

Date of Hearing: March 30, 2022

ASSEMBLY COMMITTEE ON LABOR AND EMPLOYMENT

Ash Kalra, Chair

AB 1993 (Wicks) – As Introduced February 10, 2022

**SUBJECT:** Employment: COVID-19 vaccination requirements

**SUMMARY:** Mandates every employer to require each employee or independent contractor to provide proof to the employer that the person has been vaccinated against COVID-19 unless the person is ineligible for vaccination due to a medical condition or disability or sincerely held religious belief. Specifically, **this bill:**

- 1) Mandates an employer to require each employee or independent contractor to provide proof to the employer, or an authorized agent thereof, that the person has been vaccinated against COVID-19.
- 2) Defines employer to mean both private and public employers. For purposes of the definition of “public employer” the following applies:
  - a) The state and every state entity, including, but not limited to, the Legislature, the judicial branch, the University of California, and the California State University.
  - b) A political subdivision of the state, or agency or instrumentality of the state or subdivision of the state, including, but not limited to, a city, county, city and county, charter city, charter county, school district, community college district, joint powers authority, joint powers agency, and any public agency, authority, board, commission, or district.
- 3) Defines “vaccinated against COVID-19” to mean the person has received the first dose of a two-dose COVID-19 vaccine authorized by the United States Food and Drug Administration or the World Health Organization, provides proof of that first dose, and provides proof of receiving the second dose of the vaccine within 45 days after receiving the first dose.
- 4) Defines “proof” as valid documentation of the person’s COVID-19 vaccination record, which may be their vaccine card or a copy or a digital version thereof, as provided by their health care provider, the State Department of Public Health (DPH), or another state or federal agency.
- 5) States that the vaccination requirement in (1) does not apply to a person who is ineligible to receive a COVID-19 vaccine due to a medical condition or disability or because of a sincerely held religious belief that:
  - a) Precludes the person from receiving a vaccination, subject to verification thereof.
  - b) Is in compliance with this chapter and other state and federal laws, including the reasonable accommodation provisions of the federal Americans with Disabilities Act of 1990 and Title VII of the federal Civil Rights Act of 1964.

- 6) Requires the DFEH to consult with DPH and the Division of Occupational Safety and Health to provide guidance to employers on what constitutes a medical condition or disability, or a sincerely held religious belief, for purposes of the above.
- 7) Requires proof-of-vaccination status be obtained in a manner that complies with federal and state privacy laws and shall not be retained by the employer, unless the person authorizes the employer to retain proof. The employer or authorized agent shall not share, transfer, or sell that information with or to a third party.
- 8) Requires, on January 1, 2023, each employer to affirm, in a form and manner provided by the DFEH, that each employee or independent contractor is in compliance. After January 1, 2023, each employer must also affirm that each new employee or independent contractor is in compliance at the time of hiring or contracting with that person.
- 9) Requires the DPH to impose a penalty of an unspecified amount on an employer for noncompliance.
- 10) States that the provisions of the act are operative until the federal Centers for Disease Control and Prevention's Advisory Committee on Immunization Practices determines that COVID-19 vaccinations are no longer necessary for the health and safety of individuals, and as of that date is repealed.
- 11) Provides that the provisions of the act are severable.

**EXISTING LAW:***Existing State Law*

- 1) Establishes the FEHA, which protects the right and opportunity of all persons to seek, obtain, and hold employment without discrimination, abridgment, or harassment on account of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, sexual orientation, or military and veteran status.
- 2) Prohibits, under the provisions of FEHA, various forms of employment discrimination, including discharging or refusing to hire or to select for training programs any person based on one of the protected categories in (1).
- 3) Provides that it is an unlawful employment practice for an employer to refuse to hire or take other adverse actions, as specified, because of a conflict between the person's religious belief or observance and any employment requirement, unless the employer demonstrates that it has explored any available reasonable alternative means of accommodating the religious belief or observance.
- 4) Provides that it is an unlawful employment practice for an employer to fail to make a reasonable accommodation for a known physical or mental disability of an applicant or employee so long as it would not create an undue hardship to the employer.

*Existing DFEH Guidance on COVID-19 (as of 2-16-22)*

- 1) States that an employer may require employees to receive an FDA-approved vaccination against COVID-19 so long as the employer:
  - a) Does not discriminate or harass employees on the basis of a protected characteristic;
  - b) Provides reasonable accommodations related to disability or sincerely-held religious beliefs; and
  - c) Does not retaliate against anyone for engaging in protected activity such as requesting a reasonable accommodation.
- 2) Provides that if an employer requires vaccination and an employee objects to vaccination based on a disability, the employer must engage in the interactive process and reasonably accommodate the employee unless, among other things, the accommodation imposes an undue hardship.

