



COVID-19 Workplace Vaccination Policy FAQ for California Employers

Following is a discussion of certain common questions being asked in connection with COVID-19 workplace vaccination policies and compliance with equal employment opportunity laws.¹

This publication provides general guidance only and should not be construed as legal advice. The law on the topics discussed in this publication is highly context-specific. If your organization needs legal assistance, or if you have further questions about these topics, please contact Public Counsel’s Community Development Project at (213) 385-2977, ext. 200. The Community Development Project provides free legal assistance to qualifying low-income entrepreneurs and qualifying nonprofit organizations that share our mission of serving low-income communities and addressing issues of poverty within Los Angeles County.

1. Can I require my employees to get a FDA-approved Emergency Use Authorized COVID-19 vaccine?

Both federal and state guidance indicate that employers can require employees to receive a COVID-19 vaccine approved by the U.S. Food and Drug Administration (FDA), *subject to* potential exceptions highlighted below relating to compliance with federal and state workplace anti-discrimination laws.² The California Department of Fair Employment and Housing (DFEH) specifies that the three vaccines currently available in the U.S. (Pfizer-BioNTech, Moderna, and Janssen) are “authorized and recommended” by the FDA.³ No laws currently expressly prohibit employers from requiring any COVID-19 vaccine as a condition of employment in California.

In addition to providing the reasonable accommodations mentioned below, employers must not “discriminate against or harass employees or job applicants on the basis of a protected

¹ The laws and guidelines cited in this alert may change. This alert does not cover all applicable federal, state, and local laws and is designed to highlight only selected legal issues. Consult with employment counsel for further information.

² *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*, U.S. EQUAL EMP. OPPORTUNITY COMM’N, <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws> (last modified June 28, 2021) [hereinafter EEOC COVID-19 Guidance]; CAL. DEP’T OF FAIR EMP. & HOUS., DFEH EMPLOYMENT INFORMATION ON COVID-19 (2021), https://www.dfeh.ca.gov/wp-content/uploads/sites/32/2020/03/DFEH-Employment-Information-on-COVID-19-FAQ_ENG.pdf [hereinafter DFEH Guidance]. *See also Vaccines*, STATE OF CAL. COVID-19 (last modified July 26, 2021), <https://covid19.ca.gov/vaccines/>. Both federal and state equal employment opportunity laws are referenced throughout this FAQ. Where this FAQ cites to California’s Fair Housing and Employment Act (FEHA), it does so in light of the FEHA’s more restrictive requirements.

³ DFEH Guidance, *supra* note 2, at 7 (referencing U.S. FDA, COVID-19 VACCINES (Aug. 3, 2021), <https://www.fda.gov/emergency-preparedness-and-response/coronavirus-disease-2019-covid-19/covid-19-vaccines>).

characteristic.”⁴ It is important for employers to be aware of the various anti-discrimination laws, including those highlighted below, that may require exceptions to a mandatory vaccination policy, and to continue to monitor legislative developments (to the extent the latest guidance is amended and/or there are further developments in the law). Employers are strongly advised to seek legal counsel in developing their vaccination policies, and prior to taking any adverse employment actions, to be sure they are compliant with all applicable laws.

A. Disability-related accommodations

1. My employee has a disability that prevents them from being able to safely receive a COVID-19 vaccine. What must I do?

Employers must reasonably accommodate employees’ known disabilities. If an employee objects to vaccination on the basis of a disability, an employer must engage in a “timely, good faith, interactive process,” with, and reasonably accommodate, the employee.⁵ The employer may not retaliate against the employee requesting the disability; nor may it disclose the employee’s request.⁶ The “interactive process” requires an individualized assessment of the job and the specific physical or mental limitations of the individual directly related to the need for reasonable accommodation.⁷ Examples of reasonable accommodations include: (1) providing and requiring the use of personal protective equipment;⁸ (2) social distancing;⁹ (3) reconfiguring workspaces; (4) eliminating common spaces; (5) increasing ventilation; (6) reduced office capacity; (7)

⁴ *Id.*; see also EEOC COVID-19 Guidance, *supra* note 2.

