



**MITIGATING EMPLOYMENT LIABILITY WHILE
NAVIGATING COVID-19 IN THE WORKPLACE
JULY 14, 2021**

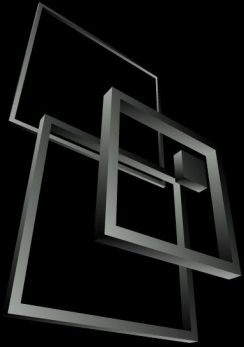
San Diego County Business Sector Telebriefing on COVID-19
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AGENDA

- California Reopened
- Cal/OSHA emergency standards
- Mandatory Vaccines in Employment
- Legal Issues Implicated by Vaccine Inquiries
- COVID Litigation Trends
- Preventing Employment Litigation





Workplace Safety

California Reopened

- The “Blueprint” has been retired
 - No more physical distancing
 - No more capacity limits on businesses
 - No more “tier” system
 - No more masks for the vaccinated
 - Honor system/self-attestation
 - Except for “mega” events
 - » Negative test or proof of vaccination status



Safely reopening California

Last updated July 1, 2021 at 6:38 PM

Thanks to your trust in the vaccine and falling transmission rates, California has fully reopened its economy. This means no more physical distancing, no capacity limits, no county tiers, and relaxed mask guidance.

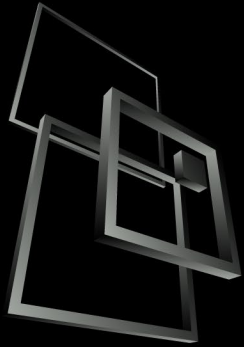
On this page:

- > [Reopening California](#)
- > [Continuing safety measures](#)
- > [Retiring the Blueprint map](#)

Cal/OSHA Emergency Temporary Standards



- Effective **June 17, 2021**
- Expires **June 13, 2022**
- Cal/OSHA publication re ETS
 - https://www.dir.ca.gov/dosh/dosh_publications/COVIDOnePageFS.pdf
- **Answered Questions**
 - <https://www.procopio.com/articles/view/cal-osh-answers-on-covid-19-safety-and-masks>
 - <https://www.dir.ca.gov/dosh/coronavirus/Revisions-FAQ.html>

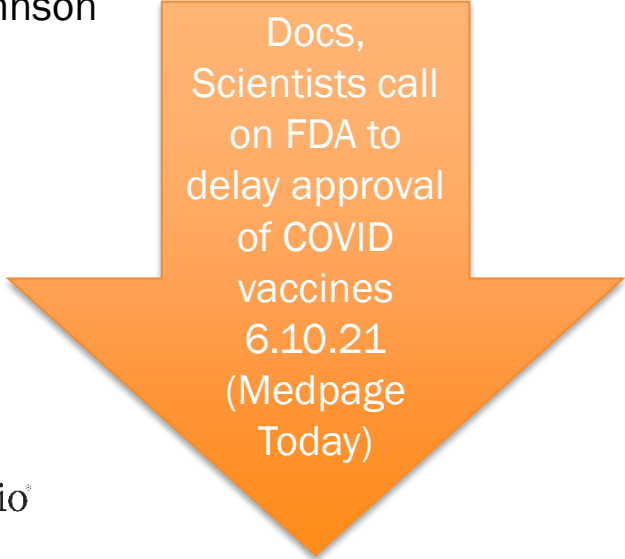


Employment Law Issues Implicated by COVID-19 Vaccines



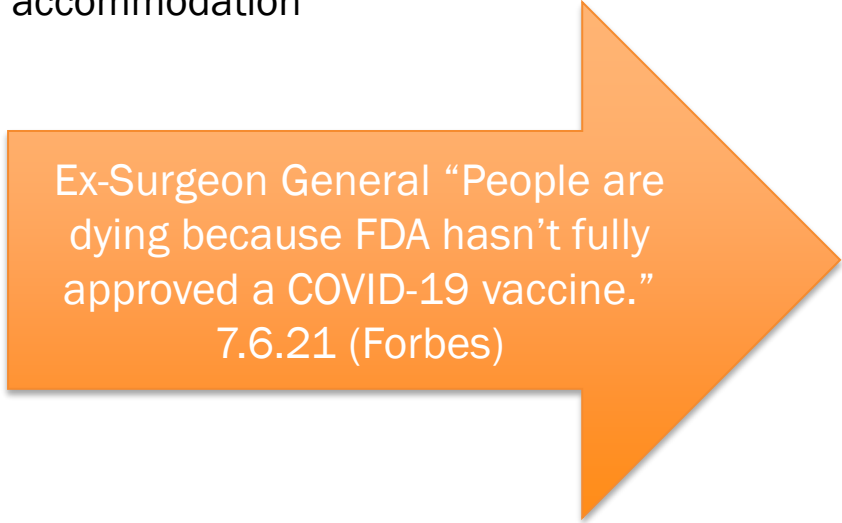
Vaccinations Issued under FDA Emergency Use Authorizations

