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## **COVID-19 Vaccines Are Soon Within Reach: Can Employers Require Employees To Be Vaccinated? Yes, Within Limits . . .**

### **Background**

In *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), the United States Supreme Court upheld the authority of states to enforce compulsory vaccination laws. ("It is within the police power of a State to enact a compulsory vaccination law, and it is for the legislature, and not for the courts, to determine in the first instance whether vaccination is or is not the best mode for the prevention of smallpox and the protection of the public health.") Over 100 years later, now that we are nearing a possible vaccination for COVID-19, how, if at all, will the *Jacobson* impact employers – non-governmental agencies –that seek to mandate that their workforces vaccinate against COVID-19?

There are a myriad of issues that ASHA members need to consider if they want to have their staff vaccinated in order to work at their communities if there is no governmental mandate that all persons be vaccinated. Below are a few of those issues to consider.<sup>1</sup>

### **1. The Equal Employment Opportunity Commission ("EEOC") and the Federal Arena**

In its March 2020 updated Guidance on vaccinations, the EEOC noted that "the world has seen four influenza pandemics in the last century:" The deadly "Spanish Flu" of 1918 was followed by the milder "Asian" and "Hong Kong" flus of the 1950s and 1960s . . . the SARS outbreak in 2003 was considered a pandemic "scare," . . . and the H1N1 outbreak in 2009 rose to the level of a pandemic." Most recently, on March 11, 2020, the World Health Organization declared the coronavirus disease (COVID-19) a pandemic. The EEOC has declared COVID-19 a direct threat

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<sup>1</sup>Apparently, the benefits of vaccinations have been known as early as 1796 when Edward Jenner demonstrated that inoculation with material from a cow pox lesion would protect against subsequent exposure to small pox. *Vaccination Mandates: The Public Health Imperative and Individual Rights*, Kevin M. Malone and Alan R. Hinman. See, [https://www.cdc.gov/vaccines/imz-managers/guides-pubs/downloads/vacc\\_mandates\\_chptr13.pdf](https://www.cdc.gov/vaccines/imz-managers/guides-pubs/downloads/vacc_mandates_chptr13.pdf), Chapter 13, pp. 262-284. The Centers for Disease Control and Prevention (CDC) declared vaccinations to be one of the 10 great public health achievements of the twentieth century. *Id.*, citing *CDC. Ten great public health achievements—United States, 1900–1999.MMWR 1999;48:241–3.*

to the workplace and has taken the position that employers can mandate that employees take their temperatures and be tested for COVID-19 before entering the workplace.

However, currently, the EEOC takes the position that, under the Americans With Disabilities Act (ADA) and Title VII of the Civil Rights Act of 1964 (Title VII), an employer covered by these laws (employers with 15 or more employees) may not require all employees be vaccinated against COVID-19. In its still current March 2020 Guidance, the EEOC states as follows:

*May an employer covered by the ADA and Title VII of the Civil Rights Act of 1964 compel all of its employees to take the influenza vaccine regardless of their medical conditions or their religious beliefs during a pandemic?*

*No. An employee may be entitled to an exemption from a mandatory vaccination requirement based on an ADA disability that prevents him from taking the influenza vaccine. This would be a reasonable accommodation barring undue hardship (significant difficulty or expense). Similarly, under Title VII of the Civil Rights Act of 1964, once an employer receives notice that an employee's sincerely held religious belief, practice, or observance prevents him from taking the influenza vaccine, the employer must provide a reasonable accommodation unless it would pose an undue hardship as defined by Title VII ("more than de minimis cost" to the operation of the employer's business, which is a lower standard than under the ADA).*

*Generally, ADA-covered employers should consider simply encouraging employees to get the influenza vaccine rather than requiring them to take it. **As of the date this document is being issued, there is no vaccine available for COVID-19.***

*See, [https://www.eeoc.gov/sites/default/files/2020-04/pandemic\\_flu.pdf](https://www.eeoc.gov/sites/default/files/2020-04/pandemic_flu.pdf)*

The EEOC Guidance, thus, recognizes that guidance from public health authorities may change as the COVID-19 situation evolves and, thus, that might change its Guidance on vaccinations. And, public health guidance may change if the COVID-19 pandemic worsens or evolves, possibly resulting in the EEOC's outlook changing on accommodation requests relating to COVID-19.

