

ALAMEDA-CONTRA COSTA TRANSIT DISTRICT



STAFF REPORT

MEETING DATE: 10/13/2021

Staff Report No. 21-468

TO: AC Transit Board of Directors
FROM: Jill A. Sprague, General Counsel
SUBJECT: Vaccination Measures

ACTION ITEM

RECOMMENDED ACTION(S):

Consider receiving background information on public and private employee vaccination initiatives, and provide direction to staff on whether to develop a plan to implement further measures to increase vaccination rates among District employees. [Requested by Director Walsh - 9/8/21]

STRATEGIC IMPORTANCE:

Goal - Safe and Secure Operations

Initiative - Employee Recruitment, Training and Retention

As many employers move toward requiring employees to be vaccinated against COVID-19, the District is looking at available options to increase employee vaccination rates to protect employees, their families and the public.

BUDGETARY/FISCAL IMPACT:

The budgetary impact of pursuing a mandatory vaccination policy is currently unclear but would likely include continued incentive pay for vaccinations; COVID testing for unvaccinated employees; employee paid time-off to obtain a vaccination or COVID test; and staff time related to negotiating, enforcing and defending vaccination requirements. By not requiring vaccinations, the District would continue to incur expenses related to employee absences for COVID, compliance with California Occupational Safety and Health Administration (CalOSHA) testing requirements for COVID outbreaks, and a potentially extended period for requiring and providing Personal Protective Equipment.

BACKGROUND/RATIONALE:

COVID-19 vaccines have been available to public transit workers since March 2021. As vaccines have become widely available, employers have considered and, in some cases imposed, vaccination requirements for their employees. Employers establishing vaccination requirements have based the decision on many factors including federal and state mandates, relatively low vaccination rates in some regions or among some employees, ensuring a safe working environment for the return to offices and work sites, and the safety of customers, patients or students served by employees. Some public entities with vaccination requirements for employees include City and County of San Francisco, City of Oakland, City of Berkeley, City of Piedmont, City of

Los Angeles, Contra Costa County and LA Metro. According to the American Public Transportation Association (APTA), 15% of all transit agencies currently require vaccinations and another 35% are considering mandating vaccinations.

All references to vaccines and vaccination are to the COVID-19 vaccines distributed by Moderna, Pfizer/BioNTech and Johnson & Johnson.

This report reviews the various vaccine requirements imposed, including federal and state mandates, as well as considerations and challenges associated with such requirements.

I. AC Transit's Vaccination Status and Efforts to Increase Vaccination Rates

AC Transit's overall vaccination rate is 49% (as of 9/21/21). The vaccination rate for the District's frontline employees is 47% (41% for Bus Operators). For comparative analysis, staff researched the employee vaccination rates for the following Bay Area public employers: Alameda County (69.9%), Contra Costa County (70.9%), employees of the Oakland Fire Department (83%) and sister Bay Area transit agencies (VTA ~65%, BART 75%, SFMTA 66% [fully vaccinated, 82% partially vaccinated], Golden Gate 80%).

To encourage employee vaccinations, the District implemented an array of internal initiatives including a \$100 incentive for each employee who provides proof of full vaccination and a comprehensive information campaign consisting of polling, myth busting videos -- Ask the Experts (a 7-part series) and It's My Shot - and the GM NEWSLTR.

The District continues efforts to safeguard employees from the risk of COVID-19 through onsite vaccine clinics. Since spring 2021, a total of four onsite clinics have been hosted across District properties, with more planned. The AC Transit vaccine clinics require no appointment, are free of charge, time-off is authorized, transportation provided, and clinics are available to all employees and family members ages 12 and up.

Beginning August 2, 2021, the District instituted a vaccination requirement for all new hires. New employees who qualify for religious or medical exemption are required to test weekly for COVID-19.

II. Federal & State Mandates

A. Federal Mandates

On August 25, 2021, and following the Food and Drug Administration's (FDA) approval of Pfizer vaccine, the Department of Defense released a memo which directed the secretaries of the military departments to immediately begin full vaccination of all members of the department on active duty or in the Guard or Reserve, who aren't yet fully vaccinated against COVID-19.

The U.S. Department of Health and Human Services is also requiring more than 25,000 members of its healthcare workforce to be vaccinated against COVID-19, including National Institutes of Health's (NIH) and Indian Health Service's staff, contractors, trainees, and volunteers who serve in federally operated health care and research facilities or who may come in contact with patients. Additional vaccine mandates were instituted for members of the U.S. Public Health Service Commissioned Corps by the U.S. Surgeon General.

