

Coronavirus Laws and Your Dealership: Part X

December 14, 2021

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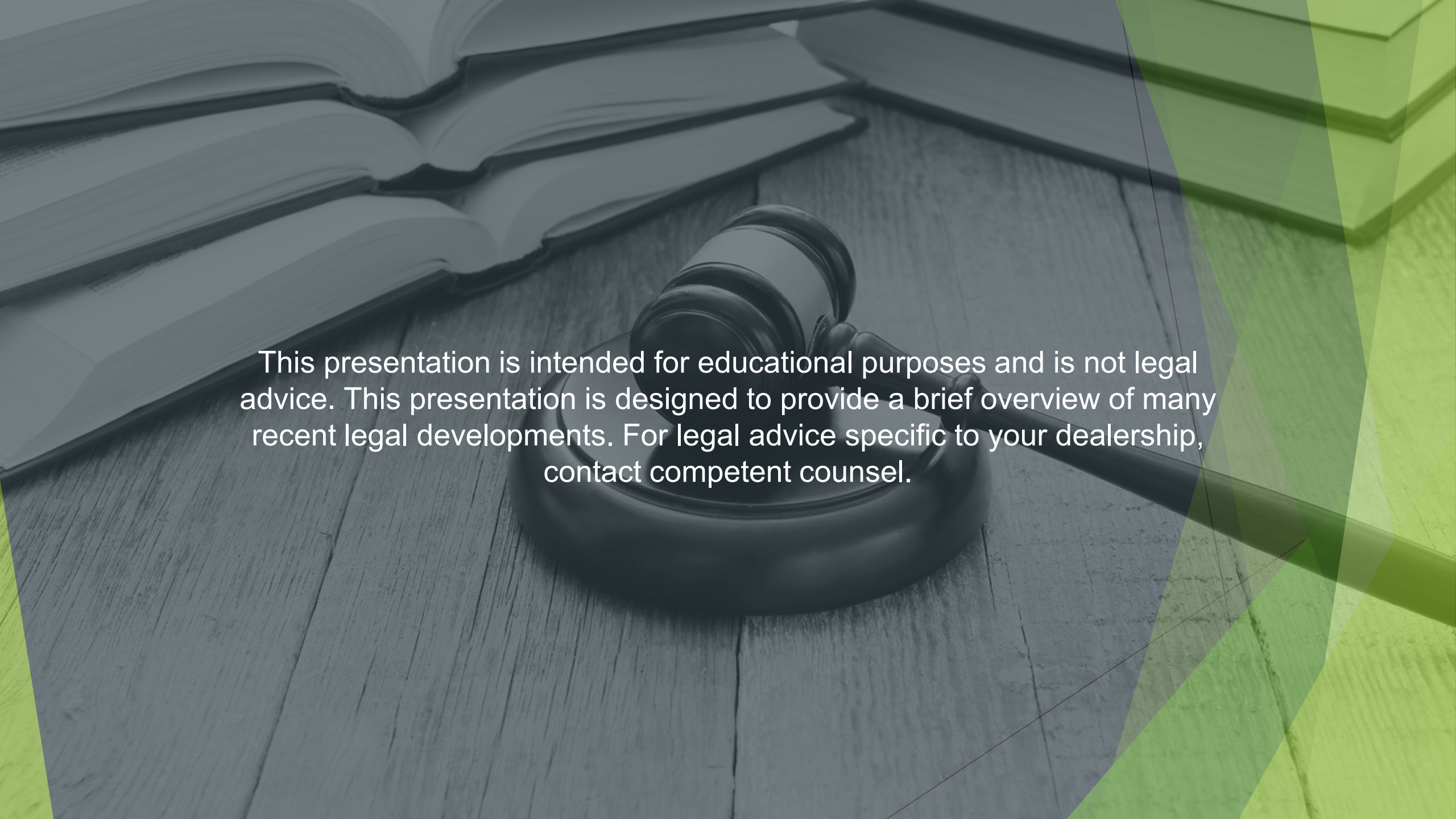
