

**Public Sector Employment Legal
Developments – Or Stop “Pivoting”
and Move Forward:
*Legal Considerations for Your Post-
Vaccine/Post-COVID Workforce***

Presented by David J. Kramer
To the Nebraska Association of County
Officials
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Pivot!



Mask Issues

The Gateway to Reopening

CDC Guidance for Vaccinated Individuals

- Fully vaccinated individuals:
 - Can resume activities without a mask or social distancing
 - except as required by other laws, or
 - local business or workplace guidance
 - Need not self-quarantine or get tested before or after domestic travel
 - Need not self-quarantine after exposure to someone with COVID-19 unless symptomatic

Equal Employment Opportunity Commission (EEOC)

On May 13, 2021, the U.S. Department of Health and Human Services, Centers for Disease Control and Prevention (CDC) issued updated guidance for fully vaccinated individuals, exempting them from masking requirements “except where required by federal, state, local, tribal, or territorial laws, rules, and regulations, including local business and workplace guidance.” **The EEOC is considering the impact of this CDC guidance on EEOC’s COVID-19 technical assistance provided to date.**

Occupational Health and Safety Administration (OSHA)

The Centers for Disease Control and Prevention (CDC) has issued new guidance relating to recommended precautions for people who are fully vaccinated, which is applicable to activities outside of healthcare and a few other environments. OSHA is reviewing the recent CDC guidance and will update our materials on this website accordingly.

Until those updates are complete, please refer to the CDC guidance for information on measures appropriate to protect fully vaccinated workers.

Local Mask Mandates

- Mandates in Omaha, Lincoln, Grand Island, Kearney, Norfolk, Columbus, Hastings... have expired or been rescinded.

Things may be getting back to
“normal”!



Practical Application

- Requires employer knowledge of vaccination status (or at very least, the honor system)
 - Employers may ask about status *but* can't go further
 - Must keep status confidential
- Then, determine whether to loosen parameters for all, some, or none

Relax for Vaccinated Only

- How to enforce this?
 - Honor system?
 - Post list of vaccinated employees?
 - Require employees to wear a sticker/insignia?
 - Inform supervisors of vaccination status?

ADA Regulations

(i) Confidentiality. Information obtained...regarding the medical condition or history of any employee shall be collected and maintained on separate forms and in separate medical files and be treated as a confidential medical record, except that:

(A) Supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations;

29 C.F.R. § 1630.14(d)(4)

Relax for Everyone

- You may be creating a safety risk
 - Contrary to CDC guidance (i.e., standard of care)
- OSHA
 - Not protecting employees from recognized hazards that are causing or likely to cause death or serious physical harm to employees (i.e., the General Duty clause)
- Nebraska COVID-19 Liability Act

Relax for No One

- Arguably the safest and least risky option
- Risk angering vaccinated employees



Returning to the Office

Poll Question #1



“How you doin” with returning to the office?

- Never left
- Left, then fully returned
- Have begun the process
- Some have returned, some still teleworking
- Planning for return
- Never going back! Remote forever!

The Enthusiastic Returners



The Resisters



Tough Position



Considerations for Returning

- Survey workforce
 - Determine how many people are vaccinated
 - Determine comfort level in returning to work
 - Consider child care situations (summer)
- Decide whether to continue remote work temporarily, permanently
- Return gradually, consider staggered shifts
- Enforce safety measures
- Encourage people to stay home if sick
- Establish expectation that return is required

Hybrid Work

- Is hybrid work temporary or intended to be permanent?
- Is it scheduled, or flexible?
- How do you protect culture?

What about the Resisters?

- Determine why the resistance
 - If health-related, initiate ADA interactive process
 - If comfort-related, describe the protective measures still being taken
 - If a preference, focus on the essential functions of the job
- What if a fully vaccinated employee requests accommodation?

