



LIEBERT CASSIDY WHITMORE

6033 WEST CENTURY BOULEVARD,  
5<sup>TH</sup> FLOOR  
LOS ANGELES, CALIFORNIA 90045  
T: (310) 981-2000  
F: (310) 337-0837

135 MAIN STREET,  
7<sup>TH</sup> FLOOR  
SAN FRANCISCO, CALIFORNIA 94105  
T: (415) 512-3000  
F: (415) 856-0306

5250 NORTH PALM AVENUE,  
SUITE 310  
FRESNO, CALIFORNIA 93704  
T: (559) 256-7800  
F: (559) 449-4535

550 WEST "C" STREET,  
SUITE 620  
SAN DIEGO, CALIFORNIA 92101  
T: (619) 481-5900  
F: (619) 446-0015

400 CAPITOL MALL  
SUITE 1260  
SACRAMENTO, CALIFORNIA 95814  
T: (916) 584-7000  
F: (916) 584-7083

# **CITY ATTORNEY'S ASSOCIATION OF LOS ANGELES COUNTY (CAALAC)**

## **Hot Topics in COVID-19 Employment Law: Vaccination/Testing Regualtions and Religious Accommodations**

*11/18/2021*

*PRESENTED BY:*

Alexander Volberding

# Hot Topics in COVID-19 Employment Law: Vaccination/Testing Regulations and Religious Accommodations

City Attorney Association of Los Angeles County (CAALAC) Webinar | November 18, 2021

Presented by: Alexander Volberding



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### Agenda

- New OSHA COVID-19 Regulations
- Religious Accommodations to COVID-19-Related Requirements
- Questions and Answers



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## Part I: New OSHA COVID-19 Regulations



### New OSHA COVID-19 Regulations: Issues to Address

- Relationship between OSHA and Cal/OSHA
- OSHA Emergency Temporary Standards (“ETS”)
  - COVID-19 Action Plan
  - ETS requirements/highlights
  - Recent developments
- Forthcoming Cal/OSHA regulations



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## New OSHA COVID-19 Regulations: Relationship between OSHA & Cal/OSHA

- OSHA
  - Jurisdiction
    - “‘Employer’ means a person engaged in a business affecting commerce” ... “but does not include ... any state or political subdivision of a state.”
  - Adoption of OSHA-approved state plan
    - 21 states have adopted such plans
      - Require health and safety standards that are “at least as effective in providing safe and healthful employment”
      - Must cover both private *and* public employers
      - OSHA provides states with such plans 50% of the operating costs
    - Preempt federal OSHA standards and enforcement

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## New OSHA COVID-19 Regulations: Relationship between OSHA & Cal/OSHA

- Cal/OSHA
  - Adoption of OSHA-approved state plan
    - Covers private and public employers
  - COVID-19 regulations (8 CCR 3205-3205.4)
    - COVID-19 Prevention Program (“CPP”)
    - Multiple infections/outbreaks
    - Major COVID-19 outbreaks
    - Prevention in employer-provided housing
    - Prevention in employer-provided transportation

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## New OSHA COVID-19 Regulations: New Federal OSHA ETS

- COVID-19 Action Plan – Announced September 9
  - 6-part plan to increase vaccination rates/reduce transmission of virus
  - Instruction to Federal OSHA - New rules/regulations
    - Scope – Employers with 100 or more employees
    - Requirements
      - Ensure employees are either fully vaccinated or tested for COVID-19 weekly
      - Provide paid vaccination leave

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## New OSHA COVID-19 Regulations: New Federal OSHA ETS

- COVID-19 Vaccination and Testing ETS (29 CFR 1910.501(a)-(m)) – November 4/5
  - Purpose
  - Scope and application
  - Definitions
  - Policy on vaccination
  - Determination of employee vaccination status
  - Employer support for employee vaccination
  - COVID-19 testing for employees who are not fully vaccinated
  - Employee notification of a positive COVID-19 test
  - Face coverings
  - Information provided to employees
  - Reporting COVID-19 fatalities and hospitalizations
  - Records
  - Dates

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## New OSHA COVID-19 Regulations: New Federal OSHA ETS

