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## MEMORANDUM

ATTORNEY-CLIENT PRIVILEGED

**TO:** Stacy DeFoe, Executive Director  
Tameka Island, Executive Associate, Professional Affairs  
California Physical Therapy Association

**FROM:** Steven L. Simas  
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**RE:** *COVID-19 Vaccination Policies for the Physical  
Therapy Industry*

**DATE:** January 10, 2022

The purpose of this memorandum is to analyze COVID-19 vaccination policies and provide guidance to CPTA members.

### COVID-19 Vaccine Policies

#### *Mandatory Vaccination Policies*

For most industries, employers have discretion in enacting a mandatory COVID-19 vaccination policy. Both the federal Equal Employment Opportunity Commission (EEOC) and the California Department of Fair Employment and Housing (DFEH) have issued guidance that suggests employers can enact mandatory vaccination policies, but both fall short of recommending a particular course of action.

Generally speaking, physical therapy practice owners may implement *mandatory* vaccination policies for their employees. However, employers must navigate two main exemptions that employees can claim -- disabilities and religious objections.

## ***Managing the Exemptions***

Employers cannot impose mandated vaccination policies without being able to determine whether an employee has a recognized disability or sincerely held religious belief.

*Reasonable accommodation of disability* -- The EEOC recently stated on December 14, 2021, that employers 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.”<sup>1</sup>

Employers are still required to provide reasonable accommodations and engage in an interactive process with any employee that makes a claim based on a disability or sincerely held religious belief, as required by the Americans with Disabilities Act (ADA). This includes an employee that is unable to be vaccinated for such a reason. In such a case, the employer may request medical certification of the disability and that the requested accommodation is medically advisable.

In cases such as providing direct patient care, where there is no reasonable accommodation that will allow the unvaccinated employee to be physically present to perform the employee’s current job without posing a direct threat, the employer must consider if telework is an option for that particular job as an accommodation and, as a last resort, whether reassignment to another position is possible.

*Reasonable accommodation of religious belief* -- For sincerely held religious beliefs, the law takes an incredibly broad view of these, so employers are usually required to take the employee’s beliefs at face value. The EEOC offers some factors that “either alone or in combination – might undermine an employee’s credibility”:

- whether the employee has acted in a manner inconsistent with the professed belief (although employees need not be scrupulous in their observance);

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<sup>1</sup> <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>.

- whether the accommodation sought is a particularly desirable benefit that is likely to be sought for nonreligious reasons;
- whether the timing of the request renders it suspect (e.g., it follows an earlier request by the employee for the same benefit for secular reasons); and
- whether the employer otherwise has reason to believe the accommodation is not sought for religious reasons.

Employers with questions about any accommodation issues, including religious beliefs should consult with legal counsel before denying any accommodation request on that basis.

*Interactive Process* -- Once an employer knows the employee has a protected disability or religious belief, both the EEOC and the DFEH instruct employers to engage in a good faith interactive process to explore any reasonable accommodation for the employee's inability to receive the vaccine; this must be done before the employer makes any decisions regarding that individual's employment.<sup>2</sup>

While the EEOC identifies several potential accommodations that may be reasonable — wearing masks, adjusting shift schedules, teleworking and reassignment — whether an accommodation is appropriate requires a case-by-case analysis. An employer does not have to accommodate an employee when it creates an “undue hardship” (significant difficulty or expense). But because each case will be factually unique, employers navigating this issue are strongly encouraged to seek legal counsel.

### ***Industry-Specific Vaccine Mandates***

Recently, Governor Gavin Newsom made news with announcements mandating employers in health care and education settings to comply with certain requirements related to the COVID-19 vaccine. The California Department of Public Health (CDPH) issued two current orders regarding vaccinations and the health care industry on July 26, 2021 and August 5, 2021.

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<sup>2</sup> *Id.*

The July 26 order took effect on August 9, 2021, and applies to 19 different types of health care settings as described in the order.<sup>3</sup> Please note, however, that the Order does specify physical therapy practices as such a setting.

