

# Vaccine Mandates

## Employers Anticipate Potential Vaccine Mandates

Since the release of COVID-19 vaccines by Pfizer, Moderna, and Johnson & Johnson, vaccination has become the most critical weapon in fighting the COVID-19 pandemic. Individuals and employers have embraced vaccination as the cheapest and most effective way to minimize the risk of COVID-19 and return their lives (and businesses) to usual. California is doing well on vaccination vis-a-vis much of the nation, with just more than 70% of adults having received full vaccination and another 8% partially vaccinated at the start of 2022 — but those rates are slowing, due to strong feelings of hesitancy among the remaining unvaccinated adults.

Many policymakers and employers have turned to vaccine mandates to push California (and the nation) closer to full vaccination.

### BACKGROUND: VACCINE MANDATES SO FAR

Looking back at 2021, individual public and private sector employers have embraced vaccines by providing vaccination opportunities at the workplace and, more recently, imposing vaccine mandates for employees. Private employers such as Southwest, Delta Airlines, Salesforce, and others were early adopters of a vaccine mandate in May 2021. Subsequently, many others moved to implement their own vaccine mandates in the following months, including giants in tech (Microsoft, Facebook, Google, Cisco), entertainment (Disney, Netflix, Viacom, NBC Universal), finance (Goldman Sachs, Blackrock) and retail (Walgreens, CVS Health).

Among public sector employers, Governor Gavin Newsom announced a vaccine requirement for state workers and certain select industries (health care and high-risk congregate settings) in July 2021. Similarly, the Biden administration issued a mandate for federal employees and contractors which affected many large employers in California. These requirements generally take the form of a “soft” mandate — requiring an employee to *either* be fully vaccinated *or* submit to regular testing. Although not being discussed currently by either California or the federal government for most workplaces, the alternative is a “hard” mandate, which *does not* allow for a testing option and instead requires all workers to be vaccinated. By law, vaccine mandates (soft or hard) must allow for reasonable accommodation, discussed below.

### Federal Vaccine Mandate

In September 2021, the Biden administration made waves by announcing: (1) a vaccine mandate for federal employees/contractors (with a testing option), and (2) an emergency regulation from the Occupational Safety and Health Administration (OSHA) that will require all employers with 100 or more workers to mandate vaccination (with employers having discretion regarding a potential testing option).

Both the federal contractor mandate and regulation were legally challenged and stayed in federal court, but on December 17, 2021, the U.S. Court of Appeals for the Sixth Circuit lifted the stay on the workplace mandate. Then on January 13, 2022, the U.S. Supreme Court halted enforcement of the workplace mandate again, in effect eliminating it for the foreseeable future. The case went back to the Sixth Circuit, for consideration of the underlying merits of the challenge, which may take longer than the expiration date of the mandate itself, May 2022. If the Sixth Circuit rules quickly, the matter *could* once again be appealed to the Supreme Court — but such a timeline before May 2022 appears unlikely.

### LIKELY FUTURE ISSUES SURROUNDING VACCINE MANDATES IN 2022

Vaccine mandate discussions have brought new questions for employers, and a few specific concerns are likely to resurface in 2022.

- **The Cost of Testing.** Employers face a fundamental question concerning all so-called “soft” vaccine mandates (those that

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allow an alternative of regular testing for employees who *choose* to remain unvaccinated) – the cost of regular testing for workers who choose to remain unvaccinated. Testing is expensive. Rapid tests cost anywhere from \$50-\$200 per test, so the cost of weekly testing of 20% of California’s workforce (the approximate unvaccinated portion of California’s workforce) is significant.

Notably, the text of the federal vaccine mandate for employers with 100+ employees does *not* place the cost of surveillance testing on employers. Employees can be required to pay for testing if they choose not to get vaccinated.

In contrast, California’s present COVID-19 workplace emergency temporary standard (Title 8, Section 3205) does *not* require surveillance testing, but *does* make employers responsible for all exposure-related testing costs, which comprises a much smaller number of employees and is less frequent than weekly surveillance testing.

- **Reasonable Accommodations.** Both state and federal employment law require employers to provide reasonable accommodation for an employee’s disability or religious beliefs. The employer must engage in an interactive process to determine whether there are any reasonable accommodations available. A potential accommodation could include a testing alternative or remote work. Employers are nervous about determining whether such requests for accommodations are genuine, especially after news articles have surfaced about employees submitting fraudulent religious exemption requests.

