

ReedSmith

The COVID-19 Vaccine: How It Will Impact Your Workplace and Business Operations

Presented by: Mark Goldstein and Ronnie Shou

January 22, 2021

Overview

- **COVID-19 Laws and Regulations**
- **What is the COVID-19 Vaccine?**
- **Who can get the vaccine?**
- **Employer considerations:**
 - Disability concerns
 - Religious concerns
 - Record keepings requirements
 - Administering vaccines
 - Whistleblower concerns
 - Wage and hour implications

COVID-19 Laws and Regulations

- **Federal Families First Coronavirus Response Act**
 - Leave requirement expired December 31, 2020
 - Tax credit extended through March 31, 2021 for voluntarily providing leave
- **California Labor Code section 248 required supplemental paid sick leave for “food sector workers”**
 - Expired December 31, 2020
- **Local supplemental paid sick leave requirements**
 - Vary by jurisdiction

COVID-19 Laws and Regulations (cont'd)

- **Workers' Compensation Presumption** (Labor Code section 3212.86)
 - Expires January 1, 2023
- **Division of Occupational Safety and Health (Cal-OSHA) COVID-19 Emergency Regulation**
 - Requires written prevention plan, as well as protocols in the event of an outbreak.
 - Track and give notice of positive cases
 - Notice to employees regarding COVID-19 related benefits and other available leave options
 - Provide face covering and enforce use
 - Handwashing breaks

What is the COVID-19 vaccine?

According to the Center for Disease Control (CDC):

- **Several different types of vaccines are available and in development**
 - mRNA
 - Protein subunit vaccines
 - Vector vaccines
- **Recommended for everyone, even those who already had COVID-19 and recovered**

Who can get the vaccine?

CDC has recommended vaccine be rolled out in phases:

- 1. Healthcare personnel and residents of long-term care facilities**
- 2. Frontline essential workers and people aged 75+**
- 3. People aged 65-72; people aged 16-64 with underlying medical conditions; and other essential workers**

No official guidance from CDC yet about next phases of vaccine rollout, but it estimates that vaccines could become widely available in April 2021.



Employer Considerations for Mandatory Vaccine Policies

Weighing the risks:

- The Equal Employment Opportunity Commission (EEOC) has issued guidance permitting mandatory vaccine policies.
 - Vaccine requirement would be a job “qualification standard”
 - Vaccine is not a “medical examination”
 - Proof of vaccination not “disability-related inquiry”
 - No violation of Genetic Information Nondiscrimination Act of 2008 (GINA)

Employer Considerations for Mandatory Vaccine Policies

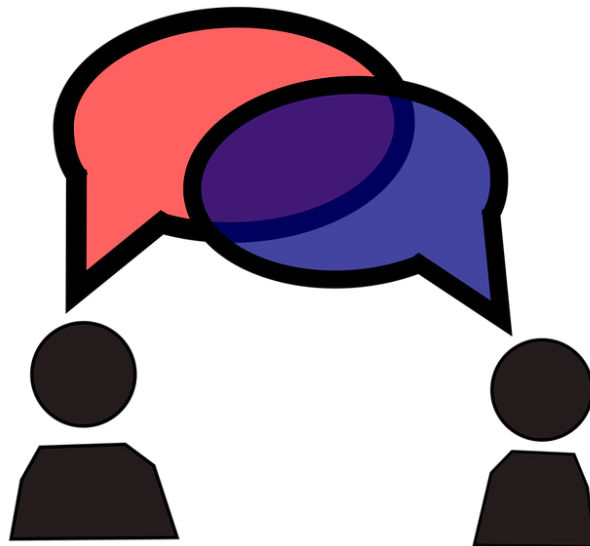
Weighing the risks:

- The Department of Fair Employment and Housing (DFEH) has not issued any related guidance.



Disability Concerns

Both the ADA and FEHA require that the employer engage in the interactive process to determine whether a reasonable accommodation is possible if an employee refuses to get the vaccine due to a disability or medical condition.



Religious Concerns

Religion Broadly Defined

Title VII

- “[T]he Commission will define religious practices to include moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views.”

