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# Private Employers Should Take a Fresh Look at Their COVID-Era Vaccination and Testing Policies

**By David A. Schnitzer**
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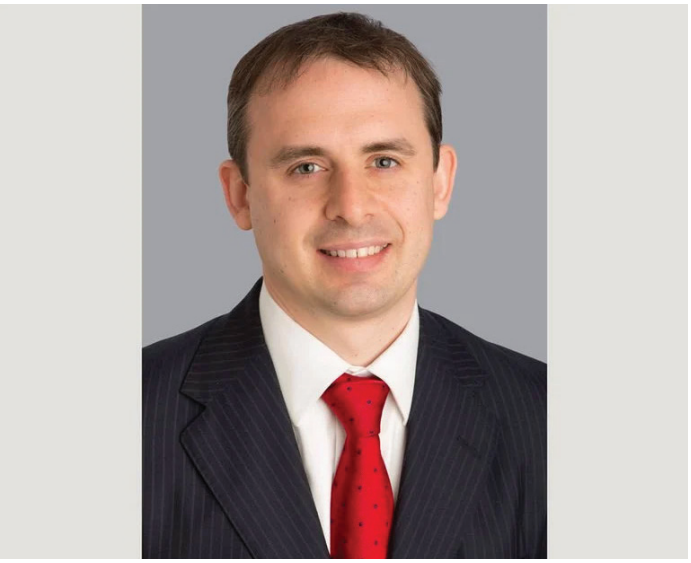
After more than three years, the federal public health emergency for COVID-19 ended on May 11, 2023. Much of the news coverage has focused on the politics of declaring the pandemic "over," implications for the health care industry and the consequential changes to immigration policy. But what about the impact on private employers at large, who have spent the last three years navigating an evolving legal landscape of workplace-safety considerations and employee rights.

Are vaccine mandates allowed, and with what caveats? Should old mandates be phased out? Is testing still allowed? Is COVID-19 a justification for allowing workers to continue to work remotely as a disability accommodation? The answers are not always crystal clear, and private employers must continue to consider their specific circumstances, including state laws, the particular nature of their workforce and business line, and individual employee circumstances.

- Employers considering a continued vaccine mandate should confirm whether the states in which they operate have laws surrounding COVID-19 vaccine mandates, be it outright bans or requirements for alternatives and exemptions.
- Employers should consider whether mandatory screening or symptom-based bans are still justifiable based on changes in the public health situation.
- Employers should consider the implications of return-to-office policies under the Americans with Disabilities Act, including whether the risk of COVID-19 exposure still merits remote work as an accommodation, and whether an individual can perform the essential functions of their job remotely without an undue hardship to the employer.



Courtesy photo

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In more detail:

**Vaccine Mandates**. Government vaccine mandates—both for private employers and government workforces—generally fared poorly in the courts. The most prominent example is the November 2021 emergency standard from the Occupational Safety and Health Administration requiring private employers with over 100 employees to require either vaccinations or weekly testing. The Supreme Court rejected the standard in January 2022, and the agency then withdrew it as an emergency standard. (It is still a pending proposed permanent rule, although there has been no further action.)

So what about mandates voluntarily adopted by private employers? As a first step, employers must be mindful

of state law. According to the National Academy for State Health Policy, at least 18 states have relevant laws, including a few enacted this year as the national public health emergency comes to an end. Those range from a ban on requiring COVID-19 vaccination for employment (recently enacted in Idaho and Utah); requirements for medical or religious exemptions from vaccine mandates (e.g., Arizona, Mississippi, Tennessee); broader exemptions covering moral or philosophical opposition (North Dakota); and requirements that employers choosing a mandatory vaccine policy allow weekly testing or proof of antibodies as an alternative (Arkansas). Multi-state employers, in particular, must keep abreast of these variations. Additionally, those operating in industries such as health care and child care continue to be subject to additional requirements (or prohibitions) in some jurisdictions.

On the federal level, the key issues are compliance with Title VII of the Civil Rights Act, the ADA, and the recently enacted Pregnant Workers Fairness Act. As before, employers need to consider possible exemptions or alternatives (e.g., regular testing) to accommodate religious beliefs and medical concerns. Under the ADA, employers should engage in (and document) the interactive process and determine if there is an accommodation that would not pose an undue hardship. Title VII's version of the "undue hardship" standard is more employer-friendly than the ADA's, defined as a burden that is more than de minimis. But the Supreme Court is currently considering a more demanding rule in *Groff v. DeJoy,* 22-174 (2023), argued in April, and with a decision expected by late June. What is clear is that under both the ADA and Title VII (and the PWFA) employer arguments about hardship in the form of exposing co-workers and customers will likely become more challenging in many sectors in light of the end of the public health emergency. Regular testing may be a viable alternative in conjunction with an exemption from the vaccine. Other options to consider in some circumstances include reconfigured workspaces or modified schedules to provide added distancing, or continued remote work.

**Testing and Screening**. Employers may also be considering continuing requirements for testing and screening employees working on company premises, and barring those who do not comply or who test positive. These programs, like mandatory vaccinations, potentially implicate ADA and Title VII, and the end of the public health emergency may have particular relevance in light of the Equal Employment Opportunity Commission's pandemic-era statement that "[g]uidance from medical and public health authorities may be relevant to making certain legal determinations under" these statutes. Indeed, the agency's latest statements (in July 2022) are replete with references to "current" circumstances, "current" CDC guidance and the "current" pandemic.

During the height of the pandemic, the EEOC was clear that barring entry to those with COVID-19 or COVID-19-like symptoms was permissible under the ADA, and relatedly indicated that a general policy of testing or screening questions was permissible in many circumstances. According to the agency, "An employer may exclude those with COVID-19, or symptoms associated with COVID-19, from the workplace because, as EEOC has stated, their presence would pose a direct threat to the health or safety of others." Similarly, screening was generally "job-related and consistent with business necessity." But the formal end of the national public health emergency suggests it may potentially be harder to justify such programs in many workplaces.

**Additional ADA Implications for Remote Work.** An additional topic of recurring employer interest in the "post-pandemic" world is remote work. Companies of all types are struggling with whether to require employees who worked remotely during the pandemic to begin to work onsite at least part time. This is not only a policy and business decision—it also raises ADA issues. During the height of the pandemic, an individual with a particular vulnerability to severe COVID-19 as a result of a disability may have had strong arguments for allowing remote work as an accommodation. But that balance has shifted with the reduced transmission levels and generally lowered risk of severe illness that the end of the public health emergency recognizes. Another issue is under what circumstances the unplanned remote work experiment of the pandemic is evidence that a given individual can perform the essential functions of their job remotely. This too requires employer attention in implementing in-person attendance policies.

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