On September 9, 2021, President Biden announced the Path Out of the Pandemic plan. The comprehensive

and multi-prong national strategy included regulatory powers to reduce the number of unvaccinated, increasing testing opportunities, stronger mask requirements, improving health care for those with COVID-19, and economic recovery. While Biden's Plan does not appear to directly affect local public agencies like AC Transit, key provisions include:

- For the private sector, the plan directs the Department of Labor's Occupational Safety and Health Administration to develop an Emergency Temporary Standard (ETS) that will require all employers with at least 100 employees to ensure their workforce is fully vaccinated or else subjected to weekly COVID-19 testing before coming into work.
 - The ETS will also require covered employers to provide employees paid time off to get vaccinated and recover from side effects associated with the COVID-19 vaccine.
 - The details and timeline of the ETS are unknown. It is possible that the ETS will be adopted by CalOSHA, which governs special districts such as AC Transit.
- For the federal government, the president signed two executive orders that, respectively, mandate vaccination for all executive branch employees and for some employees of federal contractors. The new orders eliminate the testing option for those who are not vaccinated unless they receive an approved exemption.
 - Requirements for federal contractors are set by a Safer Federal Workforce Task Force, which issued its guidance on September 24 providing that employees of federal contractors must be fully vaccinated by December 8.
 - Although AC Transit receives federal funds, it is not considered a covered contractor.
- Finally, the plan provides that the Centers for Medicare and Medicaid Services begin requiring vaccination for employees in most healthcare settings, including hospitals, dialysis facilities, ambulatory surgical settings, and home health agencies, as a condition for continued federal funding.

B. State Mandate

On July 26, 2021, Governor Gavin Newsom announced that all state workers - including workers in health care and high-risk congregate settings - must "either show proof of full vaccination or be tested at least once per week." The new policy for state workers took effect August 2 and testing is being phased in. The new policy for health care workers and congregate facilities took effect on August 9.

Per an August 5th announcement, officials expanded the vaccination requirement to cover more types of health care facilities and issued two new public health orders. The first order requires workers in health care settings to be fully vaccinated or receive their second dose by September 30, 2021. If a health care worker remains unvaccinated for religious or qualifying medical reasons, testing is required.

On August 11th, the California Department of Public Health released a public health order "requiring all school staff to either show proof of full vaccination or be tested at least once per week." The order applies to public and private K-12 schools but does not apply to higher education or child-care facilities.

California lawmakers [considered a potential bill requiring COVID-19 vaccinations](https://www.latimes.com/california/story/2021-08-26/california-lawmakers-grapple-with-statewide-covid-19-vaccine-mandate) [on a state level for anyone to enter an indoor business establishment and to have workers vaccinated](https://www.latimes.com/california/story/2021-08-26/california-lawmakers-grapple-with-statewide-covid-19-vaccine-mandate), but ultimately did not pass any mandate before the end of the legislative session.

III. Labor Considerations

The various vaccination requirements have raised a number of labor, legal and logistical questions. With

respect to labor, the wide consensus among public employers with unionized workforces is that, while a vaccination requirement itself is not subject to bargaining, the *implementation* of a vaccine mandate is subject to bargaining, referred to as effects bargaining. This consensus is based on a July 26, 2021 appellate court decision in *American Federation of State, County & Municipal Employees (AFSCME) Local 3299 v. Regents of the University of California* Case Number SF-CE-1300-H, et al, holding that “the decision to adopt the influenza vaccination policy was outside the scope of representation because under the unprecedented circumstances of a potential confluence of the COVID-19 and influenza viruses, the need to protect public health was not amenable to collective bargaining or, alternatively, outweighed the benefits of bargaining over the policy as to University employees. We also find, however, that the University was not privileged to implement the vaccination policy before completing negotiations over its effects. . .”

Assuming effects bargaining is required, the following issues would likely be subject to negotiation:

- Whether all or just certain employees will be part of a mandatory vaccination policy;
- Timing of the vaccination;
- Any time/off pay in addition to what might be required by law;
- Any consequences for an employee's refusal to be vaccinated whether through an exemption or simply a refusal to be vaccinated; and
- Accommodations for employees with valid exemptions.

IV. Legal Considerations

In addition to labor negotiations, a vaccine requirement raises a number of legal issues including exemptions, wage and hour considerations, and potential legal challenges.

A. Required Exemptions

Legal and Equal Employment Opportunity Commission (EEOC) guidance establish exemptions from vaccination requirements for medical conditions and sincerely held religious beliefs. Specifically, the Americans with Disabilities Act (ADA) contains rules regarding an employer seeking medical information and requires employers to make reasonable accommodations for employees with disabilities who cannot perform the essential functions of their job unless the accommodation creates an undue hardship. Similarly, Title VII of the Civil Rights Act (Title VII) requires employers to accommodate an employee's sincerely held religious belief unless the accommodation creates an undue hardship.

