

# The COVID-19 Vaccine Landscape

## What Employers Need to Know

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# Agenda

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- **COVID-19 Vaccine Landscape**
- **Vaccination Policies – Mandatory vs. Permissive**
- **How to Set the Table for a Successful Vaccination Campaign**

# The Vaccine Landscape\*

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## Vaccines with FDA Emergency Use Authorization include:

- **Pfizer-BioNTech**
  - Efficacy rate of 95%.
  - Requires two injections given 21 days apart. The second dose can be given up to six weeks after the first dose, if needed.
- **Moderna**
  - Efficacy rate of 94.1%.
  - It requires two injections given 28 days apart. The second dose can be given up to six weeks after the first dose, if needed.
- **Janssen (Johnson & Johnson)**
  - Efficacy rate of 85%
  - Requires one injection.

## Awaiting Emergency Use Authorization:

- **AstraZeneca** (in process, possibly by Spring)

\*Information per CDC Feb 2021

# The Vaccine Landscape

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- **Side effects:** within the first three days: pain, redness or swelling where the shot was given, fever, fatigue, headache, muscle pain, chills, joint pain, nausea, vomiting, feeling unwell, swollen lymph nodes.
- **Protection not immediate:** Takes time to build immunity, and also possible to be infected with COVID-19 just before or after being vaccinated. CDC considers someone “fully vaccinated” two weeks after final shot.
- **Leave may be required:** If side effects develop more than three days after vaccination, or symptoms last more than two days, CDC says self-isolate and get tested.

# The Vaccine Landscape

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- Approved via FDA's Emergency Use Authorization means there are several known unknowns, including:
  - Long term side effects;
  - Effectiveness at preventing transmission to others (asymptomatic infection after vaccination);
  - Percentage of vaccinated people necessary to achieve herd immunity; and
  - How new variants may impact effectiveness of vaccines.
- March 8: Per CDC, fully vaccinated people can:
  - Visit with other fully vaccinated people indoors without wearing masks or physical distancing;
  - Visit with unvaccinated people from a single household who are at low risk for severe COVID-19 disease indoors without wearing masks or physical distancing; and
  - Refrain from quarantine and testing following a known exposure if asymptomatic.

# The Vaccine Landscape – When?

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## California Plan (<https://covid19.ca.gov/vaccines/#California's-vaccination-plan>)

- **Currently vaccinating Phase 1A and 1B:**
  - Healthcare workers (1A)
  - Long-term care residents (1A)
  - Individuals 65 and older (1B)
  - Sector populations: (1B)
    - Agriculture and food
    - Education and childcare
    - Emergency services
- **Proof of sector options:**
  - Letter from employer re: sector
  - Paystub showing employer

**March 15: High-Risk Individuals (includes pregnancy, disability, illness)**

# The Vaccine Landscape – Where?

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- **Locations/ Timing:**

- **Sacramento:** [https://www.saccounty.net/COVID-19/Pages/CoronavirusVaccine.aspx?gclid=CjwKCAiA65iBBhB-EiwAW253W06RbpOiZ6lqS6blbJvnn1AaPiM0dDTMsywWdaVOlgEFEof7pqeezBoCABIQAvD\\_BwE](https://www.saccounty.net/COVID-19/Pages/CoronavirusVaccine.aspx?gclid=CjwKCAiA65iBBhB-EiwAW253W06RbpOiZ6lqS6blbJvnn1AaPiM0dDTMsywWdaVOlgEFEof7pqeezBoCABIQAvD_BwE)
- **San Francisco:** <https://sf.gov/covid-19-vaccine-san-francisco>
- **San Joaquin:** <https://sjready.org/events/covid19/vaccines.html>
- **Yolo:** [https://www.yuba.org/coronavirus/register\\_for\\_vaccination.php](https://www.yuba.org/coronavirus/register_for_vaccination.php)
- **Yuba:** [https://www.yuba.org/coronavirus/register\\_for\\_vaccination.php](https://www.yuba.org/coronavirus/register_for_vaccination.php)
- **Employees should also check availability with their medical providers.**

