp. 78-79.

⁶ The model sign can be found at: <https://www1.nyc.gov/assets/doh/downloads/pdf/covid/posters/covid-19-vaccine-required-poster.pdf>, or businesses can post their own sign that meets certain requirements.

Information contained in this publication is intended for informational purposes only and does not constitute legal advice or opinion, nor is it a substitute for the professional judgment of an attorney.

© 2021 Littler Mendelson P.C.
Littler Mendelson is part of the international legal practice Littler Global which operates worldwide through a number of separate legal entities. Attorney Advertising.

White House Announces Vaccine Mandates for Employees of Large Private Employers, Federal Contractors, and Most Healthcare Employers

By Jim Paretti, Brad Hammock, David Goldstein, Jeremy Wood, and Devjani Mishra on September 9, 2021

On September 9, 2021, President Joseph R. Biden released a sweeping new COVID-19 Action Plan, [Path Out of the Pandemic](#). This Plan includes mandates that employees working for large private employers, the federal government, federal contractors, and healthcare entities be vaccinated against COVID-19. The Plan also includes other points of interest to employers, including requirements that large entertainment venues screen patrons for vaccine status upon entry, and expanded access to federal financial assistance for many businesses.

Employers of 100 or More Employees

For the private sector, the Plan directs the Department of Labor's Occupational Safety and Health Administration (OSHA) to develop an Emergency Temporary Standard (ETS) that will require all employers with at least 100 employees to ensure their workforce is fully vaccinated or else subjected to weekly COVID-19 testing before coming into work. The ETS will also require covered employers to provide employees paid time off to get vaccinated and recover from side effects associated with the COVID-19 vaccine.¹

The White House expects that the ETS will apply to over 80 million private sector workers. It is still unclear exactly how the ETS will be worded and implemented and what OSHA's timeline for issuance will be. The way that the standard is worded will have a significant impact on employers and will be carefully monitored.

Executive Branch Employees and Federal Contractors

As for the federal government, President Biden signed two executive orders that, respectively, mandate vaccination for all executive branch employees and for some employees of some federal contractors.

The federal worker mandate alone is expected to cover more than 4 million Americans, including over 2 million in the federal civilian workforce, throughout the United States and around the world. Previously, the administration had only mandated vaccination within the Department of Defense, Department of Veterans Affairs, the Indian Health Service, and the National Institutes of Health. As this executive order applies within the executive branch only, congressional and federal court staff fall outside its scope.

These orders pertaining to the federal government's employees and contractors build on and supplement the president's July 29, 2021 directive that required employees and onsite contractors to disclose their vaccination status and, if they were not vaccinated, to mask, socially distance, and undergo regular testing. The new orders eliminate the testing option for those who are not vaccinated unless they receive an approved exemption. Thus, federal employees may no longer "test out" of vaccination.

The White House has indicated that while disability or religious exemptions may be approved on a restricted basis, workers who do not qualify for such exemptions will be subject to a 75-day "ramp-up" period in which they must become fully vaccinated.

Exactly what is going to be required of federal contractors is to be determined by a Safer Federal Workforce Task Force (Task Force), which has been ordered to issue its guidance by September 24. Until then, it is not clear what is going to be required. However, the administration had already announced in July that personnel working at federal facilities would be required to be fully vaccinated against COVID-19. The executive order is generally applicable to the same types of contracts that are covered by the administration's recent executive order increasing the minimum wage, and whatever requirements are established by the Task Force will "apply to any workplace locations (as specified by the Task Force Guidance) in which an individual is working on or in connection with a Federal Government contract or contract-like instrument."

Healthcare Employers

The Plan also provides that the Centers for Medicare and Medicaid Services (CMS) will begin requiring vaccination for employees in most healthcare settings, including hospitals, dialysis facilities, ambulatory surgical settings, and home health agencies, as a condition for continued

federal funding. The administration had previously imposed such a condition on nursing homes only. The new requirement will likely impact approximately 50,000 providers and 17 million workers.