*Existing Federal Law*

- 1) Provides, under Title VII of the Civil Rights Act of 1964, that it is an unlawful employment practice for an employer to do either of the following:
  - a) Fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to their compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.
  - b) Limit, segregate, or classify their employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect their status as an employee, because of such individual's race, color, religion, sex, or national origin.
- 2) Prohibits, under the Americans with Disabilities Act of 1990 (ADA), an employer from discriminating against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.
  - a) "Discriminating against a qualified individual" includes the failure to make reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless the employer can demonstrate that the accommodation would impose an undue hardship on the operation of its business.

*Existing Equal Employment Opportunity Commission (EEOC) Guidance on COVID-19 (as of 3-14-22)*

- 1) States that federal equal employment opportunity laws do not prevent an employer from requiring all employees physically entering the workplace to be vaccinated for COVID-19, subject to relevant reasonable accommodation provisions for a known disability or a sincerely held religious belief, practice or observance.

- 2) States that the Americans with Disabilities Act (ADA) does not prevent an employer from requiring employees to bring in documentation or other confirmation of vaccination provided that the medical information is kept confidential and stored separately from employees' personnel files.

**FISCAL EFFECT:** Unknown

**COMMENTS:** Note: This bill is double-referred to the Assembly Judiciary Committee upon passage out of this committee.

According to the author, “California has taken steps to ensure that everyone has access to the free, life-saving COVID-19 vaccine, as well as additional paid sick time for workers who test positive. Despite this critical action, however, the COVID-19 pandemic continues to pose a grave threat to the people of this state and our economic well-being. In order to reduce the spread of the virus, it is imperative that we take bold steps to increase California’s 74% full vaccination rate (and 57% booster rate) for eligible individuals and ensure everyone has a safe workplace. Local governments and individual businesses are enacting various vaccine mandates and many have suggested a statewide standard to help businesses comply and ultimately increase our vaccine rate. AB 1993 will provide a standardized, statewide vaccine protocol to increase vaccination rates by requiring employers to require that their employees be vaccinated against COVID-19.”

*Courts have upheld state and local government authority to mandate vaccines*

A state’s authority to mandate vaccination was established over a hundred years ago in the U.S. Supreme Court case of *Jacobson v. Massachusetts*.<sup>1</sup> The *Jacobson* case involved a challenge of a city-wide vaccination mandate against smallpox for all persons over 21 years of age. The court upheld the mandate, finding it to be within the police power of the state. Police power grants the state broad authority to regulate individual rights so as to protect public health and safety. Citing an earlier case, the court noted that it “has distinctly recognized the authority of a state to enact quarantine laws and ‘health laws of every description;’ indeed, all laws that relate to matters completely within its territory and which do not by their necessary operation affect the people of other states.”<sup>2</sup>

The authority of states and municipalities to condition school attendance on vaccination was upheld by the U.S. Supreme Court in *Zucht v. King*.<sup>3</sup> The case, brought on the behalf of an unvaccinated child, challenged a city ordinance requiring proof of vaccination for attending school. The *Zucht* court reasoned that the *Jacobson* case had settled that it is “within the police power of a state to provide for compulsory vaccination. That case and others had also settled that a state may, consistently with the federal Constitution, delegate to a municipality authority to determine under what conditions health regulations shall become operative.”<sup>4</sup>

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<sup>1</sup> 197 U. S. 11 (1905).

<sup>2</sup> Ibid.

<sup>3</sup> 260 U.S. 174 (1922).

<sup>4</sup> Ibid.

