

**PROTECTING LIVES AND LIVELIHOODS:
VACCINE REQUIREMENTS AND EMPLOYEE
ACCOMMODATIONS**

JOINT HEARING

BEFORE THE

**SUBCOMMITTEE ON
WORKFORCE PROTECTIONS**

AND THE

**SUBCOMMITTEE ON
CIVIL RIGHTS AND
HUMAN SERVICES**

OF THE

COMMITTEE ON EDUCATION AND LABOR

U.S. HOUSE OF REPRESENTATIVES

ONE HUNDRED SEVENTEENTH CONGRESS

FIRST SESSION

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**PROTECTING LIVES AND LIVELIHOODS:
VACCINE REQUIREMENTS AND EMPLOYEE
ACCOMMODATIONS**

Tuesday, October 26, 2021

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON WORKFORCE PROTECTIONS,
SUBCOMMITTEE ON CIVIL RIGHTS AND HUMAN SERVICES,
COMMITTEE ON EDUCATION AND LABOR,
Washington, DC.

The Subcommittees met, pursuant to notice, at 10:16 a.m., via Zoom, Hon. Alma S. Adams

[Chairwoman of the Subcommittee on Workforce Protections] presiding.

Present: Representatives Adams, Bonamici, Scott (*ex officio*), Norcross, Jayapal, Hayes, Omar, Stevens, Leger Fernández, Mrvan, Bowman, Yarmuth, Keller, Fulcher, Stefanik, Miller-Meeks, Owens, Good, McClain, Spartz, Fitzgerald, Cawthorn, Steel, and Foxx (*ex officio*).

Also present: Representatives Allen and Murphy.

Staff present: Phoebe Ball, Disability Counsel; Ilana Brunner, General Counsel; Ijeoma Egekeze, Professional Staff; Rasheedah Hasan, Chief Clerk; Sheila Havenner, Director of Information Technology; Eli Hovland, Policy Associate; Carrie Hughes, Director of Health and Human Services; Ariel Jona, Policy Associate; Andre Lindsay, Policy Associate; Richard Miller, Director of Labor Policy; Max Moore, Staff Assistant; Mariah Mowbray, Clerk/Special Assistant to the Staff Director; Kayla Pennebecker, Staff Assistant; Véronique Pluviose, Staff Director; Robert Shull, Labor Policy Staff; Theresa Thompson, Professional Staff; Banyon Vassar, Deputy Director of Information Technology; Tanisha Wilburn, Director of Labor Oversight and Counsel; Cyrus Artz, Minority Staff Director; Michael Davis, Minority Operations Assistant; Rob Green, Minority Director of Workforce Policy; Georgie Littlefair, Minority Legislative Assistant; John Martin, Minority Deputy Director of Workplace Policy/Counsel; Hannah Matesic, Minority Director of Member Services and Coalitions; Kelly Tyroler, Minority Professional Staff Member; and John Witherspoon, Minority Professional Staff Member.

Chairwoman ADAMS. Good morning. We are ready to begin our countdown from five and then we'll start. Five, four, three, two, one. The Subcommittee on Workforce Protections and the Subcommittee on Civil Rights and Human Services will come to order.

Welcome everyone. I note that a quorum is present. I note for the Subcommittees that Mr. Allen of Georgia and Mr. Murphy of North Carolina and Ms. Miller of Illinois are permitted to participate in today's hearing with the understanding that their questions will come only after all members of the Joint Subcommittee on both side of the aisle who are present have had an opportunity to question the witnesses.

The Subcommittees are meeting today for a joint hearing to hear testimony on Protecting Lives and Livelihoods: Vaccine Requirements and Employee Accommodations. This is an entirely remote hearing, and as such the Committee's hearing room is officially closed. All microphones will be kept muted, as a general rule, to avoid unnecessary background noise, and members and witnesses will be responsible for unmuting themselves when they're recognized to speak, or when they wish to seek recognition.

If a member or witness experiences technical difficulties during the hearing, please stay connected on the platform, make sure you're muted, and use your phone to immediately call the Committee's IT director whose number was provided in advance.

Should the Chair experience technical difficulty, or need to step away, Chair Bonamici or another majority member is hereby authorized to assume the gavel in the Chair's absence. In order to ensure that the Committee's five-minute rule is adhered to, staff will be keeping track of time using the Committee's digital timer, which appears in its own thumbnail picture. Members and witnesses are asked to wrap up promptly when their time has expired.

Pursuant to Rule 8(c) opening statements are limited to the Chairs and Ranking Members. This allows us to hear from our witnesses sooner, and it provides all members with adequate time to ask questions. I recognize myself now for the purpose of making an opening statement.

Today we're examining the role of workplace vaccine policies in protecting workers against COVID-19 and accelerating our economic recovery. I want to begin by reiterating a basic fact that should guide today's discussion. COVID-19 vaccines are the most effective tool that we have to save worker's lives and defeat the pandemic.

Roughly 80 percent of American adults have received at least one dose and can confidently say that vaccines are safe, effective, and necessary to prevent the spread of COVID-19 in our communities and in our workplaces. Yet there are more than 82 million people not yet vaccinated. Far too many of our Nation's workers are still suffering from the worst workplace crisis in recent history.

Workplace COVID-19 outbreaks are continuing to endanger workers and their families, and many of these outbreaks have been linked to unvaccinated workers. Thankfully, we've seen responsible employers take the initiative to implement workplace safety policies, including vaccination requirements to keep their employees safe.

Some of the largest employers in the country, including Bank of America in my district, already have vaccination requirements, and more companies are stepping up to require vaccinations each week. At the moment, with the vaccine being free and available, it's clear

that the most effective way to boost vaccination rates is through workplace vaccination requirements.

And this is why the Occupational Safety and Health Administration is expected to soon issue an emergency temporary standard, or ETSETS, that requires employers to implement vaccination and testing policies for their workers. This standard would go a long way to fulfilling our ultimate responsibility during this pandemic, which is to save lives and end the pandemic.

I hope that all of my colleagues will agree that workplace vaccination requirements are a critical tool to safely reopen our economy and protect the health of workers, their families, and their communities. I do want to thank our witnesses today.

[The statement of Chairwoman Adams follows:]

STATEMENT OF HON. ALMA S. ADAMS, CHAIRWOMAN, SUBCOMMITTEE ON
WORKFORCE PROTECTIONS

Today, we are examining the role of workplace vaccine policies in protecting workers against COVID-19 and accelerating our economic recovery.

I want to begin by reiterating a basic fact that should guide today's discussion: COVID-19 vaccines are the most effective tool that we have to save workers' lives and defeat the pandemic.

Roughly 80 percent of American adults have received at least one dose, and can confidently say that vaccines are safe, effective, and necessary to prevent the spread of COVID-19 in our communities and in our workplaces.

Yet, with more than 82 million people not yet vaccinated, far too many of our Nation's workers are still suffering from the worst workplace safety crisis in recent history.

Workplace COVID-19 outbreaks are continuing to endanger workers and their families. And many of these outbreaks have been linked to unvaccinated workers.

Thankfully, we've seen responsible employers take the initiative to implement workplace safety policies, including vaccination requirements, to keep their employees safe.

Some of the largest employers in the country, including Bank of America in my district, already have vaccination requirements. And more companies are stepping up to require vaccinations each week.

After months of the vaccine being free and available, it is clear that the most effective way to boost vaccination rates is through workplace vaccination requirements.

This is why the Occupational Safety and Health Administration is expected to soon issue an emergency temporary standard, or ETS, that requires employers to implement vaccination and testing policies for their workers.

This standard would go a long way toward fulfilling our ultimate responsibility during this pandemic, which is to save lives and end the pandemic.

I hope that all my colleagues will agree that workplace vaccination requirements are a critical tool to safely reopen our economy and protect the health of workers, their families, and their communities.

I want to thank our witnesses today.

I'm now pleased to recognize the distinguished Ranking Member of the Workforce Protection Subcommittee, Mr. Keller, for the purpose of making an opening statement.

Mr. KELLER. Thank you, Madam Chair. The Biden administration has created uncertainty and confusion throughout its politicized COVID-19 policy. President Biden has resorted to weaponizing the Federal bureaucracy, turning employers into the vaccine and testing police on behalf of the Federal Government.

OSHA's sweeping and inappropriate Federal mandate will have devastating consequences. This unprecedented national mandate will put undue burden on business owners who are already struggling with a worker shortage and a supply chain crisis.

Our job creators should not be expected to assume the responsibility for the private medical decisions of their employees. From manufacturing and energy to retail and hospitality, our team has heard from countless job creators in Pennsylvania's 12th congressional District that say this mandate will crush their operations.

We have heard from rural hospitals and correctional officers who operate in industries where qualified workers were sorely needed, even before Federal vaccine mandates were proposed by President Biden. We have now held them back even further by damaging their ability to retain workers.

After over a year of struggling to get by, businesses need a leg up, not more costly regulation and mandates. Further, this Federal Government mandate is almost certainly unlawful. On September 9th, President Biden ordered OSHA to enact a broad and sweeping public health measure under the guise of workplace safety.

Since OSHA was established 50 years ago, only 10 emergency temporary standards, or ETs, have been issued, and nearly all that were challenged have been rejected by Federal courts. The Biden administration's vaccine mandate is another power grab by Democrats to make America an authoritarian socialist State where they and Washington know best.

OSHA's vaccine mandate exceeds the authority delegated to it by Congress and turns private employers into the Federal Government's enforcement arm; and the extreme and punitive fines the Biden administration threatens to level on any business that refuses to comply shows that it will bulldoze any resistance.

We must stand up to this massive and almost certainly illegal government overreach. With that, I yield back.

[The statement of Ranking Member Keller follows:]

STATEMENT OF HON. FRED KELLER, RANKING MEMBER, SUBCOMMITTEE ON
WORKFORCE PROTECTIONS

The Biden administration has created uncertainty and confusion through its politicized COVID-19 policy.

President Biden has resorted to weaponizing the Federal bureaucracy, turning employers into the vaccine and testing police on behalf of the Federal Government.

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And the extreme and punitive fines the Biden administration threatens to level on any business that refuses to comply shows that it will bulldoze any resistance.

We must stand up to this massive and almost certainly illegal government overreach.

Chairwoman ADAMS. Thank you. I now recognize the distinguished Chair of the Subcommittee on Civil Rights and Human Services for the purpose of making an opening statement.

Chairwoman BONAMICI. Thank you, Chair Adams, for leading this hearing today, and to the Ranking Members for joining us for this important topic and thank you especially to our witnesses for providing their experience and expertise.

In 1999 the Centers for Disease Control and Prevention identified vaccinations as the greatest public health achievement of the 20th Century. Vaccinations have eradicated highly contagious diseases around the world, and vaccination requirement programs have played a key role in preventing contagion of deadly viral outbreaks. Today, children in Oregon and every other U.S. State and territory are required to be vaccinated against several different viruses, such as polio, before they attend school. And notably, no cases of polio have originated in the United States since 1979.

This is important context for today's discussion about the role of Coronavirus vaccine requirements for ending the COVID-19 pandemic. The rapid spread of the Delta variant of the Coronavirus continues to threaten the health and safety of Americans, and it is now evident that the decision to get vaccinated is not just about protecting one individual, it's a decision that affects everyone around us.

For certain groups of workers, including older workers, workers with disabilities, and other workers with underlying health conditions, the risks associated with COVID-19 are potentially even more deadly. Even those fully vaccinated face a small possibility of a serious breakthrough infection.

During the global pandemic, our priority must be to protect the rights and freedoms of the vulnerable individuals to work and to contribute to our economy—not to protect the ability of individuals to endanger others. And I truly applaud the leadership demonstrated by Oregon-based Columbia Sportswear, who is here today, representing themselves as well as other employers that recognize that vaccine requirements protect their employees and their communities and the families of their employees.

Across the country employers are demonstrating that these policies work. Today we have an opportunity to discuss how workplace vaccine requirements can protect both the lives and livelihoods of all workers, particularly those at higher risk of serious illness or death from COVID-19. So, thank you again for our expert witnesses today.

[The prepared statement of Chairwoman Bonamici follows:]

STATEMENT OF HON. SUZANNE BONAMICI, CHAIRWOMAN, SUBCOMMITTEE ON CIVIL RIGHTS AND HUMAN SERVICES

Thank you, Chair Adams, for leading this hearing and to the Ranking Members for joining us for this important topic. And thank you, especially, to our witnesses for providing their experience and expertise.

In 1999, the Centers for Disease Control and Prevention identified vaccination as the greatest public health achievement of the 20th century. Vaccinations have eradicated highly contagious diseases around the world and vaccination requirement programs have played a key role in preventing contagion and deadly viral outbreaks.

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That is important context for today's discussion about the role of vaccine requirements in ending the COVID-19 pandemic.

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For certain groups of workers—including older workers, workers with disabilities, and other workers with underlying health conditions—the risks associated with COVID-19 are potentially even more deadly. Even those fully vaccinated face a small possibility of a serious breakthrough infection.

During the global pandemic, our priority must be to protect the rights and freedoms of vulnerable individuals to work and to contribute to our economy—not the ability of individuals to endanger others.

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livelihoods of all workers, particularly those at higher risk of serious illness or death from COVID-19.

Thank you, again, to our expert witnesses today.

I'm now pleased to turn it over to the Ranking Member of the Civil Rights and Human Services Subcommittee, Mr. Fulcher—welcome back, nice to see you, hope you're doing well—for his opening statement.

Mr. FULCHER. Thank you so much for that, and Madam Chair, I appreciate this time. Madam Chair, there's just no way around it. President Biden's vaccine mandate is bad for workers. It's bad for business, and it's bad for the economy. It is also an affront to the personal liberties that Americans hold dear.

A major shortage is already contributing to a supply chain backup. In response to similar State and Federal mandates, many private companies have begun firing workers who refuse the COVID-19 vaccine.

This Federal vaccine mandate will worsen the supply chain crisis, almost guaranteeing Americans will go without needed supplies through the Christmas season. Current government mandates have created chaos at airports, weakened police forces, and put our healthcare system in jeopardy. In September, a hospital in upstate New York was so understaffed after unvaccinated medical personnel resigned that the hospital was forced to stop delivering babies. Yet babies come when it's time for them to, whether there's a staffing shortage or not.

These problems will only get worse once President Biden's OSHA vaccine and testing mandate is issued. We cannot afford to lose more workers. This coercive government mandate will compound the crisis facing our Nation. Instead of empowering American workers and job creators, my friends on the other side of the aisle are forcing Main Street to fire workers.

This is the surest way to hurt our economy. This ill-advised decree will create substantial uncertainty, costs, and liabilities. The last thing Main Street needs is another unfunded mandate dictated from Washington. Harsh fines for violating President Biden's mandate could also decimate small businesses. This is not building back better—it's crushing the job creators and American workers under the heavy hand of government intervention. Madam Chair, I yield back.

[The prepared statement of Mr. Fulcher follows:]

STATEMENT OF HON. RICH FULCHER, RANKING MEMBER, SUBCOMMITTEE ON CIVIL RIGHTS AND HUMAN SERVICES

There's no way around it. President Biden's vaccine mandate is bad for workers, it's bad for business, and it's bad for the economy. It is also an affront to the personal liberties Americans hold dear.

A major labor shortage is already contributing to a supply chain backup. In response to similar State and Federal mandates, many private companies have begun firing workers who refuse the COVID-19 vaccine.

This Federal vaccine mandate will worsen the supply chain crisis, almost guaranteeing Americans will go without this Christmas.

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This ill-advised decree will create substantial uncertainty, costs, and liabilities. The last thing main street needs is another unfunded mandate dictated from Washington.

Harsh fines for violating President Biden's mandate could also decimate small businesses.

This is not building back better. It's crushing the job creators and American workers under the heavy hand of government intervention.

Chairwoman ADAMS. Thank you. Without objection, all of the members who wish to insert written statements into the record may do so by submitting them to the Committee Clerk electronically in Microsoft Word by 5 p.m. on November 9, 2021. I will now introduce the witnesses.

Professor Sidney Shapiro is the Frank U. Fletcher Chair in Administrative Law at Wake Forest University School of Law, and the Vice President of the Center for Progressive Reform, whose career has included government service and extensive writing on occupational safety and health and administrative law, including the 1993 book *Workers at Risk: The Failed Promise: The Failed Promise of the Occupational Safety and Health Administration*.

Scott Hecker is Senior Counsel at Seyfarth Shaw LLP, whose practice areas have included the Occupation Safety and Health Act, Fair Labor Standards Act, and other labor and employment laws matters on which he developed expertise through previous government service in the Solicitor of Labor's Office.

Professor Doron Dorfman is an Associate Professor of Law at Syracuse University College of Law. His interdisciplinary analysis research focuses on disability law and health law. He teaches torts, health law, employment discrimination, and disability law.

I'm pleased to recognize my colleague, the distinguished Chair of the Subcommittee on Civil Rights and Human Services, to briefly introduce her constituent, who's appearing before us as a witness today. I yield 30 seconds to Chair Bonamici to introduce.

Chairwoman BONAMICI. Thank you, Chair Adams. It's my pleasure to introduce Richelle Luther, Senior Vice President of Corporate Affairs and Chief Human Resources Officer at Columbia Sportswear, which is headquartered in Northwest Oregon. Ms. Luther has worked at Columbia Sportswear for more than 13 years. She's currently responsible for strategies to attract, retain, and motivate employees.

And previously, she served as Deputy General Counsel for the company. She's also served as Chief Governance Officer and Corporate Secretary for the Northwest Natural Gas Company and has worked in private practice. I want to thank Ms. Luther for spending time with the Committee this morning, providing an important perspective from the business community.

I look forward to hearing more about the important work Columbia Sportswear is doing to promote employee vaccination, company-wide safety, and public health, I yield back.

Chairwoman ADAMS. Thank you, Chair Bonamici. We appreciate the witnesses for participating today and look forward to your testimony. Your written statement will appear in full in the hearing record, and you're asked to limit your oral presentation to a five-minute summary.

And after your presentation we'll move to member questions. So, the witnesses are aware of their responsibility to provide accurate information to the Joint Subcommittee, and therefore we will proceed with their testimony. So, I will now recognize, first, Professor Sidney Shapiro. We will now hear from Professor Shapiro; you have five minutes.

**STATEMENT OF DR. SIDNEY SHAPIRO, FRANK U. FLETCHER
CHAIR IN ADMINISTRATIVE LAW AND PROFESSOR OF LAW,
WAKE FOREST UNIVERSITY SCHOOL OF LAW**

Mr. SHAPIRO. Thank you, Chair Adams and Bonamici, Ranking Members Keller and Fulcher, and members of the Subcommittee. Thank you for inviting me to share my views on vaccine standards and employer accommodations.

The Court has noted that an emergency temporary standard, or ETS, is (and I'm quoting), "An unusual response to exceptional circumstances."

There could be no doubt that COVID-19 qualifies as an exceptional circumstance, requiring unusual responses. My testimony focuses on four conclusions about the OSHA ETS. First, OSHA has the legal authority to issue an ETS requiring vaccines and testing. The risk to employees from COVID is a great one, because exposed workers can die of the disease or become seriously ill.

The protection of an ETS is necessary because workers are likely to die from workplace exposures during the 6-months or so period

before a permanent standard is issued. One court has indicated that an ETS is necessary if at least 80 workers are at risk of dying in the 6-month period.

Unfortunately, this death toll is likely if there's no ETS. COVID is different than the other hazards OSHA has attempted to regulate with an ETS. According to the Courts, OSHA lacked sufficient evidence that those hazards will put workers immediately at risk, because the evidence it had concerned long-term exposure to a cancer-causing substance. By comparison, workers are immediately at risk if they're exposed to COVID. It is true the situation is improving, but not everywhere, not for certain, and COVID, unfortunately is not going to go away.

I would also note that the Courts have previously upheld OSHA standards addressing noise and diseases caused by blood-borne pathogens, even though neither is unique to the workplace, because both constituted a significant risk during employment.

My second point is that OSHA is legally mandated to require vaccines and testing.

Congress required OSHA to adopt the standard that most adequately assures that workers will not die or become seriously ill. OSHA must therefore require vaccines or testing if it has evidence that other precautions, such as mask wearing, are not sufficiently protective.

My third conclusion is that OSHA's decision to require vaccines and testing is appropriate considering the evolving understanding of the best way to protect workers. The existing ETS was promulgated at a time in the country when it appeared possible that most Americans would become vaccinated, and before there were pandemic levels of COVID due to the Delta variant.

Finally, a vaccine requirement is exactly the sort of sensible safeguard that this country has taken going back to the days of George Washington, when he mandated what amounted to a crude precursor to the smallpox vaccine for soldiers stationed in Valley Forge during the fabled winter of 1777.

More, the Supreme Court has recognized since 1905 that the imposition of a vaccine requirement is not a violation of a person's liberty. As the Court said (and here I'm quoting), "Society based on the rule that each one is a law unto himself would soon be confronted with disorder and anarchy. The enjoyment of all rights are subject to such reasonable conditions as they have been deemed necessary by the governing authority of a country essential to the safety and health of the community."

I thank you again for this opportunity to testify, and I look forward to responding to your questions.

[The prepared statement of Mr. Shapiro follows:]

PREPARED STATEMENT OF SIDNEY SHAPIRO

TESTIMONY
OF
SIDNEY A. SHAPIRO

FRANK U. FLETCHER CHAIR IN ADMINISTRATIVE LAW
WAKE FOREST UNIVERSITY

VICE PRESIDENT AND MEMBER SCHOLAR
CENTER FOR PROGRESSIVE REFORM

BEFORE THE WORKPLACE PROTECTIONS
AND
CIVIL RIGHTS AND HUMAN SERVICES
SUBCOMMITTEES
OF THE
EDUCATION AND LABOR COMMITTEE
UNITED STATES HOUSE OF REPRESENTATIVES

HEARING ON PROTECTING LIVES AND LIVELIHOODS:
VACCINE REQUIREMENTS AND EMPLOYEE ACCOMMODATIONS

October 26, 2021

Chair Adams and Bonamici, Ranking Members Keller and Fulcher, and Members of the Committees, thank you for inviting me to share my views on vaccine standards and employee accommodations. A court has noted that an emergency temporary standard (ETS) is an “an unusual response to exceptional circumstances.”¹ There can be no doubt that COVID 19 qualifies an exceptional circumstance requiring an unusual response.

My testimony focuses on four conclusions about an OSHA COVID ETS. First, OSHA clearly has the legal authority to issue an ETS requiring vaccines and testing to save workers’ lives from the continued risks of COVID-19. Second, the Occupational Safety and Health Act (Act) mandates that OSHA require vaccinations and testing because these protections save lives, more so than masking and distancing. Third, OSHA’s decision to require vaccines and testing is appropriate response to the Delta variant and a slowdown in the pace of vaccinations that has occurred since June when the existing ETS was issued. Finally, a vaccine requirement is exactly the sort of sensible safeguard that this country has taken going back to the days of George Washington.

I am the Frank U. Fletcher Chair of Administrative Law at the Wake Forest University School of Law. I am also the Vice-President and Member Scholar of the Center for Progressive Reform (CPR) (<http://progressivereform.org>). Founded in 2002, CPR is a 501(c)(3) nonprofit research and educational organization comprising more than 60 scholars across the nation. Our mission is to use the power of public participation and law to create a responsive and inclusive government, healthy and safe communities, and a just and sustainable world.

My work on regulation and administrative law includes eleven books, eight book chapters, and over 60 articles (as author or coauthor). My latest book (coauthored with Elizabeth Fisher) was published in 2020 by Cambridge University Press and addressed the history of administrative law and agency governance in this country. I have studied and written about OSHA for over 25 years. I have served as a consultant to government agencies, including OSHA, and have testified previously before Congress on regulatory subjects.

A. OSHA AND COVID

Since the beginning of the pandemic, frontline workers have been forced to labor without effective mitigation measures to protect them.² Black, Latinx, and other people of color are disproportionately represented in many occupations that make up the low-paid, high-risk jobs, such as health services, childcare, public transit, grocery clerks, janitorial services, and meatpacking, which have been deemed essential during the pandemic.³ More than 700,000 people

¹Dry Color Mfgs. Ass’n, v. Dept. of Labor, 486 F.2d 98, 104 n.9a (3d Cir. 1973)

² See, e.g., Thomas McGarity, et al., Ctr. for Progressive Reform, Protecting Workers in a Pandemic: What the Federal Government Should be Doing (2020), <https://progressivereform.org/our-work/workers-rights/protecting-workers-in-a-pandemic/>.

³ Hye Jin Rho, et al., Ctr. for Econ. & Policy Research, A Basic Demographic Profile of Workers in Frontline Industries (2020), <https://cepr.net/wp-content/uploads/2020/04/2020-04-Frontline-Workers.pdf>; Shawn Fremstad, et al., Ctr. for Econ. & Policy Research, Meatpacking Workers are a Diverse Group Who Need Better Protections (2020), [https://cepr.net/meatpacking-workers-are-a-diverse-group-who-need-better-protections/#:~:text=Almost%20one%2Dhalf%20\(44.4%20percent,and%2022.5%20percent%20are%20Black\).](https://cepr.net/meatpacking-workers-are-a-diverse-group-who-need-better-protections/#:~:text=Almost%20one%2Dhalf%20(44.4%20percent,and%2022.5%20percent%20are%20Black).)

have died from Covid in less than 2 years.⁴ Many others have suffered long-term health effects. The pandemic continues. There is no occupational health hazard that has caused so much death and disease in our lifetimes.

In the early stages of the pandemic, OSHA told a federal court that its existing regulations – none of which directly address infectious diseases – coupled with enforcement under the general duty clause made an emergency COVID standard unnecessary. OSHA suspended an employer’s obligation to record work-related COVID infections, so it had no idea how widespread the problem had become. OSHA did few inspections and issued even fewer citations as workplace outbreaks of COVID affected transportation, meatpacking, health care, correctional, retail, and other workers.⁵

The agency also ignored calls by unions and workers to adopt an ETS to protect workers from infectious diseases, including coronavirus.⁶ In fact, when unions challenged OSHA’s decision not to put in place an emergency standard for infectious diseases, the agency spent precious resources defending its inaction in court, rather than putting those resources to use protecting workers.

B. The Previous ETS

OSHA has now recognized the flaw in its earlier approach. In June 2021, the Labor Department issued an emergency COVID standard that requires non-exempt medical facilities to conduct a hazard assessment and have a written plan to mitigate virus spread. It also requires healthcare employers to provide some employees with N95 respirators or other personal protective equipment.⁷ The same employers must also ensure 6 feet of distance between workers or erect barriers between employees where feasible in situations when distancing is not possible.

The draft ETS that OSHA forwarded to OMB for review would have protected all workers from COVID, but the published ETS applies only to health care workers – and then only some of them. OSHA did not explain why other workers were not covered. Moreover, as discussed below, the existing standard does not require vaccinations or testing, but OSHA has determined that these protections are now necessary considering the impact of the Delta variant and the significant number of Americans who are not yet vaccinated.

⁴ Julie Bosman & Lauren Leatherby, U.S. Coronavirus Death Toll Surpasses 700,000 Despite Wide Availability of Vaccines, NY Times, Oct. 1, 2021, <https://www.nytimes.com/2021/10/01/us/us-covid-deaths-700k.html>.

⁵ Letter from William Cochran, Acting Area Dir., Occupational Safety & Health Admin., to Winder Nursing Inc., Citation and Notification of Penalty (May 18, 2020), <https://aboutblaw.com/Q9u>; Tom Hals, Labor Dept Cites Ohio Nursing Homes for COVID-19 Violations, Reuters (July 22, 2020), <https://www.reuters.com/article/us-health-coronavirus-usa-nursing-homes-idUSKCN24N2DM>.

⁶ Petition from Richard Trumka, President, AFL-CIO, to Eugene Scalia, Sec’y of Labor, Petition for Emergency Temporary Standard for Infectious Disease (Mar. 6, 2020), https://aflcio.org/sites/default/files/2020-03/FINAL%20AFLCIO_Petition%20COVID-19.pdf.

⁷ OSHA, Occupational Exposure to COVID 19—An Emergency Standard, 86 Fed. Reg. 32376 (2021).

C. STATUTORY AUTHORITY TO REGULATE

As the next step to protect employees, OSHA is developing a rule that will require all employers with 100 or more employees to ensure their workforce is fully vaccinated or require any workers who remain unvaccinated to produce a negative test result on at least a weekly basis before coming to work. Section 6(c) of the Occupational Health and Safety Act (Act) authorizes OSHA to issue an emergency standard if (1) employees “are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards,” and (2) if an “emergency standard is necessary to protect employees from such danger.” OSHA plans to issue an ETS to implement this requirement.

The courts have defined “grave danger” to mean a life-threatening hazard. A hazard is life-threatening when it is “incurable, permanent, or fatal” rather than “easily curable” or has “fleeting effects.”⁸ These findings must be supported by evidence that shows more than a possibility that these effects will occur.⁹ In the past, courts have recognized that 80 predicted deaths in six months would constitute a grave danger.¹⁰

The evidence that COVID meets this test is overwhelming. The statistics gathered by the federal and state governments demonstrates that many people, of all ages, races, occupations, and health status have died. The same data establish that many more than 80 people will die each month absent mandatory protections.

An ETS is “necessary” when workers are exposed to a life-threatening disease during the time the ETS is in effect while OSHA promulgates a permanent standard.¹¹ The courts that have refused to affirm an ETS perceived that OSHA lacked sufficient evidence that a significant number of workers might die or become seriously ill during the six month or so period before a permanent standard is issued.¹² Unlike the ETS at issue in those cases, we know for certain that workers will die from exposure to COVID unless they are protected by an ETS during the time it will take OSHA to write a permanent standard. Short-term exposure to COVID, especially the Delta variant, is a grave danger that requires immediate protection because that single short-term exposure is sufficient to cause the worker’s death or serious illness.

The fact that a person can be exposed to the COVID virus outside of the person’s place of employment does not eliminate OSHA’s authority to regulate. The courts have previously upheld OSHA standards addressing noise and diseases caused by bloodborne pathogens even though

⁸ Florida Peach Growers Ass’n v. Dept. of Labor., 449 F.2d 1483(6th Cir. 1978).

⁹ Dry Color Mfgs. Ass’n, v. Dept. of Labor, 486 F.2d 98 (3d Cir. 1973)

¹⁰ Asbestos Information Ass’n., 727 F.2d 415, 425-26 (5th Cir. 1984).

¹¹ *Id.* at 424.

¹²*Id.* at 425.

neither are unique to the workplace because both noise and bloodborne pathogens constituted a significant risk during employment.¹³

D. DEPARTURE FROM PREVIOUS STANDARDS

OSHA has not previously adopted a mandatory vaccination or testing requirement, but it clearly has the legal authority to do so. In fact, the Act requires this step because the risks presented by COVID 19 are unique and require a unique response.

Congress required OSHA, when “promulgating standards dealing with toxic materials or harmful physical agents,” to “set the standard which most adequately assures, to the extent feasible, based on the best available evidence, that no employee will suffer material impairment of health or functional capacity.”¹⁴ If OSHA concludes that the wearing of masks or taking other precautions, such as staying six feet from other workers, is not sufficient to protect employees, the courts will uphold this determination as long as OSHA has significant evidence to support this determination. The courts have defined “substantial evidence” as the “evidence [that] a reasonable person would regard as sufficient to support a conclusion.”¹⁵ It is likely that OSHA will be able to meet this burden of proof. Masking and distancing, while useful, do not reduce the risk to employees of contacting COVID as much as testing or vaccinations.

The existing ETS, which does not require vaccinations or testing, was promulgated at a time in the country when it appeared possible that most Americans would become vaccinated and before the new outbreaks of COVID that appeared in the fall due to the Delta Covid variant. OSHA must assess the need for an ETS by considering the evolving understanding of the best ways to protect workers in their places of employment. Moreover, OSHA found that since there was already a high level of vaccination (75 percent) among health care workers,¹⁶ the protections it ordered would be sufficient as most of the rest of health care workers become vaccinated. It seems likely that there may be hundreds of American workplaces where the rate of vaccination is far below the 75 percent OSHA found among health care workers.

Unlike previous OSHA standards, a vaccine and testing requirement requires that employers undergo a medical procedure. COVID, however, creates a unique risk that OSHA has not previously addressed. Regarding previous standards, the toxic or other harmful substances used in the workplace created a risk that workers would die or become seriously ill. Workers were not putting each other in danger of dying or of a serious disease. The source of the risk of COVID, by comparison, is the workers’ themselves. Workers who are not vaccinated or tested increase the

¹³ Forging Industry Ass’n v. Secretary, 773 F.2d 1437, 1444 (4th Cir. 1985) (affirming OSHA’s Occupational Noise Exposure standard, 29 CFR 1910.95); Dental Ass’n v. Martin, 984 F.2d 823 (7th Cir. 1993) (affirming OSHA’s Bloodborne Pathogens standard, 29 CFR 1910.1030).

¹⁴ 29 USC 655(b)(5).

¹⁵ Consolidated Edison Co. v. NLRB, 305 US 197, 229 (1938).

¹⁶ 86 Fed. Reg. at 32510.

risk that fellow workers will become die or become seriously ill. The way to minimize this risk is to create a vaccination and testing mandate.

Vaccine requirements have long been recognized in the United States as a valid policy tool for protecting the public interest in similar circumstances. The story of General George Washington mandating what amounted to a crude precursor to the smallpox vaccine for soldiers stationed at Valley Forge during the fabled winter of 1777 is now a common part of many high school U.S. history classes.¹⁷ More than two centuries later vaccine requirements have become commonplace in various contexts of American life. For instance, the U.S. military requires up to 18 different vaccines, depending on the individual member's branch of service or geographic assignment.¹⁸ Similarly, all 50 states require that children receive a wide variety of vaccinations as a condition of attending school, whether public or private. More recently, states have begun requiring certain vaccines for individuals employed in certain high-risk industries, such health care or childcare.¹⁹ Significantly, the Supreme Court has consistently upheld various vaccine requirements as consistent with constitutional protections of individual liberty.²⁰

This history recognizes that the public interest outweighs the limited intrusion on a person's privacy of a vaccine requirement. Moreover, OSHA will offer the alternative of testing which is an even more limited such invasion of privacy.

E. CONCLUSION

OSHA's intent to require vaccinations or testing is unique for the agency, but it is the type of sensible safeguard that the country has relied on to protect people since George Washington fought for our independence. OSHA not only has the legal authority to issue an ETS requiring vaccines and testing, but its statutory mandate also requires it to take this step. The agency must choose the method of protection that is feasible and "most adequately assures" that workers will not die or become seriously ill. These protections save lives, more so than masking and distancing.

OSHA declined to require vaccinations or testing in its June ETS which protected health care workers, but it must evaluate the risk to workers based on the evolving nature of that risk. An ETS

¹⁷ Lindsay Chervinsky, *The Long History of Mandated Vaccinations in the United States*, GOVERNING, Aug. 5, 2021, <https://www.governing.com/now/the-long-history-of-mandated-vaccines-in-the-united-states> (last visited Oct. 8, 2021).

¹⁸ See U.S. Dept. of Def., Military Health System, Vaccine Recommendations by AOR, <https://www.health.mil/MHSHome/Military%20Health%20Topics/Health%20Readiness/Immunization%20Healthcare/Vaccine%20Recommendations/Vaccine%20Recommendations%20by%20AOR#NORTHCOM> (last visited Oct. 8, 2021).

¹⁹ Drew DeSilver, *States Have Mandated Vaccinations Since Long Before COVID-19*, PEW RESEARCH, Oct. 8, 2021, <https://www.pewresearch.org/fact-tank/2021/10/08/states-have-mandated-vaccinations-since-long-before-covid-19/> (last visited Oct. 20, 2021).

²⁰ See *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) (upholding a state law requiring free smallpox vaccinations for adults over 21); *Zucht v. King*, 260 U.S. 17 (1922) (upholding a local ordinance barring children who had been vaccinated against smallpox from attending school).

requiring vaccinations or testing is now necessary because of the impact of the Delta variant and a slowdown in the pace of vaccinations.

People should not have to risk their lives when they go to work when there are sensible safeguards that protect them. An ETS requiring vaccinations or testing would fulfill this life-saving mandate.

Chairwoman ADAMS. Thank you, Professor Shapiro. We'll now hear from Ms. Luther. You have five minutes.

STATEMENT OF MS. RICHELLE LUTHER, SENIOR VICE PRESIDENT, CORPORATE AFFAIRS AND CHIEF HUMAN RESOURCES OFFICER, COLUMBIA SPORTSWEAR COMPANY

Ms. LUTHER. Thank you. Thank you, Chair Adams and Bonamici, Ranking Members Keller and Fulcher, members of the Subcommittees; thank you for the invitation to testify. My name is Richelle Luther, and I am the Senior Vice President of Corporate Affairs and Chief Human Resources Officer for Columbia Sportswear Company.

We are a global company headquartered in Portland, Oregon. We have more than 8,000 employees worldwide. We sell our goods in 90 countries, and we have more than 100 stores in almost every State in this country. When the pandemic hit in the United States, like other retailers we shut down all of our U.S. stores and sent headquarters employees home. Our U.S. distribution centers and call centers in Portland and in Kentucky stayed open, continuing to fulfill online orders.

Our stores gradually began opening as states began returning to business. Our headquarters employees still are not in the office yet, but we have plans to have everyone back in the office by the end of the first quarter in 2022.

In order to reopen safely, we have taken extraordinary measures with sanitation, distancing, physical barriers, and of course, masks. Our CEO, Tim Boyle, is a vocal component of vaccinations. His aunt, Hildegard Lamfrom, was one of the early researchers who contributed to the development of the polio vaccine.

Since the COVID-19 vaccines have become available, he has personally encouraged and exhorted our employees to get vaccinated. He has authorized paid time off to receive the shot, as well as catastrophic paid leave if an employee has an adverse reaction to the vaccine.

He encouraged employees to volunteer at mass vaccination sites, doing so himself, and with paid leave to do so. We brought mobile clinics to our headquarters and distribution centers to make it easy for people to get vaccinated. We have concluded that these efforts are not yet sufficient, particularly in light of the Delta variant and potential future variants.

We still have too many unvaccinated employees. We were on the brink of mandating vaccinations for our employees when President Biden announced a vaccine mandate for employers with more than 100 people. We celebrated this announcement as a tool to help us achieve our goal of full vaccination.

In this labor market, we appreciate the government support in leveling the playing field to enable us to do the right thing. If all companies mandate vaccinations as a condition of employment, we will be able to retain our valued employees and keep our company in business. We don't want to lose our employees to locations or companies that do not vaccinate/have vaccination mandates.

One of the biggest struggles the last 2 years is that we are dealing with an ever-changing patchwork of health and safety regulations that in many cases have differed not just by State, but by county. At one critical moment, as we were trying to reopen a store, we were unable to do so because the store straddled two counties that were in different stages of reopening.

A Federal mandate is needed. We do not believe it is a question of more regulation for business, but rather less. A quilt of local laws and approaches created vastly more regulation for our business, more uncertainty, more risk, and more inefficiency. Implementing a vaccine mandate will indeed be complex. We need guidance from the Federal Government on how to process accommodations, particularly for religious exemptions.

We are grappling with how to implement testing in our retail environments. It will be logistically challenging and extraordinarily expensive. Our goal is for everyone to be vaccinated to help the country get past the pandemic, to create economic growth and opportunity, and advance public safety.

One of the hallmarks of Columbia Sportswear is that we are adept at innovation. We find ways to keep people warm, dry, cool, and protected by their clothing when they are enjoying activities. We have innovation here in the form of vaccines to help us defeat the virus. We want to embrace the scientific innovation and get everyone vaccinated so that vulnerable children and adults with medical conditions that are not able to be vaccinated will be protected.

We're an outdoor company. One of the things that defines the outdoors and the appreciation of the world's natural wonders where people of all backgrounds and viewpoints come together. We need to come together to protect public health and safety. We can do that by getting everyone vaccinated. Thank you.

[The prepared statement of Ms. Luther follows:]

PREPARED STATEMENT OF RICHELLE LUTHER

Testimony
of
Richelle T. Luther

Senior Vice President, Corporate Affairs and Chief Human Resources Officer
Columbia Sportswear Company

Before the Workplace Protections
and
Civil Rights and Human Services
Subcommittees
Of the
Education and Labor Committee
United States House of Representatives

Hearing on Protecting Lives and Livelihoods:
Vaccine Requirements And Employee Accommodations

October 26, 2021

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began opening up, as states began returning to business. Our headquarters employees are still not in the office yet, but we have plans to have everyone back to the office by the end of the first quarter in 2022.

In order to reopen, we have taken extraordinary measures with sanitation, distancing and physical barriers, and, of course, masks.

Our CEO, Tim Boyle, is a vocal proponent of vaccinations. His aunt, Hildegard Lamfrom, was one of the early researchers who contributed to the development of the polio vaccine. Since the vaccines became available, he has personally encouraged and exhorted our employees to get vaccinated. He has authorized paid time off to receive the shot, as well as catastrophic paid leave if an employee has an adverse reaction to the vaccine. He encouraged employees to volunteer at mass vaccination sites with paid leave to do so. We brought mobile clinics to our headquarters and distribution centers to make it easy for people to get vaccinated. We have concluded that these efforts are not sufficient, particularly in light of Delta and potential future variants. We still have too many unvaccinated employees.

We were on the brink of mandating vaccinations for our employees when President Biden announced a vaccine mandate for employers with more than 100 people. We celebrated this announcement as a tool to help us achieve our goal of full vaccination. In this labor market, we appreciate the government's support in leveling the playing field to enable us to do the right thing. If all companies mandate vaccinations as a condition of employment, we will be able to retain our valued employees and keep our company in business. We don't want to lose employees to locations or companies that do not have vaccine mandates.

