

BENDER'S CALIFORNIA LABOR & EMPLOYMENT BULLETIN

Vol. 2021, No. 3 • March 2021
Deborah J. Tibbetts, Editor-in-Chief

Inside This Issue

Getting Back to Normal: Whether Requiring Employees to Get the COVID-19 Vaccine Is Advisable and, More Importantly, Permissible
COURTNEY O. CHAMBERS..... 65

WAGE & HOUR ADVISOR: Ninth Circuit Rejects Preemption Defense in Airline Flight Crew Wage Statement Cases
AARON BUCKLEY..... 70

“Have Fun Storming the Castle!” Wait, What Do You Mean There are Consequences?
GENEVIEVE NG..... 72

CASE NOTES 78
ADA..... 78
Collective Bargaining..... 81
Discrimination..... 82
FMLA..... 83
Retaliation..... 85
Wage and Hour..... 86
Whistleblower Protection Act..... 88

CALENDAR OF EVENTS 90

EDITORIAL BOARD AND AUTHOR CONTACT INFORMATION 91

Getting Back to Normal: Whether Requiring Employees to Get the COVID-19 Vaccine Is Advisable and, More Importantly, Permissible¹

Courtney O. Chambers

Introduction

Since the start of the pandemic, businesses and employers have been eager for a miracle that allows them to reopen their doors. The world received a step in this direction when Pfizer-BioNTech and Moderna announced the first developed vaccines against COVID-19, which were granted Emergency Use Authorization by the Food and Drug Administration in December 2020. While the vaccines are not yet widely available to the public, employers should begin to think about and plan a vaccine-related strategy for their workplaces. While surveys show a rising willingness to receive the vaccine, many individuals are still reluctant for a variety of reasons.² Therefore, employers must determine how to create a safe workplace for employees while following the law concerning employer vaccination policies.

¹ This article is based on laws and regulations as of February 2021. This is a quickly developing area of law, and certain aspects of this article may change by the time a company actually develops its vaccine protocols and policies.

² Cary Funk & Alec Tyson, *Intent to Get a COVID-19 Vaccine Rises to 60% as Confidence in Research and Development Process Increases*, Pew Research Center, Dec. 3, 2020, available at <https://www.pewresearch.org/science/2020/12/03/intent-to-get-a-covid-19-vaccine-rises-to-60-as-confidence-in-research-and-development-process-increases/>.



(Continued on page 67)

EDITORIAL BOARD**Deborah J. Tibbetts, Editor-in-Chief**

Kasper & Frank LLP
San Diego

Ray Bertrand

Paul Hastings LLP
San Diego

Phyllis W. Cheng

Mediate.Work
Valley Village

Joshua Henderson

Norton Rose Fulbright US LLP
San Francisco

Kevin D. Whittaker

Faegre Drinker
San Francisco

Zach Hutton

Paul Hastings LLP
San Francisco

F. Curt Kirschner

Jones Day
San Francisco

Hillary E. August

Mayer Brown LLP
Chicago

Alan Levins

Little Mendelson, P.C.
San Francisco

Genevieve Ng

Renne Sloan Holtzman Sakai LLP
San Francisco

Tyler M. Paetkau

Procopio, Cory, Hargreaves & Savitch LLP
Palo Alto

Kacey R. Riccomini

Thompson Coburn LLP
Los Angeles

Walter Stella

Miller Law Group
San Francisco

REPORTERS**Courtney Chambers**

Little Mendelson, P.C.
San Francisco

Brit K. Seifert

Paul Hastings LLP
San Diego

COLUMNISTS**Aaron A. Buckley**

Paul Plevin Sullivan & Connaughton, LLP
San Diego

Deborah J. Tibbetts

Kasper & Frank LLP
San Diego

This publication is designed to provide accurate and authoritative information in regard to the subject matter covered. It is provided with the understanding that the publisher is not engaged in rendering legal, accounting, or other professional service. If legal or other expert assistance is required, the services of a competent professional should be sought.

From the Declaration of Principles jointly adopted by a Committee of the American Bar Association and a Committee of Publishers and Associations.

A NOTE ON CITATION: The correct citation form for this publication is: 2021 Bender's Calif. Lab. & Empl. Bull. 65 (March 2021).