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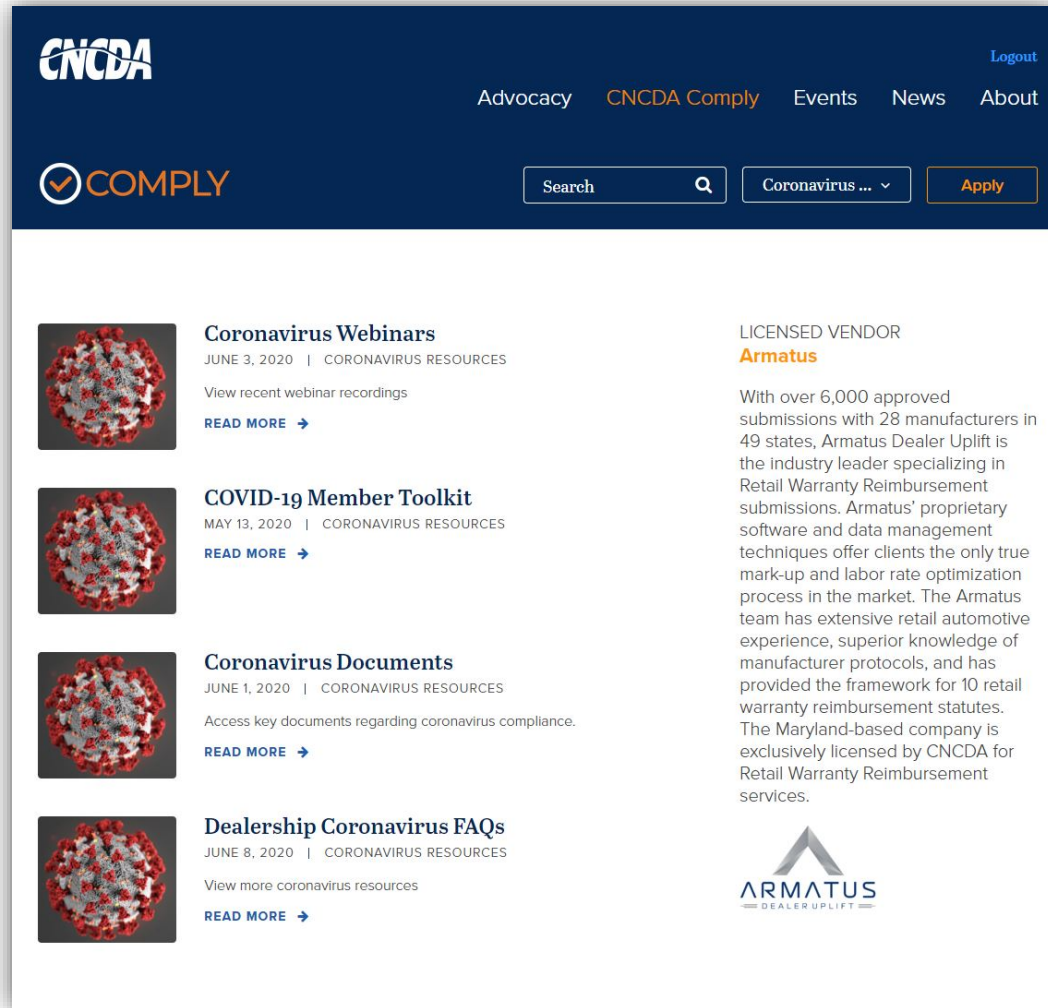
What are we covering today?

