



# Have Vaccine – Will Mandate?

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**T**he United States Food & Drug Administration (FDA) announced on August 23, 2021 that Pfizer is the first COVID-19 vaccine receiving full FDA approval. This is a procedural moment of clarity for which employers across the country and especially in California have been waiting.

For several months prior to this FDA approval, the EEOC and the Department of Fair Employment & Housing (DFEH) has told employers that they may mandate FDA-approved vaccines for employees. However, this caused much confusion as the FDA had provided emergency approval of various well-known vaccines but not actual full FDA approval. What does the fact of actual FDA vaccine approval mean for employers?

## **Must California Employers Now Mandate Employee Vaccination?**

California employers are not required to mandate employee vaccination. They can choose to continue to allow vaccinations to be discretionary, to track the status of employee vaccinations, and to implement workplace safety regulations such as physical distancing and required mask-wearing. Employers across the country have been advised by the most recent update to OSHA's guidance that even fully vaccinated workers should wear masks ["to protect unvaccinated workers" when they are working in "areas of substantial or high community transmission."](#)

## **May California Employers Now Mandate Employee Vaccination?**

Yes, they may! However, they must do so without discrimination against or harassment of employees or applicants on the basis of a protected characteristic. In addition, they have to provide an exemption from the vaccination mandate whenever that would be reasonable and not an undue hardship in response to employee exemption requests due to the employee's disability or sincerely-held religious beliefs. Employers are strongly urged to have well-trained staff make the complicated decisions on behalf of the employer about whether an exemption applies and, if it does, whether the employer must reasonably accommodate the request for it.

## **If Employers Mandate Employee Vaccinations, Can They Only Accept The Pfizer Vaccine?**

No. Employers can accept any FDA-approved or emergency-approved vaccine as the CDC and OSHA definitions of a fully-vaccinated person continue to be based on all the vaccines that have already received FDA emergency approval.

## **May California Employers Pay Bonuses Or Otherwise Reward Just The Employees Who Get Vaccinated?**

While the DFEH does not currently address this issue, it would be very challenging to implement such a rewards program in a way that does not result in discrimination against those employees who, for disability-related or religious reasons, cannot get vaccinated. However, California employers may remind

employees that the Supplemental Paid Sick Leave that continues to be in effect through September 30, 2021 affords employees paid time off to get the vaccine as well as to stay home and recover from the short-term effects of the vaccine.



Karina B. Sterman is a partner in the Litigation and Employment Law Departments of [Greenberg Glusker](#). A creative and ardent advocate for her clients, Ms. Sterman defends businesses in class action lawsuits as well as in discrimination, harassment, wrongful termination and other lawsuits. She also defends companies in administrative proceedings in front of the EEOC, Department of Labor, California Labor Commissioner and other jurisdictions.