



# Employers Rolling Up Their Sleeves: Current COVID-19 Vaccine Issues for the Construction Industry

**Fisher  
Phillips**

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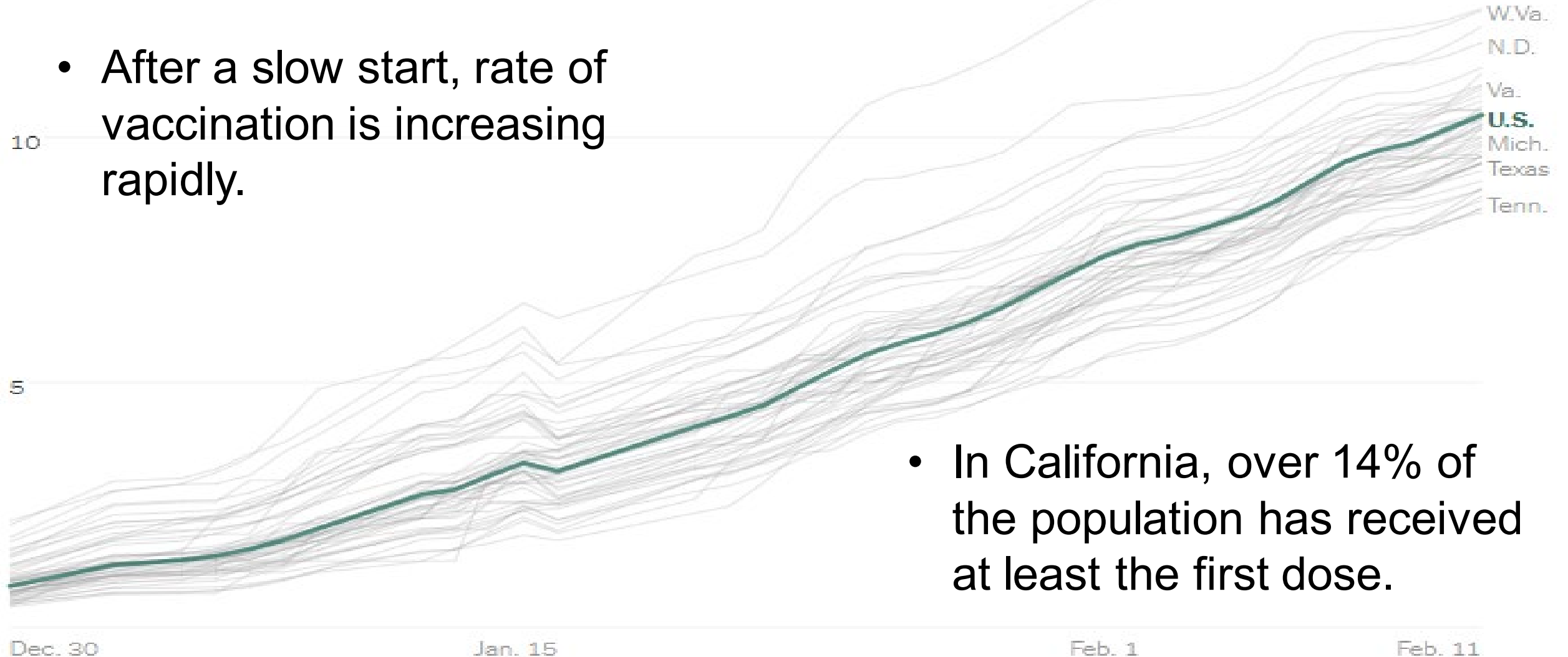
# Vaccines and the Workplace - Overview

- Current state of vaccines in U.S. and California.
- Can employers mandate vaccines?
- Can employers incentivize vaccination?
- What are the legal considerations and limitations?
- This situation is very fluid and can change rapidly.



## Current State of Vaccines

- After a slow start, rate of vaccination is increasing rapidly.



- In California, over 14% of the population has received at least the first dose.

# Current State of Vaccines

- “Open Season” for vaccines in April, according to Dr. Fauci.
- Forecasts of enough doses to allow everyone to get vaccinated.
- But, logistically, it will take several months to get the vaccines into most people’s arms.