- COVID-19 Vaccination and Testing ETS highlights
  - ETS preempts state and local laws except where there is a OSHA-approved state plan
  - Vaccination policy
    - Either: (1) vaccination requirement; or (2) vaccination/testing option
  - Testing
    - Weekly testing for employees not fully vaccinated
    - Employers do *not* have to pay for costs
  - Vaccination leave
    - Four hours to be vaccinated
    - “Reasonable” leave to recover from vaccination
  - Face coverings
    - Indoors for employees not fully vaccinated

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## New OSHA COVID-19 Regulations: New Federal OSHA ETS

- Fifth Circuit Court of Appeals Stay – November 6/12
  - Order: OSHA must “take no steps to implement or enforce” the ETS “until further notice.”
  - OSHA suspended activities related to implementation and enforcement of ETS pending future developments in the litigation

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## New OSHA COVID-19 Regulations: Cal/OSHA Regulations

- COVID-19: Vaccination, Testing, and Face Coverings (8 CCR 3205.5-3205.8)
  - Adoption of regulations to maintain OSHA-approved state plan
    - Unclear effect of stay on obligation
  - Draft regulations – **November**
  - November 18 meeting
    - Specific regulatory requirements to be determined

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## Part II: Religious Accommodations for COVID-19-Related Requirements



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# Hot Topics in COVID-19 Employment Law: Vaccination/Testing Regulations and Religious Accommodations

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## COVID-19 Religious Accommodations: Issues to Address

- Background
- Employee requests for accommodation
- Employer determination as to qualification
- Engagement in the “Interactive Process”
- Employer determination as to reasonableness of accommodation
- Best practices

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## COVID-19 Religious Accommodations: Background: Applicable Laws

- Applicable laws:
  - Federal – Title VII of the U.S. Civil Rights Act of 1964
  - State – California Fair Employment and Housing Act (FEHA)
- Scope:
  - Employees, applicants, and volunteers (FEHA)
- Purpose:
  - Prohibit employment-based religious discrimination
  - Provide protections for employees whose religion conflicts with employer policies

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# Hot Topics in COVID-19 Employment Law: Vaccination/Testing Regulations and Religious Accommodations

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## COVID-19 Religious Accommodations: Background: “Religion”/“Religious Beliefs”

- Title VII
  - Religion – broadly defined
  - “All aspects of religious observance and practice”
- FEHA
  - Similarly broad protection of religious beliefs, observances, practices
    - Beliefs that are sincerely held and occupy a place of importance in the individual’s life
    - Beliefs do not need to be part of a formally recognized religion

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## COVID-19 Religious Accommodations: Employee Requests

- Employee requests for accommodation
  - Responsive to legal requirement or employer policy
    - Accommodation request form provided by employer
    - Request submitted in other written form (e.g., email)
  - Other ways employees may request accommodation
    - Verbal - No “magic words” needed
- Minimum requirements
  - Employee must show that request for accommodation is:
    - Being requested for religious reasons; and
    - Based on a religious belief that conflicts with an employer policy

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# Hot Topics in COVID-19 Employment Law: Vaccination/Testing Regulations and Religious Accommodations

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## COVID-19 Religious Accommodations: Determination of Qualification

- Assessing the potential conflict
  - Employee articulates:
    - Request for accommodation is for religious reasons; *and*
    - Request is related to a conflict between the employee's religious belief that and the employer policy
  - Employer determines:
    - There is a conflict between the policy/practice and the employee's belief; *and*
    - The employee qualifies based on the nature and sincerity of the employee's religious belief

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## COVID-19 Religious Accommodations: Determination of Qualification

- Determination of qualification depends on two principal questions:
  1. How does the employee's religious belief, observance, or practice conflict with the employer policy?
  2. Is the employee's religious belief, observance, or practice sincerely held?
- Determination should be made on an individualized case-by-case basis
  - Analysis of employee's statement regarding the nature of their religious belief, and its conflict with the employer's policy
  - Analysis of the employee's conduct and whether such conduct calls into question the sincerity of the purported belief

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## COVID-19 Religious Accommodations: Determination of Qualification

- Religions have specific attributes
  - Distinguishable from other belief systems, such as personal and political belief systems, that are not protected by Title VII and FEHA
- Three (3) factors standard:
  1. Whether the religion addresses fundamental and ultimate questions having to do with deep and imponderable matters; and
  2. Whether the religion is comprehensive in nature and consists of a belief-system as opposed to an isolated teaching; and
  3. Whether the religion can be recognized by the presence of certain formal and external signs.