1. Health Orders
2. Employee Vaccination Issues
3. Additional Cal/OSHA ETS Issues
4. Q&A

A wooden gavel with a dark handle and a light-colored head, resting on a wooden surface. To the left of the gavel is an open book with white pages. The background is a dark, textured wooden surface. On the right side, there is a large, semi-transparent green geometric overlay consisting of several overlapping rectangular shapes. The text is centered in the middle of the image.

This presentation is intended for educational purposes and is not legal advice. This presentation is designed to provide a brief overview of many recent legal developments. For legal advice specific to your dealership, contact competent counsel.

Free Online Resources for CNCDA Members



The screenshot shows the CNCDA website's 'COMPLY' section. The header includes the CNCDA logo, a 'Logout' link, and navigation links for 'Advocacy', 'CNCDA Comply', 'Events', 'News', and 'About'. A search bar contains 'Coronavirus ...' and an 'Apply' button. The main content area features four resource cards, each with a coronavirus icon, a title, date, category, and a 'READ MORE' link. To the right, there is a section for 'LICENSED VENDOR Armatus' with a detailed description of their services and the Armatus logo.

CNCDA Logout

Advocacy **CNCDA Comply** Events News About

COMPLY Search Coronavirus ... Apply

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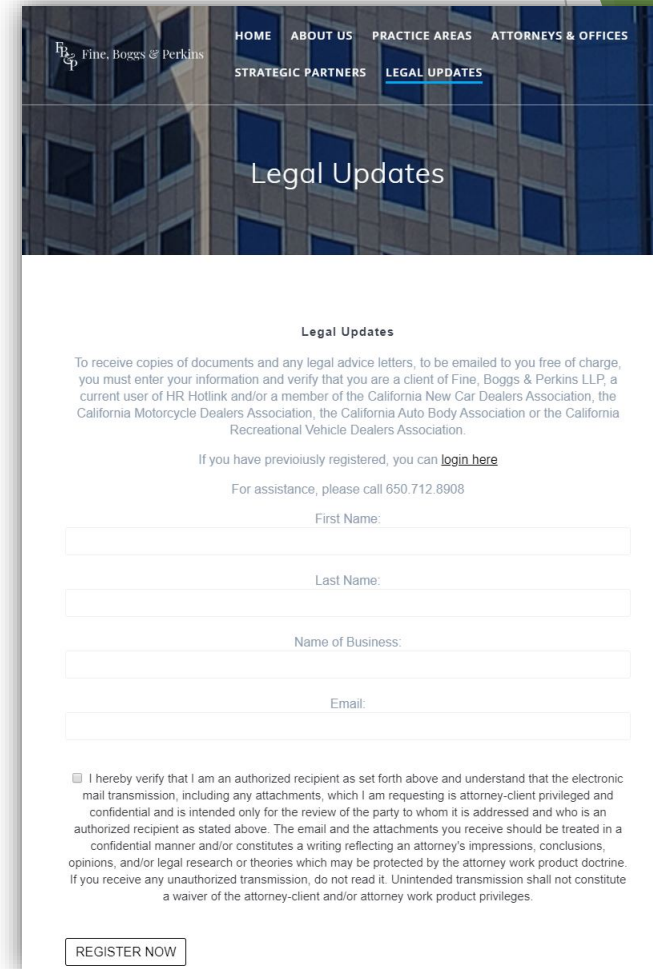
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LICENSED VENDOR
Armatus

With over 6,000 approved submissions with 28 manufacturers in 49 states, Armatus Dealer Uplift is the industry leader specializing in Retail Warranty Reimbursement submissions. Armatus' proprietary software and data management techniques offer clients the only true mark-up and labor rate optimization process in the market. The Armatus team has extensive retail automotive experience, superior knowledge of manufacturer protocols, and has provided the framework for 10 retail warranty reimbursement statutes. The Maryland-based company is exclusively licensed by CNCDA for Retail Warranty Reimbursement services.

ARMATUS
DEALER UPLIFT

<https://www.cncda.org/dealer-coronavirus-resources/>



The screenshot shows the 'Legal Updates' page on the Fine, Boggs & Perkins website. The header includes the firm's name and navigation links for 'HOME', 'ABOUT US', 'PRACTICE AREAS', 'ATTORNEYS & OFFICES', 'STRATEGIC PARTNERS', and 'LEGAL UPDATES'. The main content area contains a registration form with fields for 'First Name', 'Last Name', 'Name of Business', and 'Email'. Below the form is a checkbox for a legal disclaimer and a 'REGISTER NOW' button.

Fine, Boggs & Perkins

HOME ABOUT US PRACTICE AREAS ATTORNEYS & OFFICES
STRATEGIC PARTNERS **LEGAL UPDATES**

Legal Updates

Legal Updates

To receive copies of documents and any legal advice letters, to be emailed to you free of charge, you must enter your information and verify that you are a client of Fine, Boggs & Perkins LLP, a current user of HR Hotlink and/or a member of the California New Car Dealers Association, the California Motorcycle Dealers Association, the California Auto Body Association or the California Recreational Vehicle Dealers Association.

If you have previously registered, you can [login here](#)

For assistance, please call 650.712.8908

First Name:

Last Name:


Name of Business:

Email:

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[REGISTER NOW](#)

<https://www.employerlawyers.com/legal-updates/>



Part 1 HEALTH ORDERS

Status of Health Orders - Statewide

- ▶ Face masks (statewide)
 - ▶ Indoor public spaces (new order)
 - ▶ All persons must wear masks beginning December 15 and ending January 15 (unless order extended).
 - ▶ Following January 15, masks will still be required for persons not fully vaccinated and in jurisdictions with a local mask mandate.
 - ▶ Test drives and shuttle service
 - ▶ Always required if more than one person in the vehicle, regardless of vaccination status

Status of Health Orders – Local Orders

- ▶ The following jurisdictions require masks indoors, regardless of vaccination statutes:
 - ▶ Los Angeles County
 - ▶ Bay Area (Alameda, Contra Costa, San Francisco, San Mateo, Santa Clara, and Sonoma Counties and the City of Berkeley)
 - ▶ Marin lifted mandate on November 1
 - ▶ Sacramento County
 - ▶ Yolo County
- ▶ Check the status of your local jurisdiction. ([Click here](#))