# The Legal Landscape

- Employers must keep workplace free of recognized hazards while respecting employees' individual rights
- Most Relevant Federal Laws
  - OSHA, ADA, Title VII, HIPAA, GINA, FLSA
- EEOC Guidance: ***Employers may require vaccines, but...***
  - Enforcement may hinge on evaluation of “direct threat” issues or “qualification standard”
  - Giving the vaccine is not an ADA medical exam
  - Pre-Vaccine questions may implicate the ADA
  - Issues regarding vaccine incentives?

# OSHA Guidance

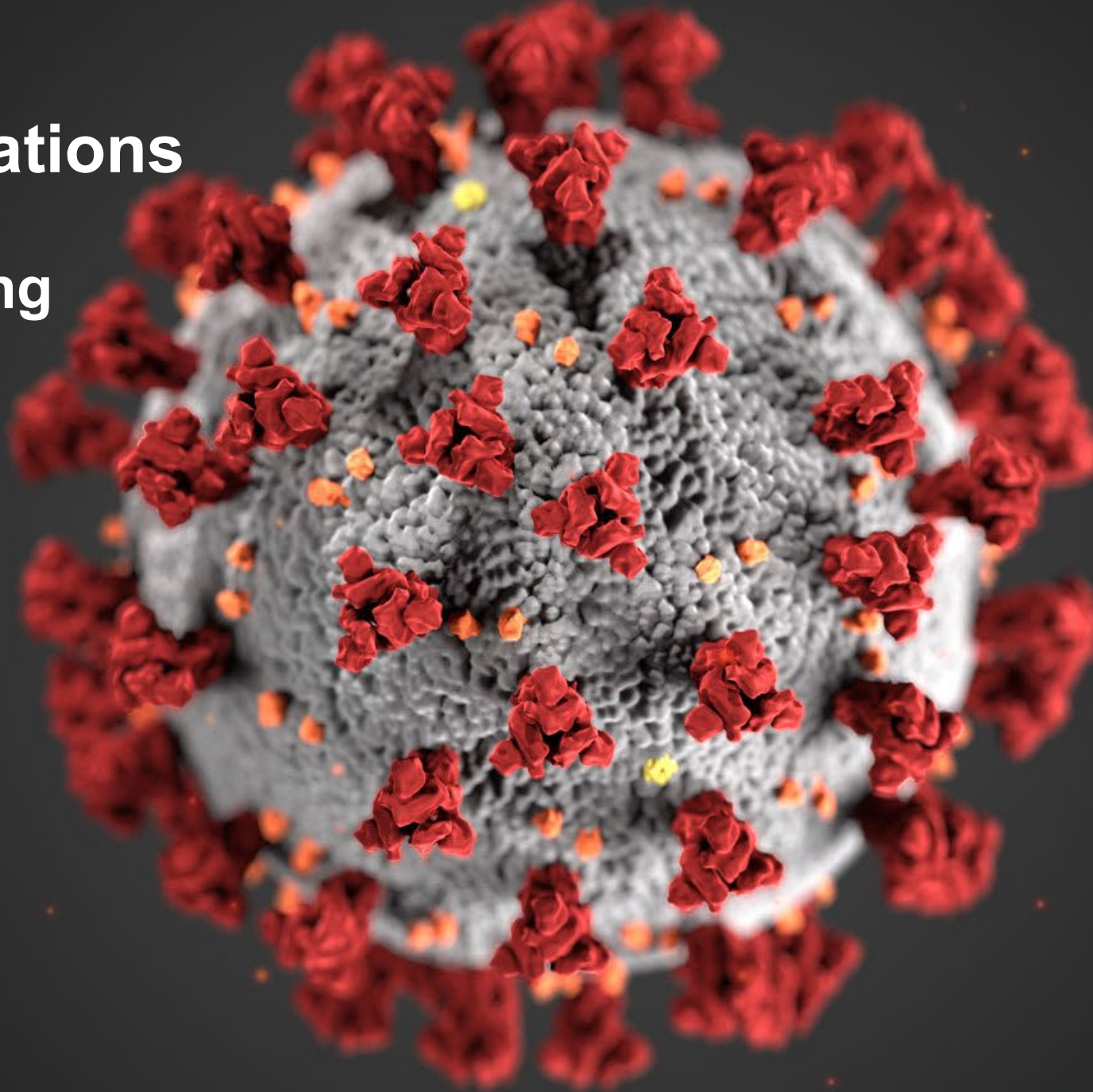
- No specific standard on vaccinations (yet)
- General Duty clause requires employers to maintain a workplace free of recognized hazards
- On January 29, 2021, issued detailed guidance:  
**“Mitigating and Preventing the Spread of COVID-19 in the Workplace”** for “planning purposes.”
- Likely the first step toward an Emergency Temporary Standard toward establishing required steps.