One of the biggest struggles of the last two years is that we are dealing with an ever-changing patchwork of health and safety regulations that, in many cases, have differed not just state to state, but county by county. At one critical moment, as we were trying to reopen a store, we were unable to do so, because the store straddled two counties that were in different stages of reopening. A federal mandate is needed. We do not believe it is MORE regulation for business, but rather, less. A quilt of local laws and approaches created vastly more regulation of business, more uncertainty, risk and inefficiency.

Implementing a vaccine mandate will be complex. We need guidance from the federal government on how to process accommodations, particularly for religious exemptions. We are grappling with how to implement testing in our retail environments. It will be logistically challenging and extraordinarily expensive. Our goal is for everyone to be vaccinated to help the country get past the pandemic, to create economic growth and opportunity and advance public safety.

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want to embrace this scientific innovation and get everyone vaccinated, so that vulnerable children and adults with medical conditions that do not allow vaccination will be protected.

We're an outdoor company. One of the things that defines the outdoors is an appreciation of the world's natural wonders where people of all backgrounds and viewpoints come together. We need to come together to protect public health and safety. We can do that by getting everyone vaccinated.

Thank you for your time.

Chairwoman ADAMS. Thank you very much. Next, we'll hear from Scott Hecker. You have five minutes, sir.

**STATEMENT OF MR. SCOTT HECKER, SENIOR COUNSEL,
SEYFARTH SHAW LLP**

Mr. HECKER. Good morning, Chair Adams, Chair Bonamici, Ranking Member Keller, Ranking Member Fulcher, and honorable members of the Subcommittee on Workforce Protections, and Subcommittee on Civil Rights and Human Services. It's an honor and privilege to participate in the congressional process.

My name is Scott Hecker, and I am vaccinated against COVID-19, as is my wife, Beth. We plan to get our children vaccinated, Lauren and Kate, as soon as their age groups are approved. COVID vaccines are effective, and from an occupational safety and health perspective, vaccination represents our best shot to beat the Coronavirus.

We should not politicize public health, and we should follow the science, but we must adhere to the occupational safety and health statutory requirements. Section 6(c) of the OSH Act allows OSHA to issue emergency temporary standards under certain defined circumstances.

OSHA must find that, one, employees are exposed to a great danger. And two, an emergency standard is necessary to protect employees from that danger. COVID-19 is a public health concern, and OSHA doesn't have the experience or resources to police conditions of public health. OSHA must explain why only now COVID-19 has become a grave workplace danger across all sectors and all businesses with more than 100 employees, when 4 months ago, OSHA published a narrowly focused healthcare ETS that did not include a vaccine mandate.

By pursuing alternative COVID-19 enforcement avenues and trumpeting the successes of pre-ETS efforts to beat back the virus, the Biden administration undercuts its own arguments that an ETS is needed. Rather than pursuing a one-size-fits-all approach, OSHA could have revised its COVID-19 guidance to allow employers the flexibility to promulgate innovative and current safety protocols that best fit the needs of their industries, the remote workforces, their culture and their supply chains.

Had OSHA been more communicative, employers could have developed and implemented the best solutions for their employees. Many employers have included a vaccination mandate as part of their overall COVID-19 response programs, and Seyfarth has shared its vaccine policy playbook 2.0 with its clients to assist with just that.

I'm happy to supplement the record with the playbook if that would be helpful.

ETSs are not a standard tool in OSHA's regulatory kit and should be used sparingly to avoid degrading the necessary-to-protect-against-grave-danger threshold established by Congress.

Of the 10 ETSs OSHA has issued to date, seven were challenged, resulting in one being fully vacated, and another partially vacated, and three stayed. Legal challenges will likely be filed shortly after OSHA publishes its ETS, both by State governments and by private employers.

While President Biden's COVID-19 action plan may have been designed for uniformity, it may instead further complicate employers' compliance efforts as they continue to deal with a patchwork

of rules and regulations to combat COVID. If the ETS doesn't survive legal challenge, its failure could undermine vaccine efforts more generally.

Open questions about the ETS continue to concern covered companies, including how the costs of a testing option will be allocated, how long we will have to ensure their employees' compliance, what paid time off requirements will look like, under what circumstances remote workers may be covered, and how the 100100-employee threshold will be calculated.

Results from a recent survey conducted by SHRM showed that, quote, 'of organizations that meet the criteria for the Biden administration's vaccine or testing requirement, 85 percent said the anticipated requirements will make retaining employees more difficult. 89 percent said some of their employees will quit, due to the new mandate.'

Further, "72 percent of the entities surveyed said the vaccine or testing requirements will make maintaining regular business operations more difficult."

We don't yet know what's in the ETS, or the scientific bases underlying these requirements. CDCDC is considering what it means to be fully vaccinated. And some groups are now eligible for boosters.

If the CDCDC doesn't know what fully vaccinated means, OSHA can't either. If OSHA's definition of fully vaccinated includes a booster, most of the population isn't authorized to receive one yet, so you have an impossibility problem. If OSHA doesn't include a booster requirement in defining fully vaccinated, we could ask why not, when the CDCDC is actively reconsidering its definition. How can OSHA align with the best available data now and also keep up with changes over the course of the ETS 6-month span?

Vaccines work, and almost 190 million Americans are fully vaccinated against COVID-19, but the unprecedented nature of this national vaccine mandate and the uncertainties, complexities, and impediments to implementing it through an OSHA ETS suggest this avenue lacks legal and practical viability. Thank you.

[The prepared statement of Mr. Hecker follows:]

PREPARED STATEMENT OF SCOTT HECKER

Testimony of
A. Scott Hecker

Before the U.S. House of Representatives
Committee on Education and Labor
Subcommittee on Workforce Protections
Subcommittee on Civil Rights and Human Services

Hearing on Protecting Lives and Livelihoods:
Vaccine Requirements and Employee Accommodations

October 26, 2021

I. Introduction

Good morning, Chair Adams, Chair Bonamici, Ranking Member Keller, Ranking Member Fulcher, and honorable members of the Subcommittee on Workforce Protections and Subcommittee on Civil Rights and Human Services. I very much appreciate the opportunity to speak with you at today's hearing, "Protecting Lives and Livelihoods: Vaccine Requirements and Employee Accommodations."

My name is Scott Hecker, and I am a senior counsel in the Workplace Safety and Environmental Practice Group of Seyfarth Shaw LLP's Washington, DC office. I joined Seyfarth on March 23, 2020, the first day the DC office was fully remote due to the COVID-19 pandemic. Throughout my time at Seyfarth, I have counseled clients across the country on compliance issues surrounding COVID-19 laws, regulations, and orders. Those clients continue to protect their workforces by developing, implementing, and updating COVID-19 response plans to reflect the most current and effective risk mitigation protocols. My recent work has included navigating the requirements of Executive Order 14042, "Ensuring Adequate COVID Safety Protocols for Federal Contractors," and subsequent guidance from the Safer Federal Workforce Task Force, the Federal Acquisition Regulatory Council ("FAR Council"), and individual agencies regarding incorporation of the Federal Acquisition Regulation deviation clause into federal government contracts.

My work also includes counseling clients on the anticipated Occupational Safety and Health Administration ("OSHA") COVID-19 vaccine mandate emergency temporary standard ("ETS"), announced by President Biden in his September 9, 2021 COVID-19 Action Plan. I am no stranger to OSHA and its rulemakings, having joined Seyfarth after approximately 12 years in the Solicitor's Office ("SOL") at the U.S. Department of Labor. For about five of those years, from May 2015-March 2020, I sat in the Occupational Safety and Health Division of SOL, with OSHA as my client. Prior to my time in the Frances Perkins Building, I worked as a trial attorney in SOL's Region III offices located in Arlington, Virginia and Philadelphia, Pennsylvania. My experiences with both SOL and Seyfarth inform my testimony today.

II. DISCUSSION

I am vaccinated against COVID-19. My wife, Beth, is vaccinated. So are my mother and brothers. I plan to get my children, Lauren and Kate, vaccinated as soon as their age groups are approved. We know COVID-19 vaccines are effective against the virus, including its Delta variant.¹ From an occupational safety and health perspective, vaccination represents our best shot to beat the coronavirus. However, for OSHA to lawfully issue an emergency COVID-19 vaccine mandate, it must carry its statutory burden. The balance of my testimony will discuss the legal requirements OSHA must meet to issue an ETS and the practical impacts an ETS requiring vaccination would have on employers and employees.

A. Legal Requirements

Section 6(c) of the Occupational Safety and Health Act of 1970 grants OSHA the statutory authority to issue emergency temporary standards under certain delineated circumstances. The Secretary of Labor must determine that 1) employees are exposed to grave danger, and 2) an emergency standard is necessary to protect employees from that danger. 29 U.S.C. § 655(c). To reiterate, employees must be exposed to a **grave danger** and the standard must be **necessary** to protect them from such a danger. These standards issue outside the typical notice and comment rulemaking process, which justifies the strict legal threshold OSHA must meet to overcome legal challenges in the emergency standard context.

We can all agree that COVID-19 presents a serious danger to public health, as the disease has claimed the lives of over 728,000 Americans.² However, whether addressing that danger should fall to a federal workplace safety enforcement agency is questionable; COVID-19 is a public health concern, and tying exposure specifically to the workplace has significant evidentiary challenges when contact with the disease can occur anywhere. Beyond that tenuous relationship, OSHA must explain why only now COVID-19 has become a grave workplace danger, across all sectors and all businesses with more than 100 employees. A little over four months ago, OSHA published an ETS scoped narrowly to the healthcare sector. That is, OSHA determined an ETS requiring designated COVID safety protocols was necessary to combat the grave danger of exposure to coronavirus - only in the healthcare industry. Notably, the healthcare ETS did not include a vaccine mandate.

OSHA considered whether to have the ETS apply more broadly, but determined (presumably with the help of the White House's Office of Information and Regulatory Affairs) that it could not support such breadth. Now, OSHA must represent - to a U.S. Court of Appeals' satisfaction - what has changed to require a private employer vaccine mandate, particularly when President Biden and his Administration suggest their plans to defeat COVID are working. On October 14, 2021, President Biden stated that his plan is "working. We're making progress. Nationally, daily cases are down 47 percent; hospitalizations are down 38 percent over the past six weeks. Over the past two weeks, most of the country has improved as well. Case rates are declining in

¹ See, e.g., <https://www.cdc.gov/coronavirus/2019-ncov/variants/delta-variant.html>, visited on October 21, 2021.

² See <https://covid.cdc.gov/covid-data-tracker/#datatracker-home>, visited on October 21, 2021.

39 states and hospital rates are declining in 38 states.”³ This progress has occurred without OSHA’s ETS. Does that suggest necessity?

Under the prior presidential Administration, OSHA and its parent agency, the Department of Labor, strongly argued that an ETS was not necessary because the agency could pursue COVID enforcement under the General Duty Clause of the Occupational Safety and Health Act. OSHA’s website lists a number of regulations the agency can use to issue COVID citations, and OSHA has a COVID-19 National Emphasis Program in place to guide enforcement of COVID-related violations. By pursuing alternative enforcement avenues, and trumpeting the success of its pre-ETS efforts to beat back the disease, the Biden Administration undercuts its own arguments that an ETS is needed.

OSHA has not published many ETSs. Before June 21, 2021, OSHA last issued an ETS, concerning asbestos, on November 4, 1983. Congress set a high legal bar for ETS implementation because ETSs were meant to be used rarely and only under certain dire circumstances. Now, we expect to see two ETSs issue within about four months’ time. The importance of public input into regulatory action counsels toward OSHA’s continuing to exercise due caution when considering whether to proceed by ETS, rather than more traditional notice-and-comment rulemaking. ETSs are not a standard tool in OSHA’s regulatory kit, and should be used sparingly to avoid degrading the “necessary to protect against a grave danger” threshold. We *should not* politicize public health, and we *should* follow the science, but we *must* adhere to the **Occupational Safety and Health Act’s** statutory requirements.

In passing the OSH Act, Congress found “that personal injuries and illnesses **arising out of work situations** impose a substantial burden upon, and are a hindrance to, interstate commerce in terms of lost production, wage loss, medical expenses, and disability compensation payments.” 29 U.S.C. § 651(a) (emphasis added). Further, Congress directed OSHA “to assure so far as possible every working man and woman in the Nation safe and healthful **working conditions.**” *Id.* at § 651(b) (emphasis added). If OSHA expands its jurisdiction to cover hazards not intrinsic to the workplace, then any public health hazard could qualify as a grave danger subject to an ETS.

OSHA decided not to meet with stakeholders concerning its anticipated COVID-19 vaccine mandate ETS, but as of October 22, 2021, OIRA had held around 70 stakeholder meetings with entities highly interested in the contours of OSHA’s standard.⁴ Unfortunately, commenters fly blind in these meetings, as the text of the regulation at issue is not released beforehand. Where President Biden and OSHA have taken unprecedented action to implement a national workplace vaccine mandate through an ETS, it would have been helpful to the Administration to do more to partner with employers, employees, and other interested stakeholders. Given the wide-ranging implications of the standard, OSHA would have benefitted from comprehensively considering interested stakeholders’ input. Instead, OSHA chose to pursue an expedited, emergency process that avoids typical notice-and-comment rulemaking under the Administrative Procedure Act.

³ <https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/10/14/remarks-by-president-biden-on-the-covid-19-response-and-vaccination-program-2/>.

⁴ See <https://www.reginfo.gov/public/do/com12866SearchResults?pubId=&rin=1218-AD42&viewRule=true>, visited on October 22, 2021.

Coupled with its decision not to engage with interested entities, OSHA missed the opportunity to obtain a more fulsome view of its ETS's practical effects on affected entities.

Historically, OSHA has not had much success in meeting the “necessary to address a grave danger” statutory standard when it publishes an ETS. The Congressional Research Service Report, “Occupational Safety and Health Administration (OSHA): Emergency Temporary Standards (ETS) and COVID-19,”⁵ includes Table A-1, which provides a summary of the legal challenges to prior OSHA ETSs:

Table A-1. OSHA Emergency Temporary Standards (ETS)

Year	Subject of ETS	Federal Register Citation of ETS	Result of Judicial Review	Judicial Review Case Citation
1971	Asbestos	36 Federal Register 23207 (December 7, 1971)	Not challenged	—
1973	Organophosphorous pesticides	38 Federal Register 10715 (May 1, 1973); amended by 38 Federal Register 17214 (June 29, 1973)	Vacated	<i>Florida Peach Growers Ass'n v. United States Department of Labor</i> , 489 F.2d 120 (5 th Cir. 1974)
1973	Fourteen carcinogens	38 Federal Register 10929 (May 3, 1973)	Twelve upheld, two vacated	<i>Dry Color Mfgs. Ass'n v. Department of Labor</i> , 486 F.2d 98 (3d Cir. 1973)
1974	Vinyl chloride	39 Federal Register 12342 (April 5, 1974)	Not challenged	—
1976	Diving operations	41 Federal Register 24271 (June 15, 1976)	Stayed	<i>Taylor Diving & Salvage Co. v. Department of Labor</i> , 537 F.2d 819 (5 th Cir. 1976)
1977	Benzene	42 Federal Register 22515 (May 3, 1977)	Stayed	<i>Industrial Union Dep't v. Bingham</i> , 570 F.2d 965 (D.C. Cir. 1977)
1977	1,2-Dibromo-3-chloropropane (DBCP)	42 Federal Register 45535 (September 9, 1977)	Not challenged	—
1978	Acrylonitrile (vinyl cyanide)	43 Federal Register 2585 (January 17, 1978)	Stay denied	<i>Vistron v. OSHA</i> , 6 OSHC 1483 (6 th Cir. 1978)
1983	Asbestos	48 Federal Register 51086 (November 4, 1983)	Stayed	<i>Asbestos Info. Ass'n v. OSHA</i> , 727 F.2d 415 (5 th Cir. 1984)
2021	COVID-19	86 Federal Register 32374 (June 21, 2021)	Petitions for review filed on June 24, 2021	<i>United Food and Commercial Workers and American Federation of Labor and Congress of Industrial Organizations v. OSHA et al.</i> , Docket No. 21-1143 (D.C. Cir. June 24, 2021)

Source: CRS with data from Mark A. Rothstein, “Substantive and Procedural Obstacles to OSHA Rulemaking: Reproductive Hazards as an Example,” *Boston College Environmental Affairs Law Review*, vol. 12, no. 4 (August 1985), p. 673.

⁵ See <https://crsreports.congress.gov/product/pdf/R/R46288>, last revised on September 13, 2021.

Of the 10 ETSs OSHA has issued to date, seven were challenged, resulting in one being fully vacated, another partially vacated, and three stayed. The COVID-19 healthcare ETS was challenged by unions, but there does not appear to have been much activity in that case.

Legal challenges will likely be filed shortly after OSHA publishes its ETS; indeed, 24 state attorneys general previewed their arguments against the ETS in a September 16, 2021 letter to President Biden.⁶ On October 11, 2021, Texas Governor Greg Abbott issued Executive Order GA-40, prohibiting any entity in Texas from compelling COVID-19 vaccination, including of its employees, when the individual objects “for any reason of personal conscience, based on a religious belief, or for medical reasons, including prior recovery from COVID-19.”⁷ Other states, like Montana and Florida, have implemented laws and orders that could conflict with OSHA’s ETS.

OSHA handles workplace safety and health enforcement in the majority of states, including Texas, Florida, and Montana.⁸ But 21 states administer their own OSHA programs, with federal OSHA’s approval.⁹ These state plan states have 30 days to either adopt the OSHA standard or develop their own that is at least as effective as OSHA’s, and they need to advise OSHA within 15 days of receiving notice of the ETS how they will proceed. Interestingly, on October 20, 2021, OSHA sent letters to Arizona, South Carolina, and Utah advising that it was reconsidering their state plan authorization because of the states’ “continued failure to adopt a COVID-19 Healthcare Emergency Temporary Standard.”¹⁰ These warnings seem timed to signal consequences for state inaction on the anticipated vaccine ETS. While President Biden’s COVID-19 Action Plan may have been designed for uniformity, the expected fractured jurisdictional response further complicates employers’ compliance efforts, as they continue to deal with a patchwork of rules and regulations to combat COVID.

⁶ See

[https://ago.wv.gov/Documents/AGs%20letter%20to%20Pres.%20Biden%20on%20vaccine%20mandate%20\(FINAL\)%20\(02715056xD2C78\).PDF](https://ago.wv.gov/Documents/AGs%20letter%20to%20Pres.%20Biden%20on%20vaccine%20mandate%20(FINAL)%20(02715056xD2C78).PDF).

⁷ https://gov.texas.gov/uploads/files/press/EO-GA-40_prohibiting_vaccine_mandates_legislative_action_IMAGE_10-11-2021.pdf.

⁸ Private Sector Employer Federal OSHA States include: Alabama, America Samoa, Arkansas, Colorado, Connecticut, Delaware, District of Columbia, Florida, Georgia, Guam, Idaho, Illinois, Kansas, Louisiana, Maine, Massachusetts, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New York, North Dakota, Northern Mariana Islands, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Dakota, Texas, Virgin Islands, West Virginia, and Wisconsin. See <https://www.osha.gov/stateplans/>.

⁹ Private Sector Employer State OSHA Plan States include: Alaska, Arizona, California, Hawaii, Indiana, Iowa, Kentucky, Maryland, Michigan, Minnesota, Nevada, New Mexico, North Carolina, Oregon, Puerto Rico, South Carolina, Tennessee, Utah, Vermont, Virginia, Washington, and Wyoming. See *id.*

¹⁰ <https://www.environmentalsafetyupdate.com/wp-content/uploads/sites/248/2021/10/ax-ltr.pdf>, <https://www.environmentalsafetyupdate.com/wp-content/uploads/sites/248/2021/10/SC-ltr.pdf>, and <https://www.environmentalsafetyupdate.com/wp-content/uploads/sites/248/2021/10/UTAH-LTR.pdf>.

In a similar vein, the FAR Council directed agencies to implement the federal contractor vaccine mandate through deviations developed by each individual agency, subjecting federal contractors to varying requirements when they hold contracts with multiple government entities. The September 24, 2021 Safer Federal Workforce Task Force Guidance directs that “[c]overed contractors must comply with the requirements set forth in this Guidance regardless of whether they are subject to other workplace safety standards,” such as OSHA ETSs.¹¹ The Guidance also makes clear the federal government’s position on what law governs, explaining that its “requirements are promulgated pursuant to Federal law and supersede any contrary State or local law or ordinance. Additionally, nothing in this Guidance shall excuse noncompliance with any applicable State law or municipal ordinance establishing more protective workplace safety protocols than those established under this Guidance.”¹² OSHA’s ETS may include similar language. But courts will need to decide which legal vehicle wins out, and in the meantime, employers and their employees may rush to comply with an ETS that eventually does not pass legal muster.

Private employers who operate in more than one jurisdiction, especially those who are also government contractors, face numerous levels of compliance complexities and are left to reconcile complicated and conflicting standards issued by various levels and sectors of federal, state, and local government. Accordingly, we should expect challenges to the ETS from private employers as well. Open questions about the ETS continue to vex covered companies, pre-release, including how the costs of a testing option will be allocated, how long they will have to ensure their employees’ compliance, what paid time off requirements will look like, under what circumstances remote workers may be covered, and how the 100-employee threshold will be calculated.

Another question that OSHA must answer is how it will enforce its vaccine mandate covering 80-100 million workers. It seems likely that OSHA will target big fish to make examples of for the rest of the regulated community. On October 23, 2020, former Assistant Secretary for OSHA, David Michaels, tweeted that “[e]very OSHA press release achieves as much compliance as 210 inspections.”¹³ We can expect OSHA to publish detailed press releases when issuing citations under its ETS as a deterrence mechanism. What we will not see is OSHA’s retracting those press statements should it withdraw or modify its initial violations or should a court overturn them.

B. Practical Impacts

Employers working to comply with multiple vaccine mandates and COVID-19 protocols fear “the Great Resignation.” In a tight labor market, employees who employers cannot afford to lose may walk away from their jobs in droves to avoid being subjected to a vaccine mandate. Results from a recent survey conducted by the Society for Human Resource Management (SHRM) showed that “of organizations that meet the criteria for the Biden administration’s vaccine-or-

¹¹

https://www.saferfederalworkforce.gov/downloads/Draft%20contractor%20guidance%20doc_20210922.pdf.

¹² *Id.*

¹³ <https://twitter.com/drdaavidmichaels/status/1319642847365259264>.

testing requirement, 85 percent said the anticipated requirement will make retaining employees more difficult. Eighty-nine percent said some of their employees will quit due to the new mandate.”¹⁴

My client calls, colleague conversations, and even my social media feeds reflect the difficulties employers face in connecting qualified individuals with open job opportunities. Such disruptions to individual employers will, of course, have ramifications for the larger economy, including negative impacts on already stressed supply chains. The SHRM survey mentioned above found that “[s]eventy-two percent [of the entities surveyed] said the vaccine-or-testing requirements will make maintaining regular business operations more difficult.”¹⁵

In addition to concerns about employee retention and economic turbulence, the costs to employers of ensuring compliance with the OSHA ETS will be significant. Companies at the lower end of the 100-employee threshold may not have robust legal, operations, or human resources departments in place to navigate the administrative and logistical challenges of implementing mandatory COVID-19 vaccine programs. Many employers, regardless of size, may face increased requests for medical and religious exemptions that they do not regularly handle. Employers take these requests seriously, and they take time and resources to evaluate.

OSHA indicated it will allow employees to choose to test at least weekly, rather than receiving the COVID-19 vaccine (an approach that the Biden Administration’s federal employee and federal contractor vaccine mandates do not permit). Employers anxiously await what the requirements of the ETS’s testing option, including how OSHA will allocate testing costs. The circumstances of the vaccine mandate suggest OSHA could decide to push costs to employees because 1) the government - not the employer - is instituting the mandate; 2) the employee - not the employer - is making a considered choice to pursue the costlier testing option; and 3) placing testing costs on the employee may encourage more individuals to choose vaccination. Despite legitimate reasons counseling toward placing testing costs on employees, some employers, expecting to bear the testing-cost burden, are already exploring options to offer onsite employee testing to minimize disruptions to company operations. While employers do not yet know for certain what type of COVID-19 tests OSHA’s standard will demand, those who have tried to secure tests have been frustrated by an inability to procure them in sufficient numbers.

Another costly provision of the vaccine mandate is President Biden’s directive that OSHA’s ETS require employers “to provide paid time off for the time it takes for workers to get vaccinated or to recover if they are under the weather post-vaccination.”¹⁶ OSHA may occasionally dabble in paid leave, but it tends to be the province of the Wage and Hour Division, and employers face uncertainties about what the OSHA ETS’s paid leave provisions will look like. For example:

¹⁴ <https://www.shrm.org/ResourcesAndTools/legal-and-compliance/employment-law/Pages/coronavirus-survey-vaccine-testing-mandate-challenges.aspx>, visited on October 21, 2021.

¹⁵ *Id.*

¹⁶ <https://www.whitehouse.gov/covidplan>.

- Will employers be able to request that their employees use existing leave programs for vaccination and recovery?
- Will employees be incentivized to exhaust their banked leave so they can receive additional, vaccine-related time off?
- Might the vague term “under the weather” lead to increased absenteeism caused by longer-than-necessary recovery periods?

Along with testing and leave, employers also face potential costs around training or retraining employees, and recordkeeping.

III. CONCLUSION

Thank you again for the opportunity to present these remarks today. Vaccines work, and almost 190 million Americans are fully vaccinated against COVID-19.¹⁷ But the unprecedented nature of this national vaccine mandate, and the uncertainties, complexities, and impediments to implementing it through an OSHA ETS suggest this avenue lacks legal and practical viability.

¹⁷ See https://covid.cdc.gov/covid-data-tracker/#vaccinations_vacc-total-admin-rate-total, visited on October 21, 2021.



Vaccine Policy Playbook

Version 2.0 Updated to Include President Biden's COVID-19 Strategic Action Plan



September 2021

Getting Started With Your Vaccine Policy

As efforts to increase the numbers of those fully-vaccinated continue—and as employers seek to bring more people safely back to the workplace—employer-driven vaccination policies are making headlines. Even so, “vaccine policy” means different things to different employers. For instance, a policy may look very different for those employers in industries where remote work is possible, versus those that require interaction with the public.

Our Vaccine Policy Playbook is an essential resource in designing, communicating, and deploying your company's vaccine policy, no matter what industry you're in. The Playbook guides employers through types of mandates, policy creation and considerations, such as reporting, incentives, and local mandates, and perhaps most importantly, defining an accommodation strategy that reduces the risks of ADA and Title VII claims.

This playbook has been updated to include information on the Biden Administration's COVID-19 Action Plan, titled the “Path out of the Pandemic,” and its six pillars, and also provides forward-looking strategies in anticipation of the rise of additional government mandates.

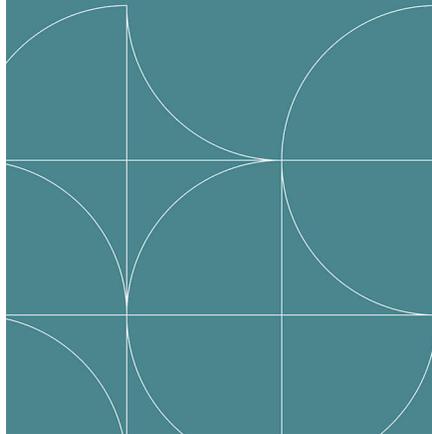


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Foreword

Employers across the country are implementing and refining protocols designed to protect their workers, customers, and the general public from the spread of COVID-19 variants. Each employer will face unique industry and operational drivers that will affect who will return to in-office work, whether remote work will continue, and when risk mitigation measures like vaccination or testing are required.

On September 9, 2021, the Biden Administration dramatically shifted that landscape by issuing a six-pronged COVID-19 Action Plan that articulates the Administration's plan to lead the country out of the ongoing pandemic. The Plan sets the stage for vaccinating more unvaccinated employees beginning with workers connected to the federal government; it leans on large employers to require vaccination or weekly testing for employees who work in proximity; mandates vaccination for health care workers at facilities reimbursed by Medicare or Medicaid; increases availability and affordability of testing, and seeks to protect economic recovery by guarding against further lockdowns. While many of the Plan's details will be revealed in guidance from the Safer Federal Workforce Task Force (anticipated on September 24, 2021) and an OSHA Emergency Temporary Standard in coming weeks, the Plan unquestionably impacts the path forward for many employers. This updated version of our Vaccine Policy Playbook unpacks the implications of the COVID-19 Action Plan as it relates to vaccine policies.

Please note, the Vaccine Policy Playbook has been prepared by Seyfarth Shaw LLP for informational purposes only. The material shared in this playbook should not be construed as legal advice or a legal opinion on any specific facts or circumstances, nor does it create an attorney-client relationship. The content is intended for general informational purposes only. Please consult a lawyer concerning your own situation and any specific legal questions you may have.

TYPES OF VACCINE POLICIES



What Does Mandatory Mean?

While COVID-19 vaccines have proven effective at preventing severe disease, hospitalization, and death from COVID-19, the virus and its variants continue to spread in various parts of the country, particularly among unvaccinated individuals. This reality, coupled with the widespread availability of multiple vaccines, has caused employers throughout the country to consider, craft, and implement vaccination programs for their workforces.

Given the most recent proclamation from the Biden Administration, private employers with 100 or more employees, employees of the federal government, and many individuals involved in federal contract work will now be subject to mandatory vaccine requirements. See [The Rise of Government Mandates](#) below for further information.

Deciding on the type of vaccination policy most appropriate for your company is an essential first step. The policy's base requirements (based on applicable law and Company policy decisions) as to who must vaccinate, who is merely encouraged to vaccinate, and what steps should or must be taken by those who do not vaccinate will affect the content and tone of related communications, potential accommodation issues, how quickly the program can be implemented, and where it can be implemented.

Many other types of employers that have announced robust vaccination programs have avoided a deluge of accommodation requests by concluding that the main concern is the health and safety of those who want to work in the office, and recognizing that not everyone must be in the office. In those situations, those who object to vaccination may be permitted by certain employers to work remotely, and potential accommodation issues become isolated in nature.

Types of Employer Vaccination Policies

Vaccine policies generally take one of three forms. Choosing the one that is right for your organization depends on many factors. Each of the three types of policies are explained in detail below.

COMPLETE AND TOTAL MANDATE	COMPLETE BUT PARTIAL MANDATE	CONDITIONAL
Everyone across all job categories must be vaccinated	Individuals in certain job categories must be vaccinated	Vaccination is a condition of in-person work

Complete and Total Mandate

This means everybody across all job categories must be vaccinated, subject to the duty to accommodate for a disability, religious belief, and (possibly) pregnancy, as well as a carve-out for employees in Montana. This may make sense if, before the pandemic, virtually everyone worked at the worksite (or, if employees worked remotely, it was because they traveled to visit customers or vendors). If that was the employment model before the pandemic and you've decided you must retain or return to that model to succeed, then a complete and total mandate may be the best

choice: those returning to the worksite must be vaccinated, and so too must individuals who visit customers or vendors, both for their own health and safety and that of the customers and vendors they visit.

Complete But Partial Mandate

Some employers mandate that all individuals in certain job categories must be vaccinated. We are frequently asked, "can I mandate vaccination for some but not all employees?" The answer is "yes," provided you distinguish between categories and not individuals, and have a reasonable non-discriminatory basis for saying all in some categories need vaccination while others do not. Some examples help:

- *Company A* has several call centers. Most who work there are inside sales employees who make phone calls to customers and prospects. Their customer relation skills—e.g., their tone in speaking with customers, how they answer questions, how they guide the call—is monitored by supervisors who observe and listen to employees. *Company A* believes that in-person observation is critical for a supervisor to effectively gauge an employee's "total performance." *Company A* mandates that all call center employees get vaccinated. Non-supervisors need to be in the center to make calls under their supervisor's watch. And supervisors must be there to watch and listen.
- *Company B* also has call centers staffed by inside sales employees. Before the pandemic, some employees worked remotely. Having seen no real performance difference between remote and in-person workers in the past, *Company B* has decided that call center employees can continue working remotely for the indefinite future and need not be vaccinated. *Company B* has observed, however, that its outside sales have plummeted, which it attributes to fewer in-person visits to customers who have grown cautious about third-party meetings due to COVID-19. Accordingly, *Company B* decides all outside sales employees are to resume those visits as soon as possible and must therefore be vaccinated.
- *Company C* would like its manufacturing employees to be vaccinated, but they are union-represented. *Company C* is also hiring, and wants to boost total vaccination across its manufacturing workforce. It knows both from the bargaining table and the grapevine that many current employees oppose vaccination. The union is well-represented by counsel who can drag out bargaining for months, thus preventing *Company C* from getting to an impasse that would permit it to implement mandatory vaccination for all. Counsel for the union has mentioned it is mostly long-service employees who oppose vaccination; more junior employees are either vaccinated or don't care one way or the other. *Company C* proposes mandatory vaccination for all new hires, to which the union agrees.
- *Company D* is a pharmaceutical manufacturer, and believes philosophically that vaccination should be mandatory for all, because they are in the "science business" and themselves manufacture life-saving drugs. While some employees have long been essential workers and can be subject to a mandatory vaccination, still other employees—such as those in finance or other support functions—have been working remotely and arguably could still do so. Because choosing to be unvaccinated runs counter to the *Company's* philosophy, *Company D* adopts

a phased approach, insisting that essential workers get vaccinated immediately and others within the next 6 months.

- *Company E* runs a health care facility and treats elderly consumers who are at significant risk for contracting coronavirus and developing life-threatening complications from COVID-19. Local government officials have declared that all health care workers in *Company E*'s industry must be vaccinated to promote public health. In response, *Company E* requires vaccination by a certain date, regardless of whether a worker works in a patient-facing role.
- *Company F*, as a federal contractor, will see guidance from the Safer Federal Workforce Task Force (anticipated September 24, 2021), resulting in provisions added in its federal contract (or "contract-like instruments") by mid-October which mandate vaccination for workers who perform work on or in connection with such contracts.

In these examples, one employer needs all call center employees vaccinated but another does not. Nothing in the EEOC guidance, nor any law outside Montana (see discussion in Section B, below), prevents an employer from requiring vaccination of some but not all employees. The same principles apply to companies with union-represented employees. *Company C* would like to mandate vaccination for all, but labor law and labor relations preclude that as a practical matter. So *Company C* will take what it can get. Federal law allows this, and only Montana's state law currently prohibits it. By contrast, *Companies D* and *E* craft programs that are guided by philosophical, mission-driven principles, or regulatory schemes.

In general, employers looking to implement a "Complete but Partial Mandate" may have a more difficult time refusing the accommodation of "continued remote work," especially if segments of the workforce are still working remotely or if it is difficult to prove the supposition that it would be "better" if the work was performed in-person.

Conditional

This means that being vaccinated is a condition of working in the office or conducting in-person meetings, but working in the office and in-person meetings are not regularly required. Equipped with experience and lessons learned from the work-from-home boom during the pandemic, many employers either want or are willing to let portions of their workforce continue working remotely, but also want to provide in-office workspace for those who prefer to come in. Many companies also are concerned about losing office "culture," and want to encourage those willing or wanting to return to the office to be able to do so safely. Therefore, anyone who works in the office must be vaccinated. In essence, under this "conditional mandate" (sometimes referred to as a "soft mandate"), *employees* get to choose whether they want to work in the office; if so, they have to be vaccinated. By contrast, with a Complete but Partial Mandate, *the employer* decides which jobs must be performed on-site and which jobs can be performed remotely.

It is important for employers to be clear in the type of "mandatory" vaccination they are instituting, because the type and related particulars will dictate how policies are designed and announced. This decision also drives the accommodation process, not only with respect to accommodation *options*, but also with respect to establishing undue hardship.

Mandate Considerations

When choosing a mandate (or not) employers must be aware of Montana law, potential disparate impact claims, and union represented employees. Read on for more detail.

Employer Right to Mandate Everywhere Except Montana

Employers have the legal right to mandate (and under the Biden Administration's proclamation, discussed below, may be required to mandate) that some or all employees be vaccinated against COVID-19 in all states where they have employees, except in Montana. As discussed below, such a mandate would be subject to a duty to bargain for union-represented employees.

Montana law prohibits requiring an individual to receive a vaccine that has been approved for Emergency Use Authorization ("EUA") only or that is undergoing safety trials. Mont. HB 702, Section 4. Now that the Pfizer vaccine has obtained full FDA approval, presumably this restriction falls away as to that vaccine, and any others that later obtain full FDA approval.

The Montana law, however, also prohibits discrimination against employees based on vaccination status. *Id.*, Section 1(b). This includes refusing employment to a person, barring a person from employment, or discriminating against a person in terms of compensation or any term, condition, or privilege of employment. This broad restriction would seem to effectively prohibit an employer from taking a "complete and total mandate" approach in Montana, because the employer cannot discharge or take other adverse action against those who refuse to be vaccinated.

Once President Biden's Executive Order regarding private employers of 100 or more employees takes effect (and assuming it withstands threatened legal challenges), large employers in Montana will presumably be able to mandate vaccination, Montana law notwithstanding. The Constitution's Supremacy Clause means federal law trumps conflicting state law. While the Executive Order allows employers to choose testing instead of or in addition to vaccination, it gives employers that choice, not the states. Any state law disallowing mandatory vaccines would conflict with and be overridden by the Executive Order, at least as to employers covered by the Executive Order.

Note that Montana's law includes special exceptions for health care facilities; licensed nursing homes, long-term care facilities, and assisted living facilities; and certain schools and daycares. With respect to health care facilities, the Montana law allows the facility to: (1) ask an employee to volunteer his or her vaccination status for the purpose of determining whether the facility needs to implement reasonable accommodation measures to protect the safety of employees, patients, visitors, and others; and (2) implement such measures for employees, patients, visitors, and others who are not vaccinated. With respect to licensed nursing homes, long-term care facilities, and assisted living facilities, the Montana law doesn't apply during any period of time in which compliance with the law's restrictions would result in a violation of regulations or guidance issued by the CDC or the Centers for Medicare & Medicaid Services ("CMS").

Montana's relatively narrow health care exceptions will soon be largely superseded by President Biden's Executive Order directing CMS to mandate vaccination at health care facilities receiving Medicare or Medicaid reimbursement.

Risk of Mandating for Some But Not All (Union Issues Aside)

As explained above, federal law and most states permit employers to distinguish between different groups of employees in requiring COVID-19 vaccination. That assumes, of course, the distinction is not based on protected class status.

Employers must be mindful of possible disparate impact claims when drawing distinctions between employee populations. In its recently updated COVID-19 Technical Assistance guidance, the EEOC states that employers with a vaccine mandate may expose themselves to allegations that the mandate disparately impacts—or disproportionately excludes—employees based on their race, color, religion, sex, or national origin under Title VII (or age under ADEA). That could happen if a company mandates vaccination for manufacturing sites but not office locations, for example, if it turns out that manufacturing sites have a comparatively larger percentage of Black or Hispanic employees than the office location. The EEOC guidance further reminds employers that because some individuals or demographic groups may face greater barriers to getting vaccinated than others, some protected class members could be adversely impacted by vaccine requirements. We recommend being mindful of vaccine availability when crafting your policy.

Even if employees could demonstrate a statistically significant disparate impact on a protected group, the employer can successfully defend any disparate impact claim by demonstrating the vaccine requirement is job-related and consistent with business necessity. This may be difficult as to positions performed remotely during the pandemic. (Why can't those employees continue working from home and remain unvaccinated?) Thus, an across-the-board mandate that everyone come into the physical workplace and be fully vaccinated may be difficult for some employers to defend if applied enterprise-wide, especially if based on a philosophic view or on the assumption that culture or productivity would improve by having everyone return. Instead, a company may need to demonstrate job-relatedness and business necessity by position or by geographic site.

Special Considerations as to Union-Represented Employees

Generally, an employer's effort to comply with a legitimate non-discretionary government mandate does not require bargaining as the employer has no ability to violate the mandate. However, to the extent that the government vaccine/testing requirement allows discretion in how the requirement is implemented, unless otherwise provided by language of the parties CBA, decision and/or effects bargaining would be required over such things as timing, location, scheduling, how to notify employees, processing exemption claims, pay for tests, paid leave for absences caused by reactions to the vaccine as well as the consequences of non-compliance, among other things. In *Western Cab Company*, 365 NLRB No. 78 (2017), a union was in the process of negotiating an initial collective bargaining agreement when the employer, without prior notice to the union, began notifying employees that they would be eligible for health insurance after 60 days of employment instead of the prior requirement of one year of employment. This was done in response to the Affordable Care Act's required eligibility for health insurance for employees after 90 days of employment. A unanimous, Republican lead NLRB held that bargaining was required before implementation due to the fact that there were requests that the

union could have made in connection with the new eligibility date (for instance a longer or shorter waiting period).

While we are unsure at this time how much latitude there will be regarding any proposed federal government mandate (as well as the scope of state and local mandates), there is ample reason to argue that notifying the union first and offering bargaining (even where there is little or no discretion) is a wise approach. Clearly, in the absence of a clear government mandate, if an employer's preferred policy in response to a mandate provides for discipline or discharge of union-represented employees who remain unvaccinated absent an approved accommodation, it is certainly a mandatory subject of bargaining. *Johnson v. Bateman Co.*, 295 NLRB 180, 193 (1989) (any form of mandatory drug testing is a mandatory subject of bargaining). The only exceptions to a bargaining obligation arise where (i) a broad management rights clause exists allowing the employer to implement health and safety rules of its choosing, or (ii) a waiver by the union may be asserted based on its prior acquiescence to the employer having repeatedly implemented similar requirements. Democratic Administrations have interpreted coverage of management rights and other contract provisions narrowly and have required an express waiver by the Union of its right to bargain over these types of issues. Having said that, it is unclear what approach the current Administration will take in disputes that conflict with policy in favor of vaccinations. The duty to bargain, of course, extends only to union-represented employees. Employers should not assume that the union will necessarily put up barriers in negotiations as they too are grappling with the very same desire to bring an end to the pandemic and some unions have published fact sheets or issued opinions regarding COVID-19 designed to persuade their ranks that vaccination is safe and effective.

