Client Alert: California Mandate Effective January 14, 2022: Can Private Businesses ask about Employee Vaccination Status?

First, a reminder for California businesses. On **January 14th, 2022,** California's Covid-19 updated mandate for ***all* non-healthcare employers** goes into effect. Private employers, irrespective of their size, will need a "to establish, implement, and a maintain an effective *written* Covid-19 Prevention Program." The State has conveniently provided a fillable model program for employers.

Key features of the mandate include:

1. Testing: Employers are required to make testing available at no cost and during paid time to employees *exposed* to Covid-19 (but are asymptomatic). This should be done once per week for an outbreak, and twice per week if there is a major outbreak at the workplace.

1. Face Coverings: Gaiters are now considered acceptable, provided they are double-layered or folded to make two layers. Otherwise, the statewide Universal Masking Requirement for indoor public spaces remains in effect till **February 15, 2022**. There are a number of exceptions, such as for an individual that is actively eating or drinking, working alone in an office, as well as for performers, and those with certain health conditions. A full list of exemptions is available here: CA Face Covering Q&A.

1. Large Employers: CAL/OSHA has neither adopted or adapted the federal 100-Employee mandate that is currently being reviewed by the Supreme Court. We are monitoring whether a similar 'vaccinate or test' mandate will be implemented in California. The CAL/OSHA committee meets January 20, 2020, and we expect to learn more at that time.

HIPAA: Can a Private Business ask for Your Vaccination Status?
Numerous, non-healthcare related businesses, have implemented vaccination requirements for their employees. Other businesses, such as theaters and gyms, require patrons to show proof of vaccination to gain entry. A number of public figures, including Dallas Cowboys quarterback, Dak Prescott, have stated that vaccination inquiries violate the HIPAA Privacy Act. Mr. Prescott would do well to focus on football and steer clear of healthcare regulatory pronouncements. In fact, HIPAA Privacy requirements do not apply to employers. While HIPAA governs the manner in which healthcare insurers, providers, and public health authorities handle data, it does not limit vaccination inquiries. In fact, HIPAA specifically authorizes state and local government agencies to aggregate personal data from Covid-19 testing laboratories—as individual test results are deemed essential to the public welfare. The U.S. Department of Health and Human Services (HHS), which is charged with enforcing HIPAA, has likewise specifically approved of employers requiring proof of vaccination under federal law.) To comply with the Americans with Disabilities Act, employers are expected to keep employee responses confidential and stored separately from the employee's personnel files.

On the national level, it is interesting to note that, currently, four states (Alabama, Florida, Montana, and Texas) have prohibited private employers from inquiring into the vaccination status of their employees. This has been accomplished either by legislation (AL) or executive order (FL, MT, TX). If the Supreme Court upholds the OSHA 100-employee mandate, the federal ruling may very well invalidate these state rules. When it comes to Covid-19 compliance, businesses with operations in multiple states have little choice but to navigate disparate obligations from one location to another.

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Authored By:

Yehuda Hausman, Law Clerk

Harry Nelson, Managing Partner

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