

COVID-19 Vaccines Are Here: CALA Members May Require Employees To Be Vaccinated Subject To Certain Exceptions

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COVID-19 Vaccinations are on the Way

As vaccinations become available for Assisted Living residents and staff, and in order to do everything possible to prevent COVID-19 outbreak, CALA members must develop policies to support wide-spread acceptance of vaccination. This Legal Update provides background and rationale for considering a mandatory vaccine policy for staff members, including allowing employees to decline vaccination for religious or medical reasons; determining whether an employee who raises religious or medical concerns can be accommodated; and, considering local health area requirements.

Background

In *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), the United States Supreme Court upheld the authority of states to enforce compulsory vaccination laws. Over 100 years later, we are nearing the distribution of COVID-19 vaccines. So, what about non-governmental agencies that seek to mandate that their workforces vaccinate against COVID-19?

Reviewing the law related to influenza vaccinations, we see that mandatory vaccinations are legal, but there are multiple issues that CALA members need to consider if they want to have their staff vaccinated. Below are a few of those issues to consider based upon current law and health orders.

1. The Equal Employment Opportunity Commission (“EEOC”) and the Federal Arena

The EEOC has declared that COVID-19 is a direct threat to the workplace and has taken the position that employers can mandate that employees take their temperatures and be tested for COVID-19 before entering the workplace.

However, currently, the EEOC takes the position that, under the Americans With Disabilities Act (ADA) and Title VII of the Civil Rights Act of 1964 (Title VII), an employer covered by these laws (employers with 15 or more employees) may not require all employees be vaccinated against COVID-19. In its still current March 2020 Guidance, the EEOC states as follows:

May an employer covered by the ADA and Title VII of the Civil Rights Act of 1964 compel all of its employees to take the influenza vaccine regardless of their medical conditions or their religious beliefs during a pandemic?

No. An employee may be entitled to an exemption from a mandatory vaccination requirement based on an ADA disability that prevents him from taking the influenza vaccine. This would be a reasonable accommodation barring undue hardship

(significant difficulty or expense). Similarly, under Title VII of the Civil Rights Act of 1964, once an employer receives notice that an employee's sincerely held religious belief, practice, or observance prevents him from taking the influenza vaccine, the employer must provide a reasonable accommodation unless it would pose an undue hardship as defined by Title VII ("more than *de minimis* cost" to the operation of the employer's business, which is a lower standard than under the ADA).

Generally, ADA-covered employers should consider simply encouraging employees to get the influenza vaccine rather than requiring them to take it. **As of the date this document is being issued, there is no vaccine available for COVID-19.** See, https://www.eeoc.gov/sites/default/files/2020-04/pandemic_flu.pdf

The EEOC Guidance, thus, recognizes that mandates from public health authorities may change as the COVID-19 situation spreads, and, thus, that might change its Guidance on accommodation requests relating to a COVID-19 vaccine.

In the meantime, CALA members should note that implementing a mandatory vaccination program would run afoul of the ADA and Title VII if it did not include an employee's ability to decline the vaccination based upon a medical condition or a sincerely-held religious belief. For example, qualifying medical exemptions may include allergies to vaccine components or a history of Guillain-Barré syndrome.¹

Unfortunately, what will be considered a "sincerely-held" religious belief is not a black and white answer. The EEOC has been active in this area of religious-based exemptions regarding the flu vaccine. See *EEOC v. Saint Vincent Health Center*, Civil Action No. 1:16-cv-234 (2016) (\$300,000 to a class of six aggrieved former employees and provided substantial injunctive relief to settle a religious discrimination lawsuit based upon a failure to grant a religious exemption as part of a mandatory seasonal flu vaccination requirement for its employees.) See also *EEOC v. Mission Hospital, Inc.*, Civil Action No. 1:16-CV-00118 (2018) (\$98,000 religious discrimination lawsuit settlement for refusal to accommodate employees who declined flu vaccinations based on their religious beliefs).

