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# Vaccine Q&A

Pacific Justice Institute

DEFENDING FAITH & FREEDOM



## Questions and Answers on the Covid-19 Vaccine

Pacific Justice Institute

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**Question:** Can my employer order me to take a Covid vaccination: can they threaten to fire me if I do not comply?

**Answer:** Yes. However, there are provisions for religious and medical exemptions / accommodations, which will be discussed in detail in the following pages.

On August 23, 2021, the U.S. Food and Drug Administration approved the first COVID-19 vaccine. The vaccine has been known as the Pfizer-BioNTech COVID-19 Vaccine, and will now be marketed as Comirnaty (koe-mir'-na-tee), for the prevention of COVID-19 disease in individuals 16 years of age and older. The vaccine also continues to be available under emergency use authorization (EUA), including for individuals 12 through 15 years of age and for the administration of a third dose in certain immunocompromised individuals.<sup>1</sup>

The vaccines were previously administered under the Emergency Use Authorization (EUA), because the vaccines were not studied for a sufficient time to ensure there are no long-term side effects. As of May 28, 2021, in an update of its COVID-19 guidance, the Equal Employment Opportunity Commission said employers could require all workers physically entering a workplace to be vaccinated against the coronavirus but that federal law may require the employer to provide reasonable accommodations for employees who aren't vaccinated because of a disability or religious belief.<sup>2</sup>

A number of courts have upheld the EEOC update, and the Department of Justice has issued an opinion that employers and colleges / universities are permitted to compel vaccinations, regardless of the facts listed below:

1. The EUA itself, 21 U.S. Code § 360bbb-3, requires: ... “Individuals to whom the product is administered are informed— of the option to accept or refuse administration of the product, of the consequences, if any, of refusing administration of the product” ...<sup>3</sup>
2. Each person who is about to receive a Covid-19 vaccine is given a fact sheet, which states in part: WHAT IF I DECIDE NOT TO GET THE (insert drug company name) COVID-19 VACCINE? It is your choice to receive or not receive the (insert drug company name) COVID-19 Vaccine. Should you decide not to receive it, it will not change your standard medical care.<sup>4</sup>
3. In the 2004 case of *Doe v. Rumsfeld*<sup>5</sup>, plaintiffs challenged the government's Anthrax Vaccination Immunization Program (AVIP), because anthrax vaccine adsorbed (AVA) had never been approved by the FDA as a safe and effective drug for protection against inhalation anthrax. Yet the government was forcing military personnel to take the vaccine. The United States District Court for the District of Columbia issued an injunction

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<sup>1</sup> FDA Approves First COVID-19 Vaccine, News Release, U.S. Food and Drug Administration.

<sup>2</sup> “What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws”, U.S. Equal Employment Opportunity Commission (EEOC), Section K Vaccinations.

<sup>3</sup> 21 U.S. Code § 360bbb-3 - Authorization for medical products for use in emergencies. Subsection (e)(1)(A)(ii)

<sup>4</sup> <https://www.cdc.gov/vaccines/covid-19/eua/index.html>

<sup>5</sup> *Doe v. Rumsfeld*, 341 F. Supp. 2d 1, 2004 U.S. Dist. LEXIS 21668

prohibiting the use of AVA on the basis that the vaccine is either a drug unapproved for its intended use or an investigational new drug, and thus requires informed consent.

4. In August 2020, Amanda Cohn, MD, the Executive Secretary of The Centers for Disease Control Advisory Committee on Immunization Practices (CDC-ACIP) stated: "I just wanted to add that, just wanted to remind everybody, that under an Emergency Use Authorization, an EUA, vaccines are not allowed to be mandatory. So, early in this vaccination phase, individuals will have to be consented and they won't be able to be mandated."<sup>6</sup>

Despite the court ruling in *Doe v. Rumsfeld*, the Pentagon will seek to vaccinate all members of the military by September 15, 2021, by order of the President.<sup>7</sup>

It is interesting that in Senate testimony on May 11, 2021, Dr. Anthony Fauci and Peter Marks, Director of the Food and Drug Administration's Center for Biologics Evaluation, were asked how many of their employees have taken the vaccine. Their response was that they thought a little more than half, up to 60%, but they were not sure because they are not allowed to ask their employees if they got the vaccination.<sup>8</sup>

As of this writing, if you work for Dr. Fauci at the National Institute of Allergy and Infectious Diseases, you still do not have to take the vaccine, and you cannot be asked if you are vaccinated. But if you work for ANY private employer, you can be mandated to take the vaccine or face the possibility of losing your job.

**Question:** What if taking the vaccination violates a sincerely held religious belief of mine?

**Answer:** Title VII of the Civil Rights Act of 1964 prohibits two categories of employment practices. It is unlawful for an employer:

“(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin;  
or

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<sup>6</sup> <https://www.youtube.com/watch?v=p0zCEiGohJs&list=PLvvp9iOILTQb6D9e1YZWpbUvzfptNMKx2&inde>

<sup>7</sup> “COVID vaccines would be required for military under new plan”, by LOLITA C. BALDOR, August 9, 2021, the Associated Press.

<sup>8</sup> Fact Check-Fauci, Marks did not say 40% to 50% of CDC and FDA employees are ‘refusing the COVID-19 vaccine’, By Reuters Fact Check, May 20, 2021.

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.”<sup>9</sup>

There is a process involved when asserting your rights under Title VII. The process begins when you communicate to your employer that you are unable to be vaccinated for COVID-19 because of a sincerely held religious belief, practice, or observance. Once an employer is on notice that an employee's sincerely held religious belief, practice, or observance prevents the employee from getting a COVID-19 vaccine, the employer must provide a reasonable accommodation unless it would pose an undue hardship.

The employer should ordinarily assume that an employee's request for religious accommodation is based on a sincerely held religious belief, practice, or observance. However, if an employer is aware of facts that provide an objective basis for questioning either the religious nature or the sincerity of a particular belief, practice, or observance, the employer would be justified in requesting additional supporting information.

An employer should thoroughly consider all possible reasonable accommodations, including telework and reassignment. The EEOC and US Department of Labor, Occupational Safety and Health Administration, provide resources to assist employers in creating accommodations for employees.

However, employers are not required to make accommodations if such accommodations will create an “undue hardship” for the employer, having more than minimal cost or burden on the employer.<sup>10</sup> However, the courts have stated that to have an undue hardship, “an employer must either provide factual evidence that co-workers of an accommodated employee will be significantly imposed upon, or that a material disruption of the work routine will occur. Mere hypothetical scenarios of what could happen... if an employee is granted an accommodation are wholly insufficient.”<sup>11</sup>

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<sup>9</sup> 42 U.S.C. § 2000e-2(a).

<sup>10</sup> EEOC, sections K 12 and K 6.

<sup>11</sup> *Heller v. EBB Auto Co.*, 8 F.3d 1433, 1440 (9th Cir. 1993); *Tooley v. Martin-Marietta Corp.*, 648 F.2d 1239, 1241 (9th Cir. 1981); *Burns v. Southern Pacific Transp. Co.*, 583 F.2d 403, 406-07 (9th Cir. 1978).

