



BARGAINING ADVISORY

The Legality of COVID-19 Vaccine Mandates and Bargaining Implications

Background

The COVID-19 pandemic has dramatically impacted the health and safety of our members' working conditions. In December 2020, the Food and Drug Administration (FDA) granted emergency use authorization to the Pfizer-BioNTech COVID-19 vaccine for people age 16 and older and the Moderna vaccine for people age 18 and older. This advisory is intended to address what the availability of COVID vaccines might mean for staff in schools and community colleges.

Can California Public School Employers Mandate Employees Take One of the New COVID Vaccines?

Yes, generally, subject to the exceptions and explanations below.

Because employers are required to provide a safe and healthy workplace, they have general authority to establish legitimate health and safety rules and requirements. The U.S. Equal Employment Opportunity Commission (EEOC) updated its guidance on December 16, 2020 indicating that an employer may mandate a COVID vaccine by establishing a safety-based qualification standard that includes "a requirement that an individual shall not pose a direct threat to the health or safety of individuals in the workplace." See EEOC Guidance, Section K titled "Vaccinations." A "direct threat" means that having someone with COVID-19 in the workplace poses a significant threat of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation.

Although the California Department of Fair Employment and Housing (DFEH) has not yet issued guidance on this topic, it is likely to be consistent with the EEOC's guidance supporting the conclusion that employers may mandate COVID vaccination. Previous guidance from the EEOC and DFEH already found that employers could conduct screening and viral testing to determine if an individual is infected with COVID-19 because the presence of an infected employee would pose a "direct threat" to the health or safety of others. See EEOC guidance at Section A.6 and DFEH guidance at p.3. Because a safety-based qualification standard requiring that an individual not pose a direct threat to others' health and safety is lawful, a public school employer's requirement that employees receive COVID-19 vaccination before reporting to work in person would likely be upheld under both federal and state law.

Although the California Education Code legislates immunization requirements for students, it is largely silent on the topic for school employees. Education Code section 44839(b) permits districts to require certificated employees to undergo periodic medical examinations, at district expense, for the purpose of determining that "the employee is free from any communicable disease unfitting the applicant to instruct or associate with children."¹ Although there are no cases interpreting this statute, this section certainly supports the right to test

¹ Education Code § 87408 similarly permits a community college district to require: (a) a medical certificate showing the applicant is free from any communicable disease unfitting the applicant to associate with students and (b) employees to undergo periodic medical examinations to determine that employees are free from communicable disease.

Further, Education Code § 44336 states that the CTC, in considering an application or renewal for a certification document, may require a certificate from a licensed physician or physician assistant showing that the applicant is "free from any contagious and communicable disease or other disabling disease or defect unfitting the applicant to instruct or associate with children."



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an employee for COVID-19 and could potentially support a school district's demand for proof of an employee's vaccination status.

Nevertheless, a California employer's ability to require its employees to get a COVID vaccine is subject to potential exemptions and bargaining obligations, as discussed below.

Possible Exemptions to a COVID-19 Vaccination Requirement

CTA's policies support immunization and testing for communicable diseases as recommended by public health departments, but a COVID-19 vaccine may not be appropriate for everyone.

The EEOC has outlined two possible exemptions to a COVID vaccine mandate by an employer: 1) a medical accommodation under the Americans with Disabilities Act (ADA), based on a qualified disability that prevents an employee from receiving a vaccine; and 2) a religious accommodation under Title VII of the Civil Rights Act. In addition to these available exemptions under federal law, employees in California can seek similar medical or religious exemptions under the state's Fair Employment and Housing Act (FEHA).

1. **Medical Accommodations.** Both federal and state law require an employer to reasonably accommodate employees with a disability unless the employer shows undue hardship after engaging in the interactive process. "Undue hardship" is defined as "an action requiring significant difficulty or expense." An employee with a qualified disability that would make it medically contraindicated to receive a COVID-19 vaccine could request a reasonable accommodation from the employer, such as continued telework.

2. **Religious Accommodations.** Under federal and state law, employment discrimination based on an employee's religious beliefs is unlawful. If a conflict arises between an employment requirement and an employee's sincerely held religious belief, the employer must accommodate the employee absent undue hardship. Although Title VII's "undue hardship" standard merely requires an employer to show "more than de minimis" cost or burden to justify denial of a religious accommodation, FEHA's "undue hardship" standard requires an employer to prove "significant difficulty or expense" to justify denial. Because FEHA provides greater protection for an employee seeking a religious accommodation than Title VII, California public school employers must evaluate the hardship presented by accommodations under a "significant difficulty or expense" test (which is similar to the federal ADA and state FEHA medical accommodation standard).

The Food, Drug, and Cosmetic Act, 21 U.S.C. §360bbb-3, provides that patients be given various information about a vaccine approved through an Emergency Use Authorization (EUA), including a general right to refuse such a vaccine. But this right to not be forcibly given the COVID vaccine does not prohibit employers from requiring employee vaccinations to protect the workplace. If the employer has mandated vaccination, an employee may refuse the vaccine – but the employee's refusal could subject them to adverse employment action (assuming they do not qualify for medical or religious exemptions).

Bargaining COVID-19 Vaccination Policies

COVID vaccination policies reasonably constitute "safety conditions of employment." The Educational Employment Relations Act (EERA) specifically enumerates "safety conditions of employment" as within the scope of representation (Gov. Code § 3543.2(a)(1)). Although PERB has not issued any precedential decision addressing whether an employer vaccination policy is within the scope of representation, there is a PERB ALJ decision under the Higher Education Employer-Employee Relations Act (HEERA) which found that a state university's policy requiring employees to either be immunized for H1N1 influenza or wear surgical masks was not negotiable.