It requires providers at the designated facilities<sup>4</sup> to verify vaccination status of its workers, provide specific types of masks, and provide once or twice weekly testing to its unvaccinated workers and symptomatic vaccinated workers depending on the health care setting.

Health care employers may only verify vaccination status in one of six ways specified in the order:

1. COVID-19 Vaccination Record Card issued by the Centers for Disease Control or the World Health Organization;
2. A physical photo of the Vaccination Record Card;
3. An electronic photo of the Vaccination Record Card stored on a phone or other device;
4. Documentation of COVID-19 vaccination from a health care provider;
5. A digital record with a QR code that when scanned by a SMART Health Card reader displays the name, date of birth, vaccine dates and vaccine type; or
6. Document of vaccination from other contracted employers who follow these guidelines and standards.

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<sup>3</sup> <https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/Order-of-the-State-Public-Health-Officer-Unvaccinated-Workers-In-High-Risk-Settings.aspx>.

<sup>4</sup> These facilities include: **A. Acute Health Care and Long-Term Care Settings:** 1. General Acute Care Hospitals; 2. Skilled Nursing Facilities (including Subacute Facilities); 3. Intermediate Care Facilities; **B. High-Risk Congregate Settings:** 4. Adult and Senior Care Facilities; 5. Homeless Shelters; 6. State and Local Correctional Facilities and Detention Centers; **C. Other Health Care Settings:** 7. Acute Psychiatric Hospitals; 8. Adult Day Health Care Centers; 9. Adult Day Programs Licensed by the California Department of Social Services; 10. Program of All-Inclusive Care for the Elderly (PACE) and PACE Centers; 11. Ambulatory Surgery Centers; 12. Chemical Dependency Recovery Hospitals; 13. Clinics & Doctor Offices (including behavioral health, surgical); 14. Congregate Living Health Facilities; 15. Dental Offices; 16. Dialysis Centers; 17. Hospice Facilities; 18. Pediatric Day Health and Respite Care Facilities; and 19. Residential Substance Use Treatment and Mental Health Treatment Facilities.

The August 5 order, which took effect on that same day, mandates that workers in 14 different health care settings as defined in the order must be fully vaccinated against COVID-19 by the effective date of September 30, 2021.<sup>5</sup> This Order again does not specifically designate physical therapists as “workers” and therefore the Order does not apply physical therapy practices directly. However, the Order’s requirements are useful as guidance for employers generally because it allows for the two exemptions discussed above: a medical disability or a sincerely held religious belief. If an employee requests an exemption for medical reasons, the employee must provide a statement from a licensed medical professional stating the employee qualifies and how long the exemption must last. There are no employee documentation requirements to substantiate a sincerely held religious belief, however the employee does need to submit a form declining the vaccine due to a sincerely held religious belief.

If the worker obtains an exemption, they must be tested once or twice weekly depending on the setting and wear a surgical mask or higher-level respirator, such as an N95. Employers must maintain records of the workers’ vaccination or exemption status, as well as their test results.

### ***Face Masks***

In the most recent revisions to these standards, dated December 13, 2021, the California Department of Public Health issued an order requiring the use of face coverings in all indoor public settings, irrespective of vaccine status, for the next four weeks.<sup>6</sup> Otherwise, employees who are exempted from wearing a face covering due to a medical or mental health condition, or disability, and cannot wear a non-restrictive alternative, must physically distance at least six feet from others and either be fully vaccinated or tested at least weekly for COVID-19.<sup>7</sup> The testing must be during paid time and at no cost to the employee.<sup>8</sup>

The following individuals are exempt from wearing masks at all times:

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<sup>5</sup> <https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/Order-of-the-State-Public-Health-Officer-Health-Care-Worker-Vaccine-Requirement.aspx>.

<sup>6</sup> This Order is in effect from December 15, 2021 through January 15, 2022. See <https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/guidance-for-face-coverings.aspx>.

<sup>7</sup> [https://www.dir.ca.gov/dosh/dosh\\_publications/COVIDOnePageFS-12-16-2021.pdf](https://www.dir.ca.gov/dosh/dosh_publications/COVIDOnePageFS-12-16-2021.pdf).