*Recent litigation on COVID-19 vaccination mandates*

On January 13, 2022, the U.S. Supreme Court, in a 6-3 decision, stayed a federal OSHA emergency temporary standard (ETS) that would have required private employers of 100 or more employees to require employees to get vaccinated or submit to testing.<sup>5</sup> Unlike the *Jacobson* and *Zucht* decision, this case turned on whether Congress had delegated OSHA wide authority to impose an immunization requirement on employers. The majority reasoned that “OSHA has never imposed such a mandate. Nor has Congress. Indeed, although Congress has enacted significant legislation addressing the COVID-19 pandemic, it has declined to enact any measure similar to what OSHA has promulgated here...Although Congress has indisputably given OSHA the power to regulate occupational dangers, it has not given the agency the power to regulate public health more broadly.”<sup>6</sup>

The concurring opinion also drew a sharp contrast between OSHA’s authority and a state or local government’s authority to require workplace vaccination. That opinion states, “there is no question that state and local authorities possess considerable power to regulate public health. They enjoy the ‘general power of governing,’ including all sovereign powers envisioned by the Constitution and not specifically vested in the federal government.”<sup>7</sup>

In the higher education context, the high court has declined to overturn COVID-19 vaccine mandates. Specifically, in *Klaassen, et al. v. Trustees of Indiana University*,<sup>8</sup> the court denied an application for an emergency writ of injunction against Indiana University’s COVID-19 vaccine mandate, upholding the rulings of the two lower courts. Justice Amy Coney Barrett denied the application without referring it for a vote to the full court.

**Committee Comments***Implementation date*

AB 1993 requires employers to comply with the vaccination mandate the day the bill becomes effective if signed into law. In addition, the bill charges the DFEH with the task of providing guidance to employers on what constitutes a medical condition/disability or a sincerely held religious belief for purposes of vaccination and how to best solicit and protect employee vaccination documentation. This implementation date is likely unattainable by many employers and by the DFEH in issuing guidance. The author may wish to move out the implementation date.

*Is DFEH the appropriate agency to oversee a vaccine mandate?*

The bill currently provides that employers will affirm, in a form and manner to be determined by the DFEH, that they have complied with the vaccination requirement. It is unclear how this affirmation will be transmitted to the department and what level of specificity it will contain. Committee staff questions whether DFEH is the appropriate entity to receive any sort of

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<sup>5</sup> *National Federation of Independent Business, et al. v. Department of Labor, Occupational Safety and Health Administration* (Docket No. 21A244), Per Curiam opinion.

<sup>6</sup> *Ibid* at 8-9.

<sup>7</sup> *Ibid* at 2, Gorsuch, J, concurring opinion.

<sup>8</sup> No. 21-2326 (7<sup>th</sup> Cir. 2021).

employee vaccination information and recommends the author consider in the future placing this responsibility within the DPH.

#### *Penalty for employer noncompliance*

AB 1993 imposes an unspecified penalty for employer noncompliance with the vaccination requirement but provides no details on how the DFEH will enforce the bill's provisions. It is unclear to committee staff how the DFEH will: 1) validate that an employer is in compliance based on an affirmation; and 2) investigate suspected cases of noncompliance. The author may wish to address this in the future.

#### *Record retention by employers*

The bill currently prohibits an employer from retaining proof-of-vaccination status unless authorized to do so by the employee. In the case where an employee declines to give such authorization, an employer will have no proof that they have complied with the mandate as it pertains to that employee. The author should consider changing this provision to allow more flexibility for an employer to maintain this documentation.

### **Arguments in Support**

The Small Business Majority, in its support and states, "California small businesses continue to face financial setbacks, supply chain issues, and workforce challenges, and they are at an inflection point in their recovery from the ongoing pandemic. Our employers want to ensure the safety of their employees and that of their customers, but piecemeal protocols are only creating additional uncertainty for small employers. What's more, California small business owners already support initiatives that would reduce disruptions to operating their businesses. A recent Small Business Majority survey found that a majority of small business owners (59%) with employees support a state law requiring businesses to mandate vaccinations for employees.

This is why it's imperative for legislators to enact AB 1993. Legislators are in the unique position to support small business recovery and enacting this legislation would help alleviate the uncertainty around maintaining workplace safety in light of the resurgence of COVID-19 variants."

### **Arguments in Opposition**

The California Professional Firefighters (CPF), is strongly opposed and argues, "CPF has been collaborative in engaging state officials to support the response to the pandemic. We have worked with policy makers on proposals to ensure worker health and safety through paid sick leave and other policy measures. Moreover, CPF has worked to educate our members on vaccination options and encouraged them to engage their local government employers on issues associated with COVID-19 safety protocols including vaccination. That engagement has resulted in locally driven solutions that represent the need of the community and their departments. This collaboration that has occurred between [our] members and their employer through local bargaining and dialogue would be thrown out by AB 1993. We are dismayed that this measure undermines the strength and importance of local bargaining and labor negotiations. Over the last two years, CPF's local affiliates, as well as the local unions for our brothers and sisters throughout the labor movement, have diligently met with their employers in good faith to discuss and bargain local COVID-19 policies and solutions. These negotiations are part of the core of

organized labor, and to summarily remove these bargained policies with a blanket mandate sets a dangerous and demoralizing precedent.”