Ultimately, if an employee cannot be accommodated, employers should determine if any other rights apply under the EEO laws or other federal, state, and local authorities before taking adverse employment action against an unvaccinated employee.<sup>12</sup>

If the request is denied, then employees may be able to look to two different governmental agencies to help them preserve their rights, their state-based agency that enforces state laws preventing workplace discrimination and the federal agency that enforces federal laws preventing workplace discrimination. For a California employee, for example, these two agencies would be the Department of Fair Employment and Housing (DFEH) for state law claims or the Equal Employment Opportunity Commission (EEOC) for federal law claims. Whenever employees in California seek to bring a claim based upon workplace discrimination, they are legally barred from filing a civil lawsuit until after they first file a claim with either the DFEH or EEOC, as applicable. For purposes of vaccine-related discrimination claims, the following sources of law are addressed by the DFEH and EEOC, respectively:

DFEH: California-based agency charged with enforcing various civil rights laws, including the Fair Employment and Housing Act (FEHA) and the California Family Rights Act (CFRA); and

EEOC: Federal-based agency charged with enforcing various federal laws against employment discrimination, including Title VII of the Civil Rights Act of 1964 (“Title VII”), the Americans with Disabilities Act (ADA), the Equal Pay Act (EPA), the Age Discrimination in Employment Act (ADEA) and the Genetic Information Nondiscrimination Act (GINA).

If your employer is not complying with the above procedure, or if you disagree with their findings related to accommodations, contact the Pacific Justice Institute to discuss your legal rights.

**Question:** What if I have a disability covered under the Americans with Disabilities Act (ADA) that prevents me from taking the vaccine?

**Answer:** Under the ADA, an employer may require all employees to meet a qualification standard that is job-related and consistent with business necessity, such as a safety-related standard requiring COVID-19 vaccination. However, if a particular employee cannot meet such a safety-related qualification standard because of a disability, the employer may not require

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<sup>12</sup> EEOC, K 12.

compliance for that employee unless it can demonstrate that the individual would pose a “direct threat” to the health or safety of the employee or others in the workplace.

In the case of Covid, that would include evaluation of things such as the current level of community spread, whether the employee works alone or with others, works inside or outside; the available ventilation; the frequency and duration of direct interaction the employee typically will have with other employees and/or non-employees; the number of partially or fully vaccinated individuals already in the workplace; whether other employees are wearing masks or undergoing routine screening testing; and the space available for social distancing.

If it is determined that an employee with a disability who is not vaccinated would pose a direct threat to self or others, the employer must consider a reasonable accommodation to reduce or eliminate that threat, such as requiring the employee to wear a mask, work a staggered shift, making changes in the work environment (such as improving ventilation systems or limiting contact with other employees and non-employees), permitting telework if feasible, or reassigning the employee to a vacant position in a different workspace.

Similar to the requirements under Title VII for sincerely held religious beliefs, employers are not required to make accommodations that impose “undue hardship” on the employer. However, the standard for undue hardship is different under the ADA, as it requires a “significant difficulty or expense.”

Also, under the ADA, it is unlawful for an employer to disclose that an employee is receiving a reasonable accommodation or to retaliate against an employee for requesting an accommodation.<sup>13</sup>

**Question:** What if I have a medical condition that prevents me from taking the vaccine?

**Answer:** The CDC makes very few exceptions medical conditions, as follows:

1. People who have weakened immune systems- People with HIV and those with weakened immune systems due to other illnesses or medication might be at increased risk for severe COVID-19. They may receive a COVID-19 vaccine. However, they should be aware of the limited safety data:
  - A. Information about the safety of COVID-19 vaccines for people who have weakened immune systems in this group is not yet available
  - B. People living with HIV were included in clinical trials, though safety data specific to this group are not yet available at this time

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<sup>13</sup> EEOC, K 5, K 6.

- C. People with weakened immune systems should also be aware of the potential for reduced immune responses to the vaccine, as well as the need to continue following current guidance to protect themselves against COVID-19.
2. People who have autoimmune conditions- People with autoimmune conditions may receive a COVID-19 vaccine. However, they should be aware that no data are currently available on the safety of COVID-19 vaccines for people with autoimmune conditions.
3. People who have previously had Guillain-Barre syndrome (GBS)- With few exceptions, the independent Advisory Committee on Immunization Practices (ACIP) general best practice guidelines for immunization do not include a history of GBS as a precaution to vaccination with other vaccines.
4. People who have previously had Bell's palsy- Cases of Bell's palsy were reported following vaccination in participants in the COVID-19 vaccine clinical trials. However, the Food and Drug Administration (FDA) does not consider these to be more than the rate expected in the general population. They have not concluded these cases were caused by vaccination.<sup>14</sup>

The general rule is that if you have a medical condition that your doctor will certify should exclude you from vaccination, present that documentation to your employer if they are mandating vaccination. If you feel the employer is responding in an unreasonable manner, contact the Pacific Justice Institute to discuss your legal rights.

**Question:** What if I am allergic to the vaccine or its components?

**Answer:** The Centers for Disease Control and Prevention (CDC) begins with the following definitions:

- An allergic reaction is considered severe when a person needs to be treated with epinephrine or EpiPen or if the person must go to the hospital. Experts refer to severe allergic reactions as anaphylaxis.

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<sup>14</sup> COVID-19 Vaccines for People with Underlying Medical Conditions, Centers for Disease Control and Prevention (CDC), updated May 14, 2021.

- An immediate allergic reaction happens within 4 hours after getting vaccinated and could include symptoms such as hives, swelling, and wheezing (respiratory distress).

#### If You Are Allergic to an Ingredient in a COVID-19 Vaccine-

If you have had a severe allergic reaction or an immediate allergic reaction—even if it was not severe—to any ingredient in an mRNA COVID-19 vaccine, you should not get either of the currently available mRNA COVID-19 vaccines (Pfizer-BioNTech and Moderna).

If you have had a severe allergic reaction or an immediate allergic reaction to any ingredient in Johnson & Johnson’s Janssen (J&J/Janssen) COVID-19 vaccine, you should not get the J&J/Janssen vaccine.

#### If You Are Allergic to Other Types of Vaccines

If you have had an immediate allergic reaction—even if it was not severe—to a vaccine or injectable therapy for another disease, ask your doctor if you should get a COVID-19 vaccine.

#### If You Have Allergies Not Related to Vaccines

CDC recommends that people get vaccinated even if they have a history of severe allergic reactions not related to vaccines or injectable medications—such as food, pet, venom, environmental, or latex allergies. People with a history of allergies to oral medications or a family history of severe allergic reactions may also get vaccinated.<sup>15</sup>

If you have any of the allergies described by the CDC, provide that documentation to your employer if they are mandating vaccination. If you feel the employer is responding in an unreasonable manner, contact the Pacific Justice Institute to discuss your legal rights.

#### **Question:** What if I am pregnant?

**Answer:** The CDC states that you MAY get the vaccine if you are pregnant, however, “key considerations you can discuss with your healthcare provider include:

- How likely you are to being exposed to the virus that causes COVID-19
- Risks of COVID-19 to you and the potential risks to your fetus or infant

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<sup>15</sup> COVID-19 Vaccines for People with Allergies, Centers for Disease Control and Prevention (CDC), updated May 25, 2021.