Whether a religious practice or belief is “sincerely held” is not a clear-cut inquiry. The EEOC Guidance provides that “the employer should ordinarily assume that an employee’s request for religious accommodation is based on a sincerely held religious belief. If, however, an employee requests a religious accommodation, and an employer has an objective basis for questioning either the religious nature or the sincerity of a particular belief, practice, or observance, the employer would be justified in requesting additional supporting information.”

The EEOC provides employers with a two-step process to determine if an employer can accommodate an employee who has a qualifying exemption - (1) does the non-vaccinated person pose a direct threat; and (2) if so, is there a reasonable accommodation that would reduce or eliminate the threat. In considering accommodations, the EEOC notes an employer should consider the status of the overall vaccination rate and

notes:

“Employers are advised to consider all the options before denying an accommodation request. The proportion of employees in the workplace who already are partially or fully vaccinated against COVID-19 and the extent of employee contact with non-employees, who may be ineligible for a vaccination or whose vaccination status may be unknown, can impact the ADA undue hardship consideration. Employers may rely on CDC recommendations when deciding whether an effective accommodation is available that would not pose an undue hardship.”

Because the religious exemption is not clear cut, employers are seeing an enormous number of accommodation requests based on religion. Health care providers in San Diego have reported over 1,700 requests for exemptions, most based on religious exemptions. Similarly, more than 2,600 Los Angeles Police Department (LAPD) employees have indicated that they plan to pursue religious exemptions. In San Francisco, of the 366 unvaccinated San Francisco Police Department officers, nearly 200 have requested religious exemptions.

One potential accommodation for such exemption requests is weekly or frequent COVID testing, which can pose an enormous logistical and financial burden on employers.

B. Challenges to Mandates

Vaccination requirements have also resulted in legal challenges which, have largely been unsuccessful to date:

- A federal district court in Texas dismissed a case challenging a hospital’s mandatory COVID-19 vaccination policy for employees. *See Bridges, et al v. Houston Methodist Hospital et al*, Docket No. 4:21-cv-01774 (S.D. Tex. June 12, 2021).
- Similarly, the Seventh Circuit Court of Appeals upheld Indiana University’s policy requiring students be vaccinated unless exempt. *Klaassen v. Trustees of Indiana University*, No. 21-2326 (7th Cir. 2021).
- In *Brown v. Smith*, six plaintiffs challenged the California’s vaccination mandate claiming that it was invalid because the state could not constitutionally mandate “unavoidably unsafe” products, and vaccines, they claimed, were very unsafe. The plaintiffs argued the mandate was unconstitutional because it violated their religious freedom as protected by the First Amendment and the California constitution, and it violated their children’s right to education because it violated equal protection. Far less convincingly, the group argued that the law violates a legal prohibition on medical experiments. The Court of Appeal rejected all of these claims, holding among other things, that the California constitution’s right to education did not prevent the state from imposing an immunization mandate.

Other challenges to both state and federal mandates are working their way through the courts, including a challenge by a California firefighter union contesting the Governor’s COVID vaccine rule; a lawsuit by LAPD employees over the City’s vaccination mandate; a lawsuit by a San Francisco firefighter over the requirement that employees report their vaccination status and eventually get vaccinated; and a challenge by police and firefighter unions to San Jose’s vaccination mandate. These challenges, while unsuccessful thus far, require extensive time and resources to defend.

C. Wage & Hour

Finally, vaccination requirements raise wage and hour considerations. Specifically, Labor Code 222.5 requires employers to pay for the time to receive a vaccination or COVID test as well as the test itself:

No person shall withhold or deduct from the compensation of any employee, or require any prospective employee or applicant for employment to pay, any fee for, or cost of, any pre-employment medical or physical examination taken as a condition of employment, nor shall any person withhold or deduct from the compensation of any employee, or require any employee to pay any fee for, or costs of, medical or physical examinations required by any law or regulation of federal, state or local governments or agencies thereof.

Specifically, the California Department of Industrial Relations has stated:

If the employer requires an employee to obtain a COVID-19 test or vaccination, then the employer must pay for the time it takes for the testing or vaccination, including travel time.

Accordingly, the District would need to build testing and vaccinations into schedules in order to implement vaccination requirements and testing as an accommodation for exemptions.

ADVANTAGES/DISADVANTAGES:

The myriad of relevant considerations related to vaccine requirements are set forth above. Based on the Board's consideration of the various pros and cons, the Board may choose to provide direction to staff regarding a vaccine requirement or other measures to improve vaccination rates among District employees.

ALTERNATIVES ANALYSIS:

The Board may choose not to provide direction to staff regarding vaccination requirements or other measures in which case the District will continue to encourage employees to get vaccinated, provide information to employees regarding the safety and efficacy of vaccines, host vaccine clinics, and incentivize employees to provide proof of vaccination.

PRIOR RELEVANT BOARD ACTION/POLICIES:

None.

ATTACHMENTS:

None.

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