DESIGNING A VACCINE POLICY



Designing a Vaccine Policy

Employers instituting a vaccine policy of any type need to explain the vaccination requirements and consequences of non-compliance within that policy. If a "Complete and Total" or "Complete but Partial" mandate is chosen, that will affect whether the policy must address legally required accommodations for disability and religion.

Under a conditional or soft mandate, accommodation should *generally* be a non-issue: those who for medical reasons should not receive the vaccine, or who object on religious grounds, can work remotely and remain unvaccinated (setting aside federal employees and certain health care employees for whom the Biden Administration intends to mandate vaccination). Even then, however, it's conceivable that accommodation issues will arise. For example, employees who work remotely 90% of the time may need to attend in-person meetings or onsite events on occasion. Whether such employees must be vaccinated should be evaluated case-by-case.

As for whether even to address accommodations in a conditional mandate policy, we recommend saying something concise, e.g., "We do not anticipate disability or religious-based requests for accommodation, because those with disability or religious-related concerns about vaccination may work remotely. Nonetheless, any employee needing accommodation in relation to this policy should contact [INSERT CONTACT PERSON]".

In situations where an employer seeks to impose either a "complete and total" or "complete but partial" mandate, meaning at least some current employees must be vaccinated as a condition of continued employment, consider the following:

Statement of Policy

Given the policy nuances described above and extensive misinformation circulating about COVID-19 vaccines and vaccine mandates in social media and elsewhere, policies should make clear exactly what is required of whom by when. If a policy applies only to employees in certain locations or positions, it should say so. If it applies to everyone everywhere, with exceptions only to the extent required by law, it should say so.

Other Required Features

While few issues surrounding employment decisions pertaining to the pandemic and vaccination are "one size fits all," we generally advise that a written policy address several critical points:

- **Accommodations.** A policy should make clear that accommodations will be granted as required by law, and that employees with a disability or religious-based objection may request an exception or other accommodations. The policy should provide that eligible employees' requests will be granted absent undue hardship to the company or direct threat to the health and safety of the employee or others. While the EEOC's Technical Assistance guidance does not say a policy must say the above, it does make clear an employer must *do* the above. Nonetheless, the policy should contain a statement to the above effects, addressing both

religion and disability. This shows the employer is aware of its obligations, and avoids the argument that the policy discouraged requests for accommodation by not referencing them.

- **Process.** To whom should accommodation requests be addressed? It is in the employer's best interest to have accommodation requests channeled to a few trained professionals instead of scattered across the country in the hands of dozens of managers. The company should designate someone or a small group within HR that knows how to handle and document accommodation requests to drive the workflow. The policy should identify these individuals and provide their contact information. Consider also relying on existing expertise within leave administration teams for disability analyses, and seeking advice from spiritual advisors as needed when assessing objections citing religion.
- **Non-compliance.** Consequences of non-compliance should be spelled out. For example, will testing (or masking) be an available alternative for those who will not get vaccinated but are not entitled to accommodation? Assuming not, you will need to decide whether to progressively discipline those who don't comply or proceed immediately to termination (subject to any federal, state or local leave laws entitling the employee to progressive discipline or limited time off related to vaccination). This is a judgment call to be made based on corporate culture, employee relations concerns (including retention and recruitment in a tight labor market), and the message you want to send via the policy. One alternative to immediate discharge would be a week's suspension for the non-compliant employee to learn more about vaccination and perhaps reconsider their refusal to get vaccinated. If you generally use progressive discipline, another option is to follow those steps, and then ultimately terminate if non-compliance persists. This also gives the individual time to consider her or his actions.
- **Timing.** Policies should inform employees how long they have to act and what constitutes compliance. Many will receive a two-shot vaccine and will not be considered "fully vaccinated" until 14 days *after* the second shot. The recommended time between injections is 21 days for Pfizer-BioNTech and 28 days for Moderna, followed by the 14-day waiting period. See www.cdc.gov ("COVID-19: When You've Been Fully Vaccinated"). Employees should be able to get vaccinated quickly in most areas of the country. But be reasonable and give employees plenty of time to get that first shot, and build in time to allow for the second shot and the subsequent waiting period. We recommend providing between 45 and 60 days from when the policy is announced. Once the employee has completed the vaccination regimen and reported vaccination status (see below), the employee is in compliance under the policy.

Optional Features.

Other appropriate topics you may want to address in the policy include:

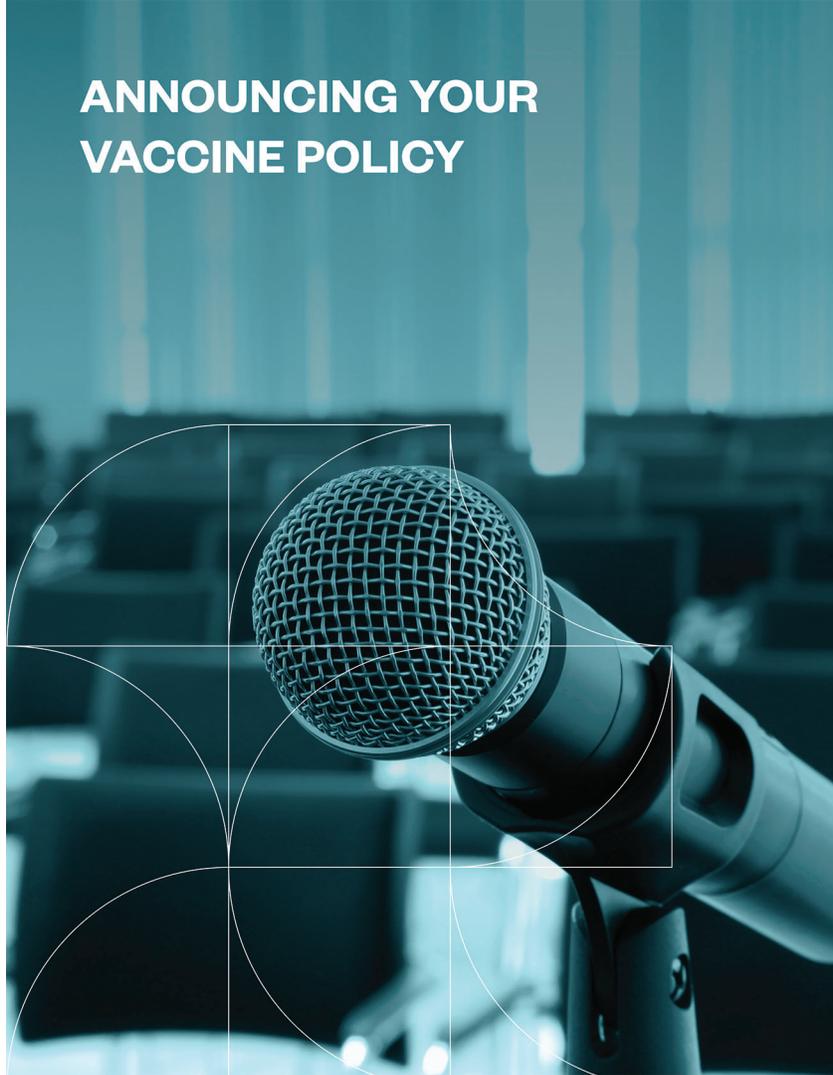
- **Rationale.** Employees will want to know why the company is implementing a vaccine mandate now. A strong policy statement and announcement should help avoid a lot of questions. Reasons may include proclamations from the Biden Administration, the delta variant, relatively low vaccination rates in areas where the company has facilities (while wanting to treat employees consistently across facilities), the need for employees who have been working remotely to return to the worksite, the recent FDA-approval of the Pfizer

vaccine and the Biden Administration's expectation that large private employers will mandate vaccination, philosophical or business-related conviction to contributing to reducing the spread of the virus, or other reasons.

- **Alternatives.** Will testing be permitted as an alternative to vaccination, apart from requests for disability or religious-based accommodation?
- **The Cost of Testing.** If so, will the company pay for such testing when it is not an accommodation for a legitimate disability or religious-based exception?
- **Paid Time.** Must or will the company pay for time spent getting vaccinated outside work hours, or provide employees extra paid time off to get vaccinated during work hours? As explained below, these are questions you must be prepared to answer. Whether to address them up front in the policy is optional.

Employers opting for a "complete and total mandate" approach can download a [sample mandatory vaccination policy here](#).

ANNOUNCING YOUR VACCINE POLICY



Announcing the Vaccine Policy

As with virtually any employment policy, leadership starts at the top. A mandatory vaccination policy will be controversial, probably offensive to some. Anyone skeptical of either the policy or vaccines generally needs to know this edict comes from the top, and that it is an edict—not an aspiration. Leadership, in turn, must face out as supportive of and committed to the organization's policy decision.

Accordingly, the policy should be announced by the CEO or its equivalent at the given organization. As explained above, employees will want to know why the company is implementing its program *now*, as opposed to two months ago or two months from now. An ideal announcement will succinctly answer that question, in addition to signaling your intentions regarding testing and masking (although accommodation under the ADA or Title VII should be determined case-by-case), such as: "Employees entitled to accommodation **may** be required to undergo testing as part of their accommodation." The messaging is critical to get right because it likely will be the focus of intense employee discussion, both inside and outside of the workplace, and for some employers could garner media attention.

As with most new employment practices, well-crafted communication neither starts nor ends with the initial announcement. The same stakeholders who etch the framework for a company's vaccination program—likely a mix of the C-suite and senior directors or managers in areas such as operations, HR, and PR—should have input on how the program will be communicated to employees. The communication plan should thoughtfully account for, at a minimum:

- When will the program be announced, and by whom. (As noted, this should ideally be the CEO or its functional equivalent.)
- How, and to whom, will employees raise questions or concerns? Stated differently, who will be authorized to speak to employees on the company's behalf about the policy?
- What guidance will those authorized individuals be provided to help them answer questions consistently, and in line with the organization's intent?
- What guidance will be provided to front-line managers who are likely to receive questions about the program? If the organization doesn't want these individuals answering questions about the program's particulars, it should provide them advance instruction on how to escalate a question. If there are certain questions it trusts these individuals to answer, it should consider providing them a FAQ.
- How will employees be instructed to handle any press inquiries? Ideally, there should be a single, clearly identified point of contact for this.

Additionally, it's important to think ahead about how you will deal with employees who object to vaccination but are not legally entitled to accommodation. Some employers may choose to make clear that those employees **must** be tested twice weekly at designated or undesignated times. The reason is not to provide options or have employees tested, but rather to encourage vaccination. Testing is inconvenient and not a fun experience, and to have to get tested during work, or outside work hours thereby limiting employees' personal time, interferes with other activities. While employers may well have

to pay employees for their time and expense associated with testing (see below), the strategy is to encourage more vaccination, to discourage baseless accommodation requests, and to make those simply disinclined to get vaccinated change their minds.

POLICY CONSIDERATIONS



Policy Considerations

Vaccination Status Reporting

Private employers can require that employees provide proof of their vaccination status (although as noted, employers should exercise caution in Montana given the prohibition on mandates for some vaccines, and the protection around vaccination status). The EEOC has confirmed that asking an employee about their vaccination status is not a disability-related inquiry under the ADA. Because proof of vaccination is not a disability-based inquiry, the EEOC has said that requesting (or requiring) such proof does not violate the ADA. See *Technical Assistance* at K.9. Nor does it violate HIPAA limits on medical inquiries in that private employers as such are not subject to HIPAA privacy rules.

All of that said, the EEOC and others have advised that employers should request only necessary information as to vaccination status, namely the information on the vaccination card. For example, the CDC has said:

If an employer requires employees to provide proof that they have received a COVID-19 vaccination from a pharmacy or their own health care provider, the employer cannot mandate that the employee provide any medical information as part of their proof.

www.cdc.gov/coronavirus/2019-ncov/vaccines/toolkits/essential-workers.html (updated July 29, 2021).

If, however, the employer goes beyond the necessary minimum and asks an unvaccinated employee why she was unvaccinated, the answer could reveal information regarding a disability, thus making that extra question disability-related and quite possibly ADA-prohibited unless the question is job related and consistent with business necessity. *Technical Assistance* at K.7. As a best practice, employers requiring proof of vaccination should include on the form to be completed: "Do not provide medical or other information of any kind beyond what is expressly requested on this form."

Acceptable Types of Proof

As for what may constitute appropriate proof of vaccination, three types exist:

CARD	NOTE	ATTESTATION
The vaccination record card or a copy of it	A health care provider's letter or note	An attestation by the employee

Whatever the form of proof, it should contain the same content as the CDC's sample vaccination card: The type of vaccine received, the date of vaccination (or dates if the employee received a two-shot vaccine), and where the individual was vaccinated.

Subject to the above, any jurisdiction requiring proof of vaccination (which various states do as to health care employees, and Puerto Rico does as to private employers more generally) will accept the vaccination card, a copy thereof, or a doctor's note. Some jurisdictions that mandate health

care workers be vaccinated will accept an employee attestation, e.g., California, whereas others will not, e.g., Washington State. These proof of vaccination requirements do not apply to most private employers, however, so the question remains: Is there a recommended nationwide approach to requiring proof? The answer (regrettably) is "it depends." In our experience, none of the three approaches is more or less susceptible to forgery. Accordingly, for a workforce (or part thereof) that bristles against any mandate and places a premium on medical privacy, allowing employee attestations makes sense. Conversely, if neither of those conditions is uniquely applicable to the workforce in question, we see no reason to allow attestations as a third method of proof. The exception would be California (and any other states) that expressly permit attestation by employees subject to mandatory vaccination. In those jurisdictions, the state has expressly authorized and thus approved attestation. Though that approval is inapplicable to most private employers, a company or company operation in those states should follow the state's example and permit attestations. Download a [sample attestation](#) here.

Keeping Vaccination Data and Status Confidential

Per the EEOC, employers should treat vaccination records as confidential medical information. *Technical Assistance* at K.4. This was a bit of a surprise, in that the EEOC has also made clear that vaccination is not itself a medical examination. In any event, employers should treat vaccination status and records the same as other confidential medical information ("CMI"), and maintain it apart from the personnel file, be it hard copy or electronic.

Can a company share vaccination status with supervisors who have a need to know, for example, in order to enforce a company-imposed mask mandate for those not fully vaccinated (assuming no applicable state or local government mandate is in effect)? Under the ADA, CMI cannot be shared with supervisors; only information concerning restrictions and accommodations flowing from the CMI can be shared. 29 C.F.R. § 1630.14(c)(1)(i).

Vaccination status of any employee must not be shared with that employee's co-workers or others. We therefore do not recommend that employers mandate the use of stickers, name badges, or other marks intended to differentiate vaccinated employees from unvaccinated employees. Not only are the legal implications unclear, bad facts can make for bad law, and we think it better not to force employees to wear a vaccination indication either way.

Paying for Time Associated With COVID-19 Vaccination and Testing

Employers that mandate vaccination or testing must consider whether an employee's time spent on either process must be paid. That question arises at two levels: (1) is the associated time compensable, such that it must be counted and paid as hours worked; and (2) if the time is not hours worked, is the employer nonetheless required to provide paid leave for the time?

The compensability of time spent obtaining a required vaccination or testing remains largely unchartered—certainly at the federal level, and in most states as well. In our experience, many employers have proven willing to provide compensation or incentives for employees to receive vaccination injections, even where they might not be required to do so. Payment for time associated with regular testing presents a taller financial and logistical burden and has seemingly resulted in more divergent practices. Nevertheless, understanding the contours of what is or may be *required* is a necessary starting point for making these sorts of decisions.

The federal wage and hour law, the FLSA, doesn't speak to mandatory vaccinations or related testing. Furthermore, the U.S. Department of Labor, which has authority to interpret and enforce the FLSA, has offered few guideposts. The DOL's guidance confirms that time spent undergoing mandatory testing on the employer's premises, during an employee's workday, is compensable time. Presumably time spent receiving vaccination injections, during the workday and onsite, would be treated the same way.

But when it comes to offsite, after-hours testing or vaccination, we have merely a scattering of dots that cannot yet be conclusively connected. They include:

- **The Definition of Work.** Employees must be paid for time performing their "principal" work activity, as well as time that is an "integral and indispensable part" of that activity. In *Integrity Staffing Solutions v. Busk*, the U.S. Supreme Court clarified that (i) "principal activities" are those the employee is employed to perform, and (ii) an activity is integral and indispensable "if it is an intrinsic element of the [employee's principal] activities and one with which the employee cannot dispense if he is to perform his principal activities."
- **Pre- and Post-Shift.** Employees needn't be paid for time spent performing activities that are "preliminary" or "postliminary" to their principal work activities.
- **De Minimis Time.** In some circumstances, an employer isn't required to pay for what could be described as inconsequential amounts of working time or, as characterized by the U.S. Supreme Court, "trifles" of time.
- **Time Receiving Medical Attention.** In pre-pandemic guidance, the DOL instructed that "[t]ime spent by an employee in waiting for and receiving medical attention on the premises or at the direction of the employer during the employee's normal working hours on days when he is working constitutes hours worked." 29 C.F.R. § 785.43.
- **Time on Special Tests, Such as Medical Exams.** Also before the pandemic, the DOL advised that if an employer imposes "special tests, requirements or conditions" that an employee must meet, such as medical examinations, fingerprinting, or drug tests, an employee's time spent traveling to/from and undergoing the exam/test is "probably hours

worked.” See U.S. DOL, FLSA Hours Worked Advisor, Physical Exams, Fingerprinting and Drug Testing.

- **Onsite Testing.** As noted above, the DOL has advised that while time spent undergoing mandatory COVID-19 testing during an employee’s workday is compensable work time, after-hours testing is compensable only if it is necessary for the employee to be able to perform her job safely and effectively during the pandemic (e.g., a grocery store cashier). See www.dol.gov/agencies/whd/flsa/pandemic (“COVID-19 and the Fair Labor Standards Act Questions and Answers, U.S. Department of Labor”).

These guideposts point to the fact sensitivity of questions surrounding whether and when time spent undergoing mandatory vaccination or testing is compensable work time under federal law. Onsite vaccination or testing during an employee’s normal work hours presents the clearest case—that time should be paid. While it’s tempting to say the opposite is also true—i.e., that offsite vaccination or testing outside of an employee’s normal work hours needn’t be paid—the better and safer bet is a fact sensitive answer for this scenario, as well as other testing or vaccination scenarios, that turn on factors such as:

- **Location.** When an employer requires an employee to test or receive a vaccination injection on its premises, that will lean in favor of deeming the time compensable. Where the employer allows the employee to test or receive their injection wherever they choose, that will point toward non-compensability.
- **Connection to the Job.** Where a retail employer, for example, mandates that only its customer-facing employees must vaccinate, there could be a strong argument that the requirement is closely connected to the job’s principal activities and therefore should be treated as compensable time. Conversely, where an employer issues a vaccine mandate as to all employees, regardless of position, this line of argument substantially weakens.
- **Amount of Time.** While an employer might not have much control over how much time an injection takes, testing is a different story. If an employee is permitted, for example, to utilize an at-home test that can be completed in seconds, that would enhance the employer’s ability to later argue that the associated time, even if technically work time, is *de minimis*.
- **Voluntariness.** For employees who undergo weekly testing because they have chosen not to vaccinate, but not as a result of a disability- or religious-based vaccine exemption and accommodation, an employer would have a stronger argument against the compensability of the time. The testing, in this circumstance, is being undertaken at the employee’s option. If, however, an employee is required to test as a reasonable accommodation for a medical or religious exemption from a mandated vaccine, that time is arguably compensable, as individuals cannot be disadvantaged based on their medical or religious status.
- **Existence of a Government Mandate.** If employees are being vaccinated or tested pursuant to a government mandate that they vaccinate or test, that leans in favor of non-compensability under the FLSA because it suggests the activity stems from something other than a principal, intrinsic, or integral aspect of any given employee’s job.

Even if an employer concludes it needn't treat vaccination or testing time as compensable under the FLSA, some states' laws may dictate a different result. Unsurprisingly, California provides an example. There, state law defines "work" more broadly than the FLSA, focusing not on "principal" or "integral and indispensable" activities, but rather on whether the employee is subject to the employer's control. With that guidance in mind, California's Labor Commissioner has confirmed that "[i]f the employer requires an employee to obtain a COVID-19 test or vaccination, then the employer must pay for the time it takes for the testing or vaccination, including travel time." See www.dir.ca.gov/dlse/COVID19resources/FAQs-Testing-Vaccine.html ("COVID-19 Testing and Vaccine FAQs"). Because such time counts as work time, it would count toward daily and weekly overtime.

California isn't the only state that is likely to take a different view of compensable time than what the FLSA might dictate. In Illinois, as another example, the state labor department has similarly provided that "[u]nder the [state minimum wage law] and the FLSA, if an employer requires employees to get vaccinated, the time the employee spends obtaining the vaccine is likely compensable, even if it is non-working time." See https://www2.illinois.gov/idol/Documents/IDOL_Vaccine%20Leave%20Guidance.pdf. Furthermore, some states, such as Pennsylvania and California, deviate from the FLSA in that they do not recognize a *de minimis* exception.

Separate and apart from the question of compensability is the question of whether an employer must provide paid time off for testing or vaccination. Under the Biden Administration's COVID-19 Action Plan, employers with greater than 100 employees should expect to be required, pursuant to the forthcoming OSHA ETS, to provide paid time off to employees to obtain the vaccine and to recover from any associated side effects. Various states and localities also require employers to provide employees with paid time off to receive a COVID-19 vaccine, as well as for time missed from work due to side effects of the vaccine. This includes, for example, New York, which requires employers to provide up to four hours of paid leave for each COVID-19 injection, and Massachusetts (through September 2021) and California, which have expanded COVID-19 supplemental paid sick leave laws to include vaccination-related entitlements.

Paying for Costs Associated With COVID-19 Vaccination and Testing.

While employers should expect they may have to pay for *time* to get vaccinated or tested, having to reimburse for hard costs may be a different matter. If employers are requiring testing of unvaccinated employees and there is an out-of-pocket cost, then for those employees being tested because they have received an approved exemption as an accommodation for a disability, pregnancy, or sincerely held religious belief, employers may have to reimburse them for these out-of-pocket costs.

If, however, unvaccinated employees are being tested because of a personal choice not to be vaccinated without a legally protected accommodation, then employers in most states need not reimburse them for the testing costs so long as minimum wage is not jeopardized. Note that some states require reimbursement of expenses, and others maintain statutes that prohibit shifting the cost of medical examinations to employees. In addition, some states have passed COVID-specific guidance that says employers must pay for testing. One state that represents a close call is California, where normally required costs must be reimbursed. However, since the employee could avoid the cost by getting vaccinated, employers may have an argument that the associated cost is not reasonable and necessary and therefore need not be reimbursed.

Incentives for Vaccination (or Disincentives for Non-Vaccination).

Employers strategizing to safely return more employees to the workplace, or to keep employees safely working onsite, have long contemplated offering incentives to encourage vaccination. Now, as the focus shifts to the costs of hospitalizations caused by COVID-19 as well as indefinite routine testing, some employers are looking to impose disincentives on those who refuse to vaccinate without a disability exemption or bona fide religious objection. Such measures can be imposed, for example, through wellness programs or increased insurance premiums.

These measures, which differentiate unvaccinated plan participants from others, implicate regulatory considerations imposed by the U.S. Department of Health and Human Services ("HHS") (relating to HIPAA) and the EEOC (which enforces the ADA and Genetic Information Nondiscrimination Act).

HIPAA divides wellness programs into two main categories: (1) participation-only programs; and (2) health-contingent programs. Participation-only programs do not require any conditions for receiving a reward and have very few associated requirements but must be available to all similarly-situated individuals.

Health-contingent programs, by contrast, reward employees who satisfy a standard related to a health factor (based on activity or outcome). Although HHS has not provided direct guidance, consensus is building that a vaccine incentive under a health plan would constitute a health-contingent activity-only program because some employees are not able to vaccinate due to underlying health conditions. Such programs must meet the following requirements:

1. **Incentive Limit.** Incentives must be limited to 30% (when combined with any other "health contingent" wellness program offered under the plan) of the overall cost of coverage (i.e., the COBRA rate) of the value of the elected coverage (e.g., self-only, family). (The limit is increased to 50% if the plan links incentives to smoker status.)
2. **Reasonable Alternative.** A reasonable alternative must be offered to persons who cannot get vaccinated because it is medically inadvisable (or due to the overlay of Title VII, because of a sincerely held religious belief).
3. **Notice Requirement.** Participants must be notified of the availability of the reasonable alternative in all materials substantially describing the program.
4. **Annual Opportunity to Qualify.** Participants must be offered the opportunity to qualify for the incentive at least once per year.

The EEOC approves of health-contingent activity-only wellness programs that meet the HIPAA/HHS standards. (And new EEOC wellness program rules also will allow a non-coercive (i.e., not overly large) incentive for participatory programs that incent vaccination.)

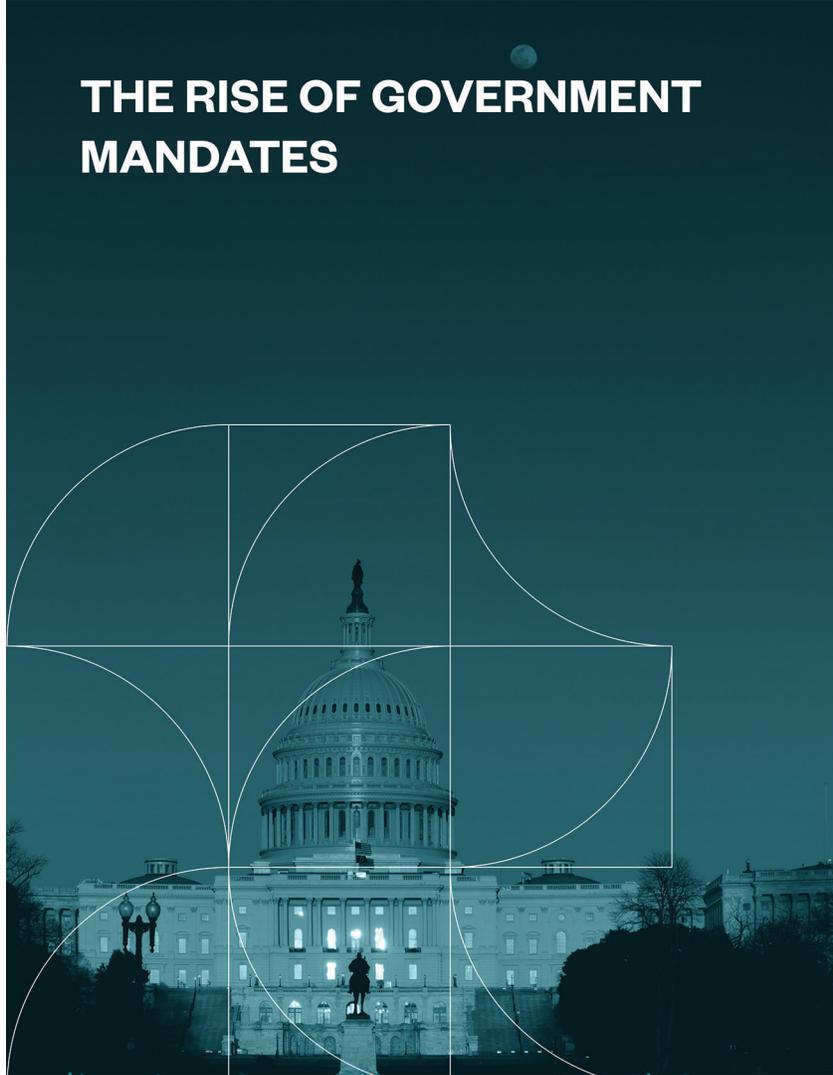
Because EEOC guidance confirms that seeking vaccine status alone is not a "medical exam or disability-related inquiry" under the ADA, if an employer simply requests proof of vaccination status without requiring the employee to get the vaccine directly from the employer (or its

contractor) that program is arguably outside of the scope of the EEOC's wellness guidelines entirely.

Employers considering this approach should be wary of any applicable collective bargaining considerations and the following additional concerns:

- **ACA/Affordability Rules May Further Restrict Surcharge.** For ACA purposes, if the "incentive" is structured as an increased premium, the employer must treat *all employees* as if they failed to get vaccinated and were required to pay the increased amount for purposes of determining the affordability of coverage. An employer could potentially mitigate this concern by designing its "penalty" as a deductible increase rather than a premium increase, which would not impact affordability. Similarly, the ACA only requires that employers offer one affordable option. To the extent the surcharge only applies to one of several benefit packages, this may mitigate ACA risks by leaving lower-cost options untouched.
- **HIPAA Privacy.** If vaccination status is procured in conjunction with a health plan-linked wellness program, vaccination status would constitute PHI and could not be used/disclosed for non-health plan purposes (e.g., workplace safety monitoring). Employers could still request vaccination status outside of the health plan and/or have the employee complete an authorization permitting the disclosure.
- **Section 125 Plan.** Any mid-year "significant" cost changes could be considered a mid-year qualifying life event. That assumes, of course, that the plan (a) recognizes that permissible IRS event, and (b) the plan administrator considers the cost increase to be significant. If it's insignificant, the plan can simply adjust the premium automatically (subject to applicable state wage withholding requirements).
- **Material Modification.** A surcharge (or reward) likely would constitute a material change requiring a Summary of Material Modification ("SMM"). A surcharge may also constitute a material reduction, meaning the SMM should be issued within 60 days of adoption.

THE RISE OF GOVERNMENT MANDATES



The Rise of Government Mandates

On September 9, 2021, the Biden Administration announced its [COVID-19 Action Plan](#), titled the "Path Out of the Pandemic." The Plan's six pillars are:

1. Vaccinating the Unvaccinated;
2. Further Protecting the Vaccinated;
3. Keeping Schools Safely Open;
4. Increasing Testing & Requiring Masking;
5. Protecting Our Economic Recovery; and
6. Improving Care for those with COVID-19.

The Plan will require all employers with 100+ employees to ensure their workers are vaccinated or tested weekly, which will be described and implemented through a new OSHA ETS. Preliminary indications are that OSHA will provide employers the option of requiring vaccination *without* a testing alternative, but of course testing must be considered as a reasonable accommodation for religion- or disability-based exceptions. OSHA has made clear that the ETS would *not* reach workers who work 100% remotely, because OSHA's province is workplace safety and employee exposure to hazards. OSHA expressed the intention, however, for the ETS to address obligations for any employee who makes an in-person appearance at work or works proximate to co-workers.

OSHA issued its first ETS in decades in June, 2021, also related to COVID-19 but applicable only to health care employers. That process took nearly six months and involved over 40 stakeholder meetings conducted by the Office of Information and Regulatory Affairs. During a DOL Office of Public Engagement and OSHA remote briefing on September 10, 2021, OSHA acknowledged that the new ETS will issue in the "coming weeks" as ordered by President Biden and as "expeditiously as possible," but was not prepared to predict how many weeks the process would take.

OSHA will also issue as part of the ETS rules that will require employers to provide paid time off for the time it takes workers to get vaccinated, or to recover from vaccination. The DOL already has guidance suggesting that mandatory testing—and presumably vaccination—that occurs on an employer's premises or during work time is compensable, but it is far less clear whether an employee must today in all states be compensated for the time and expense of testing or for vaccination outside of their normal work hours, even when required by employer policy. The Plan calls for paid time off for vaccination purposes and the ETS may provide further clarity around these questions with regard to testing time as well.

Separately, as described in this second [Executive Order](#) also issued on September 9th, the federal worker obligations of mandatory vaccination will now apply to many *government contractors* with qualifying service, construction, lease, concession and other types of contracts. At this point, the EO does not appear to apply to prime or subcontracts that are solely for the provision of supplies or products. However, a contract that is mixed (both supply and service elements), is likely to be covered by the EO

even if the contract is predominantly for supply, and especially if the services portion of contract is covered by the Service Contract Act.

Covered contractors will be required to vaccinate employees regardless of whether the services are being provided on site at a government facility or location. Indeed, the "any workplace locations" language in the Executive Order could be read together with its "an individual ... working ... in connection with" a federal "contract-like instrument" as sweeping in a wide swath of remote workers. The Safer Federal Workforce Task Force guidance anticipated on September 24th will shed more light. At this point, it appears that government contractors will be required to comply once a clause (likely in the form of a FAR 52.XXX-XX clause) pursuant to Section 2(a) of the Executive Order is included in their contract beginning in mid-October. It is likely, but not certain, that the guidance will track the federal worker requirement of vaccination only, and will not permit a weekly testing alternative (except of course as part of a legally required accommodation). Before contractors are held to the guidance, there must first be a clause obligating compliance in new contracts (including new orders or bilateral modifications to existing contracts), solicitations, or renewals after October 15, 2021. The clause will be required to flow-down to subcontractors at all tiers if the subcontract is not solely for provision of "products" and exceeds the simplified acquisition threshold (SAT), which for most contracts (not involving disaster recovery contracts) is \$250,000. Even where the clause is incorporated into a contract/subcontract, it will not apply to "employees who perform work outside the United States or its outlying areas, as those terms are defined in section 2.101 of the Federal Acquisition Regulation."

While "products" is not defined in the Executive Order, FAR 2.101 defines "products" to mean "supplies," which in turn is defined as which in turn is defined as: "all property except land or interest in land," including (but not limited to) "public works, buildings, and facilities; ships, floating equipment, and vessels of every character, type, and description, together with parts and accessories; aircraft and aircraft parts, accessories, and equipment; machine tools; and the alteration or installation of any of the foregoing."

In addition, according to the Administration's Action Plan, the CMS will take action to expand required COVID-19 vaccination to workers in health care settings that receive Medicare or Medicaid reimbursement, including additional hospitals, dialysis facilities, ambulatory surgical settings, and home health agencies. This appears to be designed to reach health care industry staff whether working in homes or hospital settings, including staff not involved in direct patient, resident or client care. CMS's previously issued requirements for nursing home staff will serve as the template for this expanded vaccine mandate.

In addition to activity at the federal level, many states' legislatures have been active in proposing bills hostile to vaccine mandates for most types of private employers (outside of health care or elderly care and congregate settings). Lawmakers in many states have proposed legislation designed to prevent private businesses from mandating COVID vaccinations of employees. As noted above, however, only Montana has passed such a law—a vaccine mandate remains legal everywhere else.

Nonetheless, the volume of proposed legislation underscores that employers requiring vaccination must anticipate resistance among some employees while continuing to monitor legislative developments. This is especially the case while some vaccines continue to be administered under EUA rather than full FDA approval. In Minnesota, proposed legislation would make it a felony with a minimum ten-year sentence for any "agent" of a "business" to "treat differently, single out, deny opportunity, ostracize, stigmatize, or discriminate against an individual as a result of the individual's decision on whether or not to receive a

vaccine." Even in New York, a proposed bill provides that no "vaccine used for the purposes of inducing immunity against coronavirus in humans in this state shall be a mandatory immunization" and no "person shall be required to receive such vaccine unless such individual chooses to be vaccinated."

Governors have also actively issued executive orders during the pandemic, many directed at requiring vaccine passports of patrons or customers. Most such orders are directed solely at government actors, but some apply to private businesses that receive funds or have contracts with the state, including those issued in Arizona, Florida, Montana, and Texas. Vaccine passport issues have also resulted in state law restrictions on both government and private business actors. That said, none of these orders expressly restrict employment actions by private employers.

Meanwhile, some states and local governments have themselves mandated vaccination for certain kinds of workers, particularly government employees who care for patients and the elderly, or who work in "congregate" settings such as prisons, hospitals, etc. An increasing number of states are expanding these mandates, and with the August 23rd FDA approval of the Pfizer vaccine, the expectation is that more and more government-imposed mandates will issue requiring vaccination for state and federal workers.

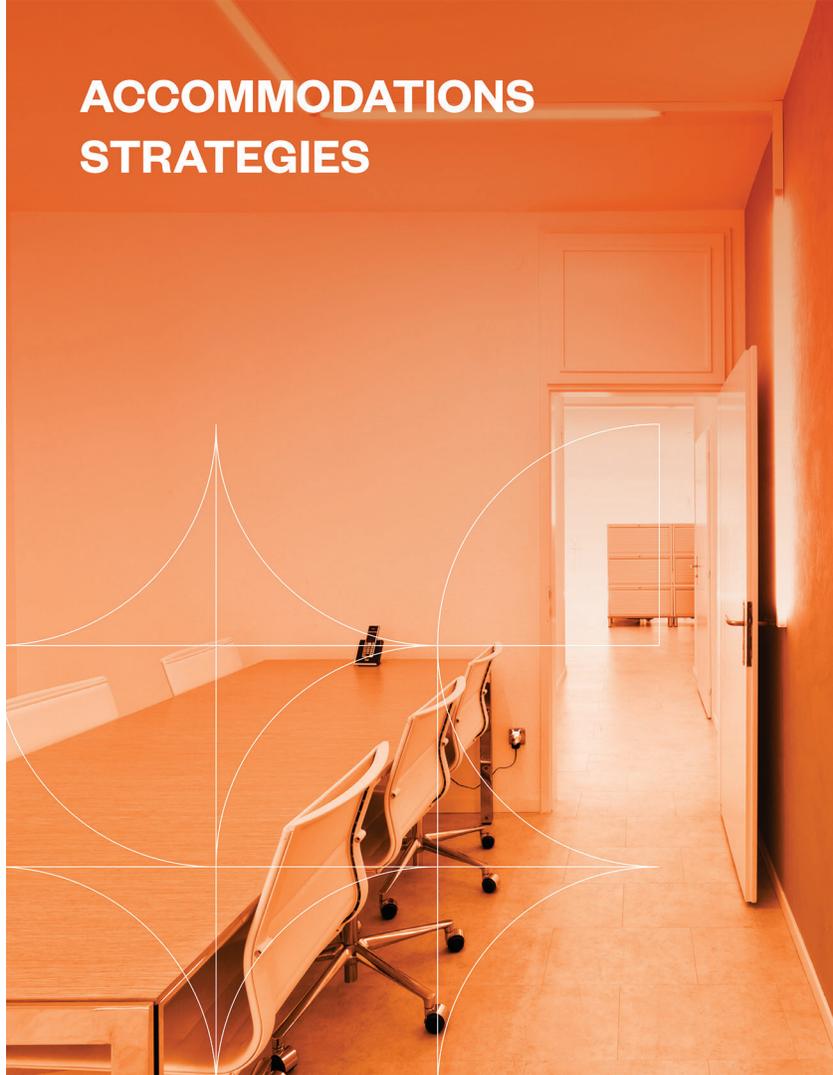
Mandates for private employers are less common at present. California, Connecticut, Massachusetts, New Jersey, New York, Oregon, Puerto Rico, and Denver, Colorado have all taken steps to mandate that employees in certain sectors—most commonly health care and long-term care facilities (though more broadly in Puerto Rico)—become fully vaccinated. Other states, such as Kentucky and North Carolina, impose mandates for certain employees at state-run hospitals. President Biden, following Pfizer's FDA approval, urged private employers to mandate vaccination, which may prompt further legislative action.

See the next page for a chart of state and local vaccine mandates for certain private sector employees, as of September 1, 2021.

Sampling of State Mandates Applicable to Private Sector Employees

CA	Employees of hospitals, nursing homes, dentists' and doctors' offices and other health care settings will have to be vaccinated against COVID-19 by August 23, 2021 , or be tested weekly.
CT	Employees at long-term care facilities including nursing homes, residential care homes, and assisted living facilities must receive their first vaccination injection by September 7, 2021 .
CO	Denver will mandate all city employees and private sector workers in high-risk settings to be vaccinated by September 30, 2021 . The order includes congregate care settings such as nursing homes, homeless shelters, hospitals, and correctional facilities. After September 30, workers who do not get vaccinated but are required to do so under the mandate will not be allowed to work onsite .
KY	Contractors and state employees working in state-operated health care facilities are strongly encouraged to be fully vaccinated by October 1, 2021 , unless there is a religious or medical reason they cannot be vaccinated. If any of the staff in these facilities is unvaccinated, they will be tested at least twice weekly.
MA	Employees and contractors at skilled nursing and other long-term care facilities must be vaccinated by October 10, 2021 barring medical and religious exemptions. Agency approval is expected to extend this mandate (through October 31) to workers in rest homes, assisted living, hospice and home care (contracting or subcontracting with MassHealth).
NJ	All workers in certain state and private health care facilities and high-risk congregate settings will be required to be fully vaccinated against COVID-19 or be subject to COVID-19 testing at minimum one to two times per week . Health care facilities and other settings covered by the requirement will have until September 7, 2021 for all employees to come into full compliance.
NY	Pursuant to its governor's announcements and a subsequent order by the state public health department , health care workers, including staff at hospitals and long-term care facilities (including nursing homes, adult care, and other congregate care settings) must vaccinate. For patient-facing health care workers at state-run hospitals, a first vaccination shot is required by September 6, 2021 . For other health care workers, a first injection is required by September 27 .
NC	As reported by the AP , workers and volunteers at state-run health care facilities must be fully vaccinated against COVID-19 by September 30, 2021, or be tested at least once each week.
OR	Oregon health care workers must be vaccinated by September 30, 2021 , or be tested weekly. Limited in scope to "workers who have direct or indirect contact with patients or infectious materials." Advisory on health care professionals with authority to vaccinate in Oregon.
PR	Health facility workers, in addition to government contractors and hotel employees, must be vaccinated by September 30, 2021. The governor has also announced that employees of restaurants and other enclosed places that serve food or drinks must get vaccinated. Those who do not vaccinate for any reason must bring a negative test result weekly.

ACCOMMODATIONS STRATEGIES



Accommodations Strategies

Employees or applicants who cannot get the COVID-19 vaccine because of qualifying disability may be entitled to reasonable accommodation under the ADA. Here, we provide an overview of this aspect of a vaccination policy, followed by common questions.

