



Memorandum

**CONFIDENTIAL**  
**ATTORNEY-CLIENT COMMUNICATION**

**DATE:** April 2, 2021  
**TO:** Debbie Tarry, City Manager  
**FROM:** Margaret King, City Attorney  
**RE:** COVID Vaccination Questions

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**Questions.**

1. **Can we require employees to get vaccinated?** Yes, subject to compliance with FLSA and subject to exemptions and potential challenges because of the EUA status of the vaccine.
2. **Can we make vaccination a condition of employment?** Yes, subject to the above.
3. **Can we require that any participant in our recreation programs must show proof of COVID vaccination?** Likely, although at present, given no vaccination currently available for those under 18 (16 for Pfizer), such a requirement would be limited to those that can obtain the vaccination. Once available, the requirement would be subject to conditions set out in answer number one.
4. **Can we require that any person of the public accessing public buildings and/or in-person meeting have proof of vaccination?** Most likely, subject to exemptions set out in answer number one.
5. **Does the City have liability if we hold public events and we don't require proof of vaccination, etc. – and an outbreak is linked to that public event even if all Public Health recommendations are followed?** Liability based on failure to require proof of vaccination alone would be unlikely. Liability will be based on the facts and will

depend on nature, size, and purpose of event and the reasonableness of the actions taken and protocol followed.

6. **Additional Approaches, Guidance, and Information.** I have provided some additional information after the questions section regarding current discussion and approaches being taken by other businesses and industries. The information in this memorandum will need to be updated frequently.

## **QUESTIONS AND ANALYSIS**

### **1. Can we require employees to get vaccinated?**

There is currently a lot of theoretical discussion around the issue of mandatory vaccinations, however, there is only beginning to be some examples and guidance from the State and Federal Government in relation to such mandates. Accordingly, this memorandum is based on the facts as they exist now and a review of the existing case law and administrative guidance.

With respect to case law, my research indicates that the issue of mandating vaccinations is not a new one. For years numerous highly regarded medical organizations have advocated for mandatory annual influenza immunizations for health care workers.<sup>1</sup> In 1905, long before the adoption of many of the current federal employment laws, the United States Supreme Court upheld Massachusetts' decision to mandate the vaccination of all citizens in response to the smallpox epidemic. See *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11 (1905). Since that decision, both state and federal courts have upheld mandatory influenza vaccine programs in the health care setting and in the context of assisted living facilities, even when the employee impacted objected to the vaccination under state or federal employment law.

Today, any mandatory vaccination program must consider the primary federal employment laws that would be implicated. These laws are:

- (1) Title VII of the Civil Rights Act of 1964 (Title VII) (provides religious grounds for vaccination abstention);
- (2) Americans with Disabilities Act (ADA) (vaccination abstention based on disability-related reasonable accommodation requests); and
- (3) Occupational Safety and Health Act of 1970(OSH) (Congress created the Occupational Safety and Health Administration (OSHA) to address safety in the workplace).

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<sup>1</sup> These medical organizations include the CDC, the American Academy of Family Physicians, the American Hospital Association, the Society for Healthcare Epidemiology of America, the Infectious Diseases Society of America, the Pediatric Infectious Diseases Society, the Association for Professionals in Infection Control and Epidemiology Inc. and the American Public Health Association.

In addition, the United States Equal Employment Opportunity Commission (EEOC) along with OSHA implement and adopt rules that address the above listed laws that need to be considered.

