DFEH Issues Guidance on COVID-19 in the Workplace and Mandatory Vaccines: What California Employers Need to Know

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On March 4, 2021, the California Department of Fair Employment and Housing ("DFEH") issued updated guidance on various COVID-19 related topics, including whether employers may require employees to be vaccinated against COVID-19.

The DFEH's new guidance relating to employer-mandated vaccination programs is similar to the guidance issued by the U.S. Equal Employment Opportunity Commission ("EEOC") on December 16, 2020. Following the release of the EEOC's guidance, we published an eAlert titled "Can and Should Employers Require Employees to Take a COVID-19 Vaccine?" Please refer to that eAlert for insight on what employers should consider when determining whether to implement a mandatory COVID-19 vaccination program.

Below, we highlight the critical elements of the DFEH's new guidance.

Mandatory Vaccinations

Per the DFEH, employers may require their employees to be vaccinated against COVID-19 in order to enter the workplace, subject to certain exceptions and requirements.

If an employee raises a concern or objects to receiving the vaccine due to a disability or sincerely-held religious belief, employers must engage in the interactive process to determine whether a reasonable accommodation is available. However, employers do not have to provide reasonable accommodation to employees who object to receiving the COVID-19 vaccine on other grounds, such as concerns relating to the safety of the vaccine or political beliefs.

Employers may require their employees to provide proof of vaccination. However, employers should request that employees redact any medical information contained in the proof of vaccination documentation.

Testing

Per the DFEH, employers may require employees to submit to viral testing, but not antibody testing, before allowing employees to enter the workplace. However, this does not include an employee who is returning from work after being quarantined due to workplace exposure to COVID-19 or infection, as emergency temporary standards issued by Cal/OSHA prohibit employers from requiring that an employee test negative before returning to the workplace in these circumstances. Instead, the viral testing endorsed by the DFEH covers more routine situations, such as when employees first return to the workplace after teleworking or weekly or monthly testing.

Reasonable Accommodation Obligations Due to COVID-19-Related Illness

Per the DFEH, whether employers must provide reasonable accommodation to an employee because of an illness related to COVID-19 is a fact-based determination. Employers must determine whether the COVID-19-related illness rises to the level of a protected disability under the California Fair Employment and Housing Act ("FEHA"). The FEHA's definition of disability is very broad. Cal. Code Regs., tit. 2, § 11065(d). It essentially includes any mental or physical disability except for mild or temporary conditions, such as common cold, minor cuts, sprains, muscle aches, soreness, bruises or abrasions and non-migraine headaches. Cal. Code Regs., tit. 2, § 11065(d)(9).

If the employee's illness rises to the level of a FEHA-protected disability, employers must engage in the interactive process. The DFEH suggests that all employers should consider telework and leave as reasonable accommodations for employees with a disability related to COVID-19, unless doing so imposes an undue hardship. Employers must evaluate each reasonable accommodation request on a case-by-case basis and may not impose an across-the-board accommodation on employees with a disability related to COVID-19.

Per the DFEH, an employee with a medical condition that increases his or her risk for severe illness from COVID-19 is only entitled to reasonable accommodation if the underlying medical condition qualifies as a FEHA-protected disability. Likewise, employers are not required to provide reasonable accommodation to an employee who is vulnerable to severe illness from COVID-19 due to his or her age because age is not a FEHA-protected disability.

CFRA Leave Eligibility

Per the DFEH, employees are eligible for California Family Rights Act ("CFRA") leave if:

- They cannot work because they are ill due to COVID-19 or because they must care for a CFRA-covered family member who has contracted COVID-19 and either:
    - The employee or family member requires inpatient care, continuing treatment or supervision by a health care provider; or
    - The COVID-19 contraction leads to other medical conditions, such as pneumonia.

Inquiries Regarding Reason for an Employee's Absence from Work

Per the DFEH, employers may ask employees why they have been absent from work. However, the DFEH states that employers must maintain the confidentiality of any illness or medically-related reason disclosed for the absence.

Maintain Confidentiality of Quarantined Employees While Notifying Potentially Exposed Employees

Per the DFEH, if an employee is quarantined, tests positive for COVID-19 or has come in contact with someone who has the virus, employers may not disclose the name of such employees. However, the DFEH states that employers may notify potentially-exposed employees in a way that does not reveal the name of the employee or any personal health-related information of the employee.