

# Employee COVID - 19 State Mandated Screening Testing

Eastern Suffolk BOCES  
September 24, 2021

FREQUENTLY ASKED QUESTIONS: COVID-19  
TESTING AND VACCINE MANDATES FOR P-12  
SCHOOL EMPLOYEES\*



## 1. Q: Can P-12 school districts/BOCES compel employees to disclose their COVID-19 vaccination status?

- ▶ A: Yes. Asking employees for proof of COVID-19 vaccination is not a disability-related inquiry and is permissible;
  - ▶ however, asking why an employee did not get vaccinated may be a disability-related inquiry that violates the Americans with Disabilities Act (ADA).
  - ▶ If an employee refuses to answer a question regarding vaccination status, they could be considered insubordinate.

(See Equal Employment Opportunity Commission, What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws, Section K, available at <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws> (last updated May 28, 2021)(EEOC Guidance)).

## 2. Q: Can an employer mandate the COVID-19 vaccine for its employees?

- ▶ A: Likely, Yes.
- ▶ No. Federal law prohibits an employer from mandating that staff receive a COVID-19 vaccine.
- ▶ Title VII of the Civil Rights Act of 1964 and the Americans with Disabilities Act (ADA) may require an employer to provide reasonable accommodations due to an employee's disability or sincerely held religious belief or practice, so long as the accommodation does not impose an undue burden on the employer.
- ▶ Vaccine mandates have been upheld by the U.S. Supreme Court in the past in response to a public health emergency. (*Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11, 35 (1905)).
- ▶ In 1904, the New York Court of Appeals upheld as constitutional a smallpox vaccination mandate directed at school employees and students. (*Viemeister v. White*, 1 N.Y. 235, 238 (1904)).
- ▶ Although courts have not yet issued many decisions on this issue, federal courts in Texas and Indiana have upheld employer vaccine mandates and relied upon the U.S. Supreme Court's decision in *Jacobson*.
- ▶ Some courts in New York have considered whether to temporarily restrain vaccine mandates, but those cases have not been decided on the merits of the claims.
- ▶ In terms of labor law, even if the employer's decision to mandate vaccines is not negotiable, the local can demand to bargain the impact or effects of such decision.

### 3. Q: Does the employer engage in discrimination if it requires an unvaccinated individual to take COVID-19 screening tests?

- ▶ A: A vaccine mandate that is neutral and of general applicability should not implicate the Free Exercise of religion clause of the Constitution, provided it has a rational basis.
- ▶ Requiring individuals who have not provided proof of vaccination to be tested is not discriminatory, as vaccination status is not a class protected by Title VII of the Civil Rights Act of 1964, the ADA or the New York Human Rights Law.

### 4. Q: Can an employer mandate COVID-19 testing for employees

- ▶ A: Yes.
- ▶ The EEOC Guidance at Section A.6 notes that “the ADA requires that any mandatory medical test of employees be ‘job related and consistent with business necessity.’”
- ▶ The EEOC further states that “applying this standard to the current circumstances of the COVID-19 pandemic, employers may take screening steps to determine if employees entering the workplace have COVID-19 because an individual with the virus will pose a direct threat to the health of others.” (EEOC Guidance, A.6).

## Mandating COVID-19 testing - Continued

- ▶ The New York State Department of Health issued emergency regulations pertaining to COVID19 testing in P-12 schools. (See 10 NYCRR 2.62, available at the following link: [COVID-19 Reporting and Testing.pdf \(ny.gov\)](#)).
- ▶ The Commissioner of Health issued a determination on COVID19 testing pursuant to the emergency regulation on September 2, 2021 (“COH Determination”), available at the following link: [2.62-determination.pdf \(ny.gov\)](#).

## Mandating COVID-19 testing - Continued

- ▶ Further, the Department of Health issued Interim Guidance for Classroom Instruction in P-12 Schools During the 2021-2022 Academic Year that addresses the implementation of COVID-19 testing for teachers and staff, available at the following link: [school-guidance.pdf \(ny.gov\)](#).
- ▶ The two types of testing are:
  - ▶ (1) Diagnostic Screening Testing (for individuals who, regardless of vaccination status, are symptomatic or are asymptomatic but have been exposed to someone with COVID-19); and
  - ▶ (2) Mandatory Screening Testing (testing of asymptomatic employees with no exposure or symptoms).
    - ▶ Teachers and staff who have been fully vaccinated AND provide proof of vaccination may be permitted by the employing school district to “opt-out” of the mandatory weekly testing.
    - ▶ And, again, the impact or effects of such mandatory testing may be subject to negotiation upon demand.