Both the EEOC and OSHA have previously interpreted mandatory flu vaccinations as a permissible mandate by employers – with certain conditions. In response to the 2009 H1N1 “swine flu” pandemic, the EEOC’s Pandemic Preparedness for the Workplace guidance advised that, absent a state or local law to the contrary (there are none here in Washington), employers may require employees to get vaccinated from the flu.<sup>2</sup> More specifically, in relation to the current COVID-19 Pandemic, on December 16, 2020, the EEOC updated its guidance to address questions surrounding the COVID-19 vaccine.<sup>3</sup> While the EEOC’s Guidance does not directly address whether an employer is permitted to adopt a mandatory employee vaccination policy, the EEOC’s responses to the vaccination-related questions posed in the Guidance strongly suggest that an employer may implement a mandatory vaccination policy as a condition of continued employment or, at the very least, as a condition of physically returning to the workplace.<sup>4</sup>

The updated December COVID-19 guidance, like the H1N1 guidance, continues to note that any mandates are subject to the application of federal anti-discrimination laws, including the Americans with Disabilities Act (the “ADA”) and Title VII of the Civil Rights Act of 1964 (“Title VII”). The EEOC advised that while these laws do not prohibit employer-mandated COVID-19 vaccinations per se, they do require employers to undertake individualized risk assessments and offer reasonable accommodations to protect the legal rights of employees who cannot or will not be vaccinated for medical or religious reasons.

#### ADA issues and protections for employees who decline vaccination due to a disability

The EEOC advises that an employer may, consistent with the ADA, impose COVID-19 vaccination requirements that screen out, or tend to screen out, employees with disabilities<sup>5</sup>

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<sup>2</sup> In its guidance the EEOC emphasized that—even during a pandemic—employers are obligated to consider accommodation requests from employees whose disabilities or religious beliefs prevent them from getting a vaccination. Similarly, OSHA’s guidance allows employers to mandate such vaccinations for employees, however, it provides an exception based on OSHA’s whistleblower provisions for any employee who refuses a flu vaccine because of a “reasonable belief” that he or she has a medical condition that creates a real danger of serious illness or death (such as serious reaction to the vaccine).

<sup>3</sup> See *U.S. Equal Employment Opportunity Commission, What You Should Know about COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws* (Dec. 16, 2020), No. K.5, available at <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws> (hereinafter, “EEOC COVID-19 Guidance”). The EEOC Guidance provides answers to certain common questions in the document.

<sup>4</sup> In addition, requiring vaccinations would need to be addressed pursuant to our recent Bargaining Agreement. We should assume that PERC would consider a mandatory vaccine policy to be a mandatory subject of bargaining. While the public’s safety is one element that PERC would consider, PERC generally considers rules on safety and health of employees to be mandatory subjects of bargaining. We should therefore review our Agreement to see if we have a management exemption that would apply to such a policy. Either way, we will need to reach out to the union early in the process as even if we could unilaterally implement the policy we would need to bargain the effects.

<sup>5</sup> “Disability,” in this context, refers to an individual who has a physical or mental impairment that substantially limits one or more major life activities. 29 C.F.R. 1630.2(g). This will be a specific assessment that needs to be made that will depend on the nature of the employee’s work and contact with others.

and may exclude such unvaccinated employees from the workplace.<sup>6</sup> Before doing so, however, the employer must first determine that unvaccinated employees would pose a “direct threat” of “significant risk of substantial harm to the health or safety” of other individuals.<sup>7</sup> In making the direct threat assessment, an employer may look to the CDC’s and Washington State’s guidance on “risk” for certain occupations, however, an employer cannot base its threat assessment *solely* on such risk categories. Instead, it *must* consider four factors when deciding whether there is a “direct threat” in the workplace: (1) The duration of risk; (2) The nature and severity of potential harm; (3) The likelihood of the harm occurring; and (4) The imminence of the potential harm.<sup>8</sup>

Second, even if the City shows that an unvaccinated employee poses a *direct threat* to the health or safety of themselves or others, the City still has a general obligation to accommodate disabilities under the ADA.<sup>9</sup> Accordingly, prior to excluding the unvaccinated employee from the workplace, it must assess whether a reasonable accommodation can eliminate or reduce the risk to an acceptable level without imposing an undue hardship on the employer.<sup>10</sup> Such accommodations might include personal protective equipment use and social distancing, remote work, or reassignment on a temporary or permanent basis to a position that does not require vaccination.<sup>11</sup>

