



**Governor Mandates COVID-19 Vaccinations  
Or Testing For All School Staff Members**

On August 23, 2021, Governor Murphy signed Executive Order No. 253 (“EO 253”), which mandates that all “covered workers” who work in a “covered setting” must submit proof of full COVID-19 vaccination by October 18, 2021, or “submit to a minimum of weekly or twice weekly testing on an ongoing basis until fully vaccinated.” EO 253 takes effect immediately and will remain in effect until revoked or modified, and requires covered settings to maintain a policy that requires all covered workers to provide proof of full vaccination or be tested at least one to two times per week, beginning October 18, 2021.

The term “covered setting” is defined as any public, private, or parochial preschool program, elementary school, secondary school, charter school, or renaissance school, while “covered workers” means “all individuals employed by the covered setting, both full- and part-time, including, but not limited to, administrators, teachers, educational support professionals, individuals providing food, custodial, and administrative support services, substitute teachers, whether employed directly by a covered setting or otherwise contracted, contractors, providers, and any other individuals performing work in covered settings whose job duties require them to make regular visits to such covered settings, including volunteers.” Individuals who visit a school only to provide one-time or limited-duration repairs, services, or construction are not considered “covered workers.”

**(1) Vaccination Requirement**

To comply with the “proof of full vaccination” mandate, covered workers may present any of the following documents if they list a COVID-19 vaccine authorized for Emergency Use Authorization in the United States and/or the World Health Organization, as well as each dose’s administration date: (a) a CDC COVID-19 Vaccination Card, or an electronic or physical copy; (b) an official record from the New Jersey Immunization Information System or other State immunization registry; (c) a record from a health care provider on official letterhead signed by a licensed physician, nurse practitioner, physician’s assistant, registered nurse, or pharmacist; (d) a military immunization or health record from the United States Armed Forces; or (e) docket mobile phone application record or any state specific application that produces a digital health record. Covered settings must comply with the Americans with Disabilities Act and all other applicable State and federal laws pertaining to the collection and storage of employee health information regarding vaccination and testing for COVID-19, and ensure that this information is maintained separately from employee personnel files.

**(2) Testing Requirement as an Alternative to Vaccination**

Covered settings must require any staff who are not “fully vaccinated” by October 18, 2021 to undergo a minimum of weekly or twice weekly testing, until they are fully

vaccinated. Because EO 253 does not address how the costs of testing for unvaccinated employees will be funded, it is unclear whether the employer or the employee is expected to pay for the testing. However, it is likely that if this issue were to be legally challenged, a finding would be reached that the costs of mandatory testing for unvaccinated staff members is mandatorily negotiable, as nothing within EO 253 expressly imposes the financial burden of the minimum weekly testing requirement upon an unvaccinated employee.

If an employee is not working on-site during a week in which testing would ordinarily be required, it is not necessary for the employee to undergo testing that week. EO 253 also reflects that the testing requirement, as an alternative to the vaccination requirement, “shall not supplant any requirement imposed by the covered setting regarding diagnostic testing of symptomatic workers or screening testing of vaccinated workers.” Additionally, each covered setting must have a policy for tracking the results of staff members’ COVID-19 testing, and must report those results to the local health department.

EO 253 does not address whether employees may seek a medical exemption from both the vaccination requirement and the testing requirement, where an employee submits sufficient medical documentation to support the exemption request. However, in order to comply with the Americans with Disabilities Act and other applicable State and federal laws, school districts should carefully consider granting such a request upon receipt of sufficient documentation from a medical provider stating that the employee cannot comply with either the vaccination requirement or the testing requirement for medical reasons, and consult with legal counsel as necessary.

### **(3) Mandatory Mask Wearing Indoors on School Premises**

Paragraph 9 of EO 253 clarifies that “the policy of public, private, and parochial preschool programs, and elementary and secondary schools, including charter and renaissance schools, regarding mandatory mask wearing in the indoor portion of school district premises, as outlined in Executive Order No. 251 (2021), must require individuals seeking a medical exemption from mask wearing under Paragraphs 1(a) – (c) of that Order to produce written documentation from a medical professional to support the exemption. Self-attestations and parental attestations are not sufficient for this purpose.” Thus, school boards may not grant a request by a parent, guardian, or student seeking an exemption from the mask wearing requirement established by Executive Order No. 251, absent “written documentation from a medical professional to support the exemption.”

### **(4) Penalties for Violations**

Paragraph 13 of EO 253 states, “Penalties for violations of this Order may be imposed under, among other statutes, N.J.S.A. App. A:9-49 and -50.” Therefore, individuals who violate the requirements of EO 253 may be subject to penalties including up to six months of jail time and a maximum fine of \$1,000.00. Nevertheless, EO 253 does not clearly indicate how enforcement will occur when covered workers fail to comply with both the vaccine

requirement and the alternative testing requirement. It is possible that school boards may need to negotiate the impact with local bargaining units, as permitted by N.J.S.A. 34:13A-24, with respect to a schedule of minor disciplinary sanctions, including fines for example, for non-compliance, but excluding letters of reprimand and tenure charges which are not negotiable (N.J.S.A. 34:13A-22). For tenured employees who refuse to comply with EO 253, districts may consider filing tenure charges if necessary, after attempting to achieve compliance through written directives and warnings that continued non-compliance may result in discipline, up to and including termination of employment.

For non-tenured employees, non-renewal or mid-contract termination upon proper notice may be warranted, based on the employee's intentional violation of the board's policy requiring COVID-19 vaccination or weekly testing, after having received adequate directives and warnings in response to the violation. While EO 253 confirms that minor criminal offense penalties also can be assessed, the State Police, local law enforcement, and the Department of Health may be unable to offer sufficient assistance to school districts in this regard.

#### **(5) Policies May Include Possible Additional or Stricter Requirements**

Finally, a covered setting will be permitted to institute "a vaccination or testing policy that includes additional or stricter requirements, so long as such policy comports with the minimum requirements of this Order." Similarly, schools "may also maintain a policy that requires more frequent testing of covered workers," beyond the mandates of EO 253.

#### **Conclusion**

As soon as possible, school boards should develop and adopt a policy consistent with the requirements of EO 253, and should make all covered workers aware of the content of the policy and the October 18, 2021 deadline for becoming fully vaccinated, in order to avoid having to submit to mandatory COVID-19 testing once or twice per week. Covered workers should also be clearly advised of the process by which they may request an exemption from the requirements of EO 253, as well as the possible penalties that may apply to covered workers for violations of the requirements of EO 253.

The Busch Law Group will continue to provide legal updates on these and other issues related to COVID-19, as necessary. Should you have any questions or concerns, our attorneys are always available to assist you.

This communication does not create an attorney-client relationship. The information contained herein is provided for informational purposes only and should not be construed as legal advice. No recipients of this correspondence should act or refrain from acting on the basis of any content without seeking the appropriate legal or other professional advice on the particular facts and circumstances at issue from a licensed attorney. The Busch Law Group expressly disclaims any and all liability with respect to actions that may or may not be taken based upon any or all of the content of this correspondence.