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# Applying California COVID-19 rules to vaccine developments

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The Law at Work (San Diego Union-Tribune Community Press File Photo)

The California Division of Occupational Safety and Health (Cal/OSHA) and the California Department of Fair Employment & Housing (DFEH) have focused recently on how the rules they enforce apply to COVID-19-vaccination-related developments.

## Cal/OSHA

The Occupational Safety & Health Standards Board (OSHSB) adopted COVID-19-related emergency temporary standards late last year that remain in effect until Oct. 2, 2021. One provision requires employers to exclude employees exposed in the workplace to someone who has tested positive for COVID-19 for at least 10 days after the infected individual's first positive test. An employer must provide full pay and benefits to an employee so excluded who is able and available to work. "An employer may require the employee to exhaust paid sick leave benefits before providing exclusion pay, to the extent permitted by law, and may offset payments by the amount an employee receives in other benefit payments."

Since those emergency regulations were adopted, millions of Californians have been fully vaccinated. On April 27, 2021, the federal Centers for Disease Control (CDC) posted this updated guidance: "Most fully vaccinated people with no COVID-like symptoms do not need to quarantine, be restricted from work, or be tested following an exposure to someone with suspected or confirmed COVID-19, as their risk of infection is low."

The same CDC post recommended that fully vaccinated individuals "with no COVID-19-like symptoms and no known exposure . . . be exempted from routine screening testing programs, if feasible." The CDC admonishes that state and local rules continue to apply to fully vaccinated individuals. San Diego County's public health order continues to require screening of all employees before entering the workplace.

Several business representatives urged OSHSB at its April 15 meeting to amend the emergency rules swiftly to reflect the CDC's latest guidance. Agency staff confirmed that draft amendments are under review. For now, though, the emergency rules must be followed as adopted.

## DFEH

In March, the DFEH updated its guidance from last year on how the state's Fair Employment & Housing Act (FEHA) applies in this new phase of the pandemic, tracking much of the guidance the federal Equal Employment Opportunity Commission posted months ago.

The agency's updated "informational" guidance says an employer may "require employees to receive an FDA-approved vaccination against COVID-19 infection so long as the employer does not discriminate against or harass employees or job applicants on the basis of a protected characteristic, provides reasonable accommodations related to disability or sincerely-held religious beliefs or practices, and does not retaliate against anyone for engaging in protected activity (such as requesting a reasonable accommodation)." The DFEH implicitly includes vaccines that have received emergency use authorization from the FDA, as no vaccine has gone through the full approval process.

The DFEH takes no position on whether employers should mandate vaccination. Instead, the agency addresses "how an employer complies with the FEHA if it decides to require employees to be vaccinated. . . ." The DFEH says possible accommodations for a worker who objects to vaccination on the basis of a disability include remote work or adopting procedures and safeguards that would enable the employee to work onsite without endangering the employee or others.

Employees whose religious beliefs or practices conflict with vaccination may be accommodated by "job restructuring, job reassignment, or modification of work practices. However, unless specifically requested by the employee, an accommodation related to religious creed is not considered reasonable if such accommodation results in the segregation of an individual from other employees or the public. If the employer shows that an accommodation imposes an undue hardship, the employer may exclude the employee from the workplace."

An employer need not accommodate an employee's general anxiety about the safety of the vaccine. "If an employee does not have a disability reason or a sincerely-held religious belief reason for not being vaccinated with an FDA-approved vaccine, the employer is not legally required by the FEHA to reasonably accommodate the employee."

Cal/OSHA and the DFEH are grappling with rapid developments in the fight against the novel coronavirus that, even as science catches up, continues to outpace the speed of law.

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