# Vaccination Policies – Federal Law

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- **May an Employer Mandate Vaccinations under Federal Law:**
  - EEOC’s December 16 guidance *implies* employers may mandate vaccinations by discussing how to handle issues that may arise under ADA; Title VII and GINA if vaccination is required
    - EEOC says administration of a vaccine by an employer is not a “medical exam.”
    - Pre-vaccination questions must be “job related and consistent with business necessity.”
    - Requiring proof of COVID-19 vaccination is not a disability-related inquiry.
    - The ADA allows an employer to have a **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.”
    - High standard to establish a “direct threat,” particularly in environments where workers have been working together for months without a vaccine.



# Vaccination Policies – Federal Law

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- **The foregoing suggests that federal law *allows* mandatory vaccination policies.**
- **However, there are always exceptions:**
  - Americans with Disabilities Act (ADA) requires reasonable accommodation for disabilities; and
  - Title VII requires reasonable accommodation for “sincerely held religious beliefs.”

# Disability Exception

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- Employee may refuse, or be prevented from receiving, the vaccine due to a disability.
- Employer may require documentation from the worker's medical provider to confirm disability and need for an accommodation.
- Managers and supervisors should be able to recognize an accommodation request and know to whom the request should be referred.

# Disability -“Direct Threat”

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- Employer may have a workplace policy requiring that employees not pose a **direct threat** to the health or safety of individuals in the workplace.
- **Direct Threat:** Employer would have to show unvaccinated employee poses “significant risk of substantial harm to the health or safety of themselves or others that cannot be eliminated or reduced by reasonable accommodation.”
- Factors to consider when determining whether unvaccinated individual poses a direct threat:
  - The likelihood that potential harm will occur;
  - The imminence of the potential harm;
  - The nature and severity of the potential harm; and
  - The duration of the risk.
- Additional factors set forth by the EEOC include:
  - The severity of the pandemic in a certain area, the employee’s own health, the employee’s job duties, and the likelihood that an individual will be exposed to the virus at the workplace.

# Disability - Reasonable Accommodation

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- If the unvaccinated individual poses a **direct threat**, engage in the interactive process to determine whether a **reasonable accommodation** may reduce or eliminate the risk.
  - This may include allowing the employee to work remotely, allowing the employee to work separate from the other employees, wearing a mask, etc.
- If there is no reasonable accommodation, the direct threat cannot be reduced, or the reasonable accommodation would be an undue burden to the employer, only then may employer exclude the individual from the workplace.

# Sincerely Held Religious Belief, Practice, or Observance Exemption

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- An employee may refuse to get vaccinated due to sincerely held **religious belief, practice, or observance**.
- Title VII prohibits employers from discriminating against employees because of their religion or religious creed.
- Generally, employers should assume that an employee's request for reasonable accommodation is sincerely held.
- If the employer has an objective basis for questioning either the religious belief or the sincerity of the belief, the employer is justified in asking for additional supporting information.

# Religious Belief - Reasonable Accommodation

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- If employee refuses vaccination due to sincerely held religious belief, engage in the interactive process and determine whether there is a reasonable accommodation available that does not cause undue hardship.
- If no reasonable accommodation, the employer may physically exclude the employee from the workplace.

# Religious Belief – Vaccination

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- No federal cases where religion has justified a refusal to vaccinate (usually in the context of healthcare workers).
- California state case has held that veganism is not a “religious” belief in context of a refusal to hire claim where a nurse declined to get vaccinated due to vaccine reliance on chicken embryos. ***Friedman v. Southern Cal. Permanente Medical Group, (2002) 102 Cal.App.4th 39.***

# Mandatory Vaccination – Union Issues

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- **Mandatory policies may inspire concerted activity on both sides.**
- **Mandatory policy may require collective bargaining:**  
*Virginia Mason Hosp. v. Washington State Nurses Association*  
**(9th Cir. 2007)**
  - Upholds arbitration ruling prohibiting hospital employer from unilaterally implementing mandatory flu immunization regime as “fitness for duty” requirement.
  - Preamble and union recognition clause of CBA requires hospital to collectively bargain with WSNA.
  - Did not fall within “management rights” clause allowing hospital to promulgate personnel policies.
  - Decision specific to language of the CBA at issue.