- What is known about COVID-19 vaccines:
- How well they work to develop protection in the body
- Known side effects of vaccination
- Limited, but growing, information on the safety of COVID-19 vaccination during pregnancy
- How vaccination might pass antibodies to the fetus. Recent reports have shown that people who have received COVID-19 mRNA vaccines during pregnancy (mostly during their third trimester) have passed antibodies to their fetuses, which could help protect them after birth.”<sup>16</sup>

**Question:** What if I am breastfeeding?

**Answer:** The CDC states “Clinical trials for the COVID-19 vaccines currently authorized for use under an Emergency Use Authorization in the United States did not include people who are breastfeeding. Because the vaccines have not been studied on lactating people, there are no data available on the:

- Safety of COVID-19 vaccines in lactating people
- Effects of vaccination on the breastfed baby
- Effects on milk production or excretion”<sup>17</sup>

**Question:** What if I do not want to take the vaccine because I am concerned about side effects or future health issues?

**Answer:** At this time, there is no allowance for persons who are declining the vaccine for health concerns. The Pacific Justice Institute will monitor current and future legal actions and revise this information as necessary. You can view information on adverse effects from Covid vaccines under the question “Is there a legal basis to challenge a vaccine mandate? Is there any prior case law?” starting on page 13.

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<sup>16</sup> COVID-19 Vaccines While Pregnant or Breastfeeding, Centers for Disease Control and Prevention (CDC), updated June 9, 2021. NOTE: The CDC, a top federal government medical agency, uses politically correct language that does not acknowledge the biological difference between men and women.

<sup>17</sup> COVID-19 Vaccines While Pregnant or Breastfeeding, Centers for Disease Control and Prevention (CDC), updated June 9, 2021. NOTE: The CDC, a top federal government medical agency, uses politically correct language that does not acknowledge the biological difference between men and women.

**Question:** I recently tested positive for Covid 19. Should I get the vaccine?

**Answer:** The CDC says no, people with COVID-19 who have symptoms should wait to be vaccinated until they have recovered from their illness. You should isolate yourself for at least 10 days since symptoms first appeared and at least 24 hours with no fever without fever-reducing medication and other symptoms of COVID-19 are improving.

If you test positive for Covid but have no symptoms, you should still not get the vaccine until 10 days have passed since the date you had your positive test.

**Question:** I already had Covid and recovered, so I have antibodies to fight off future exposures. Do I still have to get a vaccine?

**Answer:** The CDC says yes, because experts do not yet know how long you are protected from getting sick again after recovering from COVID-19. Even if you have already recovered from COVID-19, it is possible—although rare—that you could be infected with the virus that causes COVID-19 again.

However, a recent study conducted by Washington University School of Medicine in St. Louis and published May 24, 2021, in the journal Nature, found that even a mild case of coronavirus could leave people with lifelong protection against the virus.<sup>18</sup>

Additionally, in a study in the United Kingdom published April 9, 2021, “the authors suggest that infection and the development of an antibody response provides protection similar to or even better than currently used SARS-CoV-2 vaccines.”<sup>19</sup>

A study conducted by the Cleveland Clinic was released June 8, 2021, finding that “individuals with previous SARS-CoV-2 infection do not get additional benefits from vaccination”.<sup>20</sup>

The CDC updated its guidance<sup>21</sup> regarding this issue on March 17, 2021, stating in part:

#### Development of Antibodies and Immunity- Natural infection

Nearly all immunocompetent persons develop an adaptive immune response following SARS-CoV-2 infection... Our understanding of the immune response to SARS-CoV-2 is incomplete but rapidly advancing. In humans, the humoral response includes antibodies

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<sup>18</sup> Immunity to the Coronavirus May Persist for Years, Scientists Find, The New York Times, May 26, 2021.

<sup>19</sup> “Correlates of protection from SARS-CoV-2 infection”, by Florian Krammer, The Lancet, April 9, 2021

<sup>20</sup> “No point vaccinating those who’ve had COVID-19: Findings of Cleveland Clinic study”, by Dr. Sanchari Sinha Dutta, Ph.D., News-Medical.Net, June 8, 2021.

<sup>21</sup> <https://www.cdc.gov/coronavirus/2019-ncov/lab/resources/antibody-tests-guidelines.html>

directed against S and N proteins. Antibodies – including IgM, IgG, and IgA – against S and its subunits can be detected within 1-3 weeks after infection. IgM and IgG antibodies can arise nearly simultaneously...

How long anti-SARS-CoV-2 antibodies persist after infection remains unknown, although IgG antibodies, including IgG against the S and N proteins, persist for at least several months in most persons . . . Taken together, the above findings in humans and non-human primates suggest SARS-CoV-2 infection and development of antibody can result in some level of protection against SARS-CoV-2 reinfection. The durability of this immunity has yet to be determined. While life-long immunity has not been observed with endemic seasonal coronaviruses, studies of persons infected with the novel SARS-CoV-1 and Middle East Respiratory Syndrome (MERS-CoV) coronaviruses demonstrated measurable antibody for 18 – 24 months following infection, and neutralizing antibody was present for 34 months in a small study of MERS-infected patients. (Internal footnote citations removed)

A fact sheet by the organization America’s Frontline Doctors states:

“You do not need to be vaccinated if you have already contracted COVID-19. Typically people who catch an illness develop natural, life-long immunity and there is no reason to think SARS-CoV-2 is different in this regard. Persons who already had COVID were excluded from the initial trials (which is strange given that now recommend it to people who already had the illness.) There is evidence the Covid vaccine might actually be more dangerous for persons who have already had the illness in that they seem to develop an exaggerated reaction to the vaccine.”<sup>22</sup>

Also, Senator (and physician) Rand Paul has spoken extensively that it is his opinion that those who recover from Covid likely have antibodies sufficient to prevent further occurrences. As for the vaccines themselves, there is an increasing likelihood that boosters will be needed.<sup>23</sup>

As in many of these issues, there is no case law to guide us going forward. But if you have already had Covid and recovered, and your employer is mandating a vaccination, contact the Pacific Justice Institute to discuss your legal rights.

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<sup>22</sup> TEN MEDICAL FACTS REGARDING THE COVID-19 EXPERIMENTAL VACCINES, Dr. Shelley Cole, Medical Director AFLDS, dated April 12, 2021.

<sup>23</sup> Moderna and Pfizer are already developing COVID-19 vaccine boosters. Do we need a third shot? By Jaimy Lee, Marketwatch.com, dated May 31, 2021.

**Question:** Is there a difference between my employer “strongly encouraging” me to get the vaccine versus mandating the vaccine?

**Answer:** We believe there is. As of April 21, 2021, US Department of Labor (DOL), Occupational Safety and Health Administration (OSHA) provided guidance as follows:

“If an employer requires its employees to be vaccinated, adverse reactions to the vaccines are considered “work-related” by OSHA. Employers who require COVID-19 vaccines must notify OSHA within 24 hours of an employee’s inpatient hospitalization (or within eight hours of an employee’s death) resulting from an adverse reaction.”

Sometime between April 21 and May 24, 2021, OSHA changed its reporting guidance to:

“DOL and OSHA, as well as other federal agencies, are working diligently to encourage COVID-19 vaccinations. OSHA does not wish to have any appearance of discouraging workers from receiving COVID-19 vaccination, and also does not wish to disincentivize employers’ vaccination efforts. As a result, OSHA will not enforce 29 CFR 1904’s recording requirements to require any employers to record worker side effects from COVID-19 vaccination through May 2022. We will reevaluate the agency’s position at that time to determine the best course of action moving forward.”

