

CALIFORNIA BUSINESSES RECEIVE NEW COVID-19 AND REASONABLE ACCOMMODATION GUIDANCE

Insights
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California businesses struggling to police local vaccine verification mandates in places such as [San Francisco](#), [Los Angeles](#), Contra Costa, West Hollywood, and Berkeley received good news last week as state officials issued guidance regarding COVID-19 safety measures and reasonable accommodations. The October 18 [Guidance](#) for businesses, published by the Department of Fair Employment and Housing (DFEH), addresses rights and obligations under the Unruh Civil Rights Act, not those imposed by other state or local laws (i.e. local ordinances requiring face coverings or COVID-19 vaccination). While compliance with the Unruh Civil Rights Act alone does not relieve your business from obligations under existing state or local COVID-19 ordinances, the Guidance is still an informative publication that can help your business navigate these challenging times. Here's what your business needs to know about the new Guidance.

The Unruh Civil Rights Act

The Unruh Civil Rights Act is a California law that prohibits all businesses from discriminating against consumers based on a number of protected characteristics, including a person's sex, gender, sexual orientation, gender identity, gender expression, race, color, religion, ancestry, national origin, age, disability (mental or physical), medical condition, genetic information, marital status, primary language, citizenship, or immigration status.

The Act provides that all persons within California jurisdiction are entitled to "full and equal accommodations,

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Ariella Kupetz

Associate

213.402.9564

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advantages, facilities, privileges or services in all business establishments." Remedies for violations under the Act include statutory damages of no less than \$4,000, cease and desist orders, punitive damages, damages for emotional distress, out-of-pocket expenses, and attorney's fees and costs. The DFEH is authorized to enforce the Act and to investigate violation complaints.

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Business COVID-19 Safety Measures

The Guidance first clarifies that the Act allows businesses to implement rules that protect employees and customers from COVID-19 infection, including transmission from customer to employee, and from customer to customer. Accordingly, businesses are permitted to enact safety measures, such as:

- asking customers if they have COVID-19 symptoms before allowing entry;
- requiring customers to wear a face covering;
- taking customers' temperatures to determine if customers have a fever;
- requiring proof of vaccination before permitting entry; and/or
- requiring proof of a recent negative COVID-19 test.

A business may also deny entry or refuse service to someone with COVID-19 symptoms, including coughing, fever, and loss of taste and/or smell. Further, the Guidance makes clear that a business may deny entry or service to customers who refuse to state whether they have COVID-19 symptoms or refuse to have their temperatures taken.

While the Act does not require a business to take any of these steps, a business may decide (or otherwise be required by another law) to do so to protect its staff and customers against COVID-19.

However, businesses may not elect to take action against certain types of customers based on a protected personal characteristic under the Act (see list above), regardless of the reason. Examples of prohibited conduct under the Act include:

- Only taking the temperature of customers perceived to be immigrants, or only excluding customers with high

temperatures who appear to be from a particular foreign country;

- Requiring negative COVID-19 test results or proof of vaccination from individuals within a certain racial or religious group, but not others; and
- Requiring only pregnant or physically impaired customers to wear masks, even if you believe it's benevolent to do so.

Guidance Requires Businesses to Provide Reasonable Accommodations and Modifications

The Act requires businesses in California to reasonably accommodate customers with known disabilities. Unless the accommodation or modification would create a **direct threat** to the health or safety of others, an **undue burden** for your business, or a **fundamental alteration to your business's practices**, you must reasonably accommodate customers with disabilities.

Accordingly, the Guidance clarifies that if a customer communicates that they have a disability preventing them from complying with the business's COVID-19 safety measures, you may not turn the customer away and may not ask the customer to share information about the disability. Instead, you must accept the customer's statement that they have a disability preventing them from complying with the COVID-19 safety measure.