## COVID-19 Religious Accommodations: Determination of Qualification

- Potential follow-up questions:
  - What is the name of your religion?
  - Are you a member of a religious organization?
  - Please describe your belief system generally
  - How does the agency's vaccination requirement conflict with such beliefs?
  - Please describe what practices and observances your belief requires?
  - Do you have any additional information that you would like to share regarding your religious beliefs that supports your request for accommodation?

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## COVID-19 Religious Accommodations: Determination of Qualification

- Employee's request identifies:
  - Conflict between employer policy and employee's religious belief
  - Contextualizes the conflict in terms of a comprehensive religious belief system
    - Not merely an isolated teaching opposed to the policy
- Conflict should be specific
  - Vague and ambiguous conflicts may be insufficient
  - Clarifying questions may be necessary to ascertain specific conflict
- Purpose of accommodation: Resolve or reconcile the specific conflict
  - Effective accommodation resolves the conflict completely
  - Reducing, but not resolving, the conflict generally may be insufficient

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## COVID-19 Religious Accommodations: Determination of Qualification

- Establishing insincere conduct and an objective basis to question the sincerity of the employee's beliefs
  - Employee's observed/known conduct contradicts or conflicts with the professed belief;
  - Accommodation sought is particularly desirable, likely to be sought for secular reasons;
  - Timing of request is suspect
- Employer *may* request additional info going toward employee's sincerity where there is an objective basis to question
- May request, but may not require, specific form of additional info:
  - Third-party verification (clergy, fellow practitioner, etc.)
  - Written materials or employee's own explanation
- Unreasonable requests for verification (*i.e.*, unnecessary or excessive) may be considered wrongly denying the accommodation or harassment

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## COVID-19 Religious Accommodations: The “Interactive Process”

- Obligation to engage in the interactive process
  - Title VII – Does *not* expressly require interactive process
    - BUT courts expect both sides to engage in “cooperative information-sharing process”
  - FEHA – Requires interactive process
- Obligation to follow more prescriptive applicable guidance
  - General rule applicable to the qualification determination, the interactive process and determination of reasonableness
  - Obligation to engage in interactive process as required by FEHA
- Interactive process should be individualized
  - Case-by-case review of individual qualifications and determination of requested accommodations

## COVID-19 Religious Accommodations: Reasonableness and Safety

- Employer determination as to requested accommodation
  - Workplace accommodation requests should address both reasonableness and safety
  - Non-workplace accommodation requests should focus on reasonableness

## COVID-19 Religious Accommodations: Reasonableness and Safety

- Reasonableness
  - Accommodation should not pose a “undue hardship” to the employer or its operations
  - Factors (FEHA):
    1. Nature and cost of the accommodation needed
    2. Financial resources of facilities involved, number of employees at facility, effect on expense and resources of facility, other impacts on operation of facility
    3. Employer’s overall financial resources, overall number of employees, number/type/location of facilities
    4. Type of operations (composition, structure, functions of the workforce)
    5. Geographic separateness or admin./fiscal relationship of the facility

## COVID-19 Religious Accommodations: Reasonableness and Safety

- Safety
  - Accommodation must not pose a “direct threat” to the health and safety of the requestor or others
  - Determination made by analyzing the following four factors:
    1. The duration of the risk;
    2. The nature and severity of the potential harm;
    3. The likelihood that potential harm will occur; and
    4. The imminence of the potential harm

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## COVID-19 Religious Accommodations: Making a Decision and Afterward

- Provide decision in writing
  - Rejection of request should be articulable/defensible
    - Do not need to provide specific reason for rejection
- Decision should be final, not subject to appeal
- If accommodation offered, follow through
  - May revisit decision in future – employee's beliefs and circumstances may change

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## COVID-19 Religious Accommodations: Overview: Best Practices

- Individualized case-by-case analysis
  - Employee's qualification for the interactive process
  - Employer's determination regarding the reasonableness/safety of requested accommodation
- Standard and uniform questions regarding nature of religious belief
  - Use of standardized form
  - Standard preliminary questions
- Specific and tailored follow-up questions
- Document accommodation process thoroughly

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## Questions and Answers



# Thank you!

**Alexander Volberding**

**Associate | Los Angeles**

310.981.2021 | [avolberding@lcwlegal.com](mailto:avolberding@lcwlegal.com)

[www.lcwlegal.com/our-people/alexander-volberding](http://www.lcwlegal.com/our-people/alexander-volberding)



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