EBOOK ISBN 978-0-3271-6747-1

Getting Back to Normal: Whether Requiring Employees to Get the COVID-19 Vaccine Is Advisable and, More Importantly, Permissible

Courtney O. Chambers

(Continued from page 65)

On December 16, 2020, the Equal Employment Opportunity Commission (EEOC) issued updated guidance concerning employers' COVID-19 vaccine-related policies and practices.³ This article discusses the EEOC guidance, the permissibility of COVID-19 vaccine requirements in the workplace, and key issues of which employers should be aware when developing and implementing vaccine-related policies and practices.

An Employer May Require Vaccinations, With Exceptions

Employer policies related to the COVID-19 vaccine implicate a number of laws, including the Americans with Disabilities Act⁴ (ADA) and the religious protections of Title VII of the Civil Rights Act of 1964⁵ (Title VII), as well as their state equivalents. The recent EEOC guidance suggests that mandatory vaccination policies are lawful but with exceptions. Employers who choose to implement a mandatory vaccination policy may be obligated to provide exemptions or accommodations to employees with disabilities that may prevent them from obtaining a vaccination, as well as employees with sincere religious⁶ objections to vaccines. Once an

employer is on notice that an employee's disability status or religious beliefs prevent them from receiving the vaccination, the employer must engage in the interactive process with the employee to determine if a reasonable accommodation can be made without posing an undue hardship on the employer.⁷ Such accommodations could include a remote work arrangement, continued mask-wearing, schedule changes such as scheduling unvaccinated employees to work at certain times, and/or other safety measures. Whether an employer can provide an accommodation is a fact-specific and individualized inquiry that must take into account not only the workplace and the employee's job duties, but other relevant factors such as the numbers of workers in the workplace who have and have not already obtained a vaccination. Personal protective equipment (PPE) and remote-work measures have been widely used to protect employees to date and will continue to be required for some time until it can be shown that the COVID-19 vaccine prevents transmission of the virus. As a result, it may be difficult for an employer to argue that an employee cannot be accommodated or that such an accommodation would pose an undue hardship on the employer.

If an accommodation cannot be provided that would eliminate or reduce the risk of exposure by the unvaccinated employee, the employer must show that an unvaccinated employee would pose a "direct threat" in order to exclude them from the workplace. 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.⁸

³ U.S. Equal Employment Opportunity Commission, Technical Assistance Questions and Answers: *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws* (Updated Dec. 16, 2020) (hereinafter "EEOC COVID-19 Guidance"), available at <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>.

⁴ 42 U.S.C. § 12101 et seq.

⁵ 42 U.S.C. § 2000e et seq.

⁶ Religious beliefs are defined very broadly and include "moral or ethical beliefs as to right and wrong that are sincerely held with the strength of traditional religious views." *EEOC Guidelines on Discrimination Because of Religion*, 29 C.F.R. §1605.1. Under California law an employee's belief system is considered religious if it (1) addresses fundamental and ultimate questions having to do with deep and imponderable matters (e.g., the meaning and purpose of life, theories of humankind's nature or its place in the universe, matters of human life and death, or the exercise of faith); (2) is comprehensive in nature, consisting of a belief system as opposed to an isolated teaching; and (3) can be recognized by the presence of certain formal and external signs. *Friedman v. S. Cal. Permanente Med. Group*, 102 Cal. App. 4th 39, 69-70 (2002). This is a nebulous and highly private area of inquiry; employers should seek the guidance of legal counsel in addressing this issue.

⁷ Under the ADA, an undue hardship entails "significant difficulty or expense" incurred by the employer. Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, Definitions, 29 C.F.R. § 1630.2. For religious accommodations under Title VII, the "undue hardship" standard is less stringent than the ADA standard, requiring only that the employer show that providing an accommodation imposes "more than a *de minimis* cost or burden on the employer." Commission Guidelines, 29 C.F.R. §1065.2(e)(1). However, California law does *not* impose a lesser undue hardship standard on religious accommodation and applies the same undue hardship standard as in the context of disability.

⁸ EEOC COVID-19 Guidance, *supra* note 3.

The EEOC cautions that while an employer can exclude an unvaccinated employee from the workplace if the employer determines the employee poses a “direct threat,” this does not mean that an employer can automatically terminate that employee.

Duty to Bargain and Other NLRA Considerations

Another legal issue that employers should be aware of are the rights employees have under the National Labor Relations Act⁹ (NLRA). Some employees could refuse to be vaccinated on the basis of purported safety concerns and claim protection under the NLRA, which protects the rights of employees, both unionized and not, to engage in “concerted activity” regarding employment conditions. If this occurs, an employer should be cautious about taking any adverse action against employees who engage in concerted behavior and consult with a labor attorney before doing so.

