

COVID-19 Vaccination FAQs for Nonprofits

With COVID-19 vaccines now widely available to all Americans, organizations and institutions that last year began working remotely and suspended in-person programming and events are hoping that widespread protection from the virus may allow for a return to in-person activities. This Legal Alert addresses how the availability of COVID-19 vaccines may open new possibilities for nonprofits and whether they can require employees, clients, and others with whom they interact to be vaccinated. Note that the information below may become out of date over time; for that reason and as a best practice, Lawyers Alliance encourages nonprofits interested in answers to questions about their individual vaccination-related policies to seek the advice of legal counsel.

Can nonprofit employers require employees to be vaccinated?

Employers of all kinds generally may require employees to be vaccinated against COVID-19, so long as such a requirement is justified and the employer makes reasonable accommodations to employees who cannot be vaccinated for certain reasons.

According to guidance issued in December by the federal Equal Employment Opportunity Commission (EEOC),¹ employers may require employees to be vaccinated when unvaccinated employees would pose a “significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation.”² Further, an employer seeking to take any action toward an unvaccinated employee—such as excluding unvaccinated employees from the workplace—may only do so if there is no way to provide a reasonable accommodation that would eliminate or reduce the risk of direct threat to others that an unvaccinated employee might pose. This is especially likely, and especially important, in the case of employees who cannot be vaccinated due to disability or who object on religious grounds, who are protected by anti-discrimination laws, such as Title VII of the Civil Rights Act³ and the Americans with Disabilities Act.⁴

Employers should know that inquiring about an individual employee’s health status is generally prohibited, and the prescreening questions that the Centers for Disease Control and Prevention (CDC) recommends be asked before administering a COVID-19 vaccine are “medical examinations” that employers generally may not conduct.

¹ <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>

² Employers may only conclude that such a direct threat to safety exists after conducting an individualized assessment of four factors—(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—and making a determination that an unvaccinated individual will expose others to the virus at the worksite. *Id.*

³ <https://www.eeoc.gov/statutes/title-vii-civil-rights-act-1964>

⁴ <https://www.ada.gov>

New York State law on the same question is also indefinite, but many New York employers are already requiring staff to be vaccinated.⁵ Employers of all kinds and the legal community are awaiting formal guidance on vaccination policies from New York State and New York City, and legal challenges to the vaccine mandate policies already in effect may clarify how such policies may be permissible under state law.

Employers in other states should look into the state-level legislation and executive guidance where they are, especially since legislators in a number of states have introduced legislation that would restrict employers' abilities to set vaccine requirements.

Must employers provide paid time off for employees to be vaccinated?

Employers in New York must provide employees with paid time off to receive a COVID-19 vaccine. Under a law passed in March,⁶ employers must provide employees with “a sufficient period of time, not to exceed four hours” per vaccine dose, and employers may not discriminate or retaliate against employees who request or take a leave of absence to be vaccinated. The leave taken to receive the vaccine must be paid at the employee’s regular rate of pay for the entire leave period, and according to the governor’s office’s statement about the new law,⁷ may not be charged against any other leave the employee has earned or accrued, such as vacation or standard sick leave. This law will be in effect until December 31, 2022.

Can employers ask employees whether they have been vaccinated?

Employers may ask employees whether they have been vaccinated. They should, however, avoid asking any related or follow-up questions, since those run the risk of soliciting information that employers are not legally allowed to ask of employees. For example, an employer may ask an employee whether she has been vaccinated, but, if she answers that she has not, the employer may not ask why she has not been vaccinated.

Can employers ask job applicants whether they have been vaccinated?

Employers may generally ask job applicants about their vaccination status so long as they follow the same standards for job applicants and employees. For example, an employer who has implemented a vaccination requirement for employees may ask prospective employees whether they have been vaccinated, but an employer who has not issued such a requirement for employees may run into legal risk by asking job applicants about their vaccination status.

Can nonprofits that provide direct services require clients or program participants to be vaccinated in order to receive services or participate in programming in person?

A growing number of universities are requiring vaccinations for students, while accommodating a subset of students with medical or religious reasons for not being vaccinated. And some long-term care facilities have begun providing for all residents to be vaccinated as a matter of policy, with individual

⁵ <https://www.nytimes.com/2021/03/05/health/coronavirus-vaccination-elder-facilities.html>

⁶ <https://www.nysenate.gov/legislation/bills/2021/S2588/amendment/A>

⁷ <https://www.governor.ny.gov/news/governor-cuomo-signs-legislation-granting-employees-time-receive-covid-19-vaccination>

exceptions as required. However, the nonprofit and legal communities are awaiting more guidance from government agencies and courts on this question, so it is important to proceed with caution.

Can companies require employees who aren't vaccinated to take COVID-19 tests?

Requiring antibody (as opposed to antigen) testing is legally allowed. However, keep in mind that a nonprofit employer wanting to do this would either have to arrange to have it done onsite (some area hospitals are doing it) or pay for an employee's time to go elsewhere, plus pay for the test in either scenario, which may not be practical.

Can nonprofits that offer housing or run housing-related services require residents and guests to be vaccinated as a condition of receiving housing?

There is no clear answer yet, so the nonprofit and legal communities are awaiting more guidance from government agencies and courts. A growing number of universities are requiring vaccinations for students, while accommodating a subset of students with medical or religious reasons for not being vaccinated. Such a policy, if implemented by an organization that provides housing, would therefore align with the policies of these educational not-for-profit organizations whose work includes offering housing—though schools are a distinct type of institution, and one with a long-established history of requiring that students show proof of vaccination.

Are there any particular requirements regarding vaccines for nonprofits providing child care?

Yes. Governor Cuomo recently announced health and safety measures that apply to all child care, day camp, and overnight camp programs in New York State.⁸ Under the new guidance, such programs are required to collect COVID-19 vaccine status and documentation for all staff and children in their care. The guidance includes additional requirements for limiting capacity and ensuring mask-wearing and social distancing, particularly for those children and staff who are not vaccinated. Nonprofits who are providing child care, summer, or overnight camp programs are strongly encouraged to read the full guidance.⁹

This memo is meant to provide general information only, not legal advice. Please contact Ciarra Chavarria at Lawyers Alliance for New York at cchavarria@lawyersalliance.org or visit our website, www.lawyersalliance.org, for further information. Lawyers Alliance would also like to thank Peter F. Martin, a Legal Fellow working with Lawyers Alliance through NYU School of Law's National Center on Philanthropy and the Law, for his assistance in preparing this Legal Alert.

Lawyers Alliance for New York is the leading provider of business and transactional legal services for nonprofit organizations that are improving the quality of life in New York City neighborhoods. Our network of pro bono lawyers from law firms and corporations and staff of experienced attorneys collaborate to deliver expert corporate, tax, real estate, employment, intellectual property, and other legal services to community organizations. By connecting lawyers, nonprofits, and communities, we help nonprofits to develop affordable housing, stimulate economic development, promote community arts, strengthen urban health, and operate and advocate for vital programs for children and young people, the elderly, and other low-income New Yorkers.

⁸ Note that this guidance applies to School-Aged Child Care licensed programs.

⁹ https://www.governor.ny.gov/sites/default/files/atoms/files/Child_Care_Daycamps_Detailed_Guidelines.pdf