Lastly, even assuming no accommodation exists that would allow the employee to return to the physical workplace, the guidance advises that an employer should not take further adverse action against the employee, such as termination, before evaluating whether other federal, state, or local law entitle the employee to other accommodations such as remote work or unpaid leave.<sup>12</sup> The EEOC recommends that an employer look to whether the

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<sup>6</sup> There are some additional issues that must be addressed under the ADA that can impact how a mandated program would be rolled out to our employees that are discussed under question 2 in this memorandum.

<sup>7</sup> A determination that unvaccinated employees would expose others at the worksite to COVID-19 likely qualifies as such a direct threat.

<sup>8</sup> See EEOC COVID-19 Guidance; see also 29 C.F.R. § 1630.2(r). In making this assessment an employer must also show that it was based “on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence.” *Id.* Accordingly, the assessment will need to be evaluated and updated as more knowledge and information becomes available. At present, however, it is also unclear if vaccinated employees can still be carriers of the virus, in which case the threat would be to the unvaccinated person at work, even if all, or almost all other employees are vaccinated.

<sup>9</sup> Note that while EEOC public guidance is not binding on either state courts construing state laws or on federal courts construing the ADA and Title VII, they are recognized authority to which some deference is owed.

<sup>10</sup> In the ADA context, “undue hardship” refers to “significant difficulty or expense.” The EEOC has posted further guidance on how to assess undue hardship [here](#).

<sup>11</sup> According to EEOC, an employer may rely on recommendations from the Centers for Disease Control and Prevention when determining whether effective accommodations that do not impose undue hardships are available under the circumstances.

<sup>12</sup> In addition to the ADA, the Washington’s Law Against Discrimination (WLAD) places restrictions on disability-related inquiries when engaging in vaccination discussions with employees. In response to questions on mandating the H1N1 vaccine, the EEOC opined that there may be protections under the Occupational Safety and Health Act for any employee who refuses the vaccine based on a reasonable belief that the employee has a condition creating a danger of serious illness or death. See U.S. Dep’t. of Labor, Occupational Safety and Health Administration, OSHA’s Position on Mandatory Flu Shots for Employees (Nov. 9, 2009), *available at*: <https://www.osha.gov/lawsregs/standardinterpretations/2009-11-09>. For these reasons, an employer should document all efforts made to explore accommodations with an employee, and any undue hardships that explain why

employee qualifies for leave under the Families First Coronavirus Response Act (FFCRA), the Family Medical Leave Act (FMLA), Washington leave laws, and/or the City’s leave policy.<sup>13</sup>

#### Title VII protections for employees who decline vaccination on religious grounds

Another exception to mandating vaccinations is if an employee objects to receiving a mandatory vaccine because of a sincerely held religious belief, practice, or observance. In such a situation Title VII (like the ADA) requires the employer to explore whether a reasonable accommodation that does not pose an undue hardship might be possible.<sup>14</sup>

Because Title VII offers broad protections to religious beliefs and practices the EEOC says that employers should, in the absence of an objective basis for questioning a religious accommodation request, assume the request is sincere and based on a sincerely held belief. If there is an objective basis for questioning the religious nature, or the sincerity, of the belief or practice, the EEOC permits an employer to request additional supporting information.<sup>15</sup> If an employer cannot provide a reasonable accommodation to an employee who refuses vaccination on religious grounds, the employer may lawfully exclude the employee from the workplace. The employer may not, however, automatically terminate the employee. Rather, as in the ADA context, the employer would need to carefully consider the potential application of other employee rights arising from federal, state, or city code or handbook requirements.

