



Liebert Cassidy Whitmore

Medical and Religious Exemptions for COVID Vaccine in Employment

Public Agency Risk Managers Association (PARMA)
Webinar | September 23, 2021

Presented By:

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AGENDA

- I. Vaccination and Testing Requirements
- II. General Accommodations Considerations
- III. Requests for Health and Medical Accommodations
- IV. Requests for Religious Accommodations
- V. Determination as to Reasonableness and Safety
- VI. Questions and Answers
- VII. Addendum - Resources



Part I: Vaccination and Testing Requirements



Vaccination and Testing Requirements: Issues to Address

- Federal COVID-19 action plan
- State health orders
 - July 26 Order
 - August 5 Order
 - August 19 Order
- Discretionary policies



Vaccination and Testing Requirements: Federal COVID-19 Action Plan

- Scope
 - Current - employers with 100 or more employees;
Subject to federal OSHA jurisdiction
 - Future – employers subject to Cal/OSHA jurisdiction
- Obligations – employees *must* either:
 - Produce proof of full vaccination status; or
 - Submit to weekly testing
- Effective date – TBD
- Compliance date – TBD
- Interaction with Cal/OSHA regulatory requirements



Vaccination and Testing Requirements: July 26 Health Order

- Scope – high-risk settings
 - Health care settings (modified by August 5 Order)
 - High-risk congregate settings (modified by August 19 Order)
- Covered employees
 - Persons with potential for direct or indirect exposure to patients/clients/residents or SARS-CoV-2 airborne aerosols
- Obligations – vaccination or testing (weekly or bi-weekly)
- Effective date – August 9
- Compliance date – August 23



Vaccination and Testing Requirements: August 5 Health Order

- Scope – health care settings
- Covered employees
 - Health care workers
 - Persons with potential for direct or indirect exposure to patients or SARS-CoV-2 airborne aerosols
- Obligations – vaccination required unless employee is exempted
 - Qualifying medical reason
 - Religious belief
- Effective date – August 5
- Compliance date – September 30



Vaccination and Testing Requirements: August 19 Health Order

- Scope - local correctional facilities/detention centers
- Covered employees
 - Health care workers
 - Persons *not* directly involved in delivering health care, but who *could* be exposed to agents that *can* be transmitted in the health care setting
- Obligations – vaccination required unless employee is exempted
 - Qualifying medical reason
 - Religious belief
- Effective date – August 19
- Compliance date – October 14



Vaccination and Testing Requirements: Discretionary Policies

- Policy models
 - Vaccination/testing
 - Mandatory vaccination
- Accommodations
 - Provided as a matter of policy and law

Part II: General Accommodations Considerations



Accommodations Considerations: Issues to Address

- Legal authority
- Interactive process
- Employer determination
- Accommodation types
 - Workplace accommodations
 - Non-Workplace accommodations



Accommodations Considerations: Legal Authority

- Employer authority
 - Equal Employment Opportunity Commission (“EEOC”)
 - Department of Fair Employment and Housing (“DFEH”)
- Employee protections
 - Americans with Disabilities Act (“ADA”)
 - Title VII of the Civil Rights Act (“Title VII”)
 - Fair Employment and Housing Act (“FEHA”)
- Employer obligations
 - Engage in a Good Faith Interactive Process
 - Provide Reasonable Accommodations



Accommodations Considerations: Interactive Process

- COVID-19-related requirement
 - Compliance with superseding authority
 - Adoption of discretionary policy
- Requests for accommodation
 - Basis of employee request
 - Standard request forms
- Interactive process
 - Determination of employee's qualification
 - Good faith engagement in process
 - Determination regarding requested accommodation



Part III: Requests for Health and Medical Accommodations



Health and Medical Accommodations: Issues to Address

- ADA and FEHA Standards
- Health and medical conditions
- Determination of qualification



Health and Medical Accommodations: ADA and FEHA Standards

- Qualification standard
 - Disability – physical or mental impairment
 - Health or medical conditions
 - ADA and FEHA Standards: major life activities
 - ADA – Substantially limits major life activities
 - FEHA – Makes a life activity more difficult



Health and Medical Accommodations: Health and Medical Conditions

- Health and medical condition that may preclude vaccination
 - Anaphylaxis (particularly as a result of COVID-19 vaccine)
 - Pregnancy
- Other issues
 - Recent COVID-19 infection
- Health and medical condition that may preclude testing



Health and Medical Accommodations: Determination of Qualification

- Request for additional information
 - Employer authority
 - Employee obligations
- Information requested
 - Statement that individuals health or medical condition that makes vaccination/testing unsafe
 - Should NOT disclose actual health or medical condition
 - Restriction – Inability to be vaccinated/tested
 - Accommodation – Alternative to vaccination/testing
- Employer review and determination



