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COVID-19 and the Workplace: Where Do We Stand?

Law and the Workplace on **May 9, 2023**

As we have reported previously, on April 10, 2023 President Biden signed legislation ending the COVID-19 National Emergency. However, the rollback of COVID-19 requirements was already underway in many state and municipal legislatures, with some requirements having previously been repealed or with others scheduled to (or already having) sunset. With this transition, employers are now taking inventory on which COVID-19 requirements remain in effect and what considerations to keep in mind looking ahead.

The State of COVID-19 Workplace Requirements

Masking

Most states have lifted indoor masking requirements, though certain requirements may remain in effect in certain settings, such as health care facilities. However, some states do maintain masking requirements under certain conditions. For example, Washington state requires that employers ensure workers wear appropriate, fit-tested, and NIOSH-approved respirators, if they are required to provide care or work near someone known or suspected to have COVID-19, or if they are otherwise required to do so under their state required COVID-19 "hazard assessment." Employers who are no longer required to maintain masking requirements for employees can evaluate whether they want to maintain such policies going forward or eliminate or modify such policies (such as by shifting to "masking preferred" or "masking optional" standards).

Testing

Most jurisdictions that previously required unvaccinated individuals to submit to weekly testing in lieu of vaccination, have lifted these requirements. For example, New York City no longer requires unvaccinated city employees to wear masks and undergo periodic testing, except in certain instances following COVID-19 infection. Further, the CDC in its August 2022 guidance, no longer recommends testing asymptomatic persons with no exposure to "high-risk congregate settings, such as long-term care facilities, homeless shelters, and correctional facilities, and workplace settings that include congregate housing with limited access to medical care."

As we have previously reported, employers may be responsible under the federal Fair Labor Standards Act (FLSA) and/or state wage and hour law for compensating non-exempt employees for time spent adhering to employer COVID-19 requirements, including required COVID testing.

Vaccine Mandates

Most state and municipal COVID-19 vaccine mandates have either lapsed or been rescinded, though, once again, requirements may still exist in certain sectors, such as health care. New York City's private employer vaccine mandate – the most expansive of its kind – was lifted by Mayor Eric Adams on November 1, 2022. With the shift away from vaccine mandates, employers must now evaluate whether to continue to maintain a vaccination requirement for their employees. Employers who maintain COVID-19 related requirements should still keep in mind their obligation to consider reasonable accommodation requests to workplace vaccine requirements on the basis of medical need or religious beliefs.

Similarly, most state and municipal requirements that placed certain restrictions on or around mandatory vaccination have lapsed or will lapse soon. For example, Florida Sec. 381.00317 which prohibits employers from imposing COVID-19 vaccination mandates on employees without providing for certain delineated exemptions, will expire on June 1, 2023. Tennessee's law prohibiting private employers from compelling or otherwise taking adverse action against a person to compel them to provide proof of COVID-19 vaccination if the person objects "for any reason" is slated to expire on July 1, 2023. However not all restrictions have expired. For example, Nebraska's law is still in effect, which requires private employers exempt employees who provide a completed Department of Health and Human Services "vaccine exemption" form from workplace vaccination requirements.

Further, as we have reported previously, on May 1, the Biden Administration announced that the federal contractor and subcontractor vaccine mandate issued by the Safer Federal Workforce Task Force in response to President Biden's Executive Order will end on May 12, 2023.

Employers who previously did not implement vaccination requirements for employees in such jurisdictions because of statutory limitations may consider doing so following the sunset of these laws. However, despite the removal of these exemptions, as noted above, employers must still keep in mind their obligation to consider reasonable accommodation requests when maintaining COVID-19 related requirements.

Finally, similar to workplace testing requirements, employers who do maintain vaccination requirements may be responsible under the FLSA and/or state law for compensating non-exempt employees for time spent receiving their vaccination.

COVID-19 Sick Leave and Vaccine Leave

Laws requiring employers to provide an additional amount of paid leave for reasons related to COVID-19 have lapsed in several jurisdictions. For example, California's COVID-19 Supplemental Paid Sick Leave expired on December 31, 2022. However, some jurisdictions, such as New York State, still have COVID-19 sick leave laws in effect that require employers to provide separate paid leave, beyond what an employee may otherwise be entitled to under a state or local paid sick leave law or an employer's policy, for certain employee needs related to COVID-19.

Similarly, many jurisdictions no longer require that employers provide a specific bank of time off for employees (or their family members) to receive a COVID-19 vaccine. For example, New York City's law that required employers to provide paid leave time for employees to facilitate COVID-19 vaccinations for their child expired as of December 31, 2022.

