

Today's Top Employment & Legal Issues Facing the Sports and Entertainment Industry

Todd B. Scherwin, Regional Managing Partner | tscherwin@fisherphillips.com
Adam F. Sloustcher, Partner | asloustcher@fisherphillips.com

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Fisher Phillips 2022 Inside Counsel Conference



**After Adversity:
Embracing the
Transformed Workplace**

INSIDE COUNSEL CONFERENCE

March 2-4, 2022



- March 2-4, 2022
- Held at the Resort at Pelican Hill in Newport Coast, CA
- Register today at fisherphillips.com

Today's Roadmap

- 1) President Biden's Path Out of the Pandemic
- 2) What You Should Do Now (and what are other employers doing)?
- 3) Medical and Religious Accommodation Issues
- 4) Status of Mandatory Arbitration in CA

President Biden's Path Out of the Pandemic

THE WHITE HOUSE



[Administration](#)

[Priorities](#)

[COVID Plan](#)

[Briefing Room](#)

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PATH OUT OF THE PANDEMIC

PRESIDENT BIDEN'S COVID-19 ACTION PLAN

President Biden is implementing a six-pronged, comprehensive national strategy that employs the same science-based approach that was used to successfully combat previous variants of COVID-19 earlier this year. This plan will ensure that we are using every available tool to combat COVID-19 and save even more lives in the months ahead, while also keeping schools open and safe, and protecting our economy from lockdowns and damage.



[Vaccinating the Unvaccinated](#)



[Further Protecting the Vaccinated](#)



[Keeping Schools Safely Open](#)



[Increasing Testing & Requiring Masking](#)



[Protecting Our Economic Recovery](#)



[Improving Care for those with COVID-19](#)

Path Out of the Pandemic

Six-Pronged National Strategy

1. Vaccinating the Unvaccinated
2. Further Protecting the Vaccinated
3. Keeping Schools Safely Open
4. Increasing Testing & Requiring Masking
5. Protecting Our Economic Recovery
6. Improving Care for Those With COVID-19

New OSHA Emergency Temporary Standard

- Who does it apply to?
 - Applies to all private employer with more than 100 employees
- What if the ETS is violated?
 - Citation of \$14,000 per violation.
- What is the timeline for the ETS to be promulgated?
 - Uncertain, but possibly within the next several weeks.
 - OSHA will likely give employers 75 days before it starts enforcing the ETS.
 - ETS will remain in effect for 6 months.
- Requires employers to provide paid time off to get vaccinated

New OSHA Emergency Temporary Standard

What About the States with State Plans?

- 21 states have state-plans rather than being under the jurisdiction of OSHA.
- Once the ETS is issued, those states will have to adopt the ETS or “just-as-effective” measures within 15 to 30 days.



Unanswered Questions

- **Will remote employees be covered?**
 - According to comments from OSHA
 - The ETS will not apply to employees who “never” come to work.
 - But, if the employee ever comes to work, or works outside of the office with others, they will be covered.

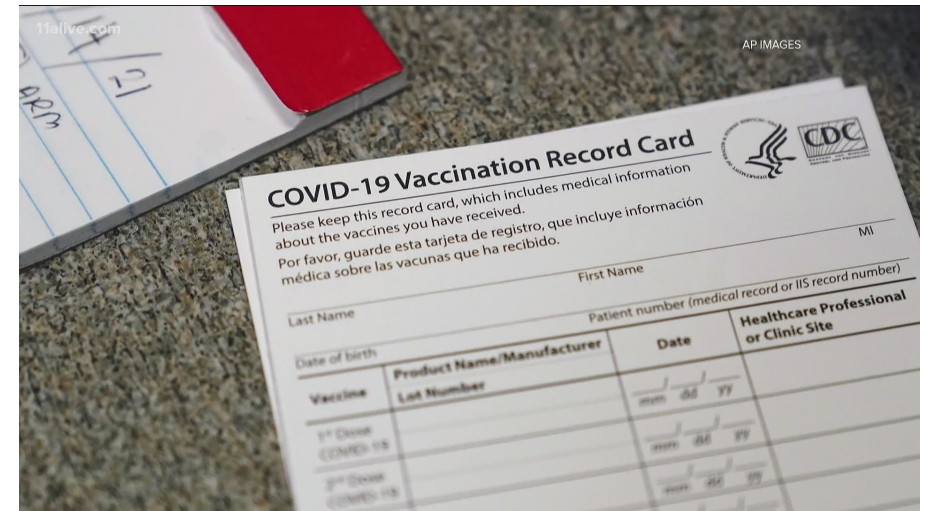


Unanswered Questions

- **How will the 100-employee threshold be counted?**
 - While not clear in President Biden's announcement, OSHA officials suggested the threshold will likely be *total* number of employees, rather than employees at each worksite.
 - Also unclear how the joint employer analysis will factor in.

