

FAQ ON COVID-19 VACCINE MANDATES

FEDERAL LAW ENFORCEMENT OFFICERS ASSOCIATION



Across the United States, COVID-19 vaccine mandates are rolling out. Schools, courts, colleges, employers, states, and health care facilities are requiring students, employees, and others to be vaccinated against COVID-19. Since the mandates have been announced, Outside Counsel to FLEOA have been busy fielding calls from members concerned about the vaccination requirements.

This summary of the present state of the law provides answers to Frequently Asked Questions about COVID-19 vaccination mandates.

1. Can my Agency require that I take the COVID-19 vaccination?

Generally, yes. At least one federal court as well as the federal government's Equal Employment Opportunity Commission (EEOC), have ruled that employers can mandate that employees get the COVID-19 vaccine. Employers may be required to provide reasonable accommodations or exemptions for employees who cannot take the vaccine because of a medical condition or a sincerely held religious belief. General objections to the vaccine are not a lawful basis to refuse.

On June 12, 2021, a Texas federal court dismissed a challenge to a Texas hospital's workplace rules requiring that employees be vaccinated or be fired. 116 employees challenged the rule.

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On April 1, 2021, Texas Hospital Houston Methodist, issued a policy directing that all of its employees must be vaccinated by June 7, 2021. 116 employees challenged the rule in federal court and asked that the court block the hospital from requiring that they be injected with the vaccine or be fired.

Judge Lynn Hughes, needed only five pages to justify dismissal of the case, a relatively short judicial decision, particularly considering the issues involved. The employees primarily challenged the vaccination under Texas laws concerning wrongful termination. The employees argued that the vaccinations are experimental and dangerous, so, if the employees were fired for refusing to subject themselves to an experimental and dangerous vaccine, it would constitute a wrongful termination.

Judge Hughes disagreed. The court explained that in Texas, a wrongful termination occurs only if an employee is fired for refusing to perform a criminal act. The court determined that taking a vaccine would not subject the employee to a criminal penalty, so refusing to take the vaccination could not give rise to a wrongful termination under Texas law.

The employees further argued that the vaccination requirement violates public policy making terminations for refusing to be vaccinated unlawful under Texas law. Preliminarily, the court rejected the argument because public policy concerns do not alter Texas's at-will employment rules. But moreover, the U.S. Supreme Court has held that forced vaccinations and forced quarantines are not against public policy (*Jacobson v. Massachusetts*, 197 U.S. 11 (1905)), and the federal EEOC has suggested that required workplace vaccinations do not violate federal EEO rules. See also *Compagnie Francaise De Navigation A Vapeur, Plff. in Err., v. State Board of Health, Louisiana, et. al*, 22 S. Ct. 811 (1902) (Quarantine of steamship and its passengers did not deprive owner of property in violation of due process laws because of infectious disease in New Orleans).

Finally, the employees argued that, generally, the vaccination policy violated public policy because it violates federal laws. Again, the court easily dismissed the argument because the laws the employees cited as being violated, regulate only the federal government, not private employers, such as the hospital.



Additionally, the court rejected the employees' argument that they were being forced to be "human subjects." Rather, the court determined that the hospital had not asked to use the employees in a trial, but were being vaccinated to keep the workplace safe. Finally, the court found it "reprehensible" that the employees would compare themselves to the subjects of Nazi doctors, discussing how the Nazis mutilated and inflicted pain on humans, whereas the hospital here was trying to save lives.

In sum, this first apparent court decision concerning forced COVID-19 vaccination of employees has been decided in much the way we predicted. Though many of the legal arguments centered on Texas law, the court's reasoning is readily applicable to challenges which may be brought under Federal law.

The law concerning vaccinations and COVID-19 is still evolving.

