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July 29, 2021

***Via Electronic Mail Only***

Labor Union Leaders

**Re: Mandatory Vaccines**

Dear Labor Union Leaders:

Now that tens of millions of Americans have been vaccinated against COVID-19, employees are returning to the workplace and issues are arising regarding an employer's right to require employees to get vaccinated. Generally, employers can require vaccinations. However, enforcement of a vaccine requirement in the workplace requires careful balancing with other federal civil rights laws, including the Americans with Disabilities Act and Title VII of the Civil Rights Act of 1964. Employers have a general duty to take reasonable efforts to maintain a safe work environment for employees that is free from recognized hazards that are causing or are likely to cause death or serious physical harm. (See 29 U.S.C. 654(a)(1).) Since COVID-19 is a contagious virus with the potential to cause serious physical harm or death, employers are eager to use vaccine mandates to restore workplaces to safety and health. But this authority is not without limitations. Employers must make reasonable accommodations for individuals with religious objections or medical conditions that make vaccination a risk.

### **1. States/ Local Governments Can Mandate Vaccinations**

Over 100 years ago, the Supreme Court decided that states can mandate that their citizens get vaccinated. In *Jacobson v. Commonwealth of Massachusetts* (1905) 197 U.S. 11, the Court upheld a local law in Cambridge, Massachusetts requiring inhabitants receive the smallpox vaccine. The Court's ruling relied on the principles that an individual's right to liberty and bodily autonomy is not absolute, and that states have the authority to take actions necessary to protect the health and wellbeing of their citizens (commonly referred to as states' "police powers").

The Supreme Court did not revisit government mandated vaccinations again until 1922 in *Zucht v. King* (1922) 260 U.S. 174. The *Zucht* Court held that mandating vaccines for only one group of people (in this case school children), did not violate individuals' Fourteenth Amendment rights to due process or equal protection. This same logic would likely apply to a mandate that first responders or public safety officers be vaccinated, even if the same requirement is not applied to the general public.

More recently, multiple California appellate courts have upheld *Jacobson* and *Zucht*, ruling that when it comes to mandatory vaccinations, finding the need for public safety outweighs individuals' rights to privacy or bodily autonomy. In *Brown v. Smith* (2018) 24 Cal.App.5th 1135 and *Love v. State Dept. of Education* (2018) 29 Cal.App.5th 980, California appellate courts upheld Senate Bill No. 277, which repealed the personal belief exemption to California's immunization requirements for school children. Thus, the courts limited the exemptions available (once full FDA approval is received) to: 1) a sincerely held religious belief, practice or observation; or 2) a medical accommodation.

There has been one court decision dealing with mandatory COVID-19 vaccines. In *Bridges v. Houston Methodist Hospital* (S.D. Tex., June 12, 2021, No. CV H-21-1774) 2021 WL 2399994, Houston Methodist Hospital implemented a policy requiring staff to be vaccinated or face termination. A number of employees sued claiming wrongful termination after they refused to be vaccinated. The court cited *Jacobson* as proof that an employer can mandate vaccines. The court also dismissed the employees' arguments that the COVID-19 vaccine was distinguishable because it had only received "emergency" approval. Ultimately, the court concluded: "Bridges can freely choose to accept or refuse a COVID-19 vaccine; however, if she refuses, she will simply need to work somewhere else... Every employment includes limits on the worker's behavior in exchange for his remuneration. That is all part of the bargain." (*Id.* at p. \*2.) It is important to note that this case dealt with a private employer. However, the rationale is applicable to public employers and employees.

It is well-settled law that state/local governments—and by extension government employers—can mandate that citizens be vaccinated. Further, the only case to date to apply these legal principles to mandatory COVID-19 vaccines found in favor of the employer. However, this authority is not absolute. Government employers may still be required to make accommodations for individuals with sincere religious beliefs or medical conditions that make vaccination a risk. The exemptions are discussed further below.

## **2. Right to Bargain over the Impacts and Effects of Mandatory Vaccinations**

While mandating vaccination is generally legal, the impacts and effects of such a decision fall within the scope of bargaining. PERB recently held the decision to adopt an influenza vaccination policy was outside the scope of representation because the need to protect public health was not amenable to collective bargaining or, alternatively, outweighed the benefits of bargaining over the policy. However, the University's implementation of the vaccination policy constituted a unilateral change, in violation of HEERA, because the University was not privileged to implement the policy before completing negotiations over its effects. (*Regents of the University of California* (2021) PERB Decision No. 2783-H.) The University had not met and conferred in good faith before implementation of the policy.

