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## LEGAL UPDATE

January 22, 2021

**To:** Superintendents/Presidents/Chancellors, Member Community College Districts

**From:** Damara L. Moore, Senior Associate General Counsel *DM*  
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**Subject:** Mandating Vaccinations for Employees  
Memo No. 02-2021(CC) REVISED

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Currently, there is no mandatory vaccination requirement from either the state or federal government. According to California For All, presently the state “hope[s] that once Californians find out how safe and effective the COVID-19 vaccines are, they will voluntarily opt to receive them.”<sup>1</sup> This Legal Update addresses the question of whether a public employer, such as community college districts, may mandate that its employees receive the COVID-19 vaccination.

Current guidance from the Equal Employment Opportunity Commission (“EEOC”)<sup>2</sup> provides that employers may require employees to receive a COVID-19 vaccination, subject to the below analysis.

### COVID-19 Vaccines, EUA, and FD&C Act

As a preliminary issue, there are two COVID-19 vaccines currently authorized for emergency use by the U.S. Food and Drug Administration (“FDA”):

- Moderna COVID-19 Vaccine (authorized by the FDA on December 18, 2020)
- Pfizer-BioNTech COVID-19 Vaccine (authorized by the FDA on December 11, 2020).<sup>3</sup>

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<sup>1</sup> <https://covid19.ca.gov/vaccines/>

<sup>2</sup> <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws> (“EEOC Guidance”)

<sup>3</sup> <https://www.fda.gov/emergency-preparedness-and-response/coronavirus-disease-2019-covid-19/covid-19-vaccines>



The EEOC guidance provides information on Emergency Use Authorization (“EUA”) of COVID-19 vaccines in its Question and Answer K.4., which provides:

Some COVID-19 vaccines may only be available to the public for the foreseeable future under EUA granted by the FDA, which is different than approval under FDA vaccine licensure. The FDA has an obligation to:

[E]nsure that recipients of the vaccine under an EUA are informed, to the extent practicable under the applicable circumstances, that FDA has authorized the emergency use of the vaccine, of the known and potential benefits and risks, the extent to which such benefits and risks are unknown, that they have the option to accept or refuse the vaccine, and of any available alternatives to the product. [Emphasis added].

The FDA says that this information is typically conveyed in a patient fact sheet that is provided at the time of the vaccine administration and that it posts the fact sheets on its website. More information about EUA vaccines is available on the FDA’s EUA page.

So, individuals do have a right under the Food, Drug and Cosmetic Act (“FD&C Act”) to refuse to be vaccinated with an EUA vaccine. That said, the FD&C Act does not address employment issues to include the right of an employer to establish the terms and conditions of their employee’s employment and the duty to ensure the health and safety of all employees in the work setting. Rather, the EEOC provides guidance on employment related issues such as this.

As we know, there are a number of conditions of public employment for which an individual could refuse to accept as a private citizen, but must accept to be a public employee such as being fingerprinted and undergoing a criminal background check,<sup>4</sup> taking a public oath,<sup>5</sup> agreeing to be a disaster service worker<sup>6</sup>, ensuring the employee does not have tuberculosis,<sup>7</sup> etc.

Therefore, public employers, if they are choosing to mandate that its employees receive a COVID-19 vaccination, should consider establishing a process to address employees that refuse to be vaccinated as per the FD&C Act, but do not otherwise have a disability under the Americans with Disabilities Act (“ADA”) or a sincerely held belief under Title VII of the Civil Rights Act of 1964 (“Title VII”). This process may include a good faith discussion to attempt to accommodate these employees. We advise working with your labor law counsel in developing this process.

### **Considerations in Implementing Employer Mandatory Vaccination Policy**

Prior to implementing such a mandate, the employer must ensure that its policies comply with the ADA, Title VII, and other workplace laws. This means the employer must have policies and practices in place to engage in the interactive process to determine what accommodations can be

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<sup>4</sup> Education Code §§ 44830.1 and 45125.

<sup>5</sup> California Constitution, Article 20, § 3.

<sup>6</sup> Government Code § 3100.

<sup>7</sup> Education Code § 49406.



made for an employee who raises objections to vaccination due to a sincerely held religious belief or a medical condition.

Before adopting such a policy, the employer must conduct a direct threat analysis and provide the opportunity to bargain to labor organizations.

