



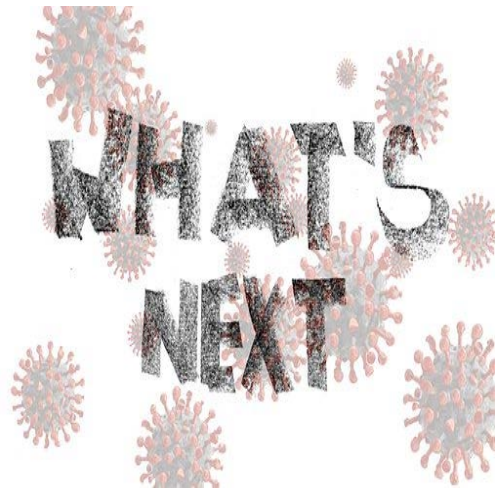
EMPLOYMENT LAW CONSIDERATIONS FOR RETURN TO WORK

JULY 7, 2021

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AGENDA

- California Reopened
- Cal/OSHA emergency standards
- Mandatory Vaccines in Employment
- Legal Issues Implicated by Vaccine Inquiries
- Return to Work Issues
- COVID Litigation Trends
- Preventing Employment Litigation



California Reopened

- The “Blueprint” has been retired
 - No more physical distancing
 - No more capacity limits on businesses
 - No more “tier” system
 - No more masks for the vaccinated
 - Honor system/self-attestation
 - Except for “mega” events
 - » Negative test or proof of vaccination status



Safely reopening California

Last updated July 1, 2021 at 6:38 PM

Thanks to your trust in the vaccine and falling transmission rates, California has fully reopened its economy. This means no more physical distancing, no capacity limits, no county tiers, and relaxed mask guidance.

On this page:

- > [Reopening California](#)
- > [Continuing safety measures](#)
- > [Retiring the Blueprint map](#)

Cal/OSHA Emergency Temporary Standards



- Effective **June 17, 2021**
- Expires **June 13, 2022**
- Cal/OSHA publication re ETS
 - https://www.dir.ca.gov/dosh/dosh_publications/COVIDOnePageFS.pdf
- **Answered Questions**
 - Do “fully vaccinated” employees have to wear masks while working indoors?
 - What does “fully vaccinated” mean?

Cal/OSHA ETS Continued

- **More Questions Answered**

- What vaccine documentation is an employer required to maintain?
- Are there medical privacy issues implicated with vaccine documentation?
- Can an employee decline to state vaccination status?
- Can an employer discipline an employee who declines to state vaccination status?
- Are unvaccinated employees required to wear masks while working indoors?
- Can an employer discipline a “fully vaccinated” employee for wearing a face mask?



Cal/OSHA ETS Continued

- **Even More Questions Answered**

- Are employers required to provide respirators (N95) to all unvaccinated employees?
 - Respirator election form
- Do employers need to provide training regarding use of respirators?
- What other training must employers provide under the ETS?
- Are employers required to enforce physical distancing for employees?
- Are employers required to update COVID-19 prevention plans?
- More questions?
 - <https://www.dir.ca.gov/dosh/coronavirus/Revisions-FAQ.html>