Accordingly, if the City were to implement mandatory vaccination the City’s duty to reasonably accommodate under state and federal requirements will necessarily impact the City’s ability to have *everyone* vaccinated if a reasonable accommodation can be made without causing the City “undue hardship”.<sup>16</sup> For example, if an unvaccinated person poses a risk to themselves or others by entering City premises, then the City could decide whether or not the employee can effectively work remotely.<sup>17</sup> Since a remote work situation may be viable for some positions, and not for others, the City would also need to

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an accommodation could not be made, if applicable. These notes and records should be kept in a separate medical or accommodation file for the employee.

<sup>13</sup> I have not yet reviewed the 2021 COVID-19 relief just passed at the federal level. If there are provisions in that law that will impact this analysis, I will provide an update.

<sup>14</sup> Courts have so far interpreted “undue hardship” in the Title VII context, as one having “more than a de minimis” cost or burden on the employer—a lower standard than in the ADA context. Costs go beyond financial expense and include the burden on the employer’s business operations, which can include the “cost” to other employees’ job rights, or workplace safety. Factors to consider when making an assessment of undue hardship for religious accommodation purposes include “the type of workplace, the nature of the employee’s duties, the identifiable cost of the accommodation in relation to the size and operating costs of the employer, and the number of employees who will in fact need a particular accommodation.” See U.S. Equal Employment Opportunity Commission, Questions and Answers: Religious Discrimination in the Workplace (July 22, 2008), No. 9, available at: <https://www.eeoc.gov/laws/guidance/questions-and-answers-religious-discrimination-workplace> (“EEOC Religious Accommodation Guidance”).

<sup>15</sup> EEOC Covid-19 Guidance at K.6. The link to the Guidance is set out in footnote 2 of the guidance and provides further information and links, which include guidance on recognizing accommodation requests, engaging with employees, and assessing possible accommodation options.

<sup>16</sup> EEOC COVID-19 Guidance at K.5.

<sup>17</sup> *Id.*

explore for those situations where remote work is not an option whether it is feasible to have unvaccinated employees wear masks and maintain social distancing.<sup>18</sup>

### FMLA Considerations

Under the Fair Labor Standards Act, employers must reimburse nonexempt employees for any expenses that are incurred for the convenience of the employer or where the expense is incurred on the employer's behalf.<sup>19</sup> Additionally, nonexempt employees must be paid for any hours in which they are "suffered or permitted" to work for the employer.<sup>20</sup>

The U.S. Department of Labor (DOL) has not yet opined on whether an employer must pay for an employee to get a Covid-19 vaccine if the employee is subject to a mandatory vaccine policy, however, it is likely the DOL would consider this paid time. For example, with respect to other types of mandatory requirements—such as physical exams, fingerprinting, and drug testing—the DOL states that when employers "impose special tests, requirements or conditions that your employee must meet," then, "time he or she spends traveling to and from the tests, waiting for and undergoing these tests, or meeting the requirements is probably hours worked."<sup>21</sup> Based on the foregoing, if an employee is required to get the Covid-19 vaccine pursuant to a mandatory vaccine policy, it would be prudent to pay employees for the time spent getting the vaccine to avoid wage and hour related claims. However, if the City is not inclined to pay employees for the time spent getting the Covid-19 vaccine, there is no firm guidance or statute requiring it to do so at this time.

## **2. Can we mandate Vaccinations as a condition of employment?**

The analysis for a new employee with respect to requiring a vaccination at a required condition of employment would be the same as that set out for existing employees. An employer may require proof of vaccination since proof of a vaccination in and of itself would not likely elicit information about a disability pursuant to the ADA, nor does it implicate Title II of the Genetic Information Nondiscrimination Act (GINA).<sup>22</sup> However, if an employer asks why an employee or prospective employee did not receive a vaccination, this may elicit information about a disability that would trigger the ADA's standard on disability-related inquiries. Similarly, such questions may invoke GINA protections (if, for example, questions on family history are asked). For these reasons, the

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<sup>18</sup> Of course, when an accommodation is requested, the City should ensure that there is documentation from a medical provider confirming the employee's need for an accommodation, and the specific limitation in place. This provides an opportunity for the City to get the information that is needed to undergo the interactive process, and work with the employee to identify the extent to which a reasonable accommodation may be granted.