The Texas court has suggested that if employees do not want to take the vaccine for reasons unrelated to a medical contraindication or religious belief, employees can quit and work for an employer that does not require vaccinations. However, the categorical vaccination mandate which applies to all Federal Agencies/Employees forecloses any opportunity for a member to obtain other Federal employment, no less a LEO position. Whether this affects the outcome of future cases remains to be seen but could be an argument put forth on behalf of members who refuse vaccination.

2. Are the COVID-19 vaccination mandates constitutional?

Generally, yes. At least one federal court has determined that such COVID-19 vaccination mandates do not violate the Constitution.

Eight students challenged Indiana University's rule that all of its students must be vaccinated against COVID-19 to attend the school next semester. The Seventh Circuit Court of Appeals heard the challenge.

In *Klassen v. Trustees of Indiana University*, 2021 WL 3281209, the Seventh Circuit reviewed the constitutionality of the University's policy which requires all students to be vaccinated against COVID-19. Eight students challenged the requirement, arguing that the requirement violates their Fourteenth Amendment right to due process. The students asked the court to implement an immediate injunction, stopping the school from implementing the rule.

The Seventh Circuit needed only four pages of opinion to dismiss the student's challenge and rule that the University's requirement does not violate the Constitution. The Court relied heavily on the 1905 case, *Jacobson v. Massachusetts*, supra. In *Jacobson*, the Supreme Court upheld a Massachusetts law which compelled all members of the public to get vaccinated against smallpox.

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The Seventh Circuit ruled that the issue of vaccinations for college is easier to resolve than the issue in Jacobson. In Jacobson, the state required the entire public to be vaccinated, without exception. In contrast, Indiana University's rule has exceptions to accommodate religious beliefs and medical conditions. (In those cases, instead of vaccinations, students must wear masks and undergo covid testing).

Further, the rule in Jacobson applied to every adult member of the public. In contrast, the Indiana rule applies only to individuals attending the school. The Court suggested that individuals who do not want to be vaccinated, do not have attend Indiana University; those individuals can get education elsewhere.

The Court also noted that vaccination requirements are common in higher education and that many schools require vaccinations against measles, mumps, tetanus, and meningitis. Because close contact with others is inevitable at schools, and because vaccinations protect not only the individual vaccinated, but those that person comes in contact with, universities may decide how to keep other students safe.



The Court compared vaccinations to other actions Universities may take without offending the Constitution. The Court noted that the plaintiffs have a right to hold property, and the state cannot take property without due process. But, the plaintiffs surrender property to the state in the form of tuition, without violating the Constitution.

Similarly, under the First Amendment, states cannot dictate what people read or write, yet state colleges can nonetheless require that students read and write things that the students might prefer not to. Requiring that students follow a particular curriculum is not offensive to the Constitution.

Taking cues from these other examples, the Seventh Circuit concluded that if public colleges can require that students surrender property (tuition money) and that students read or write particular things as part of a curriculum, it seemed more than obvious that universities could impose other conditions implemented with the purpose of keeping the student population safe.



In sum, the Seventh Circuit ruled that state university's requirement that students be vaccinated against COVID-19 is constitutional. This decision is useful in predicting how other courts across the country may rule on similar requirements. The U.S. Supreme Court refused to enjoin the University from enforcing its vaccination mandate.

But, the Seventh Circuit decision leaves open a few unanswered questions. First, the Court did not address that COVID-19 vaccines, (at the time of the decision), as opposed to vaccines against for example, measles, mumps, and tetanus, did not have full FDA approval yet (Pfizer vaccine has since been approved). The non-FDA approved vaccines are approved only for emergency use. The Court did not address this concern asserted by many who currently oppose getting vaccinated right now. Except the FDA-approved Pfizer vaccine would appear to foreclose this argument.

Further, the Court determined that students who do not want the vaccine, can attend other schools which do not require the vaccination.

But, as presumably more and more colleges and universities impose vaccination requirements and educational opportunities decline for the unvaccinated, will those conditions alter a due process analysis? We will have to wait to find out.