Unanswered Questions

- **Will employers be required to collect proof of vaccination?**
 - Unclear at this time.
 - Consider record retention requirements: OSHA requires record retention for length of employment + 30 years.
 - Could have huge recordkeeping implications if required.



The image shows a COVID-19 Vaccination Record Card from the CDC. The card is white with black text and a red tab at the top. It contains fields for patient information and vaccination details. The CDC logo is visible in the top right corner.

COVID-19 Vaccination Record Card

Please keep this record card, which includes medical information about the vaccines you have received.
Por favor, guarde esta tarjeta de registro, que incluye información médica sobre las vacunas que ha recibido.

MI

Last Name _____ First Name _____

Patient number (medical record or IIS record number) _____

Date of birth _____

Vaccine	Product Name/Manufacturer	Date	Healthcare Professional or Clinic Site
1 st Dose (COVID-19)	Lot Number _____	mm / dd / yy	
2 nd Dose (COVID-19)		mm / dd / yy	
3 rd Dose (COVID-19)		mm / dd / yy	

Unanswered Questions

- **What type of testing will be required?**
 - Unclear at this time.
 - While the PCR test is more accurate, it takes longer to receive the results and is more expensive.



Unanswered Questions

- **Who pays for testing?**
 - Insurance may cover the cost of tests, and several states (including CA) have laws predating COVID-19 requiring employers to pay for mandatory medical tests or reimburse employees for any such testing.



Unanswered Questions

- **Must employers pay employees for time spent getting tested?**
 - In CA, yes
 - Elsewhere: No clear answer for all employees – safest to pay for the time.
 - OSHA commented that employer will be required to provide paid time off or use of existing PTO.
 - Generally, time spent by employees receiving employer-required tests should be treated as compensable



Unanswered Questions

- **Will unionized employers be required to bargain over the decision of how to comply with the ETS?**
 - Unclear to what extent unionized employers will be compelled to bargain over the decision on how to comply with the ETS (or at least the discretionary aspects with respect to vaccines vs. weekly testing).
 - At a minimum, be prepared to bargain over the effects of compliance with the ETS.
 - Non-union employers should consider the practical implications of compliance from a labor relations perspective.

Unanswered Questions

- **Will the ETS face legal challenges?**
 - Most likely.
 - Governors of many states have already indicated they intend to challenge the ETS.
 - Courts may block enforcement of the emergency rule, or parts of the rule, until legal challenges are resolved.
 - OSHA will have to prove that there is a “grave danger” to workers.
 - But employers should not count on being relieved of all obligations and should prepare now.



What Should You Do?

- **Adopt Procedures for Determining Employees' Vaccination Status**
 - Maintain confidential records of employee vaccination status.
 - EEOC has indicated it is lawful to ask employees about COVID-19 vaccination status, but this should end your inquiry.
 - ETS may require that you collect proof of vaccination.
 - Otherwise, create a confidential list of vaccinated workers.
 - Review state laws regarding confidentiality and privacy of medical records.

What Should You Do?

- **Determine if you will mandate the vaccine or allow unvaccinated employees to be tested weekly.**
 - For some employers, collecting and tracking weekly test results may burden them such that they decide to adopt a mandatory vaccination policy.
 - OSHA officials stated that employers may require vaccinations without providing the alternative for weekly testing (subject to accommodations)
 - If planning for weekly testing, think through the logistics:
 - Onsite or through designated vendors?
 - Payment for testing
 - Payment of time for testing

Fisher Phillips Flash Survey Results

- Third Fisher Phillips survey conducted this year.
- Over 700 employers responded to each survey
- While only 4% indicated they would mandate or consider a mandate in the survey completed between May 14-19, that number **jumped to 15%** in this most recent survey this month.
- The number of employers opposed to a mandate **dropped by 15 points** during the past three months, but it remains high, at 68%.
- **79% of employers** (up from 74%) actively encouraging vaccination.