<sup>19</sup> 23 29 C.F.R. § 778.217.

<sup>20</sup> 24 29 C.F.R § 785.11.

<sup>21</sup> U.S. Dep't. of Labor, FLSA Hours Worked Advisor, Physical Exams, Fingerprinting and Drug Testing (as of Dec. 17, 2020), available at: <https://webapps.dol.gov/elaws/whd/flsa/hoursworked/screenEr13.asp>

<sup>22</sup> See EEOC Covid-19 Guidance at K.3 and K.8.

EEOC suggests that employers warn employees not to provide medical or genetic information as part of any proof of vaccination to avoid implicating the ADA.<sup>23</sup>

There are also some additional issues that must be addressed under the ADA that could impact how a mandated program would be rolled out (both for existing and new employees). The EEOC guidance suggests that administering a COVID-19 vaccine to an employee does not itself constitute a “medical examination” under the Americans with Disabilities Act (“ADA”). Specifically, “[i]f a vaccine is administered to an employee by an employer for protection against contracting COVID-19, the employer is not seeking information about an individual’s impairments or current health status and, therefore, it is not a “medical examination.” Accordingly, an employer does not need to establish that a vaccine is “job-related and consistent with business necessity” in order to require the employee to receive the vaccine.

Pre-vaccination medical screenings, however, which are required to determine whether an individual may safely receive the COVID vaccination, do trigger the ADA’s protections regarding disability-related inquiries because they are likely to elicit information about a disability. Accordingly, if an employer itself administers the vaccine to its employees or hires a third party to do so on its behalf, the employer must demonstrate that the screening questions are “job-related and consistent with business necessity.” To meet this standard, an employer must have “a reasonable belief, based on objective evidence, that an employee who does not answer the questions and, therefore, does not receive a vaccination, will pose a direct threat to the health or safety of her or himself or others.” Importantly, the ADA’s disability-related inquiry standard is not triggered if (1) the employee receives the employer-required vaccination “from a third party that does not have a contract with the employer, such as a pharmacy or other health care provider” rather than from the employer itself or a third party with which the employer has contracted; or (2) the employer offers employees the vaccine on a voluntary basis. Finally, an employer must also respect the rights of any pregnant employees who are reluctant to take the vaccine, given that studies have not been conducted on pregnant women the safety of COVID-19 vaccines during pregnancy is based on limited data.

Based on the foregoing, it would be my recommendation for the City to have employees receive the vaccine from a 3<sup>rd</sup> party.

### **3. Can we require that any participant in our recreation programs show proof of COVID vaccination?**

The EUAs support the Pfizer-BioNTech vaccine for use in individuals 16 and older and the Moderna and Johnson and Johnson vaccines for use in individuals 18 and older. The CDC also provides guidance regarding use of these and other Covid-19 vaccines in certain populations.<sup>24</sup> Under this current authorization it is not possible to require vaccination as

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<sup>23</sup> *Id.* This is also the guidance of the California Department of Fair Employment and Housing, discussed in paragraph 6.

<sup>24</sup> <https://www.cdc.gov/vaccines/hcp/acip-recs/vacc-specific/covid-19.html>

a condition to participation in recreation programs at this time for younger participants, since it isn't available even under the current EUA. Recently Pfizer applied for an EUA for 12–15 year old population so it is likely that such approval may be forthcoming by the end of this month. Should that occur and should the City want to apply a mandate for its recreation programs it could do so, provided it follows the similar exemptions for medical and religious reasons as that found in RCW 28A.210's school vaccination mandate.

