Returning to the Physical Workplace

Legal parameters and considerations for employers

As California businesses begin to transition back the physical workplace, employers understandably have many questions about what is, and is not, allowed as we continue to grapple with the fallout of the COVID-19 public health emergency. Working with employment law counsel Oscar Rivas, the California Medical Association (CMA) prepared this FAQ to help employers understand their rights and obligations.

Note: This document is for educational purposes only. Consult with a licensed attorney or other professional if you are facing any legal situation so that all relevant facts can be considered prior to making a decision. Nothing in this presentation should be interpreted as legal advice and no attorney client privilege is established.[1]

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1. Can employer ask about employee's vaccination status?

Yes. And you can ask for proof.

See: What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws[2], §K.3 (updated Dec. 16, 2020) (EEOC Guidance) found at www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws); DFEH Employment Information on COVID-19, pp. 7 and 10 (March 4, 2021) (DFEH Guidance) found at www.dfeh.ca.gov/wp-content/uploads/sites/32/2020/03/DFEH-Employment-Information-on-COVID-19-FAQ_ENG.pdf.

The danger of this inquiry lies when you ask why someone has not taken a vaccine. Employees can refuse to take the vaccine for medical or religious reasons, and the response may elicit privacy protected information. So, prepare and train the people not to inquire, but if you do, establish a legitimate business reason for asking for the information—we need to reopen and we need to devise a plan to implement how the office will function and knowing who is vaccinated is important to determine job, functions, and limitations. ***(EEOC Guidance at K.3, K.5-K.7; DFEH Guidance, pp. 8-9)***

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2 The Equal Employment Opportunity Commission (EEOC) is charged with enforcing most Federal EEO Laws. The Department of Fair Employment and Housing (DFEH) is charged with enforcing state EEO Laws. EEOC and DFEH both have jurisdiction under its own laws, and both sets of laws must be complied with by employers.

Also, if you ask, ask everyone to avoid targeting a particular individual. If you target an individual but not others, some objective evidence justifying the question to the particular employee may be required. ***(Id. at A.9).***

2. What are employer risks of knowing employee's vaccination status?

Not much risk because it does not trigger any obligations as it is not considered a medical examination. However, asking why someone did not take the test may elicit information that may be protected and be considered an examination, which triggers ADA, Title VII (Religion), FEHA, and others, such as GINA (genetic information based medical reason for not vaccinating). If an employee shows proof of vaccination, ensure to remind employees not to provide any document with additional medical information, and ensure whoever sees the document that they do not inquire or record such information. ***(EEOC Guidance, A.1, B.1, A.11; DFEH Guidance, p. 2)***

Any medical information must be stored apart from personnel file with adequate safety protocols requiring locking the information and limiting its access and use. ***(EEOC Guidance, B.1; DFEH Guidance, p. 1)***

3. Can an employer require employees to vaccinate?

Yes. Employers may have "qualification standards" for a position. Vaccinations can qualify as qualifications standards. However, if the standard screens out an individual for disability or religion, the employer must show that the employee poses 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." ***(29 CFR 1630.2(R))***

Employers should conduct an individualized assessment of four factors to determine whether a direct threat exists: 1) Duration of risk; 2) nature and severity of the potential harm; 3) likelihood that the potential harm will occur; and 4) imminence of the potential harm. If the employee poses a direct threat and cannot be vaccinated, the employer may only exclude the employee if there is no way to reasonably accommodate him/her absent undue hardship. As this is an affirmative defense, the employer must demonstrate it could not reasonably accommodate the employee. Care must be taken to ensure proper analysis and documentation is followed if the decision gets to this point. ***(EEOC Guidance, K.5; DFEH Guidance, p.7-9)***

No reasonable accommodation is required if an employee does not want to take the vaccine for political or safety concerns. (***Id.***)

The term "reasonable accommodation" is a term of art in employment law. There is a whole body of law under the Title VII, ADA, and FEHA around the meaning of an employer's obligation to "reasonably accommodate" an employee with a disability, along with what constitutes an "undue

burden" that renders an accommodation not reasonable. For purposes of this presentation, an employer is required to accommodate an employee's disability if that disability interferes with the employees ability to apply or perform the "essential functions of the job" unless that accommodation would cause an undue hardship. The form of the accommodation may include 1) changing job duties, 2) providing leave for medical care and recovery, 3) changing work schedules, 4) relocationg work area, and 5) proving mechanical and electrical aids. However, the actual accommodation is highly dependant on the disability (such as an inability to lift certain amounts, inability to stand for long periods of time, sensitivity to light due to migraines, etc., the job duties, and the burden that accommodating that employee will impose, such as length of the disability, costs of modifying duties, or changing certain duties.

Generally, the employee asks for an accommodation by telling the employer that they are unable to show up, perform, or need time off for a protected condition (medical condition, pregnancy, religious observance, etc.). This is the beginning of the "interactive process" required under the law in which the employer, employee and (oftentimes) the employee's physician engage in a dialog to try and determine an accommodation for the disability. Ultimately, the doctor has the last word on the medical limitations but it is the employer who determines how to accommodate the employee.