<sup>8</sup> *Id.*

- Persons younger than two years old. Very young children must not wear a mask because of the risk of suffocation.
- Persons with a medical condition, mental health condition, or disability that prevents wearing a mask. This includes persons with a medical condition for whom wearing a mask could obstruct breathing or who are unconscious, incapacitated, or otherwise unable to remove a mask without assistance.
- Persons who are hearing impaired, or communicating with a person who is hearing impaired, where the ability to see the mouth is essential for communication.
- Persons for whom wearing a mask would create a risk to the person related to their work, as determined by local, state, or federal regulators or workplace safety guidelines.<sup>9</sup>

### ***Vaccination Status Impact on Workplace Safety Rules***

Regardless of mandates, the vaccination status of employees has an impact on workplace safety rules. For most of the state's workforce, the COVID-19 Emergency Temporary Standards from the California Division of Occupational Safety and Health (Cal/OSHA) sets the workplace safety rules.

Employees who are not fully vaccinated must wear a mask indoors under most circumstances subject to the CDPH face covering guidance.<sup>10</sup> However, employers do not have to exclude fully vaccinated employees from the worksite even if they are a close contact to a known COVID-19 case (within 6 feet of a known case for a cumulative 15 minutes over the course of 24 hours) unless the vaccinated employee becomes symptomatic. Employees not fully vaccinated must follow the original rules, which means they must be excluded if they are a close contact and follow the Emergency Temporary Standards' return to work protocol (i.e., 10 days from their last known contact with a known COVID-19 case).<sup>11</sup>

To take advantage of these more flexible rules for fully vaccinated employees, the employer must document the employee's vaccination status. Unlike the previously described CDPH orders, the Emergency

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<sup>9</sup> <https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/guidance-for-face-coverings.aspx>.

<sup>10</sup> *Id.*

<sup>11</sup> See <https://www.dir.ca.gov/title8/3205.html>

Temporary Standards do not specify a particular form of verification. In its guidance, Cal/OSHA recommends a non-exhaustive list of ways an employer may verify the vaccination status, such as:

- Collecting a copy of the vaccination record;
- Viewing the vaccination record and creating a separate record that the employee is fully vaccinated; or
- Allowing employees to self-attest that they are fully vaccinated and create a record of those who self-attested.

Whichever method the employer uses, any record obtained or created is confidential and should be kept separate from the personnel file.

The Emergency Temporary Standards also allow flexibility for employers that wish to impose more strict health and safety measures, such as requiring all employees to wear face coverings regardless of vaccination status. However, as previously noted, whenever state or local rules are more restrictive, those take precedence over these Cal/OSHA rules.

### ***Pay Attention to Local Ordinances***

Of course, this is not the end of the story. The Emergency Temporary Standards require employers to follow local orders to the extent that they are stricter than the standards. This has popped up most recently with nearly a dozen localities imposing their own indoor mask mandates regardless of vaccination status. In those areas, employers cannot allow fully vaccinated employees to go without masks because the local public health orders are stricter than the Emergency Temporary Standards.

As the legal vaccination landscape is rapidly changing, sometimes over the course of weeks and even days, employers looking to explore mandatory vaccination policies or otherwise continue taking advantage of workplace flexibilities for vaccinated employees must not only stay up-to-date with the government agencies, but also consult with legal counsel about drafting and implementing such policies.

### ***Employer Takeaways***

With the rules and legal requirements around vaccines in a state of flux, employers should keep certain things in mind.

Both the federal EEOC and the California DFEH suggest that employers may maintain a mandatory COVID-19 vaccination policy. However, there are numerous issues to work out with such a policy — most importantly is how to address an employee who raises a disability- or religious-related reason for their inability to get vaccinated. Because of a mandatory vaccination policy's intricacies, employers are strongly encouraged to consult legal counsel about creating and implementing one.

As mentioned above, California is beginning to order and enforce industry-specific vaccination policies. As of the date of publication, however, there are no industry specific guidelines for physical therapists. Therefore, physical therapy clinics should continue following general state and local requirements and can consider creating their own mandatory vaccination policies as outlined above.

Thank you for the opportunity to provide this information. Please let us know should you have further questions.

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