Apparently OSHA believed that adverse reactions to mandatory Covid vaccinations were eligible for Workers Compensation.

In looking at liability, the vaccine manufacturers and distributors have been given immunity. In addition, there is immunity from liability under the 2005 PREP act (Public Readiness and Emergency Preparedness Act) for "program planners" who facilitate or supervise an onsite vaccination program, but that applies to liability for facilitating the vaccination. But there is no immunity for an employer who mandates an employee take the vaccine.

There are some older court cases on this issue. In 1949, in the case of *Roberts v. U.S.O. Camp Shows Inc.*, an employee was directed by his employer to receive various inoculations, and as a result, contracted encephalitis. The California Second District Court of Appeal held that "incapacity caused by illness from vaccination or inoculation may properly be found to have arisen out of the employment where such treatment is submitted to pursuant to the direction or for the benefit of the employer."<sup>24</sup>

In 1983, in the case of *Maher v. Workers' Comp. Appeals Bd.*, a nurse applied to work at a hospital. A mandatory test for tuberculosis resulted in treatment that injured her. The California Supreme Court found that "the rule is well settled that where an employee submits

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<sup>24</sup> *Roberts v. U. S. O. Camp Shows, Inc.*, 91 Cal. App. 2d 884, 205 P.2d 1116, 1949 Cal. App. LEXIS 1319

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."<sup>25</sup>

Therefore, if your employer is pressuring you to get the vaccine, we recommend that you ask them if getting the vaccine is mandatory and get that in writing.

**Question:** Asking me if I have been vaccinated is asking for medical information. Isn't that a violation of HIPPA?

**Answer:** The Health Insurance Portability and Accountability Act of 1996, Pub.L. 104–191, commonly referred to as HIPPA, focuses on “protected health information” as maintained by the healthcare industry (including healthcare insurance providers) to prevent such information from being exploited via theft and fraud. HIPAA only applies to “covered entities” – healthcare providers, health plans, healthcare clearinghouses, and their business associates.

HIPAA (or FERPA for students) is not likely to bar an employer (or school) from legally asking any employee about his or her vaccination status. However, various state and federal laws may prevent an employer from asking an employee why he or she is not vaccinated. This does not, of course, mean that an employee may not choose to voluntarily disclose a pre-existing medical condition or sincerely held religious belief that prevents her from receiving the vaccine, so that the employee can request a reasonable accommodation if the employer is requiring Covid vaccination as a condition of employment.

**Question:** How effective are these vaccines?

**Answer:** They are less effective than many would have you think. Many people who have been vaccinated have contracted Covid 19 afterward. There is concern that the effectiveness of the vaccines may diminish over time, thus requiring booster doses. Israel has found the Pfizer vaccine to be 39% effective.<sup>26</sup>

On August 11, 2021, the Mayo Clinic announced the results of a study that found the Pfizer vaccine to be only 42% effective against the Delta variant. The study raises serious questions

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<sup>25</sup> *Maier v. Workers' Comp. Appeals Bd.*, 33 Cal. 3d 729, 661 P.2d 1058, 190 Cal. Rptr. 904, 1983 Cal. LEXIS 176, 48 Cal. Comp. Cases 326

<sup>26</sup> “Israeli Data Suggests Possible Waning in Effectiveness of Pfizer Vaccine”, by Carl Zimmer, dated July 23, 2021, updated July 28, 2021. The New York Times.

about the vaccines' long-term effectiveness, particularly Pfizer's. It's unclear whether the results signify a reduction in effectiveness over time, a reduced effectiveness against Delta, or a combination of both. "If that's not a wakeup call, I don't know what is," a senior Biden official told Axios.<sup>27</sup>

In the United States, fully vaccinated people continue to test positive for Covid. According to the CDC, as of August 16, 2021, more than 168 million people in the United States had been fully vaccinated against COVID-19. During the same time, CDC received reports from 48 U.S. states and territories of 9,716 patients with COVID-19 vaccine breakthrough infection who were hospitalized or died.<sup>28</sup> The Delta variant seems to produce the same high amount of virus in both unvaccinated and fully vaccinated people. However, like other variants, the amount of virus produced by Delta breakthrough infections in fully vaccinated people also goes down faster than infections in unvaccinated people. This means fully vaccinated people are likely infectious for less time than unvaccinated people.<sup>29</sup>

In Los Angeles, 30% of all new Covid cases are in fully vaccinated people.<sup>30</sup>

Because the vaccines appear to lose efficacy over time, Pfizer is seeking U.S. approval of a booster dose of its two-shot COVID-19 vaccine. The FDA earlier this month said transplant recipients or others with weakened immune systems can get an extra dose of Pfizer or Moderna vaccines. Then last week, U.S. health officials announced plans to give COVID-19 booster shots to all Americans to shore up their protection amid the surging delta variant of the coronavirus<sup>31</sup>

The massive surge of COVID-19 infections in Israel, one of the most vaccinated countries on earth, is pointing to a complicated path ahead for America. In June, there were several days with zero new COVID infections in Israel. The country launched its national vaccination campaign in December last year and has one of the highest vaccination rates in the world, with 80 percent of citizens above the age of 12 fully inoculated. COVID, most Israelis thought, had been defeated.

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<sup>27</sup> New data on coronavirus vaccine effectiveness may be "a wakeup call", by Caitlin Owens, Axios, August 11, 2021.

<sup>28</sup> "COVID-19 Vaccine Breakthrough Case Investigation and Reporting", Centers for Disease Control, August 2, 2021.

<sup>29</sup> "Delta Variant: What We Know About the Science", Centers for Disease Control, August 6, 2021.

<sup>30</sup> "In Los Angeles, Breakthrough Infections Are Now 30% Of All New Covid Cases Amid Delta Surge", by Tom Tapp, Deadline, August 19, 2021.

<sup>31</sup> "Pfizer Seeking FDA OK for COVID-19 Vaccine Booster Dose", by the Associated Press, US News and World Report, August 25, 2021.

Two months later: Israel reported 9,831 new diagnosed cases on Tuesday, August 24, 2021, a hairbreadth away from the worst daily figure ever recorded in the country—10,000—at the peak of the third wave. More than 350 people have died of the disease in the first three weeks of August. In a Sunday press conference, the directors of seven public hospitals announced that they could no longer admit any coronavirus patients. With 670 COVID-19 patients requiring critical care, their wards are overflowing and staff are at breaking point. “I don’t want to frighten you,” coronavirus czar Dr. Salman Zarka told the Israeli parliament this week. “But this is the data. Unfortunately, the numbers don’t lie.”<sup>32</sup>

So there is strong evidence that the vaccines lose their effectiveness in the 6-8 month range. This may have significant repercussions on the possibility of herd immunity, and call into question the accuracy of vaccine passports or similar documents meant to show the holder has immunity to the virus.

