LBAEE
November 2021 News

CITY'S COVID-19 VACCINATION MANDATE

The City introduced its proposed vaccination mandate policy to employee organizations in late October. Here are some highlights of the City's proposed policy:

•By November 22, 2021, all City employees must establish that they are at least partially vaccinated, or obtain a religious or medical accommodation.

•Employees without a religious or medical accommodation must be fully vaccinated by December 22, 2021.

• Employees who receive a religious or medical accommodation must continue wearing a surgical mask or respirator at all times while on the City of Long Beach premises and/or the workplace.

• Employees who receive a religious or medical accommodation must get tested for COVID-19 at least twice per week at a predesignated test site within the City. Testing will be provided at City sites free of cost, and employees will be provided up to one hour of paid City time for each test.

• If an accommodated employee tests positive for COVID-19, they will be excluded from the worksite.

• Employees who fail to comply with the policy will be served with a Notice of Intent to Terminate (and should contact CEA for assistance).

AEE and other employee organizations met with the City about this policy initially in October. We asked:

• When can employees apply for a religious or medical accommodation? The City responded: Once all employee organizations have had a chance to meet and confer with the City.

• Will the City extend paid leave for employees who have a negative reaction to the vaccine, or who test positive for COVID-19? The City responded: No, those employees will have to use their own leave.

• Can an employee provide a positive antibody test instead of getting the vaccine? The City responded: No, the City will not accept a positive antibody test in lieu of vaccination.

• Will the City assume liability for employees who have a negative reaction to the vaccine? The City responded: Such employees should submit a workers' compensation claim, which will be evaluated on a case-by-case basis.

• Why does the City require testing twice a week for accommodated employees, instead of once a week? The City responded: To protect the health and safety of the workforce and the public.

The AEE Board is scheduled to meet with the City about this proposed policy on Wednesday, November 10th. While the City can legally impose a vaccination mandate, AEE is committed to negotiating over these important questions and concerns.

Happy Veterans Day!

As we celebrate Veterans Day, we take a brief look at the workplace rights of all those who serve in the armed forces. Many public employee union contracts, or MOUs, include Veterans Day (November 11) as a paid holiday for all workers. That is something to celebrate! If your MOU does not include Veterans Day as a paid holiday, consider asking your Association to propose it as an observed holiday in the next round of MOU negotiations. Below is a general overview of the legal protections that are in place for the employment of veterans and their families. If you have a specific question or concern, please contact your professional staff.

Fair Employment & Housing Act **(FEHA)** – Under a state law passed a year ago, known as AB 3364, military and veteran status is declared a civil right to be protected by the FEHA. The FEHA (Gov't Code § 12900 et seq) protects veterans and active-duty military personnel from discrimination, harassment, and retaliation in the workplace. Employers cannot discriminate against any job applicant, unpaid intern, or employee in hiring, promotions, assignments, termination, or any term, condition, or privilege of employment based on the employee's past or current military service. Any member or veteran of the U.S. Armed Forces, U.S. Reserves, U.S. National Guard, or California National Guard is protected. Also, an employer can use veteran status as a factor in employee selection but cannot inquire about whether the veteran was honorably or dishonorably discharged. (Gov't Code § 12940(a)(4)).

Right to Military Leave: The Federal Uniformed Services Employment and Reemployment Rights Act (USERRA) (38 U.S.C. §4301) and California Military and Veterans Code (§389) ensure that employees are not adversely affected in their employment for taking leave for military service. Whichever law provides greater protection is the one that controls. Military service may include active duty, trainings, special exercises, fitness for duty examinations, and performing military funeral honors. It may include temporary service, for example, if the Governor issues a proclamation or state of emergency.

An employee must provide advanced notice of the need for leave unless military necessity dictates otherwise. Employers must notify employees of their rights under USERRA. An employee may be entitled to pay while on military leave. This depends on if the employee is called to active duty (ordered military leave) or training (temporary military leave). Those employed for more than one year are generally entitled to pay for the first 30 days of leave. National Guard members on ordered military leave get full pay for the first 30 days regardless of the length of employment. A public agency can provide pay beyond

the 30 days pursuant to a resolution adopted by the agency or as provided in an MOU with an employee organization.

The employer must provide the same benefits to employees performing military service as they do for employees on other types of unpaid leaves of absences. An employee on military leave for 30 days or less cannot be required to pay more than the employee's share, if any, for health insurance coverage. For leave lasting longer than 30 days, the employee can elect to maintain coverage for up to 24-months, like under the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA). Those on military leave may also be able to accrue vacation, sick, and holiday leave benefits up to a maximum of 180 days.

