

MEMORANDUM

TO: Chancellor Mark Hagerott; Dr. Joshua Wynne
FROM: Eric D. Olson
DATE: April 15, 2021
CC: Institutional CEOs, Smart Restart Task Force
RE: UPDATE: Additional Reopening Issues

In answer to a request from institution presidents for a summary regarding what NDUS can and cannot require of students and employees regarding Covid-19 procedures:

1. Can we require students and/or employees to receive a Covid-19 vaccination before returning to campus for Fall 2021?

In a word, no. NDUS and institutions do not have authority to require a Covid-19 vaccination in order to work or attend classes. Recommending and encouraging vaccination as a route to more open campus and less Covid restrictions is permissible.

Care should be taken when communicating relaxed requirements for vaccinated individuals (for instance not wearing a mask or not needing to quarantine if a close contact of a positive Covid case), the preferred presentation would be to state the requirement and to note that an individual may choose to offer proof of vaccination in lieu of these restrictions. We should avoid any appearance of more punitive measures being required of non-vaccinated individuals, but rather as options for exemptions at the choice of the individual.

2. Can we require employees, students, or campus visitors to wear face coverings?

Unless the individual requests and accommodation under the ADA due to an existing disability which would render them unable to wear a mask (via the ADA interactive process), institutions and the NDUSO may require all employees, students, and visitors to wear face coverings.

3. Can we require employees / students / campus visitors to be screened for COVID (temperature or self-reported symptom questionnaire?)

Institutions may screen employees, students, and campus visitors who enter campus buildings or workplaces, and should rely on the CDC, other public health authorities, and reputable medical sources for guidance on symptoms associated with the disease. For example, additional symptoms beyond fever or cough may include new loss of smell or taste as well as gastrointestinal problems, such as nausea, diarrhea, and vomiting. This information may guide institutions with respect to choosing questions to ask employees to determine whether they would pose a direct threat to health in the workplace.

If a student or employee entering a campus building requests an alternative method of screening due to a medical condition, the institution should treat this request as a reasonable accommodation request under the ADA or Rehabilitation Act. If the requested change is easy to provide and inexpensive, the institution might voluntarily choose to make it available to anyone who asks, without going through an interactive process. Alternatively, if the disability is not obvious or already

known, an institution may ask for information to establish that the condition is a disability and what specific limitations require an accommodation, and request supporting medical documentation. Similarly, if an employee or student requests an alternative method of screening as a religious accommodation, the institution should determine if accommodation is available under Title VII.

Institutions may also administer COVID-19 tests to detect the presence of the COVID-19 virus before permitting employees to enter the workplace, as long as the testing is job-related and consistent with business necessity (i.e., an individual with the virus would pose a direct threat to the health of other employees or students). Consistent with the ADA standard, institutions should ensure that the tests are accurate and reliable. As noted above, requests for accommodation must be addressed under the ADA or Title VII.

Employers may *not* require antibody testing before employees re-enter the workplace. Under the ADA, antibody testing is considered a medical examination and the testing currently does not meet the ADA's standard of being "job related and consistent with business necessity." The EEOC has noted the difference between an antibody test and a test to determine if someone has an active case of COVID-19 (i.e., a viral test). COVID-19 viral tests *are* permissible under the ADA.

4. Can we require employees / students / campus visitors to be tested for COVID if they have symptoms? On a routine surveillance basis, even if asymptomatic?

The CDC does not currently recommend entry testing of all returning students, faculty, and staff. If an individual has symptoms for COVID-19, institutions may require the individual to receive a negative test before returning to campus or the workplace (subject to appropriate accommodations under the ADA or Rehab Act). Because the EEOC has not deemed the COVID-19 viral test to be a medical examination, COVID-19 tests may be required of asymptomatic employees as a condition of employment.

The guidance is much more mixed with respect to requiring COVID-19 tests of non-symptomatic students if they have not been exposed to COVID-19 per information from public health officials. Under the circumstances, it would likely be more advisable to recommend testing as appropriate, but to require self-quarantine and self-monitoring for symptoms if students refuse to receive a COVID-19 test.