

# Practice ADVISORY

## Office Reopening

As the architectural profession emerges from the constraints brought on by the pandemic and move forward in re-opening offices and public operations, we all have questions about the legal and cultural implications of this change. AIA California has asked legal and human resources professionals in addition to several member groups to gather the best thinking in response to these Frequently Asked Questions and provide you with insight as you consider next steps in returning to the office.

*Disclaimer: AIA California is providing this resource as general information and it is not to be construed as legal advice. Be sure to follow local and state public health requirements and obtain legal counsel for questions about your specific situation.*

### **Can we legally require our employees to get vaccinated?**

Yes, however it does become a condition of employment, which means unless there is a religious or medical reason (which requires an accommodation) if an employee does not get the vaccine, they could lose their job. The Fair Employment and Housing Act still applies, which requires a good faith interactive process and attempts to find a reasonable accommodation if an employee has a sincere religious or medical reason to not get the vaccine.

Also, this requirement cannot be applied in a discriminatory fashion; if an employer requires vaccination, it should be a requirement for everyone that does not have a valid accommodation request.

The California Department of Fair Housing and Employment's guidelines and FAQ on the subject are located here: [https://www.dfeh.ca.gov/wp-content/uploads/sites/32/2020/03/DFEH-Employment-Information-on-COVID-19-FAQ\\_ENG.pdf](https://www.dfeh.ca.gov/wp-content/uploads/sites/32/2020/03/DFEH-Employment-Information-on-COVID-19-FAQ_ENG.pdf) (primarily on pages 7-10).

Additionally, some companies are providing additional incentives to encourage staff get vaccinated – things like additional time off, gift cards, etc. These should be applied to all employees equally.

### **What is the best way to inform employees of the vaccine requirement?**

If an employer chooses to require vaccinations, there should be some effort to explain the rationale rather than simply giving a brute force edict that vaccines will be required, or severe consequences will follow. It should be grounded in the concerns over the health and safety of coworkers and clients, and of the more vulnerable – such as those with pre-existing conditions and the children of coworkers and clients who cannot yet get vaccinated. It could also reference the lives lost already, or those who have contracted covid and still suffer from long-lasting effects, as well as the need to do our part after the medical professionals have done their part

over the last year. Vaccinations also help prevent viral outbreaks in the workforce that could require additional quarantines. In short, an appeal to a sense of shared duty, rather than just a command, should be more positively received by employees.

### **Regarding vaccination becoming ‘a condition of employment’ – does that require employers to amend their personnel manual to specifically address this requirement?**

Employers should definitely have something in writing, but it doesn't necessarily need to be part of the personnel manual or handbook. Instead, an official statement should be issued, in writing - a memoranda or other bulletin noting what is required for a return to the office, along with a statement about contacting management if they are requesting an accommodation for a medical or sincere religious reason. A careful employer will have a published policy that can be consistently and fairly applied, as relying on words at a meeting or zoom or a written policy that is vague and inconsistent will leave far too many gray areas that could potentially create unnecessary liabilities for employers.

### **What do we do if we have an employee who refuses to get vaccinated?**

Without an accommodation request (disability or religious reason), an employer can discipline the employee who refuses to get vaccinated. However, there is a fine line, and an employer can create liability for itself if it disciplines an employee who makes claims about discrimination related to a vaccine requirement or who attempts to engage in ‘collective action’ related to the vaccine – such as trying to get other workers to oppose vaccination efforts. If there is discipline, a careful employer will ensure the documentation on the discipline is only related to the employee refusing to perform a mandatory action – in this case, obtain vaccination – without any valid accommodation request.

### **What if our firm decides not to require vaccinations for the staff as a pre-requisite for returning to the office?**

At the moment, there is no requirement in Cal-OSHA or any state health regulation that requires individuals to be vaccinated to return to work. As throughout the pandemic, these regulations remain subject to change, so it is possible the State will mandate a new requirement in the future, although it currently appears unlikely to change. It could possibly increase an employer's risk exposure, as unvaccinated employees are significantly more likely to catch the virus and possibly pass it on to other coworkers (which could create workers compensation exposure) or to clients or third parties. A claimant could argue that not requiring vaccinations is a failure to meet a reasonable duty of care, and this argument remains untested in the courts (and will remain untested in the Court of Appeal for some time).

### **Can we as a firm be held legally responsible for a workplace with unvaccinated staff?**

Right now, the answer is probably not, because not everyone can get a vaccine just yet, but this is rapidly changing. It also depends on if an employer generally follows the safety guidelines imposed by the State and County Health Departments (which themselves will be changing as things reopen). For example, masks are required. But if an employer has an employee that

chronically fails to wear a mask and the company is aware of this fact but takes no action, if that employee exposes someone (especially a third party), they could argue the employer breached its duty of care and also violated health and Cal-OSHA regulations, which contributed to the injury.

Also, if an employee becomes sick due to exposure at work, it triggers workers compensation liability (at a minimum, a rebuttable presumption that the employee contracted the virus at work). Workers' compensation liability also applies if someone contracts COVID because another employee was not vaccinated (due to a legitimate reason). Workers compensation law is a "no-fault" system, so the law will still impose liability on the employer for any workplace exposure, even if the employer met the standard of care for safety.]

