

## 2020 Isn't Quite Over Yet

# EEOC Vaccine Guidance, Cal/OSHA To Clarify Emergency Temporary Standards, and Expiration of Emergency Paid Sick Leave

### EEOC Issues Vaccine Guidance for Employers

On December 16th, the EEOC updated its Technical Assistance Questions and Answers to include guidance on requiring COVID-19 vaccination for employees. Vaccination requirements implicate a number of federal and state civil rights laws, including the Americans with Disabilities Act (ADA), the Genetic Information Nondiscrimination Act (GINA), the religious protections of Title VII of the Civil Rights Act of 1964 (Title VII), and the California Fair Employment and Housing Act (FEHA). While the EEOC guidance does not directly state that mandatory vaccination policies are lawful, it implies that vaccines can be mandated where they are job related and consistent with business necessity. It also appears the EEOC is deferring to the CDC or state and local health departments for a determination that getting vaccinated is required so that employees do not pose direct threat to the health or safety of individuals in the workplace. While an employer could make that determination itself based on the nature of the work being performed, having "official" recognition of the need for the vaccine would be safer in terms of requiring vaccination.

The EEOC guidance advises employers that they 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

unvaccinated worker poses a direct threat, the EEOC cautions that it cannot exclude that employee from the workplace "unless there is no way to provide a reasonable accommodation (absent undue hardship) that would eliminate or reduce this risk so that the unvaccinated employee does not pose a direct threat."

The EEOC guidance makes clear that neither requiring the administration of a vaccination nor the requirement that an employee show proof of vaccination are in and of themselves a "medical examination" or "disability-related inquiry," and thus do not automatically implicate the ADA. It also answers a series of questions predicated on the assumption that an employer has adopted mandatory vaccination policy, focusing on how an employer should respond to requests from employees who cannot or do not wish to be vaccinated. Importantly, in the event an employee refuses to get vaccinated due to a disability or for a religious reason, the EEOC notes that before excluding that employee from the workplace, "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.'"

Additionally, employers should be aware that pre-vaccination medical screening questions posed by the employer, including questions regarding proof that the employee has been vaccinated, may elicit information about a disability. The EEOC provides the following guidance during the screening process: "Simply requesting proof of receipt of a COVID-19 vaccination is not likely to elicit information about

a disability and, therefore, is not a disability-related inquiry. However, subsequent employer questions, such as asking why an individual did not receive a vaccination, may elicit information about a disability and would be subject to the pertinent ADA standard that they be 'job-related and consistent with business necessity.' If an employer requires employees to provide proof that they have received a COVID-19 vaccination from a pharmacy or their own health care provider, the employer may want to warn the employee not to provide any medical information as part of the proof in order to avoid implicating the ADA."

The full Technical Assistance Questions and Answers can be found [here](#). The vaccination guidance is located in section K. Further guidance may be issued by state agencies, and it is recommended that legal counsel be consulted when considering whether to institute a mandatory vaccination program for employees because of the sensitive issues involved.

## Cal/OSHA Holds Meeting To Receive Comments on its Emergency Temporary Standards

Since their adoption on November 30th, Cal/OSHA's Emergency Temporary Standards (ETS) have been the source of much vocal confusion and concern for employers. As a result, on December 18th, Cal/OSHA held a meeting for its stakeholders to receive comments on how to improve, change, or clarify the ETS to help employers comply with its terms. Stradling attended the zoom call, along with over 1,000 other stakeholders. During the call, dozens of employers and business groups submitted comments on nearly every provision of the ETS, the most common questions and comments included:

