

COVID-19 Reopening Guidance for the Fitness Industry

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As COVID-19 vaccines become more available, companies in the fitness industry, including gyms, health clubs, and fitness boutiques, continue to navigate their reopening plans. This article addresses questions companies in the fitness industry may have.

How much staff do I need and who should I bring back to work?

Once companies determine the appropriate number of employees to bring back to work, they will need to go through a detailed analysis to determine who to bring back first. Relevant to such analyses will include evaluating employees' past performance or tenure for a merit- or seniority-based return system, among other considerations. If past, objectively based criteria is not available, selections must be analyzed carefully to minimize risk related to potential disparate impact claims. Companies also should consider restructuring compensation for staff to encourage returning and ensure adequate compensation (*i.e.*, shifting piece-rate workers to hourly, incentive bonuses for virtual class, or newly structured group class attendance).

What additional restrictions should I be aware of to keep my workplace safe for employees and patrons?

Companies should consider industry-specific guidance from the Occupational Safety and Health Administration or Centers for Disease Control and Prevention. If individuals are being screened before entering the workplace, companies also should decide who will be screened (*e.g.*, employees, patrons, and vendors), how these individuals will be screened, and who will perform the screening. Finally, masks, gloves, wipes, sanitizers, and disinfectants may be required, and the company should refer to any state and local requirements concerning these requirements. Importantly, if screening occurs for non-exempt employees, potential issues may include ensuring such employees are compensated for time spent during (and waiting for) the screening. Additionally, compensation time for donning and doffing any personal protective equipment may be required.

What if my employee refuses to come to work because of concerns about contracting COVID-19?

First, determine whether any federal, state, or local leave law applies. Second, if a leave law does not apply, the company should be prepared to address accommodations or other requests from employees who refuse to return to work or ask to continue telework due to health and safety concerns. Companies will be justified for relying upon existing leave policies in making employment decisions and may require employees to come back to work if: (i) the employee does not present with a risk factor that could increase their risk of contracting COVID-19 (*i.e.*, compromised immune system); (ii) the employee has not been advised by their doctor that they have a preexisting condition that makes them more susceptible to complications if they contracted COVID-19; and (iii) the employer is following federal or state mandates regarding protection of employees and can require employees to come to work.

Can I mandate my employees to get a COVID-19 vaccine?

Guidance issued by the U.S. Equal Employment Opportunity Commission (EEOC) does not expressly prohibit employers from implementing mandatory vaccinations under federal anti-discrimination laws. However, the EEOC has not precluded claims under the federal employment discrimination laws it enforces and does not address whether a vaccine's distribution under an Emergency Use Authorization limits an employer's ability to mandate vaccines. Additionally, since the EEOC deals with federal employment discrimination laws only, employers should stay updated regarding pending state legislation on COVID-19 vaccines. State bills pending take both sides on permitting or prohibiting mandatory vaccines. Employers should be cautious if they consider adopting COVID-19 vaccination mandates given these and other related considerations.

If a company ultimately decides to implement a mandatory vaccine policy for its employees or a policy that encourages vaccinations, it should also decide whether it will require employees to provide proof of vaccination. If so, the company should inquire *solely* whether an employee has received a vaccine or not or ask for proof (such as a vaccination card). The EEOC has indicated that asking for other medical information or inquiring why an employee did not receive a vaccination would be a disability-related inquiry requiring additional regulatory justification. Regardless of whether a company mandates its employees receive a COVID-19 vaccination, it should consider educational information for employees on how they can register for vaccinations so that willing employees can easily find a vaccine when that employee becomes eligible.

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