Status of Health Orders - Statewide

▶ Travel advisories

- ▶ Fully vaccinated – no post-travel quarantine period required
- ▶ Not fully vaccinated – post-travel testing and 7-day quarantine recommended, but not required
- ▶ NEW: Persons returning from out of state should get tested within 3-5 days upon arrival, regardless of vaccination status.
- ▶ Follow CDC guidance. ([Click here](#))



Part 2
EMPLOYEE
VACCINATION ISSUES

OSHA Employer Vaccination Requirement

- ▶ On November 4, 2021, OSHA announced a nationwide Emergency Temporary Standard (ETS).
 - ▶ Requires vaccination or weekly testing for employees
 - ▶ Requirement halted pending court challenge
- ▶ Cal/OSHA decided to not impose a California-specific vaccination mandate pending the outcome of the federal ETS.
- ▶ Currently, there is no requirement for California employers to mandate the vaccination of employees.
 - ▶ This could change with future legislative and/or regulatory action.

Minimum Vaccination Requirements

- ▶ Documentation of employee vaccination information
 - ▶ Required by Cal/OSHA since June 2021
 - ▶ If employee fails to provide info, treat them as unvaccinated
 - ▶ Employees that are fully vaccinated do not need to wear face coverings indoors in most circumstances (unless a more restrictive local order applies), and they do not need to quarantine if they are asymptomatic and come in close contact with an infected individual.
 - ▶ Sample employee vaccinations status form available on CNCDA Comply.
- ▶ Paid leave for employees that get the vaccine and/or have vaccination side effects
 - ▶ Available until September 30; pending state legislation may change this.

Minimum Vaccination Requirements

- ▶ Can I condition the benefits of vaccination upon the employee providing proof of vaccination?
 - ▶ Yes. If the employee wants to take advantage of special status of vaccinated persons (e.g., not wearing a mask) or not being subject to quarantine when the person has had close contact exposure, then the employer can require proof.
- ▶ Can I require proof of vaccination of employees?
 - ▶ Yes. But they must be treated as confidential medical records. If employee refuses, just treat the employee as not vaccinated.

Vaccine Status Collection

- ▶ How should I go about requiring proof?
 - ▶ Cal/OSHA requires employers to document the vaccination status of employees to work without face coverings indoors.
 - ▶ Honor system (self-attestation) is easiest option.
 - ▶ Instead of asking to see the actual vaccination record, use a written survey to find out status without requiring the actual vaccination record.
 - ▶ Of course, if the employee declines to answer, they would not be eligible for vaccination perks.
- ▶ [Sample Vaccine Status Questionnaire available on CNCDA Comply.](#)

Vaccine Status Questionnaire

Based on current federal, state and local health directives, various social distancing, face covering, and quarantine rules, vary depending upon whether an individual is vaccinated or not. As a result, the company needs to collect vaccination status information from its employees so that it may properly implement its health and safety rules pertaining to COVID-19. In light of this requirement, you must provide the information requested below.

Answering this questionnaire is mandatory but disclosing your health information is voluntary. Please note you are required to provide accurate information about your vaccination status in response to the questions below, or alternatively you may decline to provide your vaccination status. If you decline to provide information about your vaccination status, we will be required to assume you are unvaccinated for purposes of our health and safety procedures which may affect various aspects of your work environment, including but not limited to wearing face coverings in the workplace. For example, if requirements on face coverings allow fully vaccinated employees not to wear face coverings in certain settings, the information collected below will be used to determine whether you will be required to wear a face covering in those settings. If you decline to provide vaccination status that is perfectly acceptable, however, you will be considered as not being vaccinated for the purpose of enforcing the company's health and safety rules.

For purposes of this certification, you are considered "fully vaccinated" two weeks after completing the second dose of a two-dose COVID-19 vaccine (e.g., Pfizer or Moderna) or two weeks after receiving a single dose of a one-dose vaccine (e.g., Johnson & Johnson/Janssen).

Please select the statement below that accurately describes your vaccination status:

- I am fully vaccinated.
- I received my second dose of the Pfizer or Moderna vaccine or my single dose of a Johnson & Johnson vaccine less than two weeks ago.
- I received my first dose of Moderna or Pfizer, and my second appointment is scheduled.
- I have not yet been vaccinated, but I have already scheduled an appointment to receive my first dose of vaccine.
- I have not been vaccinated.
- I decline to answer whether I have been vaccinated.

