PRISON LAW OFFICE
General Delivery, San Quentin, CA 94964
Telephone (510) 280-2621 • Fax (510) 280-2704
www.prisonlaw.com

VIA EMAIL ONLY

June 14, 2021

J. Clark Kelso
Receiver

RE: COVID-19 Staff Vaccination Mandate

Dear Clark:

We write in response to your May 21 request for our view on "on the legality of, pros and cons of, and evidentiary basis for or against requiring CDCR staff – both health care and custody" to be vaccinated.

Over the last fifteen months, more than 69,000 people who live and work in California prisons have been infected by the novel coronavirus, at least 250 have died, and an untold number are suffering and will continue to suffer debilitating, long-term effects from the disease. Staff remain the primary vector for COVID-19 infections in the prison system, where four prisons are experiencing outbreaks. Although safe and effective vaccines have been widely available to staff in all prisons since January 2021, only about half have chosen to be vaccinated. The remainder continue to work in direct physical proximity to incarcerated people and each other and expose them to an unacceptably high risk of serious harm and death. At some prisons, the number of staff who are unvaccinated is shockingly high; at High Desert State Prison, for example, 75% of staff are unvaccinated.

To protect the incarcerated population as well as the staff, including the many who are immunocompromised and the many incarcerated individuals who, because of their disabilities or medical conditions, must come in frequent, direct contact with staff, you must direct that all staff who work in the prisons be vaccinated immediately, subject to the usual exemptions and accommodations required under state and federal law.

The public health basis and the life-saving benefits of such action are beyond dispute.[1] That is why employers, including at least 43 California colleges and universities, large healthcare

[1] *See, e.g.*, Eric Reinhart & Daniel L. Chen, Carceral-Community Epidemiology, Structural Racism, and COVID-19 Disparities, Proceedings of the Nat'l Academy of Sciences, Vol. 118 (May 2021) ("[Carceral] facilities function as disease incubators, providing sites for easy viral and bacterial replication with a ready supply of tightly packed bodies that are rendered even more vulnerable by inadequate healthcare, poor living conditions, and

providers, meat-packing plants, the Prison Law Office, and other law firms, already have required, or very soon will require, that employees be vaccinated.[2]

Some employers may have the luxury of waiting to enact a vaccination mandate. You do not. There are no telework, social distancing, or other strategies that alone or in combination adequately reduce the substantial risk of serious harm and death to the almost 100,000 people confined in state prisons, not to mention the over 65,000 staff who work in the prisons and live in the outside community. The essential work of CCHCS and CDCR institution staff to operate the prison and run programming simply cannot be done over Zoom.

There is no time to monitor "trends." Delay cannot be justified based on current, relatively low case counts. By the time the virus strikes again, it will be too late, as we have seen time and time again during the pandemic. And there is evidence throughout the world that the virus will strike again. Moscow is now on lockdown and the United Kingdom has postponed its reopening because of new outbreaks of a more contagious variant. Pockets of infection have been discovered in California, including Marin County. It takes only one infected staff person to seed an outbreak and/or cause a large-scale shutdown of prison operations. Indeed, many of the new staff infections have been identified as variants, which may have higher transmissibility. You cannot vaccinate yourself out of an active outbreak; the virus spreads too rapidly, and the prisons

---

associated comorbidities"); CDC, COVID-19 Vaccine FAQs in Correctional and Detention Centers (June 1, 2021) ("Outbreaks in correctional and detention facilities are often challenging to control" and may "lead to community transmission outside of the facility").

[2] This includes the Los Angeles Unified School District, Sunrise Senior Living, University of Pennsylvania Health System, Houston Methodist Hospital, Boys & Girls Clubs of the SF Peninsula, California College of the Arts, California Lutheran University, California Polytechnic State University (San Luis Obispo and Pomona), California State University (Bakersfield, Chico, Fresno, Fullerton, Long Beach, Los Angeles, Northridge, Sacramento, San Bernardino, San Marcos, Maritime Academy, Channel Islands, Dominguez Hills, East Bay, Monterey Bay, Stanislaus), Harvey Mudd College, Humboldt State University, Samuel Merritt University, San Diego State University, San Francisco State University, San Jose State University, Sonoma State University, Southwestern College, Stanford University, University of California (Berkeley, Davis, Irvine, Los Angeles, Merced, Riverside, San Diego, San Francisco, Santa Barbara, Santa Cruz), University of La Verne, University of San Francisco, University of Southern California, Whittier College, JB USA Holdings, Inc. (meat packing), Lastique International Corp. (plastics distributor), Davis Wright Tremaine LLP, and Sanford Heisler Sharp LLP. Other employers require new hires to be vaccinated, including United Airlines, Delta Airlines, employees of the Doña Ana Detention Center, and senior living operators ALG Senior, Altria Senior Living, Civitas Senior Living, and Juniper Communities, Silverado.

function as "disease multipliers" and "epidemiological pumps."[3] As you stated earlier this year, if the coronavirus were building its ideal home, it would build a prison. Firm leadership and swift action are urgently needed.