**Question:** Is there an issue with heart inflammation after taking the vaccines?

**Answer:** On June 25, 2021, the FDA added a warning to the literature that accompanies Pfizer Inc. /BioNTech and Moderna COVID vaccine shots to indicate the rare risk of heart inflammation after its use. The fact sheets for healthcare providers have been revised to include a warning that reports of adverse events suggest increased risks of myocarditis and pericarditis.<sup>33</sup>

As of July 30, 2021, VAERS has received 1,249 reports of myocarditis or pericarditis among people ages 30 and younger who received COVID-19 vaccine. Most cases have been reported after mRNA COVID-19 vaccination (Pfizer-BioNTech or Moderna), particularly in male adolescents and young adults. Through follow-up, including medical record reviews, CDC and FDA have confirmed 716 reports of myocarditis or pericarditis. CDC and its partners are investigating these reports to assess whether there is a relationship to COVID-19 vaccination.<sup>34</sup>

In regard to vaccination of those under 18, the survivability rates of children under 18 is 99.997% according to the CDC. More than twice the number of children die each year of pneumonia than have died from Covid. More than three times die from drowning, more than six times from auto accidents.<sup>35</sup>

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<sup>32</sup> “Ultra-Vaxxed Israel’s Crisis Is a Dire Warning to America”, by Noga Tarnopolsky, Daily Beast, August 24, 2021.

<sup>33</sup> “FDA adds warning about rare heart inflammation to Pfizer, Moderna COVID shots”, Reuters, June 25, 2021.

<sup>34</sup> Centers for Disease Control, “Selected Adverse Events Reported after COVID-19 Vaccination”, August 2, 2021

<sup>35</sup> “The Kids Are Alright Why now is the time to rethink COVID safety protocols for children — and everyone else.” by David Wallace-Wells, Intelligencer, July 12, 2021.

**Question:** Is there a risk of developing Guillain-Barré Syndrome from a vaccine?

**Answer:** On July 13, 2021, the FDA announced revisions to the vaccine recipient and vaccination provider fact sheets for the Johnson & Johnson (Janssen) COVID-19 Vaccine to include information pertaining to an observed increased risk of Guillain-Barré Syndrome (GBS) following vaccination, "Reports of adverse events following use of the Janssen COVID-19 Vaccine under emergency use authorization suggest an increased risk of Guillain-Barré syndrome during the 42 days following vaccination," the updated label reads. "Guillain Barré syndrome (a neurological disorder in which the body's immune system damages nerve cells, causing muscle weakness and sometimes paralysis) has occurred in some people who have received the Janssen COVID-19 Vaccine," the FDA says in the label update for patients and caregivers." In most of these people, symptoms began within 42 days following receipt of the Janssen COVID-19 Vaccine. The chance of having this occur is very low," it adds. The CDC and FDA briefly paused use of the Johnson & Johnson vaccine earlier this year because of a risk of a rare type of blood clotting complication but lifted the pause in April after determining the risk was low and the condition was treatable. The vaccine's label was updated to warn about the risk.<sup>36</sup>

**Question:** How many deaths have been reported via the Vaccine Adverse Events Reporting System (VAERS)?

**Answer:** More than 363 million doses of COVID-19 vaccines were administered in the United States from December 14, 2020, through August 23, 2021. During this time, VAERS received 6,968 reports of death (0.0019%) among people who received a COVID-19 vaccine. FDA requires healthcare providers to report any death after COVID-19 vaccination to VAERS, even if it's unclear whether the vaccine was the cause.<sup>37</sup>

**Question:** Is there a legal basis to challenge a vaccine mandate? Is there any prior case law?

**Answer:** When attorneys look at an issue or a set of facts to determine whether there is a legal basis for a lawsuit, relevant statutes and prior case law are the best indicators of how a

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<sup>36</sup> "FDA warns of potential rare neurological complication with Johnson & Johnson coronavirus vaccine", by Amanda Sealy, John Bonifield and Maggie Fox, CNN, Jul 13, 2021

<sup>37</sup> Centers for Disease Control, "Selected Adverse Events Reported after COVID-19 Vaccination", August 23, 2021

particular case will play out. However, the issues surrounding mandatory Covid vaccines are so new that there is no settled case law, and very few cases currently in progress in the courts.

Some who advocate for mandatory Covid vaccinations point to *Jacobson v. Commonwealth of Massachusetts*<sup>38</sup>, a 1905 decision regarding a mandatory smallpox vaccine. The Supreme Court held that government actions taken in the context of a public health crisis are subject to a more deferential review:

“In every well-ordered society charged with the duty of conserving the safety of its members the rights of the individual in respect of his liberty may at times, under the pressure of great dangers, be subjected to such restraint, to be enforced by reasonable regulations, as the safety of the general public may demand.”

But there are significant differences in the circumstances surrounding *Jacobson* and our current circumstances regarding Covid. First of all, the state of Massachusetts imposed a five dollar fine for refusing to take the vaccine. In today’s money that would be approximately \$140. This hardly equates with losing a job and / or damaging a career.

Secondly, while many lives were lost due to Covid, when you look at the situation today, younger persons in good health have an extremely high survival rate when infected with the Covid 19 virus. This is much different than smallpox in 1905.

In any event, the United States Supreme Court has made it clear that *Jacobson* is not controlling law in regard to Covid 19. In July of 2020, in *Calvary Chapel Dayton Valley v. Sisolak*<sup>39</sup>, Justice Alito recognized the need for emergency action at the beginning of the pandemic when little was known about infection or mortality rates. But he then raises the question as to whether we are still in such an emergency that unquestioned drastic action is needed 10 months later. Then in November 2020, Justice Gorsuch wrote in *Roman Catholic Diocese v. Cuomo*<sup>40</sup>:

“Government is not free to disregard the First Amendment in times of crisis . . . Yet recently, during the COVID pandemic, certain States seem to have ignored these long-settled principles.”

“Put differently, *Jacobson* didn’t seek to depart from normal legal rules during a pandemic, and it supplies no precedent for doing so. Instead, *Jacobson* applied what would become the traditional legal test associated with the right at issue—exactly what the Court does today . . . Nothing in *Jacobson* purported to address, let alone approve,

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<sup>38</sup> 197 U.S. 11, 25 S. Ct. 358, 49 L. Ed. 643 (1905).

<sup>39</sup> 2020 U.S. LEXIS 3584, 2020 WL 4251360 (July 24, 2020).

<sup>40</sup> 208 L. Ed. 2d 206, 2020 U.S. LEXIS 5708, 28 Fla. L. Weekly Fed. S 590, \_\_\_ S.Ct. \_\_\_, 2020 WL 6948354 (Nov. 25, 2020).

such serious and long-lasting intrusions into settled constitutional rights. In fact, Jacobson explained that the challenged law survived only because it did not “contravene the Constitution of the United States” or “infringe any right granted or secured by that instrument.” . . .

There are a number of arguments available to fight against the vaccines, and numerous lawsuits are making their way through the courts as of this writing. However, thus far there have not been any decisions that are helpful in stopping mandatory vaccinations for employees and students. We are hopeful that one or more of these cases will find their way to the Supreme Court of the United States, for a definitive decision. The Pacific Justice Institute will continue to file lawsuits as appropriate, and will closely monitor decisions on all vaccines lawsuits throughout the nation. We will update this resource with any noteworthy news and decisions.

There is also a potential argument to be made regarding the freedom of religion rights in the First Amendment to the Constitution of the United States. The Bill of Rights only applies to actions taken by government or agents of government. So if the violation is by an employer, that employer must be some form of government entity, either state, federal, or local. In regard to education, public schools would be under the Bill of Rights, as would state or other government sponsored colleges and universities.