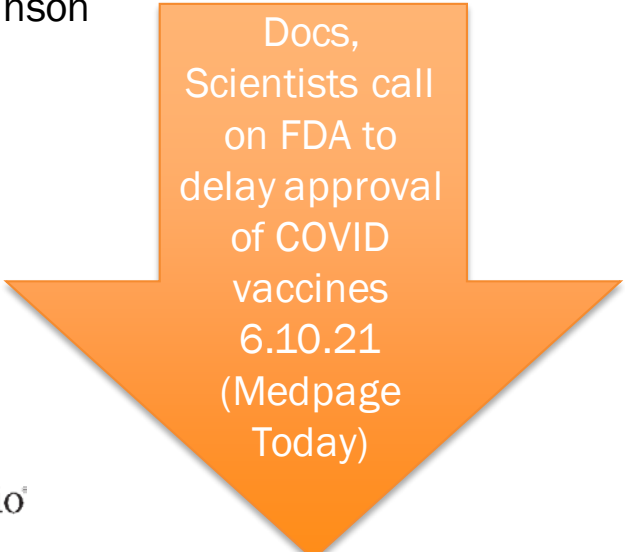




Mandatory Vaccines in Employment

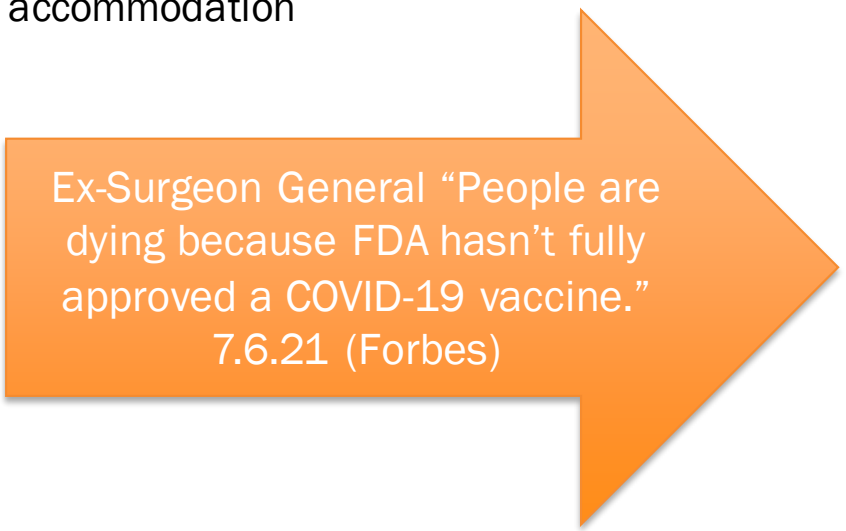
Vaccinations Issued under FDA Emergency Use Authorizations

- U.S. Food and Drug Administration (FDA) issued Emergency Use Authorizations (EUA) for COVID-19 vaccines
 - Pfizer, Moderna and Johnson & Johnson



Docs,
Scientists call
on FDA to
delay approval
of COVID
vaccines
6.10.21
(Medpage
Today)

- Every person has a right to refuse EUA vaccination under the Food, Drug & Cosmetics Act – but no process for accommodation



Ex-Surgeon General “People are
dying because FDA hasn’t fully
approved a COVID-19 vaccine.”
7.6.21 (Forbes)

Mandatory Vaccine Questions

- Can an employer require employees to receive the EUA COVID-19 vaccines? Not without risking liability.
- Can an employer require employees to receive the COVID-19 vaccines once finally approved by the FDA? Yes, but....

Lawsuit To Stop Employer's Mandatory Vaccines

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

CALIFORNIA EDUCATORS FOR
MEDICAL FREEDOM, ARTEMIO
QUINTERO, MIGUEL SOTELO,
JANET PHYLLIS BREGMAN,
CEDRIC JOHNSON, MISANON
(SONI) LLOYD, HEATHER
POUNDSTONE, and THERESA D.
SANFORD,

Plaintiffs,

v.

THE LOS ANGELES UNIFIED
SCHOOL DISTRICT, AUSTIN
BEUTNER, in his official capacity as
Superintendent of the Los Angeles
Unified School District, and LINDA
DEL CUETO, in her official capacity
as the Director of Human Resources
for the Los Angeles Unified School
District,

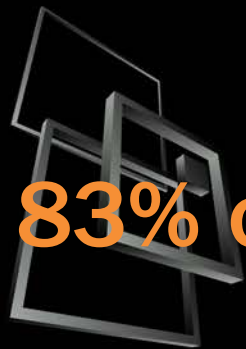
Case No.: 21-cv-02388

**COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF**

DEMAND FOR JURY TRIAL



May 25, 2021 Survey



**83% of employers are reluctant to
mandate vaccines**



Privacy Issues Implicated By Vaccine Inquiries

Privacy Issues and Medical Inquiries



- Proof of vaccines implicates privacy issues
- California Consumer Protection Act (CCPA)
 - Employers that are subject to the CCPA should provide a collection notice (before collection begins) of:
 - the fact of the collection
 - the purpose for collection, and
 - the categories of third parties the information is shared with.
 - **Note:** Vaccination information cannot be collected if the business does not provide notice to the employee.