EFFICACY OF INCENTIVES AND VOLUNTARY VACCINATION PROGRAMS

The CCPOA asks, "*at this point in time*," that this matter be delayed indefinitely and counsels that "[m]ore time" be given to wait and see if over 30,400 staff will change their minds.[4] But we cannot continue to inch along under a danger of this magnitude. We are long past the wait-and-see-and-hope-for-the-best approach. There are no data-driven guideposts or projections for whether or when incentives will result in full staff vaccination. Indeed, no metrics for efficacy have ever been offered. The data we do have, both in CDCR and in the larger community, however, indicates that a voluntary program will not achieve the full vaccination needed.

Put simply, measures to encourage voluntary vaccination have not increased staff vaccinations on the scale, or with the speed, necessary to protect our clients or the surrounding communities. Incentives of some form have been in place since December 2020. Even with them, vaccination rates remain low. Between May 14 and June 4, 2021, the number of institution staff who received a first dose of a vaccine went up by only 2%.[5] Assuming that rate remains constant, which is doubtful as remaining unvaccinated staff likely are more resistant to being vaccinated, all staff at High Desert will have received a first dose of the vaccine by **July 2023**, over two years from now.[6] At CHCF and CMF, which have close to the highest rates of partially or fully vaccinated staff (63% and 62%, respectively), it would take until **July 2022**. And this does not address whether staff will voluntarily keep up to date on any necessary booster shots.

---

3 *See* Eric Reinhart & Daniel L. Chen, Carceral-Community Epidemiology, Structural Racism, and COVID-19 Disparities, Proceedings of the Nat'l Academy of Sciences, Vol. 118 (May 2021); *see also* Eric Reinhart & Daniel L. Chen, Incarceration and Its Disseminations: COVID-19 Pandemic Lessons From Chicago's Cook County Jail, Health Affairs Vol. 39, No. 8 (June 2020) ("Existing conditions in jails and penitentiaries make infection control particularly difficult, putting inmates at unconscionable and perhaps unconstitutional risk.").

4 *See* ECF 3591 at 4 (emphasis in original).

5 *See* Email from Suzanne Benavidez, Special Assistant to Director Joseph Bick, M.D., California Correctional Health Care Services, PLO Covid Data Summary for 06/04/21 (June 4, 2021).

6 This is calculated based on the staff vaccination rates set forth in CDCR's online Vaccination Tracker as of June 10, 2021. It does not include people who were vaccinated by a community healthcare provider and did not report their vaccination status.

The mitigation efforts cited by the CCPOA have been in place for months. This includes CCPOA's admirable public service videos, released in January 2021; supplemental paid sick leave, enacted by the legislature in March 2021; COVID Mitigation Advocacy Program, finalized in April 2021; temporary relief from routine COVID-19 testing, in effect in May and June 2021; and additional vaccine clinics at each institution, in effect in May 2021.[7]

The CCPOA's only new suggestions, one-time bonuses and counseling from a medical professional, likely would not result in the number of staff vaccinations needed without needless delay and, in any event, could be done in tandem with a mandatory program.[8] Extensive information on the safety and efficacy of the vaccines from medical professionals has been widely available, and staff would be offered individual consultations under a mandatory vaccination program.[9] And, on May 18, 2021, all staff were informed of cash prizes that people who have been vaccinated, or who sign a declination form, are eligible for.[10] This is in addition to the state's $116.5 million Vax for the Win program, "which includes $50 incentive cards to newly vaccinated residents and cash prize drawings for all who have received at least one dose."[11]

The low efficacy of incentives to date is not unexpected. Medical researchers believe that "[i]ncentives alone are unlikely to deliver the population immunity that will end the pandemic."[12] As a result, they recommend that "organizations that take care of patients," such as prisons, "mandate Covid vaccination for their employees":

> No intervention strategy is more effective than requiring vaccination, and our institution, Penn Medicine, recently announced that all health

---

7 *See* ECF 3591 at 2, 5-6.