In the meantime, ASHA members should note that implementing a mandatory vaccination program would run afoul of the ADA and Title VII if it did not include the ability to decline based upon medical conditions or a sincerely-held religious belief. For example, qualifying medical exemptions may include allergies to vaccine components or a history of Guillain-Barré syndrome.

It is anyone's guess what will be considered a "sincerely-held" religious belief and, unfortunately, the EEOC has been active in this area regarding the flu vaccine and religious-based exemptions. *See EEOC v. Saint Vincent Health Center, Civil Action No. 1:16-cv-234 (2016) (Saint Vincent Health Center paid \$300,000 constituting back pay and compensatory damages to a class of six aggrieved former employees and provided substantial injunctive relief to settle a religious discrimination lawsuit based upon a failure to grant a religious exemption as part of its mandatory seasonal flu vaccination requirement for its employees.) See also EEOC v. Mission Hospital, Inc., Civil Action No. 1:16-CV-00118 (2018) (Hospital to pay \$98,000 to settle religious discrimination lawsuit filed against it when it refused to accommodate and fired employees who declined flu vaccinations based on their religious beliefs).*

In *EEOC v. Memorial Healthcare*, Civil Action No. 2:18-cv-10523 (2018), the defendant hospital paid \$74,418 (\$34,418 in back pay, \$20,000 in compensatory damages and \$20,000 in punitive damages) for refusing to hire a medical transcriptionist because of her religious beliefs against receiving flu shots and refusing to accommodate those beliefs. The EEOC lawsuit doesn't specify the woman's exact religion, but says she "has a sincerely-held religious belief that, as a follower of Jesus Christ, she cannot inject or ingest foreign substances in her body and must rely on natural methods for health." <https://www.eeoc.gov/newsroom/memorial-healthcare-pay-74418-settle-eeoc-religious-discrimination-lawsuit>

In *Chenzira v. Cincinnati Children's Hospital Medical Center*, Case No. 1:2011cv00917 (S.D. Ohio 2012), the defendant Medical Center terminated a customer service representative employee for refusing to be inoculated due to her veganism. The employee sued and the Medical Center sought to dismiss the claim on the ground veganism is not a religion. The Court held that it was plausible that the "could subscribe to veganism with a sincerity equating that of traditional religious views," particularly since she is not alone in holding to that belief," thus, it was "inappropriate to dismiss Plaintiff's claims for religious discrimination based on her adherence to veganism."

However, at least one court has found the religious belief exception is not just a philosophical belief against vaccinations. For example, in *Fallon v. Mercy Catholic Medical Center of Southeast Pennsylvania*, 877 F.3d 487 (3d Cir. 2017) Mercy Catholic Medical Center terminated a psychiatric intake worker for refusing to be inoculated against the flu vaccine. The plaintiff did not want to be inoculated claiming it would violate his conscience and that he did not want to be vaccinated because he thought it caused more harm than good. The Third Circuit believed its task to "determine whether Fallon's beliefs "address[] fundamental and ultimate questions having to do with deep and imponderable matters," are "comprehensive in nature," and are accompanied by "certain formal and external signs." According to the Court, Fallon

"believes that "one should not harm their [sic] own body and strongly believes that the flu vaccine may do more harm than good." He concludes that if he yielded to coercion and consented to the hospital mandatory policy, he would violate his conscience as to what is right and what is wrong. Consequently, he must follow his conscience and refuse the influenza vaccine."

The Court found, "[i]t does not appear that these beliefs address fundamental and ultimate questions having to do with deep and imponderable matters, nor are they comprehensive in nature. Generally, he simply worries about the health effects of the flu vaccine, disbelieves the scientifically accepted view that it is harmless to most people, and wishes to avoid this vaccine." See also, *Mason v. Gen. Brown Cent. Sch. Dist.*, 851 F.2d 47, 51 (2d Cir. 1988) (upholding as not clearly erroneous a district court finding that certain parents' opposition to vaccination was "based, not on religious grounds, but on scientific and secular theories")

Thus, when faced with an objection based upon religious beliefs, ASHA members should request a letter from the employee's religious leader attesting to the fact that the religious organization is opposed to vaccinations or otherwise assess whether it comes within the framework that the court cites. For a general discussion of how the various religions approach religious exception for vaccinations, see generally <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5141457/>

## **2. Occupational Safety and Health Administration ("OSHA")**

How about ASHA members' OSHA obligation to maintain a safe working environment for all employees? In a November 9, 2009 Interpretation Letter, the U.S. Occupational Safety and Health Administration ("OSHA") took the following confusing position regarding mandatory vaccines.

