



## CALIFORNIA CORRECTIONAL SUPERVISORS ORGANIZATION

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When Governor Newsom issued a new rule on July 26<sup>th</sup>, 2021 requiring all State employees and health care workers to show proof of vaccination or get tested regularly, many different questions and issues immediately arose. Now with the latest mandate from the Director of Public Health requiring all health care workers to be fully vaccinated by September 30, 2021, there are understandably even more concerns.

Currently the hottest questions are:

1. Can CDCR require proof of your vaccination status? How can an employee then be treated if they do not have the vaccine or refuse to disclose if they have or have not had the vaccine?
2. Can CDCR mandate health care workers to vaccinate? Can CDCR mandate I receive a vaccine as a condition of employment even if it is not yet FDA approved?
3. Who can require proof of vaccination status and how? If I have not been vaccinated (or decline to provide a status) can I be required to regularly test and wear a mask?

Let's address all of these.

### **Can CDCR require proof of your vaccination status?**

Yes, according to the recent CAL-OSHA guidance, vaccination status must be documented. The employer must record the vaccination status for any employee not wearing a face covering indoors. However, this information must be kept confidential.<sup>1</sup> Options that are considered acceptable under the CAL-OSHA guidance include: the employee provides proof of vaccination (such as their card, health care documentation, etc.) and the employer keeps a copy, or the employee shows the proof of vaccination, and the employer records it. A third option is available that states that employees may simply self-attest to their status, however given the lack of actual "proof" this is not likely to be the most favorable option for employers.

One important caveat to note is that an employee may decline to state their vaccination status. Under the updated guidance, an employer is not obligated to require employees to submit proof of being fully vaccinated. Absent such a requirement, an employee has the right to decline to state if they are vaccinated or not. However, in this scenario the employer must treat the employee as unvaccinated. Importantly they must also not take disciplinary action against any employee who chooses not to disclose their status. The employee should understand that they are choosing by default to then be classified as "unvaccinated" should they go this route.

What about HIPAA? The Health Insurance Portability and Accountability Act ("HIPAA") does not prohibit an employer from inquiring about an employee's vaccination status, even if the employer is a "healthcare provider" under that law. HIPAA generally only concerns the storage and disclosure of protected health information. Additionally, 45 C.F.R. Sec. 160.103 specifically provides: "protected health information excludes individually identifiable health information... [i]n employment records held by a covered entity in its role as employer." The distinction here would be that asking about your vaccination status should be a "yes" or "no" question – further questions regarding your reasoning or individual health that may be relevant to your decision should NOT be asked as that information is protected.

Finally, The ADA (Americans with Disabilities Act) obligates an employer to maintain certain employee medical information obtained via a medical examination and/or inquiry of an employee. However, in its own "Technical Assistance Questions and Answers: What You Should Know About COVID-

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<sup>1</sup> <https://www.dir.ca.gov/dosh/coronavirus/Revisions-FAQ.html>

19 and the ADA, the Rehabilitation Act”<sup>2</sup>, the EEOC has advised that asking or requiring an employee to show proof of receipt of a COVID-19 vaccination is *not* a disability-related inquiry. Accordingly, it seems that information regarding vaccination status alone would not be subject to the confidentiality requirements as set forth in the ADA.

Bottom line – CDCR can require proof of vaccination status OR you can choose to be classified as unvaccinated by exercising your right not to provide a status.

**If I have not been vaccinated (or decline to provide a status) can I be required to regularly test and wear a mask?**

Yes, employers may administer a COVID-19 tests when evaluating an employee’s initial or continued presence in the workplace. The ADA requires that any mandatory medical test of employees be “job related and consistent with business necessity.” Applying this standard to the current circumstances of the COVID-19 pandemic, employers may take screening steps to determine if employees entering the workplace have COVID-19 because an individual with the virus will pose a direct threat to the health of others.

Therefore, an employer may choose to administer COVID-19 testing to employees before initially permitting them to enter the workplace and/or periodically to determine if their presence in the workplace poses a direct threat to others. The ADA does not interfere with employers following recommendations by the CDC or other public health authorities regarding whether, when, and for whom testing or other screening is appropriate. Testing administered by employers consistent with current CDC guidance will meet the ADA’s “business necessity” standard. Regarding masks and other protocols, an employer may also require employees to wear protective gear (for example, masks and gloves) and observe infection control practices (for example, regular hand washing and social distancing protocols) as are fitting for your work environment.

**Can CDCR mandate I receive a vaccine as a condition of employment even if it is not yet FDA approved?**

This is a very novel question and one that is rapidly evolving almost daily. Because of that, there is not yet a final or settled legal answer in California. At the forefront of the issue is the most recent mandate to health workers issued by the Department of Public Health on August 5, 2021.

This state-wide vaccination mandate (impacting an entire employment sector) is the first of its kind in the United States in response to the Covid-19 pandemic. When protocols or mandates become subject to legal challenge, they take time to be brought in court and receive a ruling, a ruling which may then become subject to further appeal.

Absent that, we must look to other indicators with regards to how the court system is likely to rule on the matter and what the current guidance is from Federal and State regulatory agencies.

Historically the legal and legislative trend in California has been to support the ability of public and private sector employers to require vaccinations. We’ve seen this in every venue from employment to the requirement of school children to be vaccinated to receive education. Even more recently the court system has sided with legislation which invalidated the religious exemptions to vaccine mandates for school children. The big difference with the Covid-19 vaccine is that it is still classified as “experimental” and born of a project referred to as “Operation Warp Speed” no less. It is understandable to that many have concerns about taking a rapidly produced injection.

