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Mark A. Rothstein

Wendy E. Parmet

Dorit R. Reiss

UC Hastings College of the Law, reissd@uchastings.edu

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Employer-Mandated Vaccination for COVID-19

Mark A. Rothstein, JD, Wendy E. Parmet, JD, and Dorit Rubinstein Reiss, LLB, PhD

ABOUT THE AUTHORS

Mark A. Rothstein is with Institute for Bioethics, Health Policy and Law, University of Louisville School of Medicine, Louisville, KY. Wendy E. Parmet is with School of Law, Northeastern University, Boston, MA. Dorit Rubinstein Reiss is with University of California Hastings College of the Law, San Francisco. Wendy E. Parmet is also an AJPH associate editor.

🔗 See also Morabia, p. 982, and the Vaccines: Building Long-Term Confidence section, pp. 1049–1080.

When the US Food and Drug Administration (FDA) decided to grant emergency use authorization (EUA) for the first two vaccines for COVID-19, the United States' response to the pandemic entered a new phase. Initially, the greatest challenge is having enough doses of vaccine and administering them to all who want it. Yet even while many wait expectantly for their turn to be vaccinated, a significant minority of Americans are hesitant. Lack of information or misinformation about the vaccine, a long-standing and well-entrenched antivaccination movement, distrust of public health officials, and political polarization have left many people ambivalent or opposed to vaccination. According to a poll by the Kaiser Family Foundation taken in late November and early December 2020, 27% of respondents surveyed stated that they would “probably” or “definitely” not be willing to be vaccinated.¹ Reflecting the sharp partisan divide that has characterized views about the pandemic, Democrats (86%) were far more likely than Republicans (56%) to be vaccinated.

The prospect of numerous Americans declining vaccination has raised the

issue of whether vaccination could or should be mandated for education, travel, or other activities.² This editorial focuses on some of the legal and public health policy issues related to employer-mandated vaccination.

THE LEGAL FOUNDATIONS FOR VACCINE MANDATES

Vaccine mandates in the United States date back to 1827, when Boston, Massachusetts, became the first jurisdiction to require that children be vaccinated against smallpox to attend school.³ In the years that followed, such mandates became common, and they were almost always upheld by the courts.

The US Supreme Court did not consider mandatory vaccination until its 1905 decision in *Jacobson v Massachusetts*.⁴ The Court rejected the claim that a Cambridge, Massachusetts, regulation that required residents to be vaccinated against smallpox (then epidemic) or pay a \$5 fine violated the Due Process clause of the Fourteenth Amendment. The Court nevertheless recognized that state vaccine mandates could be unconstitutional if they were

unrelated to their public health goals, oppressive to particular individuals, or imposed a “plain and palpable violation of fundamental law.”³

For over a century, *Jacobson v Massachusetts* has been the leading authority for the state's ability to require vaccination. In 1922, the Supreme Court relied on this case to uphold a law requiring that children be vaccinated to attend school, even though there was no outbreak at the time of the mandate.⁵ In a 1944 case concerning child labor laws, the Supreme Court explained that religious freedom “does not include liberty to expose the community or the child to communicable disease.”⁶ In 1990, the Supreme Court further secured states' right to mandate vaccination against claims of religious freedom by holding that generally applicable state laws that do not discriminate against religion do not violate the Constitution's protection for religious liberty.⁷ Since then, courts have rejected most constitutional challenges to state vaccine laws, even those without a religious exemption.⁸

Whether the courts will adhere to this precedent, however, is uncertain. On November 25, 2020, in *Roman Catholic Diocese of Brooklyn v Cuomo*,⁹ the Supreme Court granted an injunction against New York's COVID-related restrictions on in-person worship. Although the Court had previously refused to enjoin state restrictions of religious services during the pandemic, with Justice Amy Coney Barrett on the Court, a new majority ruled that New York had violated the First Amendment by regulating worship more strictly than some secular activities. In a concurring opinion, Justices Gorsuch and Alito questioned the applicability of *Jacobson v Massachusetts* to religious liberty claims. In a later case, the same justices suggested that in some settings, such as

education, public health laws without exemptions might violate the Free Exercise clause of the First Amendment even if they do not discriminate against religion. If the majority adopts that approach, religious challenges to state vaccine laws would receive new life.