I understand that I am required to provide accurate information in response to the question above. By signing below, I confirm that I have accurately and truthfully answered the question above. I also understand that if I stated that I am fully vaccinated, my employer may request to view and retain a copy of documentation of my vaccination status (e.g., a copy of my vaccine card or other similar official document confirming vaccination status).

Date

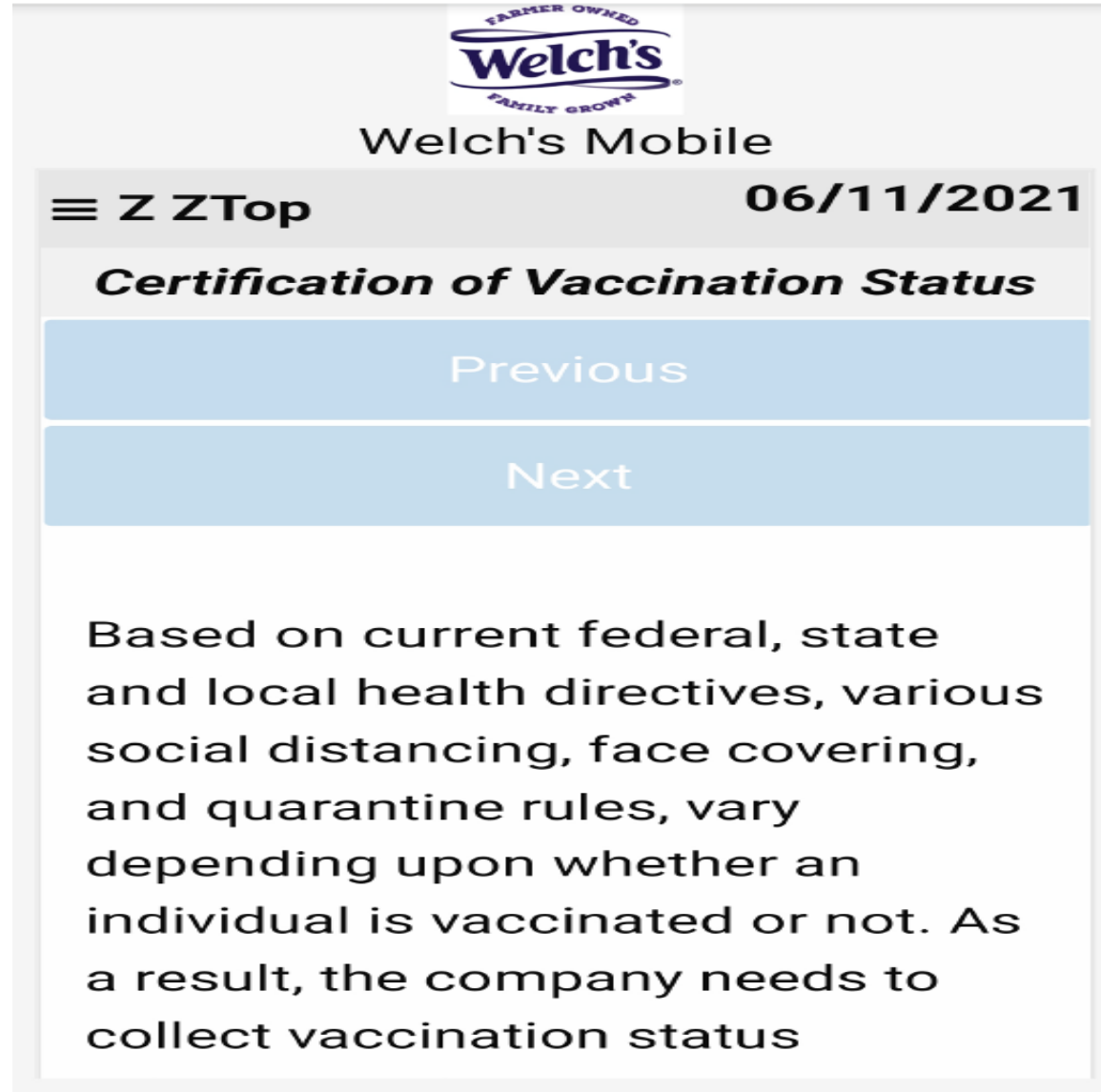
Signature

Print Name

Vaccine Status Collection

- ▶ More documents to store?
- ▶ HR Hotlink to the rescue
 - ▶ Whether you use the full HR Hotlink suite or just the symptom checker, HR Hotlink fixed the problem.
 - ▶ Here is how it works