Military leave shall not be considered a break in service. An employee on military leave has the right to reemployment with reinstatement of benefits upon completion of the military service. The cumulative length of absence and all previous absences with that employer because of military service cannot exceed five years. The employee must give notice of reinstatement to the employer, and the amount of notice is based on the number of days the employee was on leave. For example, an employee may have to report as soon as the beginning of the first full regularly scheduled work period on the first full calendar day following the completion of service (for 1-30 days of leave), apply for reemployment not later than 14 days after completion of the service (for 30-180 days of leave), or apply for reemployment within 90 days after completion of the service (for over 180 days of leave). Absent unusual circumstances, reemployment must occur within two weeks of the employee's application for reemployment.

An employee may enforce violations of USERRA by filing a complaint with the U.S. Department of Labor (DOL). If the DOL does not resolve the complaint, the employee may request to have the Secretary of Labor refer the matter to the Attorney General, who may file an action against the employer. The employee may also initiate a private lawsuit, and if the employee wins, they may be entitled to reemployment, lost wages and benefits, costs, and attorney's fees. A court may award double damages for willful violations.

California law makes it a misdemeanor to discriminate, discharge, or engage in other discipline or prejudice in employment against an employee because of their membership in the military. Any person who violates this law is liable for actual damages and reasonable attorney's fees incurred by the service member.

But contact your Association first. You may be able to enforce your rights – e.g., through the grievance process – without having to resort to a claim with the DOL or a civil lawsuit.

Right to Military Spouse Leave: Employers with 25 or more employees must allow an employee who is a spouse of a qualifying military member to take up to 10 days of unpaid leave during a qualified leave period. (Mil. & Vet. Code § 395.10). A "qualifying military member" means active-duty members of the Armed Forces, National Guard, and Reserves deployed during a military conflict. A "qualifying leave period" means the period the member is on leave from deployment during a period of military conflict. A "military conflict" is either a period of war as declared by Congress or a period of deployment to service in an area designated as a combat theatre or combat zone by the President. The employee must work an average of 20 or more hours a week and be the spouse of a qualifying military member on leave from deployment. This leave can also run concurrently with "qualified exigency leave" under the FMLA.

An employee must provide the employer with notice of intent to take this leave within two business days of receiving official notice that the spouse will be deploying. In addition, the employee may have to submit written documentation certifying that the spouse will be deployed during the time the leave is requested. Use of accrued leave during military spouse leave is at the discretion of the employee. Also, an employer cannot retaliate against an employee for requesting or taking this leave and the employee's benefits shall not be affected because the employee took this leave.

Qualifying Exigency Leave – The Federal Family Medical Leave Act (FMLA) allows for "qualifying exigency leave" and now, under SB 1383, a law passed last year that took effect on January 1, 2021, qualified exigency leave is covered under the California Family Rights Act (CFRA) too. This is leave for a family member of a service member called to active duty. Eligible employees may take FMLA/CFRA leave (up to 12 weeks of unpaid leave) because of a qualifying exigency related to the covered active duty or call to covered active duty of an employee's spouse, domestic partner, child, or parent in the armed forces. Qualifying exigencies include:

- Short-notice deployment
- Military events and related activities
- Childcare and school activities
- Financial and legal arrangements (e.g., securing an estate plan)
- Counseling
- Rest and recuperation
- Post-deployment activities
- Parental care

Covered active duty means deployment to a foreign country under a call or order to active duty. An employee must provide notice as soon as practicable and may need to complete

a certification that includes a copy of the military member's active-duty orders. It may also include information related to which qualifying exigency leave is sought. For example, suppose the employee is taking leave to meet with an alternate childcare provider or a financial consultant. In that case, the employee may have to provide the contact information of the third party with whom they are meeting. But the employer may not require second and third opinions or recertification for qualifying exigency leave.

Military Caregiver Leave – Added to the FMLA in 2010, qualified employees may take up to 26 weeks of leave in a "single" 12-month period to care for an injured covered service member. This 12-month period is calculated differently than regular FMLA leave and is more beneficial to the employee. This leave does not apply to the service-member, only for qualified employees who care for the injured service-member. But the service member may be eligible for 12 weeks of FMLA for their own serious medical condition.

A qualified employee is a spouse, son, daughter, parent, or next of kin of a covered service member. A covered service member is a current member of the Armed Forces, National Guard, or Reserves who is undergoing medical treatment, recuperation, or therapy, is otherwise in outpatient status, or is otherwise on the temporary disability retired list for a serious injury or illness. It also includes veterans who are undergoing medical treatment, recuperation, or therapy for a serious injury or illness, so long as the veteran was discharged or released under conditions other than dishonorable at any time during the five-year period prior to the first date the eligible employee takes FMLA leave to care for the covered veteran.

