

NORTH COUNTY *Lawyer*

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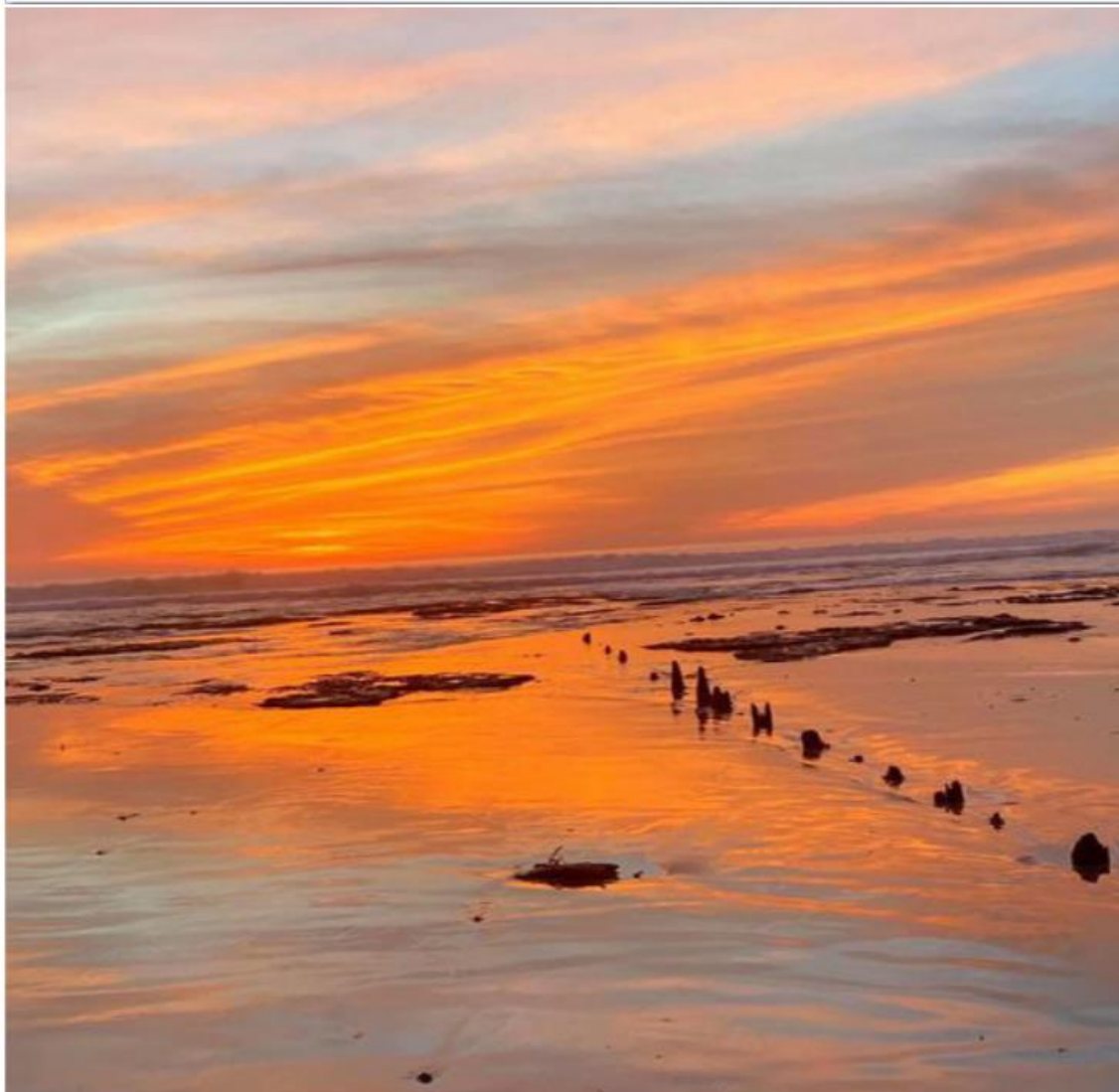


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Employers' Top Three Questions about COVID-19

By Arlene Yang, Esq.

As COVID-19 vaccines become available, employers are asking three key questions: Can they require employees to get vaccinated? Should they mandate vaccinations? And what can employers do if employees refuse?

Q: Can employers require employees to obtain COVID-19 vaccinations?

A: Likely yes, but employers must be prepared to accommodate employees with disabilities and religious objections, and comply with applicable meet and confer obligations and collective bargaining provisions.

In its most recent guidance, the U.S. Equal Employment Opportunity Commission ("EEOC") made clear that an employer can (1) mandate that employees take vaccines and (2) keep unvaccinated employees out of the workplace if the employer determines that the unvaccinated employee poses 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." At the same time, employers must still provide reasonable accommodations and engage in the interactive process with employees who have disabilities and cannot take the vaccine or those with sincerely held religious beliefs in opposition to vaccination.

Q: Should employers mandate COVID-19 vaccinations?

A: While the EEOC Guidance provides a framework under which mandatory vaccination requirements may be lawful, employers still need to carefully consider (1) the benefits, risks and expenses that may accompany a mandatory vaccination policy and (2) whether requiring vaccination is truly necessary.

Employers with unions will be required to comply with applicable memorandum of understanding ("MOU") provisions and satisfy meet and confer obligations for represented employees in order to mandate vaccinations. Careful attention should be placed on any



By Angelica Pe Benito, Esq.



rules or MOU provisions that may limit the ability to mandate vaccinations or prohibit the ability to change existing terms and conditions of employment without union agreement. All employers should consider that, under applicable wage and hour laws, if vaccines are mandated, the time it takes for an employee to get vaccinated should be treated as compensable work time. Similarly, any costs associated with getting the vaccine would be reimbursable business expenses.

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Q: What happens if many employees refuse to be vaccinated?

A: Employers may be reluctant to discipline or terminate a large number of employees, and equally reluctant to create multiple individual exceptions that may lead to litigation. For example, reports are finding that 10% to 20% of health care workers are refusing vaccination, regardless of whether they have a reason to object based on disability or religion.

For employees with for-cause employment rights, employers need to comply with due process before taking corrective action against employees as a result of a refusal to be vaccinated. Because this is an untested area of law, employers should consult with legal counsel before considering corrective action.

Mandatory vs. Voluntary Vaccination Policy?

Creating and implementing a mandatory or voluntary vaccination policy requires employers to navigate federal and state laws, MOUs, personnel

rules, and numerous practical considerations. Many important questions need to be answered, including will the vaccination policy be written? How will the employer collect and protect employees' vaccination records? What are the risks to employees, the public, customers, or clients if the employer does not mandate vaccination? Would a voluntary vaccination policy be as effective? Can the employer offer incentives to encourage vaccination? Will employers continue to maintain health and safety measures such as masks and social distancing after employees are vaccinated? How should employers handle meet and confer or renegotiating existing MOUs? Covid-19 vaccines present a myriad of issues for clients and their counsel to address to meet EEOC requirements, increase workplace safety, and minimize litigation risk.

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