

COVID VACCINES: WORKPLACE CONSIDERATIONS



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CAN EMPLOYERS REQUIRE VACCINATION?

Prior to COVID, it was accepted that vaccination could be a mandatory requirement in the workplace

- Employers could require vaccination against the flu, particularly in health care settings

EEOC and DFEH have given guidance that mandatory COVID vaccination policies are permissible

- Employers may require vaccination with an FDA approved vaccine as condition of employment
- Emergency Use Authorization by FDA appears sufficient for “approval” – but not crystal clear yet
- Exemptions must be recognized in the policy for medical and sincerely held religious reasons
- Other considerations include proof required, employer sponsored vaccination programs, and leave and pay issues



VACCINATION PROGRAMS

Employer sponsored provider

- Employer can provide the vaccinations through on-site or clinic
- Must be aware that pre-vaccine screening questions can raise issues
- Must keep all records relating to vaccination confidential and separate

Third Party provider

- Doctor's office, pharmacy, county sites
- Pre-vaccine screening does not create issues for employer even if mandatory



WRITTEN VACCINATION POLICY

Best practice to have a written policy if vaccines are mandatory

- Set forth the expectations for when vaccination must take place based on availability and eligibility
- Procedure for requesting exemption
- Procedures for employee providing proof of vaccination
- Practices for maintaining confidentiality of employee medical information
- Consequences if employee is not exempt and refuses the vaccine

Required to set forth exemptions and procedures for requesting exemption

Address pay for time spent obtaining vaccine and expenses



EXEMPTIONS FOR MEDICAL REASONS

Employee has a condition or disability that makes it medically advisable to refrain from vaccination

- Could be direct medical contraindication, such as allergy reactions to vaccines or any specific component
- Could be indirect due to a disability creating risk for vaccination
- Examples: immune compromised individuals, employees pregnant or breastfeeding

Employee must submit request and certification

- Best practice to have a written form
- Can request more information to clarify a doctor's note that does not have details
- All information received should be stored in separate confidential files

Exemption due to condition or disability must be accommodated

- Engage in the interactive process to determine what accommodations may be reasonable
- Possible accommodations in lieu of vaccination may include telework, change in job duties to avoid close contact with co-workers or the public, leave of absence if other accommodations are not possible
- Cannot retaliate against employees for objecting to vaccination and requesting an accommodation



EXEMPTIONS FOR RELIGIOUS REASONS

Employee must have a sincerely held religious belief objecting to vaccination

- Can be associated with a theistic or organized religion, such as Christian Science
- Can be a belief that is unrelated to organized religious practice

Employee must make a request for exemption

- Best practice to have a written form
- Employee can be required to either provide a note from a spiritual leader, or a more thorough explanation of the beliefs or practices in order to determine if the belief is sincerely held
- Reasonable accommodations should be discussed and granted for sincerely held religious beliefs

Certain beliefs or concerns would not qualify for exemption

- Political objections
- Concerns over vaccine safety or efficacy
- Conspiracy theories



PAY ISSUES RELATING TO VACCINATION

Pay when vaccination is mandatory

- Since it is a work related requirement, must pay for time and expenses
 - Hours missed
 - Cost of vaccine
 - Mileage expense
 - Time off due to side effects?

Pay when vaccination is not mandatory

- Employees eligible under new covid supplemental sick pay requirements (more than 25 employees)
- Paid time (up to 80 hours) for vaccine appointments and absence from work due to side effects from vaccination
- As with regular sick leave, only can require proof is suspect time off being used for other purposes
- Pay is not required for employers with 25 or less employees



VACCINATION INCENTIVE PROGRAMS

Can offer incentives to encourage employees to get vaccinated

- Incentives can include cash bonuses, gift cards, time off (additional vacation or PTO)

Cash or case equivalent incentives can create wage and hour issues

- Form of non-discretionary bonus, even if it is a gift card
- Non-discretionary bonuses must be included with regular straight time pay when calculating overtime pay
- Example: employee who is given a covid incentive bonus of \$100 works 50 hours that week. He would be owed an additional \$1 for each overtime hour worked, or \$10 total

Must make incentive available to employees exempted

- Incentive plan can't discriminate against employees with medical or religious exemptions
- Can require employee to meet additional conditions for eligibility, such as participating in additional covid safety training



WORKPLACE RULES FOR VACCINATED EMPLOYEES

Covid safety protocols under the OSHA temporary standards still apply

- Must continue wearing mask in public areas
- Maintain social distancing

Unclear when safety rules may be revised

- Temporary rules are effective until the end of May