A serious injury or illness is defined differently for active members compared to veterans. Still, generally, it means a serious injury or illness incurred by the service member or veteran in the line of duty or that existed beforehand and was aggravated by service in the line of duty. Next of kin is also defined in an order of priority, but a service member may designate a different blood relative as next of kin for FMLA purposes. Where a family member is designated, that is the only next of kin for FMLA purposes. However, if no one is designated, multiple family members with the same level of relationship to the service member may qualify as next of kin under the FMLA.

This leave can only be used once per service member or veteran, per injury, and must be used within one 12-month period. Although it is unpaid, the employee may choose to use available sick and vacation leave. Also, this leave is inclusive of the regular 12-weeks of FMLA leave. So, for example, a qualified employee may take 12 weeks of regular FMLA and then another 14 weeks of military caregiver leave for a total of 26 weeks. However, because the 12-month period is calculated differently for military caregiver leave than regular FMLA, an employee can use the 26 weeks of military caregiver leave and still use

some or all of the regular 12 weeks of FMLA leave (e.g., to care for that same family member's serious injury or illness). If a qualified employee has not used any FMLA leave during the single 12-month period, all 26 weeks can be used for military caregiver leave.

The employee must give notice as soon as practicable and at least 30 days before when the need is foreseeable. The employee must also have an authorized health care provider complete a certification. Authorized providers include the Department of Defense, Veterans Affairs, TRICARE, or non-military-affiliated providers. When using non-military-affiliated providers, the employer may request a second or third opinion of the service member or veteran's serious injury or illness.

Veteran's Hiring Preference – On October 6, 2021, Governor Newsom vetoed **SB 665**, which would have allowed private employers to create a temporary veterans' preference for hiring and deem these policies as not violating anti-discrimination laws until January 1, 2028. Governor Newsom said that "Honoring veterans and assisting them in securing employment are vitally important goals." Yet, he was concerned these veterans' preferences "could negatively impact employment opportunities for women and other protected groups underrepresented among veterans, such as people with disabilities." He said there "are ways to make the preference workable," and he looks forward to advancing such a policy. So, one may be forthcoming in 2022.

Governor Newsom Signs Important New Legislation into Law

As the state legislature's year ended – and on the heels of being chosen to remain in office after a well-publicized recall campaign – Governor Newsom signed several key pieces of legislation into law. Although a new COVID paid sick leave law (SB 95 expired September 30) did not make it, there are still a few noteworthy items.

Public Employee Communications: On September 27, 2021, Governor Newsom signed **SB 270**, which awards monetary penalties to public employee unions when a public agency violates the Public Employee Communications Chapter (PECC) (Gov't Code § 3555 et seq.). Under the PECC, a public agency must provide the union with the "name, job title, department, work location, work home, and personal cellular telephone numbers, personal email addresses on file with the employer, and home address" of any new bargaining unit employee within 30 days of hire. (Gov't Code § 3558). It also requires the public agency to provide this same information to the union for all bargaining unit employees every 120 days (Gov't Code § 3558). This requirement is commonly referred to as AB 119, the assembly bill number that the law was originally introduced as in 2017.

In the years since some employers have not provided all the information as required by the PECC or have not provided the information in a timely manner. SB 270 is meant to address this. Under SB 270, a public employee union may be entitled to monetary costs for having to go to the Public Employment Relations Board (PERB) to enforce their rights under the PECC. Prior to filing an unfair practice charge, the union must first give the employer notice that they provided an inaccurate or incomplete list of employees. The employer then has 20 calendar days to cure the alleged violation. However, the employer can only use this option to cure three times in any 12-month period. If the employer does not cure the violation, the union may file at PERB.

In addition to normal remedies, PERB *may* award a civil penalty not to exceed $10,000. PERB determines the exact amount based on the employer's annual budget, the severity of the violation, and any prior history of violations. The penalty is paid to the State General Fund. Also, PERB *shall* award a prevailing party attorneys' fees and costs that accrue from the date the case was assigned to a formal hearing until the final disposition of the charge. These changes take effect on July 1, 2022. The law's intent is to force public employers to cooperate with public employee organizations by providing complete lists of employees in the bargaining unit.