If an employer already has a unionized workforce, the law suggests that employers seeking to implement a mandatory vaccination policy should first notify the union and bargain, upon request, over both the decision and its effects. An employer could be free from any bargaining obligation in two instances - if the applicable collective bargaining agreement contains language granting the employer the right to implement such policy *or* if a local, state, or federal law mandates vaccinations for certain employees. However, both of these scenarios are unlikely and, in either of these instances, an employer may still have an obligation to bargain over any discretionary aspects of the policy, i.e., “effects” bargaining, which could include issues such as what happens if someone declines to get vaccinated or whether employees will receive time off if they experience adverse effects from the vaccine.

Additionally, an employer with a unionized workforce should comply with any request for information from the union pertaining the employer’s vaccination policy or practices.

Other Considerations for COVID-19 Vaccination Obligations

The COVID-19 vaccine poses a myriad of other issues employers must consider when developing and implementing workplace policies and practices. One concern involves medical-related inquiries and employee privacy. Specifically, employers should be mindful of which questions they ask employees regarding their vaccination status, and how they use the information obtained in response to those questions.

The ADA generally prohibits an employer from requiring a medical examination or making inquiries of an employee, unless such examination or inquiries are “job-related and consistent with business necessity.” However, the EEOC’s guidance makes clear that requiring an employee to show proof of vaccination is not a “medical examination” or “disability-related inquiry,” and thus does not implicate the ADA. However, follow-up questions, such as why an employee has not been vaccinated, may elicit information about a disability and thus trigger employer obligations under the ADA.

If an employer is administering the vaccine or contracting with a third party to administer it, pre-screening vaccination questions (as recommended by the U.S. Centers for Disease Control and Prevention) will likely implicate the ADA’s provision on disability-related inquiries, and thus must be “job-related and consistent with business necessity.” To meet this standard, an employer would need to have a reasonable belief that an employee who refuses to answer the pre-screening questions and, who therefore, does not receive a vaccination, will pose a direct threat to the health of others in the workplace. However, this standard may not apply if an employer is offering the vaccine to employees on a voluntary basis, as any pre-screening questions would also be voluntary.

Relatedly, employers conducting pre-vaccination screenings should be careful to avoid questions about any family medical or genetic history that could implicate the Genetic Information Nondiscrimination Act¹⁰ (GINA). Furthermore, any information obtained from pre-vaccination inquiries must be kept as a confidential medical record and separate from an employee’s personnel file.

To the extent an employer is considering offering bonuses or other monetary incentives to employees who agree to be vaccinated, they should be mindful of applicable wage and hour laws and benefits plan requirements, among other things, and consult legal counsel before implementing any policies.

Finally, employers should be cautious to ensure there is no retaliation or harassment against any individual who does not receive the vaccine, either voluntarily or because of a disability or religious based reason.

As new information is provided about the efficacy and longevity of COVID-19 vaccines, as well as their distribution, it is likely the EEOC and other federal and state agencies will issue additional or revised guidance. Given the uncertainty and prolonged timeline, it may be

⁹ 29 U.S.C. § 151 et seq.

¹⁰ 42 U.S.C. § 2000ff et seq.

premature for many employers to commit to any specific vaccination policy as this time. Employers may consider whether encouraging employees to receive the vaccine, rather than mandating vaccination, is a preferable option. Alternatively, employers may also consider assessing specific workplace areas that pose the highest risk or where protective measures have been less successful to determine where a vaccine mandate would be necessary to eliminate a direct threat in the workplace. Employers should continue to monitor federal, state, and local guidance related to COVID-19 and consult with legal counsel when necessary to ensure compliance with all laws while maintaining the health of their workforces.

Courtney Chambers is an attorney at Littler Mendelson in San Francisco. She represents employers in cases involving labor, wage and hour, discrimination, wrongful termination and other issues. Littler Mendelson, P.C. is global and leading labor and employment law firm that is continually monitoring closely employer concerns, as well as global issues surrounding the outbreak and its effect on the workplace. Littler's COVID-19 task force has responded to the growing demand from the Firm's clients for a practical compliance solution. Please contact Ms. Chambers at cchambers@littler.com for further information on Littler's COVID-19 resources.