"OSHA does expect facilities providing healthcare services to perform a risk assessment of their workplace and encourages healthcare employers to offer both the seasonal and H1N1 vaccines. It is important to note that employees need to be properly informed of the benefits of the vaccinations. However, **although OSHA does not specifically require employees to take the vaccines, an employer may do so. In that case, 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 serious reaction to the vaccine) may be protected under Section 11(c) of the Occupational Safety and Health Act of 1970 pertaining to whistle blower rights.**"

Based upon the above, it is reasonable to assume that if ASHA members maintain a program that mandates vaccinations subject to the guidelines that the EEOC suggests, the member will not violate any OSHA obligation to maintain a safe working environment.

### **3. The State and Local Arena**

Each ASHA member should review the local and state law in the state in which they operate as states and localities may inevitably enact their own laws regarding vaccinations. The CDC lists many of the current state vaccination laws related to healthcare workers. <https://www.cdc.gov/phlp/publications/topic/vaccinationlaws.html>

We already see states taking aggressive approaches to the flu vaccine this year. For example, in San Joaquin County in California, as of September 15, 2020, the Health Officer mandates that "all health care facilities in San Joaquin County require their HCW who work in health care settings get the flu vaccine." See, [https://www.sjgov.org/ems/pdf/flu\\_vaccine\\_order\\_hcw.pdf](https://www.sjgov.org/ems/pdf/flu_vaccine_order_hcw.pdf). The Order allows an employee to decline the vaccination under undefined "rare circumstances."

Presumably, without a federal mandate, we will see the local health officers taking on a similar approach with a COVID-19 vaccine.

### **4. Workers' Compensation**

Whether state workers' compensation laws apply to injuries or illnesses allegedly caused by COVID-19 vaccinations is also another state-by-state. See, e.g., *Roberts v. U.S.O. Camp Shows, Inc.* (1949) 91 Cal. App. 2d 884, 885 (the presence of an industrial injury is not always a prerequisite for compensability where injury results from the medical care which was required by the employer. The rule is well settled that where an employee submits to an inoculation or a vaccination at the direction of the employer and for the employer's benefit, any injury resulting from an adverse reaction is compensable under the Workers' Compensation Act.) *Carolyn R. Hicks's Case*, 443 Mass. 1107 (2005), affirmed on appeal, 62 Mass. App. Ct. 755 (2010) (employee's blindness caused by a flu vaccination administered at her hospital workplace. "Under these unique circumstances, no greater encouragement or compulsion by the employer was required in order to conclude, as a matter of law, that the flu shot arose out of and in the course of the employment.")

## **5.. Union Environments**

Any ASHA members who operate a unionized community must consider additional steps to take before implementing vaccination programs.

In *Virginia Mason Hospital v. Washington State Nurses Ass'n*, 511 F.3d 908, 911 (9th Cir. 2007), the employer hospital implemented a mandatory influenza immunization for all nurses and other employees. *Washington State Nurses Ass'n* – the nurses' union – filed a grievance and an arbitrator ordered that the hospital stop the mandatory immunization as it violated the collective bargaining agreement. The Ninth Circuit upheld the arbitrator's decision. *Id.* at 913, 917. ("In light of the considerable deference for arbitral decisions and citing the "clearly established public policy requiring employers to bargain with their union-represented employees over conditions of employment.") Thus, any ASHA members with unionized workforces should check with your labor counsel as to whether you must meet with the union before you implement the program.

Even ASHA members who do not currently have unionized workforces need to abide by Section 7 of the National Labor Relations Act. Section 7 grants employees rights to join together – engage in concerted activity – regarding working conditions. ASHA member employees who join together to protest a COVID-19 vaccine program or a member's failure to implement such a program and who suffer some adverse employment action could file unfair labor practice charges with the National Labor Relations Board.

ASHA members should look to any collective bargaining agreements and speak with labor counsel to determine if you have a duty to bargain with the union over vaccination programs and take seriously and address any employee complaints about vaccination programs.

### **Conclusion**

If ASHA members are considering implementing a mandatory vaccination program, until there is further guidance on the federal and state level, they should, at a minimum:

- Allow employees to decline the vaccination if they have a medical condition that would be negatively impacted by taking the vaccination or a religious objection to vaccination.
- Engage in an interactive discussion to determine whether the employee can be accommodated when an employee voices a medical or religious reason for declining the vaccination.
- Check local area requirements.