Safety Standards for Code Enforcement Officers: On October 7, 2021, Governor Newsom signed **SB 296**, which requires each local jurisdiction that employs code enforcement officers to develop safety standards appropriate for their jurisdiction. The state reimburses any costs that the local agency incurs. Code enforcement officer is defined "as a person who is not a peace officer, who has enforcement authority for health, safety, and welfare requirements, and who is authorized to issue citations or file formal complaints." The Legislature declared that code enforcement officers "are disproportionally at risk for threat, assault, injury, and even homicide due to the nature of their obligations."

This is not news to most code enforcement officers. Therefore, this measure is long overdue. Any public employee union that represents code enforcement officers can also meet and confer over the proposed safety standards. The hope is that the legislation is successful in developing safety standards and ultimately in reducing the risk of injury by finally providing a safe working environment for code enforcement officers.

Expansion of the Ban on Non-Disclosure Agreements – Current law prohibits settlement agreements from restricting disclosure of facts regarding sexual harassment, sexual assault, and retaliation for reporting sexual harassment or sexual assault. **SB 331** expands

this ban to include other types of workplace discrimination, harassment, and retaliation not based on sex. The bill makes it an unlawful employment practice for an employer to include in any agreement related to an employee's separation from employment any provision that prohibits the disclosure of information about unlawful acts in the workplace. The bill provides that any such prohibition is against public policy and is void and unenforceable. It applies to agreements made on or after January 1, 2022.

The law is one of the broadest efforts nationally so far to restrict how employers can use nondisclosure and severance agreements to silence workers from speaking out about harassment, discrimination, and retaliation in the workplace. It was introduced after a prominent case involving two black female former Pinterest employees who left the tech firm and tweeted about the racial discrimination they faced at the company. Because they had signed non-disclosure agreements with Pinterest when they separated, they faced legal consequences for speaking out. It is also designed to protect low-wage workers, who often live paycheck to paycheck, and may feel forced to accept a severance agreement to receive severance pay. By not signing, it could mean not having money to feed their families. This law allows workers to accept severance pay and still be free to disclose facts about unlawful acts in the workplace. Of course, one of the goals in allowing disclosure of facts is to hopefully stop unlawful acts from occurring in the first place.

News Release - CPI Increases!

The U.S. Department of Labor, Bureau of Labor Statistics, publishes monthly consumer price index figures that look back over a rolling 12-month period to measure inflation.

5.4% - CPI for All Urban Consumers (CPI-U) Nationally

5.3% - CPI-U for the West Region

4.6% - CPI-U for the Los Angeles Area

3.7% - CPI-U for San Francisco Bay Area (from August)

6.8% - CPI-U for the Riverside Area

6.5% - CPI-U for San Diego Area

Questions & Answers about Your Job

Each month we receive dozens of questions about your rights on the job. The following are some GENERAL answers. If you have a specific problem, talk to your professional staff.

Question: A supervisor is taking duties and scheduled overtime for both Saturday and Sunday, which has been in place for well over 10 years, and replacing it with a regular full-time employee on the weekends. Is there a process they need to follow considering this overtime has been long standing regular and scheduled? Most of the employees account for that regular overtime when they are scheduled on standby. Now, they are going to lose a lot of money.

Answer: Yes, there is a process the Agency should follow. Check your labor contract. It may have language about how this work is assigned (e.g., shift bidding, standby assignments, etc.) or require a certain amount of advanced notice before changing shifts. This may include regular non-emergency overtime shifts. It may also provide for premium pay for working weekend shifts. Bottom line – if the MOU has language that applies, the Agency must follow it.

The decision to assign or not assign overtime is probably the exercise of a management right, which is typically not subject to a requirement that the Agency provide your Association with notice and an opportunity to meet and confer. But there are circumstances in which the Association may have a legal basis to request to meet and confer, so contact your professional staff to see if that is the case here.

If so, potential solutions might include asking for shift differential pay for the person assigned to weekends, and/or a bidding system for how to assign shifts. In the meet and confer, the Association can raise the equity issue about the loss of overtime for those on standby, even if the lucrative weekend overtime work ends up going away.

Question: A couple of my co-workers are ordering shirts and the Director has stated the new shirts must have the department name. I reviewed the MOU uniform and equipment allowance sections, and nothing is defined or required for any department identification. Can the new shirts be ordered without a department name? I feel uncomfortable wearing the shirt on my lunch break.

Answer: The shirts could probably be ordered without the department name, but the key is whether uniform allowance language covers the purchase and whether you can wear the shirt at work. You may have an argument that the shirts are covered by the uniform allowance even if it doesn't have the department name.

For now, though, order the shirt with the department name, or don't order any shirt, and contact professional staff to help identify whether you have a viable case for reimbursement before you order it without the department name.