Privacy Issues and Medical Inquiries

- CCPA Requires disclosure of collection practices in notices provided to consumers and employees.
- Provide pre-collection notice.
- Data privacy and protection laws also require security around the information collected commensurate with the level of sensitivity of the information (health data is generally considered sensitive)
 - HIPAA covered employers?





Other Employment Law Issues Implicated By Vaccines

Employer Vaccine Inquiries

- What should an employer avoid asking?
 - Limit the request so it is not likely to elicit information about a disability
 - ☐ Vaccinated
 - ☐ Unvaccinated
 - ☐ Decline to state
 - Do not ask why an individual did not receive a vaccination
 - Warn the employee not to provide any medical information as part of response to vaccination inquiry
 - Provide a privacy pre-collection notice to the employee under the CCPA



Mandatory Employment Vaccination Considerations

Even after the FDA provides final approval of the vaccines...

- **EEOC and DFEH**: Individuals have a right to refuse vaccination for religious and disability reasons. No retaliation for exercising legal rights.
- **California Labor Code**: No retaliation for political beliefs or activities.
- **CDC Guidance**: Currently focuses on voluntary compliance and provides safety guidance for unvaccinated employees.
- **Liability**: Employers who choose to terminate or discipline employees who refuse to be vaccinated risk potential retaliation claims based on disability, religion, and political beliefs.





Return to Work Issues

Return To Work Considerations



- Provide **CCPA pre-collection notice** before asking about vaccination status
- Collect vaccination status information and store in **confidential medical** file
- Provide **respirator election form** to all employees
 - Provide respirator-fit training
- Distribute **updated COVID-19 written prevention plan**
- Provide Cal/OSHA-required COVID-19 training
- Reiterate prohibition against **discrimination and retaliation**
- Remind employees **accommodations** for disabilities and religious beliefs are available
- Engage in **interactive process** for accommodations
- Provide advance notice of changes to work schedules or locations
- Clearly communicate expectations
- Provide **advance notice** of changes to work schedules or locations
 - Clearly communicate expectations
- Require **return of equipment** or supplies used during remote work
 - Address **expense reimbursement** for remote work period
- If hybrid work, establish primary work location in writing
 - Address expense reimbursement and travel time
- Reiterate **at will employment**

Accommodation Requests - Religion



- Employee refuses to get vaccinated based on a sincerely held religious Christian belief because:
 - *Vaccines are experimental. The body is the temple of the Holy Spirit and should not be used for experimentation.*

"Do you not know that your bodies are temples of the Holy Spirit, who is in you, whom you have received from God?" (1 Cor 6:19)

- Employee refuses to wear a face mask or shield in the workplace based on a sincerely held religious Christian belief because:
 - *The veiling of the face is a Muslim practice of submission to Allah. Requiring a Christian to engage in a Muslim practice violates the employee's religious belief.*
 - *The Bible commands Christians to stand before the Lord with faces unveiled.*

"And we all, who with unveiled faces contemplate the Lord's glory, are being transformed into his image with ever-increasing glory, which comes from the Lord, who is the Spirit." (2 Cor 3:18)

- **What to do?**

Accommodation Requests – Disability

- Employee refuses to return to the office after working remotely since March 2019 because:
 - *The employee does not have child care.*
 - *The employee subsequently offers a doctor's note stating that the employee's disability requires the employee to work from home for 12 months.*
- Employee refuses to work in the office 5 days per week after working in the office 2 days per week for several months because:
 - *The employee's year old knee injury is aggravated by working in the office.*
 - *The employee offers a doctor's note stating that the employee needs to work from home 3 days per week for 10 months.*
- *What to do?*



