LIFE SUPPORT ALLIANCE & California Lifer Newsletter
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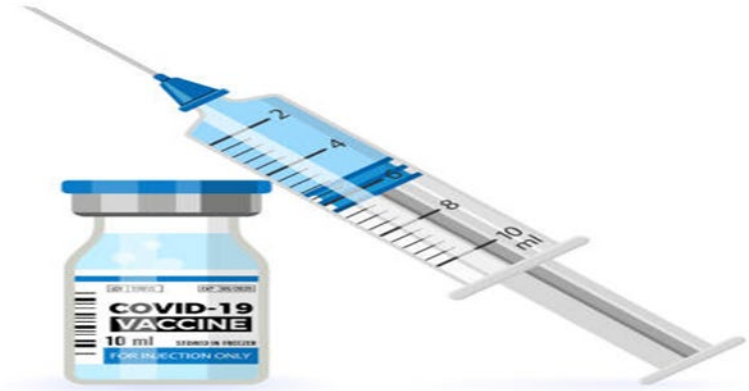

CDCR STAFF FACING MANDATORY VAX REQUIREMENT

On Sept. 27, Federal Judge Jon Tigar ruled that all workers entering California prisons MUST be fully vaccinated against the CoVid 19 virus. Additionally, Tigar's order covers all inmates who work outside the prisons and inmates who receive in-person visits.

The judge, noting "The question of mandatory vaccines is complex," also decided, "In this case, however, the relevant facts are undisputed. No one challenges the serious risks that COVID-19 poses to incarcerated persons.

"No one disputes that it is difficult to control the virus once it has been introduced into a prison setting. No one contests that staff are the primary vector for introduction. And no one argues that testing, even if done on a daily basis, is an adequate proxy for vaccination to reduce the risk of introduction," he continued. Tigar's 22-page opinion gave the state 2 weeks from the date of the order to present a plan to enforce the mandatory order. Mandatory vaccinations for staff in the prison system had been opposed by CCPOA and the Newsom administration.

The ruling comes after last month's request by the attorneys representing prisoners the Plata medical care lawsuit, who maintained inmates' Eight Amendment rights pertaining to cruel and unusual punishment, by increasing their exposure to possible infection with the Corona virus via unvaccinated staff, regardless of frequent testing. Tigar, however, cited undisputed evidence that from August to mid-September of this year 48 outbreaks in the prisons, primarily of the Delta variant of the CoVid virus, have been traced directly to prison staff, a situation Tigar termed "staggering."

Since the beginning of the pandemic almost 51,000 California inmates have been infected with CoVid, leading to the deaths of at least 240. In that same timeframe over 20,000 prison staff have contracted CoVid and 29 have died.

Once a CoVid vaccine became available, CDCR began making the shots available to all inmates, beginning with those at greatest risk from CoVid due to other medical issues. At the end of September CDCR reported 76% of the inmate population had been fully vaccinated, with totals ranging from a high of 90% at MCSP to a low of 45% at WSP. On the staff side, CDCR officially reports 57% of staff fully vaccinated, with CEN reporting the highest rate of staff vaccination at 71% and HDSP the lowest, at 30%.

However, the staff numbers can be misrepresentative, as 'staff' includes custody, free staff and those individuals that do not ordinarily come into contact with the inmate population. While CDCR does not routinely report the breakdown of custody staff vs. other staff that are vaccinated, filings with the court last month in support of the request for a court-ordered vaccine mandate revealed that vaccination rates among custody staff were, in many cases, much lower than the staff average at a given prison. As an example, J. Clark Kelso, federally appointed receiver overseeing medical care in California prisons, noted in those previous court filings, that only about 40% of custody staff state-wide were vaccinated. In fact, Kelso, in releasing numbers noting that, at that time, only 16% of HDSP's custody staff were fully vaccinated, characterized the low vaccination in some institutions as 'alarming.'

While CDCR cannot force a prisoner to undergo a medical procedure, Tigar's ruling is likely to have some effect on the inmate population, in that it includes those prisoners who wish to receive in-person visits in the mandated group. So, while no one will hold an inmate down and forcibly vaccinate them, there may well be consequences via withheld privileges for those who refuse the shots.

Similar consequences may be in store for those staff who refuse to comply with the mandatory order. CDCR, so far, has issued only a bland statement saying the department 'respectfully disagrees' with Tigar's finding that the department had exhibited deliberate indifference to the prison population's health by not mandating vaccinations among staff. The department also said it was evaluating the order to "determine next steps."

CCOPA, a more vocal and predictable opponent to mandatory vaccinations of staff, responded by claiming the union had "undertaken an aggressive, voluntary vaccination program and we still believe the voluntary approach is the best way forward," and also reported they were looking at legal options. While CCPOA did not fully document what measurers they tried to encourage vaccination among custody staff, CDCR has tried a variety of 'carrots', from cash incentives to personal counseling, with dismal results.

