

Employers Contemplating Compulsory COVID-19 Vaccination Policies: Choice or Mandate

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An effective vaccine could protect our populations from the devastating social and economic effects of COVID-19 spread, and allow employers to operate at full capacity. However, experts agree that the efficacy of any vaccine likely will require the majority of us to be inoculated before we see the rates of infection reach de minimis levels. This condition will apply equally to an employer's workforce.

According to a survey conducted in August 2020,^[1] 35% of Americans surveyed said they decidedly would not get a vaccine when one becomes available. That rate climbs to 41% among parents with children under 18. A more recent survey conducted in September 2020 indicates that number is now at 49%.^[2] So how do we move toward a fully functioning society, including restoring robust business operations, when such a large number of individuals may be unwilling to be inoculated? That is the question many public and private employers, school districts, colleges and universities are beginning to contemplate as we inch closer to an effective means of disease prevention.

While the Coronavirus may be novel, the issue of mandated vaccination is not. In a case dating back to 1905, the Supreme Court addressed mandatory vaccinations in regard to a smallpox outbreak Massachusetts.^[3] In *Jacobson v Massachusetts*, Jacobson objected to a regulation requiring compulsory vaccinations, arguing it was in “derogation of the rights secured to the defendant by the 14th Amendment of the Constitution of the United States . . . providing that no state shall make or enforce any law abridging the privileges or immunities of citizens of the United States, nor deprive any person of life, liberty, or property without due process of law” Rejecting this argument, the Court ruled that a State law requiring compulsory vaccination of citizens to eradicate disease was a proper exercise of the legislative prerogative to protect the public health, finding “the police power of a state must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety.”^[4] Drawing on the logic from then existing school immunization mandates, the Court held that such regulations do not violate the 14th Amendment right to liberty because they fall within all kinds of restraints to which every person is necessarily subjected for the common good, and that real liberty for all could not exist if each individual is allowed to act without regard to the injury that his or her actions might cause others. The holding in *Jacobson* has since been a staple of public health law and, as a result, compulsory vaccinations remain a valid exercise of State power.

State-mandated vaccination laws have been on the books for the past century and although we generally think of them as applying to children attending day care facilities, and public and private schools, many states have enacted laws requiring immunization of certain groups of people such as healthcare workers, patients, and residents of long-term care facilities.

Generally Recognized Exemptions

Because much of the law and jurisprudence regarding mandated vaccinations revolve around the inoculation of students, we generally look to that body of law for guidance on potential exemptions. According to the National Conference of State Legislators (NCSL), all states allow exemptions for medical reasons, 45 states and the District of Columbia have a religious exemption law, and 17 of those states have philosophical exemption laws allowing parents to claim an exemption based on their personal, moral or other beliefs.^[5]

Perhaps the most controversial exemptions to compulsory vaccination laws are those for religious and philosophical reasons. A few states have eliminated these exemptions altogether due to infectious disease outbreaks in recent years, namely measles.^[6] Courts have upheld state legislative enactment of laws eliminating these exemptions on the grounds that, although compulsory vaccination may burden religious practices, such laws do not violate the First Amendment's free exercise clause because the laws do not single out religion nor are they motivated by a purpose to interfere with an individual's sincerely held religious beliefs.

Notably, there has been a sea-change in public attitude toward vaccination exemptions following the catastrophic effects of COVID-19 as it spreads across the country. By way of example, on May 13, 2020, the New York State Bar Association's Health Law Section Task Force on COVID-19 issued an 83-page report and recommendations on dealing with various aspects of the pandemic.^[7] The report states that, although "some Americans may push back on the COVID-19 vaccination for religious, philosophical or personal reasons," "for the sake of public health, mandatory vaccinations for COVID-19 should be required in the United States as soon as it is available." In support of its position, the Bar notes "Constitutional challenges under the religious freedom clause under the First Amendment and under the substantive due process clause of the Fourteenth Amendment have failed, when the individual interests are not strong enough to outweigh the public benefit." The report concludes that the "gravity of COVID-19 presents compelling justification for State legislatures and Congress to mandate a COVID-19 vaccination."