8 *See* ECF 3591 at 8-9.

9 *See, e.g.*, ECF 3539, Joint CMC Statement at 4-5 (Jan. 26, 2021) (Defendants' Position); ECF 3548, Joint CMC Statement at 5-6 (Feb. 12, 2021) (Defendants' Position).

10 *See* Email from CDCR CCHCS COVID-19, Vaccine rewards program (May 18, 2021). Bonuses, unfortunately, may have unintended consequences. This is because "booster shots will probably be required down the line," and "[o]ffering incentives now may set a costly and undesirable precedent, causing people to expect—and wait for—an incentive the next time around." *See* Kevin G. Volpp & Carolyn C. Cannuscio, Incentives for Immunity—Strategies for Increasing Covid-19 Vaccine Uptake, New England Journal of Medicine (May 26, 2021).

11 Office of Governor Newsom, Governor Newsom Draws First 15 Winners in California's Vax for the Win Giveaway (June 4, 2021), https://www.gov.ca.gov/2021/06/04/governor-newsom-draws-first-15-winners-in-californias-vax-for-the-win-giveaway/.

12 Kevin G. Volpp & Carolyn C. Cannuscio, Incentives for Immunity—Strategies for Increasing Covid-19 Vaccine Uptake, New England Journal of Medicine (May 26, 2021).

> system employees will be required to be vaccinated. U.S. health care workers are declining Covid-19 vaccination at alarming rates. In one nursing home, although 90% of the residents had been vaccinated, only half of the employees had followed suit; one of the unvaccinated employees infected multiple residents, and one vaccinated and two unvaccinated residents died. Such preventable lapses in safety should be unacceptable to anyone in the health care profession. Vaccination mandates in schools and workplaces—**especially in high-contact settings such as meat-packing plants and prisons**—could substantially reduce the future toll of Covid-19 in the United States.[13]

That recommendation is consistent with studies of influenza vaccination strategies, which have found mandatory vaccination programs to be "more effective at increasing coverage levels than any voluntary strategy."[14] "The best available evidence suggests that even when health care organizations implement aggressive, labor-intensive voluntary influenza vaccination programs for their employees, they are rarely able to achieve vaccination rates higher than 70%."[15]

One study found that years of "extensive publicity, incentives and educational programs" at a large healthcare organization with approximately 26,000 employees resulted in an influenza vaccination rate below the target goal of 80%.[16] After influenza vaccination was made a condition of employment for all employees, 98.4% were vaccinated.[17] An additional 0.35% received a

---

13 *Id.* (emphasis added).

14 *See* Alexandra M. Stewart & Marisa A. Cox, State Law and Influenza Vaccination of Health Care Personnel, Vaccine, Vol. 31, 827-832, 829-830 (2013) ("Health care employers have adopted various strategies to encourage HCP to voluntarily receive influenza vaccination. However, these measures have failed to achieve 90% coverage levels. As a result, beginning in 2004, medical care facilities and local health departments began to require designated HCP to receive influenza vaccination as a condition of employment. Today, hundreds of facilities throughout the country have developed and implemented similar policies. Mandatory vaccination programs have been endorsed by professional and nonprofit, state health, and public health entities. These programs have been more effective at increasing coverage levels than any voluntary strategy, with some health systems reporting coverage levels up to 99.3%." (internal footnotes omitted)).

15 Abigale L. Ottenberg *et al.*, Vaccinating Health Care Workers Against Influenza, Am. J. of Public Health, Vol. 101, 212-16, 212-13 (Feb. 2011).

16 Hilary M. Babcock *et al.*, Mandatory Influenza Vaccination of Health Care Workers, Clinical Infectious Diseases, Vol. 50, 459-464, 460 (Feb. 2010).

