



SPARE THE HOT AIR:
**Navigating New Developments in
Labor and Employment Relations**

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Mary Weiss, Public Employment Relations Board

Moderators: **Elizabeth A. Mitchell, Burke, Williams & Sorensen, LLP**
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Mandatory Vaccines in the Workplace

Vaccine Mandates

- True Mandate verses Testing Policy
- Must allow for reasonable accommodations
 - Disability
 - Sincerely Held Religious Belief



Vaccine Mandates - Litigation Overview

Jacobson v. Commonwealth of Massachusetts, 197 U.S. 11 (1905)

- *“In every well ordered society charged with the duty of conserving the safety of its members the rights of the individual in respect of his liberty may at times, under the pressure of great dangers, be subjected to such restraint, to be enforced by reasonable regulations, as the safety of the general public may demand”*



Vaccine Mandates - Litigation Overview

Zucht v. King, 260
U.S. 177 (1922)

“These ordinances confer not arbitrary power, but only that broad discretion required for the protection of the public health.”

Vaccine Mandates – Constitutional Challenges

- **Procedural and Substantive Due Process.** Employees have the right to work and right to pursue their profession without government interference.
- **First Amendment.** Arguments involving the right to free speech and the right to free religious exercise.
- **Equal Protection.** Vaccine mandates treat vaccinated differently than unvaccinated.
- **Fourth Amendment.** Invasive medical testing, injections, and other bodily intrusions constitute a search within the meaning of the Fourth Amendment. The Constitution protects a person's right to refuse unwanted medical care.

Vaccine Mandates – Constitutional Challenges

Jason Burcham et al v. City of Los Angeles, No. 2:21-cv-07296

- LAPD officers challenged the City's mandate on various Constitutional and statutory grounds.
- The Court rejected all of the Constitutional challenges, effectively finding that any intrusion upon the employees' rights were outweighed by the public health.
- Employees granted leave to amend their Title VII / FEHA arguments.

Vaccine Mandates – Constitutional Challenges

Kheriaty v. The Regents of the University of California, No. 8:21-CV-01367

- Physician employee alleged that the University's mandate violates equal protection and substantive due process.
- Employee claimed that the University's leadership was not interested in scientific debate or ethical deliberation.
- District court denied employee's request for an injunction. Employee has filed an appeal with the Ninth Circuit.

Vaccine Mandates – Federal and State Law Challenges

- Title VII & FEHA.

Employers must make reasonable accommodations to employees based on disability or a sincerely held religious belief.

- California Constitution right to privacy.

Mandates violate employees' right to privacy under the California state constitution by forcing them to disclose private medical information and receive unwanted medical treatment.

Vaccine Mandates – Federal and State Law Challenges

***Horvath v. City of Leander*, 946 F.3d 787 (5th Cir. 2020)**

- Pre COVID-19 challenge to TDAP vaccination requirement by a city firefighter.
- A “reasonable” accommodation need not be the employee’s preferred accommodation.
- City’s offer to employee to wear a respirator on duty enabled him to freely exercise his religion in his current position and did not burden his First Amendment rights.

Vaccine Mandates – Federal and State Law Challenges

***Gregg Crawford v. Trader Joes Company*, No. 5:21-cv-01519**

- Employee offered accommodation to vaccine mandate, but only vaccinated employees were allowed to attend a leadership meeting.
- Employee was subsequently terminated and asserts that it was based upon the exercise of his religious freedom.
- Currently pending in the Central District.

Vaccine Mandates – Federal and State Law Challenges

Let them Choose v. San Diego Unified School Dist., No. 37-2021-43172

- Plaintiffs challenged the School District's COVID-19 vaccine requirement for all students over 16 years old.
- Vaccine mandate “appears to be necessary and rational, and the district’s desire to protect students from COVID-19 is commendable” but conflicts with state law.

Vaccine Mandates: Other Considerations

- Obligation to Negotiate with Bargaining Units
 - ❖ *Regents of the University of California* (2021) PERB Decision No. 2783-H
- State or County Requirements
- Who Pays for the Vaccine or Testing?