# Disability Accommodations

- **ADA – The American with Disabilities Act**
  - Prohibits discrimination.
  - Requires “reasonable accommodation” for known, *existing* physical or mental impairment.
    - Unless accommodation would impose undue hardship.
  - Limits an employer’s rights to inquire/conduct medical exams.
    - Must be job related, consistent with business necessity.
      - Medical condition must pose a significant risk of substantial harm.
      - Reliable, objective information must support employers’ concern.
  - Protects privacy of each employee’s medical information.

# Disability Accommodations

- **Known, existing impairment:**



- Only known contraindications at this time are for those with history of severe allergic reactions;
- Most individuals with disabilities will not be prevented from vaccination because of disability;
- Interactive process is key.



# Disability Accommodations

- When may an employee be “*excluded from the workplace*” for not being vaccinated?
  - **Direct Threat** – would an unvaccinated worker pose significant risk of substantial harm to self or others, based on reasonable medical judgment, which cannot be eliminated by a workplace accommodation?
    - This is a high standard.
  - Vaccination as safety **Qualification Standard** – requires an objective basis for the standard, historically tied to jobs protecting public safety.
    - Standard must be job-related and consistent with business necessity.

# Direct Threat

- To evaluate a possible direct threat, the employer should individually assess these factors:
  - The duration of the risk;
  - The nature and severity of the potential harm;
  - The likelihood that the potential harm will occur; and
  - The imminence of the potential harm.

# Safety Qualification Standard

Not as difficult to meet as “direct threat” standard.

- Direct threat requires establishing that threat cannot be eliminated by a reasonable accommodation.
- Objective basis for the standard, historically tied to jobs protecting public safety.
- Standard must be job-related and consistent with business necessity.
- Be prepared to support imposition of that standard on a job.

# Religious Accommodations

- What if employee raises a religious objection to vaccination?
  - Employer must accommodate sincerely held religious beliefs.
  - Accommodation required unless undue hardship.
  - Broad definition of religion.





## EEOC: Regarding Proof of Vaccination

- Seeking proof of vaccination is not a medical examination.
  - Such a request, *by itself*, is unlikely to elicit disability info.
- This is not a disability-related inquiry, so does not trigger ADA.
- Inquiries should stop there, however.
  - Further inquiry implicates more ADA limitations/protections.
- Any medical information received must be kept confidential.
- Employee should be instructed **not** to provide genetic information (such as family members' medical history).

# Vaccine *Pre-Screening* Questions

- CDC recommends certain pre-screening questions before administering a vaccine.
- If an employer requires employee to receive the vaccine from the employer or a contracted third party, these questions are subject to ADA standards for disability-related inquiries.
  - Questions must be job related and consistent with business necessity, based on reasonable belief, supported by objective evidence that an unvaccinated employee would pose a direct threat in the workplace.
  - But, these requirements are ***unnecessary if...***

## Those requirements are *unnecessary if*:

- Vaccination is voluntary.
  - Employee's decision to answer would also be voluntary.
  - Cannot retaliate if employee changes his mind.
- ***Or*** the employee receives vaccination from a third-party not contracted to employer (e.g., pharmacy or other healthcare provider).
- **Medical information must always be kept confidential.**

