

TOP 5 VACCINE TAKEAWAYS FROM NEW CALIFORNIA DFEH GUIDANCE

Insights

Mar 17, 2021

After patiently waiting for COVID-19 vaccine guidance in California, employers now have some clarification from California's Department of Fair Employment and Housing (DFEH). As somewhat expected, the DFEH's guidance issued early this month aligns with the EEOC's Guidance issued in December 2020. Here are the top five takeaways for employers about COVID-19 vaccines according to the [DFEH's recent guidance regarding COVID-19 vaccines](#):

1. An employer may require employees to receive COVID-19 vaccines.

Consistent with the EEOC's guidance, the DFEH states that, with certain exceptions, employers may require at-will employees to receive vaccines issued under the FDA's Emergency Use Authorization (EUA) procedures. If you do so, however, you must provide disability and religious-related accommodations and not discriminate against, retaliate, or harass employees or job applicants on the basis of a protected characteristic (e.g., medical disability, religion, etc.) and/or for engaging in protected activity (e.g., requesting a reasonable accommodation).

The DFEH does not, however, provide guidance on whether an employer should mandate vaccines. Although the EEOC and DFEH appear to permit mandatory vaccinations in the workplace, most employers are not mandating vaccines. According to our [Fisher Phillips' Flash Survey](#), only about 9% of employers are mandating or planning to mandate vaccines.

Related People



Vana Ebrahimi

Associate

[213.402.9557](tel:213.402.9557)



Hannah Sweiss

Partner

[818.230.4255](tel:818.230.4255)

2. If an employer requires vaccination against COVID-19 in its workforce, the employer must reasonably accommodate employees with disabilities or with sincerely held religious beliefs or practices.

Even if an employer may mandate vaccines amongst its employees, it does not mean you have free reign to require the vaccine for all workers. In accordance with the guidance from the EEOC, the DFEH states that if an employee objects to vaccination on the basis of disability or sincerely held religious belief or practice, you must engage in the interactive process to identify options for reasonable accommodations that do not cause undue hardship.

You should carefully document the interactive process and whether a reasonable accommodation exists. The DFEH provides examples of reasonable accommodation options employers may consider, including but not limited to, working from home, job reassignment, or modification of worksite safeguards that enable the employee to work without endangering the employee or others.

The DFEH states that if you can show the accommodation imposes an undue hardship, the employee is unable to perform their essential job duties with a reasonable accommodations, or the employee cannot perform those duties in a manner that would not endanger the employee's health or safety of others with reasonable accommodations, you may exclude them from the workplace.

However, it is important to note that the undue hardship standard applicable to requests for a disability-based accommodation is a very high standard to meet. The undue hardship standard applicable to religious accommodation is less demanding. Also, you must not retaliate against an employee for requesting an accommodation or disclose that an employee is receiving a reasonable accommodation.

This area also raises other potential legal considerations such as potentially disclosing an employee's vaccination status by the accommodation itself. This is an area in which to consult employment counsel as you navigate through the process.

Service Focus

Workplace Safety

Related Offices

Sacramento

San Diego

San Francisco

Irvine

Los Angeles

Woodland Hills

3. An employer is not legally required by the FEHA to reasonably accommodate all employees who refuse the vaccine.

The DFEH says that if an employee does not have a reason based on a disability or sincerely held religious belief for not being inoculated with a vaccine issued under the EUA procedures, you are not legally required to reasonably accommodate the employee.

The DFEH goes on to state that you are permitted to enforce reasonable disciplinary policies and practices if you are not retaliating against any employee for engaging in protected activity, such as opposing practices prohibited by FEHA. By way of example, the DFEH cites to the [California Code Section on retaliation](#) and uses the example that an employer may not retaliate against an employee who alleges that the employer's vaccination policy discriminates on the basis of a protected characteristic, such as race or national origin, or has a disparate impact on a protected group.

Although this appears to be "clear" guidance of when you may refuse to accommodate an employee who refuses vaccination, this is not so straightforward. Even by way of the DFEH's own example in the retaliation context, you should proceed with caution in this area and consult employment counsel. Mandatory vaccines can create a complex legal web and may face novel legal challenges, such as the recent [lawsuit](#) filed by a New Mexico detention center officer challenging the COVID-19 vaccination mandate, contending that he cannot be forced to be a "human guinea pig" by accepting a mandatory vaccination approved only through the FDA's Emergency Use Authorization procedures.

4. If an employer administers a COVID-19 vaccination program, an employer may ask employees for medical information relevant to vaccination.

The DFEH indicates that you may ask for medical information, such as whether an employee is experiencing COVID-19 symptoms or a pre-vaccination screening questionnaire, so long as the inquiry is "*job-related and consistent with business necessity.*" The DFEH reminds employers that any retained record of employee or applicant vaccination must be maintained as a confidential medical record.

While establishing on-site vaccinations may increase vaccination rates and reduce the time workers spend at off-site vaccination centers, this guidance implicates several additional legal issues related to potential premises liability, privacy concerns, and more.

5. An employer may require its employees to provide proof of vaccination.

The DFEH specifies that simply asking employees or applicants for proof of vaccination is not a disability-related inquiry, or religious creed-related inquiry, or a medical examination. The DFEH encourages employers to instruct their employees or applicants to omit any medical information as such documentation could potentially include disability-related medical information. Finally, DFEH reminds employers that any record of employee or applicant vaccination must be maintained as a confidential medical record. However, tracking and maintaining this information may raise additional obligations under the CCPA or otherwise.

Conclusion

If you believe a vaccine mandate is appropriate given your specific business circumstances, you should consult with employment counsel to ensure you address wage and hour considerations (e.g., paid time and reimbursement), accommodation issues, privacy concerns, potential workers' compensation liability, discrimination issues, among other considerations. Moreover, this analysis may have additional nuances in [union settings](#).

Whether you simply encourage or mandate vaccinations, you should be prepared with at least a policy framework, education campaign, and communication plan as wider availability of the vaccine becomes a reality. It is also important to keep in mind that even as vaccinations are underway, you may not currently change workplace safety practices or treat vaccinated employees different than non-vaccinated employees as it relates to general safety protocols (masks, social distancing, etc.).

We will continue to monitor developments related to the vaccine and related workplace questions that arise. Make sure you are subscribed to [Fisher Phillips' alert system](#) to get the most up-to-date information. If you have any

questions about how to ensure that your vaccine policies comply with workplace and other applicable laws, visit our [Vaccine Resource Center for Employers](#) or contact any attorney on our [FP Vaccine Subcommittee](#).