



## Heading Into 2022, How California Employers Can Avoid A COVID Litigation Infection

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With the constantly-changing landscape of COVID-19 protocols, and the first waves of COVID-related employment litigation already hitting California courts, California employers find themselves in a perpetual state of reacting to new governmental mandates, updating workplace policies, and trying to be proactive in an effort to avoid COVID-related lawsuits. Businesses have been forced to divert their attention from routine operations to focus on what has now become business as usual – masks, vaccines, accommodations for both, and constant testing – transforming employers into pseudo-healthcare providers. It is nearly impossible to stay up-to-date on applicable federal law, OSHA/Cal-OSHA regulations, CDC guidance, and the various city and county ordinances, without adversely impacting the business. This article will focus on a few key ways California employers can minimize their COVID litigation risk.

### If You Don't Already Have a Mandatory Vaccination Policy – Wait a Little Longer

Many California employers, in an effort to be proactive and to assist with the national vaccination effort, have been implementing mandatory vaccination policies before there is any legal requirement to do so. This is leading to lawsuits by people who object to vaccinations for religious, medical or other reasons. It is also putting a further hiring strain on California employers, already struggling to find qualified candidates. There is no legal defense for believing one is “doing the right thing” with respect to requiring employees to be vaccinated – and California employers should hold off on implementing mandatory vaccination policies until applicable law and regulations specifically require them (and provide some measure of protection against many of the percolating lawsuits).

President Biden announced his plan to introduce, through OSHA's Emergency Temporary Standard (“ETS”), a federal vaccine mandate for federal employees, federal contractors, and private employers with 100 or more employees. Many aspects of this impending federal mandate are still unknown. While this directive takes effect “immediately” for many, for states like California, with a state-specific OSHA system, the effective date is still unknown. Cal-OSHA claims that employers will have 50 to 90 days to comply with the requirements once they are announced; yet, as of the writing of this article, no such requirements have been published. Further, there is much uncertainty surrounding which employers will be covered by this mandate. There is no guidance as to how this 100-employee marker should be calculated, but based on other federal laws, such as the Family Medical Leave Act, the size threshold for this mandate will likely be an aggregate of part-time and full-time employees working for an employer, for the prior six months. There will be exemptions to this order for qualifying religious and American With Disabilities Act (“ADA”) exceptions – but again, the details of any such exemptions have not been announced.

Under President Biden's plan, employees who are exempted from vaccination will need to be tested weekly. Mandatory COVID testing is expensive for employers. California employers are already required to pay for any required COVID tests, as well as compensate employees for time spent taking the test and mileage. (To avoid any shenanigans, employees should be advised where to go to get tested.) Mandatory testing also may impose requirements for “show up” pay (minimum of two, and maximum of four, hours) if employees report to work, but are sent home for testing positive.

With respect to federal workers and contractors, the new Guidance states that all such employees must be “fully-vaccinated” by December 8, 2021. Although it may change when the ETS is released, currently the Guidance does not allow the options of weekly testing or working remotely. Federal contractors should let employees know about the deadline now, and advise those working remotely, that they may also need to be vaccinated (although it is likely this will change). If any employees have religious, medical or other objections, encourage them to contact Human Resources or Legal, so each case can be evaluated as we wait for the ETS.

### Review, But Do Not Maintain Copies of, Vaccination Cards

Employers in California must now ask employees if they are vaccinated and keep a record of employee vaccination status. Many employers are taking the extra step of copying and maintaining a record of employee vaccination cards, and are also questioning the veracity of cards presented to them (another reason perhaps not to keep a copy). This goes beyond California's requirements and exposes employers to potential liability. Vaccination cards are considered a confidential medical record, and employers should not keep a record of them. Any confidential medical information should be kept separate from traditional personnel records. Improper maintenance and use of vaccination information could lead to claims of discrimination, retaliation, and violation of the California Consumer Privacy Act. Less is more under these circumstances, and a simple yes or no list will suffice.

### Update Your COVID Prevention Plans

Every California business is required to create a safe environment and should already have a COVID-19 Response Plan pursuant to the current, Cal-OSHA ETS. This is usually done as a supplement to the employer's Injury & Illness Prevention Plan. These are living documents that need to be updated on a regular basis due to the frequently-changing safety standards and protocols. There is a myriad of orders and guidelines issued by federal, state, county, city and other local government offices with which California employers must comply, that often change weekly. If a company has more than one location in California, different plans will need to be developed for each location to comply with local governmental rules. Plans should include the company's plan for vaccinating employees and responding to positive or potentially exposed employees. Employees should be trained on these plans and have a copy of, or access to, the Response Plan.

California employers should be sure to stay informed, utilize subject matter experts, and keep employees apprised of all your efforts. Reducing employee anxiety is as important as reducing litigation exposure, as both can lead to an avoidable, 2022 COVID business infection.

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