I. Prior to Implementing Such a Policy, the Public Employer Should Conduct a Direct Threat Analysis.

The ADA allows an employer to have “qualification standards” that may screen out some employees with disabilities if the employer can show the requirement is “job related for the position in question and is consistent with business necessity.”<sup>8</sup> This includes “a requirement that an individual shall not pose a direct threat to the health or safety of individuals in the workplace.”<sup>9</sup> However, if such a requirement screens out or tends to screen out an individual with a disability, the employer must show that an unvaccinated employee would pose a direct threat due to a “significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation.”<sup>10</sup> According to the EEOC:

Employers should conduct an individualized assessment of four factors in determining whether a direct threat exists: the duration of the risk; the nature and severity of the potential harm; the likelihood that the potential harm will occur; and the imminence of the potential harm. A conclusion that there is a direct threat would include a determination that an unvaccinated individual will expose others to the virus at the worksite. If an employer determines that an individual who cannot be vaccinated due to disability poses a direct threat at the worksite, the employer cannot exclude the employee from the workplace—or take any other action—unless there is no way to provide a reasonable accommodation (absent undue hardship) that would eliminate or reduce this risk so the unvaccinated employee does not pose a direct threat.

If there is a direct threat that cannot be reduced to an acceptable level, the employer can exclude the employee from physically entering the workplace, but this does not mean the employer may automatically terminate the worker.<sup>11</sup>

We recommend that any public employer considering mandating the COVID-19 vaccine for employees work closely with their legal team to ensure the policy is supported by findings of a direct threat.

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8 29 C.F.R. § 1630.10.

9 EEOC Guidance, FAQ K.5.

10 29 C.F.R. 1630.2(r).

11 Id.



II. Prior to Implementing Such a Policy, Be Aware of Bargaining Obligations.

The decision to mandate vaccinations will implicate the duty to negotiate with labor organizations. Some management rights clauses might arguably permit the decision to be imposed, but will still require effects bargaining. To determine a public employer's bargaining obligations, a fact-intensive analysis of the management rights article within each collective bargaining agreement must be performed. We urge consultation with your labor law counsel prior to implementing any such policy.

III. After Adopting Such a Policy, Public Employers Will Need to Be Vigilant for the Need to Engage in the Interactive Process with Qualified Individuals.

According to the EEOC:

Employers will need to determine if any other rights apply under the EEO laws or other federal, state, and local authorities. For example, if an employer excludes an employee based on an inability to accommodate a request to be exempt from a vaccination requirement, the employee may be entitled to accommodations such as performing the current position remotely. This is the same step that employers take when physically excluding employees from a worksite due to a current COVID-19 diagnosis or symptoms; some workers may be entitled to telework or, if not, may be eligible to take leave under the Families First Coronavirus Response Act, under the FMLA, or under the employer's policies . . . .<sup>12</sup>

Administrators will need to be aware of obligations related to accommodations, to whom such employees should be directed when the employer's obligation to engage in the interactive process has been triggered, and those employees who engage in the interactive process should be aware of the requirement to provide accommodations to qualifying employees so long as the accommodations do not place an undue hardship on the employer. We suggest that you work closely with your legal team when these initial requests for accommodations are presented, to ensure compliance with a situation that may be novel for many administrators.

When determining whether an employee requires an accommodation for his or her religious beliefs, employers "should ordinarily assume that an employee's request for religious accommodation is based on a sincerely held religious belief."<sup>13</sup> Once this determination is made, "the employer must provide a reasonable accommodation for the religious belief, practice, or observance unless it would pose an undue hardship under Title VII of the Civil Rights Act. Courts have defined 'undue hardship' under Title VII as having more than a *de minimis* cost or burden on the employer."<sup>14</sup>

The obligation to engage in the interactive process does not mean all requests for accommodations must be granted. This is addressed by the EEOC, Question and Answer K.7:

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<sup>12</sup> EEOC Guidance, FAQ K.5.

<sup>13</sup> EEOC Guidance, FAQ K.6.

<sup>14</sup> Id.



**K.7. What happens if an employer cannot exempt or provide a reasonable accommodation to an employee who cannot comply with a mandatory vaccine policy because of a disability or sincerely held religious practice or belief? (12/16/20)**

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. Employers will need to determine if any other rights apply under the EEO laws or other federal, state, and local authorities.

We know there are many questions related to vaccination that require individualized answers.

Please contact our office with questions regarding this Legal Update or any other legal matter.

*The information in this Legal Update is provided as a summary of law and is not intended as legal advice. Application of the law may vary depending on the particular facts and circumstances at issue. We, therefore, recommend that you consult legal counsel to advise you on how the law applies to your specific situation.*

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