17 *Id.* at 460-62.

religious exemption, 1.24% received a medical exemption, and only eight people, or 0.03% of staff, were terminated for noncompliance.[18]

The study results are consistent with CCPOA's belief that "few employees not near retirement will resign" if COVID-19 vaccines are mandated.[19] It also is consistent with the experience of Houston Methodist Hospital, which required that its employees be vaccinated against COVID-19 by June 7, 2021. Only about 0.7% (or 178) of the over 26,000 employees have been suspended for failure to comply with the policy.[20]

LEGAL BASIS AND REQUIRED EXEMPTIONS AND ACCOMMODATIONS

A staff vaccination mandate is well supported by state and federal law. The recent decision of the Superior Court for the County of Alameda in *Kiel v. The Regents of the University of California*, No. HG20-072843 (Super. Ct. Dec. 4, 2020), is instructive. There, the Court considered the lawfulness of an Executive Order issued by the President of the University of California conditioning access to University property on flu vaccination.[21] The Court denied plaintiffs' motion for a preliminary injunction.[22] The Court observed that the U.S. Supreme Court held over a century ago in *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11 (1905), "that a state's mandatory vaccination statute was a lawful exercise of the state's police power to protect the public health and safety."[23] And, "[s]ince *Jacobson*, courts have repeatedly cited *Jacobson* and upheld mandatory vaccination laws over challenges predicated on the First Amendment, the Equal Protection Clause, the Due Process Clause, the Fourth Amendment, education rights, parental rights, and privacy rights."[24] In fact, the Court noted that it "is unaware of any case in which a court has struck down a mandatory immunization imposed as a condition . . . of access to property for the purpose of employment."[25]

The same analysis applies here. In fact, the goal of the Executive Order considered in *Kiel* is almost identical to the one that would animate a COVID-19 vaccination mandate in California prisons: "to reduce the likelihood of severe disease . . . and in turn reduce the likelihood that our

---

18 *Id.* at 461.

19 *See* ECF 3591 at 12.

20 Bill Chappell, The Clock's Ticking for 178 Hospital Workers Suspended for Not Getting Vaccinated, NPR (June 10, 2021).

21 *Kiel v. The Regents of the Univ. of Cal.*, No. HG20-072843 at 2 (Super. Ct. Dec. 4, 2020).

22 *Id.* at 7-8.

23 *Id.* at 8.

24 *Id.* at 9 (collecting cases, including *Zucht v. King*, 260 U.S. 174, 175-77 (1922) ("it is within the police power of a state to provide for compulsory vaccination")).

25 *Id.* at 14.

health system will be overwhelmed (in more in [sic] than just hospital bed capacity)."[26] The Court also found that the evidence "amply supports that requiring flu vaccination is more likely to reduce transmission of the flu on UC property than proceeding under looser rules," including mask-wearing—something that certainly is true of existing COVID-19 vaccinations.[27]

That the vaccines are authorized by the FDA for emergency use under 21 U.S.C. § 360bbb-3 does not change the analysis. Indeed, a federal court recently rejected a legal challenge on that basis and upheld Houston Methodist Hospital's COVID-19 vaccination policy, noting that "Methodist is trying to do their business of saving lives without giving them the COVID-19 virus. It is a choice made to keep staff, patients, and their families safer."[28] The California Department of Public Health has recognized that "COVID-19 vaccines have gone through extensive clinical trials and the most intensive safety review in U.S. history," and are "highly effective" at preventing serious illness from COVID-19.[29]

As with the Executive Order reviewed in *Kiel*, the COVID-19 vaccination mandate should be subject to medical exemptions and religious and disability accommodations required under state and federal law. That is consistent with recent guidance from the U.S. Equal Employment Opportunity Commission (EEOC).[30] The CCPOA attempts to make a straightforward mandate

---

26 *Id.* at 12.

27 *Id.* at 11. Indeed, over four months ago, Defendants represented that they would reevaluate their position on a vaccination mandate based, among other things, on "the outcome of ongoing scientific studies regarding how effectively the vaccine reduces not just viral infection, but viral transmission." ECF 3548, Joint CMC Statement at 5 (Feb. 12, 2021). The Centers for Disease Control and Prevention now recognize that "[a] growing body of evidence indicates that people fully vaccinated with an mRNA vaccine (Pfizer-BioNTech and Moderna) are less likely to have asymptomatic infection or to transmit SARS-CoV-2 to others." CDC, Science Brief: COVID-19 Vaccines and Vaccination (May 27, 2021).

28 *Bridges v. Houston Methodist Hospital*, No. H-21-1774 at 2-4 (S.D. Tex. June 12, 2021) (rejecting argument that "no one can be mandated to receive 'unapproved' medicines in emergencies, and . . . no currently-available vaccines have been fully approved by the Food and Drug Administration").

29 Cal. Dep't of Public Health, Vaccinate All 58, Let's Get to Immunity (last visited June 11, 2021), https://www.vaccinateall58.com/.

