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May 2021

Memo on COVID Vaccination Mandates

Liberty Counsel is a national nonprofit litigation, education and public policy organization advancing religious freedom, the sanctity of human life, and family. We have engaged in extensive litigation regarding civil rights violations ostensibly justified by “COVID-19.” We have had great success on behalf of our many clients at circuit courts of appeal and at the United States Supreme Court. See, e.g., *Harvest Rock Church v. Newsom*, No. 20A137, 2021 WL 406257 (U.S. Feb. 5, 2021); *Harvest Rock Church v. Newsom, Gov. of CA*, No. 20A94, 2020 WL 7061630 (U.S. Dec. 3, 2020); *Elim Romanian Pentecostal Church v. Pritzker*, 962 F.3d 341 (7th Cir. 2020); *Maryville Baptist Church, Inc. v. Beshear*, 957 F.3d 610 (6th Cir. 2020). The existence of COVID-19 does not justify the numerous violations of fundamental individual, economic and religious liberties. These include the rights of personal autonomy and bodily integrity, and the right to accept or reject the various COVID vaccines based on religious belief or other grounds.

COVID Vaccines Cannot Be Mandatory Under Emergency Use Authorization

On the issue of the COVID vaccines: all of such have been released under an Emergency Use Authorization (“EUA”) and employers (religious and non-religious alike) may not condition continued employment on taking an EUA-authorized COVID vaccine.

The COVID vaccines are in a special category and cannot be treated like FDA licensed vaccines. None of the COVID vaccines are FDA licensed; nor have they received full FDA approval. Rather, their approval is under the special provision noted above as EUA. This means that there is not enough data (which includes duration of testing) for the FDA to render a final approval. More importantly, no one, including private employers, may coerce individuals (by threatening their employment or otherwise) to take an EUA vaccine. Federal law requires full and informed, voluntary consent.

All employees – whether employed by religious organizations, or not – are protected against mandated COVID-19 vaccines, under [21 U.S.C. §360bbb-3](#), which provides that EUA products (like all of these vaccines) require (as a condition of emergency approval) that **people have “the option to accept or refuse administration of the product.”** “FDA has an obligation to ensure that recipients of the vaccine under an EUA are informed... that **they have the option to accept or refuse the vaccine.**”¹ (emphasis added). There is no exception in the statute for “private employers” as opposed to government; or for religious or non-religious employers. All EUA vaccines are optional.

¹ <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>

Moreover, at the Centers for Disease Control Advisory Committee on Immunization Practices (ACIP) meeting held in August 2020, CDC-ACIP Executive Secretary Amanda Cohn, MD confirmed the non-mandatory nature of an EUA vaccine: “**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.” (emphasis added).²

COVID Vaccines Cannot Be Mandatory Under Title VII

In general, employee vaccine religious exemption requests must be accommodated, where a reasonable accommodation exists without undue hardship to the employer, under Title VII of the Civil Rights Act of 1964.

Many people hold sincere religious beliefs against taking any vaccines, or taking those derived from aborted fetal cell lines, or taking those sold by companies that profit from the sale of vaccines and other products derived from abortion.

Title VII, as amended, 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 (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.” 42 U.S.C. § 2000e–2(a). (Emphasis added).

By pattern and practice, virtually every employer in America has shown that reasonable accommodations and alternatives to vaccination indeed exist for employees, and these have been required all along since the inception of COVID: self-screening with temperature checks, wearing personal protective equipment (PPE), and complying with other safety protocols until the number of COVID infections work their way down to acceptable levels. Logically, if these measures are and were effective at preventing the spread of COVID, they will continue to be effective. Thus, no employer can claim an undue hardship by allowing employees to do what they have been doing for over a year, in the alternative to a vaccine.

Liberty Counsel’s interpretation of Title VII is also supported by the footnoted, linked press releases from the Equal Employment Opportunity Commission (EEOC)³ and the U.S. Department of Justice (US DOJ).⁴ It is unlawful for employers to force vaccinations on staff and employees holding religious convictions against a vaccine, and to refuse a reasonable accommodation. This goes for healthcare industry employers. In 2018, one hospital paid \$89,000 to settle a suit after refusing to accommodate and firing employees who declined flu vaccinations based on their religious beliefs. US DOJ sought compensatory damages on behalf of a nursing home employee against whom Ozaukee County, Wisconsin discriminated.