As labor leaders, it is important to demand to bargain over the impacts and effects of any vaccination policy. And, if the failure to get vaccinated could lead to discipline, the policy itself may be subject to decision bargaining. Employers must provide notice and opportunity to meet and confer prior to mandating vaccines. Employers can offer employees incentives to get vaccines,

but it cannot be so large that it is coercive. If such incentives are being offered, it is also important to analyze whether the employer's conduct rises to impermissible direct dealing.

Similarly, it is important to invoke your right to meet and confer the impacts and effects of testing and masking policies. In bargaining over all of these issues, it is imperative you identify the impacts and effects that you wish to bargain over. Some such impacts and effects to negotiate are as follows<sup>1</sup>:

1. Why is the employer requiring testing absent a reasonable suspicion based on objective symptoms such as a high temperature or cough?
2. How will the employer coordinate the testing of members who are already working?
3. How will the employer retain the test results for each employee?
4. Who will have access to test results?
5. How will the employer retain the vaccination status for each employee?
6. Who will have access to vaccination status information?
7. What information will the employer or testing facility retain from the test (i.e., positive or negative, presence of antibodies, DNA, etc. ...)?
8. What testing methods will be utilized?
9. What alternate testing methods will be available?
10. What accommodation, will be made for a member who chooses not to take the COVID-19 test?
11. Will the employer pay for any and all expenses related to the COVID-19 test?
12. Will the employer pay for any and all expenses related to the vaccine?
13. Will the employer pay for members' time away from work due to the test and/or time away from work spent waiting for the results of the test?
14. What is the percentage of accuracy of the test(s) that will be utilized?
15. What will happen to an employee that refuses to be vaccinated?
16. What will happen to an employee that refuses to be tested?

Further, you should take into consideration any disparate impact on certain employees or communities that have great barriers to getting the vaccine and discrimination against protected classes in receiving the vaccine such as those individuals who are pregnant or have underlying diseases.

Governor Newsom recently announced a policy that California state workers and health care employees must demonstrate proof of vaccination or else continue to wear masks and undergo regular COVID-19 testing. The policy falls short of a vaccine "mandate," offering employees the option of undergoing regular COVID-19 testing instead of providing proof of vaccination. Those workers will be required to undergo testing at least once a week, possibly even twice a week. Under the new rule, issued jointly by California Department of Human Resources and the Department of Public Health, state workers will have until August 2, 2021 to prove to their employer that they were vaccinated. Those who refuse or fail to do so will be required to continue wearing a mask at work, and also submit to weekly COVID-19 tests. It is very likely local

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<sup>1</sup> This is a non-exhaustive list.

government employers will follow suit. In fact, Governor Newsom said the administration adopted the new rules to encourage other businesses and employers to enact similar requirements. If your employer proposes the same or similar policy, be prepared to demand to meet and confer.

### **3. Employers' Right to Require Disclosure of Vaccination Status**

Another issue that has arisen is whether an employer can require stickers, pins, badges or other forms of identification for vaccinated employees in the workplace. Disclosing employee vaccination status may violate confidentiality rules related to medical or personal health information. The ADA (Americans with Disabilities Act) obligates an employer to maintain confidentiality of information obtained through a medical examination and/or inquiry of an employee. In its *Technical Assistance Questions and Answers: What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws* (last updated in December 2020), the EEOC has, however, advised that asking or requiring an employee to show proof of receipt of a COVID-19 vaccination is not a disability-related inquiry. Accordingly, it seems that information regarding vaccination status alone should not be subject to the confidentiality requirements as set forth in the ADA. An employer should reference applicable state and local laws to determine whether, outside of ADA protection, there could still be a violation of privacy.

### **4. Right to Refuse Vaccination**

#### **a. Food, Drug & Cosmetic Act under the Emergency Use Authorization (EUA)**

The EUA requires employees be informed they have the right to refuse vaccination and must be given a fact sheet listing the health consequences of refusal, and of the alternatives to the product that are available and of their benefits and risks, amongst other notices. However, the Acting Assistant Attorney General Office of Legal Counsel (OLC) refused to read this language as prohibiting public and private entities from requiring individuals to be vaccinated.