Under the Fair Employment and Housing Act (FEHA), not only could an employer face litigation over whether an accommodation should have been granted, but they also can face a separate cause of action of allegedly failing to properly engage in the interactive process.

A 2017 study by insurance provider Hiscox estimates that the cost for a small to mid-size employer to defend and settle a single plaintiff FEHA claim was approximately \$160,000, which was a \$35,000 increase from Hiscox’s study just two years earlier.

- **Labor Shortage and Potential Worker Loss Due to Vaccine Mandate.** The post-pandemic recovery has been labeled by some as the “Great Resignation,” since more and more employers are struggling to hire right now. For example, the Public Policy Institute of California reported that more than 400,000 California workers quit their job in August 2021 — the highest monthly total at any point in the last 20 years. Many employers who already are struggling to fill vacant positions are hesitant to impose a vaccine mandate out of fear of losing current employees or applicants. Some may even welcome a statewide or federal mandate to level the playing field in that regard.

Depending on its terms, however, a mandate also may fall more heavily on in-person workplaces, such as service industry employers. Notably, the federal large employer vaccine mandate does not apply to remote workers or those who work exclusively outdoors.

- **Multi-State Compliance Issues for Large Employers.** Although a federal mandate and regulation might suggest an easier compliance path for multi-state employers, that may not be the case. Multiple states, including Texas and Montana, have taken executive or legislative action to forbid vaccine mandates. Evolving and inconsistent laws raise a difficult compliance environment for nationwide employers that find themselves under conflicting state-to-state and federal-to-state obligations. While some of these conflicts eventually may be solved by the courts, employers are stuck in the middle of these political struggles and face possible enforcement consequences from both sides until legal challenges are resolved definitively.

#### WHAT’S ON HORIZON IN CALIFORNIA

The outcome of the litigation surrounding OSHA’s nationwide vaccine mandate is likely to influence whether California implements its own mandate and what that mandate looks like. Before President Joe Biden’s announcement of a federal mandate, legislators surfaced two bills in California relating to vaccine. Although neither bill passed in 2021, they will be the foundation for discussions in 2022.

- The first, **AB 455 (Wicks; D-Oakland)**, would have required employers of all sizes to mandate that employees show either proof of vaccination or proof of a weekly negative COVID-19 test. The employer could *choose* to enforce a hard mandate and forgo the testing alternative for all employees (other than for those employees who are legally entitled to a reasonable accommodation).

In addition to a vaccine mandate, the bill provided each employee with 24 hours of leave to obtain a vaccine or recover from related side effects. The bill originally also included a consumer-facing mandate for certain businesses, but that was removed from the bill.

- The second, **AB 1102 (Low; D-Campbell)** was not a vaccine mandate, but provided liability protection to employers that chose to mandate vaccines. It codified existing guidance issued by the Department of Justice, Department of Fair Employment and Housing, and Equal Employment Opportunity Commission explaining that it is legal under California and federal law to require vaccination if an employer so chooses.

AB 1102 also confirmed that an employer is not required to verify that an employee’s documentation is valid as long as it

reasonably appears to be genuine and relates to the employee, alleviating some concern about how closely employers must look out for fraudulent vaccine cards. In addition, it would have provided 40 hours of COVID-19 related leave for certain reasons.

If the Legislature does not impose a vaccine mandate, it still is possible that Cal/OSHA may attempt an emergency regulation regarding vaccination. Alternatively, more local jurisdictions may impose mandates. Notably, San Francisco and Los Angeles have enacted a vaccine requirement for both customers and employees in certain indoor businesses.

#### **CALCHAMBER POSITION**

The California Chamber of Commerce believes that increasing vaccination rates is necessary to keep infection rates low and help keep California's economy open. The state should concentrate on supporting employers that encourage vaccination, incentivizing workers to get vaccinated, and removing the threat of frivolous, expensive litigation against employers that are legitimately requiring workers to be vaccinated. If the state imposes a vaccine mandate, the costs resulting from that mandate should fall on the state, not on private employers.



Staff Contacts

**Ashley Hoffman**

Policy Advocate

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[ashley.hoffman@calchamber.com](mailto:ashley.hoffman@calchamber.com)

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**Robert Moutrie**

Policy Advocate

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[robert.moutrie@calchamber.com](mailto:robert.moutrie@calchamber.com)

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