Vaccine Mandates: Other Considerations

- Incentivizing rather than mandating
- Workers Compensation
- Morale / Retention Concerns





Employees
upset that the
COVID policies
are too strict

HR

Just trying to get
through the day

Employees
upset that
the COVID
policies
aren't strict
enough



OSHA and Cal/OSHA

OSHA's Failed Vaccine Mandate

- ***National Federation of Independent Business et al., v. Department of Labor, Occupational Safety and Health Administration*, 595 U. S. ____ (2022) (citation pending)**
- The mandate would have required employers with at least 100 employees to develop, implement and enforce vaccination policies, with exceptions for those that instead required employees to either get vaccinated or undergo regular testing for COVID-19 and wear face coverings at work.
- “Permitting OSHA to regulate the hazards of daily life – simply because most Americans have jobs and face those same risks while on the clock – would significantly expand OSHA’s regulatory authority without clear congressional authorization.”

Cal/OSHA Emergency Temporary Standards

- Testing for close contacts
- Face coverings
- Exposed employees must be excluded from work
- Employers must maintain wages and benefits for all excluded employees
- Case reporting requirements





Employee Privacy

Employee Privacy

- California Medical Information Act (CMIA) (California Civil Code §§56 et seq.) Defines who may release confidential medical information, and under what circumstances. The CMIA also prohibits the sharing, selling, or otherwise unlawful use of medical information.
- Cal. Code Regs. tit. 8 § 32125. The Public Employment Relations Board can reject documents filed with confidential information.
- HIPAA: HIPAA does not generally apply to information provided by an employee (or individual vendor or customer) directly to an employer or business that is not acting as a health care plan or provider.

Employee Privacy

- Vaccine Status is confidential and employers must store outside of employee's personnel file (ADA / FEHA)
- Shared on a need to know basis



A top-down view of six people sitting around a wooden table. The people are arranged in two rows of three. The top row consists of a man in a blue and white checkered shirt, a woman in a yellow top with glasses, and a woman in a white top. The bottom row consists of a man in a light blue shirt, a man in a purple and white checkered shirt, and a woman in a light blue striped shirt. The table is a light-colored wood. Overlaid on the table are several colorful speech bubbles: a green one on the left, a blue one at the top center, a yellow one at the top right, a purple one at the bottom center, a pink one at the bottom right, and a white one on the right side. The text 'Panel Discussion' is centered over the speech bubbles.