- Cal/OSHA should distinguish between "provide testing" and "shall test" in the ETS;
- The definition of outbreak and major outbreak should consider the size of the employer;
- Many of the stakeholders took issue with the pay requirement and asked the following questions:
  - When is an employee "able and available" to work?
- Which sick leave benefits can be applied to maintain earnings?
- What is the effect of an employee receiving workers compensation benefits?
- Many stakeholders also advocated for a cap, either monetary or in days of earnings available to excluded employees
- Clarification on how the requirements of the ETS would apply if they conflict with a collective bargaining agreement covering when an employee is excluded from and can return to work;
- Explanation of how the testing requirements would apply if no testing is available;
- Several employers suggested that only the people who came in close contact should be tested, not all employees in the "exposed worksite" when there is an outbreak;
- Stakeholders were also generally concerned about the definition of an "exposed worksite" and indicated that it was too broad for certain applications like construction sites and warehouses; and
- Many stakeholders were also concerned about the effect of employees refusing testing after an outbreak occurs. They asked whether those employees should be excluded from the workplace and whether employers would have to maintain that employees earnings if they were excluded, or if an employer could terminate that employee.

Cal/OSHA indicated that it will attempt to address all these concerns and more in updated FAQs, but did not provide an exact date by which they would do so. The current FAQs and ETS are discussed in our client alert [here](#). We are hopeful that Cal/OSHA will provide further clarification and guidance by the end of the year, however, as of today employers must continue to wait and comply with the ETS as best as they can.

## FFCRA Set to Expire at the End of the Year

Unless Congress acts, the Families First Coronavirus

Response Act (FFCRA) paid-leave requirements will expire at the end of the year. Additionally, unless the California legislature acts, the current California Supplemental Paid Sick Leave (CPSL) provisions applying to employers with over 500 employees, in addition to certain food-sector workers, health care workers and emergency responders, is set to end upon expiration of the FFCRA. Accordingly, unless something changes, these provisions will no longer be effective after December 31, 2020.

The FFCRA and CPSL require employers to pay sick leave of up to 80 hours, or roughly 10 days, to employees who need to take leave for certain COVID-related reasons. If FFCRA and CPSL leave obligations expire at the end of the year, employers should treat employees' FFCRA requests in January as requests for unpaid Family and Medical Leave Act (FMLA) time off. For employees who began their FFCRA or CPSL leave by December 31st, the Department of Labor informs employees in FFCRA guidance, "If you take some, but not all 12, workweeks of your expanded family and medical leave by Dec. 31, 2020, you may take the remaining portion of FMLA leave for a serious medical condition, as long as the total time taken does not exceed 12 workweeks in the

12-month period. Please note that expanded family and medical leave is available only until Dec. 31, 2020; after that, you may only take FMLA leave." <https://www.dol.gov/agencies/whd/pandemic/ffcra-questions>

It is of course possible that the FFCRA and/or CPSL leave provisions will be extended in some manner into 2021. If the FFCRA is not extended it is also possible that California will expand the CPSL to apply to both large and small employers to fill in the gap left by the FFCRA. Stradling will keep clients apprised of any changes affecting the continuation of the FFCRA and CPSL leave requirements.

---

## Stradling Has Resources To Help You Stay Compliant

To assist California employers in complying the various COVID-19 requirements in California, Stradling has created COVID-19 protocols which incorporate all the new requirements of the ETS and help businesses comply with federal, state, and county requirements. We encourage you to reach out if you are in the process of reopening or you have been conducting business and want to make sure you are in compliance with the applicable industry guidelines.

Please do not hesitate to reach out to us for assistance in dealing with the effects of the COVID-19 pandemic on your company.

### Labor and Employment Practice Group

**Jeff Dinkin**

805.730.6820

jdinkin@sycr.com

**Jared Speier**

805.730.6804

jspeier@sycr.com

### Intellectual Property Practice Group

**Steven Hanle**

949.725.4126

shanle@sycr.com

### Corporate and Securities Practice Group

**Ryan Wilkins**

949.725.4115

rwilkins@sycr.com

### Public Finance Practice Group

**David Casnocha**

415.283.2241

dcasnocha@sycr.com

**Brian Forbath**

949.725.4193

bforbath@sycr.com

### Litigation Practice Group

**Jason de Bretteville**

949.725.4094

jdebretteville@sycr.com