The President issued a universal mandate to all Executive Agencies. Alternative Federal employment opportunities do not exist if a member chooses to remain unvaccinated. The Due Process implications of lack of meaningful employment opportunities as a LEO will have to be worked out in the courts.

Employers may have to provide reasonable accommodations for medical conditions or sincerely held religious beliefs. (See below).

3. Does the Emergency Use Authorization mean that vaccine mandates are unlawful or unconstitutional?

To our knowledge, to date, no Court has determined that the EUA has any bearing on the lawfulness or constitutionality of vaccine mandates. Further, as of August 2021, the Pfizer vaccine has full FDA approval, so legal arguments based on FDA approval are not likely to be successful in court.

In addition to the above, it should be noted that 5 CFR §339.205, Medical evaluation programs, authorizes agencies to establish immunization programs. The regulation provides, "[t]his may include the requirement to undergo a vaccination with products approved by the Food and Drug Administration..." It is likely that, in addition to Pfizer, other vaccines will be approved as well.

4. How do I sue the Employer-Agency or the United States to stop the COVID-19 vaccination mandates?

Legal challenges to the COVID-19 vaccination requirements are likely to fail.

In 1905, the United States Supreme Court ruled that a Massachusetts vaccine mandate requiring all citizens to be vaccinated against smallpox was constitutional. See *Jacobson v. Massachusetts*, 197 U.S. 11 (1905). With the exception of minor push back recently from SCOTUS about the breadth of the meaning of the 1905 case, courts continue to cite to the Massachusetts case as binding legal precedent about states' lawful ability to impose measures to control public health risks. Based on the 1905 case, we anticipate most, if not all, challenges to vaccine mandates against Federal agencies to fail in court. Each case is different, however, and individual questions about legal challenges to vaccine mandates should be discussed with an experienced attorney. FLEOA outside counsel are available to provide advice on the likely success of a legal challenge, as well as exemptions from the vaccination requirement.



5. I am required to get the vaccine or to be regularly tested for COVID-19. Is that legal?

Generally, yes. The EEOC has suggested that viral testing for COVID-19 is permissible under workplace discrimination laws. In other words, tests which determine whether an individual is currently infected, are lawful. Antibody testing, however, may violate the Americans With Disabilities Act, because antibody tests do not confirm a current infection. So, in sum, regular testing for current COVID-19 infection is likely lawful. Moreover, courts will likely view the testing option as a reasonable accommodation for individuals who cannot get vaccinated and, practically speaking, many people would view it as a reasonable accommodation for individuals who do not want to get vaccinated.

6. Does weekly COVID-19 testing violate any other laws, such as the FLSA (Fair Labor Standards Act)?

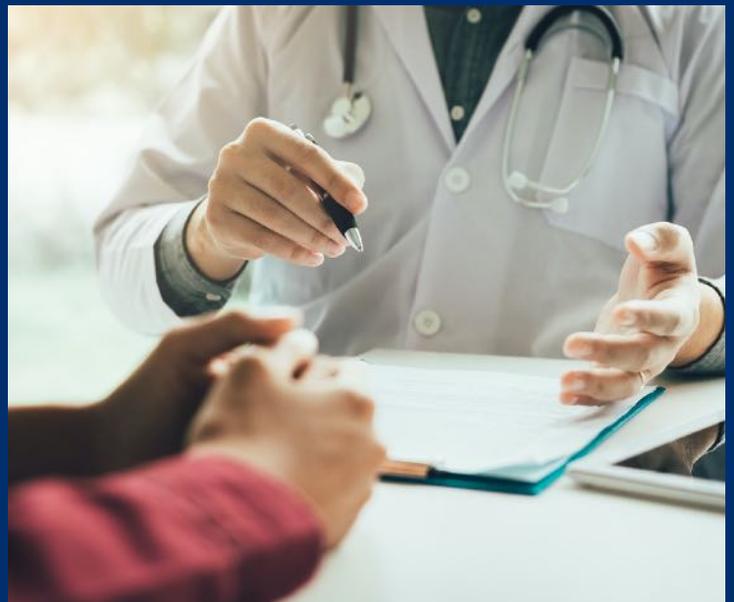
Under FLSA, employers mandating COVID-19 testing may be required to pay employees for the time spent getting the testing and for the cost of the test. The Department of Labor suggests that employers must pay employees for time spent waiting for and receiving medical attention, which the employer directs the employee to get. Moreover, if COVID-19 testing is necessary for an employee to effectively perform his or her job, the employee must be compensated for taking time to get tested, even if done on a day off.

