

Returning to the Campus and the Workplace: Key Considerations for Reopening Your Campus and Workplaces to Employees, Students and Members of the Public

Association of Chief Human Resource Officers (ACHRO) Fall Training Institute | October 21, 2021

Presented By: T. Oliver Yee



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Agenda

- Managing COVID-19 Outbreaks
- Vaccination Policies
- Reasonable Accommodations
- Legal Issues After the Expiration of Supplemental Paid Sick Leave



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Managing COVID-19 Outbreaks



Manage and Control Outbreaks

- Determine positive or suspected cases
- Help arrange testing
- Determine employees and students who may have had close contact or exposure
 - Time – 15 minutes or more
 - Proximity – within 6 feet
 - Infectious period – 2 days before symptom onset to end of isolation



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Notify Local Public Health Department and Coordinate Response

- Identify contact information for local public health department
- Share information with local public health department
 - Known and suspected outbreaks
 - Establish information sharing protocol
 - Provide information for contact tracing

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Symptomatic Employees and Students

- Instruct person to leave the campus or remain at home
- Instruct person to contact their health care provider
- Arrange for testing
- Provide advice regarding leave status

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Leaves for Employees Exposed to COVID-19

- Cal/OSHA require employers continue to be paid while excluded from the worksite
- Review leave policies
 - Both statutory and contractual leaves
 - Ensure sufficient flexibility
- Employee organizations role to communicate prevention and response plans

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Notifying Community of an Outbreak

- Districts must provide notices to all employees who at a worksite on the day in which someone tests positive for COVID-19 or was in their “infectious period”
- Notice should be given to affected employees within one business day of receiving notice of potential COVID-19 exposure
 - Must be written, not oral

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Notifying Community of an Outbreak

- Communicate
 - Instructions for infection prevention and outbreak management
 - Instructions for close contacts
 - Home quarantine and symptom monitoring
 - COVID-19 testing sites
 - Referral to local health department
 - Sick leave rights and return-to-work requirements

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Ensure Confidentiality of Medical Information

CMIA prohibits disclosure of confidential medical information

- Confidentiality of employees with suspected or confirmed COVID-19 infections
- Must not disclose other information which could reasonably identify employee
- Must limit access to information within district

Civil Code Section 56.10

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Notification of a Student Case

- Students have privacy rights under FERPA
- Must not disclose student information except to parent or student
 - Or with consent
- Health or safety emergency exception:
 - Can disclose student to appropriate parties in connection with an emergency

20 U.S.C. § 1232g(b)(1)(I);
34 C.F.R. §§ 99.31(a)(10) and 99.36

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Isolation and Quarantine

- Isolation for symptomatic persons:
 - At least 10 days have passed since symptom onset; AND
 - At least 24 hours have passed since resolution of fever without the use of fever-reducing medications; AND
 - Other symptoms have improved
- Isolation for asymptomatic cases: 10 days after first positive COVID-19 test
- Quarantine after close contact exposure
 - No quarantine required if fully vaccine and have no symptoms since exposure and positive cases that are symptom free for 90 days after initial onset of symptoms or cases who never developed symptoms after first positive test
 - Asymptomatic cases can return 10 days after last known close contact
 - Symptomatic cases can return until 24 hours have passed since fever w/o use of fever-reducing medications; symptoms have improved; 10 days have passed since symptom onset

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Vaccination Policies



Legal Issues and Laws Implicated – Overview of Federal and State Laws

- Constitutionality of government-mandated vaccinations
- Permissibility of employer-mandated vaccinations
 - Employer authority and employee entitlements
 - Americans with Disabilities Act (“ADA”)
 - Title VII of the Civil Rights Act of 1964 (“Title VII”)
 - Food, Drug & Cosmetic Act (“FD&C Act”)
 - Fair Employment and Housing Act (“FEHA”)
 - Confidentiality of Medical Information Act
 - Bargaining obligations (Education Employment Relations Act)



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Employer Authority and Obligations

- Obligation to provide for healthy and safe workplace
- Authority to require vaccinations
 - Job-relatedness and consistency with business necessity
 - Direct threat standard
 1. Duration of the risk;
 2. Nature and severity of the potential harm;
 3. Likelihood that potential harm will occur; and
 4. Imminence of the potential harm.