You must then engage in an "**interactive process**" and work collaboratively with the customer to try to identify a reasonable alternative that would allow you to serve the customer while still protecting your employees and other customers. DFEH guidance states that a representative may maintain a safe distance from the customer during this process and may request to speak to the customer in a way that protects against potential COVID-19 exposure, such as by phone or through a window.

"**Reasonable alternatives**" are determined on a case-by-case basis. Considerations include your business's layout, the number of employees on duty, the goods or services offered, the needs of the customer in question, and whether other customers are present. DFEH guidance provides three example scenarios demonstrating reasonable alternatives:

- A supermarket requiring face coverings where a supermarket customer refuses to wear a mask and a reasonable accommodation where an employee shops for the customer;
- A small computer store requiring customers to show proof of vaccination and wear a face covering and a reasonable accommodation where the customer unable to comply with the store's safety requirement is served over the phone, by video, or by text; and
- A bar with both indoor and outdoor service requiring customers to show proof of vaccination and a reasonable accommodation ensuring that a customer who cannot be vaccinated be served outdoors.

However, as discussed, a reasonable accommodation might not be available in three circumstances: when the possible alternatives create a direct threat to the health or safety of others, an undue burden for your business, or a fundamental alteration of your business. DFEH guidance provides three example scenarios demonstrating where reasonable accommodation might not be available:

- Where a restaurant is forbidden by a local ordinance from serving customers outdoors, it would not be a reasonable alternative for the restaurant to serve an unvaccinated customer at a table outside. However, the restaurant may be required to provide the food for pick up or delivery if the restaurant has those capabilities;
- A salon/barbershop that requires vaccination and/or masks would be justified in denying a service to a customer that would require close contact when the customer is unvaccinated/unmasked because providing service would directly threaten the health or safety of the employee and possibly other customers. However, if the customer only seeks to purchase products, the employer could ask the customer to wait outside while completing the transaction and bring the products to the customer; and
- A theater that requires all customers to be vaccinated against COVID-19 and/or wear a mask would be justified in denying entry to an unvaccinated/unmasked customer. A reasonable alternative could be setting up a showing outdoors if the theater already does this. Otherwise, this would likely be an undue burden and/or a fundamental

alternation of the business for the theater to be required to set up an outdoor showing for the unvaccinated/unmasked customer.

Sincerely Held Religious Belief

Interestingly, even though the Act explicitly protects religion as a personal characteristic, the Guidance states that it is unaware of any published court decision or other source of law clearly establishing that the Act requires businesses to reasonably accommodate sincerely held religious beliefs of customers.

That being said, the Guidance suggests that businesses generally attempt to identify a reasonable alternative to facilitate the business transaction when faced with a customer who asserts a religious reason for being unvaccinated or for not following a COVID-19 safety measure.

Furthermore, the Guidance suggests that U.S. Equal Employment Opportunity Commission (EEOC) [guidance](#) may prove useful for employers facing customers' religious accommodation requests. The EEOC guidance explains that the employer should ordinarily assume that an employee's request for religious accommodation is based on a sincerely held religious belief, practice, or observance. However, "if an employee requests a religious accommodation and an employer is aware of facts that provide an objective basis for questioning either the religious nature or the sincerity of a particular belief, practice, or observance, the employer would be justified in requesting additional supporting information."

Conclusion

As COVID-19 legislation continues to develop at national, state, and local levels, employers should continue to be conscious about its practices under the Unruh Civil Rights Act. Despite ongoing COVID-19 developments, one thing remains certain — taking proactive steps to ensure compliance with the Unruh Civil Rights Act as well as other applicable civil rights laws and COVID-19 orders can help decrease the risk of future civil rights claims and costly settlements.

We will monitor developments related to this Guidance and provide updates as warranted, so make sure that you are

subscribed to [Fisher Phillips' Insights](#) to get the most up-to-date information direct to your inbox. If you have further questions, contact your Fisher Phillips attorney, the authors of this Insight, or any attorney in any one of [our six California offices](#).