The United States Supreme Court in the case of *West Virginia State Board of Education v. Barnette*,<sup>41</sup> stated:

“If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.”

Therefore, anytime a government actor orders you to be a recipient of the vaccine, and that conflicts with your sincerely held religious belief, they may be in violation of the First Amendment.

Lastly, there is an argument for basic freedom, the right to life, liberty, and a pursuit of happiness. This resource has previously quoted the large number of deaths and serious illnesses that have been reported to be a result of the Covid vaccines. According to the CDC, the chance

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<sup>41</sup> *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 63 S. Ct. 1178, 87 L. Ed. 1628, 1943 U.S. LEXIS 490, 147 A.L.R. 674

of surviving Covid without any treatment at all is as follows: age 0-19 (99.997%), 20-50 (99.98%), 50-69 (99.5%), and >age 70 (95%)<sup>42</sup>. As Americans compare the adverse effects with the survival rates, they should have the freedom to decide whether or not to take the Covid vaccine.

UPDATE: On August 17, 2021, there was finally a victory in an action against mandatory vaccines at colleges and universities. A Temporary Restraining Order was put in place by the United States District Court for the Western District of Louisiana, Monroe Division, against Edward Via College of Osteopathic Medicine, located on the University of Louisiana at Monroe, prohibiting the requirement of mandatory vaccinations for the plaintiffs to attend the college. However, the ruling was narrow, made solely on a Louisiana law, and the court finding that the school was a government actor, and subject to the law.<sup>43</sup>

**Question:** What are the basic roles and powers of the government regarding vaccines?

**Answer:** In general, administering vaccines have not been the role of the federal government. In a report by the Congressional Research Service in 2014, discussing mandatory vaccinations, the report noted that: “Historically, the preservation of the public health has been the primary responsibility of state and local governments, and the authority to enact laws relevant to the protection of the public health derives from the state’s general police powers.” “Federal jurisdiction over public health matters derives from the Commerce Clause of the United States Constitution, which states that Congress shall have the power “[t]o regulate Commerce with foreign Nations, and among the several States....”

Congress has enacted requirements regarding vaccination of immigrants seeking entry into the United States, and military regulations require American troops to be immunized against a number of diseases. The Secretary of Health and Human Services has authority under the Public Health Service Act to issue regulations necessary to prevent the introduction, transmission, or spread of communicable diseases from foreign countries into the states or from state to state. Current federal regulations do not include any mandatory vaccination programs; rather, when compulsory measures are needed, measures such as quarantine and isolation are generally utilized to halt the spread of communicable diseases.<sup>44</sup>

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<sup>42</sup> TEN MEDICAL FACTS REGARDING THE COVID-19 EXPERIMENTAL VACCINES, Dr. Shelley Cole, Medical Director AFLDS, dated April 12, 2021.

<sup>43</sup> RACHEL LYNN MAGLIULO, ET AL v. EDWARD VIA COLLEGE OF OSTEOPATHIC MEDICINE, CIVIL ACTION NO. 3:21-CV-2304, filed August 17, 2021.

<sup>44</sup> “Mandatory Vaccinations: Precedent and Current Laws”, Congressional Research Service, Jared P. Cole, Legislative Attorney, Kathleen S. Swendiman, Legislative Attorney May 21, 2014

States, however, have traditionally handled vaccinations and have even mandated them in an emergency. This resource has discussed *Jacobson v. Massachusetts* from 1905 regarding the smallpox vaccine. State governments have also mandated vaccines in their schools for many years, and that right was upheld by the United States Supreme Court in 1922, in the case of *Zucht v. King*.<sup>45</sup>

**Question:** Can a store or restaurant make me show proof of vaccination before doing business with me or letting me inside? Can I be required to get a vaccine passport to get into certain venues?

**Answer:** Generally, businesses have the right to refuse to serve persons as long as the reason is not discriminatory and it serves a legitimate purpose. For example, store management can ask someone to leave if they have no shirt or no shoes. Dressing in this manner may be upsetting to customers, causing them to leave or avoid a place of business, and thus constitutes a legitimate purpose.

However, you cannot refuse to serve someone who is in a protected class, because they are in that protected class. Race, ethnicity, sex, religion, are just some of the protected categories. Some states have additional protected categories to those of federal law.

You can also be excluded by businesses for conduct, even if it is conduct that is your right. For example, as an adult you have the right to smoke, but a store owner can require you to leave because your conduct can upset or endanger other customers. The same with being intoxicated, or being loud and boisterous.

In regard to requiring the wearing of a mask, that would very likely be considered a legitimate purpose because it is for the safety of employees and customers. The same is true for requiring proof you have taken the Covid vaccine.

If you should file a lawsuit because you were prohibited from entering or required to leave a place of business and you were not discriminated against as a member of a protected class, the remedy would likely be the ability to enter and remain in that place of business in the future. This is hardly a deterrent for inappropriate behavior on the part of a proprietor.

**Question:** What if you have already had the virus and therefore have antibodies to fight Covid naturally?

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<sup>45</sup> 260 U.S. 174, 176 (1922)

**Answer:** It likely does not make any difference because it is the opinion of government health agencies that you should still be vaccinated. Those agencies maintain that no one knows how long the antibodies will last. Refer to the question, “I already had Covid and recovered, so I have antibodies to fight off future exposures. Do I still have to get a vaccine?” starting on page 8, for additional information.

**Question:** What if I have a medical condition and a letter from my doctor exempting me from the vaccine?

**Answer:** If you are considered disabled under the Americans with Disabilities Act and are refused service because of that disability, that is likely discrimination under the ADA, and you should have legal recourse. Federal law prohibits discrimination against disabled Americans and it can have serious consequences. But other than an ADA violation, the establishment will likely face little or no consequences.

**Question:** What if a Covid vaccine is required for admission to a college or university?

**Answer:** Some colleges and universities are requiring vaccinations as a prerequisite for living on campus or attending in-person classes. However, as stated previously, state (government)-sponsored institutions should not be permitted to do this while the vaccines are still approved only under the Emergency Use Authorization (EUA). If getting the Covid vaccine violates your sincerely held religious beliefs, there may be a basis for legal action in these cases, under the First Amendment for state sponsored colleges or universities, or applying state anti-discrimination laws.

In addition, 44 of our 50 states allow religious exemption for vaccinations. Only California, Connecticut, New York, Maine, Mississippi and West Virginia do not.<sup>46</sup>

Both the California State University<sup>47</sup> system and the University of California<sup>48</sup> system have gone on record, stating that they will not require Covid vaccinations while they are under the Emergency Use Authorization. However, they will mandate vaccination to come to campus or participate in athletics as soon as a vaccine is approved by the FDA. But even then, both systems are on record stating that they will allow religious and medical exemptions.

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<sup>46</sup> “States with Religious and Philosophical Exemptions from School Immunization Requirements”, National Conference of State Legislatures, April 30, 2021.

<sup>47</sup> “CSU to Implement COVID-19 Vaccination Requirement Upon FDA Approval”, the California State University, April 22, 2021

<sup>48</sup> COVID-19 Vaccination Draft Policy, Student Frequently Asked Questions, University of California, May 4, 2021.