30 EEOC, What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws (May 28, 2021), https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws ("The federal EEO laws do not prevent an employer from requiring all employees physically entering the workplace to be vaccinated for COVID-19, subject to the reasonable accommodation provisions of Title VII and the ADA and other EEO considerations"). State law imposes similar requirements. *See* California for All, Vaccines (June 11, 2021),

unpalatable by grafting unnecessary and time-consuming bureaucratic measures to it in the name of implementing antidiscrimination laws.[31] But that is nothing more than scare tactics. The state already has processes in place to evaluate requests for accommodations and exemptions under the same state and federal laws. Those existing processes can be used here.

Finally, the suggestion, as CCPOA has made and others may, to delay a needed mandate for "several months" of bargaining also is misplaced.[32] As the CCPOA acknowledges, "[t]he Dills Act permits the State to act first and bargain later in a bona fide emergency."[33] The COVID-19 pandemic certainly qualifies as "an act of God, natural disaster, or other emergency or calamity affecting the state, and which is beyond the control of the employer or recognized employee organization" under both state and federal law.[34] In any event, the prospect of drawn-out negotiations militates in favor of quick action, not further delay.

---

https://covid19.ca.gov/vaccines/ ("**May an employer require COVID-19 vaccination for all employees entering the workplace?** Yes, if certain requirements are met. Under the ADA, an employer may require all employees to meet a qualification standard that is job-related and consistent with business necessity, such as a safety-related standard requiring COVID-19 vaccination. However, if a particular employee cannot meet such a safety-related qualification standard because of a disability, the employer may not require compliance for that employee unless the employer can demonstrate that the individual would pose a 'direct threat' to the health or safety of the employee or others in the workplace." (citing to EEOC, What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws)).

31 ECF 3591 at 12-14.

32 *Id.* at 11.

33 *Id.* at 12 (citing Gov't Code § 3516.5 ("In cases of emergency when the employer determines that a law, rule, resolution, or regulation must be adopted immediately without prior notice . . . the administrative officials . . . shall provide such notice and opportunity to meet and confer in good faith at the earliest practical time following the adoption of such law, rule, resolution, or regulation.").

34 Gov't Code § 3523(d); *see, e.g.*, Exec. Dep't, State of California, Proclamation of a State of Emergency (Mar. 4, 2020); U.S. Dep't of Health & Human Services, Office of the secretary, Determination of Public Health Emergency (Feb. 7, 2020) ("[P]ursuant to section 564 of the FD&C Act, I determined that there is a public health emergency that has a significant potential to affect national security or the health and security of United States citizens living abroad and that involves a novel (new) coronavirus (nCoV) first detected in Wuhan City, Hubei Province, China in 2019 (2019-nCoV)."); FDA, Emergency Use Authorization for Vaccines Explained (Nov. 20, 2020),https://www.fda.gov/vaccines-blood-biologics/vaccines/emergency-use-authorization-vaccines-explained ("FDA recognizes the gravity of the current public health emergency and the importance of

In our view, the Eighth Amendment, requires you "to take adequate steps to curb the spread of disease within the prison system."[35] As the last year and a quarter has demonstrated the vaccine is the most effective and safe way to prevent the spread of infection and to mitigate disease caused by COVID-19 in prisons. We do not now know whether those who live and work in CDCR will be assaulted by another surge, perhaps caused by a more infectious variant. What we do know for a fact is that mandating the vaccine for staff will help enormously in reducing the risk of further disease and death.[36] Therefore, we urge you to adopt a policy requiring all staff to be vaccinated absent medical exemptions and the need for religious and disability accommodations.

If you would like to discuss this issue or need any further information, we expect that you will let us know.

Sincerely,

/s/

Donald Specter
Rita Lomio

cc: Counsel in *Plata*, *Armstrong*, *Coleman*, and *Clark*
Armstrong Court Expert
Coleman Special Master
Counsel for CCPOA

---

facilitating availability, as soon as possible, of vaccines to prevent COVID-19—vaccines that the public will trust and have confidence in receiving.").

35 *Coleman v. Newsom*, 455 F. Supp. 3d 926, 932 (E.D. Cal./N.D. Cal. 2020). "Indeed, disease control is one of the areas in which the *Plata* court previously concluded that Defendants fell short." *Id.*

36 *Helling v. McKinney*, 509 U.S. 25, 33 (1993) ("We have great difficulty agreeing that prison authorities may not be deliberately indifferent to an inmate's current health problems but may ignore a condition of confinement that is sure or very likely to cause serious illness and needless suffering the next week or month or year.")