Disability Accommodations

Commonly claimed disabilities that may prevent someone from getting the COVID-19 vaccine, include:

- **Anxiety:** This cannot be a generalized fear and must be supported by a medical certification to be considered a qualifying disability.
- **Allergic Reactions:** The individual must be allergic to a component of the vaccine or prior vaccines where the reaction was severe enough to cause anaphylaxis or other reaction that caused hospitalization.
- **Certain Autoimmune Disorders:** Certain autoimmune disorders may cause individuals to have a negative reaction to the vaccine or prevent employees who receive the vaccine from developing antibodies. Common autoimmune disorders that employees tend to seek accommodations for include: Lupus, Bell's Palsy, Guillian-Barre Syndrome, and Rheumatoid Arthritis. There is conflicting information and guidance regarding whether these or any other autoimmune disorders disqualify someone from receiving a COVID-19 vaccine. Therefore, if the employee presents a valid medical certification supporting their inability to receive the vaccine for either of these reasons, an employer should not engage in a medical debate and accept the autoimmune disorder as a disability.
- **Pregnancy/Breastfeeding:** The CDC recommends the COVID-19 vaccine is safe for pregnant and breastfeeding individuals, but there continues to be a difference of opinion amongst medical practitioners. Therefore, if the employee presents a valid medical certification supporting their inability to receive the vaccine for either of these reasons, an employer should not engage in a medical debate and accept the pregnancy as a disability.

If an individual has a qualifying disability, the employer must consider whether it can reasonably accommodate the employee under a "direct threat assessment." The ultimate question is whether the unvaccinated person poses a direct threat to themselves or others by exposing them to COVID-19 in the workplace. The factors to consider include:

- **Nature of the work.** With whom is the employee working and interacting? Are they exposed to a lot of unvaccinated or high risk people, such as children or the elderly?
- **Amount of close contact with others.** Are they working in a customer-facing retail setting or in an office job? If an office, is it an open concept or are there independent offices?
- **How many others in the workplace are vaccinated?** In general, over or under 70% is a common "tipping point" in terms of tolerance for an unvaccinated population. Are others in the office required to wear masks or socially distance?

- **Is the workplace located in an area with a high transmission rate per the CDC?**

An employer cannot automatically exclude an individual from the workplace or take any action even if they determine the employee poses a direct threat, unless no reasonable accommodation is available that would eliminate or reduce the risk of the unvaccinated employee posing a direct threat.

An employer must go through the interactive process to determine whether the employee poses a direct threat with or without a reasonable accommodation and if they do, whether there are any reasonable accommodations that can be made to eliminate that threat.

An employer should engage in the interactive process in the same way it would for any other disability-related accommodation request. This is especially true in California, where there is a separate and independent cause of action for failing to engage in the interactive process.

Common examples of reasonable accommodations include: masking, testing, social distancing, alternative work hours, work from home, unpaid leave, etc.

Common Questions Regarding Disability Accommodations

Question	Answer
<i>If an employer is only requiring employees be vaccinated to come into the workplace and is allowing any non-vaccinated employees to continue working remotely, do they have to provide reasonable accommodations under the ADA?</i>	Yes, but only if the individual is unvaccinated due to a qualifying disability and says they do not want to work remotely because, for example, they are being disadvantaged (i.e., the whole team is meeting in person and they are being excluded) or they cannot do their essential job functions remotely. In that situation, an employer must engage in the interactive process as described above.
<i>Can an employer request medical documentation to verify whether the employee has a qualified disability?</i>	Yes, an employer can and should request supporting medical documentation from employees who assert they cannot be vaccinated because of a disability.
<i>Can an employer implement temporary accommodations while working through the interactive process with the employee?</i>	Yes, an employer should consider temporary measures while engaging in the interactive process so that the employee does not create health/safety risks for themselves or other employees while an employer is determining whether or not the employee can be reasonably accommodated. An employer should provide confirmation, in writing, to the individual making it clear that the "accommodation" being provided is only temporary while the parties are engaging in the interactive process.

<p><i>Must an employer automatically allow an employee to work remotely as a reasonable accommodation if the employee has worked from home during the pandemic?</i></p>	<p>This is a fact intensive analysis and should be assessed on a case-by-case basis. Working remotely may not be a reasonable accommodation in every situation, but the employer must be able to show that the employee cannot perform their essential job functions remotely in order to deny an employee's request to continue working remotely (where they cannot be vaccinated for disability-related reasons). In the case of an employee who has been working remotely for the duration of the pandemic, it may be more difficult to show that they must be in the workplace to perform their job—but not impossible.</p>
<p><i>If an employee says that they cannot be vaccinated and cannot wear a mask due to a qualified disability, what are the employer's options?</i></p>	<p>If an employee cannot be vaccinated <u>and</u> cannot wear a mask due to a qualified disability, there are very few options for allowing the employee to physically return to the workplace that would mitigate or eliminate the "direct threat" to the employee or others. Unpaid leave or working remotely are possible options, but it will ultimately depend on the duration of the need for the accommodation and/or whether or not the employee can perform their essential job functions remotely.</p>

Religious Accommodations

In general, applicants and employees with "sincerely held religious beliefs" may be exempt from vaccination requirements to the extent such a requirement contradicts those beliefs. As a result, religious claims of exemption from mandatory vaccination policies must be taken into careful consideration, and employers must consider whether sincerely held religious objections can be accommodated.

Religion is broadly defined, and difficult to question. The EEOC defines "religion" to include "all aspects of religious observance and practice as well as belief," not just practices that are mandated or prohibited by a tenet of the individual's faith. In particular, the "belief" need not be tied to any formal, organized religion. In fact, official doctrine from most major religions does not prohibit vaccination and, to the contrary, many religions actively encourage or support vaccination.

"Because the definition of religion is broad and protects beliefs, observances, and practices with which the employer may be unfamiliar," the EEOC explains, "the employer should ordinarily assume that an employee's request for religious accommodation is based on a sincerely held religious belief." The EEOC also notes, however, that if "an employer has an objective basis for questioning either the religious nature or the sincerity of a particular belief, observance, or practice, the employer would be justified in seeking additional supporting information." See EEOC's Compliance Manual on Religious Discrimination, 12.I.A.3.

Religious beliefs may include those that are new, uncommon, not part of a formal church or sect, or only subscribed to by a small number of people. They may even include beliefs that appear illogical or unreasonable to others. Under the law, the belief need not even be theistic at all—it is enough that it is a moral or ethical belief about right and wrong. By contrast, a belief rooted in social, political or economic philosophies, or mere personal decisions or preferences, are not religious beliefs protected by law.

Whatever the claimed religious belief, however, it must be sincerely held.

Probing Claims of Religious Objection.

As noted even by the EEOC, the employer "must have enough information to make the employer aware that there exists a conflict between the applicant's or employee's religious observance, practice, or belief" and the employer's job requirement. Employers may also take steps to determine whether the religious belief is sincerely held. These inquiries, however, are sensitive and can take preparation and skill to navigate.

Employers who press applicants and employees on whether their belief is "religious" or "sincerely held" do so at their own risk, and employers should generally assume that a request for religious accommodation is legitimate. At the same time, employers mandating vaccination are drawing an unprecedented number of objections that appear to be under questionable circumstances. Churches and pastors are popping up on-line, advertising services for writing religious exemptions to vaccination, testing and masking programs. "Customizable" form templates for exemptions are also available for free online.

The primary step is to make sure the employee completes an exemption request form that requires the employee to specifically write down their precise religious beliefs, and include a detailed explanation of how their beliefs are contrary to the practice of COVID-19 vaccinations,

testing or masking, as the case may be. The form should make clear that employees must provide truthful and accurate information, and should note that the employee may be asked to provide additional information to support the request. Employers also should endeavor to uncover, up front, whether the employee intends to raise objections to potential accommodations, such as testing and masking.

If the information returned appears to be spurious or gives the employer an objective reason to doubt sincerity or the link to religious beliefs, employers may then take additional steps in the interactive process dialogue to try to parse mere personal preferences from religious beliefs, and also to determine whether claimed religious beliefs are sincerely held.

For example, if an employee presents a boilerplate form purchased on or downloaded from the internet, or a form that many others have also submitted from the same source, or the employee suddenly shifts from secular objections to a purported "religious" objection, that may constitute objective reason to make further inquiry of the employee about the sincerity of the employee's religious beliefs.

Essentially, the tenor of such a follow-up inquiry is "tell me more" or "help me understand." While the volume of objections may make individual follow-ups difficult, employers interested in testing the veracity of religious objections likely will have more success uncovering the truth in a conference or phone call, rather than in a letter or email-writing campaign. But either way, employers must proceed carefully when following up with clarifying requests and information. Documenting that each step in the interactive dialogue took place, and its outcome, remains critical.

As a follow-up to suspicious religious accommodation requests, the employer will often glean the most useful information with open-ended questions asking the employee further to explain the nature of the religious belief and the objection to vaccines. Some possible areas for respectful further discussion or inquiry may include:

- A general discussion about what the employee knows about the state of vaccines, which may cause the employee to reveal that he or she is really motivated by personal, political, or even conspiratorial reasons to be anti-vaccination;
- Follow-up questions about the specific religious underpinnings of the objection to the vaccine (or testing or masking), or how the employee's religion informs his or her views;
- Questions about how recently the employee has subscribed to this faith (understanding that even recent beliefs may be protected in some cases);
- Whether the employee has received other vaccinations in their lifetime and if so, how the COVID vaccine is different in terms of their religious belief system;
- If the employee has raised objections to potential accommodations such as testing or wearing masks, whether the employee has complied with mask guidance or has received a COVID test in their lifetime, and how the potential need to do so for work would be different in terms of their religious belief system.

Again, employers should proceed cautiously. As the EEOC explains:

An employee who fails to cooperate with an employer's reasonable request for verification of the sincerity or religious nature of a professed belief risks losing any subsequent claim that the employer improperly denied an accommodation. By the same token, employers who unreasonably request unnecessary or excessive corroborating evidence risk being held liable for denying a reasonable accommodation request, and having their actions challenged as retaliatory or as part of a pattern of harassment.

Therefore, the touchstone for the employer's inquiries should be making sure they are "reasonable" and not "unnecessary or excessive."

With the above cautions in mind, below are examples of some generally permissible follow-up inquiries if an employee requests a religious exemption from COVID-19 vaccination, and the employer has established an objective basis for doubting the religious nature and/or sincerity of the belief. Please remember that one size does not fit all so that some of the questions may not be appropriate to the situation in question and may have to be changed even in the course of the interactive meeting:

"I am respectful of whatever you believe, but I need to better understand it in order to consider your request. What is it about your religious beliefs or practices that prevents you from getting vaccinated?"
"What is the name of your religion (if any)?"
"Are you a member of a particular church or religious organization?" (<i>Understanding that such membership is not required for a belief to be protected.</i>)
"What is the nature of your beliefs/practices/ observances?"
"Where and how do you adhere to these beliefs/observances/practices?"
"When did you first began to embrace these beliefs/observances/practices?"
"How do the company's policies and/or procedures conflict with your beliefs, observances, or practices?"
"Have you ever received any vaccines before? What is the difference between your getting vaccinated before and now?"

"We understand you are comfortable complying with various COVID-19 safety protocols: social distancing, face coverings, and frequent handwashing. Can you help me understand why those measures are consistent with your religious beliefs but vaccination is not?"

"Besides vaccines, do your religious beliefs prevent you from being tested for COVID-19? (Note that the testing involves a nasal swab—there's no injection or piercing of the skin. It is not a treatment; it's only a test.)"

"Any additional information regarding your beliefs, observances, or practices that support your request for a religious accommodation?"

Because the determination of whether an employee's beliefs, observances, or practices are religious in nature and/or sincerely held can sometime be complex, difficult to answer, and it is not always possible to develop generalized criteria that fit all situations, it is recommended that an employer consult legal counsel during the interactive process and before making a determination to deny a request for religious accommodation.

Reasonable Accommodation and Undue Hardship

Once an employer is on notice of a religious belief that is sincerely held, it must provide a reasonable accommodation unless that would pose an undue hardship. With respect to religious discrimination, "undue hardship" is defined as having more than a *de minimis* cost or burden on the employer. Pre-pandemic, this has generally been an easier standard to meet than for disability-related accommodations, which requires a showing of significant difficulty or expense.

How religious exemption requests will play out against a mandatory COVID vaccination requirement remains to be seen. It certainly seems that risking the health and safety of co-workers *should* be too heavy of a burden for an employer to bear. That said, if an objecting employee's work can be and has been done remotely throughout the pandemic, simply *desiring* that employees return to the office may not suffice to deny the accommodation of continued remote work in a particular situation. At a minimum, if an employer continues to allow remote work for other employees in the same role, then remote work should also be an option for the employee who asserts a religious objection to vaccination.

Some employers may also consider whether there's a safe and acceptable way to allow the objecting employee to return to the workplace. If the job really only requires infrequent, periodic in-person meetings, the employer may need to tolerate a regimen of frequent testing, mask-wearing, personal protective equipment, distancing, and other protections used throughout the pandemic to minimize the risk of spread. For example, an employer could require: (i) before meeting in-person, an employee must have two negative test results that are 48 hours apart, with the most recent test occurring the day prior or day of the meeting; and (ii) daily symptom-checks plus continuous mask wearing and social distancing. The employer may wish to specify the type of test required, or the specific mask required (such as a well-fitting N95). Wherever possible, employers should consider vacant positions or other roles for which the employee may be

qualified without vaccination, and should always make an effort to legitimately explore potential accommodations and document having done so.

However, in certain cases, an employer may be able to conclude that an employee's religious belief against the COVID vaccine cannot be accommodated without undue hardship. Health and safety concerns have long been one of the strongest grounds for a successful undue hardship defense.

The employer should think through in detail the nature and strength of the potential undue hardship defense.

- What risk does the unvaccinated employee pose to other employees?
- To patients or customers or clients or vendors?
- In what ways are testing, masks or other measures inadequate to mitigate those risks in the particular work setting?
- Will the unvaccinated employee be working with populations that are high risk or not yet eligible for vaccination?
- Will the unvaccinated employee be in work settings where distancing or masking are not possible?
- Are there vulnerable employees in the workplace who have raised concerns about working in proximity with unvaccinated colleagues?
- What expert guidance supports the view that the unvaccinated worker presents a safety concern, and that other measures such as testing are not adequate protection?

Though health and safety concerns will generally be the strongest undue hardship defense, the employer can also consider other burdens created by unvaccinated employees—whether that is greater disruption to the business, imposition on co-workers by making their job harder, absences from illness and quarantines, an additional testing burden, or other costs.

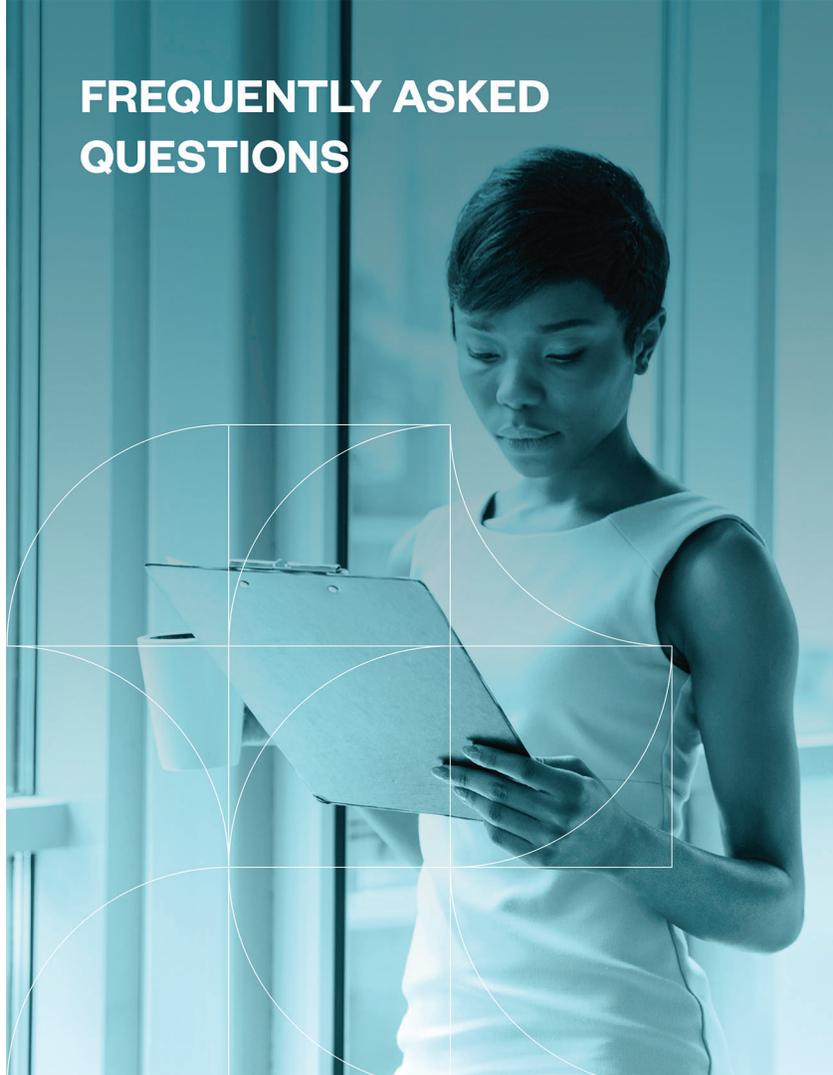
A common religious objection letter that appears to be available online requests exemption not only from vaccination requirements, but also masking and testing requirements. Certainly during the pandemic, it would seemingly pose a legitimate health and safety concern to exempt an employee from all of these requirements if the job must be performed in person. An employer facing this type of exemption request therefore should consider the request as tantamount to a request for remote work, and must be able to justify why the job must be performed in person, and demonstrate that it would be an undue hardship to permit remote work. That means, at a minimum, the employer must not let other similarly situated employees work remotely, and must be able to answer the question: if the job was remote during the pandemic, why or how continuing remote work would now present an undue hardship.

There are employers—particularly in the health care sector—who are insisting on vaccination for all employees, even those who work exclusively remotely. Those employers cite goals including:

keeping all employees healthy and safe; ensuring adequate staffing to conduct operations; and a commitment to community health. Whether the courts will agree that it is an undue hardship to allow even remote workers to remain unvaccinated remains to be seen, but recent edicts by the Biden Administration clearly indicate prioritization of the vaccine and anticipated guidance from OSHA via Emergency Temporary Standards for large employers will shed additional light on the strength of this defense.

If an undue hardship has been established with no ability to reasonably accommodate, employers may move to progressive discipline and, in some cases, to end the employment relationship. In such cases, the employer should consider whether it can rely on both objective doubts about sincerity and religious belief as well as on the undue hardship defense to justify denying the accommodation. A wise employer will consult counsel before deciding to rely on an undue hardship defense in terminating someone's employment.

FREQUENTLY ASKED QUESTIONS



Frequently Asked Questions

FAQ for Human Resources Team

Mandatory Vaccination	
<p><i>Can employers require employees to get vaccinated?</i></p>	<p>Yes, but ONLY IF, per guidance from the U.S. Equal Employment Opportunity Commission (EEOC) under the Americans with Disabilities Act (ADA):</p> <ul style="list-style-type: none"> (1) employees receive the vaccine from a third-party pharmacy or other medical provider with whom the employer does not have a contract; OR (2) the employer can show that the need to be vaccinated is job-related and consistent with business necessity, which necessitates a showing that employees who refuse to be vaccinated pose a direct threat to themselves or others in the workplace <p style="text-align: center;">AND</p> <p>The employer reasonably accommodates those with disability-related or religious objections absent undue hardship.</p>
<p><i>How does an employer determine if an employee presents a "direct threat" in the workplace?</i></p>	<p>A direct threat is a significant risk of substantial harm to the health and safety of the individual or others that cannot be reduced by reasonable accommodation absent undue hardship. The EEOC acknowledges that there may be scenarios where accommodation is not possible considering an employee's job duties and workplace.</p> <p>Determining whether a direct threat exists involves individualized assessment of:</p> <ul style="list-style-type: none"> (1) duration of risk; (2) nature and severity of potential risk; (3) likelihood potential harm will occur; and (4) imminence of potential harm.
<p><i>What are potential accommodations for unvaccinated employees?</i></p>	<p>Depending on an employer's requirements regarding vaccination, an employer who provides an exemption or accommodation may turn to various options including continued masking, social distancing and periodic COVID testing; transfer to a position in which the employee has limited interaction with vulnerable populations, customers, or the public; and remote work.</p>
<p><i>In mandating the vaccine, does it make a difference that the vaccine is available under an EUA rather than full FDA approval?</i></p>	<p>Not from a legal perspective, but the EUA status of the vaccine will likely impact employee responses to an employer mandate. In addition, under an EUA, those administering the vaccine must convey in a patient fact sheet that is provided at the time of vaccination that individuals have the option to accept or refuse the vaccine. This can cause employees to question their employer's ability to mandate a vaccine. Certain employees may be more likely to comply with a mandate if it occurs after the vaccine receives full FDA approval. The FDA approved the Pfizer vaccine effective August 23, 2021.</p>

<i>Can employers require non-employees who enter the workplace to be vaccinated?</i>	Yes, the ADA does not apply to non-employees. However, some states may have laws that require accommodation of non-employees' religious or disability-related objections, such as New York. Employers should also remain cognizant of potential joint employment and independent contractor classification issues in determining whether an individual is a "non-employee."
<i>Can employers require employees who travel for business, or visit customer sites, to be vaccinated?</i>	Yes, under the same conditions set forth in the first question above.
<i>If an employer has a vaccine requirement for employees, must they have the same requirement for contractors?</i>	Generally, no. Employers typically have greater flexibility with non-employees because the ADA only applies to employees. However, some states may have different legal requirements (including New York with respect to independent contractors). Employers should also remain cognizant of potential joint employment and independent contractor classification issues in determining whether an individual is a "non-employee." Also, a number of states are considering legislation that would forbid an employer to take adverse action against individuals who are unvaccinated. See also the discussion of Montana legislation, above.
<i>Is the time spent obtaining the vaccine "compensable time" for wage purposes for non-exempt employees?</i>	If employers are requiring vaccination, then it is safest to compensate non-exempt employees for the time they spend obtaining the vaccination. Additionally, local COVID-19 paid sick leave laws may require paid sick leave or the ability to use paid time off for any vaccine-related absences. OSHA's ETS also imposes such requirements on health care employers.
<i>If an employer requires unvaccinated employees to engage in regular testing and if there are out-of-pocket testing costs, must employers reimburse employees for such costs?</i>	If employers are requiring testing of unvaccinated employees and there is an out-of-pocket cost, then for those employees being tested because they have received an approved exemption as an accommodation for a disability, pregnancy, or sincerely held religious belief, the employer should reimburse them for these out-of-pocket costs. If, however, unvaccinated employees are being tested because of a personal choice not to be vaccinated without a legally protected accommodation, then employers in most states need not reimburse these employees for the testing costs so long as minimum wage is not jeopardized.
Impact of Not Being Vaccinated	
<i>Can employers require unvaccinated employees to continue to work from home?</i>	Yes, if the employee does not have a legally protected reason for not being vaccinated. If an employee cannot get vaccinated for COVID-19 because of a disability or sincerely held religious belief, practice, or observance, and the employee presents a direct threat in the workplace and there is no reasonable accommodation possible to reduce that threat, absent undue hardship, then it would be lawful for the employer to exclude the employee from the workplace. Also, a number of states are considering legislation that would forbid an employer to take adverse action against employees who are unvaccinated. See also the discussion of Montana legislation, above.

<i>Can employers refuse non-employees who are unvaccinated entry to the workplace?</i>	<p>Yes. Some states may, however, have laws that require accommodation of non-employees' religious or disability-related objections, such as New York with respect to independent contractors. Employers should also remain cognizant of potential joint employment and independent contractor classification issues in determining whether an individual is a "non-employee."</p> <p>Also, a number of states are considering legislation that would forbid an employer to take adverse action against individuals who are unvaccinated. See also the discussion of Montana legislation, above.</p>
Information That Can Be Required	
<i>Can an employer ask employees whether they have been vaccinated?</i>	<p>Yes. The EEOC has confirmed that asking an employee about the employee's vaccination status is not a disability-related inquiry under the ADA. If the employee has not been vaccinated, however, and the employer follows up with questions about why, this could elicit information about a disability and therefore should be avoided unless such follow-up questions are job-related and consistent with business necessity.</p> <p>Also, if an employer requires employees to provide proof that they have received a COVID-19 vaccination, the employer should caution employees not to provide any medical information as part of the proof. It should maintain vaccination records separately, as confidential medical information.</p>
<i>Can an employer ask non-employees whether they have been vaccinated?</i>	<p>Yes. The ADA does not apply to non-employees. Employers should also remain cognizant, however, of potential joint employment and independent contractor classification issues in determining whether an individual is a "non-employee."</p>
Other Common Issues	
<i>Do employees who have been vaccinated need to wear masks and social distance?</i>	<p>The CDC recommends that these precautions continue until the extent of the vaccine's protection is finally determined and herd immunity is achieved and the pandemic abates. Moreover, until state or local requirements for social distancing and mask-wearing are repealed or amended, such requirements remain in place.</p>

FAQs for Employees

<i>Why should I be vaccinated if I am willing to do things like social distance and wear a mask?</i>	<p>Vaccines serve a purpose different from but related to social distancing and mask-wearing. Vaccines work with your immune system to enable your body to fight the virus if you are exposed. Other precautions, like covering your mouth and nose with a mask and staying at least 6 feet away from others, help reduce your chance of being exposed to the virus or spreading it to others. Doing both is the best protection from COVID-19.</p>
<i>If I am vaccinated, do I need to continue to wear a mask and social distance?</i>	<p>Yes. As more is learned about the protection that COVID-19 vaccines provide under real-life conditions, it will be important for everyone to continue using all the tools available to prevent transmission of the virus, like covering your mouth and nose with a mask, washing hands often, and staying at least 6 feet away from others.</p>

<i>Once I am vaccinated, when can I stop wearing a mask and social distancing?</i>	There is not enough information currently available to say if or when CDC will stop recommending that people wear masks and social distance. Experts need to understand more about the protection that COVID-19 vaccines provide before making that decision. Other factors, including how many people get vaccinated and how the virus is spreading in communities, will also affect this decision.
<i>If I have already had COVID-19 and recovered, do I still need to get vaccinated with a COVID-19 vaccine when it's available?</i>	COVID-19 vaccination should be offered to you regardless of whether you already had a COVID-19 infection. Anyone currently infected with COVID-19 should wait to get vaccinated until after their illness has resolved and after they have met the CDC criteria to discontinue isolation. Current evidence suggests that reinfection with the virus that causes COVID-19 is uncommon in the 90 days after initial infection. Therefore, people with a recent infection may delay vaccination until the end of that 90-day period, if desired.
<i>If I am vaccinated, will I have to work in the office with other employees who have not been vaccinated?</i>	Whether or not the company is mandating that employees be vaccinated to return to the office, we anticipate that certain employees will establish a valid medical or religious reason for exemption, so vaccinated employees and unvaccinated employees will continue to work together. Currently, all infection control protocols in place for those working in the office are continuing in effect until further notice.
<i>Is the COVID vaccine free?</i>	Currently, vaccine doses purchased with U.S. taxpayer dollars will be given to the American people at no cost. However, vaccination providers may charge an administration fee for providing the shot. Providers can get this fee reimbursed by the patient's public or private insurance company or, for uninsured patients, by the Health Resources and Services Administration's Provider Relief Fund.

The Vaccine Policy Playbook was produced by the Seyfarth Labor & Employment group, an industry-leading practice that works with companies of all sizes on their holistic talent strategies.

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Chairwoman ADAMS. Thank you very much. Finally, we'll hear from Professor Doron Dorfman. Professor, you have five minutes.

STATEMENT OF DR. DORON DORFMAN, ASSOCIATE PROFESSOR OF LAW, SYRACUSE UNIVERSITY COLLEGE OF LAW

Mr. DORFMAN. Thank you for the opportunity to testify before you today. My name is Doron Dorfman, and I'm an Associate Professor of Law at Syracuse University College of Law. My areas of research and teaching are health law, anti-discrimination law, and civil rights. Therefore, in my testimony I focus only on civil rights and anti-discrimination protections, and not on constitutional questions.

The question at the heart of the testimony is this: Can employers require their employees to get vaccinated? The answer to this question is yes, as long as it is consistent with civil rights laws requirements to accommodate employees who are covered under these laws.

In this testimony I focus on three protected groups: religious employees, employees with disabilities, and pregnant employees. I would like to start by stating that American work law operates under the well-established rule of the employer's prerogative and at-will employment, meaning that the employer holds sole authority in the workplace, unless regulated or is contracted otherwise.

Nothing in civil rights laws prevents employers from maintaining a safe workplace, and so private employers have had the discretion to initiate vaccine requirements on their own, and in fact, 25 percent of private employers have done so already, even before the OSHA ETS was proposed.

The only situation in which employees can ask for an exemption from the vaccine requirement, as in as an accommodation is a situation in which the employee belongs to a protected group under civil rights laws. Unwillingness to get vaccinated by employees who do not belong to a protected group can result in a legal adverse employment action by the employer.

Now, I want to give you a very brief overview of the standards an employer needs to legally fulfill to accommodate employees who belong to each one of the three groups. The standards are based on current precedents by the Supreme Court.

Religious employees are covered under Title VII of the Civil Rights Act of 1964. Under Title VII, an employer needs to provide reasonable accommodations to employees sincerely holding religious beliefs, as long as those accommodations do not pose undue hardship on the employer. In 1977, the Supreme Court, in a case called *TWA versus Hardison*, held that anything more than a *de minimis* cost would create an undue hardship on the employer and would allow the employer not to accommodate a religious employee.

Cost is not only measured through financial means but also through disruption to the workplace and burden on third parties, like other employees. Risks to the health of other employees due to the heightened chance of contracting COVID can therefore be considered an undue hardship.

Other accommodations are available to employers who maintain a healthy workplace, as long as they do not pose undue hardship. Those accommodations include getting tested periodically, working remotely, getting reassigned, or a revised schedule. Those accommodations should be considered under the disability accommodation mandate and a pregnancy accommodation mandate as well.

Employees with disabilities are covered under Title I of the Americans With Disabilities Act. An employer is not required to accommodate a disabled employee if doing so would pose a direct threat, meaning a significant risk to the health or safety of others or to the health and safety of the employee who requests the accommodation themselves.

Not being vaccinated could cause an outbreak at the workplace. This could amount to a direct threat to the health and safety of the rest of the employees, as well as the employee who is asking for

the disability accommodation. This is specifically true if you take into account that many people with disabilities are immune-compromised and are at heightened risk of complications from COVID.

Finally, I want to talk about pregnant employees, who are protected under Title VII. According to the Supreme Court in a case called *Young vs. UPS* from 2015, the doctrine on pregnancy accommodations is relational to other accommodated groups at the workplace: meaning that in a situation in which a pregnant employee asks for an exemption from the vaccine, the employer will need to make sure to treat that employee in the same way as other employees who are similarly situated in their ability or inability to work who are not pregnant.

In conclusion, vaccine requirements are consistent with the requirement of civil rights laws as long as the employer evaluates whether certain employees are entitled to be accommodated under the law. Thank you for your attention, and I'm happy to answer any question you might have.

[The prepared statement of Mr. Dorfman follows:]

PREPARED STATEMENT OF DORON DORFMAN

Testimony of Dr. Doron Dorfman, LLB, LL.M., JSM, JSD
Associate Professor of Law, Syracuse University College of Law

Before the United States House of Representatives Committee on Education and Labor
Joint Hearing of the Subcommittee on Workforce Protections and the Subcommittee on
Civil Rights and Human Services

Protecting Lives and Livelihoods: Vaccine Requirements and Employee Accommodations

October 26, 2021

Chairwoman Adams, Chairwoman Bonamici, Chairman Scott, Ranking Member Foxx, Ranking Member Fulcher, Ranking Member Keller, and Members of the Education & Labor Committee and Subcommittees on Workforce Protections and Civil Rights & Human Services, my name is Doron Dorfman, and I am an Associate Professor of Law at Syracuse University College of Law, where my research focuses on health law, disability law, and employment discrimination law. I also serve as a Faculty Affiliate with the Disability Law & Policy Program and the Aging Studies Institute at Syracuse University and serve on the SUNY Upstate Medical University Ethics Committee. Thank you for the opportunity to testify before you today about how COVID vaccine requirements in the private workplace dovetail with civil rights mandates to provide religious, disability, and pregnancy modifications/accommodations.¹ The situation addressed in this testimony is one in which an employee would ask for an exemption from a vaccine requirement as a modification/accommodation. The opinions I offer today are my own.

The main question underlying this testimony is whether a COVID-19 vaccine requirement in the private workplace can stand under the current antidiscrimination doctrines, specifically the need to provide accommodations in the form of modifications from certain workplace policies to protected classes. My answer is yes, and the explanation is set forth in this testimony.

The testimony proceeds as follows: Part I briefly describes how the well-established rule on the employer's prerogative affects the ability of employers to require their employees to get the COVID-19 vaccine. It then discusses the proposed Occupational Safety and Health Administration COVID-19 Emergency Temporary Standard (hereinafter: proposed OSHA COVID ETS), which calls covered employers to require their employees to be vaccinated against COVID-19 or to produce a negative COVID-19 test before coming to work. The testimony then turns to explain the legal standards for requiring employers to provide accommodations/modifications to employees who are members of three legally protected classes. Part II discusses the accommodation mandate for employees who are religious observers, Part III discusses the accommodation mandate for employees with disabilities, and Part IV discusses the accommodation mandate for pregnant employees. Part V concludes the discussion.

Religious employees are protected under Title VII of the Civil Rights Act of 1964 (Title VII),² employees with disabilities are protected under Title I of the Americans with Disabilities Act (ADA),³ and pregnant employees are protected under both statutes.⁴ In regards to religious accommodations, the Supreme Court holds that the need to provide accommodations is applied in terms of the burden imposed on employers. Accordingly, an employer is not required to bear more than a *de minimis undue hardship* in terms of cost, disruption of the workforce, and burden on other employees to accommodate an employee's sincerely held religious beliefs or practices. The standard for disability accommodations is more demanding of employers than is the one for religious accommodations. To accommodate a disabled employee, the employer is required to provide *reasonable* accommodations that do not pose an *undue hardship* or a *direct threat* to the

¹ The Americans with Disabilities Act defines reasonable accommodations as including "appropriate adjustment or modifications of... policies" 42 U.S.C. § 12111(9)(B).

² 42 U.S.C. § 2000e.

³ 42 U.S.C. § 12101.

⁴ Although pregnancy itself is not a disability under the ADA, pregnancy-related impairments may be considered disabilities under the ADA and should be accommodated as such, 29 C.F.R. pt. 1630, app. § 1630.2(h).

employee himself or herself or to other employees. In regard to pregnant employees, the Supreme Court determined that under Title VII, an employer is obligated to treat all employees equally when they are similarly situated. Therefore, any duty to accommodate pregnant employees depends on whether other classes of employees are accommodated at the specific workplace.

My conclusion is that under all three classes, religion, disability, and pregnancy, vaccine exemptions should be allowed in limited cases under an individualized inquiry and that in those cases, a periodic testing requirement could serve as a reasonable accommodation/modification for the vaccine-exempted employees among other possible accommodations.

The Equal Employment Opportunity Commission (EEOC) recently listed some possible accommodations for unvaccinated employees that may come into play as long as they do not pose an undue hardship on the employer or a direct threat. Those accommodations include wearing a face mask, working at a social distance from coworkers or nonemployees, working a modified shift, working remotely (through telework), or accepting a reassignment.⁵

I. VACCINE REQUIREMENTS AND THE EMPLOYER'S PREROGATIVE

Work law in the United States operates under a simple default governance rule, that of the employer's prerogative: An employer holds sole authority in the workplace unless regulated or is contracted otherwise (either through collective bargaining agreements or individual contracts).⁶ Therefore, it is the employer's prerogative to hire and terminate at will,⁷ unless the employee in question is protected under a civil rights law such as Title VII or Title I of the ADA. The employer's prerogative is thus akin to an ocean through which the employer can navigate his or her ship as he or she likes, and civil rights law is akin to a small number of islands, the only obstacles through which the ship cannot sail. In the antidiscrimination context, an employee can only receive shelter on one of those islands if he or she belongs to a protected class. In this testimony, the protected classes of employees I was asked to discuss are religious observers (covered under Title VII), employees with disabilities (covered under the ADA) and pregnant employees (who can be covered under both statutes). Civil rights law requires providing accommodations to members of those three protected classes, which can include modifications to certain policies at the workplace. Failing to accommodate an employee from a protected class may be considered illegal discrimination, in violation of civil rights law.⁸

⁵ U.S. Equal Employment Opportunity Commission, *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws* § k.2, EEOC, GOV (2021), <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>.

⁶ RESTATEMENT (THIRD) OF AGENCY § 7.07(f) (AM. LAW. INST. 2006) (“[A]n agent is an employee only when the principal controls or has the right to control the manner and means through which the agent performs work”); Jay M. Feinman, *The Development of the Employment At Will Rule*, 20 AM. J. LEGAL HIST. 118, 118 (1976).

⁷ RESTATEMENT OF EMP'T LAW § 2.01 (AM. LAW. INST. 2015) (“Either party may terminate an employment relationship with or without cause unless the right to do so is limited by a statute, other law or public policy, or an agreement between the parties, a binding employer promise, or a binding employer policy statement”).

⁸ 42 U.S.C. § 12112(b)(5)(A) (2008) (“the term ‘discriminate against a qualified individual on the basis of disability’ includes—not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity...”).

Under the rule of the employer's prerogative, employers have very broad discretion regarding the policies they can put in place to maintain the health and safety of their employees. In that respect, the employers' policies can stand as long as they do not violate their mandate to accommodate protected classes under civil rights law.

Unwillingness to become vaccinated that is unrelated to any one of the three protected classes—religion, disability, or pregnancy—is unprotected under federal law.⁹ Generally speaking, an employer could, without any legal consequence, take an adverse action against an employee who refuses to be vaccinated under the well-established rules of the employer's prerogative and at-will employment.

On September 9, 2021, the Biden administration drafted a detailed emergency plan, the proposed OSHA COVID ETS, aimed at combating the spread of COVID-19, which is based on scientific data.¹⁰ The proposed OSHA COVID ETS is an extensive six-part plan. For the sake of this testimony, I will focus on the plan's first component, which calls private employers with 100 or more employees (hereinafter: covered employers) to require COVID-19 vaccines for their employees. In case there are employees who remain unvaccinated, the covered employers will need to require these employees to produce a periodic negative COVID-19 test before being allowed into the workplace.¹¹ Covered employers would be required to provide employees with paid time off to allow them to get vaccinated.¹²

The proposed OSHA COVID ETS as it applies to private employers does not add to or change the legal standard allowing vaccine requirements. As nothing in antidiscrimination law prevents employers from maintaining a safe workplace, private employers have had the discretion to initiate vaccine requirements on their own.¹³ Indeed, as of October 2021, one in four private employers has already initiated a vaccine requirement and an additional 13% of private employers plan to put such a requirement in place in the coming months.¹⁴ What the proposed OSHA COVID ETS

⁹ Although beyond the scope of the analysis brought forth in this testimony, it is important to mention that the Supreme Court rejected constitutional challenges to vaccine requirements, so long as they do not involve a protected class under antidiscrimination law. In the 1905 case *Jacobson v. Massachusetts*, The Court determined that a smallpox vaccine requirement imposed by the Board of Health of Cambridge, Massachusetts, did not violate the due process right to bodily integrity of a priest at the Evangelical Lutheran Augustana Church priest in Cambridge. The Court determined that there is no constitutional right to harm other citizens by refusing a vaccine. Justice John Marshall Harlan, who wrote the opinion, explained, "the liberty secured by the Constitution . . . does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint . . . On any other basis, organized society could not exist with safety to its members." See *Jacobson v. Massachusetts*, 197 U.S. 11, 26 (1905).

¹⁰ WHITE HOUSE, PATH OUT OF THE PANDEMIC: PRESIDENT BIDEN'S COVID-19 ACTION PLAN (2021), <https://www.whitehouse.gov/covidplan/>.

¹¹ *Id.*

¹² *Id.*

¹³ This is also the stance taken by the EEOC in its updated guidelines regarding vaccination published on October 13, 2021: "The federal EEO laws do not prevent an employer from requiring all employees physically entering the workplace to be fully vaccinated against COVID-19, subject to the reasonable accommodation provisions of Title VII and the ADA and other EEO considerations." U.S. Equal Employment Opportunity Commission, *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*, supra note 5, § k.1.

¹⁴ WHITE HOUSE, WHITE HOUSE REPORT: VACCINATION REQUIREMENTS ARE HELPING VACCINATE MORE PEOPLE, PROTECT AMERICANS FROM COVID-19, AND STRENGTHEN THE ECONOMY 11 (October 7, 2021), <file:///Users/dorondorffman/Downloads/Vaccination-Requirements-Report.pdf>.

intends to do is to make this practice uniform and apply the vaccine requirement to *all* covered employers as part of the efforts to curb the pandemic.

The question at the heart of the testimony is this: Can employers require their employees to get vaccinated? The answer is yes as long as it is consistent with civil rights laws' requirements to accommodate employees who are religious observers, people with disabilities, or those who are pregnant. The option to get tested periodically instead of getting vaccinated suffices as an accommodation under the circumstances. Employers could thus legally require vaccination of all their employees.

To establish this conclusion, I will turn to review the legal standards for accommodating employees who maintain religious observances, disabled employees, and pregnant employees and then apply the standards to the vaccine requirement.

II. RELIGIOUS ACCOMMODATIONS

Religion is not clearly defined under Title VII. Yet the Supreme Court famously recognized religion to be "[a] sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualified for the exemption..."¹⁵ Later the Court expanded the category to include moral and ethical beliefs that assumed the function of religion in the individual's life.¹⁶ Courts are allowed to inquire as to the sincerity of an employee's religious belief and assert a finding on whether a "bona fide religious belief" is found.¹⁷ The employer is entitled to make a "limited inquiry into the facts and circumstances of the employee's claim" about his or her religious beliefs underlying the accommodation request.¹⁸

The rule on accommodating religious beliefs is found in Section 701(j) to Title VII, which reads:

The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to *reasonably accommodate* to an employee's or prospective employee's religious observance or practice *without undue hardship* on the conduct of the employer's business.¹⁹ [emphasis added]

¹⁵ *United States v. Seeger*, 380 U.S. 163, 176 (1965).