⁵ CAL. GOV.’T CODE §§ 12926.1(e), 12940(n) (2021); EEOC COVID-19 Guidance, *supra* note 2.

⁶ CAL. GOV.’T CODE §§ 12940(l)(4), 12940(m)(2) (2021); CAL. CODE REGS. tit. 2 § 11069(g) (2021) (West); EEOC COVID-19 Guidance, *supra* note 2.

⁷ U.S. EQUAL EMP. OPPORTUNITY COMM’N, SMALL EMPLOYERS AND REASONABLE ACCOMMODATION (Mar. 1, 1999), <https://www.eeoc.gov/laws/guidance/small-employers-and-reasonable-accommodation> [hereinafter EEOC Small Employer ADA Guidance]; U.S. EQUAL EMP. OPPORTUNITY COMM’N, ENFORCEMENT GUIDANCE ON REASONABLE ACCOMMODATION AND UNDUE HARDSHIP UNDER THE ADA (Oct. 17, 2002), <https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada> [hereinafter EEOC Reasonable Accommodation ADA Guidance]. The FEHA incorporates Equal Employment Opportunity Commission (EEOC) guidelines in defining an “interactive process.” See CAL. GOV.’T CODE § 12926.1(e). The DFEH provides a sample request for reasonable accommodation package that employers and employees can use in the interactive process. Note that while the forms may be a useful tool for employers and employees, usage of these forms (1) is not required by law; (2) does not insulate a user from liability; and (3) does not create a presumption that discrimination did not occur. See *Sample Request for Reasonable Accommodation Package*, CAL. DEP’T OF FAIR EMP. & HOUS (Aug. 2016) https://www.dfeh.ca.gov/wp-content/uploads/sites/32/2021/07/Request-For-Reasonable-Accommodation-Package_ENG.pdf. For Spanish, see *Paquete de Adaptaciones Razonables*, CAL. DEP’T OF FAIR EMP. & HOUS (Aug. 2016) https://www.dfeh.ca.gov/wp-content/uploads/sites/32/2021/07/Request-For-Reasonable-Accommodation-Package_SP.pdf.

⁸ EEOC COVID-19 Guidance, *supra* note 2.

⁹ *Id.*

modified shifts;¹⁰ (8) requiring periodic COVID-19 tests;¹¹ (9) remote working arrangements;¹² (10) allowing the employee to use paid leave; (11) reassignment of the employee;¹³ or (12) placing the employee on unpaid leave. Because the process of determining whether a reasonable accommodation can be made is fact specific, employers may not impose blanket accommodations on employees with a disability related to COVID-19.¹⁴

If the employer shows that (1) the accommodation imposes an “undue hardship”; (2) the employee is unable to perform essential duties even with reasonable accommodations; or (3) the employee cannot perform those duties in a manner that does not pose a “direct threat” to the health or safety of individuals in the workplace, the employer may exclude the employee from the workplace (e.g., place the employee on furlough or terminate the employee).¹⁵

2. What constitutes “undue hardship” in providing a reasonable accommodation?

The California Fair Employment and Housing Act (FEHA) defines “undue hardship” as one that requires “significant difficulty or expense” in consideration of numerous factors including: (1) the nature and cost of the accommodation; (2) the employer’s financial ability to provide the accommodation, the total number of employees, and the impact of the accommodations on the operation of the business; and (3) the nature of the business or operation.¹⁶ With regard to the COVID-19 vaccine, the number of vaccinated employees and the amount of contact employees have with people, whose vaccination status is unknown, could impact the undue hardship analysis.¹⁷

3. What is a “direct threat” to the health and safety of individuals in the workplace and how can I determine whether an employee poses one? What can I do if an individual who cannot be vaccinated due to disability poses a direct threat at the worksite?

The FEHA defines a “direct threat” in the workplace as a “significant risk of bodily harm.”¹⁸ If “[t]he requested accommodation would constitute a direct threat to the health or safety of others .