### **Related Legislation**

SB 866 (Wiener) of 2022 authorizes a minor 12 years of age or older to consent to vaccines that meet specified federal agency criteria. The bill would authorize a vaccine provider to administer a vaccine, but would not authorize the vaccine provider to provide any service that is otherwise outside the vaccine provider’s scope of practice. The bill is currently in Senate Judiciary Committee.

SB 871 (Pan) of 2022 repeals the removing of the personal belief exemption from any additional immunization requirements. The bill is currently in Senate Health Committee.

AB 1797 (Weber) of 2022 requires health care providers and other agencies, including schools, childcare facilities, family childcare homes, and county human services agencies to disclose the specified immunization information, and would add the patient’s or client’s race or ethnicity to the list of information that shall or may be disclosed. This bill is currently pending in the Assembly Health Committee.

### **REGISTERED SUPPORT / OPPOSITION:**

#### **Support**

National Union of Healthcare Workers  
Protect US  
Santa Clara Valley Water District  
Small Business Majority

#### **Oppose**

1178 Individuals  
A Voice for Choice Advocacy  
Agricultural Council of California  
Arcadia Police Officers Association  
Assistant Dean Mary D'Amour John Adams Academy Charter School  
Board of Supervisors, County of Inyo  
Burbank Police Officers' Association  
CA Assn of Winegrape Growers  
Cal Fire Local 2881  
California Apple Commission  
California Association of Highway Patrolmen  
California Association of Wheat Growers  
California Association of Winegrape Growers  
California Bean Shippers Association  
California Blueberry Association  
California Blueberry Commission  
California Coalition of School Safety Professionals  
California Correctional Peace Officers Association

California Fresh Fruit Association  
California Health Coalition Advocacy  
California Landscape Contractor's Association  
California League of Food Producers  
California Professionals Firefighters  
California Rice Commission  
California Rice Industry Association  
California Seed Association  
California State Association of Electrical Workers  
California State Floral Association  
California State Pipe Trades Council  
California State Sheriffs' Association  
California Walnut Commission  
California Warehouse Association  
Carlsbad Chamber of Commerce  
Catholic Families 4 Freedom CA  
Children's Health Defense California Chapter  
Claremont Police Officers Association  
Coalition of California Utility Employees  
Corona Police Officers Association  
Culver City Police Officers' Association  
David SchonBrunn  
Eagle Forum of California  
Educate. Advocate.  
El Dorado County Chamber of Commerce  
Elk Grove Chamber of Commerce  
Family Details LLC  
Far West Equipment Dealers Association  
Folsom Chamber of Commerce  
Fountain Valley Chamber of Commerce  
Fullerton Police Officers' Association  
Fullerton School District  
Homewatch Caregivers of Huntington Beach  
Housing Contractors of California  
Inglewood Police Officers Association  
International Brotherhood of Electrical Workers Local 18  
International Brotherhood of Electrical Workers, Local 1245  
John Adams Academies, Inc.  
Lancaster School District  
Life Houses Ministry  
Los Angeles Gay & Lesbian Chamber of Commerce  
Los Angeles School Police Officers Association  
Marin Citizens Task Force  
National Federation of Independent Business - California  
National Vaccine Information Center  
Natomas Usd for Freedom  
Newport Beach Police Association  
Olive Growers Council of California  
Pacific Coast Rendering Association



Palos Verdes Police Officers Association  
Patriotfirefighterinc.  
Peace Officers Research Association of California  
Physicians for Informed Consent  
Placentia-Yorba Linda Unified School District  
Placer County Deputy Sheriffs' Association  
Pomona Police Officer Association  
Protection of The Educational Rights for Kids  
Rancho Cordova Chamber of Commerce  
Riverside Police Officers Association  
Riverside Sheriffs' Association  
Roseville Chamber of Commerce  
San Joaquin County Liberty Coalition  
Santa Ana Police Officers Political Action Committee  
Siskiyou Conservative Republicans  
Stand Up Sacramento County  
United Chamber Advocacy Network  
Upland Police Officers Association  
Western Growers Association  
Yuba Sutter Chamber of Commerce

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