In *EEOC v. Memorial Healthcare*, Civil Action No. 2:18-cv-10523 (2018), the defendant hospital paid \$74,418 (\$34,418 in back pay, \$20,000 in compensatory damages and \$20,000 in punitive damages) for refusing to hire a medical transcriptionist because of her religious beliefs against receiving flu shots and refusing to accommodate those beliefs. The EEOC lawsuit doesn't specify the employee's exact religion, but says she "has a sincerely-held religious belief that, as a follower of Jesus Christ, she cannot inject or ingest foreign substances in her body and must rely on natural methods for health." <https://www.eeoc.gov/newsroom/memorial-healthcare-pay-74418-settle-eeoc-religious-discrimination-lawsuit>

At least one court has found the religious belief exception is not just a philosophical belief against vaccinations. In *Fallon v. Mercy Catholic Medical Center of Southeast Pennsylvania*, 877 F.3d 487 (3d Cir. 2017), Mercy Catholic Medical Center terminated a psychiatric intake worker for

¹ Recently, California limited the scope of the medical exemption for vaccinations for children attending school. See Health and Safety Code Section 120375. Effective 2016, California also removed the "personal belief" exemption for vaccinations for children attending school.

refusing to be inoculated against the flu vaccine. The plaintiff did not want to be inoculated claiming it would violate his conscience and because he thought it caused more harm than good. The Third Circuit believed its task was to consider three factors: to determine whether Fallon's beliefs "address[ed] fundamental and ultimate questions having to do with deep and imponderable matters," are "comprehensive in nature," and are accompanied by "certain formal and external signs."

The Court found, "[i]t does not appear that these beliefs address fundamental and ultimate questions having to do with deep and imponderable matters, nor are they comprehensive in nature. Generally, he simply worries about the health effects of the flu vaccine, disbelieves the scientifically accepted view that it is harmless to most people, and wishes to avoid this vaccine." *See also, Mason v. Gen. Brown Cent. Sch. Dist.*, 851 F.2d 47, 51 (2d Cir. 1988) (upholding as not clearly erroneous a district court finding that certain parents' opposition to vaccination was "based, not on religious grounds, but on scientific and secular theories").

In *Chenzira v. Cincinnati Children's Hospital Medical Center*, Case No. 1:2011cv00917 (S.D. Ohio 2012), the defendant Medical Center terminated a customer service representative for refusing to be inoculated due to her veganism. The employee sued and the Medical Center sought to dismiss the claim on the ground veganism is not a religion. The Court held that it was plausible that the plaintiff "could subscribe to veganism with a sincerity equating that of traditional religious views," particularly since she is not alone in holding to that belief, thus, it was "inappropriate to dismiss Plaintiff's claims for religious discrimination based on her adherence to veganism." While the Court ruled that it was inappropriate to dismiss Chenzira's claim for religious discrimination based on her adherence to veganism, it noted that its "ruling in no way addresses what it anticipates as Defendant's justification for its termination of Plaintiff, the safety of patients at Children's Hospital. At this juncture there simply is no evidence before the Court regarding what, if any, contact Plaintiff might have with patients, and/or what sort of risk her refusal to receive a vaccination could pose in the context of her employment."

The *Chenzira* case settled so we don't get to hear whether the Court would have considered the Medical Center's arguments sufficient to justify the termination and thus the case never addressed how to determine whether accommodating such religious objections would impose an undue hardship on an employer. An EEOC March 2012 Informal Discussion Letter states that "facts relevant to undue hardship in this context would presumably include, among other things, the assessment of the public risk posed at a particular time, the availability of effective alternative means of infection control, and potentially the number of employees who actually request accommodation." <https://www.eeoc.gov/foia/eeoc-informal-discussion-letter-250>

In sum, when faced with an objection based upon religious beliefs, CALA members should request a letter from the employee's religious leader attesting to the fact that the religious organization is opposed to vaccinations and speak with legal counsel before taking any adverse action.

2. Occupational Safety and Health Administration ("OSHA") and Cal/OSHA

In a November 9, 2009 Interpretation Letter, the U.S. Occupational Safety and Health Administration ("OSHA") took the following confusing position regarding mandatory vaccines.