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.* For more information on remote working arrangements as a reasonable accommodation, see U.S. EQUAL EMP. OPPORTUNITY COMM’N, WORK AT HOME/TELEWORK AS A REASONABLE ACCOMMODATION GUIDANCE (Feb. 3, 2003), <https://www.eeoc.gov/laws/guidance/work-hometelework-reasonable-accommodation>.

¹³ EEOC COVID-19 Guidance, *supra* note 2.

¹⁴ See *Bates v. United Parcel Serv., Inc.*, 511 F.3d 974 (9th Cir. 2007); *McGregor v. National R.R. Passenger Corp.*, 187 F.3d 1113 (9th Cir. 1999).

¹⁵ See 29 C.F.R. § 1630.2(r) (2011); DFEH Guidance, *supra* note 2, at 8; see, e.g., EEOC Small Employer ADA Guidance, *supra* note 7; EEOC Reasonable Accommodation ADA Guidance, *supra* note 7.

¹⁶ See CAL. GOV.’T CODE § 12926(u) (2021). For an explanation of various factors to be considered when determining whether an accommodation poses an undue financial or administrative burden, see CAL. CODE REGS. tit. 2 § 12179(b) (2021) (West).

¹⁷ EEOC COVID-19 Guidance, *supra* note 2. For additional resources on accommodation requests, see *Accommodation and Compliance: Coronavirus Disease 2019 (COVID-19)*, JOB ACCOMMODATION NETWORK, <https://askjan.org/topics/COVID-19.cfm> (last accessed Aug. 3, 2021).

¹⁸ CAL. CODE REGS. tit. 2 § 12179(a)(5) (2021) (West). For the Americans with Disabilities Act’s definition of direct threat and individualized assessment requirements, see 29 C.F.R. § 1630.2(r) (2011).

. . . or would cause substantial physical damage to the property of others and such risks cannot be sufficiently mitigated or eliminated by another reasonable accommodation,” employers may deny the request for reasonable accommodation.¹⁹ Employers should conduct an individualized assessment that relies on objective evidence²⁰ to determine whether a direct threat exists and base their direct threat determination on a “reasonable medical judgment” that relies on the most current medical knowledge about COVID-19.²¹

B. Religion-related accommodations

1. My employee says their sincerely held religious beliefs, practices, or observances prevent them from receiving a COVID-19 vaccine. What must I do?

An employer must reasonably accommodate an employee’s sincerely held²² religious beliefs, practices, or observances unless doing so would result in an “undue hardship,” and may not retaliate against the employee for requesting the accommodation.²³ Thus, if an employee objects to vaccination on the basis of a sincerely held religious belief or practice, an employer must engage in an interactive process with the employee similar to the disability context discussed in 1.A.1.²⁴

The FEHA requires employers to explore “any available reasonable alternative means of accommodating the religious belief or observance, including the possibilities of excusing the person from those duties that conflict with the person’s religious belief or observance or permitting those duties to be performed at another time or by another person.”²⁵ The DFEH states that a reasonable accommodation to a mandatory vaccination policy is one that “eliminates the conflict” between the sincerely-held religious belief or practice and the vaccination requirement.

¹⁹ CAL. CODE REGS. tit. 2 § 12179(a)(5) (2021) (West).

²⁰ *Id.* Employers should consider (1) the nature, duration, and severity of the risk; (2) the probability that a direct threat will actually occur; and (3) the availability of additional or alternative reasonable accommodations that will eliminate the direct threat. *Id.* at § 12179(a)(5)(B).

²¹ EEOC COVID-19 Guidance, *supra* note 2. The EEOC states that U.S. Centers for Disease Control guidance is an important source of current medical knowledge about COVID-19. *Id.* Such “medical knowledge” may include the level of community spread at the time of the assessment. *Id.* Additional considerations include the type of work environment, including

whether the employee works alone or with others or works inside or outside; the available ventilation; the frequency and duration of direct interaction the employee typically will have with other employees and/or non-employees; the number of partially or fully vaccinated individuals already in the workplace; whether other employees are wearing masks or undergoing routine screening testing; and the space available for social distancing.