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Employer Authority and Obligations

- Obligation to engage qualified employees in an accommodations process
- Authority to refuse requested accommodations that would either:
 1. Pose a threat to the health and safety of the employee or other employees; or
 2. Impose an undue hardship on the employer.

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Bargaining Obligations

- Regents of the University of California PERB Decision
 - Flu vaccine requirement was outside scope of representation and University was not obligated to bargain the decision with affected employee organizations
 - University must still bargain over effects of the decision
- Elements to establish non-negotiable mandatory vaccine policy
 - Establish that vaccinations are mandatory
 - Establish the immediacy of the vaccination requirement
 - Establish a vaccine requirement for non-employees
 - Establish that the vaccine requirement is time-limited and only effective during present public health emergency/while certain health risks are present

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Disability and Religious Accommodations for COVID-19 Vaccine Mandates



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Disability Accommodations

- Determining an employee's qualification for accommodation
 - Employer may request supporting information
 - Certification regarding employee's disability from health care provider under the ADA
 - Supporting information regarding employee's religiosity under Title VII
 - No additional information required under the FD&C Act

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Disability Accommodations

- Determining the reasonableness of accommodation requested
 - Engage employee in an individualized process to understand limitations and requested accommodation(s)
 - Accommodation must be reasonable
 - Must *not* present undue hardship to employer
 - Must *not* pose threat to health and safety of employee, other employees or the workplace

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What is a Reasonable Accommodation?

- What is a reasonable accommodation?
 - Any change or adjustment to a job or work environment that permits a qualified employee with a disability to perform the essential functions of a job, or to enjoy benefits and privileges of employment equal to those enjoyed by employees without disabilities
- Examples of COVID-19-related reasonable accommodations
 - Teleworking
 - Job restructuring
 - Part-time or modified work schedules
 - Reassignment to a vacant position
 - Making the workplace readily accessible and usable

What is a Reasonable Accommodation?

- Employers do not have to provide accommodations that would cause an “undue hardship”
 - Fact-specific inquiry
 - Pandemic may affect what constitutes an undue hardship

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Religious Accommodations

- Title VII and FEHA prohibit religious discrimination in employment
- Employees with “sincerely held religious beliefs” may request an exemption from their employer policies and practices
- Employers must provide these employees reasonable accommodations to the extent that they do not impose an undue hardship on the employer or its operations
- The EEOC does acknowledge that if employer has an “objective” basis for questioning the religious nature or sincerely held belief, employer would be justified in seeking additional information

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Inquiry into Religious Objection

- If an employee does not sufficiently articulate that their opposition to the COVID-19 vaccine is part of a larger belief system, employers could reasonably ask questions
 - E.g., a district can ask the employee to describe the specific ways the vaccine conflicts with the employee’s beliefs system
- These inquiries should be individualized and should *not* focus on employee’s stated religious practice but whether practice is part of system of religious beliefs

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Nature of a Religious Belief

- Religion is broadly defined under Title VII and FEHA
- Legal definition of “religion” addresses fundamental issues having to do with deep and imponderable matters
- Employer can ask additional questions to ascertain basis of employee’s opposition to vaccination is religious
- Compare:
 - “The COVID-19 vaccines were developed using or tested on fetal cell lines, and I cannot in accept vaccination with a product that relies on fetal cells”
 - “I adhere to a religious belief that recognizes that life begins at conception and that every human life is sacred, and because the COVID-19 vaccines were developed using or tested on fetal cell lines, I cannot in good faith accept vaccination with a product that violates this belief”

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Sincerity of a Religious Belief

- Courts recognize that an employee’s sincerity is largely a matter of individual credibility
- Employers should limit inquiry to factors that courts have recognized as potentially undermining the employee’s credibility:
 - Employee behavior markedly inconsistent with professed belief
 - Timing of request renders it suspect
 - Employer has other reason to believe request is not sought for religious reasons
- In the context of COVID-19 vaccines, these factors could be implicated if
 - The employee received other vaccines
 - The employee expressed personal objections to the COVID-19 vaccine, and did not cite religious reasons
 - Employee received religious exemption form from an online church with which they had no previous relationship

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Determination as to Reasonableness

- If District determines that an employee is qualified for a religious accommodation, the district may still determine that it cannot accommodate the employee
- Different standards under federal and state law:
 - Title VII – unreasonable if there is more than a de minimis cost
 - FEHA – same “undue hardship” standard for disability-related accommodations
- Districts should be mindful of two standards and adhere to FEHA standard