- U.S. Food and Drug Administration (FDA) issued Emergency Use Authorizations (EUA) for COVID-19 vaccines
 - Pfizer, Moderna and Johnson & Johnson



Docs,
Scientists call
on FDA to
delay approval
of COVID
vaccines
6.10.21
(Medpage
Today)

- Every person has a right to refuse EUA vaccination under the Food, Drug & Cosmetics Act – but no process for accommodation



Ex-Surgeon General “People are dying because FDA hasn’t fully approved a COVID-19 vaccine.”
7.6.21 (Forbes)



Mandatory Vaccine Questions

- Can an employer require employees to receive the EUA COVID-19 vaccines? Not without risking liability.
- Can an employer require employees to receive the COVID-19 vaccines once finally approved by the FDA? Yes, but....

Lawsuit To Stop Employer's Mandatory Vaccines

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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION**

CALIFORNIA EDUCATORS FOR
MEDICAL FREEDOM, ARTEMIO
QUINTERO, MIGUEL SOTELO,
JANET PHYLLIS BREGMAN,
CEDRIC JOHNSON, MISANÓN
(SONI) LLOYD, HEATHER
POUNDSTONE, and THERESA D.
SANFORD,

Plaintiffs,

v.

THE LOS ANGELES UNIFIED
SCHOOL DISTRICT, AUSTIN
BEUTNER, in his official capacity as
Superintendent of the Los Angeles
Unified School District, and LINDA
DEL CUETO, in her official capacity
as the Director of Human Resources
for the Los Angeles Unified School
District,

Case No.: 21-cv-02388

**COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF**

DEMAND FOR JURY TRIAL



May 25, 2021 Survey



83% of employers are reluctant to mandate vaccines

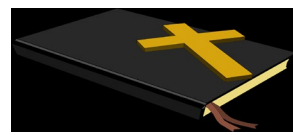


Other Mandatory Employment Vaccination Considerations

Even after the FDA provides final approval of the vaccines...

- **EEOC and DFEH**: Employers must accommodate employees who refuse vaccination for sincerely held religious beliefs and disabilities. No retaliation for requesting accommodations.
- **California Labor Code**: Employers may not retaliate against employees your political activities or beliefs.
- **CDC Guidance**: Currently focuses on voluntary compliance and provides safety guidance for unvaccinated employees.
- **Liability**: Employers who choose to terminate or discipline employees who refuse to be vaccinated risk potential retaliation claims based on disability, religion, and political protections.





Accommodation Requests - Religion

- Employee **refuses to get vaccinated** based on a sincerely held religious Christian belief because:
 - Vaccines are experimental. The body is the temple of the Holy Spirit and should not be used for experimentation.
"Do you not know that your bodies are temples of the Holy Spirit, who is in you, whom you have received from God?" (1 Cor 6:19)
- Employee **refuses to wear a face mask** or shield in the workplace based on a sincerely held religious Christian belief because:
 - The veiling of the face is a Muslim practice of submission to Allah. Requiring a Christian to engage in a Muslim practice violates the employee's religious belief.
 - The Bible commands Christians to stand before the Lord with faces unveiled.
"And we all, who with unveiled faces contemplate the Lord's glory, are being transformed into his image with ever-increasing glory, which comes from the Lord, who is the Spirit." (2 Cor 3:18)
- **What to do?** Engage in a documented, good faith interactive process with the employee to identify alternative options (i.e. reasonable accommodations) such as weekly COVID-19 testing, remote work etc.