UPDATE: Both the University of California and the California State University systems have gone back on their promise not to require vaccines until there is at least one with FDA approval. Faculty, staff and students will be required to be vaccinated for Covid-19 before reporting for the Fall Semester.

Should any government sponsored institution of higher learning in California not allow for religious exemption to a Covid vaccine mandate, an action could be brought for religious discrimination under Article 3, Section 220 of the California Education Code, Prohibition of Discrimination; as well as California Government Code, Article 9.5, Section 11135, Discrimination.<sup>49</sup>

As previously mentioned, refusal by government sponsored institutions of higher learning to allow religious exemptions may violate the First Amendment of the United States Constitution, which would be enforced under federal law by 42 U.S.C. § 1983.

The Fair Housing Act prohibits discrimination based on religion,<sup>50</sup> and student housing owned by the college or university falls under the Fair Housing Act.<sup>51</sup> Therefore, if a student is refused student housing on the basis of not being a recipient of the Covid vaccine, and the college or university refuses to allow religious exemptions, there may be an action for discrimination under the Fair Housing Act. This argument could be made against private colleges or universities as well as government sponsored institutions.

If a college or university is mandating Covid vaccinations and not allowing religious exemptions, contact the Pacific Justice Institute to discuss your legal rights.

**Question:** What about special events, or transportation? Can they require vaccine passports or proof of vaccination? If so, how can we stop all of these passports and requirements to prove we have been vaccinated?

**Answer:** There are a number of people and entities pushing for vaccine passports that you would need for entry into different places and different events, or give you additional rights such as mass travel, that the unvaccinated do not have. This could be used in an attempt to coerce more people into getting vaccinated. In essence, this would create two classes of citizens, the vaccinated and the unvaccinated.

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<sup>49</sup> Brennon B. v. Superior Court, 57 Cal. App. 5th 367, 2020 Cal. App. LEXIS 1077, 271 Cal. Rptr. 3d 320, 2020 WL 6689639

<sup>50</sup> HOUSING DISCRIMINATION UNDER THE FAIR HOUSING ACT, U.S. Department of Housing and Urban Development

<sup>51</sup> United States v. Univ. of Neb. at Kearney, 940 F. Supp. 2d 974, 2013 U.S. Dist. LEXIS 56009, 2013 WL 1694603

On June 14, 2021, the European Union announced the requirement of a digital vaccine passport for travel in the EU. At this time, evidence of a negative Covid test or documentation that you have recovered from Covid will also be accepted. The system will be opened to other nations as well, including the United States. During the ceremony for the system that will be effective July 1, 2021, the presidents stated:

*“The EU Certificate will again enable citizens to enjoy this most tangible and cherished of EU rights – the right to free movement. Signed into law today, it will enable us to travel more safely this summer. Today we reaffirm together that an open Europe prevails.”<sup>52</sup>*

But a number of state legislatures and governors have taken action to preserve the rights of their citizens, to prohibit vaccine passports and / or to prohibit the requirement to prove you’re vaccinated.

In regard to events, such as athletic events, some could have separate sections for those vaccinated and those who are not. Government-sponsored activities including air travel will have a difficult time requiring a vaccine while they are under the EUA. However, once one or more of the vaccines are approved by the FDA, vaccines could be required in theory. Pfizer has submitted its vaccine for FDA approval on May 7, 2021.

As previously noted, the wearing of a mask and the requiring of a vaccine would both likely be considered legitimate business purposes and, without discrimination of a protected class, would likely be upheld. This is why it is so important for states to pass legislation to protect their citizens from being placed in a separate unvaccinated classification. Lawmakers in more than 40 states have introduced legislation that would forbid mandates requiring people get vaccinated.<sup>53</sup>

Below is a summary of status of actions by state legislatures and governors to prohibit vaccine passports, and / or prohibit governments or businesses refusing service without proof of Covid vaccination, as of June 1, 2021:<sup>54</sup>

**Alabama-** New law bans businesses and government entities across the state from requiring coronavirus vaccine passports. Law also states "an entity or individual doing business in this state may not refuse to provide any goods or services, or refuse to allow

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<sup>52</sup> “EU Presidents Officially Sign Regulation on EU Vaccine Passports for Travel”, Schengenvisa.info News, June 14, 2021

<sup>53</sup> “State lawmakers opposed to COVID vaccine mandates have filed a flurry of bills this session. Some worry about the message they send.” By Elizabeth Weise and Kaitlin Lange. Published 5:00 AM CDT Apr. 27, 2021 Updated 11:03 AM CDT Apr. 27, 2021

<sup>54</sup> “These States Have Banned Vaccine Passports”, by Elliott Davis. US News and World Report, June 1, 2021.

admission, to a customer based on the customer's immunization status or lack of documentation that the customer has received an immunization."

**Arizona-** An executive order prohibiting state and local government agencies from requiring residents "to provide their COVID-19 vaccination status to receive service or enter an area". Applies to government only.

**Arkansas-** New laws prevents state and local governments from requiring proof of vaccination as a condition of employment or to access goods and services. Applies to government only.

**Florida-** Executive order and new law bans vaccine passports. No state government entity shall be permitted to issue "vaccine passports, vaccine passes or other standardized documentation for the purpose of certifying an individual's COVID-19 vaccination status to a third party." The order also prohibits businesses from requiring similar documentation to enter or get services from a business.

**Georgia-** An executive order states "that no state agency, provider of state services or state property shall implement a vaccine passport program or otherwise require an individual to provide proof of COVID-19 vaccination as a condition to enter the premises of or conduct business with a state agency." Applies to government only.

**Idaho-** An executive order prohibits government agencies from producing COVID-19 vaccine passports or requiring such proof as a condition of accessing state services. Applies to government only.

**Indiana-** New law prohibits "the state or a local unit from issuing or requiring a COVID-19 'immunization passport.'" Applies to government only.

**Iowa-** New law prohibits businesses and government entities from requiring people to show proof of vaccination against COVID-19 in order to enter their premises, and notes that state grants and contracts "shall not be awarded to or renewed" with entities that violate this provision. The law also prohibits government agencies from issuing identification cards that include COVID-19 vaccination status.

**Kansas-** Legislature passed a budget that includes language banning vaccine passports from being a requirement for entering a state government building or receiving related services. Applies to government only.

**Montana-** Executive order bans the development or use of vaccine passports. Believed to apply to government only.

**North Dakota**- New law bans state and local governments from requiring inoculation proof documents and prohibits businesses – with some exceptions – from requiring vaccination documents of customers and patrons for access.

**Oklahoma**- New law prohibiting schools from requiring COVID-19 vaccines for students, requiring vaccine passports, or imposing mask mandates on unvaccinated students. Applies to schools only.

**South Carolina**- An executive order bans vaccine passports in the state.

**South Dakota**- An executive order bans the development or use of COVID-19 vaccine passports.

**Tennessee**- New law bans government-issued vaccine passports. Applies to government only.

**Texas**- An executive order bans state agencies or political subdivisions from creating a vaccine passport requirement. The order also "prohibits organizations receiving public funds from requiring consumers to provide documentation of vaccine status in order to receive any service or enter any place."

**Utah**- New law prohibits state government from requiring people to get the COVID-19 vaccine. Applies to government only.