On July 6, 2021 the OLC issued a slip opinion addressing whether section 564 of the Food, Drug and Cosmetic Act prohibits Entities from requiring the use of a vaccine subject to and EUA. The slip opinion is not binding legal authority, but delivers a strong opinion favoring mandatory vaccines. Ultimately, the OLC concluded that section 564 does NOT prohibit public or private entities from imposing vaccination requirements, even when the only vaccines are those authorized under EUAs.

The argument the vaccines are “experimental” because they only have emergency authorization, and therefore cannot be mandated, is weak. EUA means the shot is safe enough for the public. Further CDC has also said vaccines approved under the EUA are “safe” and “effective.” Moreover, we expect the FDA to issue full approval in the coming months. Therefore, this basis for an exemption is not likely to prevail. (*See Legaretta v. Macias*, No. 21-CV-179 MV/GBW, 2021 WL 833390, at \*1 (D.N.M. Mar. 4, 2021); *Bridges v. Houston Methodist Hosp.*, No. 4:21-cv-01774, 2021 WL 2399994, at \*1–2 (S.D. Tex. June 12, 2021.)

**b. Medical Accommodations under the ADA/ FEHA**

An individual that suffers adverse medical consequences—such as an allergic reaction—to vaccinations may be entitled to a reasonable accommodation under the Americans with Disabilities Act (“ADA”) (42 U.S.C. § 12101 *et seq.*) and the California Fair Employment and Housing Act (“FEHA”) (Govt. Code § 12900 *et seq.*)

The ADA and FEHA require that employers to provide a reasonable accommodation for an employee’s disability. Such disability may include an inability to be vaccinated due to a serious medical condition. The employee must first put their employer on notice and request accommodation to begin an interactive process. In addition, employees must put forward medical documentation to substantiate their claim of a disability.

Moderate reactions to vaccines are probably not legally sufficient. For example, in *Hustvet v. Allina Health System* (8th Cir. 2018) 910 F.3d 399, 411, the Eighth Circuit affirmed a judgment against an employee who had “never been hospitalized due to an allergic or chemical reaction [from a vaccine], never seen an allergy specialist, . . . [or] ever sought any significant medical attention when experiencing a chemical sensitivity, taken prescription medication because of a serious reaction, or had to leave work early because of a reaction.” Therefore, this claim will only be available to individuals who suffer serious, documented medical consequences from being vaccinated.

**c. Religious Accommodations Under Title VII**

Individuals with sincerely held religious objections to the COVID-19 vaccine may also seek a religious accommodation to a vaccination requirement under Title VII of the Civil Rights Act of 1964 (“Title VII”). Title VII prohibits employers from discriminating “against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s . . . religion.” (42 U.S.C. § 2000e-2(a)(1).)

An employer must make reasonable accommodations for employees sincerely held religious beliefs “unless an employer demonstrates that he is unable to reasonably accommodate . . . without undue hardship on the conduct of the employer’s business.” (42 U.S.C. § 2000e(j).) Thus, an employer is obligated to try to reasonably accommodate an employee’s religious beliefs to the extent it does not cause an undue hardship on the business, and failure to do so violates Title VII. This does not mean that the employer is required to offer an employee his or her preferred accommodation. Rather, the accommodation offered simply must be reasonable. (*Bruff v. N. Miss. Health Servs., Inc.* (5th Cir. 2001) 244 F.3d 495, 501.)

In conclusion, public employers will generally be able to mandate that employees receive vaccinations if they deem it necessary for public health and safety. Individuals for whom vaccination poses a serious health risk should be able to obtain an exemption under the ADA/FEHA. Further, individuals that hold sincere religious objections to vaccinations may be able to obtain a reasonable accommodation from their departments. Lastly, at a minimum, the impacts and effects of such policies are subject to bargaining.

Mastagni Holstedt, A.P.C. to Labor Union Leaders  
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If you have any further questions, please feel free to contact me.

Sincerely,

**MASTAGNI HOLSTEDT, A.P.C.**

A handwritten signature in black ink, appearing to read "Kathleen Storm", written over the printed name below.

KATHLEEN N. MASTAGNI STORM  
Attorney at Law

KNS/ajm/cmw

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