Fisher Phillips Flash Survey Results

- 64% of ERs who changed their policy did so because of Delta-variant fueled surges.
- Other key factors that led to comfort with mandating:
 - A quarter (24%) view mandates as serving the greater good;
 - 23% now feel the law permits vaccine mandates;
 - 16% believe their workforce is now more receptive to being vaccinated;
 - 13% report they want to be able to appeal to customers and visitors that staff has been vaccinated; and
 - 12% want to see more remote workers spend time at the physical workspace

Fisher Phillips Flash Survey Results

Industries Most Likely to Mandate

- Healthcare: 42%
- Hospitality: 29%
- Education: 24%
- Non-Profit or Civic Orgs: 22%

Industries Generally in Line with Overall Average

- Professional/Tech Services: 14%
- Tech: 14% Retail: 13%
- Construction: 11%

Industries Least Likely to Mandate Vaccine

- Automotive: 9%
- Manufacturing: 8%
- Staffing, PEO, and Employment Services: 7%
- Finance and Insurance: 5%

What Should You Do?

- **Have a plan for tracking test results.**
 - You should have a plan in place for collecting and tracking test results.
 - Who is going to collect the results?
 - When will the test results need to be collected?
 - How will you track the results?

What Should You Do?

- **Have a plan for addressing noncompliance by employees.**
 - What happens to an employee who does not get tested?
 - What happens to an employee who refuses to get vaccinated?

What Should You Do?

- **Develop a plan for handling accommodation requests.**
 - Employees may request accommodations for disabilities or for religious reasons under federal or state laws.
 - Develop a robust and clear reasonable accommodation policy to address religious and disability issues.
 - Communicate and administer the accommodation process thoughtfully, emphasizing individualized, confidential consideration of each request.
 - Be prepared for employees to request an accommodation from the weekly testing requirement.

Religious Accommodation Requests

- 1) Is it a **religious** belief?
- 2) Whether belief “**sincerely held**” by employee
- 3) If religious and sincerely held, engage in interactive process to find accommodation
- 4) Undue hardship? (lower standard than disability/medical)

“Sincerely Held” Religious Beliefs

- Beliefs, observances, or practices, which an individual sincerely holds and which occupy in their life a place of importance parallel to that of traditionally recognized religions
- What doesn't qualify:
 - Personal preferences
 - Social, political or economic philosophies
- Factual inquiry that favors employee
- If objective reason to doubt sincerely held belief, employer allowed to make limited reasonable inquiry
 - Don't require a particular type of confirmation

Religious Accommodation Requests

Real life questions following unvaccinated EE claiming religious exemption from testing

- You stated your religion is Garifuna - when did you embrace this religious belief/observance/practice?
- Can you please describe how the belief/observance/practice prevents you from being tested for COVID-19?
- How does the belief/observance/practice conflict with being tested for COVID-19?
- You've previously been tested for COVID-19 – has something changed since you were tested (a few months/weeks) ago?
- Why were you able to be tested for COVID-19 previously but are now not able to be tested for purposes of the company's policy?
- Can you tell us more about your beliefs that prevent you from being tested for COVID-19? Is this a personal belief you hold against the testing?
- You previously mentioned that you have a terrible reaction to COVID-19 testing – is that the issue here?
 - There are multiple ways to be tested for COVID-19 that don't include the swab that is put up your nose, including less invasive nose swabbing and cheek swabbing. There are also tests that you can do yourself at home – would this lessen or avoid the terrible reaction that you had to the prior COVID-19 test that you had?
 - Would you be willing to be tested with one of the alternative forms of tests we've discussed?

Religious Accommodation Requests

NEW TESTAMENT MINISTRIES

Australia, Canada, Colombia, Congo, Dominican Republic, El Salvador, Fiji, France, Germany, Ghana, Guadeloupe, Gulf States, India, Israel, Jamaica, Kenya, Malaysia, Mauritius, Mexico, Nepal, Nicaragua, Papua New Guinea, Philippines, Puerto Rico, Seychelles, Sierra Leone, Singapore, Sri Lanka, Switzerland, Togo, Trinidad and Tobago, United Kingdom, United States of America