29 C.F.R. § 1605.1

Religious Concerns (cont'd)

Religion Broadly Defined

FEHA

- “[A]ny traditionally recognized religion as well as beliefs, observances, or practices, which an individual sincerely holds and which occupy in his or her life a place of importance parallel to that of traditionally recognized religions.”

2 C.C.R § 11060

Religious Concerns (cont'd)

Employer obligations:

- Duty to accommodate religious beliefs against vaccinations
- “Sincerely held belief” – a fine line

Religious Concerns (cont'd)

Defenses:

- “Undue hardship” defense under Title VII
- “Bona Fide Occupational Qualification” and “Business Necessity” defenses under FEHA

Religious Concerns (cont'd)

Court Guidance

U.S. Supreme Court

- *Jacobson v. Massachusetts*, 197 U.S. 11, 38 (1905)
 - Upholding compulsory vaccinations for communicable diseases

California Court of Appeal

- *Friedman v. S. Cal. Permanente Med. Grp.*, 102 Cal. App. 4th 39, 71, (2002), as modified (Sept. 24, 2002)
 - Veganism was not a protected “religious creed” and thus not grounds to refuse vaccine.

Providing Accommodations

If an employee requests an accommodation (either for disability or religious reasons):

- Review your religious and disability accommodation policies with management and supervisory personnel.
- Ensure that your managers and supervisors are trained on how to (a) spot an accommodation request; (b) respond to a request; and (c) forward the request to the necessary human resources personnel.

Providing Accommodations

If an employee requests an accommodation (either for disability or religious reasons):

- Consider what types of accommodations might be possible for your work environment.
- Engage in an interactive process with each employee to determine if, and what, reasonable accommodation can be made.
 - Ex: WFH, adjusted schedule, or sequestering at work site

Providing Accommodations

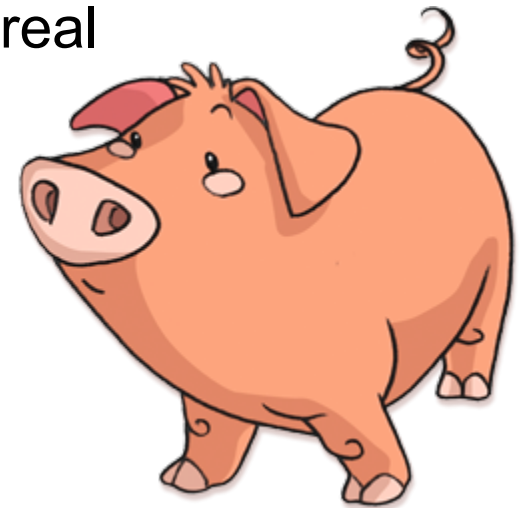
If an employee requests an accommodation (either for disability or religious reasons):

- Religious accommodations only: Ask employees to complete and sign a Religious Accommodation Request form, which explains the overall nature and scope of the employee's opposition to the vaccine.
- Document the entire interactive process, including the reason for any denial if an accommodation cannot be made.

Whistleblower Protection

OSHA

- No guidance specific to COVID-19 yet, but 2009 letter of interpretation during swine flu pandemic is instructive
 - Employers may require vaccines even if OSHA does not
 - Refusal to get vaccinated due to “reasonable belief” that a medical condition creates “a real danger of serious illness or death” is protected by OSHA whistle blower rights



Record Keeping Requirements

Employers may keep records of vaccination

- Limit inquiry to confirmation of receipt of vaccine
- Showing proof of vaccination not considered a “disability related inquiry” under the ADA.
- Vaccine records are medical records and must be kept confidential

**Employer administered vaccines
vs.
Third-party administered vaccines**



Wage and Hour Considerations

If vaccines are mandatory then:

- Employers may be required to pay for the time spent obtaining the vaccine
 - Non-exempt/hourly workers
- Employers may be required to pay for the cost of the vaccine as a reasonable business expenditure

Other Considerations for Mandatory Vaccine Policy

- Limited knowledge about the vaccine
 - Limitations of clinical trials
- Limited availability
- Costs and recordkeeping
- Potential for future lawsuits

Questions?



Mark S. Goldstein
Partner
New York
+1 212 549 0328
mgoldstein@reedsmith.com



Ronnie Shou
Associate
San Francisco
+1 415 659 4853
rshou@reedsmith.com