"OSHA does expect facilities providing healthcare services to perform a risk assessment of their workplace and encourages healthcare employers to offer both

the seasonal and H1N1 vaccines. It is important to note that employees need to be properly informed of the benefits of the vaccinations. However, **although OSHA does not specifically require employees to take the vaccines, an employer may do so. In that case, an employee who refuses vaccination because of a reasonable belief that he or she has a medical condition that creates a real danger of serious illness or death (such as serious reaction to the vaccine) may be protected under Section 11(c) of the Occupational Safety and Health Act of 1970 pertaining to whistle blower rights.**”

Cal/OSHA provides that workers can decline vaccinations. See 8 §5199, Appendix C1. Based upon the above, it is reasonable to assume that if CALA members maintain a program that mandates vaccinations subject to the guidelines that the EEOC suggests, the member will not violate any obligation to maintain a safe working environment.

3. The State and Local Arena

Each CALA member should review the local and state law in the state in which they operate as states and localities may inevitably enact their own laws regarding vaccinations. The CDC lists many of the current state vaccination laws related to healthcare workers. <https://www.cdc.gov/phlp/publications/topic/vaccinationlaws.html>

We already see states taking aggressive approaches to the flu vaccine this year. For example, in San Joaquin County in California, as of September 15, 2020, the Health Officer mandates that “all health care facilities in San Joaquin County require their HCW who work in health care settings get the flu vaccine.” See, https://www.sjgov.org/ems/pdf/flu_vaccine_order_hcw.pdf. The Order allows an employee to decline the vaccination under undefined “rare circumstances.”

Presumably, without a federal mandate, we will see the local health officers taking on a similar approach with a COVID-19 vaccine.

4. Workers’ Compensation

Whether state workers’ compensation laws apply to injuries or illnesses allegedly caused by COVID-19 vaccinations is also another state-by-state. See, e.g., *Roberts v. U.S.O. Camp Shows, Inc.* (1949) 91 Cal. App. 2d 884, 885 (The rule is well settled that where an employee submits to an inoculation or a vaccination at the direction of the employer and for the employer’s benefit, any injury resulting from an adverse reaction is compensable under the Workers’ Compensation Act.) *Carolyn R. Hicks’s Case*, 443 Mass. 1107 (2005), affirmed on appeal, 62 Mass. App. Ct. 755 (2010) (employee’s blindness caused by a flu vaccination administered at her hospital workplace: “Under these unique circumstances, no greater encouragement or compulsion by the employer was required in order to conclude, as a matter of law, that the flu shot arose out of and in the course of the employment.”).

5. Union Environments

Any CALA members who operate a unionized community must consider additional steps to take before implementing vaccination programs.

In *Virginia Mason Hospital v. Washington State Nurses Ass'n*, 511 F.3d 908, 911 (9th Cir. 2007), the employer hospital implemented a mandatory influenza immunization for all nurses and other employees. *Washington State Nurses Ass'n* – the nurses' union – filed a grievance and an arbitrator ordered that the hospital stop the mandatory immunization as it violated the collective bargaining agreement. The Ninth Circuit upheld the arbitrator's decision "[i]n light of the considerable deference for arbitral decisions and citing the clearly established public policy requiring employers to bargain with their union-represented employees over conditions of employment." *Id.* at 913, 917. Thus, any CALA members with unionized workforces should check with their labor counsel as to whether you must meet with the union before you implement the program.

CALA members who do not have unionized workforces need to remember Section 7 of the National Labor Relations Act. Section 7 grants employee rights to join together – engage in concerted activity – regarding working conditions. Employees who join together to protest a COVID-19 vaccine program or a member's failure to implement such a program and who suffer some adverse employment action could file unfair labor practice charges with the National Labor Relations Board.

CALA members should look to any collective bargaining agreements and speak with labor counsel to determine if they have a duty to bargain with the union over vaccination programs. They should also take seriously and address any employee complaints about vaccination programs and speak to counsel before taking action against any employees who do complain.

Conclusion

Without further guidance or mandates from federal, state or local governments, if CALA members are considering implementing a mandatory vaccination program, they should, at a minimum:

- Allow employees to decline the vaccination if they have a medical condition that would be negatively impacted by taking the vaccination or a religious objection to vaccinations.
- Engage in an interactive discussion to determine whether the employee can be accommodated when an employee voices a medical or religious reason for declining the vaccination.
- Check local area requirements.