

Vaccines and Your Workforce

August 19, 2021



PRESENTED BY:
Michael Watts, Of Counsel



Meet Michael

- **Michael Watts** is an accomplished litigator and workplace investigator and who focuses his practice on defending employment and financial claims.
- Mr. Watts began his legal career as a Judge Advocate in the United States Army, where he served as a prosecutor for two years. After leaving the Army, Mr. Watts became a Special Agent with the U.S. Secret Service assigned to the Los Angeles Field Office. He participated in numerous bank fraud, wire fraud and money laundering investigations.
- He is currently a Lt. Col. in the Judge Advocate General's Corps, where he serves as the chief prosecutor for the second largest unit in the United States Army Reserve.



Agenda

- Mask Mandates
- Vaccination Timelines/Statistics
- Vaccine Mandates
 - EEOC Requirements
 - DFEH
 - Exceptions
- Proof of Vaccine

Return of the Mask Mandates

- CDPH
 - Required for unvaccinated individuals in indoor public settings and businesses
 - <https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/guidance-for-face-coverings.aspx>
- LA County - Aug. 16
 - LA Order - all employees wear a face mask while working indoors or in shared vehicles regardless of vaccination status. http://publichealth.lacounty.gov/media/Coronavirus/docs/HOO/HOO_SaferReturnWorkCommunity.pdf
 - Best Practices for Businesses—**Read This!** <http://publichealth.lacounty.gov/acd/ncorona2019/BestPractices/>
- San Bernardino, Riverside County, San Diego
 - CDPH Order would apply
 - San Bernardino - <https://sbccovid19.com/faq/>
 - Riverside – <https://www.rivcoph.org/Portals/0/Documents/News/July%202021/7.28.21%20Mask%20update%20recommendation.pdf?ver=2021-07-28-164811-710>
 - San Diego - https://www.sandiegocounty.gov/content/sdc/hhsa/programs/phs/community_epidemiology/dc/2019-nCoV/face-coverings.html

Return of the Mask Mandates

- Remember you can choose to implement a **more strict requirement** to ensure workplace safety, if you think it's necessary—now is the time to think about how you're going to proceed:
 - FFCRA and SPSL in effect until Sep. 30
 - Cal/OSHA requirements for contact tracing, employee notification, quarantine, testing and DPH notice are still in effect
 - Workers' Compensation notification requirement (SB 1159) is still in effect
- Delay bringing employees back into the workplace if remote work is still feasible.



Vaccination Timeline

- Timeline to Full Vaccination

- CDC: person is considered fully vaccinated once 2 weeks (14 calendar days) have passed since they received the final dose of a COVID-19 vaccine
 - https://www.cdc.gov/coronavirus/2019-ncov/vaccines/fully-vaccinated-guidance.html#_edn1
- For single-dose vaccine (J&J): 2 weeks after
- For 2-dose vaccine (Pfizer and Moderna): 5-6 weeks
 - 2 weeks after 2nd dose
 - 2nd dose given 3 weeks after 1st dose (Pfizer)
 - 2nd dose given 4 weeks after 1st dose (Moderna)



Vaccination Timeline — Expanding Eligibility

- Ages 12 and Up
 - Able to be vaccinated now (12+ - Pfizer)
- Ages 11 and under
 - No vaccine approved yet for this age group.
 - Studies for ages 6 months to 11 years have begun
 - Unclear when studies will conclude
 - **Ages 11 and under may not be able to vaccinated until 2022**

Vaccination Statistics — Progress Made in California

- As of Aug. 17, 2021:
 - California has an approximate population of 39.51 million, (approx. 30.62 million adults)
 - Census data — <https://www.census.gov/quickfacts/CA>
 - 21.9 million persons in California have been fully vaccinated
 - 3.4 million persons have been partially vaccinated
 - <https://covid19.ca.gov/vaccination-progress-data/>
- Approximately 64.7% of adults have been fully-vaccinated in California
 - Another 10.3% of adults have received at least one dose of Pfizer or Moderna vaccine
 - California is the closest to herd immunity of any other state and San Francisco is leading the state

Vaccine Mandates

- California requires vaccination or weekly testing for state employees & health care workers
- State encouraged private businesses to consider mandating vaccination; some took them up on that:
 - Disney
 - Cisco
 - Delta Air
 - Door Dash
 - Equinox
 - Facebook
 - Ford
 - Goldman Sachs
 - Google
 - Lyft
 - Microsoft
 - Morgan Stanley
 - Netflix
 - NY Times
 - Salesforce
 - Twitter
 - Tyson
 - Uber
 - United Air
 - Walmart