Even when the First Amendment does not prohibit state or federal vaccine mandates, Religious Freedom Restoration Acts (RFRA)—either at the state or federal level—may. The federal RFRA requires that laws imposing a substantial burden on religion must be the least restrictive means for protecting a compelling state interest. In dissenting to the Supreme Court's decision in *Hobby Lobby v Burwell*, which held that the Affordable Care Act's contraceptive mandate violated the federal RFRA, Justice Ginsburg presciently raised the specter that the majority's holding might impact coverage for vaccines.¹⁰ The majority dismissed those concerns, stating there was no reason to believe that employers would object to paying for vaccines.

EMERGENCY USE AUTHORIZATION

Scientists have focused on creating a COVID-19 vaccine since early in the pandemic, when the United States provided grants for vaccine development and manufacture to several candidates.¹¹ Operation Warp Speed—the federal task force coordinating vaccine funding, development, and distribution—was announced on May 15, 2020.¹² Despite its somewhat unfortunate name—which implies the rushing of vaccines—such coordination was critical.¹³ Operation Warp Speed involved members from multiple agencies, including scientists with extensive experience in vaccine development as well as participants from industry. In addition, in

April 2020, the Advisory Committee on Immunization Practices established a working group dedicated to following COVID-19 vaccines through their development and preparing recommendations for their deployment once the FDA granted an EUA.

During discussions before federal advisory committees, officials from the Centers for Disease Control and Prevention and the FDA stated consistently that COVID-19 vaccines authorized via an EUA cannot be mandated. The law, however, is not clear on this point. The relevant provision of the Food, Drug, and Cosmetic Act¹⁴ provides that the required conditions of an EUA include informing individuals that they can accept or refuse an EUA product, and of any consequences of refusal. Officials interpreted this as a prohibition of mandates, but the statutory language says nothing about employers or even states. It is directed only at vaccine recipients and providers and declares that there can be consequences for refusal. Potentially, such consequences may include discharge or exclusion from work, thereby allowing workplace mandates.

This view is reflected in guidance from the Equal Employment Opportunity Commission (EEOC), which clearly assumes that vaccines approved under an EUA can be mandated under the same terms as other vaccines.¹⁵ The best argument against mandating an EUA vaccine is that the vaccine is still experimental; however, that argument has not been tested in court, and a long tradition of allowing workplace mandates and the lack of clear statutory prohibition on mandates by private actors work against it.

EMPLOYER MANDATES

Many private-sector employers want their employees to be vaccinated

against COVID-19 to prevent the spread of the virus, reassure employees and customers that the premises are safe, avoid potential liability for transmission of the virus, and advance public health. Private-sector employers are generally free to use any hiring criteria and impose any condition of employment unless doing so violates federal or state law (public employers are subject to the constitutional limits applicable to states). Bills introduced in more than a dozen state legislatures would prohibit employers from mandating vaccination for COVID-19.¹⁶

The Americans with Disabilities Act (ADA) and its state law analogs prohibit discrimination in employment because of disability. If employees assert that the vaccine would cause a severe adverse reaction, they would first have to prove that they are covered under the ADA by having a physical or mental impairment that constitutes a substantial limitation of a major life activity, such as breathing. Even if the mandate burdens employees who are covered under the ADA, an employer can still mandate vaccination to prevent a direct threat to the employee or others.¹⁷ Courts are likely to find this in many work settings if a vaccine reduces infectiousness. Even if a lack of vaccination creates a direct threat, the employer would need to provide covered employees who are unable to be vaccinated for medical reasons with "reasonable accommodation," such as working remotely or using additional personal protective equipment. Reasonable accommodation is not required if it would cause an undue hardship to the employer, which is defined as "significant difficulty or expense." For example, an employer is not required to create new positions or fundamentally alter job duties.

According to the EEOC, if an unvaccinated employee cannot be accommodated, an employer may “exclude” the employee from the workplace.¹⁶ Exclusion is especially appropriate for health care workers and other employees who have direct contact with the public. Granting leave without pay for the duration of the direct threat is preferable to discharge.

Employees might also assert that a vaccination requirement conflicts with their religion and is therefore in violation of Title VII of the Civil Rights Act of 1964 or similar state laws, which prohibit religious discrimination and require employers to provide reasonable accommodations to an employee’s religious beliefs. The courts have interpreted reasonable accommodation under Title VII as less demanding on employers than under the ADA, only requiring employers to incur de minimis costs.¹⁸ Although the employee need not be a member of a traditional religion, a “personal philosophy” (such as veganism) does not qualify.¹⁹ Furthermore, the accommodation must be reasonable—not unduly burdensome for the employer. Recent decisions of the Supreme Court, however, indicating a heightened concern for religious liberty,⁸ could presage decisions requiring employers to make greater accommodation to employees’ religious beliefs and practices.