Panel Discussion

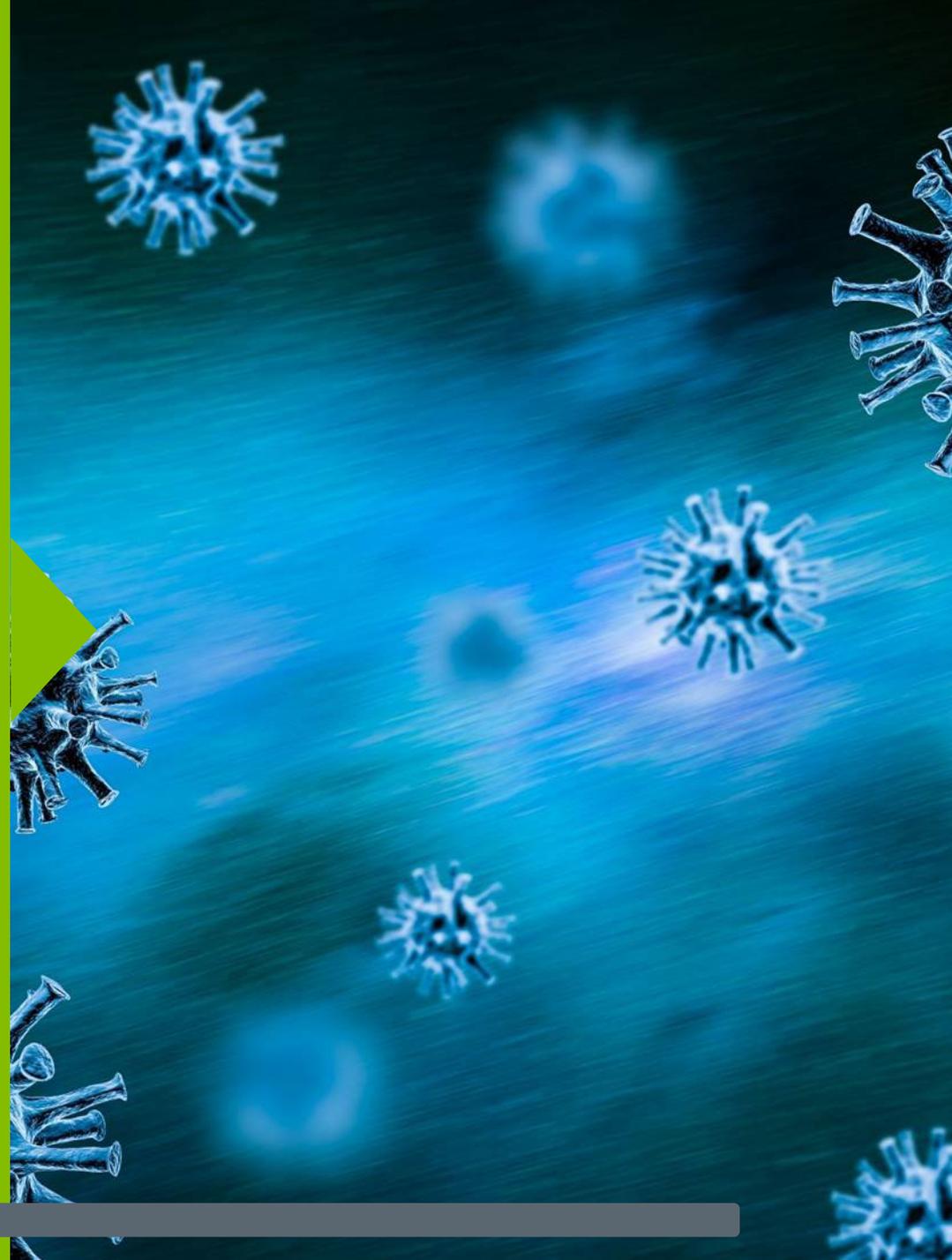


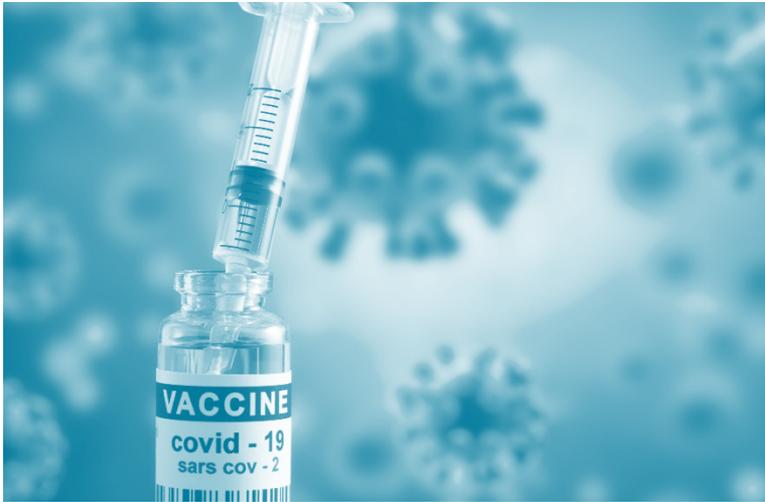
**COVID-19
Employment Related
Legislation**

COVID-19 Employment Related Legislation

Federal

- Families First
Coronavirus
Recovery Act





COVID-19 Employment Related Legislation

State

- Senate Bill 114
- Senate Bill 1159
- Proposed Assembly Bill 1993



Working From Home – Legal Issues

Working from Home



- Non-Exempt Employees
- Reimbursement Issues
- Negotiations

I sleep in pajamas
just because it's
nice to wake up
already dressed for
work.



Working from Home

- American Rescue Plan Act funds
- Return to the Office



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Panel Discussion

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