Poll Question #2

- “How you doin’” with regard to vaccinations?
 - We made vaccinations mandatory
 - We made vaccinations voluntary and do not intend to make it mandatory
 - We made vaccinations voluntary and are considering making it mandatory



Vaccination Mandates

- First consider whether to offer incentives for vaccination
- If that does not increase the vaccination percentage, consider mandating vaccines
 - Offer through employer or employer's agent?
 - Third party?
- Make sure to consider reasonable accommodation
- Consider disparate impact

Vaccination Mandates (continued)

- Public entities can require vaccinations
 - Job-related; clear terms
 - Religious and disability exemptions
- Voluntary vaccination may avoid hurdles ADA and GINA concerns
 - Incentives as long as not coercive

Vaccination Incentives

- Minimal guidance
 - Suggest only de minimis gifts
 - Incentives must be acceptable by all employees to avoid discrimination issues
 - Withdrew wellness plan incentives
 - Cannot be coercive

Permanent Remote Work

Poll Question #3



“How you doin” related to remote work/telework?

- We plan to eliminate remote work and require all employees to return to the office
- We plan to allow some employees to continue remote work
- We plan to move to 100% remote work



Relevant Considerations

- Will you let employees work from other states?
- Management and productivity issues
- Culture/equity issues
- Technology issues
- Legal issues

Technology Challenges

- Remote Server log in only – no use of personal or remote drives
- State statute requiring all reasonable protections and encryption of personal identifiable data
- All other required protections (HIPAA, ADA) must remain in place

Cross-State Law Issues

- Corporate law issues
 - State tax issues
 - Corporate registration/filing
- State employment laws
- State business expense laws
- Workers' compensation
- Unemployment insurance



Managing Working Time

- Develop a clear policy that addresses:
 - To whom the policy applies—not everyone may be able to work remotely
 - Approval to work remotely and to change remote work location
 - How/when to log/clock in and out
 - What “normal working hours” are, and how to record calls or texts outside of normal working hours
 - The right to monitor system use

Managing Working Time (cont.)

- Develop a clear policy that addresses:
 - Adherence to all policies and conduct rules, including drug/alcohol policies
 - Mandatory reporting of employee injuries
 - Mandatory reporting of potential privacy, security, or confidentiality breaches
 - Business expenses

Future Considerations

- Continuing remote work practices
 - Reconsider accommodation requests
- New forms of paid leave

Post-COVID Accommodation Requests



EEOC Guidance

- The Bank permitted telework and excused some essential functions because of COVID-19
- A request to continue telework need not be granted if it requires employer to continue to excuse an essential function of the job
- Temporary excuse of essential function during pandemic ≠ required accommodation after pandemic
- *But*, if worked before, can no longer argue that employee could not perform essential functions

Miscellaneous

FFCRA

- Remember that the FFCRA's paid leave requirements (if you are voluntarily providing) remain in place until September 30, 2021
- Relaxed CDC guidance does not change those obligations

Unions

- Bargaining implicated with mandatory vaccinations
- NLRB advice memos
 - Unilateral employer decisions

NLRB Advice Memos

- Employers can act unilaterally if expressed in terms of CBA
- Limited application of economic exigencies exception to bargaining
- Management rights clause; legal mandates; zipper clauses

Social Movements

- Rise in employee activism internally and externally
- Union protected speech needs a nexus to an employment concern
 - Attendance policies can bypass
- Impacts on work and/or hostile work environments

Social Movements

- Black Lives Matter terminology does not violate the Hatch Act
 - Issue-based advocacy; no political party/candidate endorsements
- Employee discharged for advocating for police reform
 - Upheld since no nexus to employment concern

Case Law

- Amalgamated Transit Union Local 85 v. Port Authority of Allegheny County
 - Black Lives Matter masks worn at work
 - Banned all masks with political/social protest messages. Later limited to specific masks that could be worn at work
 - No evidence provided of actual or reasonably expected disruption to work
 - Too overbroad and arbitrary

Prisons

- Suits regarding conditions
 - Officials acting with deliberate indifference and expose a prisoner to substantial risk of serious damage to future health
- Restricting visitations
- Overall, fewer paroles granted

Questions?