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Handling Religious Accommodation Requests

- Approach each accommodation request on an individualized case-by-case basis
- Limit requests for information regarding the nature of the employee’s purported religious beliefs to those that will assist the employer in ascertaining whether the opposition to vaccination is part of a larger belief system
- Limit requests for additional information regarding the sincerity of employee’s religious beliefs to situations where there is an objective basis for doing so
- Document the interactive process, including any determination that the requested accommodation is unreasonable or an undue burden

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Considerations for Telework as an Accommodation

- Districts may allow employees to telework as an accommodation
 - It will be difficult to deny
- Districts that permit telework should:
 - Have a Telework Policy in place
 - Consider which employees can continue to telework
 - Have employees sign a Telework Agreement

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Accommodating Students

- Students in high-risk categories
- Students living with a family member or other individual in a high-risk category
- Types of accommodations: weekly testing, masking

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Employer Obligations After the Expiration of COVID-19 SPSL



Continuing SPSL Obligations after September 30

- Employers are still obligated to provide SPSL to employees who are using such leave on September 30
 - Must allow employee to continue to use SPSL for the qualifying reason until the employee no longer qualifies or exhausted leave
- Monitor situations where employees were using SPSL on SPSL
 - Ensure that employees receive full amount of leave they are entitled to



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Obligations under Cal/OSHA COVID-19 Regulations

- Cal/OSHA COVID-19 regulations require that employers exclude employees from the workplace when they qualify as COVID-19 cases
 - During exclusion period must maintain employee's earnings, benefits, and wages if the exposure was work-related
- Exclude employees will no longer be able to use SPSL as a source of compensation during exclusion period
- Regulations state that employers may use employer-provided employee sick leave to compensate employees excluded "to the extent permitted by law"
 - DIR guidance clarified "to the extent permitted by law" – employers can't require employees to use paid sick leave provided under Labor Code 246 during exclusion period

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Sick Leave Protected by Labor Code § 246

- Labor Code § 246 – employees are entitled to an accrual rate of at least one hour of sick leave per 30 hours worked, with accruals carrying over from one year to the next
 - By default, sick leave will accrue to a max of 48 hours
- Section 246 authorizes employers to limit sick leave use to 24 hours per year where employers provide a full 24 hours of sick leave at the beginning of each year
 - Employers can effectively limit accruals to 24 hours per year by providing all 24 hours up front

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Use of Employer-Provided Sick Leave for Excluded Employees

- Districts who use one sick leave bank will need to distinguish between statutory and employer-provided leaves
 - Should not deplete an employee's sick leave to the extent it invades the 24 or 48 hour max accrued leave under Section 246
- Employees may argue that statutory and non-statutory leave are the same
 - Districts can respond by showing the employee's accrued leave exceeds the 24 or 24-hour max protected by Section 246
- Track employees' sick leave use so that it does not cut into protected Section 246 leave amounts

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Continuing Need for COVID-19 Related Leave

- Before SPSL expiration, SPSL provided paid leave to:
 1. Comply with quarantine or isolation orders
 2. Self-quarantine
 3. Receive COVID-19 vaccine
 4. Recover from symptoms related to the COVID-19 vaccine
 5. Seek medical diagnosis after experiencing COVID-19 symptoms
 6. Care for a family member isolating/quarantining
 7. Care for a child whose school or place of care closed/became unavailable for COVID-19 related reasons
- Districts should allow for employees to use other accrued leave other than sick leave for these reasons

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Resources

- The Cal/OSHA Emergency Temporary Standards for COVID-19:
<https://www.dir.ca.gov/dosh/coronavirus/ETS.html>
- Cal/OSHA Emergency Temporary Standards for COVID-19 on COVID-19 testing requirements:
<https://www.dir.ca.gov/title8/3205.html>

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Resources

- LCW Special Bulletin on Employee Vaccination Information:
<https://www.lcwlegal.com/news/requesting-proof-of-employees-vaccination-confidentiality-requirements-use-and-disclosure-of-employee-vaccination-information/>
- Expiration of SPSL:
<https://www.lcwlegal.com/news/what-to-expect-after-the-expiration-of-covid-19-supplemental-paid-sick-leave/>

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Resources

- EEOC Guidance on Religious Discrimination:
<https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination>

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Questions?



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Thank You!

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