In adopting a mandate, the City should also consider if it should apply to all programs or only those that pose the highest risk. Regardless, the City should continue to have participants sign a waiver whether it implements such a policy or not.

**4. Can we require that any person of the public accessing public buildings and/or in-person meeting have proof of vaccination?**

Generally, yes, we can require proof of vaccination if any required accommodations are provided in accordance with the ADA and the City complies with any applicable provisions of the Civil Rights Act or any other applicable state and federal anti-discrimination laws.

Additional issues could come also into play for such a requirement under the Civil Rights Act since such restrictions could be seen as similar to offering "special accommodations," that have the effect of discriminating on the basis of someone's race, color, national origin, or religious beliefs. Access to vaccines for certain groups has been more difficult, accordingly, those groups may argue that they are being target or disproportionately impacted by such an exclusionary mandate. With the increase in the vaccine availability and no cost being attached to receipt of the vaccine, these concerns will hopefully be addressed in the very near future.

There are some additional challenges that could be raised in relation to public meetings and the requirements under the OPMA to allow public access to certain meetings without preconditions. Accordingly, the City would need to demonstrate that such rules are facially neutral, necessary for protection, and that there is an alternative method to fully participate.

Finally, as discussed below, there may be a practical problem with administering a non-employee proof of vaccination rule when there is currently no uniform system that one can utilize that would demonstrate vaccination. Accordingly, at present it would be mostly an honor system that would rely on the good faith of those that attend meetings to provide accurate proof of vaccination.

**5. Does the City have liability if we hold public events and we don't require proof of vaccination, etc. – and an outbreak is linked to that public event even if all Public Health recommendations are followed?**

Under tort law principles employers that fail to take *reasonable care* to protect employees, vendors, visitors, customers, or others on premises risk liability. Applying this concept, individuals who become sick based on alleged on-premises exposure would likely argue, and in some cases have already started to argue, that a business's negligent safety practices caused their illness. Accordingly, first and foremost it is critical to follow all CDC and

public health recommendations to both reduce the risk of transmission as well as potential liability should an employee or others get COVID from a city related meeting or event.<sup>25</sup>

Of course, providing a mandatory vaccination policy for our work force would necessarily help with liability issue related to third parties claiming they contracted COVID from interacting with City personnel (addressed in the previous question), it doesn't fully address issues relating to public meetings or events open to the public where the public is interacting with each other. The same arguments could be made that requiring proof of vaccination by others attending public events as well as from outside contractors and visitors is a way to reduce potential liability. It becomes a bit more logistically complicated, however, because these individuals are not employees of the City so there is no direct control or means to confirm the accuracy of the vaccination documentation.

Additionally, at this time it should be noted that there is just beginning to be scientific data that affirmatively demonstrates that a proof of vaccination policy amounts to a safer environment. Of course, as the questions related to length and breadth of immunity become clearer, it is likely that such data will be supportive of vaccination policies and having such a policy in place will likely help with liability issues that may come from 3<sup>rd</sup> parties.<sup>26</sup>

Although not part of your question, I thought I would also touch on the issue of workers compensation. While Washington's Department of Labor & Industries (L&I) has not addressed the issue outright, it will likely take the position that for City employees COVID-19 will qualify as a work-related condition subject to workers' compensation coverage if it is probable that the employee's exposure to the virus occurred through a work-related activity.<sup>27</sup> L&I has instructed, however, that the worker's occupation "must have a greater likelihood of contracting the disease because of the job (examples include first responders or health care workers)." Further, "there must also be documented or probable work-related exposure, and an employee/employer relationship." Accordingly, it appears that if the virus was contracted incidental to the workplace, or the contraction was "common to

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<sup>25</sup> Lawsuits have already been filed seeking relief for employee injuries ranging from wrongful workplace exposure to COVID-19 to wrongful death from COVID-19. Most of these cases are related to businesses such as health care or meat packing facilities that have a higher risk for exposure than the City, however, these cases will inform how other entities and businesses will be impacted.

