

Resources

The Impact of COVID-19 Laws on the Return of Employees to the Workplace

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Due to the COVID-19 pandemic, sweeping new laws and regulations having a tremendous impact on California workplaces were enacted in California in 2020 and 2021. Included, among numerous others, are laws imposing health and safety obligations on employers, regulations requiring employers to quarantine employees and provide wage replacement for employees exposed to COVID-19 in the workplace, along with mandated job-protected paid sick leave and extended paid family leave.

In addition, legislation was passed in California providing for a rebuttable workers' compensation presumption that an employee who contracted COVID-19 did so in the workplace.

Cal/OSHA also enacted COVID Emergency Temporary Standards (ETS), requiring employers to establish and implement written COVID-19 Prevention Programs, provide effective employee training programs on how to prevent COVID-19 spread, maintain COVID-19 testing for employees and set up comprehensive recordkeeping and reporting of COVID-19 cases. COVID ETS allows Cal/OSHA to impose significant fines for non-compliance, and in cases in which there is a spread of the virus, Cal/OSHA is empowered to close down businesses.

Although the mandatory employer paid sick leave and mandatory extended employer paid extended family leave provisions under the Families First Coronavirus Response Act (FFCRA) expired on December 31, 2020, California enacted SB 95, which extends these mandatory employer paid sick leave requirements through September 30, 2021, and applies them to all private employers with more than 25 employees, not just employers with fewer than 500 employees.

These laws have the potential to delay or undermine the recovery of California businesses. In order to protect the workplace and avoid the consequences of mandatory quarantines, paid sick leave, loss of essential workers and possible fines and closures, employers might want to use every effort not to allow anyone in the workplace who has COVID-19 symptoms or who may have been recently exposed to someone who tested positive to COVID-19.

The Primary Issue: May California Employers Require Their Employees Be Vaccinated?

The short answer is: yes, at least as to private-sector employers.

According to the U.S. Equal Employment Opportunity Commission, it is legally permissible to require that all employees get vaccinated. Under the Americans with Disabilities Act (ADA), an employer is permitted to implement a vaccination requirement as a qualification standard or a "requirement that an individual shall not pose a direct threat to the health or safety of individuals in the workplace."

The California Department of Fair Employment and Housing ("DFEH") also made clear in its "Guidance" that under the California Fair Employment and Housing Act ("FEHA"), "employers may require employees to receive an FDA-approved vaccination against COVID-19 infection."

Under OSHA's General Duty Clause, employers have an obligation to employees to furnish a workplace that is "free from recognized hazards that are causing or are likely to cause death or serious physical harm." Because COVID-19 is a recognized deadly hazard, employers could be faced with a claim for violation of OSHA if they do not mandate that employees be inoculated in order to perform in-person work.

Reasonable Accommodation for Employees with Disabilities or Sincerely held Religious Beliefs

Although generally pursuant to both the federal EEOC guidance, as well as the California DFEH, an employer may require an FDA approved COVID-19 vaccine as a condition of employment or return to the workplace, employers have reasonable

accommodation obligations to employees who refuse vaccination due to disability or a sincerely held religious belief or practice.

According to the California DFEH an employer may require employees to receive an FDA-approved vaccination so long as the employer:

- Does not discriminate against or harass employees or job applicants on the basis of a protected characteristic;
- Provides reasonable accommodations **related to disability or sincerely held religious beliefs or practices**; and
- Does not retaliate against anyone for engaging in protected activity, such as requesting a reasonable accommodation or alleging discriminatory practices.

If an employer requires employees to be vaccinated, but an employee objects to the vaccine on the basis of a disability or sincerely held religious belief, the Guidance explains that the employer must engage in an interactive process with and reasonably accommodate the employee, unless such an accommodation would impose an undue hardship.

The DFEH Guidance recognizes that employees who are unable to perform their essential duties even with reasonable accommodations, or those who cannot perform those duties in a manner that would not endanger the health or safety of themselves or others even with reasonable accommodations, may be excluded from the workplace.

According to the DFEH, when assessing whether an undue hardship exists, employers should consider whether the individual can work from home or “whether reasonable procedures and safeguards could be put in place at the worksite that would enable the employee to work without endangering the employee [or applicant] or others.” This may entail more stringent compliance with mask wearing and social distancing obligations, if feasible. A reasonable accommodation does not mean that the employer must allow workers with disabilities or religious belief objections to working with others if that would jeopardize the safety of other employees, vendors, customers, etc.

Disability Accommodation

A qualified individual with a disability may be entitled to an exemption from an employer required vaccine policy:

- The FEHA requires employers to make reasonable accommodations to an employees’ known disabilities;
- If an employee objects to vaccination on a disability-related basis, the employer must engage in an interactive process to reasonably accommodate the employee;
- If accommodation is available that does not create an undue hardship on the employer, it must be provided to the disabled employee; and
- If the employee cannot perform the essential functions of their position in a manner that doesn’t endanger the health or safety of others, even with reasonable accommodations, the employer may exclude the employee from the workplace.