¹⁶ *Welsh v. United States*, 398 U.S. 333, 342-343 (1970). See also the Equal Employment Opportunity Commission's (EEOC) definition of religion adopting the construction of the Supreme Court in the *Seeger* and *Welsh* cases, 29 C.F.R. § 1605.1 ("In most cases whether or not a practice or belief is religious is not at issue. However, in those cases in which the issue does exist, the Commission will define religious practices to include moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views.")

¹⁷ *E.E.O.C. v. Union Independiente de la Autoridad de Acueductos y Alcantarillados de Puerto Rico* 279 F.3d 49, 56-57 (1st Cir. 2002) ("The requirement that the employee have a 'bona fide religious belief' is an essential element of a religious accommodation claim. Title VII does not mandate an employer or labor organization to accommodate what amounts to a 'purely personal preference.' . . . In order to satisfy this element, the plaintiff must demonstrate both that the belief or practice is religious and that it is sincerely held").

¹⁸ EEOC, *Questions and Answers: Religious Discrimination in the Workplace*, EEOC-NVTA-2008-2 § 8 (July 22, 2008), <https://www.eeoc.gov/laws/guidance/questions-and-answers-religious-discrimination-workplace>.

¹⁹ 42 USC § 2000e(j).

The law on religious accommodations has evolved in the courts in a much more stringent way compared with how the law on disability accommodations has.²⁰ Despite the seemingly broad language of the statute, the Supreme Court has interpreted the obligation narrowly.²¹ The leading case on the issue is *Trans World Airlines v. Hardison* handed down by the Supreme Court in 1977.²² In light of the Court's analysis in the case, the standard in religious accommodations cases is that anything more than a "*de minimis* cost" would create an undue hardship on the employer and would allow the employer not to accommodate the religious employee.²³ The EEOC provided some guidance on when a religious accommodation possesses more than *de minimis* cost, stating that:

[C]osts to consider include not only direct monetary costs but also the burden on the conduct of the employer's business. For example, courts have found undue hardship where the accommodations... Impairs workplace safety.²⁴

When applying this *de minimis* standard to the case of vaccine requirements, it is easy to conclude that an exemption from vaccination *and* from periodic testing (which could be offered as alternative) creates an undue burden as it holds a great chance of impairing the safety of other employees due to the significant risk of contracting the highly contagious COVID-19. Therefore, no employer should grant any request for such exemption as the basis for a religious accommodation.

In a subsequent case, the Supreme Court determined that once an employer offers the religious employee a reasonable accommodation, that satisfies the employer's duty under Title VII, even if the employee views a different accommodation as better responding to his or her needs.²⁵ In the circumstances before us then, granting employees who do not wish to get vaccinated due to their religious observance the option of being tested periodically is likely a reasonable accommodation that satisfies the legal obligation to accommodate religious beliefs under Title VII. This is unless the testing requirement violates the employee's sincerely held religious views, a case that seems hypothetical.

The conclusion is therefore that a vaccine requirement satisfies the legal standards for providing religious accommodations at the workplace.

²⁰ JOSEPH A. SEINER, EMPLOYMENT DISCRIMINATION: PROCEDURE, PRINCIPLES, AND PRACTICE 473 (2nd ed. 2019).

²¹ CHARLES A. SULLIVAN & MICHAEL J. ZIMMER, CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION 378 (9th ed. 2017).

²² 432 U.S. 63 (1977).

²³ As Justice White wrote for the majority opinion: "To require TWA to bear more than a *de minimis* cost in order to give respondent Saturdays off would be an undue hardship." See *Id.*, at 65.

²⁴ EEOC, *Questions and Answers: Religious Discrimination in the Workplace*, *supra* note 18, § 9.

²⁵ *Ansonia Bd. Of Educ. v. Philbrook* 476 U.S. 60, 61 (1986) ("Neither the terms nor the legislative history of § 701(j) supports the Court of Appeals' conclusion that an employer's accommodation obligation includes a duty to accept the employee's proposal unless that accommodation causes undue hardship on the conduct of the employer's business. An employer has met its obligation under § 701(j) when it demonstrates that it has offered a reasonable accommodation to the employee. The employer need not further show that each of the employee's alternative accommodations would result in undue hardship").

III. DISABILITY ACCOMMODATIONS

The ADA defines a person with a disability as a person having a physical or mental impairment that substantially limits one or more major life activities, a person with a record of such an impairment, or someone regarded as having such an impairment.²⁶ In the ADA Amendments Act of 2008, Congress instructed federal courts to adopt a broad interpretation of the definition of disability and to reject the previous strict and narrow interpretation of the term.²⁷ To receive protection under the ADA, in addition to being a person with a disability, the individual needs to be qualified for the job, meaning that he or she “with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.”²⁸

One of the primary goals for the ADA was to integrate people with disabilities into the labor market.²⁹ To achieve this mission, Title I to the ADA, which covers employment discrimination, includes an accommodations mandate that imposes an active duty on employers to provide reasonable accommodations with the goal of removing barriers to allow equal opportunities for and participation by disabled people. The accommodation mandate is broad and includes within it “appropriate adjustment or modifications of... policies.”³⁰ Failing to provide reasonable accommodations or modifications for a known disability constitutes discrimination.³¹ Nevertheless, and as stated previously, a person who is not qualified is not covered under the ADA and should therefore not be accommodated.

An employee may not be qualified for the job if he or she presents a direct threat in the workplace. Posing a direct threat means “a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation.”³² According to the ADA regulations, the assessment of whether an employee presents a direct threat, and thus is not qualified and should not be accommodated, should be made on an individual basis and “be based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence.”³³ In *Chevron U.S.A. v. Echazabal*, the Supreme Court recognized that the direct threat defense available to employers allows them to screen out employees with disabilities not only for risks that he or she would pose to others but also for risks to his or her own health or safety.³⁴

Applying these standards to the vaccine requirements, in case an employee requests an exemption from vaccination and an alternative periodic testing as an accommodation/modification, an employer can claim that on the basis of the scientific and medical knowledge at hand, not being vaccinated or not knowing the employee’s COVID-19 status could cause an outbreak at the

²⁶ 42 U.S.C. § 12102(1).

²⁷ 42 U.S.C. § 12101(b).

²⁸ 42 U.S.C. § 12111(8).

²⁹ SAMUEL R. BAGENSTOS, LAW AND THE CONTRADICTIONS OF THE DISABILITY RIGHTS MOVEMENT 29 (2009).

³⁰ 42 U.S.C. § 12111(9)(B).

³¹ 42 U.S.C. § 12112(b)(5)(A) (“the term ‘discriminate against a qualified individual on the basis of disability’ includes... not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity”).

³² 42 U.S.C. § 12111(8).

³³ 29 C.F.R. § 1630.2(f).

³⁴ 536 U.S. 73, 78-79 (2002).

workplace.³⁵ This would put the rest of the employees, as well as the employee asking for the disability accommodation, at significant risk to their health or safety. This is specifically the case, as people with certain disabilities are at an increased risk of infection, severe illness, and complications from contracting COVID-19 because of underlying medical conditions.³⁶ An unvaccinated or regularly untested employee will under these circumstances be considered unqualified for the job and therefore not be entitled to protection under the ADA.

The conclusion is therefore that a vaccine requirement satisfies the legal standards for providing disability accommodations in the workplace.

IV. PREGNANCY DISCRIMINATION

Although pregnancy itself is not a disability under the ADA, pregnancy-related impairments (such as gestational diabetes) may be considered disabilities under the ADA and should be accommodated as such.³⁷ In 1978, Congress passed an amendment to Title VII known as the Pregnancy Discrimination Act (PDA), which prohibits discrimination against pregnant women. The second clause of Section 701(k), which embodies the antidiscrimination mandate and is relevant for our discussion, reads as follows:

[W]omen affected by pregnancy, childbirth, or related medical conditions *shall be treated the same for all employment-related purposes*, including receipt of benefits under fringe benefit programs, *as other persons not so affected but similar in their ability or inability to work...*³⁸ [emphasis added]

Yet in the decades following the enactment of the PDA, federal courts tended not to find that employers' denials of accommodations for pregnant women constituted violations of the PDA. Courts concluded that the pregnant employee failed to identify anyone "similar in their ability or inability to work" who had been treated more favorably and thus failed to make a viable claim under the PDA.³⁹ In 2015, the Supreme Court was called to interpret the clause in *Young v. United Parcel Service*.⁴⁰ The Supreme Court in *Young* rejected the district and appellate courts' trend of approving employer refusals to accommodate pregnancy. The holding in *Young* sends a strong message to employers; if there are any policies accommodating an appreciable number of employees but not pregnant women, then unless the employer can show *sufficiently strong* reasons

³⁵ In late August 2021, the FDA fully approved the Pfizer vaccine and found it to be safe and effective, meeting the agency's standard of approval, U.S. FOOD & DRUG ADMIN., FDA APPROVES FIRST COVID-19 VACCINE (2021), <https://www.fda.gov/news-events/press-announcements/fda-approves-first-covid-19-vaccine>.

³⁶ Centers for Disease Control & Prevention, *People with Disabilities*, CDC.GOV <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-disabilities.html>. An estimated 83% of people under the age of sixty-five who died from COVID were people living with underlying medical conditions that meet the legal definition of disability, including heart disease, cancer, kidney disease, diabetes, and lung disease. See: Jonathan M. Wortham et al., *Characteristics of People Who Died with COVID-19—United States, February 12–May 18, 2020*, 69 CENTERS FOR DISEASE CONTROL & PREVENTION: MORBIDITY & MORTALITY WEEKLY REPORT 923, 924 (2020), <https://www.cdc.gov/mmwr/volumes/69/wr/mm6928e1.htm>.

³⁷ 29 C.F.R. pt. 1630, app. § 1630.2(h).

³⁸ 42 U.S.C. § 2000e(k).

³⁹ Joanna L. Grossman & Gillian Thomas, *Making Sure Pregnancy Works: Accommodation Claims After Young v. United Parcel Service, Inc.*, 14 HARV. L. & POL'Y REV. 319, 325 (2020).

⁴⁰ 575 U.S. 206 (2015).

for not accommodating pregnant women, the employer will be violating the PDA.⁴¹ According to the Court, the pregnant employee will also need to show that the employer's policies not accommodating her impose a *significant burden* on pregnant employees.⁴²

In conclusion, the significance of *Young* for employers is that failing to accommodate pregnant women while accommodating other employees is risky under Title VII and that employers are advised to accommodate pregnancy to avoid liability.⁴³ This means that the doctrine on pregnancy accommodations is relational to the other accommodated groups at the workplace.

For the purposes of this testimony, in a situation in which pregnant employees ask for an exemption from the vaccine, the employer will need to make sure to treat her the same way as an employee who is "similarly situated but outside the protected class,"⁴⁴ one who is "similar in their ability or inability to work."⁴⁵ Because I cannot think of any situations in which other protected groups should be exempted from both the vaccine and periodic testing requirements, I do not envision instances in which pregnant women would be exempted from those either.

The conclusion is therefore that a vaccine requirement satisfies the legal standards for providing pregnancy accommodations at the workplace.

V. CONCLUSION

After considering the statutory standards and the legal doctrines developed by the Supreme Court for accommodating employees who are religious observers, people with disabilities, and pregnant women, I conclude that these standards do not contradict a vaccine requirement whether it was independently initiated by private employers or was put in place because of the proposed OSHA COVID ETS. The option to get tested periodically instead of being vaccinated can be considered in and of itself a reasonable accommodation among other possible accommodations.

Chairwoman Adams, Chairwoman Bonamici, Chairman Scott, Ranking Member Foxx, Ranking Member Fulcher, Ranking Member Keller, and members of the committee and subcommittee, I am appreciative of your focus on this important issue, and I thank you for the opportunity to testify before you today. I look forward to answering your questions.

⁴¹ *Id.* at 208.

⁴² *Id.*

⁴³ Bradley A. Areheart, *Accommodating Pregnancy*, 67 ALA. L. REV. 1125, 1128 n. 7 (2016) ("certainly, *Young* has made it more likely that employers will voluntarily extend pregnancy accommodations simply as a matter of being safe rather than sorry").

⁴⁴ *Young*, *supra* note 40, at 206

⁴⁵ 42 U.S.C. § 2000e(k).

Chairwoman ADAMS. Thank you. Under Committee Rule 9(a), we will now question witnesses under the five-minute rule. As this is a joint Committee hearing, after the Chairs and Ranking Members, I will be recognizing the Subcommittee members based on seniority order on the full Committee. As Chair, I now recognize myself for five minutes.

Thank you to my colleague, Chair Bonamici, and to my other colleagues of the Subcommittees on Workforce Protections and Civil Rights and Human Services for joining us today. And to our witnesses, thank you as well for sharing your expertise.

We must understand both the law and our new reality brought by the pandemic. This hearing could not have come at a more time-

ly juncture. Employees and employers must have a clear understanding of any requirements at the workplace, ranging from a dress code to a vaccine requirement. I look forward to the witnesses' answers that they shed further light on mitigation measures that workplaces have adopted and will continue to consider.

So, Ms. Luther, will you describe how Columbia Sportswear handles employee requests for pandemic-related accommodations?

Ms. LUTHER. Absolutely. Thank you, Chair Adams. So, Columbia Sportswear, of course, considers accommodations for vaccines. We have not fully implemented a mandate at this point, so we are still working through that process, and frankly, would very much appreciate guidance, particularly as it relates to religious exemptions.

As I'm sure you are aware some of the states have begun to mandate the vaccines. There are some people who are claiming religious exemptions that may not quite qualify, and so companies would very much appreciate further guidance in how to think through that. But as we consider accommodations, we would be looking at various alternatives, depending on the nature of the role, from testing to remote work.

As you may know, we have people who are in very different types of roles in the company, so depending on job role we would consider whether it would be appropriate to have remote-type work. But again, testing, masking, those kinds of activities, in a limited way, could be used for accommodations.

Chairwoman ADAMS. Thank you. So, based on your personal knowledge and experiences, how have employees responded to the safety protocol and vaccination requirements at Columbia?

Ms. LUTHER. Absolutely very well, for the most part. If you're talking about the accommodations—such as physical barriers, physical distancing, masking. Overall, we've had very good luck, with the exception that, in some parts of the country, there are resistance, and I'd say in different geographic locations where vaccines are not as accepted, particular those retail employees have been somewhat at risk where we've had mask mandates.

And our concern has been, in terms of engagement with customers, there's been some resistance.

Chairwoman ADAMS. OK ma'am. I want to move on to another question but thank you very much. So, Professor Shapiro, will you elaborate on the definition of "grave danger" and how COVID-19 could be considered a grave danger?

Mr. SHAPIRO. Yes. The courts are seeking to distinguish workplace hazards that cause relatively minor problems, (such as skin irritation, for example), from those that are deadly, usually defined as the worker can be at risk of dying or of a very serious illness, such as being hospitalized with COVID or long-term COVID.

Chairwoman ADAMS. OK. Well thank you. Professor, it's always good to welcome and to see witnesses from North Carolina. Thank you, again.

Mr. SHAPIRO. You're welcome.

Chairwoman ADAMS. What prongs of the Occupational Safety and Health Act must OSHA prove to justify the issuance of an ETS?

Mr. SHAPIRO. It must prove both that a risk to workers during the six-month interim period before there's a permanent standard

is grave, and that it is necessary. So, we've heard the suggestion that this is not OSHA's business because vaccines are a public health concern, and that's true enough, but OSHA was charged in 1971 to protect workers from disease in the workplace and has been in the health protection business since 1971.

Chairwoman ADAMS. Oh, OK. Great. Well thank you very much. I'm going to—I did want to know though why the issuance of an ETS is needed now, If you can give us that by 22 minutes, why is it needed now, in comparison to the issuance of the ETSs before?

Mr. SHAPIRO. We know now two things: not as many people have become vaccinated as we would have wished earlier in the year, and the Delta variation has caused a pandemic again in the United States, and there's the risk of additional pandemics down the line from additional variations in the next?

Chairwoman ADAMS. Thank you so much. I am out of time, and I'm going to yield now to Mr. Keller. You're recognized, Ranking Member Keller, for your questions, five minutes.

Mr. KELLER. Thank you. Mr. Hecker in September President Biden's Chief of Staff Ron Klain retweeted a comment stating that OSHA doing this vax mandate is an emergency workplace safety rule is the ultimate work around of the Federal Government to require vaccination.

This was an admission that the administration is attempting to circumvent the rule of law by stretching OSHA's limited authority under the Occupational and Safety Health Act to enact a sweeping public health edict. Furthermore, President Biden demanded back in September that OSHA issue this ETS quickly and provided specific guidance on what it should include.

Is this highly improper approach consistent with proper OSHA emergency temporary standards or rulemaking in general?

Mr. HECKER. Thank you, Ranking Member Keller. I would say again section 6(c) of the OSH Act refers to an ETS that is necessary to address a grave danger. The Secretary is designated to make that determination, not the President, in the statute, and presumably he's handed that to his Occupational and Health Administration.

So that's what OSHA needs to determine. OSHA needs to determine there is a grave danger, and they need to show that it's necessary, that an ETS is necessary, to address that danger in the workplace. And so, I would say, you know, it's for OSHA and the court to determine whether they've met that standard, but I think, based on the written and oral testimony given today, I think there are a number of hurdles that the administration needs to clear to meet that threshold, that statutory requirement.

Mr. KELLER. I would agree with that, and I would say that, you know, our businesses, our employers, our families, friends, and neighbors that run these businesses, did a good job of keeping their employees safe throughout the pandemic before vaccine mandate, when they took the precautions necessary to keep people from spreading the virus in their workplaces.

Do you think that the White House edicts will impact the final ETS? Is it vulnerable to legal challenge?

Mr. HECKER. For the same reasons, it's certainly vulnerable to legal challenge, and OSHA will need to address, I think, some of

the directives that came directly from the President rather than the Secretary, or from the Occupational Safety and Health Administration. For example, you know, OSHA has certain regs, or requirements and rules, that address the number of employees impacted for application, but here, the 100-employee threshold didn't seem to be a considered determination by the administration—by 'the agency' I should say—but, rather, you know, passed down from President's Bidens action plan on December 9.

So, I think a lot of employers are concerned, and presumably employees as well, whether there will be an exact impact. We don't know exactly how it's going to be calculated and, you know, exactly who may be covered, depending on how that determination is made. Again, that came top-down rather than from considered, you know, discourse internally at OSHA.

Mr. KELLER. OK. I appreciate that. Also Mr. Hecker, in October COVID-19 case rates dramatically decreased in the United States as the summer surge from the Delta variant peaked, and more and more of Americans have acquired immunity from the virus through infection and vaccination.

Further, employers around the country have already implemented robust policies, as I mentioned before, and protocols based on evolving CDC and OSHA guidance to protect their workers. Given these facts, do you believe that the American workers are presently in grave danger in the workplace?

Mr. HECKER. You know, that's a determination, again, for OSHA to make about whether they believe they can meet that standard. But what I would say is with the administration sort of trumpeting its successes, its partnerships with employers to put in these other risk mitigation protocols that you've mentioned, I believe that sort of undermines the necessity for when we are seeing President Biden on October 14th put in a number of statistics in the remarks, he made showing decline in hospitalization rates, in cases, and that's across a number of states, a majority of states.

So, it's hard to say that as planned, the current plan, the pre-ETS plan is working, and still show a necessity for an ETS when your other risk mitigation protocols, your national emphasis program on COVID-19, your other regulations, can be used to cite employers related to COVID.

If you're claiming they're working, how does that mean you need an ETS as well?

Mr. KELLER. I appreciate that, and I would just hope that Columbia Sportswear is making sure that their employees that make their products around the globe, that they're fighting in those nations, too, to make sure their workers are protected. Thank you, and I yield back.

Chairwoman ADAMS. Thank you. I recognize Chair Bonamici five minutes.

Chairwoman BONAMICI. Thank you, Chair Adams, and to all the witnesses. And I think I want to start with a reminder that more than 700,000 people in the United States have died during this pandemic, and the recent surge that we saw, an overwhelming majority of people who are hospitalized are unvaccinated. So, Ms. Luther, thank you again for being here. Oregon, as we know, has an exceptional outdoor recreation industry. It's responsible for hun-

dreds of thousands of jobs, and billions in revenue, and it's a critically important industry.

And Columbia Sportswear has a globally recognized brand that operates as a nationwide employer. You said you have stores in 90 locations, and some states have, as you mentioned, implemented prohibitions on private employers instituting vaccine requirements. So how has that affected your efforts to promote vaccinations in your workplace?

Ms. LUTHER. Thank you, Chair Bonamici. It's a pleasure to see you, and it absolutely has made it more complicated. When you think about a national company, and trying to be efficient with your operations, and a complex footprint across the United States, the, the inefficiencies of having to address different circumstances for different employees and different locations is quite burdensome.

And when you think about travel between locations, having some who are vaccinated, some who are not vaccinated, it definitely complicates our ability to communicate clearly with our employees and keep our employees safe. Unfortunately, just a few weeks back we did lose our first employee in this effort.

Chairwoman BONAMICI. I'm sorry to hear that, and to followup on that, Columbia Sportswear is currently navigating conflicting State and local regulations, so how would a uniform national OSHA vaccination standard benefit Columbia and other companies?

Ms. LUTHER. It would absolutely be?we are not medical professionals, and we don't want to be in the business of interpreting what would be the best medical way to approach this pandemic. We need guidance from the Federal Government to help us keep our employees safe.

Since the beginning of this pandemic, we have taken extraordinary measures, sometimes well in advance of what local authorities were prepared to provide guidance for, so we've been eager to do everything we can to keep our employees safe., But we are not in the business of interpreting pandemic best practices, and that's where we really need the Federal Government to step in and provide that guidance for us.

Chairwoman BONAMICI. I appreciate that. Did you want to take just a moment to respond to Mr. Keller's comment about Columbia around the globe?

Ms. LUTHER. Absolutely. We have done extraordinary things to get our employees vaccinated, in fact, working to get oxygen supplies in India when they were in short supply. We have been cooperating with local authorities to help and partner with factories in Vietnam to ensures ? so, we have been working with partners around the world to do whatever we can. Obviously, we don't control supply of vaccine, but where our employees have been stranded in India, or in other places, we have gone the extra mile to ensure we've extended catastrophic medical care to employees in other countries to ensure that they had access to the highest quality of medical care. So absolutely, we are committed to that across the world.

Chairwoman BONAMICI. Thank you. And thank you so much, Ms. Luther. Professor Dorfman, under Title VII of the Civil Rights Act, what are an employer's legal obligations when it receives numer-

ous, potentially hundreds of requests for religious-based exemptions to a vaccination requirement, and how does that volume of employees? requests for exemptions affect the workplace?

We're seeing this already in the district I represent, for example, where a large number of employees are saying, 'We're religious, they don't, 'we can't get vaccinated,?' so how is that handled under Title VII?

Mr. DORFMAN. Thank you for this question. So, an employer can consider such a situation under the undue hardship on the employer. At a certain point, reviewing the large number of requests for accommodations can be really detrimental to the way we run our businesses, not to mention, you know, giving all those accommodations to many employees would actually make it much harder for the employer to run its business.

In those circumstances, employers would not be under any legal obligation to grant those requests.

Chairwoman BONAMICI. And do you know, Professor Dorfman, of any religion that prohibits vaccination?

Mr. DORFMAN. I personally do not know of any religion that prohibits vaccination, per se.

Chairwoman BONAMICI. Thank you so much. And thanks again to all our witnesses, and I yield back the balance of my time.

Chairwoman ADAMS. Thank you, Chair Bonamici. I'm going to yield now to Ranking Member Fulcher.

Mr. FULCHER. Thank you so much, Madam Chair, and I appreciate the candor of Ms. Luther, just by identifying the cumbersome nature of what this will employ on our workforce. So, I have a question for Mr. Hecker, and this has to do with just the realistic impact that an ETS would really have.

So, Mr. Hecker you stated that a recent survey from Society of Human Resource Management found a whopping 90 percent of employers believe it will be somewhat or very challenging to implement the OSHA ETS, and 89 percent believe they will lose workers as a result of that.

And so, just from a realistic standpoint here, what are you hearing about the potential impact of this ETS on workforce and the ability to retain that workforce?

Mr. HECKER. Thank you, Ranking Member Fulcher. Yes, from client counseling, we know it's already a tight labor market, and people are having difficulty retaining or onboarding staff, and I can look at my social media feeds and see people reaching out, saying, 'If you know anyone, I'm looking.?'

You know, I had a client conversation recently where the client said, 'You know, I'm not joking' this may sound like I'm joking' but I cannot lose one person. I have over 300 openings, and I can't fill them. So, if I lose a person, it's going to have real impacts on my operations.?' And I think, you know, we'll see things like that. There was just a discussion on the combinations.

I think most employers are taking those seriously and looking at going through the individual interactive process. I think it's hard to dismiss a batch of accommodations out of hand, so that process, standing that up, will be quite difficult if you're not used to the volume.

Some smaller businesses in the 100 to 500 number range of employees, they may not have the H.R. support or the legal department or the compliance department, to stand this up quickly, and they need time. You know, OSHA determined not to take stakeholder input here, in this emergency temporary standard process, and typically, under the APA, Administrative Procedure Act, you would have notice of comment rulemaking that would account for stakeholder input, and we would have a better idea, Ranking Member Fulcher, about what really concerns employers on the ground, and OSHA would be able to consider that.

They didn't do that here. In the OIRA stakeholder meetings—I think there have been more than 70—unfortunately we fly blind in those. Nobody has the text of this ETS yet, at least in the regulated community. You know OSHA has it, OIRA has it, but beyond that we don't know what's in it, so it's really hard to determine, you know, what testing allocation—the cost of testing allocation will be, what the paid time off requirements will be.

Mr. FULCHER. Right, right.

Mr. HECKER. Just don't know, and those are all the practical impacts on employers.

Mr. FULCHER. Thank you, Mr. Hecker. I've got just a couple minutes left, and I have a couple more questions here. This one in regard to test costs: there's likely going to be a provision for testing here. And there are valid concerns that implementation of the ETS would overwhelm some of that testing capacity. Have you heard anything from employers about the availability and the cost of testing kits, and what would the impact of this be, and the average costs of these tests, and who picks up the bill for it?

Mr. HECKER. Yes. Anecdotally, Ranking Member Fulcher, I have heard some concern about the availability of testing and the costs. I had a client suggest that it was going to be in the hundreds of thousands of dollars for them if it's allocated to the employers. Again, we don't know. Typically, throughout the pandemic I think costs have tended to be allocated to the employers, rather than employees.

So, you know, even if there may be some justification for shifting that here, I don't know that anyone is optimistic on the employer side that's going to happen. But yes, it's, another question we don't know is, there's time to reach full vaccination. In the meantime, while people are getting—those who choose to be vaccinated, while they're getting vaccinated—well, they need to undergo weekly testing as well until they've reached that full vaccination.

So, you may have to roll out a testing program even if the vast majority of your employees choose to be vaccinated. I think that's something that we haven't heard much from OSHA on, and you know, personally I'm curious about whether those who choose to become vaccinated will need to test in the meantime. We know that those who choose the testing option will be subject to it weekly at least, and there will be real costs, and we could stretch the supply chain even further.

Particularly, we also don't know what kind of tests will be accepted under the reg if it will be rapid, or something more.

Mr. FULCHER. OK, thank you, Mr. Hecker. Madam Chair I yield back.

Chairwoman ADAMS. Thank you very much. I want to recognize now the Chair of Education and Labor, Mr. Scott. You are recognized for five minutes sir.

Mr. SCOTT. Thank you, Madam Chair. Madam Chair, I ask unanimous consent to place in the record a statement from Professor Douglas Laycock.

Chairwoman ADAMS. So ordered.

Mr. SCOTT. Madam Chair, you've indicated pride in North Carolina, in Virginia, Dr. Laycock, Professor Laycock, is one of the foremost religious liberty law scholars in the Nation. He's at the University of Virginia Law School, and he states in his statement, "I am about a strong a supporter of religious exemptions of burdensome regulations as you could find in legal academia. If the law or regulation requires an American to violate his or her own conscious, I believe the government should grant that person an exemption unless some truly compelling government interest requires that an exemption be denied. But some government interests are really, really are compelling, and every Constitutional right is subject to occasion limits or exceptions." He goes on to cite Supreme Court cases, which show the precedents of the Supreme Court which have rejected many challenges to vaccine mandates.

Professor Dorfman, you've had a couple questions on the religious exemption. Can the employee take into account the impact accommodations might have on customers, coworkers, and others?

Mr. DORFMAN. Yes. So, when we are considering what is the cost? When we are considering the cost and we have Supreme Court telling us that more than a di minimis cost would create a situation where an employer does not need to accommodate a religious employee, we take into account also the harm to third parties. We also take into account the ability to conduct the business.

Mr. SCOTT. Thank you. And when you deal with the religious exemption, we know that many of this vaccine hesitancy is not religious, it's actually political. How do you deal with that, particularly in light of the fact that there's been with many of them expressed no opposition to vaccines to children who routinely get vaccinated to attend public school? How do you deal with that?

Mr. DORFMAN. So, an employer has the authority to conduct a limited inquiry, which needs to be respectful of the religious employee, but it also needs to be individualized through an interactive process. But in that individualized inquiry, there is, in order tease out religious beliefs, a way to do that is looking at consistency of the claims.

For example, if employee actually allows for certain vaccination, and not others, that's inconsistent. For example, if another employee is objecting to a vaccine because of the use of fetal cell lines in its development, we would look at whether that employee has actually taken other medications that have been using that type of methodology in its development.

If it does, it's inconsistent, and it indicates that it's not sincere religious belief.

Mr. SCOTT. Thank you. Professor Shapiro, a question was raised about whether the ETS, which does limit input, can you tell me how long a normal OSHA regulation takes to implement?

Mr. SHAPIRO. On average, complicated regulations like this one can take anywhere from 3 years to 7 years.

Mr. SCOTT. So, if this was not an ETS it would be worthless?

Mr. SHAPIRO. It may well be.

Mr. SCOTT. government, OSHA, has the responsibility to show that there's grave danger. How can that be done if you have 100 employee cutoff? How can you show this danger over 100, but not under 100?

Mr. SHAPIRO. OSHA is always making judgments about residual risk, and the fact is you can't eliminate all risk in all workplaces. So it has to do its best to protect workers, realizing that there are situations where it's not going to be able to regulate, and it's done that with various kinds of rules, including setting the level of protection, determining which workplaces it will work best in, and, at some point, it has to say this is the best we can do, and let's get on with it, because this is going to protect most workers most of the time.

Mr. SCOTT. Is there precedence for a size of employee size cutoff like this?

Mr. SHAPIRO. Yes. In fact, Congress and Appropriation writers regularly exempt small businesses from OSHA regulation.

Mr. SCOTT. Thank you. I yield back.

Chairwoman ADAMS. Thank you, Mr. Chairman. Representative Miller-Meeks, you are now recognized for five minutes.

Ms. MILLER-MEEKS. Thank you so much. And I find it interesting that we're having a hearing about vaccine mandates, and we're not talking about immunity. So, you can achieve immunity through two different pathways. One is infection acquired immunity, which is very well-known, very well recognized and accepted, but rarely talked about when it comes into context of COVID-19.

And you can achieve immunity through vaccinations. And throughout the discussion this morning, what I've not heard is any acknowledgement or addressing that there can be infection-acquired immunity from COVID-19, and therefore we should be talking about immunity as a whole.

In addition to which, as I recall in the American Rescue Recovery Act, or the COVID-19 bill, that was passed earlier this year, there was 47.8 billion that was appropriated for testing for COVID-19, and I think, when we're talking about small businesses, how small businesses can get through this if there's a vaccine mandate, that I'd like to see some of that money utilized for small businesses to be able to conduct testing on their employees.

Mr. Hecker the Biden administration officials have claimed that employers not in compliance with the forthcoming OSHA emergency temporary standard mandate could receive fines up to \$14,000.00 per violation. However, the budget reconciliation bill approved by the Democrats on this Committee includes massive penalty increases for violations of the Occupational and Safety Health Act, which would give the Department of Labor the authority to assess fines as high as \$700,000.00 for certain violations.

How would the threat of substantial penalties under current law impact businesses struggling to comply with the rushed and burdensome ETS?

Mr. HECKER. Yes. Representative Miller-Meeks, I appreciate your question. The increased penalties that were passed, if you're a small business, particularly, \$700,000.00 violation, could be, you know, threatening to your business, could put you out of business, with the company litigation to challenge it.

You know, I anticipate that we'll see a lot of press around violations under the ETS to pass legal muster and go into effect, because, you know, OSHA is just—it's not a large agency, and it's going to look for other deterrence mechanisms.

Former Assistant Secretary for OSHA, David Michaels, who served under the Obama administration, tweeted back in October 2020, just about a year ago, almost to the day, that one OSHA press release is worth about 210 inspections on the deterrence and enforcement front.

So, I think you can expect that kind of approach here. When OSHA issues a citation, it will issue that press release, and these large numbers will look splashy. What they won't do is withdraw that press release or correct it, if those violations that were issued are modified, or, you know, overturned, or withdrawn, by OSHA or by a Court.

So, you know despite the company litigation to challenge a violation that is, you know, one, willful, two willfuls, gets you a million and a half dollars. That will be difficult, I think, and it costs money to hire someone to battle for you, someone like my law firm.

But I would like to say to, Ms. Luther, we're happy to counsel Columbia in any and all aspects here, including accommodations. That's what we've been doing throughout, is to navigate the complexities and the fractured response to the pandemic that I don't think this ETS will actually fix that issue and provide the uniformity that employers are looking for.

Ms. MILLER-MEEKS. Yes and Mr. Hecker thank you for that. Like you, I have been double vaccinated, fully vaccinated, as has my husband, as have my children. I have administered vaccines in all 24 of the counties in my congressional District. I've talked people and persuaded people to become vaccinated, but I also respect their desire and willingness to be vaccinated.

And it seems to me that when we do not recognize infection-acquired immunity, which does provide immunity—the studies that have come out of Israel and other studies have shown that it is as beneficial as vaccination, and in some cases maybe more beneficial, because it's not only to the spike protein—that we're not addressing that, and we could have the same accommodations for individuals in the workplace as we have had throughout the pandemic, knowing that most infections occur at home or elsewhere outside the workplace. So, I think that it's a very burdensome regulation. The testing requirements on small businesses will put some of these small businesses out of business which is the last thing we want to do in a struggling economy, so thank you very much, I yield back my time.

Chairwoman ADAMS. Thank you. Representative Leger Fernández, you're now recognized for five minutes.

Ms. LEGER FERNÁNDEZ. Thank you so very much. Thank you so much for holding this hearing. I wanted to followup a bit with regards to Professor Shapiro. Can you expand a little bit more on the

impact that refusing to follow mandates has, and the impact that a lot of politicization of refusing to follow mandates, would have on the willingness of those to uptake on those mandates?

Mr. SHAPIRO. Two things in response. First, as Ms. Luther has pointed out, the best way to address this and get rid of the crazy quilt of various requirements, the risk that workers will go here and there because of vaccine mandates, is to have a national mandate. Now, of course, to have a national mandate, it has to be enforced, and OSHA does have and reserve financial penalties, if necessary, to bring employers into compliance.

As a matter of convenience and expedition, OSHA almost always settles those cases for pennies on the dollar if you agree to come into compliance. OSHA's view has long-been our job is not to raise money for the national treasury, our job is to get people to come into compliance. If companies come into compliance, there won't be any significant fines.

Ms. LEGER FERNÁNDEZ. Thank you very much, Professor Shapiro. Professor Dorfman, I want to raise an issue that is important for many, as well as myself. I have an immunocompromised individual in my household. We got all vaccinated as soon as we could; we've done the test to determine the antibodies because we are very worried about his health.

And we're worried when we go out as to whether everybody's vaccinated now, right? There's a desire to take care of each other, and when you live with an immunocompromised individual, it is simply heightened. Professor Dorfman, do you believe employers have a duty to protect immunocompromised employees in the workplace from COVID-19, especially when there is going to be a higher likelihood of unvaccinated coworkers spreading COVID?

Mr. DORFMAN. If you look at the history of the Americans with Disabilities Act, one of its main goals was to have people with disabilities be part of the labor market and be inserted safely into the labor market. The CDC estimates that 83 percent of people under the age of 65 who died of COVID had an underlying medical condition that is considered a disability. In the context of which there is an employer who has many people with disabilities or immunocompromised, in their workplace, they have the duty and the responsibility of protecting them against COVID-19, and the complications that might amount from that.

Ms. LEGER FERNÁNDEZ. Thank you, very much Professor and I yield back, Madam Chair.

Chairwoman ADAMS. Thank you very much. Representative Owens, you are now recognized for five minutes.

Mr. OWENS. Thank you. One second. OK, thank you. Thank you, Madam Chair. Like many others that I've heard from constituents and stakeholders about their concerns regarding OSHA's forthcoming emergency standard, temporary standard. An overwhelming majority of small businesses I have heard from in my Districts are struggling to retain employees.

Where the vast majority of businesses, small businesses, are currently struggling to hire new employees, a majority of them also believe that a vaccine mandate will negatively impact their business.

Finally, virtually none of them believe that the Federal Government has the authority to dictate the policies of private business. Mr. Hecker, in your testimony earlier, you mentioned that OSHA would have benefited greatly from considering comprehensive input from the stakeholders.

What is the importance of stakeholder and public input through the public notice and comment of the OSHA rulemaking process, and what type of information is typically collected by OSHA before publishing major rules?

Mr. HECKER. Thank you, Representative Owens. As I believe I noted previously, a noticed comment, you're going to hear from stakeholders, interested stakeholders on both sides. And OSHA hasn't done that here. It can take into account the practicalities the employers, employees, worker representatives, whatever interested stakeholder wants to weigh in and comment, OSHA will review that.

I've been part of that process. I worked for the Occupational Safety and Health Division of the Solicitor's Office in the Department of Labor. We've looked at those comments. We took them seriously. We responded to them in the rules, in the rulemaking and that's important.

Here, we're hearing from Ms. Luther at Columbia about all the things they have done. I think a lot of employers take affirmative actions to address this, and some of them including vaccine mandates. It's just a question here, as I've noted, I think there are concerns legally on whether OSHA is able to meet the statutory standard that this ETS is necessary to address a grave danger in the workplace.

We heard concerns about going out and the need for national mandates to level the playing field, but OSHA is a workplace safety agency. It's the Occupational Safety and Health Administration, so there will still be unvaccinated people and risks outside the workplace. This is a public health concern, and 'it's hard, I believe, to tie exposure to COVID as a public health concern specifically to the workplace.

We heard mention about noise standards, and the blood-borne pathogen standard. You will understand that those exposures to noise, or to, you know, blood or other potentially infectious materials, happened at work. There's an occurrence that leads to that exposure. Here, it's not the same where, this is everywhere. We know this is everywhere, it's a public health concern, so to have it fall to OSHA, I think, is difficult.

Mr. OWENS. OK thank you. I want to ask another question, Mr. Hecker. The Cargo Airline Association, a trade group for the air cargo companies like UPS and FedEx, is warning that the administration's compliance with the Federal contract vaccine mandate will create havoc in the supply chain during the busiest time of the year.

Do you anticipate a similar situation once the OSHA ETS is issued? And is the Biden administration rushing the issuance of the national vaccine mandates put out, adequately reviewing the impact it would have on our economy during the Christmas season and beyond?

Mr. HECKER. Yes. I think there's certainly impacts here, in an already stretched workforce, and supply chains. We talked about being able to fill positions if you have folks who are hesitant, or you know push back on the mandate, that could cause workforce disruptions, operational disruptions. People may not be able to find replacements. We have a lot of temporary folks who come in the holiday season to support retail in particular, and I think it might be difficult to find those people and onboard them if they're subject to mandate.

So, there could be disruptions there. You mentioned the Federal contractor mandate, and I'll say that the rollout there, the Council when it issued its deviation clause to be incorporated in contracts and to cover government contractors with the safety requirements of the safer Federal workforce task force guidance that was issued on September 24th, they sort of disseminated the responsibility to individual agencies.

So, each agency has its own deviation, its own incorporation process, so you're not actually dealing with uniformity. You're dealing with different agencies, different clauses, different Department of Defense regulations, and we'll see the same thing here. There's a conflict, at least in the testing option, between being proposed, what we expect to be in the OSHA ETS, and the Federal Contactor Executive Order 14042.

There is no testing option under EEO. So Federal contractors could be covered by both the ETS and the mandate and could get pushback there. The OSHA ETS and the Federal contractor mandate further demonstrates just sort of the patchwork and will certainly see litigation pushing back on the OSHA ETS.

We have states who have their own State plans who may or may not fall in line promptly. OSHA recently warned three states over the healthcare ETS.

Chairwoman ADAMS. If we could?

Mr. OWENS. Thank you. Thank you very much Mr. Hecker. I yield back my time.

Chairwoman ADAMS. Thank you. Representative Jayapal, you're recognized now for five minutes, ma'am.

Ms. JAYAPAL. Thank you, Chair Adams, and thank you all for coming to testify before us. I did want to make a point in response to some of my colleagues on the other side talking about why workers aren't coming back to work. One of the reasons is because they don't feel safe.

I mean, they literally don't feel safe, and they don't want to put their families at risk. But I want to start by just saying that recently, I was unfortunately in the hospital with my husband, and the person who was drawing his blood told him that she had only just gotten her vaccine that morning.

