



# SCHOOL & COLLEGE LEGAL SERVICES OF CALIFORNIA

*A Joint Powers Authority  
serving school and college  
districts throughout the  
state.*

5350 Skylane Boulevard  
Santa Rosa, CA 95403

Tel: (707) 524-2690  
Fax: (707) 578-0517  
santarosa@sclsca.org  
www.sclsca.org

*General Counsel*  
Carl D. Corbin

*Attorneys*  
Monica D. Batanero  
Jennifer Henry  
Nancy L. Klein  
Damara L. Moore  
Jennifer E. Nix  
Steven P. Reiner  
Kaitlyn A. Schwendeman  
Loren W. Soukup  
Erin E. Stag

*Of Counsel*  
Ellie R. Austin  
Robert J. Henry  
Frank Zotter, Jr.

## LEGAL UPDATE

January 21, 2021

**To: Superintendents, Member School Districts (K-12)**

**From: Damara Moore, Senior Associate General Counsel** *DM*

**Subject: Mandating Vaccinations for Employees**  
**Memo No. 03-2021**

---

Currently, there is no mandatory vaccination requirement from either the state or federal government. According to California For All, presently the state “hope[s] that once Californians find out how safe and effective the COVID-19 vaccines are, they will voluntarily opt to receive them.”<sup>1</sup> This Legal Update addresses the question of whether a local educational agency (“LEA”) may mandate that its employees receive the COVID-19 vaccination.

Current guidance from the Equal Employment Opportunity Commission (“EEOC”) provides that employers may require employees to receive a COVID-19 vaccination, subject to the below analysis.

Prior to implementing such a mandate, the employer must ensure that its policies comply with the Americans with Disabilities Act (“ADA”), Title VII of the Civil Rights Act of 1964 (“Title VII”) and other workplace laws. This means the employer must have policies and practices in place to engage in the interactive process to determine what accommodations can be made for an employee who raises objections to vaccination due to a sincerely held religious belief or a medical condition.<sup>2</sup>

Before adopting such a policy, the employer must conduct a direct threat analysis and provide the opportunity to bargain to labor organizations.

---

<sup>1</sup> <https://covid19.ca.gov/vaccines/>

<sup>2</sup> <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws> (“EEOC Guidance”)



I. Prior to Implementing Such a Policy, the LEA Should Conduct a Direct Threat Analysis.

The ADA allows an employer to have “qualification standards” that may screen out some employees with disabilities if the employer can show the requirement is “job related for the position in question and is consistent with business necessity.”<sup>3</sup> This includes “a requirement that an individual shall not pose a direct threat to the health or safety of individuals in the workplace.”<sup>4</sup> However, if such a requirement screens out or tends to screen out an individual with a disability, the employer must show that an unvaccinated employee would pose a direct threat due to a “significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation.”<sup>5</sup> According to the EEOC:

Employers should conduct an individualized assessment of four factors in determining whether a direct threat exists: the duration of the risk; the nature and severity of the potential harm; the likelihood that the potential harm will occur; and the imminence of the potential harm. A conclusion that there is a direct threat would include a determination that an unvaccinated individual will expose others to the virus at the worksite. If an employer determines that an individual who cannot be vaccinated due to disability poses a direct threat at the worksite, the employer cannot exclude the employee from the workplace—or take any other action—unless there is no way to provide a reasonable accommodation (absent undue hardship) that would eliminate or reduce this risk so the unvaccinated employee does not pose a direct threat.

If there is a direct threat that cannot be reduced to an acceptable level, the employer can exclude the employee from physically entering the workplace, but this does not mean the employer may automatically terminate the worker.<sup>6</sup>

We recommend that any LEA considering mandating the COVID-19 vaccine for employees work closely with their legal team to ensure the policy is supported by findings of a direct threat.

II. Prior to Implementing Such a Policy, Be Aware of Bargaining Obligations.

The decision to mandate vaccinations will implicate the duty to negotiate with labor organizations. Some management rights clauses might arguably permit the decision to be imposed, but will still require effects bargaining. To determine an LEA’s bargaining obligations, a fact-intensive analysis of the management rights article within each collective bargaining agreement must be performed. We urge consultation with your labor law counsel prior to implementing any such policy.

---

3 29 C.F.R. § 1630.10.

4 EEOC Guidance, FAQ K.5.

5 29 C.F.R. 1630.2(r).

6 Id.



III. After Adopting Such a Policy, LEAs Will Need to Be Vigilant for the Need to Engage in the Interactive Process with Qualified Individuals.

According to the EEOC:

Employers will need to determine if any other rights apply under the EEO laws or other federal, state, and local authorities. For example, if an employer excludes an employee based on an inability to accommodate a request to be exempt from a vaccination requirement, the employee may be entitled to accommodations such as performing the current position remotely. This is the same step that employers take when physically excluding employees from a worksite due to a current COVID-19 diagnosis or symptoms; some workers may be entitled to telework or, if not, may be eligible to take leave under the Families First Coronavirus Response Act, under the FMLA, or under the employer’s policies . . . .<sup>7</sup>

Administrators will need to be aware of obligations related to accommodations, to whom such employees should be directed when the employer’s obligation to engage in the interactive process has been triggered, and those employees who engage in the interactive process should be aware of the requirement to provide accommodations to qualifying employees so long as the accommodations do not place an undue hardship on the employer. We suggest that you work closely with your legal team when these initial requests for accommodations are presented, to ensure compliance with a situation that may be novel for many administrators.

When determining whether an employee requires an accommodation for his or her religious beliefs, employers “should ordinarily assume that an employee’s request for religious accommodation is based on a sincerely held religious belief.”<sup>8</sup> Once this determination is made, “the employer must provide a reasonable accommodation for the religious belief, practice, or observance unless it would pose an undue hardship under Title VII of the Civil Rights Act. Courts have defined ‘undue hardship’ under Title VII as having more than a *de minimis* cost or burden on the employer.”<sup>9</sup>

The obligation to engage in the interactive process does not mean all requests for accommodations must be granted. This is addressed by the EEOC, Question and Answer K.7:

**K.7. What happens if an employer cannot exempt or provide a reasonable accommodation to an employee who cannot comply with a mandatory vaccine policy because of a disability or sincerely held religious practice or belief? (12/16/20)**

If an employee cannot get vaccinated for COVID-19 because of a disability or sincerely held religious belief, practice, or observance, and there is no reasonable accommodation possible, then it would be lawful for the employer to exclude the employee from the workplace. This does not mean the employer may

---

<sup>7</sup> EEOC Guidance, FAQ K.5.

<sup>8</sup> EEOC Guidance, FAQ K.6.

<sup>9</sup> Id.



School & College Legal Services of California  
Tel: (707) 524-2690 Fax: (707) 578-0517  
[www.sclscal.org](http://www.sclscal.org)

automatically terminate the worker. Employers will need to determine if any other rights apply under the EEO laws or other federal, state, and local authorities.

We know there are many questions related to vaccination that require individualized answers.

Please contact our office with questions regarding this Legal Update or any other legal matter.

*The information in this Legal Update is provided as a summary of law and is not intended as legal advice. Application of the law may vary depending on the particular facts and circumstances at issue. We, therefore, recommend that you consult legal counsel to advise you on how the law applies to your specific situation.*

© 2021 School and College Legal Services of California

*All rights reserved. However, SCLS grants permission to any current SCLS client to use, reproduce, and distribute this Legal Update in its entirety for the client's own non-commercial purposes.*