
California's June 15th Reopening What Employers Need to Know

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SPEAKER INFORMATION



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GOALS & OBJECTIVES

- Information for State and Federal Laws in a Fluid Environment
- Ability to Spot Issues
- Best Practices
- Policies and Procedures
- Recurring Problems and Pitfalls
- Answer Questions

GROUND RULES

- Engage; Interact; Ask Questions.
- Training; Not Legal Advice.
- Hypotheticals; Not Actual Situations.
- Respect Individual Privacy.

AGENDA

- Governor Newsom's June 15th Reopening Announcement
- Assessment of the Various Standards and Guidelines in Play
- What to Know About Vaccinations in the Workplace
- Leave Rights Related to Vaccinations
- Cal/OSHA COVID-19 Prevention Emergency Temporary Standards of June 3, 2021
- Social Distancing and Mask Policies and Enforcement in Light of Evolving Guidelines
- Next Steps for June 15th Reopening

GOVERNOR'S ANTICIPATED JUNE 15th REOPENING

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- **April 6, 2021** - Governor Newsom announces “turning the page on our tier system” and plan to “fully reopen its economy” on **June 15th** if two criteria are met:
 - If vaccine supply is sufficient; and
 - If hospitalization rates are stable and low
 - Ends the Blueprint for Safer Economy
 - “All sectors...may return to usual operations in compliance with Cal/OSHA requirements and with common-sense public health policies in place...” (e.g., masking, testing, vaccinations)

GOVERNOR'S ANTICIPATED JUNE 15th REOPENING

- **Pfizer-BioNTech COVID-19 Vaccine** – December 11, 2020.
- **Moderna COVID-19 Vaccine** – December 18, 2020.
- **Janssen (J&J) COVID-19 Vaccine** – February 27, 2021.
-CDC lifted pause on April 23, 2021

GOVERNOR'S ANTICIPATED JUNE 15th REOPENING

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- As of June 4, 2021:
 - 52.5% of California is fully vaccinated
 - 12.3% of California is partially vaccinated
 - = 64.8% of California
 - Averaging 120,229 vaccinations a day (.003% of 39.51M population)
 - As of April 15, 2021: every CA 16 years and older are eligible
 - As of June 4, 2021: 6.5M doses on hand (54 days of inventory)

GOVERNOR'S ANTICIPATED JUNE 15th REOPENING

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- As of June 5, 2021:
 - **1,309** patients hospitalized in California
 - *Compare* - January 10, 2021 - **22,665** patients hospitalized
 - Lowest number of hospitalizations since March of 2020
 - **Bottom line**: Expect to reopen on June 15th

JUNE 15th REOPENING: WHAT NOW?

“Return to Usual Operations” – What does that mean?

- CDC Guidelines** – as of May 28, 2021
- EEOC Guidelines** – as of May 28, 2021
- DFEH Guidelines** – March 4, 2021
- Local County/City Public Health Orders** (e.g., Santa Clara May 18, 2021 Order)
- Cal/OSHA Revised COVID-19 Prevention Temporary Standards** – June 15, 2021

CDC GUIDELINES – as of MAY 28, 2021

- **“Fully Vaccinated”** people have **minimal risk for indoor and outdoor activities &** have **minimal risk of transmission** to unvaccinated people
 - >> No further mask requirement, except where required by law, local business, or workplace guidance
 - >> No further need for quarantine post domestic travel
 - >> No further need for self-quarantine post contact with confirmed positive or be subjected to routine screening
- NOTE: symptoms or positive test result in 10 day isolation

CDC GUIDELINES – as of MAY 28, 2021

- “**Fully vaccinated**” defined:
 - 2 weeks after second dose of Pfizer or Moderna OR
 - 2 weeks after single dose of J&J
- Currently, no time limit on fully vaccinated status
- Currently, “**unvaccinated**” includes people of all ages, including children
- Currently, CDC recognizes lack of information regarding immunocompromised individuals – individualized assessment

EEOC GUIDANCE - VACCINATIONS

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- **EEOC Guidance – December 16, 2020:**
 - Vaccination is not a “**medical examination**” for purposes of ADA (i.e., vision test, blood/urine test, blood pressure screening, etc.)
 - No medical information sought
 - But: screening questions?
 - Same as to requests for proof of vaccination (Title II of Genetic Information Nondiscrimination Act)

EEOC GUIDELINES – as of MAY 28, 2021

- Mandatory vaccination policy by employer is not a violation of law (subject to reasonable accommodations for religious or disability reasons)
- Requesting vaccination status information from employee is not a “disability-related inquiry” under ADA (suggesting incentive programs acceptable)
- Vaccine information (e.g., vaccination card) is considered “medical information” and thus must be kept confidential and separate from personnel file.