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<sup>2</sup> <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>

## Federal Equal Employment Guidance

In May 2021, the U.S. Equal Employment Opportunity Commission opined that federal equal employment opportunity laws do not prevent an employer from requiring that “all employees physically entering the workplace ... be vaccinated for COVID-19, subject to the reasonable accommodation provisions of Title VII [of the Civil Rights Act] and the ADA [Americans with Disabilities Act]” as well as other equal employment opportunity considerations. The EEOC did not however make any mention of the implications of the lack of FDA approval.

On July 6, 2021, in a Memorandum Opinion for the Deputy Counsel to the President, Acting Assistant Attorney General Dawn Johnsen concluded that the Food, Drug, and Cosmetic Act, “does not prohibit public or private entities from imposing vaccination requirements, even when the only vaccines available are those authorized under [Emergency Use Authorizations or EUA.]” This is significant because as we know the FDA has granted EUAs for the use of all three currently existing Covid-19 vaccinations.

While this opinion is not binding law, it is the current legal advice provided to the President of the United States. It gives us a strong indication of the position of the Federal Government on the subject.

In short – the federal regulatory and legal position is that employers can mandate you take the Covid-19 vaccine even while still classified as “experimental”.

## State Law

In the absence of federal limitations on the vaccine mandate it is up to the states to enact legislation guiding their employers and citizens accordingly. Such mandates can still be the subject of legal challenge. While various limitations or prohibitions on a vaccine mandate are in the process of implementation in about one-third of U.S., California is taking a very different approach.

It should be noted that the DPH mandate was just issued with a September 30<sup>th</sup> deadline for compliance. It is not yet known exactly how CDCR will handle any employees who elect not to comply. Further, any resulting legal challenges which may arise from department action taken against a non-compliant employee have not yet arisen. While we may speculate as to what may occur the actual consequences to your employment are not yet certain.

## Litigation and Court Rulings

As noted above, California regulations or legislation on this matter may be the subject of future court decisions. As of today, none have yet been rendered. Across the Nation a number of lawsuits have been initiated but most without any meaningful resolution – some are still pending, some were dismissed on technical grounds or decided on other factors (such as lack of damages).

As mentioned above, the legislative and court decisions have historically supported vaccinations. Over 100 years ago the U.S. Supreme court ruled in a case called *Jacobson* that citizens of Massachusetts could be mandated to take the smallpox vaccine. Their rationale? They ultimately found that an individual’s right to liberty and bodily autonomy could take a back seat to the states need to protect the health and well-being of their citizens.

The first court ruling on the topic of a Covid-19 vaccine mandate was just issued on June 12, 2021. In that case, the Southern District of Texas dismissed claims brought by a group of hospital employees in *Bridges v. Houston Methodist Hospital*. These employees were terminated when they refused to comply with a mandatory vaccine requirement imposed as a condition of employment (sound familiar?). Ultimately the court (citing in part to the *Jacobson* decision) ruled against the employees and in favor of the vaccine mandate. They specifically opined that, “[The employees] can freely choose to accept or refuse a COVID-19 vaccine; however, if [they] refuse, [they] will simply need to work somewhere else... Every employment includes limits on the worker's behavior in exchange for [their] remuneration. That is

all part of the bargain.” While this case did involve a private sector employer, it gives sobering insight into how the court system is viewing the employees position in such challenges<sup>3</sup>.

So what is the bottom line? We are in uncharted waters and the current federal guidance and recent court decisions provide no contradiction to DPH’s mandate in California. We anticipate that legal challenges will be asserted across California (and other states) in the coming weeks and months and it is quite likely the court system will give these matters some priority. Even still (especially in California) it is not uncommon for cases to take months to come to a resolution and put this matter to rest. Ultimately however, if the court process upholds the vaccine mandate, absent legislative modification it will become the law.

#### ADA and Title VII Exceptions

There are two possible exceptions to the vaccine mandate. They would have to be based upon a legitimate medical basis or upon a *sincerely* held religious basis. The nuances of what is required to establish each of these are unique and complex unto themselves and very specific to individual employees. The process for how CDCR may entertain reasonable accommodations on the basis of either exception is yet unknown. Ultimately, should an employee have a valid basis for an exception, and should CDCR refuse to accommodate, then civil litigation would need to be commenced. Even then, there are limitations on what a court would grant an employee if it was determined that the accommodation sought by the employee was not reasonable or imposed an undue hardship on the employer.

#### **What can CCSO do for me?**

CCSO has always been an organization committed to representing its members to the extent possible. While regulatory and legal trends on the issue of mandatory vaccinations do not seem to be favorable, we are committed to advocating for our members wherever we can. Should you be disciplined in any way in connection to any of the above topics, please contact us immediately for assistance.

We are committed to continuing to monitor and study the ever-shifting landscape and are regularly communicating with CAIHR and CDCR Labor on the matters which concern our members. Please also bear in mind that CCSO members are not all in the same camp – there are many that feel mandatory vaccinations are a prudent idea while there are many that oppose them. CCSO is committed to utilizing its resources as a labor organization to find the best way forward for all involved.

**Dan Thompson: CCSO Legal Counsel**



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<sup>3</sup> The ruling in *Bridges* is presently under further appeal.