<sup>26</sup> Of course, the City will likely be challenged for having such a mandate so there will be a litigation risk either way.

<sup>27</sup> L&I's current position is as follows: "Under certain circumstances, claims from health care providers and first responders involving COVID-19 may be allowed. Other claims that meet certain criteria for exposure will be considered on a case-by-case basis. For allowed claims, time-loss payments for lost wages during a quarantine period may be available for up to 14 days. The CDC indicates that COVID-19 symptoms may appear anywhere from 2 to 14 days after exposure. Appropriate, medically required testing/surveillance would also be covered. This is a time limited benefit, and no benefits would be paid after the worker tests negative for COVID-19 or the quarantine period has ended, unless the worker develops the disease. As with all wage replacement benefits under the Industrial Insurance Act, the first 3 days are not paid unless the worker is medically required to remain off work on the 14th day following exposure. Once a claim is allowed, the insurer will pay for treatment of COVID-19. Currently, the only treatment for this new coronavirus is supportive care to help relieve symptoms." Washington State Dep't. of Labor & Industries, Workers' Compensation Coverage and Coronavirus (COVID-19) Common Questions (as of Feb. 11, 2020), available at: <https://www.lni.wa.gov/agency/outreach/workers-compensation-coverage-and-coronavirus-covid-19-common-questions>

all employment” (such as an office worker who contracts the condition from a fellow employee), the comp claim would be denied.

Therefore, a mandatory vaccine policy, in and of itself, will not insulate the City from workers’ compensation liability, and the City will still be expected to abide by all current guidelines under state law that require employers to provide proper protective equipment for employees. A mandatory vaccine policy, however, may nonetheless mitigate some risk of workers’ compensation claims in that vaccinated employees are far less likely to contract the virus in the first place and will be especially less likely to contract it from co-workers.

Outside of the employee context, workers’ compensation does not apply to other persons or stakeholders (non-employees) who may claim COVID-19 damages from exposure to an unvaccinated events or workforce. Because suits could also come from contractors, vendors, visitors, or customers that would not be covered by workers comp, the extent of the City’s potential exposure to liability in these situations will necessarily be higher in contact-intensive situations where PPE may not provide sufficient protection.<sup>28</sup> While current OSHA guidance suggests this “general duty” can be satisfied by measures like PPE or distancing, in the longer-run the agency might take the position that a robust vaccination program is required in order to provide adequate protection and that workplaces without such policies are not safe. Even if they do not go that far, OSHA may find that having such a policy gives the employer a presumption in its favor. Of course, even if OSHA does not enforce the “general duty” clause in this way, private litigants, unions, or others may still argue that employers without mandatory vaccination policies are not providing a safe workplace.<sup>29</sup>

## **6. Additional Approaches, Guidance, and Information.**

Many businesses have strongly encouraged employees to get vaccinated but stopped short of requiring it. That includes Amazon, which offers front-line employees as much as \$80 to be immunized, and Walmart, which provides shots at its stores and gives associates two hours of paid time off to get theirs. Trader Joe’s and Instacart have announced plans to promote the vaccine among employees, including flexible work schedules, paid time off to visit a vaccination site, and bonuses of up to \$200. Kroger, owner of QFC and Fred Meyer stores, will pay workers \$100. At the downtown Seattle law firm Davis Wright Tremaine, vaccination will be a condition of returning to the office. Similarly, Aegis senior living facilities will require vaccination once vaccines are widely available. Outside of the regions, the Houston Methodist health care system is focusing on its management. In a

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<sup>28</sup> Arguments in favor of an employee mandatory vaccination policy in this regard is that it would arguably reduce the risks to our City employees of contracting the disease. First, mandatory vaccination makes it less likely individuals get sick in the first place, and as a direct consequence the City is less likely to suffer legally actionable damages. Separately, the adoption and implementation of a mandatory vaccine plan can itself be pointed to as evidence of the high standard of care the City is providing for its employees and others (including contractors and the public) that are on City premises, which also may be important in beating back potential liability from the outside. Apart from perhaps reducing civil liability from private plaintiffs, a mandatory vaccination policy could possibly also provide protection against enforcement action by regulators in the future. As noted above, under OSHA’s “general duty” clause, employers are required to furnish each employee with a workplace free from recognized hazards that could cause serious harm.<sup>29</sup> U.S.C. § 654.