DFEH COVID-19 RELATED GUIDANCE

- **DFEH Guidance – March 4, 2021:**

- FEHA** – employer can mandate a FDA-approved vaccination only when employer:

1. Does not **discriminate** against or harass employees or job applicants on the basis of a protected characteristic;
2. Provides **reasonable accommodations** related to disability or sincerely-held religious belief or practice; and
3. Does not **retaliate** against anyone for engaging in protect activity (i.e., requesting a reasonable accommodation

DFEH COVID-19 RELATED GUIDANCE

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- **DFEH Guidance – March 4, 2021 Cont'd:**
 - Expressly recognizes that FDA has “authorized and recommended” (approved) Pfizer, Moderna, and J&J.
 - Refuses to provide guidance on whether employer should mandate vaccination
 - Hopes to guide employer choosing to require vaccination

COVID-19 VACCINATIONS

- DFEH Guidance: Not trusting the vaccine is NOT a sincerely-held religious belief on its own
- If an employer requires employees to be vaccinated, and an employee refuses not because of religious or medical reason, the employer can enforce reasonable disciplinary policies.
- **However:** Employer cannot retaliate against protected activity.

So.....

REASONABLE ACCOMMODATION : RELIGIOUS BELIEFS

FEHA: requires employer to reasonably accommodate a “**sincerely-held religious belief or practice**” unless it would impose an undue hardship

Can include “non-theistic and moral beliefs” held with the “strength of traditional religious views”

REASONABLE ACCOMMODATION : RELIGIOUS BELIEFS

What is a Sincerely-Held Religious Belief?

FEHA - “**Religious creed**” includes any 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.

Three part test for religious beliefs:

1. Addresses fundamental and ultimate questions having to do with deep and imponderable matters, such as the meaning of life.
2. Is comprehensive in nature, consisting of a belief system as opposed to an isolated teaching.
3. Can be recognized by the presence of certain formal and external signs.

REASONABLE ACCOMMODATION : RELIGIOUS BELIEFS

Things to Consider...

1. Catholics – J&J's use of fetal cells to make the vaccine – US Council of Bishops?
2. Veganism? (not in CA)
3. Dutch Reformed Congregations, Faith Tabernacle, Church of the First Born, Faith Assembly, End Time Ministries, and First Century Gospel Church (rely on faith healing)
4. First Church of Christ, Scientist (Christian Scientist)
5. Some Amish or Muslim Fundamentalists (i.e., Polio)

REASONABLE ACCOMMODATION REQUIREMENT

- Employer must make accommodation of known religious creed unless the accommodation would impose an undue hardship.
- Refusing to hire an applicant or terminating an employee to avoid accommodation constitutes religious creed discrimination.
- A reasonable accommodation = eliminates the conflict between the religious practice and the job requirement.

VACCINE REQUIREMENTS AND DISABILITY DISCRIMINATION

- FEHA also requires an employer to engage in an interactive dialogue and provide reasonable accommodations related to **disabilities** with respect to their vaccination policies.
- “Disabilities” can include allergies to a vaccine component or other underlying medical condition (e.g., autoimmune condition) for which there may be heightened risk for the vaccine recipient.

VACCINE REQUIREMENTS AND DISABILITY DISCRIMINATION

- **May 28th EEOC Update** : recognizes **pregnancy** as a valid basis for exemption to vaccine requirement requiring accommodation
- “Employees may seek job adjustment or request exemptions from a COVID-19 vaccination requirement due to pregnancy.”
- Employer must ensure the pregnant employee is not discriminated against compared to other employees similar in ability or inability to work.