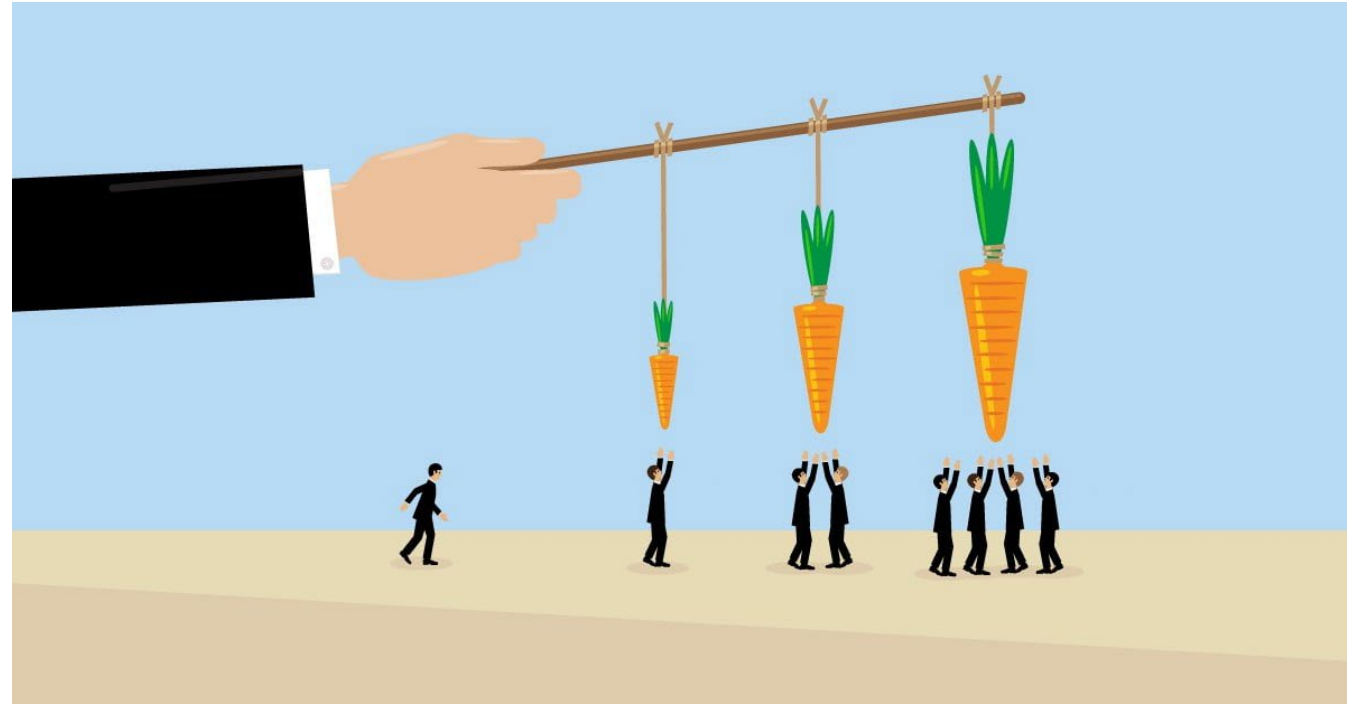
# Summary Regarding Vaccine Mandates

- An employee *may* be entitled to exemption from “required” vaccines:
  - due to an ADA-covered disability or other medical circumstances.
  - based on sincerely-held religious beliefs, practices, or observances.
- In either case – the “interactive process” is critical.
- Employer must consider reasonable accommodations.
- Document communications with employee.
- “Process” may be as important as the final accommodation decision.
- Supervisor training is vital – avoid inadvertent medical inquiries.



# Vaccination Incentives – a not-so-simple alternative?

- Consider federal laws to determine what incentives may be right for your workplace.
- Applicable Laws to Consider:
  - ADA;
  - Title VII;
  - HIPAA (ACA);
  - FLSA;



# ADA: Wellness Program Rules

- EEOC recently withdrew the proposed wellness program rules.
- Employers offering incentives to employees receiving the COVID-19 vaccine do not have to establish job-relatedness and business necessity of pre-vaccine screening questions if:
  - The pre-exam questions come from a third party that is not contracted with the employer to conduct testing (such as neighborhood pharmacy or clinic);  
*or*
  - The employee's participation and responses to the screening inquiries are "voluntary."
- If the employer *requires* vaccines, consider administration of the shot by an independent third party.