With this backdrop, it is not inconceivable that compulsory vaccinations may be on the horizon at the state or even federal level. At a minimum, we would expect to see legislation regarding certain sectors with high risk populations such as healthcare workers, employees and residents of elder-care facilities, school districts, universities, and perhaps even employees in the retail and food service sectors.

Navigating Potential Accommodations in the Employment Context

While a fully inoculated workforce is ideal, absent federal or state laws mandating inoculation, whether for all citizens or specific sectors and employee groups, employers only can go so far in implementing compulsory vaccination policies. Employers need to be mindful of existing federal and state laws that may be implicated when implementing such policies. Public employers may face greater challenges in implementing a vaccination policy based upon employees' constitutional rights.

The Equal Employment Opportunity Commission (EEOC) has not issued new guidance on a COVID-19 vaccine, however, employers can reasonably rely on the EEOC's guidance regarding the flu vaccine. That guidance was issued on March 21, 2020,^[8] in which the EEOC specifically addressed the issue of whether employers covered by the Americans With Disabilities Act (ADA) and Title VII of the Civil Rights Act of 1964 (Title VII) may require employees to be inoculated for the influenza virus. According to the EEOC, an employee may be entitled to an exemption from an employer's mandatory vaccination policy under the ADA based on a disability that prevents the employee from being vaccinated for medical reasons. In that case, an employer would be required to grant a reasonable accommodation unless it would result in undue hardship to the business. Under the ADA, "undue hardship" is defined as "significant difficulty or expense" in providing the accommodation.

An employer also may be required to provide a reasonable accommodation for an employee's sincerely held religious belief, practice, or observance under Title VII if such belief prevents the employee from being inoculated and providing the

accommodation would not pose an undue hardship on the employer. Undue hardship is a lower bar in Title VII cases and requires only a showing of more than a de minimis cost to the employer. Employers should be cognizant of parallel state laws that may impose stricter standards to show that an accommodation would pose an undue hardship on the employer.

In addition to the EEOC guidance, in 2009 the U.S. Occupational Safety and Health Administration (OSHA) took a position during the H1N1 pandemic that employers may require employees to submit to influenza vaccines, providing that employees are properly informed of the benefits of vaccinations.^[9] OSHA cautioned, however, that “an employee who refuses vaccination because of a reasonable belief that he or she has a medical condition that creates a real danger of serious illness or death (such as a serious reaction to the vaccine) may be protected under Section 11(c) of the Occupational Safety and Health Act of 1970 pertaining to whistleblower rights.”

Take Away: In the private sector, an employer may implement a policy mandating its workforce be inoculated once a safe and effective vaccine becomes available. Although the policy should be uniformly applied, the employer will need to consider exceptions to the mandate, on a case-by-case basis, for an employee's medical condition or his or her sincerely held religious beliefs. In the public sector, absent specific statutory authorization, employers need to proceed with more caution before considering such a mandated policy, as such a policy may run afoul of the constitutional rights of employees.

[1] <https://news.gallup.com/poll/317018/one-three-americans-not-covid-vaccine.aspx>

[2] <https://www.pewresearch.org/science/2020/09/17/u-s-public-now-divided-over-whether-to-get-covid-19-vaccine/>

[3] 197 US 11 (1905).

[4] *Id.* at 88.

[5] <https://www.ncsl.org/research/health/school-immunization-exemption-state-laws.aspx>

[6] New York, California, Mississippi, and West Virginia.

[7] https://nysba.org/app/uploads/2020/05/HealthLawSectionTaskForceCOVID-19Report_5.13.20-1.pdf

[8] <https://www.eeoc.gov/laws/guidance/pandemic-preparedness-workplace-and-americans-disabilities-act>

[9] <https://www.osha.gov/laws-regs/standardinterpretations/2009-11-09>