Under the National Labor Relations Act, private sector employers with unionized workforces are required to “bargain” with the union before making unilateral changes in working conditions. A vaccination requirement would be considered a mandatory subject of bargaining. Even nonunionized employees are protected from discharge or discipline if they engage in “concerted activity for their mutual aid or

protection,” as when employees submit a list of COVID-19 concerns to their employer. All employers would be wise to consult with their employees before formulating and implementing a vaccination plan.

OSHA-MANDATED VACCINATIONS

The Occupational Safety and Health Administration (OSHA) is likely to promulgate an emergency temporary standard for COVID-19, which could require face masks, other appropriate personal protective equipment, physical distancing, and similar measures. It also might require that some or all employees be vaccinated. Under the Occupational Safety and Health Act, the Secretary of Labor may issue an emergency temporary standard “if employees are exposed to grave danger from substances or agents determined to be toxic or physically harmful or from new hazards.”²⁰

An OSHA standard requiring employers to ensure that all employees are vaccinated might face two types of legal challenges. First, a court might hold that there is no “grave danger” justifying the requirement for workers who do not face heightened risks of exposure. Second, a standard could be challenged if it does not generally permit employees to decline vaccinations or does not include medical and religious exemptions. OSHA’s blood-borne pathogen standard requires employers to offer vaccination for hepatitis B to exposed health care employees, but employees can decline vaccination for any reason. Although a verified medical exemption from COVID-19 vaccination probably would involve a small number of employees, religious exemptions might be claimed more broadly, and not allowing them might

raise issues under the First Amendment and RFRA.

PUBLIC HEALTH STRATEGY

The development of multiple safe and effective vaccines in record time provides hope that the horrible human and economic consequences of the coronavirus pandemic may begin to abate and, ultimately, end. Many employers may view mandated universal employee vaccination as a way to keep their workplaces safe and mitigate their financial losses, but premature and inflexible vaccination mandates raise numerous legal issues. Employment policies on vaccination also need to align with public health strategies.

Without a sufficient uptake of the vaccine, it will be impossible to develop the herd immunity necessary to end the pandemic. Yet those reluctant to be vaccinated have a variety of reasons, including concerns about safety and efficacy. Pregnant women, children younger than 16 or 18 years (depending on the vaccine), elderly people in nursing homes or similar facilities, and immunocompromised individuals and those with severe allergies were excluded from vaccine trials. In addition, the first approved vaccines have been shown to prevent moderate and severe cases of COVID-19, but it is not known whether they prevent infection or whether a vaccinated person can infect others. These determinations go to the heart of employer mandates—the ability to protect others—and are critical for deciding the law and ethics of vaccine mandates.

We believe that rigid, coercive approaches enforced by employers could harden the opposition of individuals who are currently unsure about the vaccine. Rather than rushing to compel

vaccination, employers should help educate their employees about the benefits of vaccination, and help employees, to the extent possible, get vaccinated (e.g., offering on-site vaccination or giving employees time off for vaccination).

The most hopeful scenario is that support for vaccination will continue to grow with the lack of serious adverse events and additional evidence of the vaccine's effectiveness as shown in declining rates of infection, serious illness, and death. Support from vaccinated peers and family members—together with consistent, positive messaging from the government, public health officials, and employers—may appeal to all but those with the most entrenched views. Americans frequently have demonstrated an ability to change their prevailing opinions in a short time, and a sound public health strategy for workplace-based vaccination should be predicated on prevention and persuasion grounded in science before resorting to compulsion. **AJPH**

CORRESPONDENCE

Correspondence should be sent to Mark A. Rothstein, JD, Institute for Bioethics, Health Policy and Law, University of Louisville School of Medicine, 501 East Broadway #310, Louisville, KY 40202 (e-mail: mark.rothstein@louisville.edu). Reprints can be ordered at <http://www.ajph.org> by clicking the "Reprints" link.

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CONFLICTS OF INTEREST

M. A. Rothstein and W. E. Parmet have no conflicts of interest to disclose. D. R. Reiss owns stock in GSK, which has a COVID-19 vaccine candidate in early stages of testing. She also served as a volunteer,

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