

**Question:**

Can a grocery employer require proof of vaccination from current or prospective employees as a condition of continued employment?

**Short Answer:**

According to state and federal agencies, California employers may require employees to receive an FDA-approved COVID-19 vaccination as long as the employer 1) does not discriminate against or harass employees or job applicants on the basis of a protected characteristic, 2) provides reasonable accommodations related to disability or sincerely-held religious beliefs or practices, and 3) does not retaliate against anyone for engaging in protected activity (such as requesting a reasonable accommodation).

However, mandatory vaccination policies may expose employers to lawsuits claiming liability under state privacy laws, including the state constitutional right to privacy and the California Confidentiality of Medical Information Act (CMIA). Mandatory vaccination policies may also conflict with the employer's obligations under a collective bargaining agreement.

**Useful Resources:**

- California Department of Faith Employment and Housing (DFEH)
  - See [DFEH Employment Information on Covid-19 - FAQ](#)
- U.S. Equal Employment Opportunity Commission (EEOC)
  - See [What You Should Know About Covid-19 and the ADA, the Rehabilitation Act, and Other EEO Laws](#)
- *Los Angeles Times*
  - [Can Your Employer Require a Vaccination? Probably. So can a restaurant or hotel](#)

**Employers should consider the following:**

1. **The policy may not discriminate against or harass employees based on protected characteristics, such as disability and religious creed.**
  - a. Employer must reasonably accommodate employees who object to vaccination on the basis of disability or known sincerely-held religious beliefs or practices.
  - b. Employer must engage in an interactive process with an employee in figuring out reasonable accommodations.
    - i. An accommodation related to religious belief or practice is not considered reasonable if the accommodation results in segregation of the individual from other employees or the public.
  - c. Employer may not retaliate against employees who request accommodations.
  - d. If employer shows that the accommodation imposes an undue hardship, the employer may exclude the employee from the workplace.
  - e. Employer does not need to provide reasonable accommodations to an employee who objects to receiving an FDA-approved vaccine for reasons other than disability, sincerely-held religious beliefs, or other non-protected characteristics.
2. **Employers should not retaliate against employees who question the employer's mandatory vaccination policy because the employees could be engaging in protected activity.**
  - a. For example, an employee's criticism of the policy could be based on the grounds that the policy discriminates on the basis of race, national origin, or another protected characteristic.
3. **Employers should avoid ADA violations.**

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- a. Asking for proof of vaccination is not a disability-related inquiry, but employer should not ask intrusive follow-up questions to an employee or applicant who refuses to get vaccinated.
  - b. When employer is self-administering the vaccination program.
    - i. Employer is not conducting a medical examination when administering vaccines.
    - ii. Employer can have employees answer certain questions that could elicit information about a disability as long as the inquiry is “job-related and consistent with business necessity.” See [What You Should Know About Covid-19 and the ADA, the Rehabilitation Act, and Other EEO Laws](#)
    - iii. Employer must maintain employee or applicant’s record of vaccination as confidential medical record.
  - c. When a third-party administers the vaccination program.
    - Employer can request proof of vaccination if a third party is administering the mandatory vaccination program,
    - Because the proof could contain disability related information, employer should instruct employees to omit that information.
    - Employer must maintain employee or applicant’s record of vaccination as confidential medical record.
- 4. Employer should know that mandatory vaccination policies could violate privacy laws.**
- a. California law provides a number of privacy protections, some of which are general (i.e. California Constitutional Right to Privacy) and some of which apply specifically to Medical information (i.e. California Confidentiality of Medical Information Act (CMIA). Read more about these laws [here](#).
  - b. With mandatory vaccination policies, the employer could find itself in a situation where it asks for or learns too much about an employee’s medical information.
- 5. Employers should check for conflicts between a mandatory vaccination policy and a collective bargaining agreement.**
- a. In a 2007 case, the Ninth Circuit upheld an arbitration award for nurses at the Virginia Mason Hospital in Washington State. The arbitration award affirmed the nurses’ argument that their employer’s mandatory flu vaccination policy could not be enforced under the terms of their collective bargaining agreement. See *Virginia Mason Hospital v. Washington State Nurses Ass’n*, 511 F.3d 908 (9<sup>th</sup> Circ. 2007).

**Ongoing Litigation**

- [New Mexico Corrections Officer Sues Over Vaccination Mandate](#)
  - A corrections officer is suing a county in New Mexico over its requirement that county employees must get COVID-19 vaccines. The officer is facing termination for not getting a vaccine. The officer is arguing that it is against federal law for the county to require employees to take vaccines that are not fully approved by the U.S. Food and Drug Administration.