POST-PANDEMIC EMPLOYER CONSIDERATIONS: EEOC UPDATES COVID-19 TECHNICAL GUIDANCE AS PUBLIC HEALTH EMERGENCY EXPIRES

Date: 17 May 2023

US Labor, Employment, and Workplace Safety Alert

By: April Boyer, Erinn L. Rigney

While many have moved on from thinking about COVID-19 and its impact on daily life, employers are reminded that despite the expiration of the public health emergency (PHE), there are still workplace considerations related to COVID-19 to incorporate into business operations. Specifically, on 15 May 2023, and in response to the official termination of the COVID-19 public health emergency on 11 May 2023 in the United States,[1] the Equal Employment Opportunity Commission (EEOC) updated its pandemic era Technical Assistance Questions and Answers—"What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws"[2] (COVID Guidance). With the abandonment of most COVID-related health mandates over the past year and the "official" end of the pandemic, many employers have transitioned away from the more stringent health and safety guidelines. However, the EEOC's COVID Guidance is a reminder that although the COVID-19 pandemic may be in the rearview mirror, various anti-discrimination laws under the EEOC's jurisdiction require employers to be prepared to respond to the effects of COVID-19 in the workplace.

Originally published in March 2020 at the onset of the pandemic, the COVID Guidance has been updated at various points throughout the pandemic[3] to address the application of anti-discrimination laws to shutdown orders, COVID-19 health screenings, use of face coverings, COVID-19 testing, remote work/leaves of absence as an accommodation, vaccination mandates and incentive programs, storage of COVID-related information, harassment, long COVID, and other reasonable accommodations. Throughout many of the iterations, the EEOC consistently has reminded employers of the different requirements of Title VII of the Civil Rights Act of 1964 (Title VII), the Americans with Disabilities Act (ADA), the Genetic Information Nondiscrimination Act (GINA), and the Age Discrimination in Employment Act (ADEA) in managing a workforce impacted by the COVID-19 pandemic and the disease itself.

This most recent update to the COVID Guidance continues that trend and highlights that despite the expiration of the PHE, employers are not relieved of their obligation to maintain reasonable accommodations for employees who requested or received accommodation related to COVID-19. However, employers may engage with employees on an individual basis, following the interactive process, to identify and evaluate whether an accommodation granted in response to the pandemic is still necessary. As with non-COVID accommodation requests, employers may request supporting documentation to clarify the need and to identify if an alternative accommodation may be suitable. Employers should take into account employees who remain more susceptible to severe disease or are immunocompromised, as the end of the PHE may not alleviate the need for a reasonable accommodation.

©2005-2026 K&L Gates LLP. All Rights Reserved.

With regard to preventative measures, the COVID Guidance continues to direct employers to look to recommendations from the US Centers for Disease Control and Prevention (CDC) when maintaining COVID-19 screening protocols and when directing employees to remain away from the workplace as a result of a COVID-19 diagnosis or positive test result. While employers may continue such health and safety protocols, such measures must be supported by business necessity and employers must provide for reasonable accommodations under applicable law. The COVID Guidance also addresses situations where an employee may refuse to comply with an employer's COVID-19 screening procedures (e.g., screening for symptoms or inquiring as to close contact with individuals with COVID-19) following the expiration of the PHE. Pursuant to the COVID Guidance, an "employer may take whatever action it deems appropriate, consistent with its applicable policies or procedures (e.g., barring an employee from physical presence in the workplace or otherwise working closely with others)."[4] However, the COVID Guidance encourages employers to seek the justification for the employee's refusal and to reassure employees as to the specific reason for the continued adherence to health and safety protocols.

In addition, the COVID Guidance recognizes that long COVID continues to be an enforcement focus for the EEOC. According to the COVID Guidance, individuals with long COVID may be considered, after an individualized assessment,[5] as an individual with an "actual disability," an individual with a "record of a disability," or an individual "regarded as having a disability." Employers must continue to evaluate long COVID within the ADA framework, assessing whether the employee with long COVID has a "physical or mental" impairment that "substantially limits one or more major life activities."[6] Further, the COVID Guidance outlines various "low cost" accommodations that employers may consider implementing for employees affected by this condition. Examples of these accommodations include providing "a quiet workspace, use of noise cancelling devices, and uninterrupted worktime to address brain fog; alternative lighting and reducing glare to address headaches; rest breaks to address joint pain or shortness of breath; a flexible schedule or telework to address fatigue; and removal of 'marginal functions' that involve physical exertion to address shortness of breath."[7]

One topic that many employers have been pondering is whether a vaccination requirement may still be imposed in light of the expiration of the PHE. Despite the end of the PHE and the termination of the federal vaccination mandates,[8] the COVID Guidance does not affect an employer's ability to implement a COVID-19 vaccination requirement so long as an employer provides for reasonable accommodations under the ADA and Title VII.[9] The COVID Guidance reiterates the types of accommodations that may be feasible for an employee who requests an exemption from receiving the COVID-19 vaccine, including wearing a mask, social distancing, and telework. And, as a reminder and as noted in other updates, vaccination mandates also need to comply with the patchwork of state law requirements that limit employers' ability to impose a vaccination requirement on employees.[10]

Finally, the COVID Guidance underscores that employers should be proactive in addressing pandemic-related harassment in the workplace as part of an employer's obligations under Title VII, the ADEA, and the ADA. Specifically, the COVID Guidance recommends that employers incorporate examples of such harassment into training materials, such as bullying employees who choose to continue wearing a mask in the workplace or harassing an employee because they sought a religious accommodation from a vaccination requirement. As with all types of harassment, employers should promptly investigate any concerns of harassment that arise in the workplace, including those stemming from the pandemic.