Failure to enage in the interactive process is itself a violation of the law. The employer generally can ask for a doctor's note if the condition is medical in nature. The note will indicate what the limitation is that the employee has which needs to be accommodated. If the disability cannot be accommodated because the employee cannot perform the essential functions of the job, the employer may try to place the employee in a similar position (duties, responsibility and pay). If this cannot be done, another position may be considered, even if it is at lower pay, different duties, or different responsibilities. If there are no alternate similar or dissimilar positions, a leave of absence may be granted until the employee may recover. Finally, if no accommodation can be made or if the only accommodations create an undue burden on the employer, the employer may terminate the employee as being unable to perform the essential fucntions of the job with or without a reasonable accommodation. ***(See, e.g., www.dfeh.ca.gov/accommodation.)***

It should be noted that employees with disabilities may also be entitled to leaves under other laws, such as the Federal Family and Medical Leave Act (FMLA) or the California Family Rights Act (CFRA). Given that all these laws must be complied with, all accommodation issues should be discussed with an attorney or, at minimum, an HR specialist.

4. **Can employer make decisions regarding employee work environment, assignments, work-space, etc., based on whether employee is vaccinated?**

   Yes. The employer may require employees to wear PPE or impose infection prevention protocols (wash hands, etc.) or take other actions designed to protect employees. The only limitations are that such requirements not violate the other provisions of the law, as changes that may create medical risks or infringe on religious or other protected categories. For example, if an employer requires latex gloves, but a person is allergic to latex, the employer may have to modify the requirement for that employee as an accommodation under the ADA. An ER may also modify work areas to ensure distancing and safety, such as requiring handwashing or other sanitary actions. ***(EEOC Guidance, G.1 - G.2, DFEH Guidance, p. 3)***

5. **What are an employer's legal obligations for employee safety as it relates to COVID-19 (i.e., Cal-OSHA, etc.)?**

   OSHA basically requires that employers provide a safe and healthy work environment. To that end, it has published emergency rules requiring the implementation of a safety plan, and other requirements related to COVID, that mimics their normal duties. ***(8 CCR §3200)***

OSHA Safety Plan Mandate

OSHA's Emergency Rules ***(codified at 8 CCR §§3205, et seq.)*** require employers to "establish, implement, and maintain" an effective COVID-19 Prevention Program, which should include:

Identification and evaluation of employee exposures to COVID-19 health hazards

1. Implementation of effective policies and procedures to correct unsafe and unhealthy conditions (such as ensure distancing, modifying workplace, and staggering work schedules)
2. Provide and ensure workers wear face coverings to prevent exposure in the workplace.

You must ensure requests for accommodation based on legitimate reasons are considered and addressed. ***(See Cal/OSHA COVID-19 Emergency Temporary Standard Fact Sheet found at www.dir.ca.gov/dosh/coronavirus/ETS.html).***

OSHA rules are complicated and very detailed, this FAQ only generally addresses the issues that may arise. Before implementing the plan, any employer is urged to consult an OSHA specialist to ensure full compliance.

Model Written Program at: www.dir.ca.gov/dosh/coronavirus/ETS.html

Reporting

Employers must report to their county public health department **outbreaks** (3 or more COVID-19 cases in a 14-day period) or **major outbreaks** (20 or more COVID-19 cases in a 30-day period). Notification is to be made immediately but no later than 48 hours after "the employer knows, or with diligent inquiry would have known, of three or more COVID-19 cases for guidance on preventing the further spread of COVID-19 within the workplace." ***(8 CCR §3205.1(f)(1))***

Record-Keeping

Employers must keep a record and track all COVID-19 cases while ensuring all medical information is maintained confidential. ***(See Cal/OSHA COVID-19 Emergency Temporary Standard Fact Sheet, supra.).*** These records must be made available to employees, authorized employee representatives, or others, as required by law. ***(Id.)*** These records, as any record related to an injury and illness prevention (IIP) plan, must be kept at least one year. ***(8 CCR §3208)***

Workers Comp

Any infection at work may be covered by workers comp. Employers should refer the employee to an industrial injury clinic and give employee a DWC 1 Form if they suspect the employee was infected at work. While the presumption that an employee who worked in the last 14 days was infected at work under the Governor's Order N-62-20 is no longer in place, that presumption is now codified in law by the passage and signing of SB 1159 ***(codified as Labor Code §3212.86).***

Aside from the requirements imposed by state and federal law, each city and county has additional requirements. Follow the tier system of each county in terms of where they are with their COVID-19 ranking. ***(See for example www.saccounty.net/COVID-19/Pages/default.aspx.)***