VACCINE REQUIREMENTS AND DISABILITY DISCRIMINATION

If after completion of the interactive dialogue the employer determines:

- (1) the accommodation imposes undue hardship,
 - (2) the employee cannot perform essential job functions, or
 - (3) the employee cannot perform his or her job without posing a “direct threat” to the health or safety of other workers,
- then the employer is not required to provide an accommodation.

REASONABLE ACCOMMODATION REQUIREMENT

Typically: Reasonable accommodation = job restructuring, job reassignment, modification of work practices, or allowing time off in an amount equal to the amount of non-regularly scheduled time the employee has worked in order to avoid a conflict with religious observances.

If No Vaccine?

- Remote Work
- Isolated work station (be careful)
- Additional PPE
- Modification of schedules

MANDATORY VACCINATION POLICIES

- **Benefits of Vaccinated Employees:**
 - Reduces absences due to sickness
 - Reduces workers compensation claims
 - Reduces likelihood of outbreaks triggering testing, shut downs and isolation (Cal OSHA Emergency Standards)
 - Reduces burdens on testing and screening
 - Morale – safer workplace

COVID-19 VACCINATIONS

However...

- **Public Policy Institute of California** (March 30, 2021):
 - 1 in 5 (approximately 21%) Californians will not get the COVID-19 Vaccine
 - 7% will “probably not get it”
 - 14% will “definitely not get it”

WHY NOT A MANDATORY POLICY?

- Employee relations
- Wage and Hour considerations for requiring vaccination
- Number of Accommodations required
- OSHA – April 20, 2021: if you **require** vaccine, all adverse reactions (symptoms) are recordable “work-related” events (i.e., 24 hour notice, potential OSHA 300 log)
- Union CBA requirements
- Forces a tough decision... expect litigation

CONSEQUENCES OF COMPANY MANDATORY VACCINE POLICY

- If company policy expressly requires an employee to obtain a vaccination (including a COVID-19 vaccination), or if the employee obtains the vaccination as a direct consequence of the employee's discharge of the employee's duties (i.e., the vaccination is effectively required for a job), the employer must:
 - Reimburse the costs of the vaccination.
 - Reimburse the costs of travel (if required).
 - Pay for the time it takes for the vaccination, including waiting and travel time.

ELEMENTS OF VACCINE POLICY

- Affirm the purpose of the policy.
- Identify the vaccines that are the subject of the policy.
- Identify whether vaccination is mandatory or voluntary.
- Establish a clear mechanism for lodging objections.
- Provide disability- and religious-related accommodations, up to the point of undue hardship.
- Affirm anti-discrimination, -harassment, and -retaliation policy.
- Affirm the confidentiality of medical information, including that such information will be kept separately from personnel files.

LEAVE RIGHTS FOR VACCINATIONS: IMPORTANT QUESTIONS

- Are employers required to provide employees time off to obtain vaccinations?
- Are employers required to pay employees for time off to obtain vaccinations?
- Are employers required to provide employees time off for illnesses resulting from vaccinations?
- Are employers required to pay employees for time off for illnesses resulting from vaccinations?
- Caution: Answers may depend on whether the vaccination is for COVID-19.

LEAVE RIGHTS FOR VACCINATIONS: NAVIGATING THE LABYRINTH

- Consider all possible sources of leave rights:
 - Federal laws and regulations
 - State laws and regulations
 - County and city local ordinances
 - Contracts (individual and collective)
 - Company policies



LEAVE RIGHTS FOR VACCINATIONS: AMERICAN RESCUE PLAN ACT OF 2021

- Covered Employers: Employers with fewer than 500 employees (unchanged). Emergency paid sick leave under ARP is now voluntary for all covered employers.
- Eligible Employees: All employees (paid sick leave); those employed for 30 days (paid family leave).
- Qualifying Reasons For Leave: As of April 1, 2021, employees unable to work or telework because: (a) obtaining a COVID-19 vaccination; or (b) recovering from any injury, disability, illness, or condition related to COVID-19 vaccination.
- Leave Entitlement: Up to 80 hours (sick leave) or 12 weeks (family leave).