## 5. Q: Can an employee obtain a medical or religious exemption to a COVID-19 testing requirement?

- ▶ A: Likely, no.
  - ▶ See EEOC Guidance at A.6 and response to Question #4, above.
  - ▶ While an employee might request a medical or religious accommodation from a testing requirement from the employer, the employer may deny such accommodation and may question the medical need for such accommodation.
  - ▶ If an ESBOCES believes they have a case for a medical or religious accommodation they should provide documentation of that accommodation to the Department of Human Resources for review.
  - ▶ Each of those cases will be closely reviewed

## 6. Q: What are the diagnostic COVID-19 testing requirements for employees or students who are symptomatic or have been exposed and are asymptomatic?

- ▶ A: School districts are required to have the capacity (either directly on-site or via referral) to provide diagnostic testing for individuals, including teachers, staff and students, who regardless of vaccination status, are
  - ▶ (a) symptomatic or
  - ▶ (b) asymptomatic, but have been exposed to someone with COVID-19.
- ▶ ESBOCES will be providing referral information for community testing sites for these cases as we have since 2020.

## 7. Q: How does an employer maintain and store COVID-19 testing results and vaccination status for its employees?

- ▶ A: According to EEOC Guidance, testing data and vaccination status is considered medical information and must be kept confidential and maintained in a medical file, stored separately from the personnel file.
- ▶ Within this medical file (even if it predated COVID), an employer may store all medical information related to COVID-19.
- ▶ While COVID-19 status is considered confidential, employers may disclose the name of the employee to a public health agency if the employer learns of a positive test.
- ▶ If an employee tests positive, or is displaying symptoms, employers should “make every effort to limit the number of people who get to know the name of the employee.”

## Maintaining COVID-19 test results - Continued

- ▶ The HIPAA Privacy Rule does not apply to P-12 schools and administrators because they are not covered entities under HIPAA.
- ▶ HIPAA applies to health plans, health care clearinghouses, and to any health care provider who transmits health information in electronic form in connection with transactions for which the Secretary of HHS has adopted standards under HIPAA. (45 CFR §160.103).
- ▶ Although HIPAA does not apply to the COVID-19 testing data and vaccination records, if such records are provided to P-12 schools they must be kept confidential and maintained in a separate file (as noted above).

## 8. Q: What happens when an employee of a P-12 school refuses to submit to screening testing or provide proof of vaccination status?

- ▶ A: If an employee in a P-12 school refuses to comply with the COVID-19 screening testing, assuming they have not provided proof of vaccination and therefore opted out of the screening requirement, and the employee does not have an approved accommodation, they can be disciplined for insubordination pursuant to the statutory

(i.e. Education Law § 3020-a and Civil Service Law § 75) or contract procedures that may apply to the particular employee's title. (\*See response to Question #9, below for additional information). NYSUT's Office of General Counsel represents employees in disciplinary due process proceedings pursuant to Education Law § 3020-a and Civil Service Law § 75 and in contractual disciplinary arbitrations, at the request of the local union.

## 9. Q: Can a school district or BOCES employer dock an employee's pay or unilaterally require them to use leave accruals for days out of school because the employee refused testing or to provide proof of vaccination?

- ▶ A: The answer depends on the statutory or contractual rights that apply to the particular employee.
  - ▶ For example, if an employee has due process protections under Education Law §§3020/3020-a (tenured teachers); Civil Service §75; or just cause protections under the contract, the employer may be prohibited from imposing discipline without implementing the applicable disciplinary procedure.
  - ▶ These issues may also be an appropriate subject of impact bargaining. The local union may negotiate (or demand to negotiate) the impact or effects of testing or vaccination refusals.

## 10. Q: Who is responsible for the cost of required testing in P-12 schools?

- ▶ A: The district should seek available federal funds to cover the costs of the testing. In accordance with the COH Determination (issued pursuant to Emergency Regulation 2.62), all schools must have the capacity to offer COVID-19 testing to teachers, students and staff. (See NYSDOH Interim Guidance, [school-guidance.pdf \(ny.gov\)](https://www.nysdoh.gov/interimguidance), #6).
- ▶ According to the Regulatory Impact Statement for Regulation 2.62, in imposing testing requirements pursuant to the COH Determination, the Commissioner, in consultation with the NYSDOH, is directed to consider costs and how they may be offset.