New Leave

California recently enacted SB 95 ***(codified as Labor Code §§248.2 and 248.3)*** as enacted grants employees up to 80 hours of paid sick leave (in addition to any other laws or prior COVID-related leaves) if the employee is subject to a quarantine or isolation order, or has been advised to quarantine by a healthcare provider, to attend an appointment to receive the vaccine, suffering from COVID-related symptoms preventing the employee from working or teleworking, the employee is suffering COVID-related symptoms and is seeking medical diagnosis, the employee is caring for a family member who is subject of an order or has been advised to self-quarantine, or if the employee is caring for a child because the school or place of care is unavailable due to reasons related to COVID. ***(Labor Code §§248.2 and 248.3)*** The statute was signed in March 2021 but is retroactive to January 1, 2021, and anyone who has already taken the leave for a qualifying reason may ask for reimbursement of the time off or for pay, if the time off was unpaid. ***(Id.)***

6. **Can employer require COVID-related safety protocols beyond what is required by federal/state/local law? If employee challenges those protocols, does employer have to accommodate?**

   Yes, within reason. Employers can impose safety protocols under the normal mandate requiring they provide a safe and healthy workplace. If an employer feels that certain actions should be taken that are not specifically covered by official guidance, those actions can be taken. The only limitation is the general discriminatory rules. If an employee asks for an accommodation, the employer would be required to follow the normal good faith interactive process as required by ADA, FEHA, Title VII if a measure being imposed by an employer triggers any of those protections. ***(EEOC Guidance, D.1 - D.12, G.2; DFEH Guidance, p. 5-6)***

7. **Are employees required to notify employer of a positive COVID-19 test or exposure to someone who has tested positive?**

   There is nothing that specifically requires employees to disclose this information. Most guidance says that employees "should" let their employers know. However, given that an employer may require the employee to disclose this information, the employer can require it and the employee must comply. ***(EEOC Guidance, A.1 – A.8)***

8. **What are an employer's obligations if notified that an employee tested positive for COVID-19 or that an employee was exposed to someone who tested positive?**

   The CDC states that if anyone is suspected or confirmed of having COVID-19, the employer need not close down the facility, but it recommends waiting 24 hours before cleaning the area where the employee worked to protect the cleaner. If waiting 24 hours cannot be accommodated, wait as much as possible, then clean surfaces with soap and water and disinfect other areas. If confirmed that the employee had COVID-19, employers should inform other employees of possible exposure while maintaining confidentiality of employee, and employees who test positive should quarantine and employer should provide information related to COVID-19, if employee not in hospital. The employee can be sent home to quarantine and asked not to return to work until they have consulted a health provider. ***(See www.cdc.gov/coronavirus/2019-ncov/community/general-business-faq.html#Suspected-or-Confirmed-Cases-of-COVID-19-in-the-Workplace.)***

   Employers may need to work with local health agencies when there is an outbreak. Any employee potentially exposed to another employee who has COVID-19 should quarantine for 14 days. If the exposure happened outside of the workplace (i.e., the employee was exposed to COVID-19 elsewhere), the employer should still send the employee home to quarantine to prevent any spread. ***(Id.)***

9. **If employer requires all employees to return to work in-office, does the employer have to make exceptions or accommodations for employees that request such an accommodation to**

continue to work from home? (e.g., child-care issues, school issues, underlying health condition, etc.; note that an employee's county of residence may be under different public health restrictions/guidance than the county where the workplace is located).

Generally, an employer does not need to accommodate any employee's request unless it is protected by law, such as the ADA, Title VII, or the FEHA. An employer is not required to accommodate a request for an accommodation because of child-care. There are laws that allow employees to take time off to address school issues but nothing long term. For example, an employer with 25 or more employees, would be required to allow an employee up to 40 hours a year for "school-related emergencies," which the pandemic would likely satisfy. ***(Labor Code §230.8).*** An employee may also use vacation and other paid leave, and the employee may even be able to use paid sick leave as "preventive care," according to the DIR. However, nothing that was not protected before is not protected now. Prior to the pandemic, employers did not have to accommodate child-care issues, danger of exposure of family members who fear going out, etc.

Also, SB 95 (see above), would require an employer to provide up to 80 hours of paid sick leave if the employee is sick or under orders to quarantine or isolate due to COVID-19 or COVID-19 exposure, is caring for someone who is sick from COVID-19, is taking time to take the vaccine or recoup from being vaccinated, or is caring for a child whose school or child care facilities are unavailable due to COVID-related reasons. ***(Labor Code §§248.2 & 248.3)*** If an employee is covered by this leave, the employer should not use PTO, vacation, regular paid sick leave under state statutes as this provision is in addition to any other rights.

Also, the employer is not required to accommodate fear of the vaccine or whether the employee lives with a "high risk" person, or not wanting to take the vaccine, if required, due to political reasons. However, any religious or medical reasons or if the policy discriminates on the basis of gender, legal protections may come into play. ***(EEOC Guidance, K.5 – K.7; DFEH Guidance, pp. 8 – 9.)***