As of the end of September, there were over 200 positive cases of CoVid 19 among the inmate population and while that is certainly below the several thousand cases posted in past months, it does represent a new outbreak, reportedly largely of the new Delta variant of the virus. The increase in cases has caused some institutions to step back into Phase 1 restrictions due to the outbreaks.

At the same time, staff positive cases in the prisons were well over 300 persons. Staff deaths stood at 39, including 3 in September alone.

Tigar's ruling did not set a deadline for staff to comply with vaccination. That deadline, consequences for those who refuse as well as additional incentive programs are expected to be revealed when CDCR presents its compliance plan to the court in 2 weeks. Stay tuned.

ELDERLY PAROLE REGS TAKE-AWAYS

Herewith a few highlights from the recently approved regulations implementing the BPH's Elderly Parole hearings, under both the auspices of AB 3234 and the 3JP agreement. Remember, you can receive the full FAQ sheet released by the BPH by sending a stamp or SASE to LSA.

The Board of Parole Hearings has been conducting elderly parole hearings under a court order since October 2014. At these hearings individuals who have been incarcerated for 25 years, and are over 60 years of age are considered for parole release. Special consideration is given to the individual's age, time served, and any diminished capacity.

On January 1, 2021, Penal Code section 3055 was amended by Assembly Bill (AB) 3234, to provide elderly parole consideration for some people who are 50 years of age or older and have served a minimum of 20 years of continuous incarceration.

Due to the passage of AB 3234, the Board adopted and is implementing regulations for conducting elderly parole hearings. These regulations will allow the Board to carry out the mandate in Penal Code section 3055, and once approved will remain in place unless they are repealed.

Key Provisions of the Proposed Regulations

1. The regulations define an elderly inmate in compliance with Penal Code section 3055, and detail those who are excluded from elderly parole under the Penal Code. The regulations also define continuous incarceration and detail that CDCR's Case Records staff will calculate an individual's Elderly Parole Eligible Date, or EPED.

2. The Board will meet with an elderly inmate during the sixth year before their EPED for a consultation.

3. An elderly inmate shall be scheduled for an elderly parole hearing within six months following their EPED.

4. The Board's hearing panel shall give special consideration to whether elderly inmate factors reduce the person's risk of future violence. The elderly inmate factors of age, time served, and diminished physical condition are more clearly defined.

5. If parole is not granted, subsequent elderly parole hearings shall be scheduled in accordance with Penal Code section 3041.5, subdivision (b)(3).

6. If an individual is determinately sentenced and due for release within a year, they will not be scheduled for an elderly parole hearing.

Where can I find additional information about the calculation of an EPED?

CDCR will soon promulgate their own regulations regarding the calculation of an individual's EPED, and the ability to appeal eligibility decisions and calculations

Once an EPED is set, when will an elderly parole hearing be scheduled?

If an individual's EPED is before January 1, 2023, the individual will be scheduled for an elderly parole hearing on or before December 31, 2022. If an individual's EPED is after January 1, 2023, they will be scheduled for an elderly parole hearing within six months of their EPED.

AB 2942—POSSIBLY HELPFUL

Because of interest in recent bills providing some pathways for resentencing the question of AB 2942 and where it fits in this tangled trail of travails keeps popping up. Herewith, culled from several sources is what AB 2942, passed, signed and chaptered (entered into the legal statutes) in 2018 and effective since January 1, 2019, can and can't do.

AB 2942 amended Penal Code section 1170(d)(1) so that the District Attorneys can now review the sentences of those already serving time with an eye toward possible resentencing, if the DA feels additional time is not "in the interest of justice." On such finding by the DA's office, the office can recommend to the sentencing court that the original sentence be recalled. Recall simply means the DA recommends to the sentencing court that the sentence of the individual in question be re-examined, with an eye to shortening that time imposed, again, 'in the interest of justice.' It does not mean the sentence can be lengthened—only shortened. While the law is state-wide, it allows each county DA office to establish their own criteria for which cases they will review, as well as what qualifies any individual for a resentencing recommendation.

The DA offices in some counties have been quite pro-active in researching and recommending some cases for this consideration, other counties have simply thrown up a stone wall. While AB 2942 allows, even encourages, DA offices to make such reviews and recommendations, it does not require them to do so. Each county is different in their action on this front, but the following counties have some sort of review process in place, with more information available from the DA's website or by calling the DA's office:

San Luis Obispo, Napa, San Francisco, San Diego Santa Cruz, Humboldt, Santa Clara, Yolo, Contra Costa, Riverside and Los Angeles.