815 W Whittier Blvd,
Montebello, CA 90640
Email: losangeles@ntcministries.org

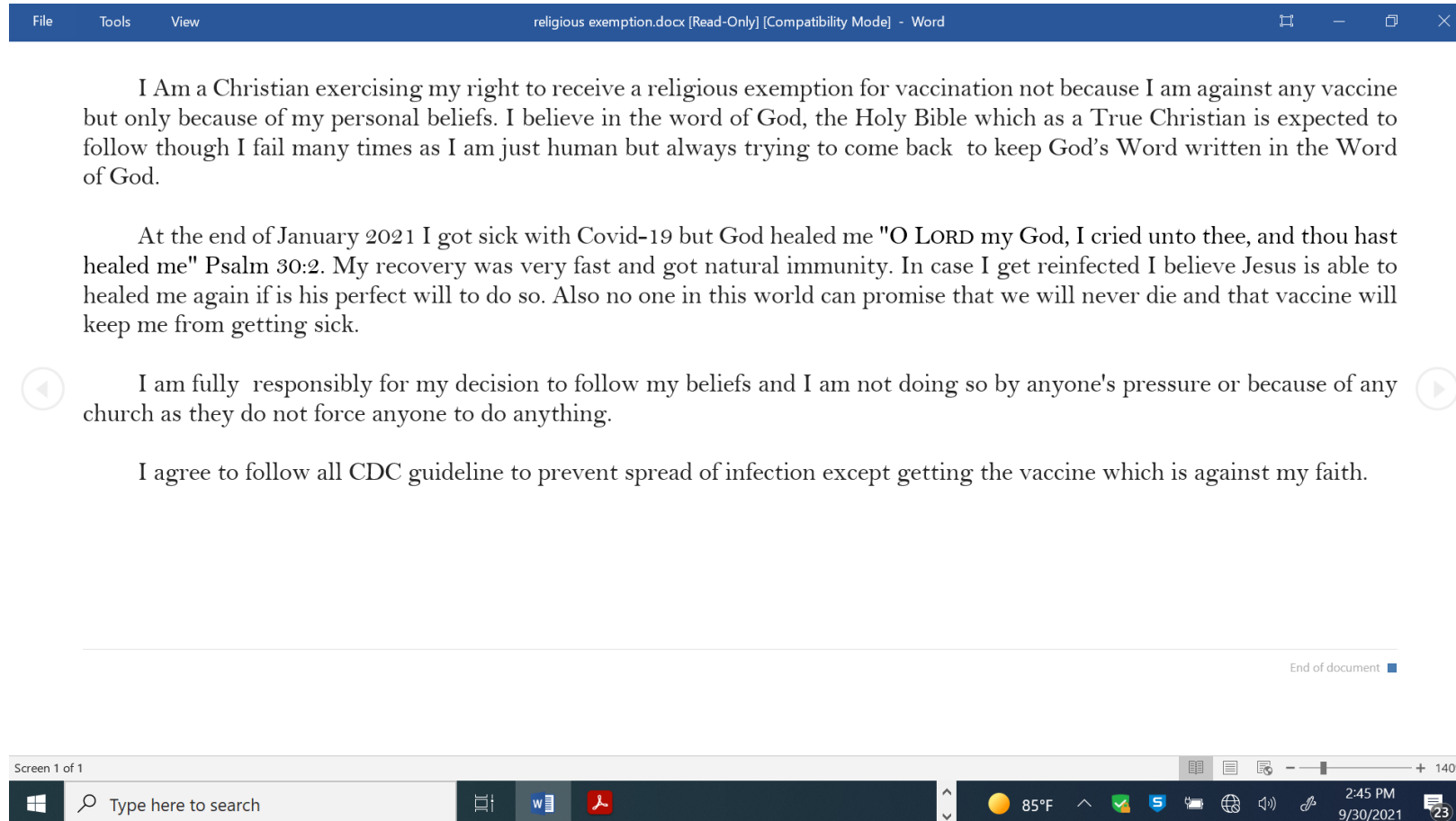
Mailing Address:
2717 Westbourne Place,
Rowland Heights, CA 91748
Phone: 562-552-1767