**Wyoming**- A directive from the governor prohibits "state agencies, boards and commissions from requiring 'vaccine passports' to access state spaces and state services." Applies to government only.

UPDATE: The state of Ohio enacted House Bill 244, which prohibits school and colleges in Ohio from mandating the COVID vaccine while it does not have FDA approval and prohibits discrimination for anyone who is unvaccinated.<sup>55</sup>

Federal legislation has been introduced to prohibit the Transportation Security Administration (TSA) from requiring Americans to show proof of vaccination or produce a vaccine passport for domestic flights and protect the privacy of personal health information.<sup>56</sup>

If the government issues and / or requires a vaccine passport, or unreasonably restricts access to persons who will not or do not prove they have been vaccinated, such a policy may violate

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<sup>55</sup> Ohio House Bill 244 enacted 2021.

<sup>56</sup> "Sen. Rick Scott Introduces Freedom to Fly Act Banning TSA from Requiring Vaccine Passports", Office of Senator Rick Scott, June 2, 2021.

the rights granted under the Privileges and Immunities Clause of Article IV, Section 2 of the United State Constitution. Such a government action would, in essence, create two classes of people- vaccinated and unvaccinated.

The Privileges and Immunities Clause of Article IV, Section 2 of the Constitution states that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states."

This clause protects fundamental rights of individual citizens and restrains state efforts to discriminate against out-of-state citizens. However, the Privileges and Immunities Clause extends not to all commercial activity, but only to fundamental rights. But much debate surrounds the particular rights which the Privileges and Immunities Clause protects, so it is difficult to predict how a case might be decided in regard to an action based on this clause.<sup>57</sup>

Lastly, and very importantly- Citizen participation in their government is vital to a thriving democracy, or in our case a representative republic. If you feel strongly about issues relating to vaccine passports or not being required to provide proof of Covid vaccination to travel, transact business, attend church, school or work, or participate in leisure or recreational activities, you should contact your elected representatives at the local, state, and federal level about executive and legislative guarantees that will preserve your liberty and freedom. Support those elected officials or candidates that fight for rights that are important to you.

**Question-** Are there any vaccines coming that are more like the traditional vaccines we have taken as children?

**Answer-** Yes. The next set of vaccine candidates, expected mid-to late 2021, are heavily skewed toward approaches that have produced successful vaccines. Conventional methods include using a killed or inactivated version of the pathogen that causes a disease to provoke an immune response, such as those used to make flu, polio and rabies vaccines.

Also more common are protein-based vaccines that use purified pieces of the virus to spur an immune response. Vaccines against whooping cough, or pertussis, and shingles employ this approach.

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<sup>57</sup> Privileges and Immunities Clause, Legal Information Institute, Cornell Law School

Novavax Inc. is using similar purified protein technology and had targeted the vaccine to be available 3<sup>rd</sup> quarter of 2021. They have a combination Covid vaccine / flu shot that has tested well for both.<sup>58</sup> Novavax stated on June 14, 2021, that their Phase 3 trials continue to go well, and following approval, it is on track to reach manufacturing capacity of 100 million doses per month by the end of the third quarter and 150 million doses per month by the end of the fourth quarter of 2021.<sup>59</sup>

However, Atlantic magazine published an article titled: “The mRNA Vaccines Are Extraordinary, but Novavax Is Even Better”, pointing out the lack of publicity surrounding the Novavax vaccine, even though it was a traditional vaccine and was more effective than the current vaccines and testing showed a greatly reduced rate of side effects. The article goes on to say the FDA does not appear to be eager to approve it, and it could be months until it is approved:

*"At the end of January, reports that yet another COVID-19 vaccine had succeeded in its clinical trials—this one offering about 70 percent protection—were front-page news in the United States, and occasioned push alerts on millions of phones. But when the Maryland-based biotech firm Novavax announced its latest stunning trial results last week, and an efficacy rate of more than 90 percent even against coronavirus variants, the response from the same media outlets was muted in comparison."*

*"If the FDA sees no urgency, the Novavax vaccine might not be available in the U.S. for months, and in the meantime the national supply of other doses exceeds demand. But the asymmetry in coverage also hints at how the hype around the early-bird vaccines from Pfizer and Moderna has distorted perception. Their rapid arrival has been described in this magazine as “the triumph of mRNA”—a brand-new vaccine technology whose “potential stretches far beyond this pandemic.” Other outlets gushed about “a turning point in the long history of vaccines,” one that “changed biotech forever.” It was easy to assume, based on all this reporting, that mRNA vaccines had already proved to be the most effective ones you could get—that they were better, sleeker, even cooler than any other vaccines could ever be.”<sup>60</sup>*

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<sup>58</sup> “Next crop of COVID-19 vaccine developers take more traditional route”, By Julie Steenhuysen, Caroline Copley, Reuters

<sup>59</sup> “Novavax COVID-19 vaccine 90.4% effective in clinical trial, company says”, Foxnews.com, By Alexandria Hein, June 14, 2021.

<sup>60</sup> “The mRNA Vaccines Are Extraordinary, but Novavax Is Even Better”, by Hilda Bastian, The Atlantic, June 24, 2021.

On August 6, 2021, it was reported that Novavax was having trouble getting FDA approval for authorization under the Emergency Use Authorization (EUA). They now estimate the vaccine will be available sometime in the fourth quarter of 2021.<sup>61</sup>

In addition, French drug maker Sanofi is developing a protein-based COVID-19 vaccine employing the same approach it uses for its Flublok seasonal flu vaccine. Sanofi targets FDA approval in the 4th Quarter of 2021.<sup>62</sup>

### **In closing-**

The Pacific Justice Institute is not anti-vaccination, it is pro-freedom. Undoubtedly the Covid 19 vaccines have served portions of the American population very well, and have saved lives. We commend those who have worked tirelessly since the outbreak of the pandemic to make those vaccines available in record time.

However, because they have been approved only under the Emergency Use Authorization, they should not be mandated on any American. Further, even if one or more vaccines receive full FDA approval, Americans should have the right to assess their own risk and make informed decisions as to whether or not they want to be vaccinated.

There is risk involved in nearly everything we do in life. We as free citizens assess that risk and act accordingly. This nation was brought forth by people who took the great risk of traveling across the Atlantic Ocean to come to the New World. The United States of America was founded by people who decided to take the risk of going to war with the world's only superpower to become a free nation. The western part of our nation was settled by people who took the risk to travel across the wilderness by horse and buggy.

As previously stated, the odds of survival when contracting Covid 19, even if untreated, for healthy people under the age of 50 is 99.98% or higher<sup>63</sup>. American citizens should have the right to examine that risk and decide whether or not a vaccination is right for them. They should not be forced in either direction by their government, nor should they become another class of citizen based on the decision they make.

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<sup>61</sup> "COVID-19 vaccinemaker Novavax faces manufacturing setback", by Meredith Wadman, August 6, 2021.

<sup>62</sup> "Next crop of COVID-19 vaccine developers take more traditional route", By Julie Steenhuysen, Caroline Copley, Reuters

<sup>63</sup> TEN MEDICAL FACTS REGARDING THE COVID-19 EXPERIMENTAL VACCINES, Dr. Shelley Cole, Medical Director AFLDS, dated April 12, 2021.