LEAVE RIGHTS FOR VACCINATIONS: ARP SUMMARY

- Are employers required to provide employees time off to obtain vaccinations? **No, but covered employers may do so voluntarily.**
- Are employers required to pay employees for time off to obtain vaccinations? **No, but covered employers may do so voluntarily.**
- Are employers required to provide employees time off for illnesses resulting from vaccinations? **No, but covered employers may do so voluntarily.**
- Are employers required to pay employees for time off for illnesses resulting from vaccinations? **No, but covered employers may do so voluntarily.**

LEAVE RIGHTS FOR VACCINATIONS: CALIFORNIA SENATE BILL 95

- Covered Employers: Employers with more than 25 employees.
- Eligible Employees: Any employee of a covered employer who is unable to work or telework for a qualifying reason.
- Qualifying Reasons For Leave: Retroactive to January 1, 2021, employees unable to work or telework because: (a) attending an appointment to receive a COVID-19 vaccination; or (b) experiencing symptoms related to a COVID-19 vaccination that prevent the employee from being able to work or telework.
- Paid Leave Entitlement:
 - Up to 80 hours (full-time) or normal hours in two weeks (less than full-time)

LEAVE RIGHTS FOR VACCINATIONS: SB 95 SUMMARY

- Are employers required to provide employees time off to obtain vaccinations? **For employers with more than 25 employees, yes for COVID-19 vaccinations.**
- Are employers required to pay employees for time off to obtain vaccinations? **Same answer.**
- Are employers required to provide employees time off for illnesses resulting from vaccinations? **Same answer.**
- Are employers required to pay employees for time off for illnesses resulting from vaccinations? **Same answer.**

LEAVE RIGHTS FOR VACCINATIONS: CALIFORNIA (STANDARD) PAID SICK LEAVE

- Covered Employers: All California employers.
- Eligible Employees: All employees employed for 30 days are eligible for paid sick leave; all employees employed for 90 days are eligible to use paid sick leave.
- Qualifying Reasons For Leave: (a) Preventive care for the employee or employee's family members; or (b) care or treatment of an existing health condition of the employee or the employee's family members. According to the DIR, "preventive care" includes flu shots. Logically, it also includes COVID-19 vaccination.

LEAVE RIGHTS FOR VACCINATIONS: CALIFORNIA PAID SICK LEAVE SUMMARY

- Are employers required to provide employees time off to obtain vaccinations? **If an employee is eligible for paid sick leave and has accrued but unused paid sick leave, yes any vaccinations.**
- Are employers required to pay employees for time off to obtain vaccinations? **Same answer.**
- Are employers required to provide employees time off for illnesses resulting from vaccinations? **Same answer.**
- Are employers required to pay employees for time off for illnesses resulting from vaccinations? **Same answer.**

LEAVE RIGHTS FOR VACCINATIONS: CITY AND COUNTY ORDINANCES

- City and County of San Francisco; Berkeley; Emeryville; Los Angeles County; Oakland; City of San Diego; and City of Santa Monica (Standard) Paid Sick Leave Laws: All employees employed for a specified number of hours within the city or county are eligible to accrue paid sick leave and may use it for (a) preventive care for the employee, employee's family members, or, in some cases, designated persons; or (b) care or treatment of an existing health condition of the employee, employee's family members, or, in some cases, designated persons. "Preventive care" includes all vaccinations, (not just COVID-19 vaccination).

LEAVE RIGHTS FOR VACCINATIONS: CITY AND COUNTY ORDINANCES

- City of Los Angeles, Santa Rosa, Los Angeles County, Sonoma County, San Mateo County, San Jose, City and County of Sacramento, Oakland, Long Beach, and City and County of San Francisco COVID-19-Related Paid Sick Leave Laws: Do not currently authorize leave for vaccinations or illness following vaccinations.