## COVID-19 Testing costs - Continued

- ▶ For example, the American Rescue Plan allocated \$335 million to support COVID-19 detection and prevention through screening testing in New York Schools (this excludes NYC which received separate funding).
- ▶ These funds were distributed to states by the CDC's Epidemiology and Laboratory Capacity for Infectious Diseases Cooperative (ELC) Agreement and are referred to as "ELC Funds" by the NYSDOH.
- ▶ The NYSDOH passed these funds on to county health departments to distribute to school districts to provide these services directly or contract with labs to provide such services. Thus, these funds are intended to offset costs associated with the mandated school-related testing.
- ▶ Costs for testing may also be offset by testing that is offered under Operation Expanded Testing which is free testing in K-12 schools and other congregate settings funded by the Department of Health and Human Services (HHS) and Department of Defense (DoD).

For additional information, see: ELC Reopening Schools Revised Guidance: Support for Screening Testing to Reopen & Keep Schools Operating Safely ([cdc.gov](https://www.cdc.gov)) (see page 2, Funding Strategy & Support to School Districts) and Epidemiology Laboratory Capacity (ELC) Reopening Schools – Open & Safe Schools ([openandsafeschools.org](https://www.openandsafeschools.org)) (Guidance & Technical Assistance for Funding Recipients).

## 11. Q: Who is responsible for providing the tests, where are they to be provided and when?

- ▶ A: The school is required to provide the tests, although it is not necessarily required to provide them on-site.
- ▶ According to the DOH Determination, schools must have the capacity (either directly on-site or via referral) to provide diagnostic testing for any students, teachers and staff, who regardless of vaccination status, are symptomatic or asymptomatic following exposure to someone with COVID-19.
- ▶ The NYSDOH Guidance provides that schools can have testing performed “off-site by a laboratory, local health department, pharmacy or other local health care provider partner.” See NYSDOH Guidance (p. 7, #2(b)).
- ▶ With respect to Screening Testing for asymptomatic individuals with no reason to suspect infection, the DOH Guidance for Classroom Instruction similarly provides that “schools must establish the capability to conduct or offer screening testing and have flexibility in how they operationalize such testing.” See NYSDOH Guidance (p. 6, #2).
- ▶ When and where such tests will be performed may depend on all the facts and circumstances, including whether the employee is symptomatic or whether there are any time exigencies for getting the test.
- ▶ Once again, the impact or effects of such testing requirement may be subject to negotiation.

## 12. Q: How is the screening testing requirement enforced?

- ▶ A: Local health departments have the primary, but not exclusive, role in enforcement.
- ▶ According to the Emergency Regulations, local health officers must take steps to assist with enforcement of the mandates.
- ▶ Violations of the provisions of the Regulation are subject to all civil and criminal penalties provided for by law and entities, such as school district employers, who violate the Regulations are subject to a maximum fine of \$1,000 per violation.
- ▶ Each day that the entity operates in a manner inconsistent with the Regulation constitutes separate violations.

## 13. Q: What leave time is available for members when exposed to COVID-19?

- ▶ A: New York State has adopted a COVID leave law that provides fourteen days of paid leave upon someone being subject to a mandatory or precautionary order from the state or local health department. Please note, in most instances Suffolk County Department of Health will generally quarantine a person for 10 days depending upon circumstances and symptoms
- ▶ The law authorized the Commissioner of Labor to issue regulations and/or guidance related to the implementation of this law. While the law does not explicitly state the following limitation,
  - ▶ On January 20, 2021, the Commissioner of Labor issued guidance stating that employees may draw upon this leave for a total of three times.
  - ▶ The first time an employee utilizes the leave, it may be for either a quarantine based on the employee testing positive for COVID-19 or due to the employee being placed in a precautionary quarantine by the department of health.
  - ▶ The employee may draw upon the benefit a second, or third time, only if the employee tests positive for COVID-19 and is placed in quarantine by the department of Health. The timeline for utilizing this benefit began on January 1, 2021.

## COVID-10 Leave Continued

- ▶ In the public sector, this benefit is only available for use by the employee for the employee's personal quarantine status.
- ▶ There is no NYS benefit for leave to care for family members in quarantine.
- ▶ In addition, and as general rule, individual sick leave should be available once the NYS law has been utilized.
- ▶ The NY COVID leave time does not replenish once utilized.
- ▶ Locals may also bargain to create COVID leave provisions directly with their employer.
- ▶ Please note that all other benefits that were provided for under federal Families First Coronavirus Response Act expired on 12/31/20 and are no longer in effect (unless locally bargained to continue).