As for the dress code, the Director can require staff to wear shirts that identify the department during work hours, but generally, you should be free to take the shirt off or cover it up while on your lunch break. If you have an official dress code policy, check what it says. If there are safety concerns with wearing it in the field, contact your Association who can help raise these issues on your behalf. You may even have colleagues who share the same safety concerns as you do!

Question: The City is having building inspectors take an ethics training even though we don't have to file a statement of economic interests Form 700 under the Political Reform Act of 1974. In the "about this course" section, it says it applies to elected and appointed officials per AB 1234 ethics training. The memo we received from management says employees in a position to supervise or lead others, or have influence in decisions with financial impact, must complete the training even if they aren't required to file a Form 700. We are directed to the FPPC website for the online course. We must spend at least two full hours completing it, print the certificate, then forward to Human Resources. Should we be taking this course?

Answer: You are correct that AB 1234's training requirements apply to elected and appointed officials and not building inspectors. But just because the law does not require building inspectors to complete the training does not mean the City cannot require building inspectors (or other classifications of employees) to complete this training also.

If you are being directed to complete the training – meaning it's not voluntary – the City should pay for your time spent training and completing the necessary forms. In other words, it should be on work time, not your own time.

Question: I was injured at work (my lower back) and directed to go to a medical clinic by my supervisor and the workers' comp case manager. I had already seen my treating physician. I was in major pain and had trouble walking for several days. I had to reschedule my clinic appointment twice and the third time I was well enough to make it to the clinic. They put me back to work with restrictions and set a follow up appointment. I went to the follow up and was released to full duty. Workers' compensation said they will not cover my time off for the days I was off work prior to going to their clinic. They said I must use my own leave. That doesn't seem right to me. If I was injured on the job, why isn't the entire

time covered? I don't think I should have to use my own time for an injury that was on the job, and I followed protocol. I shouldn't be penalized for being too injured to make it to their clinic. Please advise.

Answer: Generally, an injured worker is entitled to wage replacement benefits known as total temporary disability (TTD) while recovering from a workplace injury or illness and unable to return to work. But, under California Labor Code Section 4652, a worker is not eligible for TTD payments for the first three days after leaving work due to the injury. To calculate the waiting period, the day of the injury is included unless the employee was paid full wages that day.

There are exceptions, though. For example, if the disability continues for more than 14 days, or the employee is hospitalized as an inpatient for treatment required by the injury, or the worker is the victim of a criminal assault, then the waiting period does not apply. It also does not apply to sworn law enforcement.

It sounds like you were off work for less than three days before you returned to work, and it doesn't sound like an exception applies. So, the employer is probably correct that you must use your own leave time, but not for the reason they implied (*i.e.,* that you didn't use their clinic initially).

Question: Last year, the Agency cut several positions in the budget, some of which were filled, due to an anticipated shortfall. In one Department, they cut an Analyst position filled by a long-standing 30-year employee, who was forced to demote to a lower position in the Analyst series to stay employed. In the new budget, the Agency is adding a new Senior Analyst in that same Department. The description of the duties is very similar to the Analyst position they cut last year, but just with a higher title. Is there any recourse for the affected employee? Can the employee organization voice any opinion on this? Can we ask the Agency to reinstate the former employee to the new classification? Chances are this employee will have to train any new employee hired into the Senior position.

Answer: Yes, to all three. For starters, your employee organization can request to meet and confer about the new Senior Analyst job description (assuming the position is in the bargaining unit and did not exist previously). If it is essentially the same as the Analyst position that the Agency cut, the employee organization could propose that the old position be restored in lieu of creating a brand-new position or that the employee be placed in the new, higher-level position since the duties are nearly identical.

The affected employee should check the layoff language in the MOU. Often there

are recall rights where the Agency must offer to restore those who held the position before running an external recruitment. If the language says, “the same or equivalent position,” the affected employee would have a good argument. Otherwise, recall rights are typically to the original position the employee held prior to layoff, if that position is restored in a prescribed time-period (typically a year or two). Sometimes layoffs are negotiated as well, so look to see if there was any agreement between the Association and the Agency about recall rights separate from any language in the MOU or personnel rules.

Regardless, the affected employee can apply for the position or request a transfer. Recruitment language may give the affected employee a leg up over any other internal or external candidates. It’s also possible the affected employee is the most qualified if they used to perform the same duties in the same Department. If the affected employee is later asked to train a new employee, the affected employee may have a grievance for higher class pay or training pay. It’s best to contact professional staff to help evaluate the best options.