Vaccine Mandates

- FDA is aiming to grant final approval of the Pfizer vaccine by Labor Day
- Final approval may make it easier for you to enforce a vaccine mandate, if you wish



Vaccine Mandates

**WHEN
IS THE END?
#COVID19**

- EEOC and DFEH agree: **you can mandate vaccination, but**
 - Avoid administering it yourself
 - Be prepared to consider reasonable accommodations
 - Be prepared for Employee Relations issues
- <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>
- https://www.dfeh.ca.gov/wp-content/uploads/sites/32/2020/03/DFEH-Employment-Information-on-COVID-19-FAQ_ENG.pdf

EEOC Guidance

- **FAQ K.5:** *Employers must ensure that any mandatory vaccine policy*
 - (1) Is job-related and consistent with the employer's business necessity (met here, as COVID-19 poses direct threat to health and safety of others)
 - (2) Includes exemptions for employees who are unable or unwilling to get vaccinated due to a qualifying disability or religious beliefs
 - (3) Involves an accommodation process for evaluating whether the employee can receive an exemption from the vaccine policy and continue working without posing a threat to health and safety of others, or imposing an undue hardship on the employer
- If a direct threat exists, the employer must consider other reasonable accommodations

EEOC Guidance

- **FAQ K.9:** *Is asking or requiring an employee to show proof of receipt of COVID-19 vaccination from a third party a disability-related inquiry?*
 - No. These questions are not likely to disclose the existence of a disability. Therefore, requesting documentation or other confirmation of vaccination by a third party in the community is not a disability-related inquiry under the ADA, and the ADA's rules about such inquiries do not apply.
 - Documentation of vaccination provided by the employee to the employer is medical information about the employee and must be kept confidential.

EEOC Guidance

- If an employer offers vaccination to employees on a **voluntary basis**, or if an employee receives a vaccine from a third party not affiliated with the employer, ADA restrictions on medical inquiries would not apply.
- Employers are urged to consider seriously **not** using a self-administering vaccination program or working with legal counsel in designing one that does not run afoul of federal and state law.

EEOC Guidance

- **FAQ K.12:** *How should employer respond if employee indicates that he or she is unable to receive a COVID-19 vaccine because of a religious belief?*
 - Title VII requires the employer to accommodate the request, unless to do so would pose an “undue hardship”
 - EEOC noted that undue hardship must involve more than minimal cost or burden
 - Note: employer should assume that employee’s religious belief is sincerely held, unless it has an objective basis for questioning the sincerity of the belief

EEOC Guidance

- If an employee cannot get vaccinated for COVID-19 because of a disability or 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.
- “Ultimately, if an employee cannot be accommodated, employers should determine if any other rights apply under the EEO laws or other federal, state, and local authorities before taking adverse employment action against an unvaccinated employee.”

Vaccine Mandates—Disability Exceptions—Review

- You must attempt to reasonably accommodate disabled individuals who cannot be vaccinated
 1. Evaluate whether allowing unvaccinated employees to work under your existing COVID-19 protocols (masking, social distancing, testing, etc.) is a viable option
 2. If you cannot accommodate them in the workplace, consider
 - Remote work
 - Leave of absence until the pandemic situation changes
- You may deny reasonable accommodation if it poses an undue hardship (significant difficulty or expense), but consider
 - Prevalence of employees who already have received vaccination
 - Amount of contact with others, whose vaccination status could be unknown
- Termination is not recommended

Vaccine Mandates—Religious Exceptions—Review

- Same reasonable accommodation analysis
- Assume an employee's request for religious accommodation is based on a sincerely-held religious belief.
 - If you have an **objective basis** for questioning either the religious nature or the sincerity of a particular belief, practice, or observance, you can request additional supporting information.
 - Be careful.

Vaccine Mandates—Employees Who Refuse—Review

- No accommodation required
 - DFEH – If the employee does not have disability or religious reason for refusal, no reasonable accommodation required
- No legal protection under disability laws
 - Be careful if employees work together to protest/challenge employer activity—NLRA could be implicated
 - Legal challenges pending (upcoming slide)
 - Employees will assert privacy rights
- Termination is not recommended; consider a leave of absence for now
- Leave of absence poses practical challenges (next slide)