<sup>29</sup> Of course, those same organization will likely challenge a mandatory vaccination policy as well.

March email its CEO gave managers until mid-April to get their first dose, or an exemption. No deadline was specified for other employees.

In March of this year the California Department of Fair Employment and Housing (“DFEH”) released updated COVID-19 employment frequently asked questions addressing the permissibility of employer-mandated COVID-19 vaccination policies. Consistent with the EEOC guidance, DFEH indicated that employers may require employees to receive an FDA emergency use authorized COVID-19 vaccine so long as the employer does not discriminate against or harass employees or job applicants on the basis of a protected characteristic and provide reasonable accommodations related to disability and/or sincerely-held religious beliefs.<sup>30</sup> The DFEH’s new guidance also indicates there is no obligation to reasonably accommodate employees whose opposition to being vaccinated is not related to a disability or religious beliefs.

The question remains, however, how can an employer ensure that employees are, in fact, vaccinated? The DFEH’s guidance indicates that employers may require employees to furnish “proof” that they have been vaccinated as part of the vaccine requirement—because this is not a disability- or religious creed-related inquiry or medical examination. However, the DFEH’s FAQs caution employers to instruct employees to omit any protected medical information from their documentation prior to submission. Further, once collected, the DFEH indicated that employers must maintain records of employee or applicant vaccination as confidential medical records.

The Biden Administration recently stated that it will not require a national proof of vaccination plan and instead will leave proof of vaccination up to the private sector and individual businesses and states.<sup>31</sup> New York state has unveiled its “Excelsior Pass” smartphone app to quickly prove vaccination or a clean test. It appears that the widely used Clear airport check-in system will soon offer its own version. At this time, how proof of vaccinations will be handled is still up in the air for the most part. Should the City of Shoreline decide to require proof of vaccination, it would need to determine how to do so in a way that omits protected medical information and maintains confidentiality, both for its employees and the public.

## **Conclusion**

A mandatory vaccination policy is legally permissible, provided that it is subject to exceptions. There are issues being expanded upon every day in relation to both mandatory and incentive-based vaccine policies as well as how to confirm vaccination compliance.

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<sup>30</sup> I have included a link to the FAQ’s here as I think they succinctly set out answers to numerous questions related to protocols for COVID-19. Questions related to vaccination start on page 7. [https://www.dfeh.ca.gov/wp-content/uploads/sites/32/2020/03/DFEH-Employment-Information-on-COVID-19-FAQ\\_ENG.pdf](https://www.dfeh.ca.gov/wp-content/uploads/sites/32/2020/03/DFEH-Employment-Information-on-COVID-19-FAQ_ENG.pdf)

<sup>31</sup> <https://thehill.com/homenews/administration/546705-white-house-rules-out-involvement-in-vaccine-passports>

Bottom line, the question is one of timing and whether a mandatory vaccination plan can be adequately instituted and confirmed. Whether it will increase compliance and/or improve the City's position from a liability standpoint will depend on the facts. Accordingly, it may be best to wait for a few more months to see the vaccination rates of both employees and the public to better determine the benefits of a mandatory vaccination policy.

The City has lots of incentives already in place for employees to utilize should they want to receive a vaccine. Clearly the more employees and members of the public that are vaccinated the better protected everyone that utilizes Shoreline programs will be.

I will continue to provide updates and more guidance comes from the Federal and State agencies and legislatures.

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