Religious Accommodation

If an employee objects to vaccination on the basis of a sincerely held religious belief or practice, the employer must reasonably accommodate the employee. The accommodation analysis however is not as stringent as with disability:

- Unless specifically requested by the employee, a religious-based accommodation is not considered reasonable if such accommodation results in the segregation of the individual from other employees or the public.
- Personal beliefs opposing vaccinations rooted in political, medical, or intellectual bases (e.g. “anti-vaxxer” views) however do not entitle an individual to a religious exception.
- Personal beliefs that inoculations would be damaging to physical health based on internet research have been found to not be “religious in nature.”
- If the employer shows that an accommodation imposes an undue hardship, the employer may exclude the employee from the workplace.
- Based on EEOC guidance, Employers should *not* request documentation or additional information supporting a religious objection unless it has “an objective basis for questioning the religious nature or the sincerity of a particular belief, practice, or observance.”

Employers Are Not Required to Accommodate Philosophical or Political Objections

- There is no obligation to reasonably accommodate employees who oppose being vaccinated if their objection is not related to a disability or a sincerely held religious belief.
- Employers are not required to reasonably accommodate employees who do not “trust that the vaccine is safe.”
- Employers are not required to reasonably accommodate employees who are afraid of, or uncomfortable getting the vaccine.

If an employee refuses to be vaccinated but does not have a disability reason or sincerely held religious reason for not being vaccinated, the employer does not have to accommodate that employee. The employee may be refused access to the worksite

Employers may enforce reasonable disciplinary policies with respect to employees who refuse to become vaccinated for a reason other than disability or religion, provided that the employer does not discipline an employee in retaliation for engaging in protected activity, such as requesting a reasonable accommodation or alleging discriminatory practices in connection with the employer’s vaccination policy.

An Employer May Require Its Employees to Provide Proof of Vaccination

- The DFEH Guidance provides that asking employees for proof of vaccination is not a disability-related inquiry, religious creed-related inquiry, or a medical examination.
- An employer can require employees who have been inoculated to supply a record of vaccination before allowing them to return to in-person work without running afoul of the ADA.
- If, however, the employer asks employees why they did not receive the vaccine, it will increase the risk of liability for discrimination claims.
- According to the CDC, “If an employer requires employees to provide proof that they have received a COVID-19 vaccination from a pharmacy or their own healthcare provider, the employer cannot mandate that the employee provide any medical information as part of the proof.”

Reasonable Accommodations and Undue Hardship

If an employee requests an exemption or accommodation to a mandatory vaccine policy on the basis of a disability or a religious belief, the employer may only deny the accommodation if it can prove that it would result in an undue hardship to the employer.

An undue hardship based on a religious belief under Title VII is defined as “more than *de minimis*” cost or burden, which is a substantially lower standard than the ADA undue hardship standard, which is defined as “significant difficulty or expense.” It would be an undue hardship if the accommodation resulted in a direct threat to the health and safety of the employee or third parties.

If an employee requests an exemption from a vaccination policy, whether due to a disability or a religious belief, there are a number of possible alternative means of infection control that the Company could consider:

- Requiring the employee to transfer to a position that does not require interaction with other employees and members of the public;
- Requiring the employee to work, or continue to work, remotely;
- Relocating the employee’s workspace to eliminate interaction with other employees;
- Requiring employees to attend meetings remotely;
- Altering an employee’s work schedule to reduce the time spent at work with other employees; and/or
- Providing unpaid leave to the employee until virus spread is more controlled.

Potential accommodations would need to be evaluated on a case-by-case basis depending on an employee’s job duties.

Best Practice: When an exemption is requested, the employer should be sure to engage in the interactive process to determine if there is an alternate solution that will not create an undue hardship. Efforts to accommodate employees who seek exemptions to a mandatory policy should always be carefully documented.

Incentives

Following EEOC guidance, if the employer simply gives a nominal incentive to employees who provide proof they received the vaccine without providing any other, additional medical information, there should be no ADA concerns. Rather than implementing absolute mandates, employers may wish to focus on steps they can take to encourage and incentivize employees to get vaccinated. For example, employers may choose to:

- Develop vaccination education campaigns;
- Make obtaining the vaccine as easy as possible for employees;
- Cover any costs that might be associated with getting the vaccine;
- Provide incentives to employees who get vaccinated;

Provide paid time off for employees to recover from any potential side effects (though, in California, Employees must already be paid for the time taken to get vaccinated);

- Provide employees leave for absences related to an adverse reaction;
- Provide extra PTO days; and/or
- Provide first priority for overtime work or a more desirable schedule.

Unionized Employers

To the extent an employer's workforce is unionized, implement some of these requirements may be mandatory topics of bargaining. As such, absent express contract language suggesting otherwise, an employer may not be able to implement the changes without first exhausting their duty to bargain.

For more information, please contact Laura P. Worsinger (213-457-1744 or lworsinger@dykema.com) or your Dykema relationship attorney. Dykema Labor & Employment lawyers can help you navigate through these complex rules and obligations.

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Labor & Employment

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