September 20, 2021

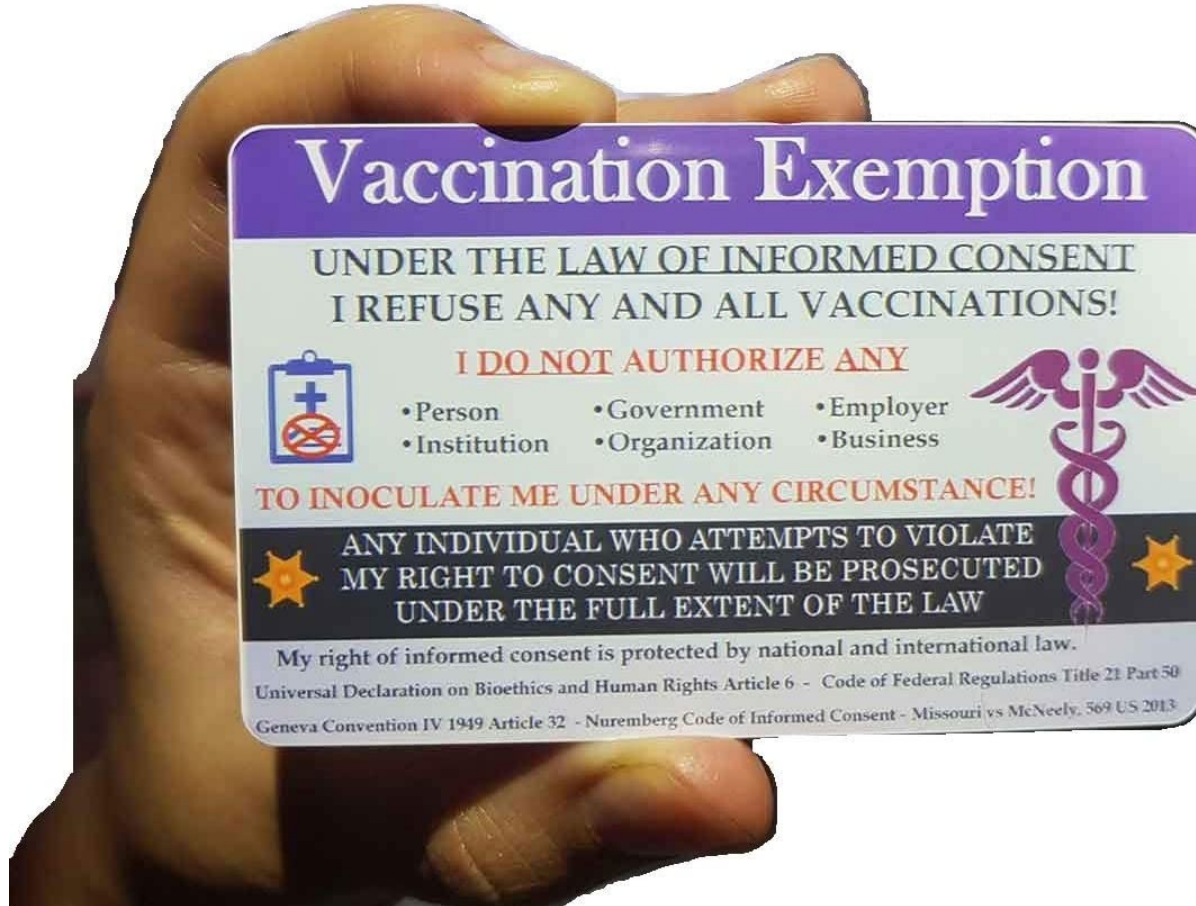
To Whom It May Concern:

This letter is to certify that [REDACTED] has been a member of our church in Los Angeles in good standing since January 2019. [REDACTED] attends meetings regularly as work permits her. She has been a real blessing to our church and we are thankful to have her.

Religious Accommodation Requests



What Do We Do With This?!?!



Next Steps / Action Plan

- Keep an eye out for OSHA ETS and Guidance on the EO.
- Carefully consider your company's needs, culture and position on the vaccine
- Whether you mandate or test, talk to counsel first
- Use solid policies, forms, and procedures
- Continue to stay up-to-date
- Make use of the Fisher Phillips Resource Center
- Make use of the Fisher Phillips Alerts

Mandatory Arbitration in CA

- Ninth Circuit rules that portions of Assembly Bill 51 are not preempted by the Federal Arbitration Act (“FAA”) and lifts a lower court’s injunction that barred the law from taking effect
- Violation of the law to mandate arbitration agreements – but, Ninth Circuit decision does NOT impact enforceability of agreements
- You have 3 options:
 - 1) Continue Mandating
 - 2) Adopt a Voluntary Arbitration Program
 - 3) Middle ground

Questions?

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Thank You!

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