HOW IT WORKS



The screenshot displays the Welch's Mobile app interface. At the top, the Welch's logo is centered, featuring the text 'FARMER OWNED' above 'Welch's' and 'FAMILY GROWN' below it. Below the logo, the text 'Welch's Mobile' is displayed. A navigation bar contains a hamburger menu icon, the text 'ZZTop', and the date '06/11/2021'. The main content area is titled 'Certification of Vaccination Status' and contains two blue buttons labeled 'Previous' and 'Next'. Below these buttons, a paragraph of text explains the purpose of the app: 'Based on current federal, state and local health directives, various social distancing, face covering, and quarantine rules, vary depending upon whether an individual is vaccinated or not. As a result, the company needs to collect vaccination status'.

HOW IT WORKS



Welch's Mobile

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- I have not been vaccinated.
- I decline to answer whether I have been vaccinated.

I understand that I am required to provide accurate information in response to the question above. I hereby affirm that I have accurately and truthfully answered

HOW IT WORKS

☰ Z ZTop 06/11/2021

Vaccination Declaration Report

« ↻ 🖨️

Company: Workgroup:

All

A	B	C	D
	↕	▲	↕
D	Z ZTop	06/11	Single/Both less than 2 weeks
E	Lorelei Adamson	06/11	Fully Vaccinated
F	Somerset Willison	06/10	Second Scheduled
H	Sybilla Ven Niekerk	06/10	Fully Vaccinated
I	Ky Phipard-Shears	06/10	Decline Answer
K	Henrie Knibbs	06/10	Single/Both less than 2 weeks
L	Shina Hilliam	06/10	Not Vaccinated
N	Shirlee Haacker	06/10	Fully Vaccinated
O	Otto Goodliff	06/10	Decline Answer
Q	Boniface Elkin	06/10	First Scheduled
R			

Mandatory Vaccine Policy: Legal?

- ▶ At our previous webinar, we recommended against requiring employees to get vaccinated, due to the FDA not granting full approval to any vaccine
 - ▶ Vaccines had been administered through an FDA emergency use authorization
- ▶ On August 23, the FDA granted full approval to the Pfizer vaccine for persons 16 years and older
 - ▶ This opens the door to employer vaccine mandates, but there are still important issues to consider

Mandatory Vaccination Policy- Risk Considerations

▶ Federal Discrimination Laws:

- ▶ In May 2021, the United States Equal Employment Opportunity Commission published guidance that federal law permits private employers to require that workers be vaccinated, so long as employers comply with reasonable accommodation provisions of the Americans with Disabilities Act of 1990 and Title VII of the Civil Rights Act of 1964.

▶ State Discrimination Laws

- ▶ On March 4, 2021, the Department of Fair Employment and Housing published guidance entitled “Employment Information on COVID-19” and noted that, under the California Fair Employment and Housing Act (FEHA), an employer may require employees to receive a vaccination against COVID-19.

▶ U.S. Department of Justice

- ▶ On July 6, 2021, the United States Department of Justice issued an opinion that the Federal Food, Drug, and Cosmetic Act does not prohibit private entities from imposing vaccination requirements for emergency use authorization of COVID-19 vaccines.

Mandatory Vaccination Policy- Risk Considerations

- ▶ Opponents of compulsory vaccination argue that such mandates violate various statutory and constitutional provisions:
 - ▶ Due process
 - ▶ Free exercise of religion
 - ▶ Disability accommodation requirements
 - ▶ The right to attend school
 - ▶ Equal protection
 - ▶ Statutes forbidding non-consensual medical experimentation.
- ▶ Others raise moral or philosophical objections
- ▶ Still others refuse vaccinations because they believe the vaccinations are unsafe

Mandatory Vaccination Policy- Risk Considerations

- ▶ Although courts have rejected these arguments in various settings, employees opposing vaccinations likely will resurrect them to challenge an employer requiring COVID-19 vaccinations
 - ▶ Because the current COVID-19 pandemic poses a greater risk to public health and safety than previous outbreaks, we expect courts will uphold an employer-mandated COVID-19 vaccination against any of those complaints
- ▶ But nothing is certain in California.

California's Constitutional Right to Privacy

- ▶ Article I, Section 8 of the California Constitution provides private citizens with a right to privacy that does not exist in federal law.
 - ▶ California law, unlike federal law, gives employees the right to sue private parties (employers) for alleged violations of the Constitutional right to privacy.
 - ▶ These violations are referred to as Invasion of Privacy claims.
- ▶ California has long recognized that the Constitutional right to privacy in California protects individuals from being forced to allow medical and other intrusive procedures
 - ▶ For example, drug testing has been recognized by the California Supreme Court as a potential invasion of privacy claim
 - ▶ Vaccinations pose the same analysis and risk associated with invasion of privacy claims related to drug testing.