Accommodation Requests – Disability

- Employee refuses to return to the office after working remotely since March 2019 because:
 - *The employee does not have child care.*
 - *The employee subsequently offers a doctor’s note stating that the employee’s disability requires the employee to work from home for 12 months.*
- Employee refuses to work in the office 5 days per week after working in the office 2 days per week for several months because:
 - *The employee’s year old knee injury is aggravated by working in the office.*
 - *The employee offers a doctor’s note stating that the employee needs to work from home 3 days per week for 10 months.*
- ***What to do?*** Engage in a documented, good faith interactive process with the employee to obtain information from the health care provider to confirm disability, explore alternative options etc



Privacy Issues and Medical Inquiries

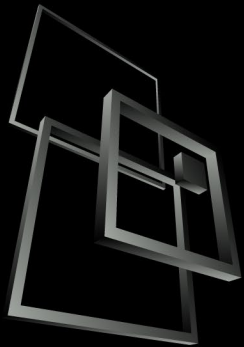


- Proof of vaccines implicates privacy issues
- California Consumer Protection Act (CCPA)
 - Employers that are subject to the CCPA should provide a collection notice (before collection begins) of:
 - the fact of the collection
 - the purpose for collection, and
 - the categories of third parties the information is shared with.
 - **Note:** Vaccination information cannot be collected if the business does not provide notice to the employee.
- California Confidential Medical Information Act
- HIPAA

Employer Vaccine Inquiries


- What should an employer avoid asking?
 - Limit the request so it is not likely to elicit information about a disability
 - Vaccinated
 - Unvaccinated
 - Decline to state
 - Do not ask why an individual did not receive a vaccination
 - Warn the employee not to provide any medical information as part of response to vaccination inquiry
 - Provide a privacy pre-collection notice to the employee under the CCPA





COVID Employment Litigation Trends

COVID Litigation Trends

- 
- Wrongful termination
 - Retaliation for whistleblowing regarding safety;
 - Retaliation for requesting reasonable accommodation
 - Failure to provide a safe work environment;
 - Discrimination or harassment (age, race, disability or COVID-stereotypes);
 - Failure to provide reasonable accommodations;
 - Failure to provide COVID paid sick leave pay or Cal/OSHA exclusion pay;
 - Wage and hour class action and PAGA action claims;
 - Failure to reimburse expenses incurred for remote work;
 - Unpaid wages for temperature checks, auto clocking remote employees etc;
 - Failure to provide WARN notifications – extended furloughs or layoffs.

Employment and retaliation. Defendant retaliated against plaintiff, a full-time assistant manager, because plaintiff refused to assist a customer who refused to wear a mask in defendant's store during the Covid-19 pandemic.

Defendant's corporate-level executives prohibited its retail employees from enforcing the mandate to wear masks and social distance and ordered its employees to assist customers who refused to follow the mandate. Defendant's district manager retaliated against plaintiff after plaintiff lodged complaints about defendant's failure to follow Covid-19 safety protocols by suspending plaintiff and later terminating plaintiff via text message. The reason given for plaintiff's termination was it "came from up top."

Class action for employment. Defendant misclassified its mortgage salespersons as exempt from overtime, minimum wage, meal and rest periods, and paid them on a commission basis which failed to compensate for non-sales work or rest breaks. Defendant also failed to reimburse business expenses incurred by plaintiff while working from home during the Covid-19 pandemic.

Recent San Diego Superior Court Lawsuits June and July 2021

Preventing Employment Liability

- Train supervisors on how to properly deal with all complaints
- Promptly investigate all complaints.
- Consider all California applicable laws and regulations.
- Train supervisors on COVID-19 issues
- Provide a privacy pre-collection notice before asking about vaccine status
- Do not retaliate based on vaccine status
- Engage in an interactive process regarding requests for accommodation
- Keep medical information private
- When possible, be flexible
- Understand “why” employees sue
- Hire and train strong leaders
 - **Employees often sue because of a bad boss**
- Treat employees with dignity and respect
- Communicate effectively
 - **Empathy and active listening**
- Provide coaching and mentoring
 - **Provide job skills support**
- Consider arbitration agreements
- Consider release agreements

Thank you!

Questions? Please feel free to
contact us any time for guidance.



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