# Vaccination Policies – California Law

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- **May an employer Mandate Vaccinations in CA?**
- **Cal/OSHA General Obligations:**
  - Every "employer shall furnish employment and a place of employment that are safe and healthful." (Lab. Code §6400)
  - Employers must do everything "reasonably necessary to protect the life, safety, and health of employees." (Lab. Code 6401)

# Vaccination Policies – California Law

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- **No OSHA rule requiring (or even allowing) mandatory COVID vaccination by employers**
  - In context of testing, OSHA requires employers to “provide” for testing, or “make it available.”
  - Employer cannot require a COVID-19 test for an employee to come back to work. (Cal/OSHA Reg at 8 CCR 3205(11)(C).)
- **Only currently mandated vaccinations in CA:**
  - Schools
  - Tuberculosis

# Vaccination Policies – California Law

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- **California also protects disability and religion, and requires reasonable accommodation.**
  - In most cases, CA is more protective of employees than federal law.
- **Right to Privacy under Cal. Const., art. I, § 1**
  - Employee has an “autonomy privacy” interest in making intimate personal decisions about an appropriate course of medical treatment, without undue intrusion or interference from his employer. Termination for failing to participate in alcohol treatment program is potentially a wrongful termination. ***Pettus v. Cole (1996) 49 Cal.App.4th 402***
  - Employee decision about vaccination is potentially a personal medical decision.

# Vaccination Policies – California

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- **Is a “Mandatory” Policy a Good Idea in California?**
  - “Mandatory” suggests a consequence if the employee does not vaccinate, ie: termination or exclusion from the workplace, weigh benefit of a threat that is almost impossible to enforce
  - Risky to **terminate** under State law due to privacy, disability and religion (employee may claim coverage to avoid vaccination mandate)
  - If you merely **exclude**, for how long and when do they come back?
  - Risk posed by unvaccinated employees will vary from business to business
    - If most employees are vaccinated, measure risk to and from those who are not
    - If you have been operating for the last year with every employee being unvaccinated – may be hard to make the case that unvaccinated employee cannot be accommodated
    - What is the risk to third parties – lawsuits vs. workers’ compensation claims
    - There are other steps you can take to demonstrate you are providing a healthful, safe, workplace per Cal/OSHA requirements (IIPP, Covid protection, education, sanitation)

# Vaccination – Benefits of Optional Policy

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- Must keep COVID-19 protocols in effect regardless of vaccine for foreseeable future
- May avoid morale and concerted activity issues
- Avoids administration associated with reasonable accommodation of disability and religion
- Less risk of discrimination claims and privacy claims
- Avoid liability for side effects
- May avoid issues with Collective Bargaining Agreement

# Vaccination Policy – Setting the Table

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- Educate Employees about:
  - The vaccines – reader friendly
  - Which risk groups CDC suggests benefit most from vaccines
  - Benefits of vaccination to them and to the business
  - Explain why continuing COVID-19 protocols, including PPE, distancing and masks (ie: for the safety of those who for medical or religious reasons cannot get the vaccine)
  - Message in a way that looks forward to return to normalcy
- Set up a system to inform employees:
  - About eligibility each time a new group becomes eligible (so that their families are also protected)
  - Where they can get vaccinated

# Vaccination Policy – Setting the Table

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- Consider offering:
  - Reimbursement of costs of getting the vaccine
  - Paid leave to get vaccinated
  - Flexibility and/or paid leave for employees experiencing side effects
  - Other incentives
- Document your efforts

# Thank You For Attending Questions?

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