California's Constitutional Right to Privacy — A Balancing Test

- ▶ The determination of whether a mandatory vaccination policy would pose a risk of liability or whether it meets the legal requirements requires a balancing test:
 - ▶ On one side, what is the level of the intrusion upon privacy (medical procedures and records are amongst the highest privacy rights)?
 - ▶ On the other side, what is the important public interest involved? And are there other, less intrusive, means to protect that public interest?
- ▶ In other words, the court's will examine whether the mandatory vaccination policy is "justified."
- ▶ That is why the risk of liability still exists—the answer has not yet been determined by the courts or the legislature.

Mandatory Vaccination Policy- A FREE SAMPLE

A Sample Mandatory Vaccination Policy is available on HR Hotlink, www.employerlawyers.com and on [CNCDA Comply](#). All attendees will receive an email of the free sample policy.

MANDATORY COVID-19 VACCINATION POLICY

Effective September 1, 2021

Purpose

The FDA has fully approved Pfizer & BioNTech's COVID-19 vaccine for adults. Federal, state and local government have also stressed the importance of employers requiring COVID-19 vaccinations as a condition of employment. The California Department of Employment and Housing also released under the Fair Employment and Housing Act stating an employer may require employees to receive an FDA-approved vaccination against COVID-19 infection. Finally, in accordance with the Company's duty to provide and maintain a workplace that is free of known hazards, the Company has determined that the best way to protect our workplace and our employees is to require all employees to be vaccinated in certain areas of our workforce where potential transmission of the infection is higher risk.

Thus, the Company is adopting this policy to safeguard the health of our employees and their families, visitors, and the community at large from COVID-19 by requiring that all current employees and new hires be vaccinated to the full extent permitted by law.

Commitment to Compliance

This policy shall comply with all applicable laws and is based on guidance from the Centers for Disease Control and Prevention, the California Department of Public Health, the Department of Fair Employment and Housing, the Equal Employment Opportunity Commission, Cal OSHA, the



Part 3
Additional
CAL/OSHA ETS
REQUIREMENTS

Self-isolation and quarantine

- ▶ Follow Cal/OSHA rules in the workplace!
- ▶ Lots of confusion due to constantly changing CDC guidance and new Cal/OSHA rules
 - ▶ Cal/OSHA to consider updated ETS on December 16
 - ▶ **Proposed changes marked in red**
 - ▶ **If adopted, would be effective January 14, 2022**
- ▶ If a local or state order is more restrictive than the Cal/OSHA rule, follow the local or state order.

Self-isolation and quarantine

▶ Self-isolation (positive test/virus infection)

- ▶ Applies when a person is infected with COVID-19.
- ▶ If symptomatic, may return to work when all the following are satisfied:
 1. At least 24 hours have passed since a fever of 100.4 degrees Fahrenheit or higher has resolved without the use of fever-reducing medications; and
 2. COVID-19 symptoms have improved; and
 3. At least 10 days have passed since COVID-19 symptoms first appeared.
- ▶ If asymptomatic, may return to work after 10 days from first positive test.
- ▶ Do not require negative test to return to work.

Self-isolation and quarantine

▶ Quarantine (virus exposure)

- ▶ Applies when an unvaccinated person is exposed (“Close Contact”) to someone who has COVID-19
- ▶ Vaccinated persons only need to quarantine when they show symptoms (in which case the isolation rules apply)
 - ▶ **Fully vaccinated persons must also:**
 1. **Wear a face covering for 14 days following close contact; and**
 2. **Maintain 6 feet of distancing for 14 days following close contact.**
- ▶ Asymptomatic persons that have recovered from COVID-19 are exempt if 90 days or less have elapsed since the onset of their symptoms from the original illness.
 - ▶ **Must also wear face coverings and comply with distancing requirements, noted above.**

Self-isolation and quarantine

- ▶ Return to work for not fully vaccinated persons following close contact exposure
 - ▶ “Persons who had a close contact but never developed any COVID-19 symptoms may return to work when **10 days** have passed since the last known close contact.”
 - ▶ If the person has symptoms, treat it as a self-isolation (see previous slides)
 - ▶ **Must also wear face coverings for 14 days following close contact exposure and maintain 6 feet distancing.**
 - ▶ **May return to work after 7 days, if negative test at least five days after close contact.**

