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## Health Law: Vaccine Mandates: A Primer

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**Health Law**  
*Vaccine Mandates: A Primer*

Dorit Reiss<sup>1</sup>

Legal questions involving vaccine mandates come up in a number of contexts, including the legality of employer mandates, the constitutionality of mandates imposed by state actors, and when mandates are appropriate.<sup>2</sup>

Employer vaccine mandates implicate the limits imposed by the Americans with Disabilities Act (“ADA”).<sup>3</sup> With few exceptions, the ADA requires employers imposing vaccine mandates to reasonably accommodate those with medical conditions that increase their susceptibility to medical risks from the vaccine. Reasonable accommodations include changes to the work environment that would allow the employee to work despite the medical condition, but accommodations do not have to be exactly what the employee wants. The ADA allows employers to refuse accommodations if accommodating would create a “direct threat,” including “a significant risk of spreading a vaccine-preventable illness to others.”<sup>4</sup> The employer can also refuse accommodation if the accommodation imposes undue hardship on the employer, but undue hardship means significant difficulty or expense, a fairly high bar. This bar is higher than the standard for accommodating employees with religious objections to a workplace rule, where an employer need not provide an accommodation that imposes more than minimal costs.<sup>5</sup>

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<sup>1</sup> Excerpted and adapted from Y. Tony Yang, Elizabeth Pendo & Dorit Rubinstein Reiss, *The Americans with Disabilities Act and Healthcare Employer-Mandated Vaccinations*, 38 VACCINE 3184 (2020), and Dorit R. Reiss & Arthur L. Caplan, *Considerations in Mandating a New COVID-19 Vaccine in the USA for Children and Adults*, 7 J.L. & BIOETHICS (2020).

<sup>2</sup> Dorit Rubinstein Reiss, *Litigating Alternative Facts: School Vaccine Mandates in the Courts*, 21 U. PA. J. CONST. L. 207 (2018).

<sup>3</sup> Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101, *et seq.*

<sup>4</sup> Yang et al., *supra* note 1, at 3184.

<sup>5</sup> D.R. Reiss & V.B. Dubal, *Influenza Mandates and Religious Accommodation: Avoiding Legal Pitfalls*, 46 J.L. MED. & ETHICS 756, 757 (2018).

Two recent cases illustrate these issues. In *Hustvet v. Allina Health Systems*, the U.S. Court of Appeals for the Eighth Circuit upheld summary judgment entered against an employee who asserted ADA claims. The employer had required her to submit to a health-assessment screening for infectious diseases and then terminated her when she refused to obtain a rubella immunization. The court reasoned that the employer, a healthcare provider, had a business justification for requiring employees whose duties required coming into contact with immunocompromised patients to be immunized against infectious diseases, and the employer was not required to accommodate the employee's low risk of seizure by suspending its vaccine mandate.<sup>6</sup> In contrast, the U.S. Court of Appeals for the Third Circuit permitted ADA claims by a nurse to proceed. The nurse argued that severe anxiety and eosinophilic esophagitis prevented her from receiving a Tdap vaccine and requested that she be allowed to work while wearing a mask. The court found that the nurse pleaded a sufficient case to survive a motion to dismiss.<sup>7</sup>

Employers should consider three issues when imposing a vaccine mandate. First, the more easily communicated the disease, the stronger the justification for a mandate. Second, the more prevalent (as with COVID-19) the disease, the stronger the justification for a mandate. Third, the closer the relationship between the vaccine mandate and the employee's particular disability, the stronger the justification for an accommodation.

Lawsuits related to COVID-19 vaccines are on the way. The first lawsuit appears to have been filed in New Mexico in March 2021, and there will be others.<sup>8</sup> Employers should act proactively to prepare for addressing ADA claims when they mandate vaccines, including by considering possible accommodations.

Vaccine mandates imposed by governmental entities present other ethical and legal constraints.<sup>9</sup> Too often, the ethical and legal implications of vaccine mandates often focus on *whether* they are ethical and legal, rather than on *when* they are ethical and legal.

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<sup>6</sup> *Hustvet v. Allina Health Sys.*, 910 F.3d 399 (8th Cir. 2018).

<sup>7</sup> *Ruggiero v. Mt. Nittany Med. Ctr.*, 736 F. App'x 35, 39–42 (3d Cir. 2018).

<sup>8</sup> Susan Montoya Bryan, *New Mexico Corrections Officer Sues Over Vaccine Mandate*, AP NEWS (Mar. 4, 2021).

<sup>9</sup> Reiss & Caplan, *supra* note 1.

The answer to when a vaccine mandate is ethical depends upon values of autonomy, beneficence, utilitarianism, justice, and non-maleficence. To illustrate, consider how those values can apply to COVID-19 vaccine mandates. As a general matter, adults have more autonomy than children, and thus vaccine mandates must be more careful to respect adults' autonomy than children's. On this ground, school vaccination mandates have stronger footing than, say, employer mandates. But vaccine mandates can apply to adults as well, especially adults who choose to work in a healthcare setting or engage in other high-risk activities. The ethical values also consider the relative risks of disease. The evidence suggests that, in general, COVID-19 affects adults more severely than children. Yet vaccine mandates for children may still be justified both by the risk to children and by children's role in transmitting the disease to adults. Rubella vaccination mandates imposed by schools, for example, are primarily to protect against transmitting the disease to pregnant women, since the disease is most harmful when contracted in pregnancy. Similarly, the risk of COVID-19 transmission to adults through children would help support a potential school vaccine mandate.

Beyond ethics, the law imposes different standards for assessing vaccine mandates. Because children's mandates touch upon two important state interests—the children's own health and the public health—courts have largely upheld school vaccination mandates. Cases support the lawfulness of adult mandates, too. In fact, the seminal Supreme Court case of *Jacobson v. Massachusetts* upheld an adult vaccine mandate.<sup>10</sup> Perhaps courts should reconsider the balance between public health and constitutional rights.<sup>11</sup> But even under a recalibrated balance, targeted vaccine mandates—as opposed to statewide mandates—would likely continue to be found to be constitutional. A vaccine mandate on healthcare workers, for example, accompanied by medical exemptions, is tailored to protect public health and presents workers with the reasonable choice to vaccinate or to work elsewhere.

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<sup>10</sup> 197 U.S. 11, 12 (1905).

<sup>11</sup> Lindsay F. Wiley & Stephen I. Vladeck, *Coronavirus, Civil Liberties, and the Courts: The Case Against "Suspending" Judicial Review*, 133 HARV. L. REV. F. 179, 180–83 (2020).

There is considerable uncertainty as to the effects of recent religious-freedom decisions on broader public-health measures.<sup>12</sup> First, these are decisions on temporary measures on the Supreme Court's shadow docket, without the benefit of full argument, and the opinions were relatively short and cursory. Without clear reasoning, the scope of their effect is difficult to predict. Second, the decisions concerned public-health measures that directly addressed houses of worship. Their application to a more general context—like a vaccine mandate that is not targeted at religious institutions or activities—is unclear.

Vaccine mandates present multi-faceted questions touching on questions of law, policy, and ethics. Impending COVID-19 vaccination mandates will put those questions into the limelight.

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<sup>12</sup> *E.g.*, *S. Bay United Pentecostal Church v. Newsom*, 592 U.S. \_ (2021); *Roman Catholic Diocese v. Cuomo*, 141 S. Ct. 63 (2020).