Handling Employee Accommodation Requests

- **Identify the specific accommodation requested** by the employee.
 - Examples: Report to work without vaccination or face mask or work from home
- **Document the reason** for the accommodation request.
 - Disability or sincerely held religious belief
- Request **additional information**
 - If **disability**, request from employee's doctor :
 - Confirmation that the employee has a disability (do not ask for diagnosis);
 - Explanation of how the employee's disability limits/impairs the ability to perform the duties of the job; and
 - Whether the limitations are temporary (and expected end date) or permanent.
- If **religious belief**, ask employee to state clearly that a sincerely held religious belief supports the accommodation request.
 - Note: Typically, the employer should accept such a statement from the employee.
 - However, if an employer has an objective basis for questioning either the religious nature of the objection to the vaccination or the sincerity of the particular believe or practice, then the employer would be justified in seeking additional supporting information.
- **Commence and continue a “good faith” interactive process** with the employee to discuss reasonable accommodations



Handling Employee Accommodation Requests

- **Document all interactions** with the employee during which the accommodation request was discussed (include dates/times)
- **Identify all potential reasonable accommodations** discussed with employee
- For each accommodation denied, **explain reason for the denial** including:
 - Accommodation ineffective
 - Accommodation would cause undue hardship to employer
 - Identify hardship
 - Medical documentation inadequate
 - Identify issues with documentation
 - Accommodation would require removal of an essential job function.
 - Identify function




- Accommodation would require lowering of performance or production standard.
 - Identify standard
- No alternative vacant position available.
 - Identify positions considered
 - Employee rejected alternative accommodation.
 - identify accommodation offered and reason for employee's rejection.
 - Other
- **Provide written statement to the employee of the specific reasonable accommodation** to be provided.





COVID Employment Litigation Trends

COVID Litigation Trends

- 
- Wrongful termination
 - Retaliation for whistleblowing regarding safety;
 - Retaliation for requesting reasonable accommodation
 - Failure to provide a safe work environment;
 - Discrimination or harassment (age, race, disability or COVID-stereotypes);
 - Failure to provide reasonable accommodations;
 - Failure to provide COVID paid sick leave pay or Cal/OSHA exclusion pay;
 - Wage and hour class action and PAGA action claims;
 - Failure to reimburse expenses incurred for remote work;
 - Unpaid wages for temperature checks, auto clocking remote employees etc;
 - Failure to provide WARN notifications – extended furloughs or layoffs.

Employment and retaliation. Defendant retaliated against plaintiff, a full-time assistant manager, because plaintiff refused to assist a customer who refused to wear a mask in defendant's store during the Covid-19 pandemic. Defendant's corporate-level executives prohibited its retail employees from enforcing the mandate to wear masks and social distance and ordered its employees to assist customers who refused to follow the mandate. Defendant's district manager retaliated against plaintiff after plaintiff lodged complaints about defendant's failure to follow Covid-19 safety protocols by suspending plaintiff and later terminating plaintiff via text message. The reason given for plaintiff's termination was it "came from up top."

Class action for employment. Defendant misclassified its mortgage salespersons as exempt from overtime, minimum wage, meal and rest periods, and paid them on a commission basis which failed to compensate for non-sales work or rest breaks. Defendant also failed to reimburse business expenses incurred by plaintiff while working from home during the Covid-19 pandemic.

Class action for employment. Defendant misclassified its mortgage salespersons as exempt from overtime, minimum wage, meal and rest periods, and paid them on a commission basis which failed to compensate for non-sales work or rest breaks. Defendant also failed to reimburse business expenses incurred by plaintiff while working from home during the Covid-19 pandemic.

Recent San Diego Superior Court Lawsuits June and July 2021

Preventing Employment Liability

- Train supervisors on how to properly deal with all complaints
- Promptly investigate all complaints.
- Consider all California applicable laws and regulations.
- Train supervisors on COVID-19 issues
- Provide a privacy pre-collection notice before asking about vaccine status
- Do not retaliate based on vaccine status
- Keep medical information private
- Engage in an interactive process regarding requests for accommodation
- When possible, be flexible
- Understand “why” employees sue
- Hire and train strong leaders
 - **Employees often sue because of a bad boss**
- Treat employees with dignity and respect
- Communicate effectively
 - **Empathy and active listening**
- Provide coaching and mentoring
 - **Provide job skills support**
- Consider arbitration agreements
- Consider release agreements

Thank you!

Questions? Please feel free to contact us any time for guidance.



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