Additional Compliance Obligations

- ▶ Daily symptom screenings
 - ▶ Applies to all employees
 - ▶ Employees that fail symptom screening test should not report to work until they have approval from authorized management official
- ▶ Special rules for “outbreaks”
 - ▶ “Outbreak” means 3 or more people at a worksite test positive within 14 days
 - ▶ Must make testing available at no-cost to all employees at the exposed worksite during work hours (with a few exceptions)
 - ▶ **Asymptomatic fully vaccinated employees must also be provided tests**
 - ▶ All employees should wear face coverings

Additional Compliance Obligations

- ▶ Close Contact Testing Requirements
 - ▶ Make tests available free of charge during worktime to employees that had a close contact exposure at work **(regardless of vaccination status)**
 - ▶ Narrow exception for employees that recovered from COVID-19 during the past 90 days
- ▶ Symptomatic Employee Testing Requirements
 - ▶ Make tests available free of charge during worktime to employees that are symptomatic and have not been fully vaccinated
- ▶ N95 respirators
 - ▶ Must provide access to N95 respirators to employees that are not fully vaccinated at no charge
- ▶ Written COVID-19 Prevention Program
 - ▶ Update your written program to comply with Cal/OSHA new rules

Additional Compliance Obligations

- ▶ What tests are permissible?
 - ▶ All tests that are FDA approved or authorized for emergency use
 - ▶ **Self-administered tests must be observed by employer or authorized telehealth proctor.**
 - ▶ **Acceptable tests include:**
 - ▶ **Lab processed tests**
 - ▶ **Proctored over the counter tests**
 - ▶ **Point of care tests**
 - ▶ **Test done or observed by employer**

COVID-19 Paid Sick Leave Requirements

- ▶ SB 95 Has Expired

- ▶ SB 95, passed by the legislature in 2020, created an obligation for California employers to provide paid COVID-19 sick leave and the federal American Rescue Plan Act of 2021 (ARP) extended federal tax credits for providing COVID-19 paid sick leave. Both of these laws expired on September 30, 2021.

- ▶ But Paid Sick Leave Obligations Continue...

- ▶ Despite the expiration of SB 95 and the ARP tax credits, the Cal/OSHA COVID-19 Prevention Emergency Temporary Standards (ETS) continue to require employers to provide paid sick leave to employees that cannot work due to COVID-19 exposure or illness, **unless the employer can demonstrate that the exposure was not workplace related.** The ETS do not provide for paid time off for symptoms related to vaccinations.

Ca/OSHA Exclusion Pay FAQ

Q: How does an employer show that a COVID-19 exposure is not work related?

A: Proving that COVID-19 exposure is not work related to avoid the ETS' exclusion pay requirement involves an employer conducting an investigation and producing evidence to show it is more likely than not that an employee's COVID-19 exposure did not occur in the workplace.

Q: How long does an employee with COVID-19 exposure, or who tests positive for COVID-19 from the workplace, receive pay while excluded from the workplace?

A: An employee would typically receive pay for the period the employee is excluded, which could be 10 or more days. If an employee is out of work for more than a standard exclusion period based on a single exposure or positive test, but still does not meet the regulation's requirements to return to work, the employee may be entitled to other benefits, such as Temporary Disability, Disability, or Supplemental Paid Sick Leave.

<https://www.dir.ca.gov/dosh/coronavirus/COVID19FAQs.html#exclusions>

Cal/OSHA Exclusion Pay FAQ

Q: How is exclusion pay calculated for employees excluded from the workplace due to exposure to COVID-19 at work?

A: The rate of pay for exclusion pay is an employee's regular rate of pay for the pay period in which the employee is excluded. These employees are entitled to exclusion pay, depending on the length of the required exclusion period and how many days they were scheduled to work during that exclusion period. Employees must be paid no later than the regular payday for the pay period(s) in which the employee is excluded.

<https://www.dir.ca.gov/dosh/coronavirus/COVID19FAQs.html#exclusions>

Note: The Cal/OSHA ETS FAQ is updated frequently. The information in this slide deck is current as of 12/12/2021.

Employer Leave Obligations

- ▶ Other Notable Leave Requirements
 - ▶ California requires 3 days of paid sick leave.
 - ▶ Local ordinances may require additional sick leave.
 - ▶ Employees may also be entitled to unpaid FMLA/CFRA leave.
 - ▶ Recalled employees may be able to continue to collect unemployment benefits if they are concerned about returning to work.
 - ▶ Disability / workers compensation.

Thank you!

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