Part IV: Requests for Religious Accommodations



Religious Accommodations: Issues to Address

- Title VII and FEHA Standards
- Religious objections
- Determination of qualification



Religious Accommodations: Title VII/FEHA – “Religion”

- Religion – broad and protects beliefs with which employer may be unfamiliar
 - Concerns ideas about life, purpose and death (*i.e.*, deep/imponderable matters)
 - Comprehensive in Nature; a belief-system as opposed to an isolated teaching
 - New and uncommon religions; not only traditional, organized religions
 - All aspects of religious, observance, practice and belief; not just those mandated by tenet’s of an individual's faith



Religious Accommodations: Title VII/FEHA – “Religious Beliefs”

- Religious belief
 - A belief that occupies a place in the individual’s life that is parallel to that filled by god
 - Need not be acceptable, logical consistent or comprehensible to others
 - Theistic or non-theistic moral and ethical beliefs
- Areligious beliefs
 - Personal, political and philosophical beliefs are not religious beliefs
 - Some potential overlap with religious beliefs



Religious Accommodations: Title VII/FEHA – “Sincerely Held”

- Sincerely held
 - Not related to motives or reasons for holding the belief
 - Matter of individual credibility; however, the individual need not be scrupulous in their behavior
- Factors to evaluate sincerity
 - Marked inconsistency with professed belief
 - Whether the accommodation requested is a particularly desirable benefit
 - Suspect timing (e.g., Follows a request based on secular reasons)
 - Reason to believe accommodation sought for areligious reasons



Religious Accommodations: Religious Objections

- Religious objections
 - Inerrancy of scripture/sovereignty of god
 - Unique protective/healing power of god “prayerful healing”
 - Opposition to invasion of person’s body
 - Opposition to use of fetal cells
- Objections are often not strictly religious
 - Overlap between personal, political, philosophical and religious

Religious Accommodations: Determination of Qualification

- General

- Employer should ordinarily assume that an employee's request is based on a sincerely held religious belief
- If the employer has an objective basis to question either the nature or the sincerity of the belief, the employer would be justified in requesting additional information



Religious Accommodations: Determination of Qualification

- Case-by-case analysis required
- Information requested
 - Nature:
 - Information regarding tenets of belief
 - Associated practices, rituals, clergy, observances, etc.
 - Sincerity:
 - Information regarding how long the employee has embraced the belief
 - When, where and how they came to believe what they do



Religious Accommodations: Determination of Reasonableness

- Determination of reasonableness
 - Different standards under Federal and state laws
- Obligation to Adhere to Comply with FEHA



Part V: Determination as to Reasonableness and Safety



Determination re: Accommodation: Reasonableness

- Requested accommodation must be reasonable
- Must not impose an undue hardship
 - Employer
 - Employer's operations
- Factors:
 - Nature and cost
 - Overall financial resources of the employer
 - Impact on operations



Determination re: Accommodation: Safety

- Requested accommodation must be safe
- Must NOT pose an undue safety risk
 - Employee requesting accommodation
 - Others (other workers and members of the public)
- Direct threat standard
 - Duration of the risk;
 - Nature and severity of the potential harm;
 - Likelihood that potential harm will occur; and
 - Imminence of the potential harm



Determination re: Accommodation: Workplace Accommodations

- Must be reasonable and safe
- Common examples
 - Production of negative test result/COVID-19 testing
 - Use of face coverings or Personal Protective Equipment (“PPE”)
 - Job reassignment
- Consideration of costs
 - Different analysis than when something (e.g. testing) is required
 - Subject to reasonableness standard
 - Hardship must NOT include speculative costs



Determination re: Accommodation: Non-Workplace Accommodations

- Must be reasonable
 - Safety not principle concern
- Common examples
 - Teleworking
 - Unpaid leave
- Accommodations may be temporary and may be reevaluated

Questions and Answers



Resources



Resources

- COVID-19 Action Plan
 - [Vaccinating the Unvaccinated](#)
- State Health Orders
 - [July 26 Order](#) (High-Risk Settings)
 - [August 5 Order](#) (Health Care Settings)
 - [August 19 Order](#) (Correctional Facilities and Detention Centers Officers)
 - [Health Care Worker Q&A](#)
- EEOC Guidance
 - [What You Should Know About COVID-19 and the ADA, the Rehabilitation Act and Other EEO Laws](#)
 - [Religious Discrimination](#)
 - [Q&A Religious Discrimination](#)



Thank You!

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