



Can Employers Mandate the COVID-19 Vaccine?

Urgent message: Based on precedent, urgent care operators and other employers can mandate the COVID-19 vaccine when available, subject to reasonable accommodation for exemptions, which are limited when an employee's role is public- or patient-facing.

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As we strain our eyes to see the light at the end of the tunnel in this pandemic, many urgent care centers will continue to have front office staff, medical assistants, and providers interacting with the public. In fact, research from the U.K. and U.S. shows that risk of testing positive for COVID-19 is nearly *12-times* higher for frontline healthcare workers compared with individuals in the general community (see **Figure 1**).¹

It stands to reason that both employers and the local department of health would want to see those urgent care employees get vaccinated for the coronavirus when the vaccine becomes available. This article will explore whether the government and employers have the authority to mandate that all frontline healthcare workers get vaccinated, and if so, what medical and religious exemptions must be permitted.

The Short Answer: Yes

In 1905, a man named Jacobson refused to get a compulsory smallpox vaccination in Cambridge, MA pursuant to a city ordinance. Jacobson was arrested, fined, arraigned, and pleaded not guilty. At trial, he challenged the vaccination program on the basis that it was an unreasonable invasion of his rights under the 14th Amendment. The Massachusetts Supreme Court disagreed and held that the vaccination program was constitutional. The United States Supreme Court affirmed, ruling that the vaccination program had a real and substantial relation to the protection of the public health and safety.²

U.S. Supreme Court Justice Harlan wrote that "the liberty secured by the Constitution of the United States to



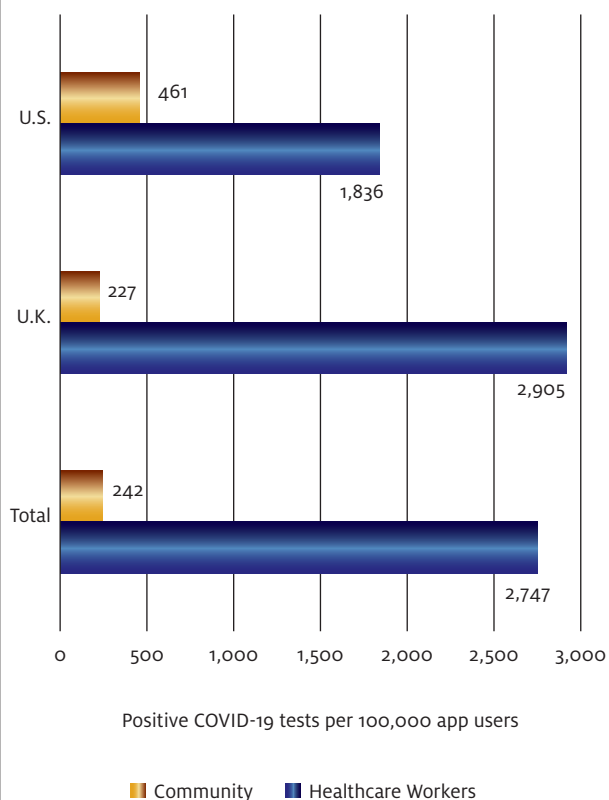
every person within its jurisdiction does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint." He went on to opine:

There are manifold restraints to which every person is necessarily subject for the common good. On any other basis organized society could not exist with safety to its members. Society based on the rule that each one is a law unto himself would soon be confronted with disorder and anarchy.²

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Figure 1. Risk for COVID-19 Among Healthcare Workers vs General Community

Nguyen, et al undertook a prospective cohort study of the general community, including frontline healthcare workers, who reported information through the COVID Symptom Study smartphone application between March 24 in the United Kingdom and March 29 in the United States, through April 23, 2020. See below for comparison of occurrence among them, per 100,000 app users.



Adapted from: Nguyen LH, et al. Risk of COVID-19 among frontline healthcare workers and the general community: a prospective cohort study. *medRxiv*. Available at: <https://www.medrxiv.org/content/10.1101/2020.04.29.20084111v6>. Accessed October 15, 2020.