## 14. Q: Is antibody testing a permissible alternative to mandated weekly screening testing for P-12 school employees?

- ▶ A: Likely Not.
- ▶ The emergency regulations provide that the Commissioner of Health “may require routine COVID-19 testing” and that such “testing determination may also include alternatives to testing . . . .”
- ▶ The only alternative to mandatory weekly screening testing set forth in the COH Determination is for a school employee to provide proof of vaccination.
- ▶ Further, the COH Determination only considers two types of testing, nucleic acid amplification tests (NAAT) or a SARS-CoV-2 point of care antigen test (Antigen Test).
- ▶ Both NAAT and Antigen tests are to detect current COVID-19 infections. The Determination makes no mention of, nor lists as an acceptable alternative, antibody or serology tests.
- ▶ Finally, the CDC considers antibody tests as only useful to detect whether an individual had a past infection. The CDC also does not currently recommend that antibody testing be used to determine if an individual is immune to COVID-19 following vaccination or to assess the need for vaccination in an unvaccinated person.
- ▶ Based on the goal of the emergency regulations and directives in the COH Determination, it does not appear that either intended to allow for antibody testing as a substitute to the mandatory weekly testing requirement

## 15. Q: I want to be tested regardless of my vaccination status. Can I?

- ▶ The weekly testing is a mandate.
- ▶ Individuals can opt out of that mandate by showing proof of vaccination.
- ▶ Individuals may choose to not take advantage of this opt-out opportunity.
- ▶ However, please know this program was not designed to fulfill a personal desire for ongoing diagnostic testing, but rather as a screening program to minimize COVID-19 positive individuals in school buildings.

## ESBOCES Testing Program - Key Points



- ▶ Testing program begins the week of September 27, 2021
- ▶ Employees who are not choosing to opt-out must provide proof of a negative COVID-19 test once per week. Test results can be provided to ESBOCES at any point during the week.
- ▶ Employees who are part of this Mandatory Screening Program **DO NOT** need to quarantine while they are awaiting their weekly testing results.
- ▶ We are in the process of finalizing a contract with a vendor to provide in-house, self-administered COVID-19 tests.
- ▶ Until that time, employees have many options for obtaining COVID-19 tests at no out-of-pocket expense to the employee

## ESBOCES Testing Program - Key Points - continued

Suffolk County Department of Health Testing Location  
Drive-Thru

COVID-19 Rapid Testing for Teachers, Faculty, Bus Drivers and other educational staff

Saturday September 25

8am-4pm Smith Point County Park

1 William Floyd Pkwy

Shirley, NY 11767

No appointment required Drive-Through Testing

**Bring Your School ID**

Employee Verification:

School district staff members will need to show ID or a letter (on school letterhead) at the testing site noting they are an employee of the school district. These testing sites are only for school district asymptomatic employees (not family members or dependents).



## ESBOCES Testing Program - Key Points - continued

### Additional Testing Sites Available for all:

- ▶ In addition to these county-sponsored locations, unvaccinated staff members can also visit any one of the following testing sites in Suffolk County on their own.
- ▶ Symptomatic employees should see their own physicians and/or visit one of these locations:
- ▶ 19 City MD Locations
- ▶ 19 CVS Locations
- ▶ 15 Quest Locations
- ▶ 14 Go Health (Northwell) Locations
- ▶ 11 STAT Health Locations
- ▶ 11 Walgreens Locations



## ESBOCES Testing Program - Key Points - continued

### Additional Testing Sites Available for All:

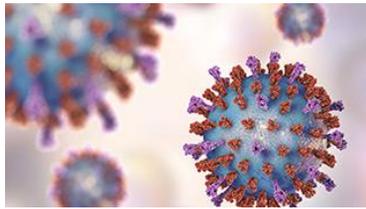
- ▶ 10 Sun River Health Locations
- ▶ 6 Rite Aid Locations
- ▶ 5 ProHealth Catholic Services Locations
- ▶ 4 Long Island Urgent Care Locations
- ▶ 3 MD 365 Locations
- ▶ 3 Enzo Labs Locations
- ▶ 2 American Family Urgent Care Locations
- ▶ 2 Excel Urgent Care Locations



(This list does not include hospitals, medical practices, government-run testing sites, mobile pop-up site, or single location testing sites.)

## ESBOCES Testing Program - Key Points - continued

- ▶ Reporting School District Requirements
- ▶ Reporting of COVID testing is required by school officials
- ▶ This includes reporting our known cases to Suffolk County Department of Health
- ▶ Reporting in the New York State COVID-19 School Report Card



## Employee Options for reporting their COVID-19 test results

- ▶ Upload into the School Front portal
- ▶ Place a copy of your test results clearly marked with your name into a sealed envelope,
- ▶ Send via interoffice mail to:

COVID-19 Testing Program  
Department of Human Resources  
James Hines Administration Center



Questions - please place them in the Q and A or chat