However, it is essential that employers ensure they follow any applicable and then-current COVID-19 requirements as some jurisdictions still maintain such leave. New York State's law requiring New York employers to provide employees with "a sufficient period of time, not to exceed four hours" of paid leave per dose (including boosters) to be vaccinated for COVID-19 is presently set to remain in effect through December 31, 2023. Furthermore, even in the absence of a COVID-specific law, many state and local paid sick leave laws will still cover time spent by employees obtaining a COVID-19 vaccine for themselves or assisting a family member in becoming vaccinated.

State Specific COVID-19 Safety Plans

Many state COVID-19 or airborne disease safety plan requirements are no longer in effect due to improved conditions, though such laws may continue to impose certain requirements on employers. For example, the designation of COVID-19 as a covered airborne infectious disease under the New York State HERO Act ended on March 17, 2022 , and with it covered employers' obligations to have an active airborne infectious disease exposure prevention plan actively in place. However, even in the absence of an active designation of a disease under the HERO Act, New York employers must still maintain a copy of their current airborne infectious disease exposure prevention plan in their employee handbooks. Further, should COVID numbers begin to rise once again, it is possible that more heightened requirements under the HERO Act and similar laws may once again be implemented.

In contrast, some jurisdictions such as California have integrated their COVID specific safety plan requirements into pre-existing workplace safety requirements. For example, California employers must maintain a separate "Injury and Illness Prevention Program," which addresses COVID-19 and other workplace hazards. California OSHA has released guidance delineating COVID specific requirements that must be included in employer's program such as the provision of COVID-19 hazard prevention training and the investigation and response to COVID-19 cases. In addition to California, other states that maintain their own Occupational Safety Hazard Agencies, separate and apart from the federal OSHA, still have in effect COVID-19 requirements and guidance. For example, Washington state still maintains COVID-19 guidance for both private and state employers, which requires, among other things, that employers address COVID-19 hazards in their "Accident Prevention Program."

Looking Ahead

Beyond specific government mandates and statutory requirements, there are additional legal and practical considerations that employers should keep in mind when thinking about their approach to COVID-19 moving forward:

Consider the Continued Interplay of COVID-19 and Other Employment Laws

- Under the Americans with Disabilities Act (ADA) (and, in some cases, state and/or local disability laws), employers are required engage in the interactive process with employees who seek a medical accommodation as a result of the effects of long COVID. The EEOC has stated in guidance that the effects of long COVID could constitute an actual disability under the ADA. As part of the interactive process, employers are permitted to request reasonable supporting medical documentation to better assess a request for accommodation as a result of long COVID.
- Employers may also need to assess whether an employee's contraction of COVID-19 and/or any subsequent long COVID symptoms may qualify as a covered "serious health condition" under the federal Family and Medical Leave Act (FMLA) and/or applicable state or local leave laws. Similarly, requests to care for a family member suffering from COVID or long COVID impairments may also potentially trigger FMLA or state/local leave law requirements. And in almost all cases, an employee's own medical needs related to COVID-19 (including obtaining COVID testing, isolating due to a positive diagnosis, receiving treatment for symptoms, or obtaining a COVID vaccine) or the need to care for a family member experiencing similar COVID-19 related needs are likely to be covered by applicable state and local paid

sick leave laws.

- To the extent an employer maintains COVID-19 workplace policies requiring masking, testing or mandatory COVID-19 vaccination, employers must engage in the interactive process with employees who seek a medical or religious-based accommodation from such requirements.
- Pursuant to the ADA's confidentiality requirements, any employee medical information an employer receives in connection with a COVID-related request for leave, reasonable accommodation or otherwise must be maintained as confidential and stored in a medical file separate and apart from an employee's regular personnel file.

Monitor Current Guidance

- Employers should continue to monitor the most up-to-date CDC guidance on best practices regarding individuals who have been exposed to COVID-19 and/or who are symptomatic or have tested positive. The CDC currently recommends that individuals who may have been exposed to COVID-19 wear a mask for up to 10 days when indoors. The CDC recommends symptomatic individuals isolate for a minimum of 5 days and only end insolation when in addition to seeing an improvement of other symptoms, they are without fever for 24 hours.
- The CDC also recommended in its August 2022 guidance, precautions that employers can consider implementing such as improved ventilation and filtration systems and the provision of adequate hand sanitation supplies.

Revisit and Review Workplace Policies

- Employers who have not yet done so should review any existing COVID-19 policies and procedures to ensure they reflect current workplace practices. For example, employers who have eased or eliminated the enforcement of masking, testing or mandatory vaccination policies should ensure that any employee-facing policies are revised to reflect the current manner in which those policies are enforced.

Conclusion

The COVID-19 era of employment law is transitioning, and with this transition come new challenges that require employers to carry on the lessons gained from the pandemic about workplace safety. Employers should consult state and local requirements to determine what is necessary in order for them to comply with applicable law. But in the absence of federal, state or local requirements, employers now have significantly more flexibility to determine how best to promote a productive and healthy work environment while mitigating the risk of workplace disruption from illnesses.

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