Id.

²² Employers should generally presume an employee’s asserted religious belief or practice is sincerely held unless there is an objective basis to question it. EEOC COVID-19 Guidance, *supra* note 2. If an employer has an objective basis for questioning either the religious nature or the sincerity of the employee’s religious objection, the employer may request that the employee provide additional supporting information. *Id.* Employers may deny the accommodation request if the employee is unable to establish the religious nature or sincerity of the religious objection. *Id.*

²³ CAL. GOV.’T CODE §§ 12926.1(e), 12940(n) (2021); *see* DFEH Guidance, *supra* note 2, at 8.

²⁴ DFEH Guidance, *supra* note 2, at 8.

²⁵ CAL. GOV.’T CODE § 12940(l)(1) (2021).

²⁶ This may include, but is not limited to, job restructuring, job reassignment, or modification of work practices.²⁷ More examples of reasonable accommodations are listed in 1.A.1.

C. Potential exemption 3: Pregnancy

1. My employee is not receiving a COVID-19 vaccination due to pregnancy. What can I do?

An employer cannot discriminate against an employee on the basis of pregnancy per Title VII of the Civil Rights Act of 1964 (Title VII) and the FEHA. Thus, if an employee seeks an exemption from a mandatory vaccination policy due to pregnancy, the employer must ensure that it is complying with the FEHA by providing reasonable accommodations²⁸ and that the employee is not being discriminated against compared to other similarly situated employees.²⁹ Therefore, a pregnant employee may be entitled to job modifications including remote work arrangements, changes to work schedules or assignments, and leave to the extent that such modifications are provided for other similarly situated employees.³⁰

2. Can I require proof of vaccination? What other inquiries or disclosures can I make?

1. Can I require my employees to submit a proof of receipt of a COVID-19 vaccination?

Yes, the DFEH and the U.S. Equal Employment Opportunity Commission state that, subject to the exceptions listed above, employers may require employees to submit a proof of receipt of a COVID-19 vaccination administered by a third-party or to receive a COVID-19 vaccination that the employer administers.³¹ However, state privacy laws may require an employer to give certain notices to employees upon receiving proof of their vaccination status.³² If an employer retains records of employee vaccination, the employer must maintain the records as confidential medical records separate from other employee files.³³

²⁶ DFEH Guidance, *supra* note 2, at 8–9.

²⁷ *Id.* at 9.

²⁸ For a discussion on reasonable accommodations in connection with disability, see section 1.A. California employers must also abide by California’s Pregnancy Disability Leave Act and the Family Rights Act in addition to any applicable federal laws such as the ADA and the Family Medical Leave Act. Note that pregnancy itself is not an ADA disability although pregnancy-related medical conditions may be disabilities. EEOC COVID-19 Guidance, *supra* note 2.

²⁹ DFEH Guidance, *supra* note 2, at 2; EEOC COVID-19 Guidance, *supra* note 2.

³⁰ EEOC COVID-19 Guidance, *supra* note 2.

³¹ *See id.*; DFEH Guidance, *supra* note 2, at 9–10.

³² CAL. CIV. CODE § 1798.100(b) (2019).

³³ CAL. CODE REGS. tit. 2 § 11069(g) (2021) (West); DFEH Guidance, *supra* note 2, at 10; EEOC COVID-19 Guidance, *supra* note 2.

2. Can I ask any follow-up questions if my employees are not vaccinated or have not submitted proof of vaccination?

Both federal and state laws limit what inquiries an employer can make regarding an employee's disability, religious creed, or medical status.³⁴ Employers that have decided to mandate vaccinations should, therefore, limit the scope of their vaccination follow-up questions. Merely asking for proof of vaccination is not a disability-related inquiry, religious creed-related inquiry, or a medical examination for the purposes of the FEHA, the Americans with Disabilities Act (ADA), or Title VII.³⁵ However, because such documentation or questioning could potentially include information that is related to an employee's disability or family medical history, employers should instruct their employees to omit any medical or family-history information from such documentation in addition to limiting the scope of their questions.³⁶ While employers may ask job applicants for proof of vaccination, the FEHA and the ADA restricts employers from making disability-related inquiries and requiring medical exams prior to making a conditional job offer to an applicant.³⁷ Therefore, employers should not ask follow-up questions of job applicants that may implicate the FEHA or the ADA.