Vaccine Mandates—Practical Challenges—Review

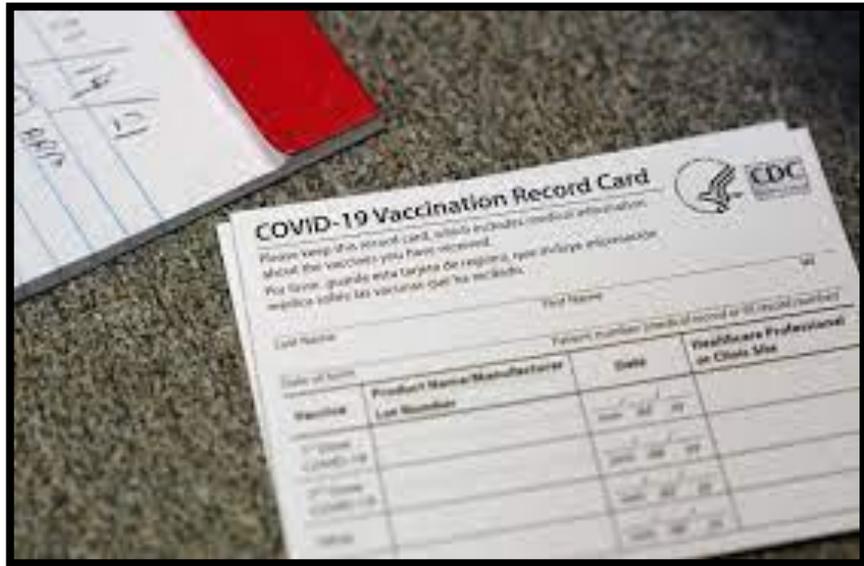


- Vaccination is a highly political issue
 - Employees have demonstrated a willingness to quit rather than be vaccinated
- Anticipate serious pushback
- Clients report a high rate of refusal in some industries and among some employee groups
 - Putting everyone on leave may not be an option if too many people refuse

Vaccine Mandates—Legal Challenges—Review

- LAUSD employees allegedly subject to mandatory vaccination filed suit in federal court challenging the mandate – Case was dismissed
 - The Argument: Emergency Use Authorization (EUA) = the individual receiving the vaccine must be informed it is voluntary
 - But DOJ just issued an opinion that this law does not prohibit vaccine mandates
 - No clear law stating an employer cannot mandate the vaccine
 - But there's some logical inconsistency there...
- Similar case brought by New Mexico detention center employee
- Texas case brought by hospital employees dismissed
- Supreme Court declined to hear Indiana Univ. vaccine mandate

Proof of Vaccination



- NYC will require proof of vaccination to permit entry to indoor dining, gyms and movie theaters
- LA City Council directed City Attorney to draft ordinance mandating vaccines in indoor public settings, including restaurants, gyms, retail stores, theaters, concert venues and stadiums

Vaccine Mandates & Testing for State Employees

- Cal DPH July 26 order still applies to state employees
 - <https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/Order-of-the-State-Public-Health-Officer-Unvaccinated-Workers-In-High-Risk-Settings.aspx>
- State employees **must (1) show proof of vaccination or (2) get tested regularly**
 - Order took effect **August 9**
 - Full employer compliance required by **August 23**

Vaccine Proof Examples

- From the July 26 CDPH Order:
 - COVID-19 Vaccination Record Card which includes name of person vaccinated, type of vaccine provided and date last dose administered); OR
 - photo of a Vaccination Record Card as a separate document; OR
 - photo of the client's Vaccination Record Card stored on a phone or electronic device; OR
 - documentation of COVID-19 vaccination from a health care provider; OR
 - digital record that includes a QR code that displays name, date of birth, vaccine dates and vaccine type. The QR code must also confirm the vaccine record as an official record of the state of California; OR
 - documentation of vaccination from other contracted employers who follow these vaccination records guidelines and standards.

Wrap-Up

- Employers may take many different approaches regarding vaccines:
 - require vaccines as a condition of returning to work;
 - encourage employees to receive vaccines by offering incentives;
 - suggest employees receive vaccines; or
 - take a hands-off approach.
- Engage in timely and good faith interactive processes with employees, provide reasonable accommodations where available, and document all efforts made to accommodate.
- Stay flexible when considering accommodations, and remain up to date on information from public health authorities.

Updated AALRR Workplace Prevention Plan

- *The COVID-19 Prevention Program has been updated to include current requirements in all areas and now includes information specific to vaccines, masks, etc. Reduced pricing for previous purchasers.*
- \$300 New Plan Purchase/\$150 Updated Plan
- Written workplace plan
- Notices for exposed employees, other employees, contractors, departments of public health, union representatives
- Other documents required by AB 685 + Reg 3205 (Emergency Standards)
- Contact for more information:
- <https://www.aalrr.com/aalrr-mmodel-covid-19-prevention-plan>

AALRR September Breakfast Briefings

- Breakfast Briefing | **COVID-19 Litigation is Here, and More is Coming...Tips for Managing Pandemic-Related Litigation Risks**



- September 16 or 23, 2021 @ 10am
- Join us for this free virtual briefing
- Register & more information: <https://www.aalrr.com/newsroom-events>

Thank You

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