As the United States emerges from the pandemic, employers must continue to navigate COVID-19 in the workplace, focusing on the principles of anti-discrimination, anti-harassment, and reasonable accommodation.

©2005-2026 K&L Gates LLP. All Rights Reserved.

Although the PHE has expired, employers may still mandate certain health and safety requirements, including vaccinations and health screenings, so long as such measures are consistent with business necessity and provide for reasonable accommodations. In addressing reasonable accommodations, employers should recalibrate how they approach the undue hardship analysis, especially in light of the current state of the pandemic, while being cognizant of employees who are at high risk or may be suffering from long COVID. Employers should review their COVID-19 policies to ensure they align with the COVID Guidance as well as current recommendations from the CDC.

As a final thought, the expiration of the PHE is an important milestone in the United States' (and the world's) recovery from the COVID-19 pandemic. While there is cause for celebration, employers should use this time to reflect on their policies and procedures related to pandemics arising out of communicable and highly infectious diseases, so that they are prepared for the possibility of another pandemic[11] in the future.

K&L Gates Labor, Employment, and Workplace Safety lawyers can assist employers in navigating the post-pandemic workplace.

FOOTNOTES

[1] *See* US Department of Health and Human Services, https://www.hhs.gov/coronavirus/covid-19-public-health-emergency/index.html (last visited May 15, 2023).

[2] *See* EEOC, https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws?utm_content=&utm_medium=email&utm_name=&utm_source=govdelivery&utm_term, (last visited May 15, 2023).

[3] *See, e.g.,* COVID-19 Vaccines for Everyone! Wait, Not So Fast. Considerations for Health Care and Other Employers When Evaluating Mandatory COVID-19 Vaccination Programs, (24 November 2020); and COVID-19: Mandatory Vaccinations: New EEOC Publication Provides Timely Guidance for Employers, (28 December 2020).

[4] *See*, COVID Guidance at Section N.2.

[5] The COVID Guidance notes that "[d]etermining whether a specific employee's COVID-19 is an actual disability always requires an individualized assessment, and such assessments cannot be made categorically." *See* COVID Guidance.

[6] *See*, COVID Guidance at Section N.2.

[7] *See* COVID Guidance at Section D.19.

[8] *See* 1 May 2023 White House Statement, "The Biden-□Harris Administration Will End COVID-□19 Vaccination Requirements for Federal Employees, Contractors, International Travelers, Head Start Educators, and CMS-Certified Facilities", https://www.whitehouse.gov/briefing-room/statements-releases/2023/05/01/the-biden-administration-will-end-covid-19-vaccination-requirements-for-federal-employees-contractors-international-travelers-head-start-educators-and-cms-certified-facilities/ (last visited May 16, 2023); see also K&L Gates Legal Alert, Scotus Blocks Osha's ETS And Allows CMS Mandate to Go into Effect (14 January 2022).

[9] *See*, COVID Guidance at K.5.

[10] *See*, e.g., K&L Gates Legal Alert, Covid-19: Florida Curtails Vaccination Mandates for Private Employers (19

©2005-2026 K&L Gates LLP. All Rights Reserved.

November 2021), https://www.klgates.com/COVID-19-Florida-Curtails-Vaccination-Mandates-for-Private-Employers-11-19-2021.

[11] For example, as the world continued to grapple with COVID-19, monkeypox was declared a public health emergency in July of 2022. See K&L Gates Legal Alert, "Here We Go Again" (August 5, 2022), https://www.klgates.com/Here-We-Go-Again-Considerations-for-Employers-in-Addressing-Monkeypox-in-the-Workplace-7-28-2022.

KEY CONTACTS



APRIL BOYER
CHAIR OF WOMEN IN THE PROFESSION COMMITTEE

MIAMI
+1.305.539.3380
APRIL.BOYER@KLGATES.COM



ERINN L. RIGNEY
PARTNER

CHICAGO
+1.312.807.4407
ERINN.RIGNEY@KLGATES.COM

This publication/newsletter is for informational purposes and does not contain or convey legal advice. The information herein should not be used or relied upon in regard to any particular facts or circumstances without first consulting a lawyer. Any views expressed herein are those of the author(s) and not necessarily those of the law firm's clients.

©2005-2026 K&L Gates LLP. All Rights Reserved.