Likewise, with respect to employees who are FLSA-exempt, such as 1811 Criminal Investigators, the Employer-Agency must pay for the cost of the COVID-19 test (5 C.F.R. § 339.304) when the Employer requires the test (5 C.F.R. § 339.303) as a condition of employment or to support essential duties. We can develop this line of argument.

7. What do I have to show to get an exemption from vaccination due to a medical condition?

To obtain an exemption from a COVID-19 vaccination mandate because of a medical condition, **individuals must show that the vaccination is contraindicated for a medical condition for which the individual is diagnosed.** This means that individuals cannot simply allege that they have a particular condition and that the individual is worried that the vaccine will be harmful based on the condition. Rather, a doctor should be able to articulate the particular danger that the vaccination poses to the person's medical condition. Currently available information suggests that few, if any, medical conditions will adequately meet this standard, other than allergies to COVID-19 vaccination ingredients.

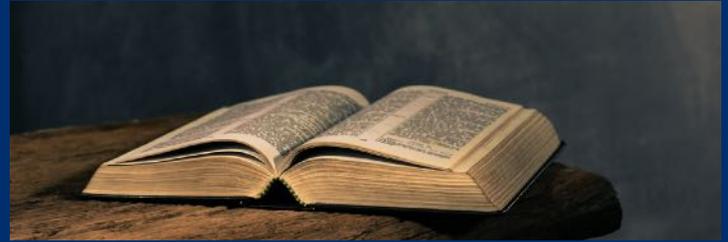
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8. What do I have to show to get an exemption from vaccination due to a religious belief?

Like medical exemptions, **religious exemptions to vaccination must be particularized.** In other words, individuals cannot say generally that their religious beliefs prohibit vaccinations. Rather, individuals should be prepared to describe the teachings, creed, dogma and/or beliefs which form the basis of the objection to vaccination.

Explanation from religious leaders may be helpful in describing the belief. Further, the religious belief must be sincerely held. Applicants requesting an exemption for a religious belief should be prepared to describe their adherence to their religion and other ways that they apply their beliefs to their life, such as for example, eating or not eating certain foods, or taking or not taking certain medications.



As issues related to mandatory vaccinations continue to emerge, Outside Counsel will update this vaccination fact sheet.

Science is beginning to catch up to policy. In a recent study, based upon an examination of more than 800,000 people, the study found that “never-infected people who were vaccinated in January and February were, in June, July and August 2021, 6 to 13 times more likely to get infected than the unvaccinated people who were previously infected with Coronavirus.” The authors wrote: “This analysis demonstrated that natural immunity affords longer lasting and stronger protection against infection, symptomatic disease, and hospitalization due to the Delta variant of SARS-COV-2 compared to the . . . two-dose vaccine-induced immunity.” In other words, participants with natural immunity were up to 13 times less likely to contract COVID-19 than those who were given two jabs. See generally “Comparing SARS-COV-2 natural immunity to vaccine-induced immunity; reinfections versus breakthrough infections,” sponsored by Maccabi Healthcare, Tel Aviv University. Note: This study has not yet been peer reviewed. However, if accurate, it means the categorical vaccination mandate which sweeps infected persons with a powerful natural immunity into the mandate could be overbroad, and an exemption of previously infected persons could be justified. Peer review may change the outcome. We must await results.

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