

ALAMEDA-CONTRA COSTA TRANSIT DISTRICT



STAFF REPORT

MEETING DATE: 12/8/2021

Staff Report No. 21-468a

TO: AC Transit Board of Directors
FROM: Michael A. Hursh, General Manager
SUBJECT: Employee Vaccine Mandate

ACTION ITEM

RECOMMENDED ACTION(S):

Receive a report on employee vaccination rates and discussions with labor regarding vaccination requirements; and consider whether or not to implement a vaccine mandate for all District employees, Board officers and Board members. [Continued by the Board at the October 13, 2021 Board of Directors Meeting]

STRATEGIC IMPORTANCE:

Goal - Safe and Secure Operations
Initiative - Employee Recruitment, Training and Retention

The increase in District employees' vaccination rates protect the public, other employees, and their families.

BUDGETARY/FISCAL IMPACT:

There is no fiscal impact to receiving this report. Should a vaccination mandate be implemented, the District will incur costs for administration and testing. These costs will be reviewed and itemized at a later date.

BACKGROUND/RATIONALE:

During the September 8th, 2021 public meeting of the Alameda-Contra Costa Board of Directors, the Board of Directors requested background information on public and private employee vaccination initiatives and whether to implement further measures to increase vaccination rates at the District. On October 13, 2021, Staff Report 21-468 was presented to the Board. This report outlined the District's vaccination rates at the time, efforts to increase vaccination rates among District employees, federal and state vaccination mandates, labor considerations and legal considerations. In response to this report, the Board of Directors requested staff to approach and discuss a potential vaccine mandate with the District's labor unions. In addition to an update on the conversations with labor unions, this report also provides updates on District vaccination rate efforts, supplemental vaccination rates for District employees, as well as updates on federal and state vaccination mandates and exemptions.

A. Discussions with Labor

From late October until late November, staff actively met with all three labor unions at the District to discuss

potential vaccination mandates. Below are the results of these meetings.

- Staff met with International Brotherhood of Electrical Workers (IBEW), Local 1245 on October 27th, 2021. Union leadership expressed interest in and support of a vaccine mandate. Per voluntary disclosure data, IBEW's vaccination rate is approximately seventy percent (70%), which is higher than the District voluntary disclosure average of fifty two percent (52%).
- Staff also conferred with Amalgamated Transit Union (ATU) Local 192 on October 27th, November 3rd, 9th, 19th, and 23rd, 2021 regarding a vaccine requirement. Initially, ATU requested additional time prior to any District vaccine mandate to strategize and implement an internal union initiative to increase their membership's vaccination rates. ATU also advised the District that they would be surveying their membership to better understand membership's sentiments regarding a District vaccine mandate. Results from their survey are expected to be shared December 4, 2021. Per voluntary disclosure data, ATU vaccination rates are currently at approximately forty-nine percent (49%).
- Staff attempted to schedule several meetings with American Federation of State, County and Municipal Employees (AFSCME) Local 3916, on October 26, October 29 (two meetings), November 3, and November 9, 2021. During the November 9th meeting, AFSCME advised that they were not prepared to discuss a District employee vaccine mandate. On November 18th, 2021, AFSCME notified the District that they would be surveying their membership like ATU and would communicate results by November 30th. Per voluntary disclosure data, AFSCME's current vaccine rate is approximately sixty percent (60%).

Once both ATU and AFSCME have provided results regarding their memberships' responses to the survey, the District will be able to engage in substantive and collaborative conversations about vaccine requirements, grace periods for compliance, and potential consequences for failure to vaccinate.

B. District Vaccination Efforts

As a result of the recent meetings, Staff partnered with ATU to build upon the myth busting communication plan referenced above. Myth busting and vaccine education, using scientifically supported evidence and credible sources, are one of the best and most effective ways to encourage vaccination rates. Staff continues the education and myth busting initiative through encouragement from management staff, written articles and information in the General Manager's newsletter, District wide signage, and videos that play continuously in the common areas of the divisions. Staff and ATU plan to continue these efforts in the coming months.

To further encourage vaccinations at the District, Staff and ATU partnered with Holy Names University, School of Nursing for three onsite vaccine clinics at D6, D4 and D2 on November 11, 12, and 14, 2021, resulting in seventy-eight shots administered, five of which were new vaccinations and seventy-three of which were booster shots. This is in addition to the multiple clinics that were held earlier in the year for employees and families.

C. Supplemental Vaccination Rate Data

Staff currently reports out vaccination rates on a weekly basis based on the voluntary disclosure of vaccination

by employees (“voluntary disclosure data”). Employees are encouraged to disclose their vaccination status to the District after they have completed the second dose. In response, the District provides a monetary incentive for proof of vaccination. While this method has been mostly successful, there are some concerns that it may not be capturing all vaccinated employees, as some may choose not to disclose to the District for personal reasons.