# ADA Wellness Rule Component - Complications

- May arise if:
  - Program is not “voluntary,” in view of applicable history, guidance, and court decisions.
  - If the incentive offered is too high.
    - EEOC: employees could feel coerced to participate → leading to wellness program rules violations when employees are “forced” to disclose protected medical information in order to gain the incentive.
  - EEOC proposed rule permits only de minimis incentives.
    - Biden administration withdrew proposed rule during administrative transition.
  - Takeaway: Higher incentives equals higher risk.

# ADA - Reasonable Accommodations

- Employers must also consider offering alternative means for an employee to earn an incentive if unable to be vaccinated due to a disability.
- Some potential options:
  - Watching a workplace COVID-19 safety video.
  - Reviewing CDC literature on how to mitigate the spread of COVID-19 in the workforce.
- Consider other creative vaccine alternatives offered by employer in the past (i.e., incentives for flu shot).



# Title VII-Religious Objections

- What if employee raises a religious objection to vaccination?
  - Employer must consider an alternative means by which the employee can earn the incentive.
  - Similar to the analysis described for an ADA accommodation.
  - The standard for evaluating religion-based accommodation requests is different from ADA accommodation.

- HIPAA: Requires health-contingent wellness programs, which connect incentives with health status goals, to meet certain tests.
  - Full incentive must be available to all similarly situated individuals.
  - Also, limits the amount of incentives that may be offered.
- FLSA: Must pay all employees for all time worked.
  - State or local wage and hour law may also create similar, or even higher, obligations.
  - FLSA is detailed and demanding regarding recording keeping and calculating employees' "regular rate."

# Pay Equity

- California requires equal pay for comparable work:
  - Offering financial incentive to those who get the vaccine and not to those who do not for religious or health reasons could create risk.
  - Even one-time bonus could be a violation of the law.
  - Alternatives could include bonuses to all if certain percentage of workforce gets vaccine.
  - Also, could pay bonus to those who get vaccine or opt out for disability/religious reasons, but not to others who merely refuse.



# Incentive Risk Chart

- *Educating Employees:*  
Little To No Risk – Big reward? Recent Reports say Construction Workers are the least likely to get the vaccine.
- *Providing Paid Time Off For All Workers:*  
Low Risk
- *Offering A De Minimis Incentive For Those Who Get The Vaccine:*  
Low Risk
- *Providing Paid Time Off For Those Who Get the Vaccine:*  
Medium Risk
- *Providing Compensation To Cover “Costs” Associated With Vaccine:* Medium Risk
- *Offering An Incentive Of Greater Value For Those Who Get The Vaccine:*  
Higher Risk



# Other Legal Considerations

- State and local laws:
  - Unlikely to protect “anti-vaxxers” from a workplace requirement.
- Vaccine Prioritization.
- Vaccine Registration:
  - i.e., Vaccine Administration Management System (VAMS)
- Employee rights under Section 7 of the NLRA to engage in protected concerted activities:
  - Vaccine requirements likely to be mandatory bargaining topics.
- Collective bargaining agreements.

# Mandating COVID-19 Vaccination *For Unionized Employees*



# Mandating COVID-19 Vaccination For Unionized Employees



- **First Step**: Mandatory Or Permissive Subject?
  - Mandatory subjects trigger an obligation to give notice and potentially bargain with the union.
  - Permissive subjects fall outside the scope of wages, hours, and other terms and employment conditions.
  - Consider potential risks like work stoppages.



# Mandating COVID-19 Vaccination For Unionized Employees



## **Next Question:** Decisional v. Effects Bargaining

- Decisional Bargaining refers to an employer's obligation to bargain over the actual decision at issue
  - A general vaccination provision or health and safety provision in other parts of the CBA may meet the NLRB's contract coverage standard
- Effects Bargaining (or "impact-bargaining") refers to decisions that go to the effect or impact of an employer's decisions on bargaining unit employees



# Mandating COVID-19 Vaccination For Unionized Employees



## Effects Bargaining Subjects:

- Sequence of vaccination (e.g. most senior v. least senior employees, by department or by classification, etc.);
- Pay for the time spent participating in the vaccination process;
- The vaccination locale and schedule;
- Sick leave for employees experiencing an allergic reaction or side effects;
- Exemptions from the Vaccine Policy;
- Consequences of non compliance.