And while there are no specific exclusions in the bill for any type of crime or sentence (everyone is theoretically eligible for review, no exclusions for 3X, LWOP or for victim characteristics), the bill also does not require any DA's office to review any sentences or recommend any resentencing hearings or require the sentencing court to act on any such recommendations. The provisions of the bill even apply to those serving time in other locations for California convictions. It can also be used in some cases when an inmate may be facing deportation for certain types of offenses.

A referral for recall of sentence under the provisions of AB 2942, while still getting someone to that recall hearing under PC 1170 (d), differs from the 1170 (d) referrals made by CDCR itself. CDCR is promulgating their own regs outlining in what circumstances and cases the department might consider recommending someone for sentence recall, and those regs will be more restrictive than referrals by DAs. As an example, as outlines in AB 2942 the DA could refer anyone currently serving time for a sentence recall; under CDCR's referral process 3 situations: 1) for "exceptional conduct" by a prisoner, 2) the current sentence has become legally invalid due to new information, a change in the law, or a new judicial decision, and 3) when the current sentence includes enhancements that are now within the court's discretion to strike (e.g. gun enhancements, "nickel prior"). The department has also indicated they would not consider those sentenced to LWOP for such resentencing recommendations.

Once a DA's office has completed their review of a specific case and made a decision to recommend the courts consider a resentencing hearing. However, recommend is all they can do. AB 2942 operates the same in regard to the courts as it does the DA offices—recommendations only, no power to require the courts to agree to the hearing.

If a resentencing hearing is held, it will look at the crime and sentence from a fresh perspective, as if the individual had not been sentenced previously. And they will consider the sentence in light of both any new laws in place now and the individual's post-incarceration behavior—has he/she been following rules, programming well, basically participating in rehabilitation. That can have an impact on the court's decision.

Once the court determines what the new sentence should be, credit will be given for time served; obviously, this could shorten the time anyone is either in prison in general, or the time before their first parole hearing, if that is still in the cards. All of these events take time---but the DAs and the courts know those under consideration aren't going anywhere, so there is no real sense of urgency in completing the tasks.

Here's what AB 2942 does not do: it does not create a path for prisoners, family members or attorneys to petition the sentencing court, or the DA, for recall of sentence consideration. The only way a resentencing will be considered under 1170 (d) (1) is on the recommendation of the prosecuting DA's office, the CDCR (and we've already discussed this sort of 1170 consideration in terms of CDCR involvement), the Board of Parole Hearings, or, for those still in jail (not prison), the Sheriff's office.

It's important to note, this exclusion of a pathway for petitioning extends to any third-party attorneys, para legal, organizations or other 'helpers' who may offer to file writ or petition for you for consideration under AB 2942—those are basically scams. Because such 'writs' or 'petitions will go nowhere. Nor can any of those entities fast-forward any action the DA may be considering—it just isn't in the terms of the bill.

What can you do if you're up for consideration? Continue to program well, keep yourself out of trouble, and have all your documentation and post-conviction history ready, should the DA's representatives come (figurat8ively) knocking on your door. You'll want to be able to show that you're AB 2942 material, if asked. Until then, be patient, and know that efforts to expand and increase opportunities like those offered by AB 2942 are continuing constantly.

MANAGING YOUR DENIAL

BPH panels have a way of providing suggestions for programming to those before them that sometimes are less than clear and informational. Aside from suggesting just simply 'continue to program,' they often suggest specifics that are not widely available, if available at all. Among those suggestions are often treatment for sex offenders (none officially available), to get therapy or counseling (iffy and sporadically available) or, most recently, engage in Denial Management courses.

That one stumped us for a bit, but on doing some inquiry and research, we found it is something of a current 'thing,' starting in the substance abuse recovery world, but also applicable to other areas of culpability and anti-social, even criminal, behavior. But—the only currently available course we could find was a segment of the LTOPP program, a program which isn't available in all institutions, and where it is available there is often a waiting list.

What to do? Write a program to fill the need. As we did with The Amends Project, and mostly recently, with the roadmap to creating a parole and relapse prevention plan, if this is something lifers need, we'll try to provide.

Beginning October 10 LSA will be offering a correspondence course on this topic-of-the-moment, "Denial Management; Breaking the Habit of Dodging Reality." The 2-part program, mailed directly to you, was created after several months of research and consultation with clinicians in psychology and recovery. And while there is a nominal cost ($10 to cover printing and postage, including return postage for your replies), we've been able to set aside a very limited amount of funds to underwrite the program for those who are truly indigent.

Also, we've condensed our in-person presentation, Understanding Your CRA, into a booklet, available on request for those including a SASE. After October 10 those inside can request either course by writing to LSA, or, in the case of Denial Management, families can order via LSA's website.

A word on costs for programs—printing and postage are not negligible expenses, especially when requests number in the several hundred, and both those expenses are slated to increase. Asking lifers to help underwrite those expenses helps the process continue and shows their commitment to their own rehabilitation. We keep costs as low as possible and continue to provide numerous free resources.