LEAVE RIGHTS FOR VACCINATIONS: CITY AND COUNTY ORDINANCES SUMMARY

- Are employers required to provide employees time off to obtain vaccinations? **Yes, in certain cities and counties under standard paid sick leave ordinances for covered employers as to eligible employees.**
- Are employers required to pay employees for time off to obtain vaccinations? **Same answer.**
- Are employers required to provide employees time off for illnesses resulting from vaccinations? **Same answer.**
- Are employers required to pay employees for time off for illnesses resulting from vaccinations? **Same answer.**

LEAVE RIGHTS FOR VACCINATIONS: CONTRACTS AND CBAs

- Consult applicable contracts and collective bargaining agreements to determine if they create an obligation to provide paid or unpaid leave to obtain vaccinations or for illness following vaccinations.

COUNTY ORDERS – SANTA CLARA COUNTY ORDER MAY JUST BE THE START...

- Santa Clara County Order **effective** May 19, 2021
- Requires all businesses and government entities to do the following:
 - Ascertain the vaccination status of all personnel (broadly defined) by June 1, 2021, updating it every 2 weeks thereafter;
 - Maintain adequate records to demonstrate compliance (e.g., vaccination card or attestation form documenting each individual's vaccination status)
 - Require all personnel (broadly defined) and the public to comply with mandatory rules on face coverings;
 - Report all positive test results of all personnel (broadly defined) to the Public Health Department within 24 hours.

COUNTY ORDERS – SANTA CLARA COUNTY ORDER MAY JUST BE THE START...

- Santa Clara County Order defines “**personnel**” as all employees, contractors, and subcontractors, independent contractors, vendors that sell goods onsite, volunteers, and any other individuals that provide services onsite at a business’s request
- Individual refusing to disclose information is to be deemed “not fully vaccinated”
- You can rely on your contractors to report the results of their employees to you
- Violation is a misdemeanor subjecting a business to \$5,000 fine for each day of violation

CAL/OSHA COVID-19 PREVENTION ETS

- Adopted by OSHA on June 3, 2021 – Expected to be effective by June 15, 2021
- First updated standards by OSHA since November 2020
- Designed to fit with the June 15th Reopening

CAL/OSHA COVID-19 PREVENTION ETS

- **Physical Distancing:** Employers can eliminate physical distancing and partitions/barriers for employees working indoors and at outdoor mega events if they provide respirators (e.g., N95 masks) to unvaccinated employees for voluntary use.
 - After July 31st, no physical distancing or barriers are required (except if there are outbreaks) **but all unvaccinated employees must be provided N95s for voluntary use**
 - Fully vaccinated employees that test positive for COVID must still quarantine for 10 days, but no quarantine for close contact
 - No testing requirements for fully vaccinated (still required for close contact by unvaccinated employees)

CAL/OSHA COVID-19 PREVENTION ETS

- **Face Coverings:** Fully vaccinated workers without COVID symptoms do not need to wear face coverings in a room where everyone else is fully vaccinated and showing no symptoms. Same as to outdoor moments.
However:
 - “**Outdoor Mega Events**” Exception: (10,000+ attendees) still require face coverings
 - Public-facing businesses** will still need to wear masks
 - Open work areas** (e.g., cubicles, shared offices) will still need to wear masks
 - Starting July 31st, employers are required to provide respirators (**N95 masks**) to all unvaccinated employees working indoors or at outdoor mega events
 - Check local county and city rules too

CAL/OSHA COVID-19 PREVENTION ETS

- **Prevention Program:** Employers still required to maintain a written COVID-19 Prevention Program:
 - Assess California Department of Public Health’s Interim guidance for Ventilation, Filtration and Air Quality in Indoor Environments of February 26, 2021
 - Provide COVID-19 training that includes information of how the vaccine is effective at preventing COVID-19 and protecting against transmission
 - Maintain documentation showing employee is “fully vaccinated” (i.e., signed acknowledgement or copy of vaccination card)

NEXT STEPS FOR REOPENING

- Update your written COVID-19 Prevention Program (WCPP) and related notices and policies
- Assess workplace for compliance with all COVID-19 safety requirements
- Prepare your vaccination policy and assess how you will handle vaccinated employees
 - Mandatory?
 - How you will handle documentation (confidentiality)
 - Face covering and distancing scenarios/assessments
- Stock up on NIOSH-approved N95 Respirators
- Train supervisors on revised COVID-19 protocols and policies
- Ensure procedures for accommodation process are developed

Questions?



Thank You!

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