Large Entertainment Venues Must Require Proof of Vaccine or Negative Test

The Plan calls on entertainment venues like sports arenas, large concert halls, and other venues where large groups gather to require that their patrons be vaccinated or show a negative test upon entry. This may preempt some state and local restrictions on such businesses' inquiring into their patrons' vaccination status, while bolstering other states and localities that have adopted similar requirements.²

Expanded Access to Federal Assistance

Recognizing the pandemic's ongoing impact on private businesses, the Plan provides for expanded federal financial assistance to businesses in need.

First, the Plan calls for strengthening the Economic Injury Disaster Loan (EIDL) program, providing for long-term, low-cost loans. Improvements include expanding the amount of funding available to any one business from \$500,000 to \$2 million, which can be used to hire and retain employees, purchase equipment or inventory, or pay off higher-interest debt. No business that receives funding will owe repayments for two years. The EIDL program will be targeted towards hard-hit businesses like restaurants and hotels, and the Small Business Administration (SBA) will offer a 30-day exclusive window for only small businesses to apply, as long as their requests do not exceed \$500,000.

Second, the Plan promises improvements in the Paycheck Protection Program (PPP), which forgives federal loans to employers that use such loans to fund payroll. Borrowers with loans of \$150,000 or less will enjoy a new streamlined approach to wipe their debts clean. The SBA will send these borrowers a pre-completed application form for the borrower to sign and return, completing the process. The administration expects that this new process will take borrowers no more than six minutes to complete.

Other Points of Interest

In an effort to increase vaccination in schools, the Plan requires that staff in federally run schools be vaccinated and calls on all states to mandate vaccination for their own school employees.

To expand access to testing, the Plan calls for a federal investment of nearly \$2 billion to procure 280 million rapid and at-home tests, increasing the availability of these tests for employers that require their employees to undergo regular testing. Medicaid will also be required to cover at-home tests. In many cases, however, employers that offer employees the option of regular COVID-19 testing in lieu of vaccination will face costs associated with such tests, including the possibility that employees in some jurisdictions must be compensated for time spent undergoing such tests.

Lastly, the Plan maintains masking requirements on federal property and in interstate travel.

Guidance in these areas is changing on an almost daily basis. Littler will keep readers apprised of significant developments in this rapidly evolving area of the law.

¹ Similar requirements currently apply to private employers in numerous jurisdictions, including California, Massachusetts, and New York, but the proposal reflects a significant expansion of paid leave on a nationwide basis. *See, e.g.*, Devjani Mishra, Emilie Hammerstein, Stephanie Mills-Gallan and Sebastian Chilco, *Littler Lightbulb: A Dose of Paid Time Off for COVID-19 Vaccinations*, Littler Insight (Apr. 16, 2021).

² *See, e.g.*, Lisa M. Griffith and Devjani H. Mishra, *The Key to NYC Pass: Vax Up or Miss Out*, Littler Insight (Aug. 17, 2021); Lisa M. Griffith, Devjani H. Mishra and Mark T. Phillis, *No Soup for You & Take Your Coffee to Go – Accommodations and the Key to NYC Pass*, Littler Insight (Aug. 19, 2021); Jeremy Wood, Nicholas McKinney, Tom Holt, and Alka Ramchandani-Raj, *California and Washington Issue Vaccine Mandates — Frontrunners in What Appears to Be a Growing Trend*, Littler Insight (Aug. 12, 2021); *Mandatory Employee Vaccines – Coming to A State Near You?*, Littler Insight.

Information contained in this publication is intended for informational purposes only and does not constitute legal advice or opinion, nor is it a substitute for the professional judgment of an attorney.

© 2021 Littler Mendelson P.C.

Littler Mendelson is part of the international legal practice Littler Global which operates worldwide through a number of separate legal entities. Attorney Advertising.