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Regents of the University of Cal. (Irvine) (2011) 35 PERC ¶ 77. In our view, the ALJ's *Irvine* decision should not govern the analysis under EERA primarily because EERA, unlike HEERA, specifically includes safety as a mandatory subject of bargaining. Thus, while an employer's mandatory vaccination policy would arguably constitute a mandatory subject of bargaining under EERA, the case law does not yet address it.

But even if the decision to force vaccination is itself not a mandatory subject, **the effects of a COVID vaccination policy – whether mandatory or voluntary – are subject to bargaining.**

Subjects that do not fall within the mandatory scope of bargaining are nonetheless subject to bargaining if there is an impact or effect on a mandatory subject. In addition to chapter proposals to enhance members' access to vaccination (as detailed in C4OB's [Sample Contract/MOU Language for Reopening Schools](#), pp. 11-12), any management proposals regarding vaccination should be carefully analyzed to identify all subjects within scope that may be impacted; whether or what portions of the proposal(s) support association goals; and if there are additional provisions the chapter should propose. Some bargaining concepts and provisions may include:

Coordination with the Local Public Health Department, Health Plans, and Authorized Vaccine Providers

Chapters are strongly encouraged to negotiate and otherwise push the employer to coordinate with the local health department, the health insurance plan administrator, and/or an authorized vaccine provider to develop a convenient and timely system for vaccinating district staff. A coordinated program to notify members, access at a convenient location(s), a dedicated vaccine supply, and a schedule of appointments for vaccination will improve and streamline the process. Leaving each member to their own devices may lead to haphazard vaccination coverage. Ensuring members are provided clear health information about the safety, efficacy, and risks of the vaccine may also increase member vaccination rates. Additional planning questions and suggestions can be found in C4OB's [COVID-19 Vaccine: Another Layer of Protection, Action Steps for Union Leaders](#) flyer, which will be updated as the state's vaccination system continues to evolve.

Here are some models of coordination to strongly consider and promote:

Agreement with a Vaccine Provider. The district establishes a direct relationship and agreement with an authorized vaccine provider like a local hospital, health system, or fire department. Then, working with the authorized provider, the district/chapter together set dates/schedules for vaccine events for school employees, establish a special registration link for school employees, and the provider handles all on-site details – in some cases augmented by logistical support from district staff and vaccine administration support from school nurses. A mix of walk-in sites and drive-in sites can be used.

Health Plan Support. District health plans can be helpful in setting up relationships with authorized vaccine providers, such as commonly used health care providers already in their network, to provide a vaccination program for employees covered by their plans.

Integration with County Sites. A county can establish an educator-specific program within its own overall vaccination effort, with designated lanes or appointments for essential workers at existing county-run sites.

Paid Time to Get Vaccinated

Time off during the workday may be necessary to ensure all members are able to get vaccination appointments. This time off should be without loss of pay. Similarly, providing pay at the employee's hourly rate for appointments after the workday encourages vaccination.



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Paid Leave for Vaccine Side Effects

Some people will experience side effects from some vaccines. Initial reports suggests that two-dose vaccines may cause people to experience flu-like symptoms. These [side effects](#) may affect one's ability to do daily activities but should subside within a few days. Additional leave for vaccination side effects or access to any already-existing COVID leave for this purpose may be negotiated. Keep in mind if the employer mandates vaccination and members experience side effects, this may trigger workers' compensation benefits.

Incentive Pay to Receive the Vaccine

Some unions and employers have found success in modest cash incentives to members to get vaccinated. In addition to paid time to receive the vaccine, flat stipends such as \$50 per dose or \$100 or the entire vaccine have been negotiated. In other examples, employers and unions have negotiated for employees to be paid the equivalent of two hours of pay at the employee's hourly rate.

Proof of Vaccination or Exemption

Employers may require or desire proof of vaccination or a bona fide exemption in either a mandatory or voluntary vaccination situation. If this is the case, chapters should negotiate what form of verification will be accepted, what consequences may result from failure to provide verification, and proper employer notification to members.

Transfer and Reassignment

Chapters should consider the effects on transfer and reassignment for members who are exempt from taking the vaccine or who refuse under a voluntary vaccination program. Will members who legitimately cannot take the vaccine (and/or may have at-risk family members living with them) be given preferential rights to distance learning assignments? Under a voluntary program where members refuse to be vaccinated, can the employer transfer or reassign the employee if the member would pose a greater risk to other employees or students?

Non-Retaliation

Members who are exempt from taking the vaccine for bona fide medical or religious grounds should be protected from arbitrary, capricious, or discriminatory retaliation. If negotiating such provisions, chapters should consider this issue in concert with transfer and reassignment.

On-Site Vaccination Considerations

In cases where the district/association have arranged with providers to vaccinate employees on site or where school sites may be used as community vaccination centers, chapters should consider additional impacts and effects such as: training for this new role; supervision and priority vaccinations for members who are involved in vaccinating others or working at the on-site vaccination operation; safety processes to ensure appropriate distancing, PPE, and separation between stable groups; and stipends that reflect any increased hazardous conditions and/or additional hours and duties those providing vaccinations may encounter.

The above bargaining considerations are not exhaustive. Each chapter may have unique circumstances that should be considered. This advisory should be used in conjunction with prior bargaining advisories regarding the pandemic, including C4OB's [Sample Contract/MOU Language for Reopening Schools](#), as well as additional materials on vaccinations, which can be found on CTASearch. Questions and concerns should be directed to your Primary Contact Staff person.