And the reason she got her vaccine was because the hospital required, had a policy, that people who work in the hospital have to get the vaccine. And I just want to say how important I think it is that we have these requirements and policies to keep the employees safe, and also, obviously in healthcare, to keep people like my husband safe, so that he is sure that, and other patients are sure that, the people that are treating the patients are actually vaccinated themselves.

You know when she told me that I was actually horrified, first for my loved one, but I also thought about the nurse, who told me that she was afraid to hug her children for fear of infecting them. Her employer's policy ensures that of the many hazards posed by their jobs, coworkers aren't one of them.

This nurse's story is so common among frontline workers who are terrified of bringing the virus home to family. Ms. Luther would you agree that some workers welcome vaccine requirements for the protect that it affords them and their families?

Ms. LUTHER. Absolutely. In fact, a case in point: we have a pilot group coming back into our office to learn from their hybrid experience, and as a part of that pilot we have a mandate in place for vaccination. So, those people who are participating, but because we also have other people that are in the office that aren't part of this pilot, six people out of about just a little under 100 dropped out, some of which, most of which, was entirely around not having the assurance that they could be in an environment that was completely vaccinated.

Ms. JAYAPAL. That's exactly right. That's what I'm hearing as well. Though hardline anti-vaccination activists are the voices that often get showcased in media reports about unvaccinated Americans: about 11 percent are merely vaccine hesitant. They're open to the idea of getting vaccinated, or they would do so if required. In fact, that's the position that the phlebotomist, the person that was drawing blood from my husband was in. She agreed to do it because it was required. So, Ms. Luther as Chief Human Resources Officer, what kinds of education and outreach will Columbia Sportswear conduct to address the concerns of the hesitant and to build their trust?

Ms. LUTHER. We've been in constant communication with our employees with over 34 discreet email communications, about 10 different styles of posters for our retail and distribution. We have hosted webinars with medical professionals that allows for them to learn medically, as well as the vaccine clinics themselves.

We have to balance and make sure we're not over communicating, but we plan also to visit onsite; in fact the CEO and I are currently planning some onsite visits to some of the more vaccine hesitant communities, so that we can get a firsthand account of what are the barriers.

And we have been surveying our employees to get a little color and understand what percentage of our employees continue to be hesitant.

Ms. JAYAPAL. Thank you. You know, the truth is that vaccine requirements work. My home State of Washington is actually proof of that effectiveness. On October 18th, when our Governor, Governor Inslee's vaccine policy for State employees went into effect, the vaccination rates of State employees rose to 92 percent, and that is why I welcome the Biden administration's emergency temporary standards on vaccinations. It is truly a crucial step to get everyone across the finish line of this pandemic, and to protect people everywhere—in workplaces, in hospitals—and ultimately to get workers to feel comfortable that they will come back to work, and they will be safe because everyone will be vaccinated. So, with that, Madam Chair, I yield back. Thank you.

Chairwoman ADAMS. Thank you. Now I'm going to yield to Representative Good you are recognized for five minutes.

Mr. GOOD. Thank you, Madam Chair. It's incredible where we find ourselves as a nation as our most basic of freedoms are truly under assault by our own government. Our Constitution limits the powers that Federal Government in particular and serves to protect the minority from the tyranny of the majority.

The first ten amendments to the Constitution were written to protect citizens from the Federal Government. That includes the First Amendment which protects our freedom of religion. We've certainly seen that under assault in the past year. Our Fourth Amendment prohibiting unreasonable searches and seizures. Our Fifth Amendment requiring due process. The Ninth Amendment says the enumeration that Congress—excuse me, the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.

The Tenth Amendment says the powers not delegated to the United States by the Constitution, nor prohibited to it by the states, are reserved to the states respectively or the people. And yet, we have experienced great threats and restrictions on our most basic freedoms. Our freedom of assembly, who we can be with, our freedom of worship and religion, whether or not we can hold or attend church services, and under what conditions.

Or who gets to decide, we've already heard it said this morning, who gets to decide if someone is religious enough for an exemption? Freedom of speech and expression, what we can say about the risk of the vaccine, the effectiveness of certain medicines, the efficacy of natural immunity, the origins of the China virus and much more.

Freedom of movement, whether or not we can travel, and under what conditions. Freedom to earn a living, whether or not we can go to work, keep our job, open, or operate our business, and freedom of our own person, our own bodies, whether or not we can keep our own health information private, obtain the medicine of our choice, decide for ourselves whether or not to receive a vaccine that we may not want or we may not need.

Our own government, with the help of their allies and big media, big tech, academic and entertainment, is controlling the narrative so that only the approved science, the approved medicine, the approved message is permitted. We're not being told the whole truth about the risk of the consequences of the China virus, the risk of the vaccine, or the efficacy of natural immunity.

This President said during his campaign that he would not try to enforce a vaccine mandate. And then earlier this year he acknowledged that he had no Constitutional authority to do so, because you know that's true, because of separation of powers and legislative branch's responsibility to make laws, but this is not regulated interstate commerce. We're forcing it upon businesses that don't even do business outside their own State.

It is forcing businesses to do what the Federal Government doesn't have power to do in and of itself. And yet we find ourselves firing hardworking Americans, including heroic law enforcement, first responders, and frontline healthcare workers, inexcusably diminishing our ability to respond to emergencies, treat the sick from the China virus, or other health issues, and to protect Americans.

Not to mention, we're depleting our workforce, hurting already struggling businesses, and further disrupting supply chains.

This, as reports are that positive cases to the degree that asymptomatic positive cases matter anyway, they are greatly declining across the country. Our only real question cannot be answered by these panelists but would be instead directed at the President of this administration: how we can continue, let alone possibly, justify this terrible violation of our Constitutional oaths, and is trampling on the freedoms and welfares of the American people.

That said, I'll direct one question to Mr. Hecker. Mr. Hecker this disaster of a reconciliation spending package that the majority of Congress are trying to ram through right now with no Republican support, would raise the maximum fine for a violation of this proposed vaccine mandate tenfold to \$700,000. It's not hard to imagine that a Biden administration who weaponizes agencies against American citizens would use this brutal coercion tool to target businesses it doesn't agree with, much like the Obama-Biden administration did with the IRS toward conservative groups.

Mr. Hecker, do you have any thoughts regarding why this threshold on the OSHA regulations being raised so astronomically to the \$700,000.00 penalty?

Mr. HECKER. Unfortunately, Member Good, I'm not privy to that information. We spoke earlier about how it could impact businesses, and I don't really have any additional insights on that.

Mr. GOOD. Well, it's \$70,000.00 now, and they're looking to raise it to \$700,000.00 to try to force businesses, punish businesses, for operating their business and not harassing and violating the rights of their employees. With that, I will yield back Madam Chair.

Chairwoman ADAMS. Thank you very much. Representative Norcross, you are now recognized for five minutes, sir.

Mr. NORCROSS. Thank you, Madam Chairman, and certainly for holding this hearing on literally an issue of life and death to the people we represent, and certainly, you know, I couldn't agree more with my colleague who talked about freedom for our bodies, except it seems when it comes to women. But we'll have to hold another hearing on that one.

What I would like to ask is a question for Professor Shapiro. I recently heard from an employer in my district who was over 100 people, so we're good there, but he is extremely concerned on the validity of what is being submitted to him in terms of proof of vaccine.

You know, many of us have these COVID vaccine cards, but apparently, they're readily available from the internet, that you can falsely put down whatever you want. How can an employer—what steps can he take to prove that the information being given to him is actually true? Is there anything within the framework of the law now, or what we're looking at from OSHA, that will allow them to validate that, what he is being told or showed is actually true?

Mr. SHAPIRO. Thank you. That is just one of a host of details. Of course, you're correct, that are going to be involved in the implementation of this rule, and that's true of most rules. There's just a lot of details to work out. States have records of who is vaccinated and who is not, and as this rolls forward, as America adjusts, we are inventive, we can figure out ways to do this.

We can give people access to accurate information. And OSHA is going to take this into account. It needs good faith compliance by employers, that's what it expects of them, and if it turns out false vaccine cards are a problem, it's something that can be addressed.

Mr. NORCROSS. So right now, we really don't have a mechanism to go after it, and an example I'll bring up is to work in a nuclear powerhouse, you have to go through a series of background checks. I would assume as part of that the vaccine proof will be one of those. Is there anything that is available to—if something is falsely submitted, knowingly falsely submitted, that would cut into a criminal side of providing that?

Mr. SHAPIRO. I don't know of any existing regulation at the moment that penalizes employees or other people for falsely presenting their vaccine status, but I don't know of all the possible laws that could come into play here.

Mr. NORCROSS. We have a way to go there. So, thank you. Mr. Dorfman, a question which is a little bit of a twist. You talked about in your testimony that a disability would be one of those issues that could prevent you from having the vaccine. Disability is pretty wide open what that is. How can an employer verify that the disability you're referring to actually does have a contradiction to having a vaccine?

How does somebody go about saying that, or how do they prove that?

Mr. DORFMAN. An employer can request an employee for medical documentation from a healthcare provider. This is done in the directed process for determining what reasonable accommodations under the circumstances should be.

Mr. NORCROSS. So, a doctor would have to say this disability, in fact, is a reason not to have the vaccine? You would have to tie those two together, just not that you have a disability, that there's a contradiction. Is that correct?

Mr. DORFMAN. That's correct.

Mr. NORCROSS. Thank you. Madam Chairwoman, I yield back, thank you.

Chairwoman ADAMS. Thank you very much. Ranking Member Foxx, you're recognized now for five minutes ma'am.

Ms. FOXX. Thank you, Madam Chair. Mr. Hecker, it's been widely reported that the forthcoming emergency temporary standard was demanded by the White House, without the input of OSHA experts, and that the agency has struggled to write a rule that could withstand legal scrutiny.

The ETS will likely claim that all employees of companies with over 100 employees, regardless of industry, are in grave danger in every workplace from COVID-19. What impact and the wide range of an arbitrary scope of the ETS as dictated to OSHA by the White House have on whether Courts ultimately deem it lawful?

Madam Chair there is somebody pounding in the background, and it's going to make it difficult to hear.

Chairwoman ADAMS. Oh, please make sure that you are muted. OK. Thank you.

Mr. HECKER. Thank you, Ranking Member Foxx. I do think we have an issue here where OSHA has a statutory standard that they need to issue an ETS. They need to demonstrate it's necessary

to address the grave danger, and how OSHA would do that here with the administration suggesting their previous ETS efforts are working, and numbers are going down, how they'll tie it to workplace specifically. How they'll support decisions like the 100-employee threshold. We don't have a science. We don't have the data that OSHA has relied on underlying its requirements here, whatever they may be, because we haven't seen them yet, but you know typically when OSHA is going to undertake a massive rulemaking like this, with broad implications, you would have the science beforehand, and we would know what we're relying on.

Here, you know, some of these determinations have been made ahead of time without the consideration of the experts at the Occupational Safety Health Administration, and they were sort of dictated as part of the September 9, COVID action plan from President Biden.

So, we're yet to see how these will look, but we're setting ourselves up for difficulties in implementation/compliance and complexities in the various jurisdictions that will be responsible for handling this rule, interpreting it, and implementing it.

Ms. FOXX. Well, let me followup on that. If OSHA can stretch the authority delegated to it by Congress to issue what's clearly a public health edict without adhering to the important requirements and protections of noticing comment rulemaking, including accepting formal comments from effected stakeholders before the rule goes into effect, what precedent would this set for future OSHA regulation? And Madame Chair, I'm sorry, there is still a very bad noise in the background.

Mr. VASSER: If I may Madam Chair, and Ranking Member Dr. Foxx, Mr. Hecker, if possible, I believe that whooshing sound is coming from the slight delay on audio from the speakers to your mic. If you could be a little more exacting in muting your mic as soon as you finish speaking Mr. Hecker, and then unmuting exactly when you intend to talk sir, I would greatly appreciate it. Thank you, Mr. Hecker.

Mr. HECKER. I will do my best. Ranking Member Foxx, I apologize. We could see if OSHA begins to use the emergency temporary standard avenue as a regular part of its tool kit, we could see degradation of the standard statutory requirement to demonstrate a great danger that the ETS is necessary to address.

This was, you know, this was a threshold set by Congress, and it's meant to be used rarely. We've seen in 10 times in history, but twice in the last 4 months or so. So, you know, we need to follow the framework, the statutory framework. Congress set a high bar and using this more frequently could degrade that standard.

Ms. FOXX. On Friday, Mr. Hecker, CDC Director Rochelle Walensky, stated that the United States may change its definition of fully vaccinated against COVID-19 as more Americans become eligible to receive booster shots. Mr. Hecker, could the ever-changing guidance from the CDC, especially regarding vaccinations, create a conflict with the OSHA ETS, or cause confusion and liability for employers?

Mr. HECKER. Yes, Ranking Member Fox, it certainly could cause confusion. I believe we've seen this before when sister agencies haven't necessarily been on the same page throughout with COVID

guidance, and requirements. I believe it was May 13th when CDC updated its masking guidance to say that fully vaccinated individuals did not need to mask anymore.

We've since rolled that back a little bit, but OSHA took some time to interpret the CDC's guidance and decide whether it was going to apply it to the workplace, so you had the Center for Disease Control saying one thing, and the Occupational Safety and Health Administration needing to evaluate it because they had not apparently coordinated.

I'll say, in the context of the Safer Federal Workforce Task Force, OSHA does not have a seat at that table, which I think is very interesting given that it's about the workforce, the Federal workforce. Why DOL and OSHA were excluded there and aren't allowed to work the Federal contractor mandate and the ETS, where we're going to see more confusion to your point, that seems like a shortcoming.

Ms. FOXX. Madam Chair, even though I lost some time, I'm going to yield back, thank you.

Chairwoman ADAMS. OK. I was going to give you an additional 30 seconds if you want it.

Ms. FOXX. All right. Thank you. I will take it then. Looking ahead to the Christmas season, Mr. Hecker, could you say a little bit more about the impacts that the vaccine and testing mandates are going to have on employers, workers, and consumers in light of the current workforce shortage and supply chain crisis?

Mr. HECKER. Yes. I think there's going to be a ramp up time. Of course, if this passes, legal muster goes into effect, there's going to be a lot that employers are going to have to stand up. There's a lot for employees to do to comply, and it's not something you snap your fingers and everyone's vaccinated. Obviously, the Moderna vaccine, if you take that the two doses, are you know about 5 weeks or so apart, a month apart, and then you need 2 weeks on top.

So, you're talking about six or seven weeks to get fully vaccinated, and that's if you go and get your shot the first day the vaccine, or the mandate goes into effect. So, there will certainly be an impact there, and employers could have difficulty finding vaccinated employees to hire when the market is already stretched very thinly.

Ms. FOXX. Thank you very much. Thank you, Madam Chair.

Chairwoman ADAMS. Thank you. Representative Hayes, you are now recognized for five minutes.

Mrs. HAYES. Thank you, Madam Chair. I move to strike the last word. In Connecticut, 78 percent of residents have received at least one dose of a COVID-19 vaccination, and 70 percent of our residents are fully vaccinated. Even with strong and growing vaccination rates we still have a responsibility to protect the health and safety of all people who have been gravely impacted by this virus.

That is why Connecticut instituted a vaccine requirement for State employees, which has resulted in a 95 percent compliance rate. Unfortunately, vaccine non-compliance is still a reality in our State. Yesterday, the Governor's office reported that they have taken action against 121 State employees for vaccine non-compliance. In addition to State employees, at least 200 healthcare work-

ers in my State have also faced termination for failure to comply with vaccine mandates.

While religious concerns regarding the COVID 19 vaccine have been widely reported, faith leaders have been working to ensure their congregants are protected from this virus. In fact, many faith leaders and leaders of faith-based organizations have indicated that they will not endorse requests for religious exemptions from vaccinations.

Madam Chair, I ask unanimous consent to insert into the record several articles stressing support of the faith community for vaccinations.

Chairwoman ADAMS. So ordered.

Mrs. HAYES. My question today is for Professor Dorfman. Does the law allow for employees to filter out objections that are submitted as religious, which prove to not be based on religion?

Mr. DORFMAN. Yes. The employer as I said would have a limited inquiry as to the sincerity of the religious belief that is requested, that is attested for, and in situations where those are not found to be sincere, again, through a very respectful interactive process between the employer and the employee, if those were not found sincere, those can be thrown out.

Mrs. HAYES. Thank you, Professor Dorfman. It's imperative that we continue to debunk misinformation surrounding the vaccine. What I will say also is that one of the hardest things throughout this pandemic for me, as a woman of faith, is to not be able to worship in person. So, I am deeply, deeply sympathetic to these concerns. However, I also recognize that I can't find a religion that has any specific concern about vaccinations, so this is—it's important to get good information out there.

And direct outreach is critical in mitigating vaccine hesitancy and preventing COVID-19 fatalities. Dr. Dorfman again, what is your assessment of how employers under civil rights law can approach employees who have these objections? And must those employers consider the threat of COVID-19, as they determine what may constitute an undue hardship for employees?

Mr. DORFMAN. Yes. So as I said the Supreme Court in *TWA vs. Hardison* said that anything more than a *de minimis* cost to the employer is going to be considered an undue hardship, and it would allow the employer not to accommodate the religious employee.

When we're talking about costs, we are talking about the risks to other employees of getting COVID-19. We're also talking about the ability of the employer to conduct their business properly, so in those situations and when there is a request for a religious accommodation, if there is more than a *de minimis* cost to the employer, they can refuse to accommodate and request to not get the vaccine.

Mrs. HAYES. So, what if an employer agrees to provide a reasonable accommodation for an employee's religious objection, and what is the employer legally required to do under Title VII?

Mr. DORFMAN. So, in those situations, the employer and the employee would be for interactive process and will discuss what would be the reasonable accommodation under the circumstances. Those could be for example, working remotely. It can be for example, to

be reassigned to another position where the person is not coming into contact with many people, right? It can be a revised schedule.

All of those are possible accommodations as long as they do not pose an undue hardship on the employer.

Mrs. HAYES. Well thank you Professor Dorfman for your time today, and for your thoughtful responses to all of these questions. Madam Chair, with that I yield back.

Chairwoman ADAMS. Thank you. Representative Spartz you are now recognized for five minutes.

Mrs. SPARTZ. Thank you, Madam Chair. I appreciate this hearing. I actually had town halls this weekend, and I know that we're talking about legal concept here and have questions for that, but we need to understand we're dealing with people's lives, and I had a lot of constituents crying to me that the policemen, nurses, business owners, they're going to lose employees, they're going to lose jobs, and they're very, very concerned.

And I understand, you know, if Ms. Walker wants to, the employment at will, or whatever they want to do, she can terminate all of them, that's a choice she makes. But I have a quick question for some of the legal scholars we have, and I can start with Mr. Hecker. Do you believe that Federal Government mandated for you to lose your private job for refusing the vaccine can bring some issues, how Constitutional it is?

Mr. HECKER. Yes. Representative Spartz, I can speak to the standard that's required for OSHA, and that's to demonstrate that this is a grave danger where the ETS is necessary. I think they're going to have trouble meeting that standard. I think, as you've said, private employers, and as I testified previously, private employers have taken a number of mitigation efforts, instituted a number of COVID risk mitigation protocols, including in certain circumstances, vaccine mandates.

And, you know, I'm here speaking sort of more to the ETS standard, and I think there are issues that OSHA has there: how we'll need to, how private employers will need to address their workforces if there is noncompliance. I don't think we know yet. We haven't seen the ETS.

But there could be issues not only with the ETS, but also in the way that conflicts for trying to dovetail with the Federal contractor mandate, and folks will have to deal with how they're going to deal with their Federal contractor workforce as well.

Mrs. SPARTZ. I think there are some issues there, but also for President Biden to issue such a broad vaccine mandate on his own authority versus via the legislative branch, and also for OSHA to do the rules, really, it's a misrepresentation of his rules, and we actually dealt with it with eviction moratoriums where you know the rules talk about the laws, especially as they deal with toxic substances.

Now we're talking about viruses. So, if my colleagues want so much to mandate, wouldn't it make more sense more for legislative branch to act, and actually for Congress to pass this legislation, if you believe it's so important, versus you know, give such a broad authority to be challenged. What do you think, Mr. Hecker?

Mr. HECKER. The statute does grant authority to the Occupational Safety and Health Administration to issue emergency tem-

porary standards under certain defined circumstances, so OSHA will need to demonstrate that there's a grave danger, and that this ETS is necessary.

Mrs. SPARTZ. But my question is for you. Are you saying that if my colleagues want so badly to have this mandate, they should go through the legislative branch and then charge and they can pass this mandate, would that clear a lot of Constitutional authority challenges potentially that doesn't need for qualification. Do you think it would be a bad choice if you know if this Committee believes that it needs to be mandated?

Mr. HECKER. Representative Spartz, I don't think that's my determination to make. I think that's a question better directed to your Democratic colleagues. I'm speaking to the ETS, and I think I elucidated why I think there's some issues, and some hurdles, that the ETS will have in going into effect or passing/meeting legal authority.

Mrs. SPARTZ. OK. And I believe maybe Mr. Dorfman if you have a second, and Mr. Shapiro, since you're a legal professor. Do you believe it would be bad and less potential challenges if we dealt with this issue on the legislative versus an executive branch level?

Mr. DORFMAN. So, I'm not a Constitutional law scholar. I'm here to talk about the civil rights mandates, and civil right requirements.

Mrs. SPARTZ. OK. What about Mr. Shapiro. Do you have any thoughts from that? We'll try to this last lawyer on this panel.

Mr. SHAPIRO. Thank you. Congress has acted, it enacted the OSH Act. I believe and have argued OSHA has the legal authority to have an ETS. Mr. Hecker and I disagree about that. There's no doubt as to Congress's Constitutional authority to create the OSH Act, and the issue here is not a Constitutional one, it's whether or not OSHA has the legal authority to have such an ETS.

Mrs. SPARTZ. Right. And I think that is an issue that Congress wants to clarify, they could clarify this legal authority, is that correct, specifically you know to challenge on that issue. If they believe that a certain point, and we can talk about how Constitutional it is to do it a little different, but do you think believe it would be better?

Mr. SHAPIRO. Well, I think we're going to find out whether OSHA has this authority because as Mr. Hecker predicted, there will be lawsuits.

Mrs. SPARTZ. OK, OK, well, I yield back. Thank you.

Chairwoman ADAMS. Thank you. Representative Omar, you are now recognized for five minutes, ma'am.

Ms. OMAR. Thank you, Chairwoman. It has taken OSHA far too long to move past the voluntary guide, fact sheets, and significant finds. Instead, take strong action to protect our most vulnerable workers. While the initial ETA was a good first step, its scope was too narrowly limited to healthcare related settings.

That is why I am relieved the administration is now taking additional steps to protect more frontline and essential workers with a broader ETS. However, OSHA must still learn from its slow and inadequate action during the COVID crisis, not only as it works to craft this new ETS, but also as the agency looks to enact other related workplace safety rules in the future.

Whether it is another public health pandemic, or a climate change disaster, these safety issues will always be here at the forefront in the future. Professor Shapiro, what should OSHA be doing now to be better prepared for the next pandemic, and what should Congress be doing to assist OSHA in their preventative work for the future?

Mr. SHAPIRO. In the Obama administration, OSHA was working on an infectious disease standard which would have been a standard that could be used to head off every nature of pandemic because we don't know what the next pandemic will be. And once OSHA gets this done, because, right now, I think as you're suggesting, there is an emergency and we need to do this, we should start thinking about how we create a universal standard, so we can act more expeditiously, more quickly, and more protectively the next time around.

Ms. OMAR. Thank you. Some 40 percent of all workers are covered under OSHA State plans instead of Federal OSHA. Some states have had these local plans, such as South Carolina, Utah, Arizona, have indicated their opposition to the forthcoming OSHA standard.

There are also the same states that haven't complied to any part of OSHA's first ETS for healthcare workers or adopted an equivalent standard. Professor Shapiro if such states refuse to implement an OSHA ETS, what is OSHA's recourse to ensure the Federal standard, or at least equivalent standard is enforced in those states, and what process does OSHA need to follow?

Mr. SHAPIRO. OSHA does have the authority to take over a State program if it is failing to protect workers. It's done that once before regarding North Carolina and the protection of poultry workers. That's kind of a radical remedy, but it might be necessary here.

Before we get there however, those states will be subject to lawsuits by uncovered workers that seek to Court order to recall mandamus to require those states to obey the law, which is they have to meet the minimum standards set out by OSHA.

That is a mandatory duty. It's subject to mandamus and private lawsuits by covered employees will enforce this.

Ms. OMAR. Thank you. Madam Chair I yield back.

Chairwoman ADAMS. Thank you. Representative Stefanik you are recognized for five minutes.

Ms. STEFANIK. Thank you, Madam Chair. In the State of New York, we have already seen the devastating impacts of Governor Hochul's vaccine mandate for healthcare workers. We are facing a healthcare workforce crisis as a result of this unconstitutional mandate.

In September in my District, Lewis County General Hospital announced a temporary shutdown of their maternity ward due to a workforce shortage stemming from the vaccine mandate. This is robbing a rural community of a vital healthcare service, and front-line healthcare workers of their ability to provide for their families.

As a new mom myself, particularly when I think of my constituents in rural communities, they have to travel that much further when they deliver their babies. As the Biden administration attempts to impose their vaccine mandate on private employers across the country, the Society for Human Resource Management

recently conducted a survey of their member employers, and 89 percent said some of their workers will resign due to the new mandate. This of course is as we are facing a supply chain crisis just in time for the holidays.

My question is for Mr. Hecker. Do you believe that the Biden vaccine mandate is likely to exacerbate existing workforce shortages and hamper our Nation's recovery from the COVID-19 pandemic?

Mr. HECKER. Thank you, Representative Stefanik. I think that this is one reason that massive undertakings like this need to be thoughtful and knowledgeable, and not rushed. They need to take into account the stakeholder comments, and input of practical impacts here.

I think we've discussed how there's already a workforce shortage, there's a tight labor market, and it could continue or be exacerbated by the ETS if folks walk, if there is a great resignation that. That a lot of my clients, and a lot of employers fear. I think it was discussed earlier about making one of the accommodations being remote work, and maybe you could retain people in that manner.

But I put forth to you that the Federal contractor vaccine mandate actually requires vaccination of remote workers who work on or in connection with government contracts. So, it may be difficult there to fill spots if people have objections. What's the accommodation at that point?

I don't know that we know, or what the interaction will be, or exactly how it will contemplate and address remote workers, but yes, I think we have a number of issues on the labor supply.

Ms. STEFANIK. The remove worker excuse is absurd, particularly when you're talking about healthcare workers. You cannot deliver babies remotely, that is just impossible, and the same goes for our law enforcement and our first responders, as we're seeing after multiple—, two, years of high crime numbers in New York City for example, we're now facing a significant shortage of first responders and law enforcement officers because of this vaccine mandate.

And I want to ask you a broader question. Do you believe, and I think we can all agree, that losing a job is generally detrimental to worker's overall health and well-being?

Mr. HECKER. I think, you know, I'm more here to talk about the standard, but yes, I mean I think being employed is certainly a positive thing, at least for me. I enjoy my work, and it's fulfilling. It gives me opportunities like talking to you, so I think people, you know, if given the option they want to pursue gainful employment.

Ms. STEFANIK. Well certainly in my district, I represent hard-working families, I get texts and calls every single day. People love their jobs. They are dedicated to their jobs, and they are frustrated, and they are panicked, frankly, that they are leaving their jobs because of this unconstitutional mandate.

My last question is about the compliance costs, and the burdens to employers who will incur the costs of this mandate. Can you walk through that challenge for our employers?

Mr. HECKER. Yes. I mean it's difficult in one respect to do that without the text. And we talked about how really, only the stakeholder input from the White House is Office of Information and

Regulatory Affairs. That's really the only group that's taking stakeholder input, not OSHA.

So, we don't know exactly what's going to happen here. We don't know the testing allocation. We can guess at where that will land, but the weekly testing is going to be very expensive. As I mentioned earlier, particularly for smaller businesses, if you don't have a robust HR or compliance or legal department standing this up and implementing it, executing the vaccine mandate isn't something that rolls out. You need to communicate it to your workforce. You need to message. You need to do all these things to consider exactly what you need to do when the ETS issues, and how you're actually going to make it happen again. That's all if it passes legal muster. We saw that initially you mentioned healthcare, and obviously the last ETS stroked narrowly into healthcare, and the draft that went to OIRA, the draft that OSHA initially worked on, was broader, and presumably OSHA and OIRA and the administration determined that it couldn't meet the necessary to address grave danger threshold.

So, it's curious that we're looking at this 4 months later, and there was no mandate in the healthcare ETS, there was no vaccine mandate.

Ms. STEFANIK. Thank you I yield back.

Chairwoman ADAMS. Thank you. Representative Stevens you are now recognized for five minutes ma'am.

Ms. STEVENS. Ms. Luther, thank you so much for joining us today. Certainly, your company Columbia, is not the only private company in the United States encouraging its workforce to get vaccinated and welcoming a comprehensive and cohesive Federal approach.

Certainly, smaller companies who are very eager to fill open jobs and get people back to work are facing this workforce shortage, and we hear often—just, the other day I was talking to a constituent in Northville, Michigan who said, “Gosh I wanted to help out my friend's business, but I just don't feel totally safe yet until we get our vaccine threshold up,” although Michigan is doing a good job, particularly in southeastern Michigan.

Also, the small business roundtable recently issued a statement saying that, “American business leaders know how critical vaccination and testing are in defeating the pandemic and writing that over the past several weeks many companies have decided to implement a vaccine mandate for some or all of their employees, a decision we applaud.”

Do you Ms. Luther, do you agree with the sentiment expressed by the Business Roundtable?

Ms. LUTHER. I do. And the crisis is very real. The labor crisis is very real, however that's precisely why we need the uniformity to level the playing field to allow for us to do the right thing by our workforce and getting everyone vaccinated to protect our employees without being vulnerable to having to have our employees walk down the street to the next retailer to join that store where they don't face the same requirement, because that labor shortage, that labor crisis is very real.

Ms. STEVENS. And what do you know about other businesses with whom you work? Do you know if they agree with this position,

your suppliers? Are you getting a sense of general agreement with the statement that was expressed by the business roundtable?

Ms. LUTHER. I do. I regularly participate in CHRO roundtables where there's a cross-section of industry leaders brought together to discuss these issues. Frankly, the pandemic, and having unanswered approaches, really, banding together is the only way we've gotten through this pandemic is by sharing best practices, and those conversations regularly come back to making it a safe environment for employees, and knowing that the risk is very real in taking action on our own, but with a level playing field when we're all playing by the same rules, that would help all of us to have a bit more courage in taking these very difficult steps knowingly that there will be people who choose not to continue employment under those circumstances.

Ms. STEVENS. Yes. And any strategies that you've used to help employees who are partially vaccinated against COVID-19 receive their second dose? Is there any best practices that you could share around those effective strategies about encouraging employees to receive the full COVID-19 vaccination?

Ms. LUTHER. We have adopted a pay-for-vaccine strategy really directed at our hourly workforce to pay up to 3 hours for getting that vaccine, in addition to holding two vaccine clinics that coincided with getting that second shot as well as an ongoing communication campaign to make sure that they know when and where they can become vaccinated to make sure that they have the community resources that they know, so we've been in constant communication to encourage that full vaccination, as well as understanding and getting the information from them on vaccine status, including requiring uploading of that vaccination card so we knew exactly where our workforce stood.

Ms. STEVENS. Well, it's certainly been a unique time to serve or work as a head of human resources, and it sounds as you've been writing the playbook as you've been going, but that dialog with other companies and other stakeholders has certainly been very beneficial, and I just really want to applaud you for coming here today and sharing your testimony and your success story. We're thrilled to receive your playbook for success, and with that, Madam Chair, I yield back.

Chairwoman ADAMS. Thank you. Representative McClain, you are now recognized for five minutes.

Mrs. McCLAIN. Thank you, Madam Chair, and thank you to all the witnesses today. I too have done several roundtables. I've talked to several businesses. I've talked to several people, and this is clear, vaccine mandates is on everyone's mind. But as it pertains to the businesses, they are very concerned with the mandates

You had the labor shortages, you have the supply chain shortages, you also, remember, have the businesses who have been hardest hit with all of the mandates, especially from our Governor and our State, with capacity restrictions and what not. They don't feel at all that the mandates are going to make it easier for them to hire employees, especially with 11 million jobs still out there to be filled.

So, I think there is a lot of division within the country right now. I think what the American people are looking for, quite frankly is

a little bit of truth, transparency, and a lot of consistency which hasn't been there. So, Mr. Hecker I'd like to start with some facts because I understand everybody's feelings are important, but we have got to have some facts at some point in time.

A study funded by the National Science Foundation found that unvaccinated people who previously had COVID could expect immunity against reinfection anywhere between 3 months and 5 years. Even a Yale study concluded that antibodies generated from a natural infection were sufficient to protect against COVID on average, for at least 16 months.

Now these are facts. These aren't feelings, these aren't hypothesis. My question is: does it make sense to force someone, mandate—, and this is a mandate that's not by their doctor, not by their healthcare professional, takes a look at no underlying condition. This is a government person mandating for someone who has had natural vaccines or has natural immunities—does it make sense to force someone to take a vaccine when they've already recovered from COVID-19, and has natural immunity?

Why don't we take that into consideration?

Mr. HECKER: Yes, thank you Representative McClain. I don't believe OSHA is going to take that into consideration. I appreciate the studies you cited. I think the CDC is taking a different position, but I could speak to the fact that I think in the ETS context OSHA has some hurdles to get over to mandate the vaccine in the workplace for anyone because they have to meet their grave danger and ETS needs to be necessary to address that danger.

So, I'm not speaking to the issue about immunity. I don't see OSHA necessarily adopting that or taking that into account.

Mrs. MCCLAIN. Isn't that the goal we're trying to get, is to protect people? Now we're forcing people to get a mandate, and anyway, I appreciate. The other thing is, Mr. Hecker, and the employers will be tasked with tracking vaccinations, do you have an idea of what type of recordkeeping will be imposed on them?

Mr. HECKER. We don't know that yet since we don't have the text. We can look to Federal contractors, see if the workforce/task force guidance and see that there were specific documents that were required, but that guidance seems to suggest you just need to show it rather than maintain it, at least that's my read of it.

I don't know that OSHA will do that because, actually, I think former Assistant Secretary Michaels referred to this as basically a recordkeeping statute, so I think you can expect a robust recordkeeping framework in the ETS.

Mrs. MCCLAIN. Of which the businesses will pay for. If an employee suffers an adverse reaction after receiving the vaccine, will this be considered worker's compensation?

Mr. HECKER. I can't speak to that workers' comp. It's really a state-by-State system, and I think there may be different standards in each other's worker's compensations. I'm not really a worker's comp—

Mrs. MCCLAIN. But I'm assuming that question will be answered before we mandate something right?

Mr. HECKER. Well, this is something that maybe if there was collaboration and taking into account stakeholder input by OSHA,

they may have addressed it, or been able to consider it. We'll see how they—

Mrs. MCCLAIN. But here's my concern. We are going to mandate something, and we have no ideas what the rules of the game are, yet we're going to mandate something. I mean we're in the middle of baseball season. Can you imagine going up to the plate and saying eh, I don't know if you get three strikes, four strikes, seven strikes, two strikes, just go up to the plate and give it a whirl.

If we're going to mandate something, don't you agree we should perhaps maybe have some of the bugs worked out prior to the mandate?

Mr. HECKER. Right. And I think I said earlier, you know, we should have the data and the science ahead of time. We should know where we're going with this. Again, the—

Mrs. MCCLAIN. That's a little crazy. Having the data and the science, I mean that's a little crazy.

Chairwoman ADAMS. Out of time.

Mrs. MCCLAIN. Thank you, Madam Chair. I yield back.

Chairwoman ADAMS. Thank you. Representative Yarmuth, you are now recognized for five minutes.

Mr. YARMUTH. Thank you, Madam Chair. Thank you to the witnesses for their responses today and their testimony. I want to followup on Ms. McClain's and also Dr. Miller-Meeks' interest in natural immunity, and I'd like to submit for the record the August 2021 CDC morbidly and mortality weekly report, which includes a study of COVID-19 infections in my State of Kentucky among people who were previously infected with the virus that causes COVID-19. I ask unanimous consent that be put in the record.

Chairwoman ADAMS. So ordered.

Mr. YARMUTH. This study concluded that unvaccinated people were twice as likely to be reinfected with COVID-19 than those who were fully vaccinated after initially contacting the virus. So, it seems that, you know, real-life examples indicate pretty strongly that you are much safer from the, and much more protected from, the virus if you have been vaccinated, even if you had it before clearly, obviously if you've not had it.

And this basically shows that the vaccines offer better protection, and I think we have to consider that. And you know we still don't know, and, you know, I know Ms. McClain had mentioned a study that shows protection of up to 16 months, but these are wide ranges, they're very uncertain, and I think the question is: do we want to make sure that we have the best protection for our workers, for the customers, and so forth?

We also don't know how natural immunity affects the reinfection with the Delta variant, or other variants that may occur, and again, this study in Kentucky points to the importance of vaccination, even those who had prior infection.

With that in mind, I'd like to ask Professor Dorfman some questions about natural immunity, and how an employer would handle an employee objections to a vaccination based on a natural immunity argument. Professor, is an employee required to provide them with the exception to the requirement under the ADA?

Mr. DORFMAN. No. So, it is a reasonable consideration or recommendation by an employer that a person who already got COVID could still be a direct threat to the health of other employees at the workplace, to the health of customers in the workplace. As you said, science are still unsettled as to whether a person who has “natural immunity”, whether that person can actually still contract or spread COVID-19.

Mr. YARMUTH. Thank you. And is there any requirement under Federal civil rights laws that compel an employer to provide accommodations to employees who claim to have natural immunity?

Mr. DORFMAN. No, there is not.

Mr. YARMUTH. And I think you raised an important point, and I've actually gotten in all sorts of arguments over the last year and a half about: we still are in uncharted territory to a certain extent. The information accumulates in the data, and the evidence accumulates, but there's still an awful lot of unanswered questions about the course of the virus, and what provides the best protection, and it just seems to me that we know that vaccines work.

We know that right now I think we know that it is the most probable and most likely protector of everyone involved at this point in our State of knowledge. So once again, I thank the witnesses and I yield back.

Chairwoman ADAMS. Thank you very much. Representative Fitzgerald, you're now recognized for five minutes.

Mr. FITZGERALD. Thank you, Madam Chair. Mr. Hecker, in addition to this Committee, I'm also on the Small Business Committee, and we have had a steady stream of stories from small businesses who have just been decimated by the pandemic. First, you know, they were forced in the shutdowns, and then they were forced to compete on this system obviously that was created on the enhanced unemployment benefits.

What I'm most worried about is when the rule is unveiled, that somehow small business, and you know, it can be anywhere from two employees obviously, you know what I consider small business, all the way to 100 employees, that could get caught up in this.

I'm unaware of any other mandate of this type that could cause this type of strain, especially on, you know, what we would refer to as Ma and Pa shops, and ultimately kind of the heavy hand of, you know, what would be the government and the OSHA ETS on these size businesses. Can you just comment on that?

I mean, I think that's critical, is that the size of these companies affected would have to be taken into account.

Mr. HECKER. Yes, Representative Fitzgerald. So, there is—we understand that there will be a 100 employee thresholds. We don't know exactly how that's going to be calculated, or how it's justified. Even if you're above 100 employees, there may be circumstances where you still operate as a small business, and you don't have all the frameworks in place, for example, in HR, or recruiting or, you know, onboarding or legal or compliance to address this kind of issue and to figure out promptly how to deal with it, how to navigate its contours, and then also how to implement once you're able to determine exactly what's required of your business.

And if you're on the borderline, if you're 98 employees right now, well, what if you were 104 in July, are you covered? You may be.

And so, there's some fluidity there, and again we don't have the text, so it's hard to opine definitively, but there certainly could be issues for smaller and medium sized businesses to comply and to navigate the default complexities of this rule.

Mr. YARMOUTH. Yes, Fitzgerald. Yes, and thank you for that. Let me just followup with you. The guidance from the administrators say for Federal worker task force, there seems to be some discussion again about extending the mandate to even those workers that are working "remotely," and I know that's taken on many different forms since the pandemic began.

Is there any way for OSHA to measure that, or is there any way for them to really have any type of data that you know had already been collected, or requests for future data to be collected, where they actually could execute this? To me it's like mind-boggling that if there is somebody working at home, that suddenly you could have an OSHA rule applying to that individual.

I've never, I'm not aware of that ever happening in the history of OSHA, or in the you know the SBA and everything that they oversee.

Mr. HECKER. Yes. So, our understanding from the September 10 stakeholder call that OSHA put on is that they don't intend the vaccine mandates to provide under the ETS to fully 100 percent remote workers. However, if you're someone who's going to come into the office even once, you may fall under, as noted previously, the Federal contractor vaccine mandate actually, specifically does apply to remove workers who are working for, or in connection with the Federal Government covered contract.

So, there's a conflict there between the two mandates again, adding to the complexity that employers and employees need to navigate in order to determine their actual compliance obligations. The task force guidance that you referenced, Representative Fitzgerald, actually again explicitly says remote employees are covered, and also says basically OSHA's ETSs are no safeguard.

If you're complying with those it doesn't matter, you're subject to the Federal contractor mandate, so there again, the uniformity that we're looking for, or that may have been promised from the approach here in the COVID action plan on September 9th, we're not really seeing it. Not only at the Federal level, because each agency is going to enforce its own implementation of the Federal contractor mandate, and we have State plan stages—

Chairwoman ADAMS. Time. The gentleman is out of time

Mr. YARMOUTH. Thank you, Madam Chair, I yield back.

Chairwoman ADAMS. Thank you. Representative Bowman, you are now recognized for five minutes.

Mr. BOWMAN. Thank you, Madam Chair. Mr. Shapiro in your written testimony you note that Black, Latinx, and other people of color are disproportionately represented in many occupations that make up the lowest paid, highest risk jobs that have been deemed essential during the pandemic, such as health services, childcare, public transit, grocery clerks and meat packing.