# ***What If The CBA Is Silent – Or There Is No CBA Altogether?***



- Under these circumstances, any established policies or practices would ordinarily govern.
- Any departure from the status quo must be preceded by notice to the union of the proposed change along with, upon the union's demand, an opportunity to bargain over the change.
- Here, there would exist an obligation to bargain over the decision *and* its effects.



# Mandating COVID-19 Vaccination For Unionized Employees



## The Wildcard: Exigent Circumstances

- The NLRA recognizes an “exigent circumstance” exception;
- The employer must be able to demonstrate that “economic exigencies” compelled prompt action before notifying the union and allowing it to bargain.
  - NLRB has held that “economic events such as loss of significant accounts or contracts, operation at a competitive disadvantage, or supply shortages do not, alone, meet the economic exigency standard to justify unilateral action.”

***Currently, no decisions, regulations, or general guidance on whether a vaccination is an “economic exigency.”***



# California's Vaccinate ALL 58

- **Currently Phase 1:** Limited supplies of COVID-19 vaccine doses are available. Efforts will focus on reaching critical populations.

- **1A:** Healthcare Workers and Long-Term Care Residents

- **1B:** Individuals 65+, and the following sectors: Agriculture and Food; Education and Childcare; Emergency Services

***Starting March 15:***

Highest Risk Individuals ages 16-64



**Vaccinate ALL 58**

Together we can end the pandemic.

# Other Considerations

- Public Relations
  - New York Times: N.Y. Restaurant Fires Waitress Who Wouldn't Get COVID-19 Vaccine
  - Social Media
- Employee Morale

# Opinions Differ

- Is the workplace ready?
  - Surveys have shown 20-50% would refuse the vaccine
  - Construction workers are more likely than other industries to refuse the vaccine.
  - Is the public becoming more receptive?
- The U.S. Surgeon General recommended that employers ***not*** mandate the vaccine.
- What are employers doing?
  - F&P polling suggests most employers are not planning to mandate, but many want to incentivize.

# Next Steps to Implement Now

1. Organize a Vaccine Committee to develop recommendations for your company.
2. Determine when your employees can get the vaccine.
3. Decide whether you will **mandate** or **encourage** the vaccine.
4. Launch an effective education campaign.
5. Decide whether you will incentivize the vaccine.
6. Consider whether you will offer on-site vaccinations.
7. Plan for post- vaccination issues such as side effects as employees may need to take time off work.
8. Maintain workplace safety measures like masks and avoiding close contact.
9. Stay updated on vaccine developments and trends.

## Final Thoughts

- Anticipate issues, questions and pushback from some employees.
- Develop policies and communications aligned with your decision.
- Educate employees and, especially, supervisors!
- Keep up to date with new developments -- work with your employment counsel.
- **REMEMBER**: Just because an employee gets vaccinated, employees should continue to mask and social distance!

# Helpful Resources

- [EEOC.gov](https://www.eeoc.gov)
- [CDC.gov](https://www.cdc.gov)
- [OSHA.gov](https://www.osha.gov)
- [HHS.gov](https://www.hhs.gov)
- [saferatwork.covid19.ca.gov](https://saferatwork.covid19.ca.gov)
- [cdph.ca.gov](https://cdph.ca.gov)
- [dir.ca.gov/dosh](https://dir.ca.gov/dosh)



# Visit **FISHER PHILLIPS** **VACCINE RESOURCE CENTER** for **Employers**

Fisher Phillips has a number of resources to aid employers with the upcoming COVID-19 vaccine that can also be used during flu season. We encourage you to check back often.

- COVID-19 Vaccine FAQs
- Sample policies and procedures
- Data Bank of templates and forms
- 50-state issues
- COVID-19 Vaccine and Flu insights
- ... and more

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