During the October 13th Board meeting, Director Peoples expressed concern regarding the accuracy of the vaccination rates contained in the Staff Report. To supplement the voluntary disclosure data, staff contacted the District’s health providers, Kaiser Permanente (KP) and Healthnet. KP provided a vaccination report dated November 14, 2021, which includes vaccination data for KP subscribers from both KP and non-KP providers. The data demonstrates that out of 235 non-ATU subscriber employees, 205 employees are fully vaccinated, equaling a vaccination rate of 87.2%. Of the 1392 ATU subscriber employees, 984 employees are fully vaccinated, equaling a vaccination rate of 70.7%. Of the 1627 total KP subscriber employees (management, AFSCME, IBEW and ATU), 1189 total employees are fully vaccinated, equaling a total KP subscriber rate of 73.1%.

HealthNet is not able to provide vaccination rates for employees because of the way that HealthNet is organized as an HMO. This does provide a gap in data; however, assuming half of HealthNet subscribers are vaccinated, this would put the total employee vaccination rate at a much higher rate than the voluntary vaccination rate percentage that Staff currently is reporting. Staff is continuing to refine these numbers to provide the most accurate employee population data as possible.

D. Status of Federal and State Mandates

On November 5, 2021, the federal Occupational Safety and Health Administration (OSHA) issued Emergency Temporary Standards (ETS) requiring employers with 100 or more employees to develop, implement and enforce a mandatory COVID-19 vaccination policy, with an exception for employers who establish, implement and enforce a policy allowing unvaccinated employees to undergo testing at least weekly and wear a face covering while at work. Per the OSHA ETS, employees must be fully vaccinated by January 4, 2022. In addition, employers must pay employees for the time taken to get vaccinated. Importantly, however, on November 12, 2021, the Fifth Circuit issued a stay of the OSHA ETS implementation. The stay and all other legal challenges to the mandate are currently consolidated in the Sixth Circuit Court of Appeals.

As explained in Staff Report 21-468, Cal/OSHA would need to formally adopt the federal OSHA ETS before these requirements would apply to AC Transit. Due to the current stay of the OSHA ETS issued by the Fifth Circuit Court of Appeals, Cal/OSHA has postponed its consideration and adoption (via HORCHER proposal) of the OSHA ETS until more information on the litigation develops. Accordingly, the current Cal/OSHA ETS (which does not have a vaccine mandate) remains in effect.

E. Exemptions

With a vaccine requirement, the District will be required to provide for medical and religious exemptions to comply with the ADA, Title VII, FEHA and other applicable laws. Specifically, the District is required to receive, assess, and grant/deny exemption requests based on medical conditions and sincerely held religious beliefs. If exemption is granted, testing must be considered as one possible reasonable accommodation. An

accommodation is reasonable unless it causes an undue burden on the employer. If testing is provided as a reasonable accommodation, the cost will be absorbed by the District. If the Board elects to move forward with a vaccine requirement, Human Resources will work with Legal to receive, assess, and approve/deny exemption requests, ensuring that there is a uniform process for evaluating requests.

F. Natural Immunity

Those challenging employer mandated vaccination policies have argued that natural immunity should be considered by employers before crafting a mandatory vaccination policy. More specifically, if science supports the idea that unvaccinated individuals who have had COVID-19 have certain natural immunities, this should be considered when determining whether all unvaccinated employees are required to be vaccinated. This concept was raised by the Fifth Circuit in ruling on the request for an injunction prohibiting the implementation of OSHA ETS: “[l]ikewise, a naturally immune unvaccinated worker is presumably at less risk than an unvaccinated worker who has never had the virus.” To date, however, staff is not aware of any vaccine requirements that exempt employees who have already had COVID-19 due to a perceived natural immunity. Moreover, requiring proof of a COVID infection in lieu of vaccination could present additional challenges for the District.

G. Staff Recommendation

Staff recommends a vaccine requirement with no testing option given the efficacy of mandates with other employers. Despite the various challenges to mandates, they appear to be working. The Department of Transportation boasts the highest vaccination rate of any federal agency at 99.6%. And as of its November 1st deadline for full vaccination, the City and County of San Francisco’s employee vaccination rate was 98%, with SFMTA reporting fewer than 100 employees who remained unvaccinated or who had not shared their status.

If the Board elects to proceed with this recommendation, staff will continue its discussions with Labor regarding implementation, including a grace period to get vaccinated, consequences for failure to vaccinate and time off to get the shot. The Board can, of course, provide guidance regarding any or all of these implementation issues or allow staff and the unions to work them out within a specified time frame.

ADVANTAGES/DISADVANTAGES:

The advantages of continuing the District’s efforts to improve vaccination rates and a vaccination mandate are the safety and well-being of District employees and the public. The disadvantage is the added cost of resources needed for efforts and a mandate.

ALTERNATIVES ANALYSIS:

There are no practical alternatives to the course of action recommended in this report as all other alternatives have been considered and/or implemented in an effort to increase vaccination rates.

PRIOR RELEVANT BOARD ACTION/POLICIES:

Staff Report 21-468

ATTACHMENTS:

None

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