We also know that our Black and Latinx communities have faced worst health outcomes over the course of the pandemic. This can be attributed to multiple compounding reasons, including systematic racism, inadequate, or zero paid leave to get the vaccine, no

means of transportation to get to the vaccine site, inadequate access to affordable quality healthcare, and much more.

How would OSHA's upcoming emergency temporary standard help us better protect Black and Latinx essential workers and address racial inequities and workplace health and safety?

Mr. SHAPIRO. By increasing the likelihood that everyone they will come into contact with is vaccinated or is immediately tested, providing a layer of protection that we simply have not provided to date.

Mr. BOWMAN. Thank you very much. Ms. Luther, thank you for joining us today and telling us about your efforts to protect the health and safety of your workers. I really appreciated hearing about how much effort your workplace has put into removing barriers that so many workers face, such as offering paid leave.

For many workers they simply can't afford to miss work in order to get vaccinated if it means they won't get paid leave. People shouldn't have to choose between a lifesaving vaccine and being able to afford rent or put food on the table. The U.S. is one of six countries with no national paid leave policy. Can you tell us why Columbia Sportswear implements a paid leave, and how did you make this feasible, so your employees face one less barrier to getting vaccinated? What kind of impact did paid leave have on your staff?

Ms. LUTHER. Paid leave played a critical role in keeping our business afloat and our employees engaged during the workforce. In addition to paid leave to get the vaccine, we also introduced a catastrophic leave program that was new to us that really took into account a variety of impacts that the employee may experience in relation to the pandemic, whether it be adverse effects, whether it be child care crisis, whatever, we gave 2 weeks of paid leave in order to deal with those types of catastrophic and unexpected events in order to provide that cushion at a time that was very, very scary for everyone.

So, it played a critical role in keeping our workforce engaged and keeping our business running.

Mr. BOWMAN. Thank you very much. Madam Chair, I yield back.

Chairwoman ADAMS. Thank you. Representative Cawthorn, you are now recognized, sir, for five minutes.

Mr. CAWTHORN. Thank you very much, Madam Chair. There are 20-year veterans of law enforcement agencies turning in their badge today because they refuse to bow the knee to tyranny. There are nurses who studied and trained for years, plunging themselves into debt to fulfill their dream of caring for others, only now to have the government strip them of their jobs because a virus that they were themselves committed to defeating. I barely recognize America anymore, Madam Chairman. You and your colleagues have sacrificed freedom on the altar of safety. Forced injections mandated by the Federal Government is nothing short of subsidized medical apartheid. Something must be done.

Today I'm introducing a bill to address this tyranny head on. The Justice for All Businesses Act will stop Joe Biden's overreach in its tracks. The JAB Act strips the Secretary of Labor from using funds to enforce a mandate, not a law, a fake mandate, forcing employees to be vaccinated against COVID-19.

It also prohibits the Federal Government from raining down fines on businesses for upholding the Constitution and defying tyrannical edicts. My bill will not be the end of the matter. I promise to keep working until Washington bureaucrats once again know who they truly work for.

This is not a matter of health. It's a matter of liberty. The right to work is innately American. When you strip away someone's livelihoods you rob them of their freedom. You rip away their identity, you tarnish their dignity. There are patriots across this Nation would rather see their jobs ripped away from them than lose their right to live, liberty and the pursuit of happiness. I stand with them to defend freedom at all costs.

Ms. LUTHER thank you very much for your testimony today. I had a question for you. What does it say about President Biden that he has outsourced shutting down this virus to OSHA?

Ms. LUTHER. I think President Biden is frankly being courageous in confronting a pandemic that is taking the lives of over 700,000 people in this country, and trying to level the playing field for businesses to get ahead of this economic crisis that we are facing as businesses, whether it be in the supply chain, keeping us from being able to manufacture our goods in the countries where we produce our goods, or being able to come together and bring our employees back together to really enjoy what collaboration feels like.

And I think he's helping us navigate through a complex quilt of requirements that are different State by State and county by county.

Mr. CAWTHORN. Well, Ms. Luther, I've heard in your testimony, we were talking about getting paid leave, people to get the job, for people to get the vaccine. And really, I do not care what you use to incentivize vaccinations within your own company, that's your prerogative, it's your company, but frankly, there is an enormous disparity between persuasion and coercion. It's the difference between liberty and tyranny.

You've proven yourself incapable of persuading your employees, so now you resorted to oppressing them. You've turned to the government to break the will of your subordinates and legitimize your medical intrusion. I believe that this mandate will literally force Americans to choose between their livelihoods and a deeply intrusive medical ultimatum.

The fact is you have a widely unpopular policy that you want to enforce, and you need government overreach to give you air cover. You've admitted this in your testimony to the Committee. You called this government mandate a tool in the fight to run rush onto personal liberty.

You care more about the bottom line than allowing your employees to make medical decisions for themselves, and I really believe that you are more worried about your company's ESG score for your percent of COLM than you are your employees' individual freedom.

Other members of this Committee may hesitate to call you out for this, but I will not. Your tactics are disgusting; they are un-American. In the coming months Americans will be plunged into financial turmoil because of President Biden's failed economic poli-

cies which have led us to our supply chain shortages, and our shortage of having a workforce.

And your company will now be complicit in ripping financial stability away from the families who depend on your survival. I would also like to thank having Mr. Hecker on and for your expert testimony. Mr. Hecker, what impact will enforcing the ETS, a controversial and burdensome national mandate, have on the public perception of OSHA, and the agency's ability to implement other workplace safeties?

Mr. HECKER. Yes, thank you Representative Cawthorn. It could certainly, in one respect, pull resources away from other workplace safety initiatives, so we'll have broad impacts on allocation of efforts. And beyond that you know the penalties could be high, and it could be very difficult to challenge or cost intensive for especially smaller businesses to challenge violations under the ETS if it passes with full muster.

It could also you know if folks—I said earlier not to politicize public health, right?—and so here, if OSHA is seen as a political tool rather than an occupational safety and workforce, excuse me, occupational safety, and health enforcement agency, then it could lead to pushback, or greater pushback.

Chairwoman ADAMS. The gentleman's time.

Mr. CAWTHORN. Yes ma'am, Madam Speaker, Madam Chair, I yield back. Mr. Hecker, thank you very much.

Chairwoman ADAMS. Thank you. Representative Allen, you are next, but before you do that, I do have to speak on the floor on a bill that the Committee has, and so Representative Yarmuth will assume the gavel.

Mr. YARMUTH. Thank you, Madam Chair. I'm not sure who is next up.

Chairwoman ADAMS. It's Representative Allen.

Mr. YARMUTH. Representative Allen. You are recognized for five minutes.

Mr. ALLEN. Thank you, Mr. Yarmuth, and obviously as we can tell by this hearing that this has created hysteria throughout the country. We paid a heavy price for COVID. Early on it was trying to figure out how to deal with it, and of course, you know, we ended up shutting the economy down. Supposed to be for 30 days and ended up being 90 days, and it's cost a lot of treasure and a lot of lives.

And it's been very difficult to deal with. And thank goodness for the development of the vaccines. I've been vaccinated, my wife has been vaccinated, and most of my children have been vaccinated. But again, it seems like we're getting the cart before the horse, because there are a lot of unanswered questions here that it sounds like if we could be fighting for, I don't know, years in court on a lot of these Constitutional law issues that have been brought up, you know, the rights, our rights are guaranteed under the Constitution. Particularly when you have a virus that is absolutely still a mystery. And when I say a mystery, I mean I know people that have antibodies that had COVID, and they didn't even know they had it.

And so, they asked me why should I get a vaccination? And I said, 'Well you know I'm not going to just tell you to do it? I said

what I think you should do is talk to your doctor. We do know that both unvaccinated and vaccinated folks do carry the virus, and can expose others to the virus, and so, like I said, we're mandating something here in totality that really needs to be examined individually.

And we've got companies that are doing this—obviously, Columbia Sportswear doing their thing—and you know as a company they have a right to you know, they have a right to do that. I'm not going to say whether I agree with your or not agree with you.

I'll tell you in my company, we wouldn't dare do something like that. But Mr. Hecker, I mean it looks like to me, well, let me just say this too. This economy is trying to come back, and a lot of that is because the government has thrown a lot of money into this economy.

And folks have a lot of spendable income. We got a 70 percent consumer-based economy. But you know that isn't necessarily going to continue, particularly when we have these disruptions. And you know, my fear is—obviously COVID is a fear, and loss of life is a fear—but what if we lose the very engine that runs the country, and that's the economy, over all this you know this government one size fits all, you know?

And healthcare has been under this threat for, you know since Obamacare. I mean we're telling people how long they can stay in a hospital now, we're telling people, 'OK, you know this is how long you can have rehab, and you know if you're readmitted?' and, you know, the same folks don't understand is, you know, there are 7 billion people in the world, we all got different DNA, and a different thumbprint, and like I said, this one-size-size fits-all business is a real problem.

So how in the world from a legal standpoint did you advise the folks on this panel and in this Committee, and then employees out there, if you've got somebody who has had COVID and has the antibodies, how can you fire them?

Mr. HECKER. Yes, and that's, as you said, it deals with an individualized question, and we would certainly—it's hard for me to speak to that specific circumstance. To your point, I think we are here, or I am here, speaking about the threshold for this mandate, and how there's certainly some difficulties with the, you said, one size fits all approach here, particularly where stakeholder input is not really taken at least on now by OSHA.

Then they say they've heard enough before, and things as you noted are changing, and I think everyone can agree there's fluidity in the environment. So, you know, private employers could have addressed that perhaps.

Mr. ALLEN. Thank you so much and Mr. Yarmuth, I yield back.

Mr. YARMUTH. Thank you, gentleman. I now recognize Mr. Murphy of North Carolina for five minutes.

Mr. MURPHY. Thank you, Mr. Chairman, just I appreciate the ability to just be on this Subcommittee meeting even though I'm not on the Committee. I've been a physician now for 30 years I guess it is, and I'm kind of a medical nerd. I read a lot of literature. In fact, I think I was one of the first people that read some of the first articles in Lancet in February 2020 talking about this virus, and I actually picked the phone up, as a lot of physicians do.

And we asked people smarter than we are in our disciplinary areas to find out about it and was told about how, for many folks who are much smarter than I am with this, about how this was going to wreak havoc across the world, and that has turned to be the case.

But you know the amazing thing is, again, being a physician of 30 years, there are a lot of things that go on with this that bear to my question. I actually would love to ask Mr. Dorfman a question, because I just looked on your CV, and you've had a lot of interest in healthcare, and I was wondering if you could ask me a few questions.

Mr. Dorfman are you aware that when people come into my office as a physician, and by the way, I'm still a practicing physician. They sign a permission form for me to treat them. Are you aware of that?

Mr. DORFMAN. Yes.

Mr. MURPHY. OK. Good. And you know the role of a physician is not telling people what to do, it is going through treatment options and discussing the risks and benefits of a particular medication, or a certain type of surgery correct?

Mr. DORFMAN. Yes.

Mr. MURPHY. OK. And so, if I have somebody that has a tumor, a cancer, or a kidney stone or something, and I make a recommendation of a treatment regime, they sign a permission form that they fully understand the risks and benefits of what we're going to do, and they sign a permission form that gives me permission to follow that treatment plan correct?

Mr. DORFMAN. I would just say this is called informed consent, right, that every medical professional.

Mr. MURPHY. Yes, but you agree with me, correct?

Mr. DORFMAN. Yes, I would.

Mr. MURPHY. OK. And so, you're aware that legislation was passed to free drug companies from any liabilities should any untoward effects occur because of the vaccine, correct?

Mr. DORFMAN. I'm sorry I testify on the issues of civil rights protections. I don't testify on Constitutional issues or?

Mr. MURPHY. I didn't ask you what you testified on. I said are you aware of that particular type of legislation?

Mr. DORFMAN. For this testimony I am not.

Mr. MURPHY. OK. All right. Well so then, tell me, since a vaccine is the medication, and it is a treatment, using, what we call, I guess you guys call, in legal terms, precedent, how can the government then come in and say the government takes authority over a patient, where you have to have this treatment where heretofore all decisions made about medical treatments are made between a patient and their doctor, and the patient gives informed consent?

Mr. DORFMAN. As I mentioned I'm not here to talk about the form consent. I'm here to talk about how the vaccine requirement dovetails with the civil rights protections.

Mr. MURPHY. I didn't ask you that question. I looked at your CV. I looked at the, you know, the authority that you had, I just wondered if you could maybe postulate on that question.

Mr. DORFMAN. I'm not going to postulate on it because—

Mr. MURPHY. OK, all right. So, you just go on ranting. OK. All right. Fair enough. Let me ask you, Mr. Hecker, then, I know—I just go back to Mr. Dorfman because I know that would be an impossible question to answer because the medications and treatment regimens are decisions made between doctor patient, not citizen government, but this particular administration seems to now want to create their own medicines and—

Mr. DORFMAN. Well, this is a matter of public health, right, and it's not a matter of treatment between a physician and a patient.

Mr. MURPHY. No, it's entirely a matter, it's a treatment. It has side effects. There can be definite deleterious effects from this, and so it is, definitely, in the purview of doctor patient relationship. Let me ask Mr. Hecker a quick question. You know OSHA has come out with these mandates. How well do you think businesses will be able to come out and adapt to those things in such a short period of time?

Mr. HECKER. Yes, thank you, Representative, Dr. Murphy. I think there needs to be a ramp up period. It would have been helpful for OSHA, and it would have been helpful to have taken take into account stakeholder input there. As we discussed earlier, if you decide to get Moderna, you know the day that ETS goes effective, you'll likely need, what, six or 7 weeks before you're fully vaccinated under the current definition.

And some smaller businesses you know closer to that 100-employee threshold may not have robust frameworks in place to ramp up and execute this kind of requirement. So, I think there will be difficulties, you know, if the standard, if the statutory standard is met, and the ETS goes into effect.

Mr. MURPHY. All right, well, thank you, Mr. Hecker, it looks like my time has expired, thank you and I yield back.

Mr. YARMUTH. Thank you, sir. Are there any other members who have yet to question and who wish to question? Hearing none, that will conclude our question-and-answer session. I remind my colleagues that pursuant to Committee practice, materials for submission for the hearing record must be submitted to the Committee clerk within 14 days following the last day of the hearing, so that means by close of business on November 9, preferably in Microsoft Word format.

The material submitted must address the subject matter of the hearing. Only a member of the joint Subcommittee, or an invited witness, may submit materials for inclusion in the hearing record. Documents are limited to 50 pages each. Documents longer than 50 pages will be incorporated into the record via an internet link that you must provide to the Committee Clerk within the required timeframe.

But please recognize that in the future that link may no longer work. Pursuant to House rules and regulations, items for the record should be submitted to the clerk electronically by email and submissions to edandlabor.hearings@mail.house.gov. Again, I want to thank the witnesses for their participation today.

Members of the Joint Committee may have some additional questions for you, and we ask the witnesses to please respond to those questions in writing. The hearing record will be held open for 14 days in order to receive those responses. I remind my colleagues

that pursuant to Committee practice, witness questions for the hearing record must be submitted to the Majority Committee Staff or Committee Clerk within 7 days.

Questions submitted must address the subject matter of the hearing. I now recognize the distinguished Ranking Member of the CRHS Subcommittee Ranking Member Fulcher for a closing statement.

He's not here. In that case, I now recognize the distinguished Chair of the CRHS Subcommittee, Chair Bonamici, for a closing statement. She's here OK.

Chairwoman BONAMICI. Yes, I'm here. Thank you. Thank you so much, Mr. Yarmuth, and thank you to Chair Adams for hosting this hearing. And thank you to our witnesses for your testimony. Today we reflected on the continued threat that COVID-19 Delta variant poses to the American people, and the importance of vaccines in safeguarding our workers.

As we continue to battle this historical global health emergency, COVID-19 vaccine requirements are a good and logical step that will help us turn the page in our fight against the pandemic. I applaud Columbia Sportswear and other employers across the country that have made the health and safety of their employees and communities a priority and have demonstrated that vaccine requirements are critical to protect the workers against COVID-19.

And I look forward to working with my colleagues to fulfill our responsibility during this pandemic, which is saving the lives of workers, their families, and all of our constituents across the country. And Mr. Chairman, Mr. Acting Chairman, I had to leave the hearing for a brief period of time to go speak on the floor, and it came to my attention that during my absence there was an accusation made against Ms. Luther and name calling, calling her perhaps un-American.

I would have objected had I been here at this time, and I just want to note that our witnesses are here to bring their expertise. They're dedicating their time and their knowledge, and if we have differences among each other, we should do that respectfully without disparaging our witnesses. So, I just wanted to get that on the record Mr. Yarmuth.

And thank you again and to each and every one of our witnesses, for your time and expertise, and I now will yield to Mr. Fulcher if he's here for his closing statement.

Mr. FULCHER. Thank you, Madam Chairman. And to all the witnesses that have participated today. This has been helpful, informative, and just want you to know that your time and your expertise is very much appreciated.

As of today, we have heard that the Biden vaccine mandate is going to worsen the workforce shortage and the supply chain crisis at a time when there are 10.4 million job openings in the country, and we have seen thousands of workers across the country leaving their jobs due to similar State and Federal mandates. It's simply wrong that President Biden would move forward with a nationwide OSHA vaccine and a testing mandate.

The OSHA mandate also fails to consider the substantial uncertainty, costs, and liability which will be inflicted on business owners, including small businesses who will be most impacted by these

penalties. For 19 months, business owners have implemented many proven measures to make the workplace safer for their employees, based on evolving science, government guidance, and industry best practices. As I said in my opening statement, this isn't about building back better. It's crushing the job creators and American workers under the heavy hand of government intervention. Thank you again to the witnesses, and those participating today. Madam Chairman, I yield back.

Mr. YARMUTH. OK thank you very much. I'm not sure whether I was Chairing or not still but thank you for your closing statement. I will now recognize myself for the purpose of making a closing statement and this is on behalf of Chair Adams.

I want to thank our witnesses again for sharing their testimony and expertise today. This hearing reaffirmed that workplace vaccine requirements are among the best strategies we have to keep workers safe during the pandemic. We know that vaccinations save lives, and mitigate the spread of COVID-19, yet far too many people remain unvaccinated, even while workplace outbreaks of COVID-19 continue to invade your workers across the country. As our witnesses made clear, broad workplace vaccine requirements are the next step we must take to prevent workers from both contracting and spreading the deadly virus. I'm grateful we had an opportunity to hear from employers who are already implementing these workplace policies on their workers.

These employers demonstrate that it is not only possible to implement workplace vaccine requirements, but also essential for ensuring their workers and workplaces are well protected against COVID-19. As we continue to face one of the worst workplace safety crises in recent history, we must ensure that all workers have the workplace safety measures, including vaccine requirements, that they need to help safely reopen our economy.

I want to thank our witnesses again and I yield to the Ranking Member, Mr. Keller, for further remarks.

Mr. KELLER. Thank you, Mr. Chairman. I would like to before I begin my closing remarks ask unanimous consent to enter into the record a letter from the National Federation of Independent Business opposing the Biden administration's efforts to direct OSHA to issue a vaccine and testing emergency testing standard.

Mr. YARMUTH. Without objection, so ordered.

Mr. KELLER. Thank you. OSHA's vaccine and testing mandate will have devastating impacts on an already struggling labor market, and further contribute to the supply chain crisis. After hearing from many businesses across Pennsylvania, it is clear that this mandate will drive even more Americans out of the workforce, and the harsh fines for violations of the mandate will almost certainly run some companies out of business.

Not only is this nationwide OSHA mandate a government overreach, it also exceeds OSHA's statutory authority. There's a reason that out of the 10 emergency temporary standards issued by OSHA in its 60-year history, nearly all that have been challenged were rejected by Federal Courts.

As we heard today, this forthcoming emergency temporary standard is completely unnecessary. COVID-19 cases continue to dramatically decrease in the United States.

Immunity acquired in communities through vaccine and infection and the policies and protocols implemented by employers are all contributing to this positive trend. The OSHA vaccine and testing mandate is the last thing that businesses and workers need, and it's not the answer to the crisis facing our Nation.

As I said in my opening statement, we must stand up to this massive and almost certainly illegal government overreach. Again, thank you to our witnesses, and I yield back.

Mr. YARMUTH. I thank the gentlemen for his closing statement. If there's no further business, without objection, the Joint Subcommittee stands adjourned.

[Additional submissions by Chairman Scott follow:]



Joint Hearing on
Protecting Lives and Livelihoods: Vaccine Requirements and
Employee Accommodations

Subcommittee on Workforce Protection
and
Subcommittee on Civil Rights and Human Services
of the
House Committee on Education and Labor

October 26, 2021

Statement for the Record of
Rachel K. Laser, President and Chief Executive Officer
and
Dena Sher, Associate Vice President of Public Policy
Americans United for Separation of Church and State

Chairwoman Adams, Chairwoman Bonamici, Ranking Member Fulcher, Ranking Member Keller, and members of the Subcommittees, thank you for the opportunity to submit a statement for the record for the joint hearing, "Protecting Lives and Livelihoods: Vaccine Requirements and Employee Accommodations."

Founded in 1947, Americans United is a nonpartisan advocacy and educational organization with a national network of more than 300,000 supporters. We are dedicated to preserving the constitutional principle of church-state separation, which is the foundation of religious freedom for all Americans. We fight to protect the right of individuals and communities to practice religion—or not—as they see fit without government interference, compulsion, support, or disparagement, so long as they do not harm others.

Our nation promises everyone the freedom to believe as they want, but our laws cannot allow anyone to use their religious beliefs to harm others. The fundamental right to be treated equally under the law depends upon the separation of church and state. This foundational American principle ensures everyone is able to live as ourselves and believe as we choose.

Religious freedom is meant to be a shield that protects; it should never be used as a sword to discriminate or cause harm. That's especially true when it comes to public health and saving people's lives.

The Free Exercise Clause Does Not Require a Religious Exemption from Vaccine Mandates

For more than a century, the United States Supreme Court has made clear that the government has the authority to protect public health through appropriate measures, including requiring vaccinations. In 1905, in *Jacobson v. Massachusetts*, the Supreme Court upheld a vaccination requirement, explaining that “a community has the right to protect itself against an epidemic of disease which threatens the safety of its members.”¹ Again in 1922, the Supreme Court in *Zucht v. King* rejected a challenge to a San Antonio ordinance that barred children from attending public or private schools without proof of vaccination.²

In *Jacobson*, the Supreme Court rejected claims that vaccination requirements violated individual liberties. The Court explained that “[r]eal liberty for all could not exist under the operation of a principle which recognizes the right of each individual person to use his own [liberty] . . . regardless of the injury that may be done to others.”³ Indeed “persons and property are subjected to all kinds of restraints and burdens in order to secure the . . . health . . . of the state.”⁴

In *Prince v. Massachusetts*, the Supreme Court explicitly held that vaccine requirements do not violate religious freedom: one “cannot claim freedom from compulsory vaccination . . . on religious grounds” because the “right to practice religion freely does not include liberty to expose the community . . . to communicable disease or . . . to ill health or death.”⁵

The holding in *Prince* was reaffirmed in *Employment Division v. Smith*,⁶ a 1990 opinion written by Justice Antonin Scalia. *Smith* held that neutral and generally applicable laws do not violate the Free Exercise Clause of the First Amendment to the U.S. Constitution—even if they result in a substantial burden on religious exercise. Allowing a person’s religious beliefs to “excuse” them from “compliance with an otherwise valid law” would make “professed doctrines of religious belief superior to the law of the land, and in effect . . . permit every citizen to become a law unto himself.”⁷ Thus, the *Smith* Court reaffirmed that the Free Exercise Clause does not “require[] religious exemptions from . . . health and safety regulation such as . . . compulsory vaccination laws.”⁸

¹ 197 U.S. 11, 27 (1905).

² 260 U.S. 174, 175 (1922).

³ *Jacobson*, 197 U.S. at 26.

⁴ *Id.* (quoting *Hannibal & St. Joseph R.R. Co. v. Husen*, 95 U.S. 465, 471 (1877)).

⁵ 321 U.S. 158, 166-67 (1944).

⁶ 494 U.S. 872, 890 (1990).

⁷ *Id.* at 878-79 (quoting *Reynolds v. United States*, 98 U.S. 145, 166-67 (1879)).

⁸ *Id.* at 888-89 (citing *Cude v. State*, 377 S.W.2d 816 (Ark. 1964)).

Over several decades, dozens of federal and state courts have upheld this principle, confirming that, under the U.S. Constitution, religious objections do not entitle individuals to exemptions from vaccination requirements.⁹

Bottom line: there is simply no general constitutional right to a religious exemption from a public safety law such as a vaccine mandate.

A Medical Exemption to a Vaccine Mandate Does Not Necessitate a Religious Exemption Under the Constitution

Medical exemptions to vaccination requirements are ubiquitous because it would be “cruel and inhuman in the last degree” to require vaccination of a person “if it [is] apparent or can be shown with reasonable certainty that he is not at the time a fit subject of vaccination, or that vaccination, by reason of his then condition, would seriously impair his health, or probably cause his death.”¹⁰ Furthermore, a failure to provide medical exemptions would undermine the overall goal of vaccine requirements, which is to protect the public health and save lives.

⁹ See, e.g., *Does 1-6 v. Mills*, ___ F.4th ___, No. 21-1826, 2021 WL 4860328 (1st Cir. Oct. 19, 2021), application for injunctive relief denied by ___ S. Ct. ___, No. 21A90, 2021 WL 5027177 (Oct. 29, 2021); *Nikolao v. Lyon*, 875 F.3d 310 (6th Cir. 2017); *Phillips v. City of N.Y.*, 775 F.3d 538 (2d Cir. 2015); *Workman v. Mingo County Bd. of Educ.*, 419 F. App'x 348 (4th Cir. 2011); *Dixon v. de Blasio*, No. 1:21-cv-5090, 2021 WL 4750187 (E.D.N.Y. Oct. 12, 2021); *Dr. T. v. Alexander-Scott*, No. 1:21-cv-387, 2021 WL 4476784 (D.R.I. Sept. 30, 2021); *Harris v. Univ. of Mass.*, No. 21-cv-11244, 2021 WL 3848012 (D. Mass. Aug. 27, 2021), appeal docketed, No. 21-1770 (1st Cir. Sept. 28, 2021); *Klaassen v. Trustees of Ind. Univ.*, ___ F. Supp. 3d ___, No. 1:21-cv-238, 2021 WL 3073926 (N.D. Ind. July 18, 2021), *mot. for injunction pending appeal denied* by 7 F.4th 592 (7th Cir. 2021), emergency application for writ of injunction denied by No. 21A15 (U.S. Aug. 12, 2021); *W.D. v. Rockland County*, 521 F. Supp. 3d 358 (S.D.N.Y. 2021), appeal docketed, No. 21-551 (2d Cir. Mar. 9, 2021); *Whitlow v. California*, 203 F. Supp. 3d 1079 (S.D. Cal. 2016); *Middleton v. Pan*, No. 2:16-cv-5224, 2016 WL 11518596 (C.D. Cal. Dec. 15, 2016), report and recommendation adopted by 2017 WL 10543984 (C.D. Cal. July 13, 2017); *Schenker v. County of Tuscarawas*, No. 5:12-cv-1020, 2012 WL 4061223 (N.D. Ohio Sept. 14, 2012); *Brock v. Boozman*, No. 4:01-cv-760, 2002 WL 1972086 (E.D. Ark. Aug. 12, 2002); *Boone v. Boozman*, 217 F. Supp. 2d 938 (E.D. Ark. 2002); *McCarthy v. Boozman*, 212 F. Supp. 2d 945 (W.D. Ark. 2002); *Sherr v. Northport-E. Northport Union Free Sch. Dist.*, 672 F. Supp. 81 (E.D.N.Y. 1987); *F.F. v. New York*, No. 2021-443, 2021 WL 4735375 (N.Y. Oct. 12, 2021); *Acebedo v. Commonwealth*, No. 21-0187-cv, slip op. (N. Mar. I. Commw. Super. Ct. Sept. 13, 2021), <https://bit.ly/3FhBG5D>; *C.F. v. N.Y.C. Dep't of Health & Mental Hygiene*, 139 N.Y.S.3d 273 (N.Y. App. Div. 2020); *Brown v. Smith*, 235 Cal. Rptr. 3d 218 (Cal. Ct. App. 2018); *Davis v. State*, 451 A.2d 107 (Md. 1982); *Wright v. DeWitt School District No. 1*, 385 S.W.2d 644 (Ark. 1965); *Cude v. State*, 377 S.W.2d 816 (Ark. 1964); *Bd. of Educ. v. Maas*, 152 A.2d 394 (N.J. Super. Ct. App. Div. 1959), *aff'd mem.*, 158 A.2d 330 (N.J. 1960); *State ex rel. Dunham v. Bd. of Educ.*, 96 N.E.2d 413 (Ohio 1951); *Anderson v. State*, 65 S.E.2d 848 (Ga. Ct. App. 1951); *Mosier v. Barren County Bd. of Health*, 215 S.W.2d 967, 969 (Ky. 1948); *Sadlock v. Bd. of Educ.*, 58 A.2d 218 (N.J. 1948); *In re Whitmore*, 47 N.Y.S.2d 143 (N.Y. Dom. Rel. Ct. 1944); *State v. Drew*, 192 A. 629 (N.H. 1937); *Vonnegut v. Baun*, 188 N.E. 677, 679 (Ind. 1934); *Commonwealth v. Green*, 168 N.E. 101 (Mass. 1929); *City of New Braunfels v. Waldschmidt*, 207 S.W. 303, 305 (Tex. 1918). See also, *Brown v. Stone*, 378 So. 2d 218, 223 (Miss. 1979) (holding not only that religious exemption to Mississippi student-vaccination statute was not required by Free Exercise Clause but also that it violated Equal Protection Clause because it “would discriminate against the great majority of children whose parents have no such religious convictions”).

¹⁰ *Jacobson*, 197 U.S. at 39.

Yet some people wrongly point to recent Supreme Court opinions to claim that medical exemptions necessitate religious exemptions. This is not the case.

Although the Court stated in *Tandon v. Newsom* that "government regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat *any* comparable secular activity more favorably than religious exercise," the Court explained that "whether two activities are comparable for purposes of the Free Exercise Clause must be judged against the asserted government interest that justifies the regulation at issue."¹¹ In other words, when a nonreligious exemption to a law advances the governmental interests served by the law, or at least does not undermine those interests as much as a religious exemption would, the nonreligious exemption does not trigger a constitutional obligation to provide a religious exemption.

The obvious government interest in requiring vaccinations is to protect public health and a medical exemption *advances* this purpose. As explained by Professor Douglas Laycock, "[M]edical exceptions don't undermine the government's interest in saving lives, preventing serious illness or preserving hospital capacity. By avoiding medical complications, those exceptions actually serve the government's interests."¹²

In stark contrast, a religious exemption undermines the vaccination mandate's purpose of protecting the public health and welfare. A religious exemption undermines public health by leading to fewer people being vaccinated and increasing the risk of disease outbreaks.

This distinction is evident in *Smith*. In *Smith*, the Court held that a religious exemption was not required in a law banning possession of controlled substances, even though the law included a medical exemption. As then-Judge Samuel Alito explained in an opinion for the Third Circuit, strict scrutiny did not apply to the refusal to provide a religious exemption because "[t]he purpose of drug laws is to protect public health and welfare." But "when a doctor prescribes a drug, the doctor presumably does so to serve the patient's health and in the belief that the overall public welfare will be served."¹³

The Establishment Clause Bars Religious Exemptions that Cause Harm

Although the government may offer religious accommodations even where it is not required to do so by the Constitution, its ability to provide religious accommodations is not unlimited.

¹¹ *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021) (per curiam).

¹² Douglas Laycock, [What's the Law on Vaccine Exemptions? A Religious Liberty Expert Explains](#), *The Conversation* (Sept. 15, 2021).

¹³ *Blackhawk v. Pennsylvania*, 381 F.3d 202, 211 (3d Cir. 2004) (discussing *Employment Div. v. Smith*, 494 U.S. 872 (1990)).

The Establishment Clause prohibits the government from granting religious exemptions that would detrimentally affect any third party.¹⁴ Thus, when crafting an exemption, the government “must take adequate account of the burdens” an accommodation places on nonbeneficiaries¹⁵ and ensure it is “measured so that it does not override other significant interests.”¹⁶ In short, the government may not make a person bear the costs of another person’s religion.

For example, in *Cutter v. Wilkinson*, the Court upheld the Religious Land Use and Institutionalized Persons Act (RLUIPA) against an Establishment Clause challenge. Under RLUIPA, people who are incarcerated may seek exemptions from prison rules that substantially burden their religious exercise.¹⁷ The Court explained that “[p]roperly applying RLUIPA” includes taking adequate account of other significant interests and does not “elevate accommodation of religious observances over an institution’s need to maintain order and safety.”¹⁸ The Court concluded that if, under RLUIPA, “requests for religious accommodations become excessive, impose unjustified burdens on other . . . persons, or jeopardize the effective functioning of an institution, the facility would be free to resist” granting an accommodation.¹⁹

Religious exemptions to vaccination requirements in the workplace put the health and safety of other people—including coworkers, patients, and customers—at risk and impose unjustified burdens on them and on employers. The Establishment Clause bars religious exemptions that cause harm.

Considerations Under Title VII

When discussing vaccination requirements in the workplace it is also important to examine Title VII of the Civil Rights Act. Title VII bars employment discrimination on the basis of race, color, religion, national origin, and sex, including sexual orientation and gender identity.²⁰ With respect

¹⁴ *E.g.*, *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 729 n.37 (2014) (citing *Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005)); *Holt v. Hobbs*, 135 S. Ct. 853, 867 (2015) (Ginsburg, J., concurring); *Cutter*, 544 U.S. at 726 (may not “impose unjustified burdens on other[s]”); *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 18 n.8 (may not “impose substantial burdens on nonbeneficiaries”).

¹⁵ *Cutter*, 544 U.S. at 720; see also *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 709-10 (1985).

¹⁶ *Cutter*, 544 U.S. at 722.

¹⁷ 42 U.S.C. §§ 2000cc - cc-5.

¹⁸ *Cutter*, 544 U.S. at 722.

¹⁹ *Id.* at 726.

²⁰ 42 U.S.C. § 2000e-2. Title VII also applies to federal employees and federal district and appellate courts have held that “Title VII provides the exclusive remedy” for religious discrimination claims, and not the Religious Freedom Restoration Act (RFRA). See, e.g., *Harrell v. Donahue*, 638 F.3d 975, 984 (8th Cir. 2011) (“[Appellant’s] claims under RFRA are barred because Title VII provides the exclusive remedy for his claims of religious discrimination.”); *Francis v. Mineta*, 505 F.3d 266, 272 (3d Cir. 2007) (“It is equally clear that Title VII provides the exclusive remedy for job-related claims of federal religious discrimination, despite [Appellant’s] attempt to rely upon the provisions of RFRA.”); see also *Holly v. Jewell*, 196 F. Supp. 3d 1079, 1090 (N.D. Cal. 2016) (“District courts uniformly have held that where a federal employee asserts a RFRA claim that addresses the same basic injury as a parallel claim asserted under Title VII, the RFRA claim is barred because Title VII provides the exclusive remedy.”) (citing *Tagore v. United States*, No. CIV. A. H-09-0027, 2009 WL 2605310, at *7-9 (S.D. Tex. Aug. 21, 2009), *aff’d in part, rev’d in part* 735 F.3d 324 (5th Cir. 2013)).

to religion, Title VII also requires an employer to offer a reasonable accommodation for an employee's or applicant's sincerely held religious belief, observance, and practice, unless an accommodation would impose an "undue hardship" on the employer.²¹ An accommodation is an "undue hardship" when it imposes "more than de minimis" cost or burden on the employer.²²

Sincerely Held Religious Belief

An employer is only obligated to offer a reasonable accommodation to an employee, when the employee's belief, observance, or practice is religious in nature²³ and sincerely held.²⁴ To ascertain if the employee meets this criteria, employers not only are permitted to ask the employee questions²⁵ but should be encouraged to. Granting accommodations to employees without ensuring their religious beliefs or practices are sincerely held could lead to abuse of the accommodation process and will only increase the risk of spreading COVID-19 in the workplace.

According to the Equal Employment Opportunity Commission, under Title VII, religion includes familiar organized religions as well as religious beliefs that are not part of a set of traditional religious teachings. It includes beliefs that may be held by only a few people, as well as non-theistic "moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views."²⁶ But "[s]ocial, political, or economic philosophies, as well as mere personal preferences, are not religious beliefs protected by Title VII."²⁷

Courts consider several factors when determining whether a belief or practice is religious. One court explained:

First, a religion addresses fundamental and ultimate questions having to do with deep and imponderable matters. Second, a religion is comprehensive in nature; it consists of a belief-system as opposed to an isolated teaching. Third, a religion often can be recognized by the presence of certain formal and external signs.²⁸

In *Fallon v. Mercy Catholic Medical Center of Southeastern Pennsylvania*, a hospital employee requested a religious accommodation under Title VII from the requirement to get the flu vaccine, explaining he believed "one should not harm their own body" and the vaccine "may do more

²¹ 42 U.S.C. § 2000e(j).

²² *TWA v. Hardison*, 432 U.S. 63 (1977).

²³ *E.g.*, *Fallon v. Mercy Catholic Med. Ctr. of Se. Pa.*, 877 F.3d 487, 490 (3d Cir. 2017).

²⁴ *E.g.*, *EEOC v. Union Independiente De La Autoridad De Acueductos y Alcantarillados de Puerto Rico*, 279 F.3d 49, 55-57 (1st Cir. 2002). It is important to remember that although the "truth of a belief is not open to question," whether the belief is "truly held" is a "significant question." *Id.* at 56 (quoting *United States v. Seeger*, 380 U.S. 163, 185 (1965)).

²⁵ *E.g.*, EEOC Compliance Manual on Religious Discrimination, § 12-I(A)(3) (2021).

²⁶ EEOC Compliance Manual, § 12-I(A)(1) (citing Commission Guidelines, 29 C.F.R. § 1605.1).

²⁷ *Id.* at § 12-I(A)(1).

²⁸ *Fallon*, 877 F.3d at 491 (quoting *Africa v. Commonwealth*, 662 F.2d 1025, 1032 (3d Cir. 1981)).

harm than good.²⁹ The Third Circuit determined that these were not religious beliefs for the purposes of Title VII, because they did not "address fundamental and ultimate questions having to do with deep and imponderable matters" and were not "comprehensive in nature."³⁰

The religious belief must also be sincerely held. According to the EEOC, sincerity does not hinge on "scrupulous" observance, but evidence that the employee has acted inconsistent with their stated beliefs is relevant to determining sincerity. This evidence could include:

"whether the employee has behaved in a manner markedly inconsistent with the professed belief; whether the accommodation sought is a particularly desirable benefit that is likely to be sought for secular reasons; whether the timing of the request renders it suspect (e.g., it follows an earlier request by the employee for the same benefit for secular reasons); and whether the employer otherwise has reason to believe the accommodation is not sought for religious reasons."³¹

If an employer is "aware of facts that provide an objective basis for questioning" whether an employee's belief or practice is either religious or sincerely held, "the employer would be justified in requesting additional supporting information."³²

For example, in *Bushouse v. Local Union 2209, United Automobile, Aerospace & Agricultural Implement Workers of America*, the plaintiff had "utilized information and forms prepared by" an advocacy organization "in submitting his request for religious accommodation" and the union had "reason to believe that the request [was] either insincere, political, or a personal preference rather than a religious belief."³³ Based on these facts, the court held that "Title VII does permit an inquiry into the sincerity and religious nature of" an employee's or union member's "purported beliefs before the duty to accommodate such a belief arises."³⁴ Likewise, with COVID-19 vaccination requirements, if an employee uses one of many widely available online forms³⁵ to request a religious accommodation, the employer has "an objective basis for questioning" whether the request is based on a sincerely held religious belief or practice.

²⁹ *Fallon*, 877 F.3d at 492.

³⁰ *Id.* See also, *Brown v. Children's Hosp. of Phila.*, 794 F. App'x 226, 227 (3d Cir. 2020) (healthcare worker not entitled to Title VII religious accommodation because her objection to receiving a flu vaccine was not a religious belief); *cf.*, *Geerlings v. Tredyffrin/Easttown Sch. Dist.*, No. 21-cv-4024, 2021 WL 4399672, *6 (E.D. Pa. Sept. 27, 2021) (Although each plaintiff seeking religious exemption from wearing masks in school under First Amendment have "passionate objection to wearing masks," court determined objections were an "isolated teaching" or "personal moral code" rather than a religious belief "that warrants First Amendment protection.")

³¹ EEOC Compliance Manual, § 12-I(A)(2) (footnotes omitted).

³² EEOC, [What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws](#) at K.12 (Oct. 28, 2021); see also [EEOC Informal Discussion Letter](#) (Mar. 5, 2012) (discussion of health care workers' requests for exemption from employer-mandated vaccination).

³³ *Bushouse v. Local Union 2209, UAW*, 164 F. Supp. 2d 1066, 1071, 1073 (N.D. Ind. 2001).

³⁴ *Id.* at 1075.

³⁵ *E.g.*, Ruth Graham, [Vaccine Resisters Seek Religious Exemptions, But What Counts as Religious?](#), *N.Y. Times* (Sept. 11, 2021).

When there is "[e]vidence tending to show that an employee acted in a manner inconsistent with his professed religious belief," the employer may also question the employee because consistency is "of course, relevant to the . . . evaluation of sincerity."³⁶

There are numerous documented instances of people claiming a religious objection to the COVID-19 vaccine when they have not objected to other vaccines. Conway Regional Health System in Arkansas, for example, had a much larger percentage of staff request a religious accommodation to the required COVID-19 vaccine than to a required flu vaccine. In doing so, employees frequently cited an objection to the use of fetal cell lines in the testing or development of the COVID-19 vaccine. The employer asked employees to attest they do not use many other common medications developed using fetal cell lines in order to ensure that "their sincerely held religious belief is consistent and true."³⁷

Reasonable Accommodation and Undue Hardship

If it's clear that an employee's belief or practice is both religious and sincerely held, then the employer must offer a reasonable accommodation to the employee unless offering the accommodation would impose more than a de minimis cost. This requirement respects the rights of employees with religious objections, but also takes into consideration how an accommodation would affect the employer and the workplace, including coworkers, customers, and patients.