Singling Out Employees For Individual Questioning or Adverse Action Under the ADA, GINA and Title VII

In interpreting the Americans With Disabilities Act (“ADA”), the **EEOC** has opined that it

² <https://www.youtube.com/watch?v=p0zCEiGohJs&list=PLvvp9iOILTQb6D9e1YZWpbUvzfptNMKx2&index=43>. See Minute 1:14:40

³ <https://www1.eeoc.gov/eeoc/newsroom/release/1-12-18.cfm?renderforprint=1>

⁴ <https://www.justice.gov/opa/pr/justice-department-files-lawsuit-against-ozaukee-county-wisconsin-religious-discrimination>

is improper to “ask only one employee—as opposed to asking all employees—questions designed to determine if [he] has COVID-19, or require that this employee alone have [his] temperature taken or undergo other screening or testing[.] “If an employer wishes to ask only a particular employee to answer such questions, or to have [his] temperature taken or undergo other screening or testing, the ADA requires the employer to have a reasonable belief based on objective evidence that this person might have the disease.”⁵ EEOC has also stated that an employer may not “**ask an employee who is physically coming into the workplace whether they have family members who have COVID-19 or symptoms associated with COVID-19,**” as such is a violation of the Genetic Information Nondiscrimination Act (GINA).⁶

The **Occupational Safety and Health Administration** (OSHA) has also recognized that there is “**not evidence that COVID-19 vaccines prevent transmission of the virus from person-to-person,**” and reiterated that employers should not improperly distinguish between employees.⁷ (Emphasis added). “The most effective COVID-19 prevention programs ... include the following elements:”

15. Not distinguishing between workers who are vaccinated and those who are not: Workers who are vaccinated must continue to follow protective measures, such as wearing a face covering and remaining physically distant, because at this time, there is not evidence that COVID-19 vaccines prevent transmission of the virus from person-to-person. The [CDC explains](#) that experts need to understand more about the protection that COVID-19 vaccines provide before deciding to change recommendations on steps everyone should take to slow the spread of the virus that causes COVID-19.⁸ (Emphasis original and added).

On May 22, 2021, OSHA’s reversed the following guidance regarding whether adverse reactions experienced by employees who take the shot under certain conditions or arrangements are recordable on OSHA’s recordkeeping log⁹:

If I require my employees to take the COVID-19 vaccine as a condition of their employment, are adverse reactions to the vaccine recordable?

If you require your employees to be vaccinated as a condition of employment (i.e., for work-related reasons), **then any adverse reaction to the COVID-19 vaccine is work-related.** The adverse reaction is recordable if it is a new case under 29 CFR 1904.6 and meets one or more of the general recording criteria in 29 CFR 1904.7.¹⁰ (Emphasis added).

I do not require my employees to get the COVID-19 vaccine. However, I do recommend that they receive the vaccine and may provide it to them or make arrangements for them to receive it offsite. If an employee has an adverse reaction to the vaccine, am I required to record it?

No. Although adverse reactions to recommended COVID-19 vaccines may be recordable under 29 CFR 1904.4(a) if the reaction is: (1) work-related, (2) a new case, and (3) meets one or more of the general recording criteria in 29 CFR 1904.7, OSHA is exercising its enforcement discretion to only require the recording of adverse effects to required vaccines at this time. **Therefore, you do not need to record adverse effects from COVID-19 vaccines that you recommend, but do**

⁵ <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>

⁶ *Id.*

⁷ <https://www.osha.gov/coronavirus/safework#role-employers-workers>

⁸ *Id.*

⁹ <https://www.osha.gov/coronavirus/faqs#worker>

¹⁰ <https://www.osha.gov/coronavirus/faqs#vaccine>

not require. (Emphasis added).

Note that for this discretion to apply, the vaccine must be truly voluntary. For example, an employee's choice to accept or reject the vaccine cannot affect their performance rating or professional advancement. An employee who chooses not to receive the vaccine **cannot suffer any repercussions from this choice. If employees are not free to choose whether or not to receive the vaccine without fearing adverse action, then the vaccine is not merely "recommended"** and employers should consult the above FAQ regarding COVID-19 vaccines that are a condition of employment. (Emphasis added).¹¹

On May 22, 2021, OSHA's updated FAQ stated as follows:

[Are adverse reactions to the COVID-19 vaccine recordable on the OSHA recordkeeping log?](#)

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.¹²

Finally, questioning employees (much less taking adverse employment action against them) on the basis of church membership or church attendance potentially violates not only the ADA, but also Title VII, which prohibits discrimination based on religious worship or religious practices engaged in by the employee outside the workplace.

Conclusion

There are strong protections under federal law for persons who wish to decline the current EUA-authorized COVID vaccines. Neither government nor private employers may force anyone to receive any of the COVID injections.

¹¹ *Id.*

¹² <https://www.osha.gov/coronavirus/faqs#collapse-vaccine>