3. Can I disclose an employee's vaccination status to co-workers, customers, etc.?

No. An employer cannot disclose an employee's vaccination status to others, as this is confidential medical information.³⁸ Employers must keep confidential any employee health information obtained and must keep an employee's medical file separate from the employee's personnel file.³⁹ Employers may share aggregated and anonymous numbers about vaccination rates (e.g., 85% of the office is vaccinated or all employees are vaccinated). Employers may also share that they have a mandatory vaccination policy in place. Employees may voluntarily share information with others.

3. What other factors should I consider?

1. What are my payroll obligations if an employee takes leave to obtain a COVID-19 vaccine?

California employers with more than twenty-five employees must provide up to a maximum of eighty hours of COVID-19 related sick leave until September 30, 2021 immediately upon an oral or written request for full-time employees.⁴⁰ Part-time employees with a regular weekly schedule are entitled to the number of hours the employee is normally scheduled to work over two weeks.

³⁴ DFEH Guidance, *supra* note 2, at 10; EEOC COVID-19 Guidance, *supra* note 2.

³⁵ DFEH Guidance, *supra* note 2, at 10; EEOC COVID-19 Guidance, *supra* note 2.

³⁶ DFEH Guidance, *supra* note 2, at 10; EEOC COVID-19 Guidance, *supra* note 2.

³⁷ DFEH Guidance, *supra* note 2, at 10; EEOC COVID-19 Guidance, *supra* note 2.

³⁸ CAL. CODE REGS. tit. 2 § 11069(g) (2021) (West); DFEH Guidance, *supra* note 2, at 9; EEOC COVID-19 Guidance, *supra* note 2.

³⁹ CAL. CODE REGS. tit. 2 § 11069(g) (2021) (West); DFEH Guidance, *supra* note 2, at 9; EEOC COVID-19 Guidance, *supra* note 2.

⁴⁰ STATE OF CAL., DEP'T OF INDUS. REL., 2021 COVID-19 SUPPLEMENTAL PAID SICK LEAVE (Mar. 29, 2021), <https://www.dir.ca.gov/dlse/2021-COVID-19-Supplemental-Paid-Sick-Leave.pdf>.

⁴¹ Part-time employees with variable schedules are entitled to fourteen times the average number of hours worked per day over the previous six months.⁴² This paid sick leave may be used for vaccine appointments or vaccine-related side effects.⁴³

2. *What might a workplace vaccination policy look like and/or address?*

Employers should consider having a written policy so that expectations are clear. A workplace vaccination policy should clearly identify the vaccination verification process, including the records the employee must provide and the information an employee should not provide (e.g., any medical or genetic information, including family history, ancillary to the inoculation). The policy should also make clear what the process is for an employee to obtain a vaccination record and encourage employees to retain copies of their records. Further, the policy should clearly state the potential consequences of violation, including reasonable disciplinary policies and practices to which employees may be subject.⁴⁴

Going forward, employers should consider whether vaccination records must be updated to account for potential periodic booster vaccinations.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Employer Vaccination Toolkit*, STATE OF CAL., DEP'T OF INDUS. REL. & LAB. & WORKFORCE DEV. AGENCY <https://saferatwork.covid19.ca.gov/employer-vaccination-toolkit/> (last accessed Aug. 3, 2021).

⁴⁴ The DFEH guidance permits employers to discipline employees who refuse to get the vaccine for a reason unrelated to disability or religion. *See* DFEH Guidance, *supra* note 2, at 9. Employers, however, cannot discipline or retaliate against an employee if the employee is engaging in protected activity under the FEHA such as alleging that the employer's vaccination policy intentionally discriminates on the basis of race or national origin. *See id.*