Justice Harlan also explained that “real liberty for all” could not exist where each individual person’s right to use his own liberty could be allowed regardless of the injury that may be done to others.² Thus, the court held that an individual’s liberty rights under the U.S. Constitution are not absolute, and the mandatory vaccination law was necessary to promote the interest of public health and safety.

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This 115-year-old case is still valid and serves as a template for the current analysis.

Other Government Guidance on Mandatory Vaccinations

In 2009, OSHA provided its position on mandatory flu shots for employees. In response to a letter from Rep. Marcy Kaptur (D-Ohio), OSHA stated that it “does expect facilities providing healthcare services to perform a risk assessment of their workplace and encourages healthcare employers to offer both the seasonal and H1N1 vaccines.”³

OSHA stated that it was essential for employees to be properly informed of the benefits of the vaccinations. That said, while OSHA did not specifically require employees to take the vaccines, it said that an employer may do so.

This spring, the U.S. Equal Employment Opportunity Commission was asked if an employer covered by the ADA and Title VII of the Civil Rights Act of 1964 could compel all of its employees to take the influenza vaccine—regardless of their medical conditions or their religious beliefs during a pandemic.⁴ The agency said no, and that an employee may be entitled to an exemption from a mandatory vaccination requirement based on an ADA disability that prevents them from taking the influenza vaccine. As a result, employers can generally require vaccination as a term and condition of employment, but there are exceptions to this rule.

Exemptions

Employers can mandate a COVID-19 vaccination, but those covered by the ADA⁵ and Title VII of the Civil Rights Act of 1964⁶ cannot compel all employees to take the vaccine regardless of their medical conditions or their religious beliefs during a pandemic. Both laws cov-

ers employers with 15 or more employees. Significantly, the notion of “reasonable accommodation” is discussed in detail below.

However, as an exception to the exception, under Title VII, employers are not required to grant religious accommodation requests that result in more than a de minimis cost to the operation of the employer’s business.⁷ Even so, urgent care owners should consult an attorney about possible applicable state laws and local with stricter standards.⁸

“An employer can require or mandate a vaccine as a term and condition of employment. However, they must be aware of possible exemptions from this policy where federal or state law provide for an employee’s ADA disability or sincerely held religious belief, practice, or observance.”

Reasonable Accommodation

The EEOC advised that an employee may be entitled to an exemption from a mandatory vaccination requirement based on an ADA disability that prevents them from taking the vaccine. The agency says that this would be a reasonable accommodation barring undue hardship. Also, under Title VII of the Civil Rights Act of 1964, once an employer receives notice that an employee’s sincerely held religious belief, practice, or observance prevents him from taking the vaccine, the employer must provide a reasonable accommodation unless it would pose an undue hardship.

Title VII defines “undue hardship” as anything “more than de minimis cost” to the operation of the employer’s business—a lower standard than under the ADA. That law states that once an employee has made requested accommodation, the employer is obligated to participate in an interactive process of seeking accommodation by making a good-faith effort to work with the employee to seek accommodation.^{9,10} The process

is one by which employer and employee work together to facilitate resolution relating to the employee’s request for accommodation.⁵

In light of the fact that everything in an urgent care center is “patient-facing,” there is arguably *no* reasonable accommodation that would enable an employee to perform their duties working with patients while not interacting with patients. Further, the risk of contracting the virus in the community extends to urgent care employees exposing other employees and patients. Thus, the argument can be made fairly easily that there is no reasonable accommodation or that any possible option would result in significant difficulty or expense to the urgent care business. Because of this, urgent care owners would not likely see many claims of failure to accommodate.¹¹

Summary

An employer can require or mandate a vaccine as a term and condition of employment.¹² However, they must be aware of possible exemptions from this policy where federal or state law provide for an employee’s ADA disability or sincerely held religious belief, practice, or observance. In the case of denying a requested religious exemption, the employer should be prepared to explain why providing a reasonable accommodation would pose an undue hardship. ■

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