## **Is COVID Testing and Vaccination Time "Hours Worked" in California?**

The California Labor Commissioner has now released updated guidance addressing questions related to what and when an employer will have to pay for testing or vaccinations. The determining factor is whether or not the employer "requires" employees to either get tested or get vaccinated.

### **Employer-Required Testing and Vaccinations**

When an employer is requiring employees to be tested or vaccinated:

- The employer must pay for the time it takes for the testing or vaccination, including travel time
- The time must be considered "hours worked," and the time associated with completing the test or vaccination, including any time traveling and waiting for the test or vaccination to be performed, would constitute time worked
- Time spent waiting for COVID-19 test results is not compensable as hours worked, although the worker may be able to utilize paid leave while waiting for the results.
- The employee cannot be required to utilize paid leave if the time is considered "hours worked."
- If there are any costs for the test or vaccination, the employer must pay, as it is a reimbursement for necessary business expenses
- If the testing or vaccination is performed at a location other than the employee's ordinary worksite, the employer will also be required to reimburse for necessary expenses incurred to travel to and from the testing or vaccination location.

### **Not-Required Testing and Vaccinations**

If the employer is not requiring that employees be tested or vaccinated:

- The worker may be able to utilize paid leave for time off from work to obtain testing or vaccination.
- Regular paid sick leave may be used for preventive care, which includes medical testing and vaccines, for the employee or the employee's family members, and is protected against retaliation under the Labor Code.

## COVID-19 Testing and Vaccine FAQs (excerpted from Department of Fair Housing and Employment)

(1) Is an employer required to compensate employees for the time spent obtaining a COVID-19 test or vaccination?

If the employer requires an employee to obtain a COVID-19 test or vaccination (see Department of Fair Employment and Housing FAQs for guidance on the types of COVID-19 tests an employer may require and on vaccination), then the employer must pay for the time it takes for the testing or vaccination, including travel time.

The employer must pay for the time it takes for testing or vaccination because such time would constitute “hours worked.” The term “hours worked” means the time during which a worker is subject to the control of an employer and includes all the time the worker is suffered or permitted to work, whether or not required to do so. Under this definition, one way to determine whether time a worker spends performing a task must be paid as time worked is whether the employer exercised control over the worker by requiring the worker to perform that task. If an employer requires that a worker obtain a medical test or vaccination, the time associated with completing the medical test or vaccination, including any time traveling and waiting for the test or vaccination to be performed, would constitute time worked. However, unless otherwise required, the time spent waiting for COVID-19 test results is not compensable as hours worked, although the worker may be able to utilize paid leave while waiting for the results.

An employer cannot require the worker to utilize paid leave if the time is considered “hours worked” as referenced above.

If the time is not considered “hours worked,” the worker may be able to utilize the worker’s paid leave for time off from work to obtain testing or vaccination. Regular paid sick leave may be used for preventive care, which includes medical testing and vaccines, for the employee or the employee’s family members, and is protected against retaliation under the Labor Code.

(2). Is an employer required to compensate employees for the cost of a COVID-19 test or for the cost, if any, of getting a COVID-19 vaccination?

Yes, if an employer expressly requires an employee to obtain a COVID-19 test or a vaccination, or if the employee obtains the test or vaccination as a direct consequence of the employee’s discharge of the employee’s duties (i.e., the test or vaccination is effectively required for a job), the employer must pay for the costs of the test or vaccination as it is a reimbursement for necessary business expenses. If the employer requires a test or vaccination and there is no designated testing site, workers should ask which location(s) or vendor(s) are acceptable to the employer to avoid disputes over cost.

If the testing or vaccination is performed at a location other than the employee’s ordinary worksite, the employee may also be entitled to reimbursement for necessary expenses incurred to travel to and from the testing or vaccination location.

(3). What anti-retaliation protections apply to vaccinations?

The Department of Fair Employment and Housing (DFEH) enforces an anti-retaliation provision under the Government Code that protects employees seeking reasonable accommodations for a disability or sincerely-held religious belief or practice, among other protected activities. More information on this protection is available on DFEH’s website <https://www.dfeh.ca.gov/>.

Additionally, the Labor Commissioner's Office enforces anti-retaliation protections that may apply to actions workers undertake in connection with getting vaccinated, such as using paid sick leave to get vaccinated. Laws that prohibit retaliation.

**Can we fully open up the office to visitors, clients, collaborators, if we knowingly have unvaccinated staff in the office?**

**Yes**, provided the employer adheres to the local, county, and state regulations, including Cal-OSHA regulations and if the employer has their required Covid Prevention Plan and the plan is enforced. The most important factors are masking, social distancing, and good ventilation. The Cal-OSHA emergency temporary standards will remain in effect even for the vaccinated for some time as well.

[Click here](#) for the Cal-OSHA page on the subject, which includes an FAQ and a summary of key things employers need to know

**Where can I find a sample Covid Prevention Plan?**

<https://www.dir.ca.gov/dosh/coronavirus/ETS.html>

**What additional resources are available to me as an employer?**

Resources in a number of different languages can be found here:

<https://www.dfeh.ca.gov/covid-19-resources-and-guidance/>