

COVID-19

Vaccine Policies, Outbreaks, and Mitigating Legal Exposure



The End is Near

...

In a good way

- Vaccines are becoming more available
- Dr. Fauci is projecting vaccines will be widely available by May or June
- Governments have made it a priority to reopen businesses and get individuals back to work
- The vaccine has brought legal hurdles for the implementation – both logistically and legally
- Employers need to carefully weigh the options before implementing a vaccine policy

Mandatory Vaccines

EEOC

**Default: EEOC =
Yes
California = Yes -
kind of**

“Employers should remember that guidance from public health authorities is likely to change as the COVID-19 pandemic evolves. Therefore, employers should continue to follow the most current information on maintaining workplace safety.”

- General Duty Clause v. Medical Examinations
- Most Health Care Providers will require medical screening questions. If asked by the employer or a contractor on the employer’s behalf, they are “disability-related” under the ADA. Thus, if the employer requires an employee to receive the vaccination, administered by the employer, the employer must show that these disability-related screening inquiries are “job-related and consistent with business necessity.”
- Two Exceptions:
 - Voluntary Vaccines - If an employee chooses not to answer these questions, the employer may decline to administer the vaccine but may not retaliate against, intimidate, or threaten the employee for refusing to answer any questions
 - Third Party Vaccine Administration Unrelated to Employer

Mandatory Vaccines

EEOC = Yes
**California = Yes -
kind of**

DFEH

Under the FEHA, an employer may require employees to receive an FDA-approved vaccination against COVID-19 infection 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 practice, and does not retaliate against employees for protected activities

Mandatory Vaccines

EEOC = Yes
California = Yes -
kind of

DFEH

“DFEH does not provide guidance on whether or to what extent an employer SHOULD mandate vaccination within its workforce”



Mandatory Vaccines

EEOC = Yes
California = Yes,
kind of

Is asking or requiring an employee to show proof of receipt of a COVID-19 vaccination a disability-related inquiry?

No.

However, subsequent employer questions, such as asking why an individual did not receive a vaccination, may elicit information about a disability and would be subject to the pertinent ADA/FEHA standard that they be “job-related and consistent with business necessity.”

Mandatory Vaccines?

Where do we sit?

February 2, 2021 Fisher & Phillips Survey:

- January 26-29: 700 respondents providing their thoughts
 - Mandatory: 9%
 - Optional: 64%
 - Unsure: 27%
- Most likely: agricultural and food production employers (18%); construction (13%), healthcare (12%), hospitality (11%), and retail (10%)
- Least likely: Government employers (4%); finance and insurance (5%); professional services (5%); automotive (6%); manufacturing (7%); and education (9%)

What about Disability Discrimination?

If a safety-based qualification standard, such as a vaccination requirement, screens out or tends to screen out an individual with a disability, the employer must show that an unvaccinated employee would pose a direct threat due to a “significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation.”

Four Factor Determination:

- 1) the duration of the risk;
- 2) the nature and severity of the potential harm;
- 3) the likelihood that the potential harm will occur; and
- 4) the imminence of the potential harm

If there is a direct threat that cannot be reduced to an acceptable level, the employer can exclude the employee from physically entering the workplace, but this does not mean the employer may automatically terminate the worker.

What about Religious Discrimination?

If an employee cannot get vaccinated for COVID-19 because of sincerely held religious belief, practice, or observance, and there is no reasonable accommodation possible, then it would be lawful for the employer to exclude the employee from the workplace.

This does not mean the employer may automatically terminate the worker.

Suggested Policy Language

To assist any employee who is disabled, pregnant, a nursing mother, has a qualifying medical condition that contraindicates the vaccination, or objects to being vaccinated on the basis of a sincerely held religious belief or practice, the Company will engage in an interactive process to determine if a reasonable accommodation can be provided that does not create an undue hardship on the Company and/or does not pose a direct threat to the health or safety of others in the workplace and/or to the employee. To request an accommodation for one of the above reasons, please notify the POSITION TITLE in writing at [insert email/contact]. Once the Company is aware of the need for an accommodation, the Company will engage in an interactive process to identify possible accommodations. Employees may request an accommodation without fear of retaliation. If you believe you have been treated in a manner not in accordance with this policy, please notify the Company immediately by speaking to the POSITION TITLE.



Well, What the Heck Does Of This Mean?

- Monitor new regulation/guidance from California closely!
- Employers should be documenting your internal analysis regarding “necessary business justification” **for each job**. This is not a one day decision
- **DOCUMENT** the reason for vaccine refusal and allow employees to identify their objections as either a disability or religious concern

Well, What the Heck Does Of This Mean?

- If you have employees who refuse to get vaccinated, do not terminate. While the guidance indicates that employers can mandate the vaccine, “do not terminate” is all over the guidance.
 - Consider extended leaves of absence
 - Can the employee work remote?
 - Are there alternative, open, positions that would allow the employee to safely work without the vaccine?

Additional Considerations

- Remember: even if all of your employees are vaccinated, you CANNOT relax the social distancing and face mask requirements, nor any other mandated safety precautions
- Consider staggering employees in a particular department or unit for vaccines. The vaccine may induce such symptoms as fever, headache, and myalgias, and employees with these symptoms may need to be absent from work. By simultaneously vaccinating an entire business unit, you may find yourself with a shortage of staff to keep your operations running.

Additional Considerations

- Mandatory vaccines may require reimbursement of necessary business expenditures
- Employees may be entitled to compensation for their time getting the vaccine
- Whether employees have been vaccinated is HIPPA protected information – it must be kept in a secure location.



Can we incentivize our employees to be vaccinated?

- Yes, but not without risk.
- Need to create exceptions for those that cannot be vaccinated for disability/religious reasons
- IRS requirements associated with employer-sponsored wellness programs
- Potential wage and hour bonus/overtime issues



Q&A Session

I am here for as long as you need me to
answer questions.

Our best wishes to you, your family, your workforce, and those you care about -- stay safe.



TYLER T. RASMUSSEN

Partner
Fisher Phillips, LLP

TRasmussen@fisherphillips.com
949.798.2163