Under Title VII, federal courts routinely rule in favor of employers when requested accommodations would negatively affect third parties.³⁸ In *Robinson v. Children's Hospital Boston*, for example, the court held that "granting [plaintiff's] request—no vaccination while

³⁶ *Union Independiente*, 279 F.3d at 57.

³⁷ Parris Kane, [Conway Regional CEO Says COVID-19 Religious Exemption Isn't an Attempt to Shame Employees](#), KATV.com (Sept. 14, 2021).

³⁸ See, e.g., *Shelton v. Univ. of Med. & Dentistry*, 223 F. 3d 220 (3d Cir. 2000) (holding that a hospital that offered to transfer a nurse who refused to treat certain pregnancy complications based on her religious views acted properly because it was not required to risk that a patient be denied emergency medical treatment); *Chalmers v. Tulon Co.*, 101 F.3d 1012 (4th Cir. 1996) (employer did not have to accommodate employee who proselytized coworkers, mailing them letters that reprimanded them for immoral conduct and urging them to "get right" with God because Title VII does not require allowing an employee to impose religion on others); *Baz v. Walters*, 782 F. 2d 701 (7th Cir. 1986) (Veterans Administration hospital did not have to accommodate a chaplain serving psychiatric patients who wanted to use his position to proselytize and engage in his own religious ministry, which undermined the purpose of the hospital—the overall well-being of the patients); *Noesen v. Medical Staffing Network, Inc.*, No. 06-C-071-S, 2006 WL 1529664 (W.D. Wis. June 1, 2006), *aff'd*, 232 F. App'x 581 (7th Cir. 2007) (employer offered pharmacist with religious objection to filling birth control prescriptions the option of notifying other members of the staff; employer did not have to accommodate "abandonment" of customers); *Favero v. Huntsville Ind. Sch. Dist.*, 939 F. Supp. 1281 (S.D. Tex. 1996), *aff'd mem.*, 110 F.3d 793 (5th Cir. 1997) (school district did not have to accommodate school bus drivers' request for eight days off to observe religious holiday because the accommodation interfered with the district's conduct of its business; it was chronically short-staffed, forced to combine bus routes, causing delays, and needed mechanics to drive bus routes instead of performing their usual jobs, which put children at risk of being stranded if busses broke down); *cf.*, *Weber v. Roadway Exp., Inc.*, 199 F.3d 270, 274 (5th Cir. 2000) ("The mere possibility of an adverse impact on co-workers . . . is sufficient to constitute an undue hardship.")

keeping her patient-care position—would have created an undue hardship,³⁹ because the accommodation would “cause or increase safety risks.”⁴⁰

According to the EEOC, factors relevant to determining an undue hardship in the context of COVID-19 vaccinations include “the proportion of employees in the workplace who already are partially or fully vaccinated against COVID-19 and the extent of employee contact with non-employees, whose vaccination status could be unknown or who may be ineligible for the vaccine.”⁴¹ In the hospital setting, factors relevant to an accommodation for vaccination requirements include “the assessment of the public risk posed at a particular time, the availability of effective alternative means of infection control, and potentially the number of employees who actually request accommodation.”⁴²

* * *

We are a stronger nation when we protect religious freedom for all. Americans United remains steadfast in our work, as we have for more than seventy-five years, to fight back against threats to religious freedom, including religious exemptions that risk harm to others.

³⁹ No. 14-10263-DJC, 2016 WL 1337255, at *8 (D. Mass. Apr. 5, 2016).

⁴⁰ *Id.* (quoting *E.E.O.C. v. Oak-Rite Mfg. Corp.*, No. IP99-1962-C-H/G, 2001 WL 1168156, at *10 (S.D. Ind. Aug. 27, 2001)). See also *Draper v. United States Pipe & Foundry Co.*, 527 F.2d 515, 521 (6th Cir. 1975) (“[S]afety considerations are highly relevant in determining whether a proposed accommodation would produce an undue hardship on the employer’s business. Title VII does not require that safety be subordinated to the religious beliefs of an employee.”).

⁴¹ EEOC, What You Should Know at K.12.

⁴² EEOC Informal Discussion Letter.

**House Subcommittee on Workforce Protection,
and House Subcommittee on Civil
Rights and Human Services**

**Hearing on Protecting Lives and Livelihoods:
Vaccine Requirements and
Employee Accommodations**
October 26, 2021

Statement of Douglas Laycock*
University of Virginia Law School

Chairwoman Adams, Chairwoman Bonamici, Mr. Fulcher, Mr. Keller, Members of the Subcommittees: Thank you for the opportunity to testify on efforts to require that more American workers be vaccinated against the virus that causes Covid-19.

This statement is submitted in my personal capacity as a scholar. I hold endowed professorships at the University of Virginia Law School, and an emeritus position at the University of Texas at Austin, but of course neither university takes any position on any issue before the Subcommittees.

I have taught and written about the law of religious liberty for forty-five years now. I have represented both religious organizations and secular civil liberties organizations—groups across the political and theological spectrums—in the Supreme Court and elsewhere. My commitment on these issues is not to one side or the other in any political or cultural conflict, but to genuine religious liberty for all Americans.

* Robert E. Scott Distinguished Professor of Law, Class of 1963 Research Professor in Honor of Graham C. Lilly and Peter W. Low, and Professor of Religious Studies at the University of Virginia, and Alice McKean Young Regents Chair in Law Emeritus at the University of Texas.

As Chairman Scott may recall, I am about as strong a supporter of religious exemptions from burdensome regulations as you can find in legal academia. When a law or regulation requires an American to violate his or her conscience, I believe that government should grant that person an exemption unless some truly compelling government interest requires that an exemption be denied. But some government interests really are compelling, and every constitutional right is subject to occasional limits or exceptions.

I believe that vaccination is an easy case for refusing exemption. Government has a compelling interest in insisting that everyone be vaccinated. Serious threats to human life present compelling government interests whenever and where ever they arise. And at least until our current political polarization, the courts have always agreed. *Workman v. Mingo County Board of Education*, 419 F. App'x 348, 352-54 (4th Cir. 2011) ("the state's wish to prevent the spread of communicable diseases clearly constitutes a compelling interest"). The *Workman* opinion collects cases from federal district courts and from the Supreme Courts of Arkansas and Maryland, all upholding vaccination requirements. The Supreme Court of Mississippi has actually held a religious exemption from vaccination requirements unconstitutional, because it endangers everyone around the person granted the exemption. *Brown v. Stone*, 378 So. 2d 218, 223 (Miss. 1979).

Two U.S. Supreme Court cases are also frequently cited for the validity of vaccination requirements. These are persuasive to varying degrees but not squarely controlling. *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), upheld a vaccination requirement against a substantive due process challenge, but that claim is subject to a more deferential standard of review than religious liberty claims today. In *Prince v. Massachusetts*, 321 U.S. 158, 166-67 (1944), the Court said that "[t]he right to practice religion freely does not

include liberty to expose the community or the child to communicable disease or the latter to ill health or death." This was dictum; vaccinations were not at issue. The Court used this example of what it apparently considered an obvious case to support the state's claim of power to regulate in a more difficult case.

I am not aware of any case invalidating vaccination requirements before two very recent temporary orders. I believe that when the dust settles, courts will continue to agree that vaccination requirements serve compelling government interests that create exceptions to generally enforceable constitutional rights.

Judicial and legislative disagreement over the basic rules for religious liberty have produced a variety of ways to present a religious liberty claim, each with a different scope and a different set of rules. I will consider them one at a time.

I. The Employer's Duty to Reasonably Accommodate Religious Practices.

Title VII of the Civil Rights Act of 1964 prohibits religious discrimination in employment. This statute applies to employers in the private sector and to government employers as well. As used in the statute, "[t]he term 'religion' includes all aspects of religious observance and practice, as well as belief, unless the employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's observance or practice without undue hardship on the conduct of the employer's business." 42 U.S.C. § 2000e(j).

Despite its wording, this statute has been interpreted to impose only limited obligations on employers. The Supreme Court has interpreted "undue hardship" to include any step that would require an employer "to bear more than a de minimis cost." *Trans World Airlines v. Hardison*, 432 U.S. 63, 84 (1977). That is not a plausible

interpretation of “undue hardship,” and some Justices have questioned it, but for now, it is the law.

A single case of Covid within a workplace would impose more than a de minimis cost on the employer. An employer would lose the services of the infected employee, briefly or for longer or permanently, depending on the seriousness of the infection. The employer could easily lose the services of one or several or many others if the first employee spread the infection within the workplace.

Employers with more than fifty employees are required to provide health insurance, and many smaller employers do so voluntarily. Many of these health insurance plans are self insured, so that the employer ultimately pays the claims, and many of the rest are experience rated, so that if there are more claims in one year, the insurance premium will be higher in the next year. Most Covid infections do not result in hospitalization, but those that do impose very substantial costs. Quite apart from the danger imposed on co-workers, an unvaccinated employee imposes significant risks on the employer, and if he gets sick, imposes more than de minimis costs on the employer.

Employers therefore have no obligation to exempt employees from vaccination requirements under federal law. State law is generally similar or less protective of employees, and in any event, any state-law right to exemption would be preempted by a federal vaccination requirement.

II. The Government’s Obligations Under the Free Exercise Clause.

The First Amendment to the Constitution protects the free exercise of religion. This Clause applies to government employment; it also applies to government regulation of the private sector.

So a government employee could complain that her employing agency violated the Free Exercise Clause by requiring its employees to be vaccinated. Or a private-sector employer could complain that the government violated the Free Exercise Clause by requiring employers to require their employees to be vaccinated.

I believe that a private-sector employee could not directly challenge a government regulation requiring employers to require vaccinations. Because the employer could require employee vaccinations on its own, whether or not the government required it to do so, the employee's primary claim is against the employer and is subject to the deferential *Hardison* standard. See part I.

If the employer defends on the ground that allowing an exemption would impose an undue hardship by subjecting the employer to penalties under the government's requirement, then presumably the employee could respond that the government's requirement is unconstitutional. If the vaccination requirement were imposed by a federal or state statute, the court would be required to notify the Attorney General of the United States or of the affected state, who could then intervene in the litigation. 28 U.S.C. § 2403. This notification requirement would not apply if the vaccination requirement were imposed by a federal or state regulation, but the litigant defending the requirement would likely consult with the Attorney General anyway.

The current law of the federal Constitution is that there is no right to a religious exemption from a neutral and generally applicable rule, however great the burden on the free exercise of religion and however trivial the government's interest in enforcing the rule without exceptions. *Employment Division v. Smith*, 494 U.S. 872 (1990). But a law or regulation is not generally applicable if it fails to regulate, or has exceptions for, a

secular activity that “endangers [government] interests to the same or greater degree” as the religious activity for which exemption is sought. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 543 (1993).

In recent cases involving Covid restrictions on the number of persons allowed to attend a church service, the Supreme Court has interpreted this requirement of general applicability stringently. It held that the government’s interests in reducing the spread of Covid were undermined to the same or greater degree not only by exceptions for other places where people sit together for long periods, such as theaters and concert halls, but also by many other places, such as ordinary retail businesses. But disagreement about these comparisons was a disagreement about facts, and perhaps about the states’ sloppy drafting of regulations and failure to offer sufficient evidence of how the risks of spreading Covid differed.

The Court has continued to reaffirm in these cases that “whether two activities are comparable for purposes of the Free Exercise Clause must be judged against the asserted government interest that justifies the regulation at issue.” *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021). Where the government closes religious activities but “permits other activities to proceed with precautions, it must show that the religious exercise at issue is more dangerous than those activities even when the same precautions are applied.” *Id.* at 1297.

The only exceptions to vaccination requirements in most statutes and regulations are religious or conscientious exemptions and medical exemptions. Medical exemptions apply to cases where the vaccination is medically contraindicated. A medical exemption does not make the requirement less than generally applicable, because it does not undermine the

state's interest, and certainly not to the same degree as a religious exemption.

In the first place, there are relatively few medical exemptions, especially to the Covid vaccine, which does not use a live virus. There appear to be vastly more claims to religious exemptions, because there are organized movements of vaccine resisters.

More fundamentally, medical exemptions do not undermine the government's interest at all. They actually serve the government's interest in minimizing death and serious illness from the pandemic. Covid can seriously harm patients; so can vaccinations that are medically contraindicated. Both sets of harms flow directly from the pandemic; there would be no Covid vaccinations without the Covid pandemic. It is the combined total of those harms that the government seeks to minimize.

There is an opinion by Justice Alito, when he was on the Court of Appeals for the Third Circuit, holding that a medical exception requires a religious exception. *Fraternal Order of Police v. City of Newark*, 170 F.3d 359 (3d Cir. 1999). But the facts and logic of that case were very different.

The case presented a challenge to the city's requirement that police officers be clean shaven. The city's interest was not in preserving life and health, but in preserving a uniform appearance among its officers. The city allowed a medical exception for officers who had difficulty shaving, but no religious exception for officers, such as many Muslims and Orthodox Jews, who are religiously obligated to grow their beard. The medical exception undermined the city's interest in uniformity, unlike the medical exception to vaccination requirements, which actually serves the government's medical interests. The court held that the city's rule was not neutral and generally applicable, and that a religious exemption was also required. Because it

treated medical needs as more important than its interest in uniformity, and religious needs as less important than uniformity, the city had devalued religion as compared to medicine.

The city also had an exception for under cover officers. The court treated this exception as irrelevant. It did not undermine the city's interest in uniformity, because under cover officers were not supposed to be recognized as police officers in the first place. So one point of *Newark* is that each exception must be examined on its own terms in light of the government's asserted interest. Some exceptions undermine that interest; some do not. Medical exceptions to vaccination requirements do not.

Vaccination requirements are therefore neutral and generally applicable even though they have a medical exception. Refusing religious exemptions to vaccination requirements does not require any justification under current Supreme Court law. Or at most, it requires easily satisfied rational-basis justification.

Vaccination requirements almost never have any other exceptions within their scope, but they sometimes have limited scope. The more all-inclusive a vaccine requirement is, the safer it is from attack under current law. Western Michigan University required its athletes to be vaccinated but not the rest of its student body. A rule that applies to only a few percent of the students is hard to defend as generally applicable, and it does not suggest that the university really believes that its interest is compelling. The validity of such a rule would depend on a showing that transmission is so much more common among athletes that athletes alone are the relevant category for assessing general applicability.

The rule was ineptly drafted and defended in any event. The rule provided for religious exemptions but the university refused to grant any, and it argued that loss of the right to participate in intercollegiate athletics is

not a burden on the exercise of religion. The courts preliminarily enjoined enforcement of the rule, based largely on these grounds. *Dahl v. Board of Trustees*, 2021 WL 4618159 (6th Cir. Oct. 7, 2021). But the rule's limited scope was another vulnerability.

So what if a vaccine requirement applies only to large employers, such as those with more than one hundred employees? Such size limitations on the reach of regulation have so far not been treated as making a regulation less than generally applicable. They have not yet been seriously challenged, but probably they will be. The widespread intuition that such limits are unobjectionable may rest on any of several views: that small employers pose a lesser danger than large employers (and thus do not undermine the government's interest to the same or greater degree), that size limits do not pose much risk of undervaluing or discriminating against religion, that they sometimes track perceived limitations on the scope of regulatory power (do very small employers affect interstate commerce), or that they are so common that treating them as making a regulation less than generally applicable would mean that hardly any regulations are generally applicable. However that argument is ultimately resolved, it is safer to regulate more widely than more narrowly.

If a law or regulation that burdens religion is held to be not generally applicable, then it must serve a compelling government interest. Vaccination requirements do; see part IV. But lack of general applicability is a form of discrimination; compelling interest must be evaluated in light of the unequal treatment of those persons or activities subject to the requirement and those that are not. The unequal treatment must be justified; a court might even say that there must be a compelling interest in treating them differently.

Such a requirement would be easy to meet with respect to the medical exception. A vaccination *endangers* the health or even life of those for whom vaccination is medically contraindicated; it *protects* the health and even life of those without such medical contraindications. That is a compelling distinction.

Limits to the scope of regulation might be harder to defend. How are large and small employers really different? There are answers to that question, but they are not so compelling as the difference between protecting or endangering human life. Lawyers defending such limits in litigation should not assume or just assert that they are different; they should offer expert medical evidence. Legislators drafting statutes and executive-branch officials drafting regulations should take care to avoid distinctions that seem arbitrary. They should refuse requests from well connected squeaky wheels seeking exemptions without strong justifications, and they should think through how they would defend any exceptions they create.

III. The Government's Obligations Under the Religious Freedom Restoration Act (and Under Potential Reinterpretations of the Free Exercise Clause).

Six Justices have questioned the rule that neutral and generally applicable laws entirely escape judicial review under the Free Exercise Clause. See *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1883 (2021) (Alito, J., concurring, joined by Thomas and Gorsuch, JJ.); *id.* at 1882 (Barrett, J., joined by Kavanaugh, J.); *City of Boerne v. Flores*, 521 U.S. 507, 566 (1997) (Breyer, J., dissenting). That rule may or may not change going forward. It is principally relevant to state and local burdens on the exercise of religion.

With respect to the federal government, Congress responded to the general-applicability rule with the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb

et seq. RFRA requires that the federal government show that substantial burdens on the exercise of religion serve a compelling government interest by the least restrictive means, whether or not the burdensome rule is neutral and generally applicable.

Federal vaccination requirements are valid under RFRA, and would be valid under a potentially reinterpreted Free Exercise Clause. There are two reasons for this conclusion. One is that vaccination requirements, especially with respect to Covid, serve a compelling government interest by the least restrictive means. See part IV, below. The second is that very few of these claims are based on sincere religious beliefs at all. See part V.

IV. The Government Has a Compelling Interest in Requiring Widespread or Nearly Universal Vaccination.

Physicians and epidemiologists are better able than I am to testify about the compelling interest in vaccination. My brief overview is that the government's compelling interest here is in protecting life and health—both the life and health of those who would refuse vaccination and the life and health of everyone around them.

The vaccine resister's own health is not just his or her own business. Large numbers of these people wind up in hospitals, often in intensive care units, burdening the entire medical system, endangering and exhausting hospital staff, and adding large expenses to Medicare, Medicaid, and private insurance pools. At various peaks in the infection rate, ICU beds or sometimes any kind of hospital beds were unavailable, or available only in very small numbers. People in need of less urgent treatment had to be turned away. If you had a stroke or a heart attack or a serious injury, you might have been left in the emergency room or even in a parked ambulance for lack of space in the hospital.

As a society, we are not willing to turn away the unvaccinated just because their illness is their own fault. That speaks well of us. But because will not do that, those with serious cases of Covid become a large, and mostly unnecessary, burden on many others.

The unvaccinated also endanger those around them outside of hospitals, by spreading the infection. They endanger those who cannot be vaccinated because the vaccine has not yet been tested on the very young, or because the vaccine is medically contraindicated for some reason. They endanger those with various forms of immune suppression, which make the vaccine less effective. They endanger, to a lesser degree, everyone else who is vaccinated, because no vaccination is 100% effective. For the most part, infection and hospitalization rates have been highest where vaccination rates are lowest, and the Covid death rate for the unvaccinated is more than ten times the Covid death for the vaccinated. The unvaccinated suffer Covid infections more often, and when they catch it, they can spread it.

Protecting against significant threats to human life and health is the most compelling of compelling government interests, and the courts have always upheld vaccination requirements on that ground. See the cases noted in the introduction to this statement. With well over 700,000 Americans already dead, the compelling interest here is clear.

The vaccines now being administered in the United States have been very widely tested and have now been administered to more than 200 million Americans. The various claims that that they are somehow ineffective, counterproductive, or even more dangerous than Covid are better suited for scientific than judicial resolution. They are based on pseudoscience, and sometimes, on misinterpretation or wildly exaggerated accounts of real science.

Nor is there any less restrictive means that is at all comparably effective. Masks help substantially but are far from foolproof. They are often removed or dropped below the nose and mouth, and they often do not fit tightly. Frequent testing is after the fact—up to a week or more after the fact if the employer requires weekly testing. That is a common schedule, and daily testing would be seven times as expensive. Moreover, an individual can be contagious for some number of days before a test will detect the infection.

V. The Additional Problem of Insincere Claims.

Aggravating this problem is a large and organized anti-vaccine movement with strong incentives to falsely claim religious exemptions. And now a political movement and some elements of a major political party have made opposition to COVID-19 vaccination a matter of political identity for many. President Trump's greatest accomplishment was to subsidize and accelerate the development of safe and effective vaccines, but instead of claiming credit, many of his supporters have become vaccine resisters.

Many of these resisters are sincerely opposed to vaccination, but they are not sincerely *religiously* opposed. Their opposition is political or pseudoscientific or misunderstanding and excessive risk aversion. And those are not grounds for exemption either under the Constitution or statutes.

It is a very safe bet that many of the recent political objectors are vaccinated against other diseases and had their children vaccinated against other diseases. Their objections are not religious, and they are not to vaccinations; they are specific to the strange politics that have emerged around Covid.

No branch of government can question the truth or reasonableness of religious beliefs. But governments and courts can question sincerity; it is an element of

every claim for a religious exemption that the claimed religious belief is sincerely held. See, e.g., *Ramirez v. Collier*, 2021 WL 4129220 (U.S. Sept. 10, 2021) (directing parties to brief “whether petitioner has satisfied his burden ... to demonstrate that a sincerely held religious belief has been substantially burdened”); *Holt v. Hobbs*, 574 U.S. 352, 360-61 (2015) (“of course, a prisoner’s request for an accommodation must be sincerely based on a religious belief and not on some other motivation”); *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 717 n.28 (2014) (“To qualify for RFRA’s protection, an asserted belief must be ‘sincere’”).

Sincerity is often hard to judge, and defendants often and properly concede the point. But they should not concede the point in vaccination cases. Where insincerity is widespread, or there is other substantial evidence of insincerity, courts find ways to deal with it.

The longstanding anti-vaccination movement, and the more recent political resistance to vaccination, mean that if we allowed religious exemptions, we would get many false claims. Professor Reiss of the University of California’s Hastings College of Law has compiled anecdotal and survey evidence that most claims to religious motivation for refusing vaccination are false. The practice is so widespread among the traditional anti-vax movement that there are Facebook pages exchanging tips on how to fake a religious claim. See Dorit Rubinstein Reiss, *Thou Shalt Not Take the Name of the Lord Thy God in Vain: Use and Abuse of Religious Exemptions from School Vaccination Requirements*, 65 *Hastings L.J.* 1551, 1570-88 (2014).

The political anti-vax movement is more recent than her research, but it shows every sign of having the same problem. It is impossible to believe that tens of millions of people suddenly converted to religions that teach opposition to vaccination in the last year. For all practical purposes, there are no such religions. And few

of these people were claiming religious objections to other vaccines before the politicization of Covid.

Assuming that some of these claims are sincere, there are many false claims for every sincere claim. Absent some unusually strong evidence of sincerity in an individual case, these claims are all insincere by a preponderance of the evidence. That is, if the overwhelming majority of a set of claims is insincere, then it is more likely than not that each individual claim within the set is also insincere. And the burden of proving sincerity is on the religious claimant.

Whenever that situation arises, the Supreme Court refuses exemptions. The Court rarely or never talks explicitly about this reason for refusing exemptions. But it may be justified either on the ground that each claim is more likely than not insincere, or on the ground that there is a compelling interest in not having a general policy undermined by thousands or millions of claimed religious objections.

This consideration is part of the reason the Court refused constitutional exemptions for religious objections to paying taxes, *Hernandez v. Commissioner*, 490 U.S. 680 (1989); *United States v. Lee*, 455 U.S. 252 (1982), or to serving in the military, *Gillette v. United States*, 401 U.S. 437 (1971) (refusing to expand draft exemption beyond statutory limits, despite plausible claim of denominational or theological discrimination), or, back in the desegregation era, to desegregating restaurants, *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968). All these decisions were in the days when the compelling-interest test still applied to claims under the Free Exercise Clause. Most of these opinions alluded to the risk of large numbers of claims. See *Hernandez*, 490 U.S. at 693, 699-700; *Lee*, 455 U.S. at 259-60; *Gillette*, 401 U.S. at 455-56. *Newman* did not; it gave no reasons. But the Court was well aware of

massive resistance to the Civil Rights Act, and the pattern in the cases is clear.

Some religious conservatives object to COVID-19 vaccinations because many-generation descendants of a fetal stem cell were used in the vaccine research. Some of these people are probably sincere; some are just making a political point. If that is their sincere religious belief, it doesn't matter that the Pope and longstanding interpretations of Catholic theology on formal and material cooperation with evil disagree.¹

However sincere a few such claims may be, the great bulk of claims to religious objections to vaccination are probably phony. And even when they are sincere, government has a compelling interest in overriding the religious objection and requiring vaccination anyway. See part IV.

VI. State Provisions for Religious Exemptions.

Every state requires that children be vaccinated against a range of diseases before entering public schools. Most of these states also authorize religious exemptions. These exemptions tend to be absolute; they have no exceptions for pandemics or compelling government interests. These exemptions were created by legislation, not by courts pursuant to religious liberty provisions. They have been repealed in several states as outbreaks of preventable disease and deaths of young children showed legislators that their predecessors had made a serious mistake. Most of the remaining state

¹ See, e.g., National Catholic Bioethic Center, *What Is the Principle of Cooperation in Evil?*, https://static1.squarespace.com/static/5e3ada1a6a2e8d6a131d1dcd/t/5eb070d4a628653343d6f60c/1588621525058/NCBC_Module_6_Supplemental_Principle_of_Cooperation_in_Evil.pdf. This summary of Catholic doctrine explains that cooperation with evil is forbidden when the cooperator intends the evil, and that one cannot avoid all material cooperation with evil. One who seeks to protect his health today cannot intend the evil of an abortion that occurred decades earlier.

exemptions are drafted in terms of children and public schools and would not apply to Covid vaccines for employees.

Whether or not they are drafted to apply, these exemptions would of course be preempted by contrary federal law. State law cannot limit the reach of any statute the Congress might enact, or any executive order or regulation that the President or a federal agency might issue.

VII. Early Covid Decisions.

As mentioned in part II, the Sixth Circuit has preliminarily enjoined a badly conceived vaccination requirement for athletes at Western Michigan University. The Seventh Circuit has upheld a vaccination requirement for all students at Indiana University, but that decision is of limited reach because Indiana provided for religious exemptions; students not claiming religious exemptions challenged it on substantive due process grounds. *Klassen v. Trustees of Indiana University*, 7 F.4th 592 (7th Cir. 2021).

The First Circuit has preliminarily upheld a vaccination requirement applied to health care workers in Maine. *Does 1-6 v. Mills*, 2021 WL 4860238 (1st Cir. Oct. 19, 2021). The plaintiffs have asked Justice Breyer for an injunction pending a petition for certiorari; he has asked for a response by October 25. Application No. 21A90 in the Supreme Court.

Finally, a federal district court in New York has preliminarily enjoined a vaccination requirement for health workers in New York State, in an opinion that disagrees with most of what I have said in this statement. *Dr. A. v Hochul*, 2021 WL 4734404 (N.D.N.Y. Oct. 12, 2021). I believe that this dangerous injunction will sooner or later be vacated or reversed.

It may be that the judges will be affected by the polarization gripping so much of the country, nitpick

vaccination requirements over details of drafting and scope, and abandon more than a century of law upholding vaccination requirements—and abandon it in the face of one of the two worst pandemics in our history. I do not believe that will happen. If the lower courts divide and a case gets to the Supreme Court, I believe that at least five Justices are more responsible than that.

But opinions like that in *Dr. A.* should be a caution to government officials. Draft carefully. Tend to the details. Take nothing for granted. Leave no gaps that can be challenged as making your law discriminatory or less than generally applicable.

And the same advice follows for those defending these laws or regulations in court. Do not assume that compelling government interest and least restrictive means are obvious. Put in detailed medical and epidemiological evidence. The burden of proving compelling interest and least restrictive means is on the government. Make sure you carry that burden.

[Additional submission by Mr. Yarmouth follows:]

Morbidity and Mortality Weekly Report

Reduced Risk of Reinfection with SARS-CoV-2 After COVID-19 Vaccination — Kentucky, May–June 2021

Alyson M. Cavanaugh, DPT, PhD^{1,2}; Kevin B. Spicer, MD, PhD^{2,3}; Douglas Thoroughman, PhD^{2,4}; Connor Glick, MS²; Kathleen Winter, PhD^{2,5}

On August 6, 2021, this report was posted as an MMWR Early Release on the MMWR website (<https://www.cdc.gov/mmwr>).

Although laboratory evidence suggests that antibody responses following COVID-19 vaccination provide better neutralization of some circulating variants than does natural infection (1,2), few real-world epidemiologic studies exist to support the benefit of vaccination for previously infected persons. This report details the findings of a case-control evaluation of the association between vaccination and SARS-CoV-2 reinfection in Kentucky during May–June 2021 among persons previously infected with SARS-CoV-2 in 2020. Kentucky residents who were not vaccinated had 2.34 times the odds of reinfection compared with those who were fully vaccinated (odds ratio [OR] = 2.34; 95% confidence interval [CI] = 1.58–3.47). These findings suggest that among persons with previous SARS-CoV-2 infection, full vaccination provides additional protection against reinfection. To reduce their risk of infection, all eligible persons should be offered vaccination, even if they have been previously infected with SARS-CoV-2.*

Kentucky residents aged ≥18 years with SARS-CoV-2 infection confirmed by positive nucleic acid amplification test (NAAT) or antigen test results¹ reported in Kentucky's National Electronic Disease Surveillance System (NEDSS) during March–December 2020 were eligible for inclusion. NEDSS data for all Kentucky COVID-19 cases were imported into a REDCap database that contains laboratory test results and case investigation data, including dates of death for deceased patients reported to public health authorities (3). The REDCap database was queried to identify previously infected persons, excluding COVID-19 cases resulting in death before May 1, 2021. A case-patient was defined as a Kentucky resident with laboratory-confirmed SARS-CoV-2 infection in 2020 and a subsequent positive NAAT or antigen test result during May 1–June 30, 2021. May and June were selected because of vaccine supply and eligibility requirement considerations; this period was more likely to reflect resident choice to be

vaccinated, rather than eligibility to receive vaccine.⁵ Control participants were Kentucky residents with laboratory-confirmed SARS-CoV-2 infection in 2020 who were not reinfected through June 30, 2021. Case-patients and controls were matched on a 1:2 ratio based on sex, age (within 3 years), and date of initial positive SARS-CoV-2 test (within 1 week). Date of initial positive test result refers to the specimen collection date, if available. The report date in NEDSS was used if specimen collection date was missing. Random matching was performed to select controls when multiple possible controls were available to match per case (4).

Vaccination status was determined using data from the Kentucky Immunization Registry (KYIR). Case-patients and controls were matched to the KYIR database using first name, last name, and date of birth. Case-patients were considered fully vaccinated if a single dose of Janssen (Johnson & Johnson) or a second dose of an mRNA vaccine (Pfizer-BioNTech or Moderna) was received ≥14 days before the reinfection date. For controls, the same definition was applied, using the reinfection date of the matched case-patient. Partial vaccination was defined as receipt of ≥1 dose of vaccine, but either the vaccination series was not completed or the final dose was received <14 days before the case-patient's reinfection date. Using conditional logistic regression, ORs and CIs were used to compare no vaccination and partial vaccination with full vaccination among case-patients and controls. SAS (version 9.4; SAS Institute) was used for matching and statistical analyses. This activity was reviewed by CDC and was conducted consistent with applicable federal law and CDC policy.⁴

Overall, 246 case-patients met eligibility requirements and were successfully matched by age, sex, and date of initial infection with 492 controls. Among the population included in the analysis, 60.6% were female, and 204 (82.9%) case-patients were initially infected during October–December 2020

⁵ May and June were selected for two primary reasons. First, when vaccination supplies were low, some previously infected persons were deferring vaccination for 90 days to allow never-infected persons priority for available vaccine; however, by May 2021, deferral for 90 days was no longer a reason for those infected in 2020 to remain unvaccinated. Second, although vaccination eligibility was initially restricted based on age, comorbidities, and occupation, by April 5, 2021, all Kentucky residents aged ≥16 years became eligible for vaccination (<https://chfs.ky.gov/agencies/dph/covid19/Cv19VaccineFAskedQ.pdf>). Thus, vaccination status in May or June 2021 might more accurately reflect choice rather than eligibility to be vaccinated.

⁴ 45 C.F.R. part 46.102(l)(2), 21 C.F.R. part 56; 42 U.S.C. Sect. 241(d); 5 U.S.C. Sect. 552a; 44 U.S.C. Sect. 3501 et seq.

* https://www.cdc.gov/vaccines/covid-19/clinical-considerations/covid-19-vaccines-us.html#CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fvaccines%2Fcowid-19%2Finfo-by-product%2Fclinical-considerations.html#CoV-19-vaccination

¹ <https://www.cdc.gov/coronavirus/2019-ncov/hcp/testing-overview.html>

Summary**What is already known about this topic?**

Reinfection with human coronaviruses, including SARS-CoV-2, the virus that causes COVID-19, has been documented. Currently, limited evidence concerning the protection afforded by vaccination against reinfection with SARS-CoV-2 is available.

What is added by this report?

Among Kentucky residents infected with SARS-CoV-2 in 2020, vaccination status of those reinfected during May–June 2021 was compared with that of residents who were not reinfected. In this case-control study, being unvaccinated was associated with 2.34 times the odds of reinfection compared with being fully vaccinated.

What are the implications for public health practice?

To reduce their likelihood for future infection, all eligible persons should be offered COVID-19 vaccine, even those with previous SARS-CoV-2 infection.

(Table 1). Among case-patients, 20.3% were fully vaccinated compared with 34.3% of controls (Table 2). Kentucky residents with previous infections who were unvaccinated had 2.34 times the odds of reinfection (OR = 2.34; 95% CI = 1.58–3.47) compared with those who were fully vaccinated; partial vaccination was not significantly associated with reinfection (OR = 1.56; 95% CI = 0.81–3.01).

Discussion

This study found that among Kentucky residents who were previously infected with SARS-CoV-2 in 2020, those who were unvaccinated against COVID-19 had significantly higher likelihood of reinfection during May and June 2021. This finding supports the CDC recommendation that all eligible persons be offered COVID-19 vaccination, regardless of previous SARS-CoV-2 infection status.

Reinfection with SARS-CoV-2 has been documented, but the scientific understanding of natural infection-derived immunity is still emerging (5). The duration of immunity resulting from natural infection, although not well understood, is suspected to persist for ≥90 days in most persons.** The emergence of new variants might affect the duration of infection-acquired immunity, and laboratory studies have shown that sera from previously infected persons might offer weak or inconsistent responses against several variants of concern (2,6). For example, a recent laboratory study found that sera collected from previously infected persons before they were vaccinated provided a relatively weaker, and in some cases absent, neutralization response to the B.1.351 (Beta) variant when compared with the original Wuhan-Hu-1 strain (1). Sera from the same persons after vaccination showed a heightened

** <https://www.cdc.gov/coronavirus/2019-ncov/hcp/duration-isolation.html>

neutralization response to the Beta variant, suggesting that vaccination enhances the immune response even to a variant to which the infected person had not been previously exposed. Although such laboratory evidence continues to suggest that vaccination provides improved neutralization of SARS-CoV-2 variants, limited evidence in real-world settings to date corroborates the findings that vaccination can provide improved protection for previously infected persons. The findings from this study suggest that among previously infected persons, full vaccination is associated with reduced likelihood of reinfection, and, conversely, being unvaccinated is associated with higher likelihood of being reinfected.

The lack of a significant association with partial versus full vaccination should be interpreted with caution given the small numbers of partially vaccinated persons included in the analysis (6.9% of case-patients and 7.9% of controls), which limited statistical power. The lower odds of reinfection among the partially vaccinated group compared with the unvaccinated group is suggestive of a protective effect and consistent with findings from previous studies indicating higher titers after the first mRNA vaccine dose in persons who were previously infected (7,8).

The findings in this report are subject to at least five limitations. First, reinfection was not confirmed through whole genome sequencing, which would be necessary to definitively prove that the reinfection was caused from a distinct virus relative to the first infection. Although in some cases the repeat positive test could be indicative of prolonged viral shedding or failure to clear the initial viral infection (9), given the time between initial and subsequent positive molecular tests among participants in this study, reinfection is the most likely explanation. Second, persons who have been vaccinated are possibly less likely to get tested. Therefore, the association of reinfection and lack of vaccination might be overestimated. Third, vaccine doses administered at federal or out-of-state sites are not typically entered in KYIR, so vaccination data are possibly missing for some persons in these analyses. In addition, inconsistencies in name and date of birth between KYIR and NEDSS might limit ability to match the two databases. Because case investigations include questions regarding vaccination, and KYIR might be updated during the case investigation process, vaccination data might be more likely to be missing for controls. Thus, the OR might be even more favorable for vaccination. Fourth, although case-patients and controls were matched based on age, sex, and date of initial infection, other unknown confounders might be present. Finally, this is a retrospective study design using data from a single state during a 2-month period; therefore, these findings cannot be used to infer causation. Additional prospective studies with larger populations are warranted to support these findings.

TABLE 1. Demographic characteristics of COVID-19 patients with reinfection (case-patients) and COVID-19 patients who were not reinfected (control participants) — Kentucky, May–June 2021

Characteristic	No. (%)	
	Case-patients* (n = 246)	Control participants† (n = 492)
Age group, yrs		
18–29	46 (18.7)	89 (18.1)
30–39	37 (15.0)	83 (16.9)
40–49	43 (17.5)	80 (16.3)
50–59	44 (17.9)	88 (17.9)
60–69	27 (11.0)	51 (10.4)
70–79	28 (11.4)	58 (11.8)
≥80	21 (8.5)	43 (8.7)
Sex		
Female	149 (60.6)	298 (60.6)
Month of initial infection in 2020		
March	0 (0)	3 (0.6)
April	7 (2.8)	11 (2.2)
May	2 (0.8)	2 (0.4)
June	4 (1.6)	11 (2.2)
July	8 (3.3)	17 (3.5)
August	8 (3.3)	13 (2.6)
September	13 (5.3)	22 (4.5)
October	36 (14.6)	78 (15.9)
November	72 (29.3)	141 (28.7)
December	96 (39.0)	194 (39.4)

* Case-patients were eligible for inclusion if initial infection occurred during March–December 2020, and a subsequent positive nucleic acid amplification or antigen test result was received during May–June 2021 (using date of specimen collection). Cases for analyses were restricted to persons aged ≥18 years at time of reinfection.

† Controls were matched by sex, age (within 3 years), and time of initial infection diagnosis (within 7 days).

These findings suggest that among persons with previous SARS-CoV-2 infection, full vaccination provides additional protection against reinfection. Among previously infected Kentucky residents, those who were not vaccinated were more than twice as likely to be reinfected compared with those with full vaccination. All eligible persons should be offered vaccination, including those with previous SARS-CoV-2 infection, to reduce their risk for future infection.

Acknowledgments

Kentucky's local health departments, disease investigators, and regional epidemiologists; Kentucky Department for Public Health immunization and data team members; Suzanne Beavers, CDC.

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¹Epidemic Intelligence Service, CDC; ²Kentucky Department for Public Health; ³Division of Healthcare Quality Promotion, National Center for Emerging and Zoonotic Infectious Diseases, CDC; ⁴Division of State and Local Readiness, Center for Preparedness and Response, CDC; ⁵College of Public Health, University of Kentucky, Lexington, Kentucky.

All authors have completed and submitted the International Committee of Medical Journal Editors form for disclosure of potential conflicts of interest. No potential conflicts of interest were disclosed.

TABLE 2. Association of SARS-CoV-2 reinfection* with COVID-19 vaccination status — Kentucky, May–June 2021

Vaccination status	No. (%)		OR (95% CI)†
	Case-patients	Control participants	
Not vaccinated	179 (72.8)	284 (57.7)	2.34 (1.58–3.47)
Partially vaccinated‡	17 (6.9)	39 (7.9)	1.56 (0.81–3.01)
Fully vaccinated§	50 (20.3)	169 (34.3)	Ref
Total	246 (100)	492 (100)	—

Abbreviations: CI = confidence interval; NAAT = nucleic acid amplification test; OR = odds ratio; Ref = referent group.

* All case-patients (reinfected) and control participants (not reinfected) had previous SARS-CoV-2 infection documented by positive NAAT or antigen test results during March–December 2020. Reinfection was defined as receipt of positive NAAT or antigen test results during May 1–June 30, 2021.

† Estimated based on conditional logistic regression.

‡ Case-patients were considered partially vaccinated if ≥1 dose of vaccine was received, but the vaccination series was either not completed or the final dose was received <14 days before their reinfection date. For control participants, the same criteria were applied, using the matched case-patient's reinfection date.

§ Case-patients and control participants were considered fully vaccinated if a complete COVID-19 vaccine series was received ≥14 days before the case-patient's reinfection date.

References

- Stamatatos L, Czartoski J, Wan YH, et al. mRNA vaccination boosts cross-variant neutralizing antibodies elicited by SARS-CoV-2 infection. *Science* 2021. Epub March 27, 2021. PMID:33766944 <https://doi.org/10.1126/science.abc9175>
- Deng X, Garcia-Knight MA, Khalid MM, et al. Transmission, infectivity, and neutralization of a spike L452R SARS-CoV-2 variant. medRxiv [Preprint posted online March 9, 2021] <https://www.medrxiv.org/content/10.1101/2021.03.07.21252647v1>
- Harris PA, Taylor R, Thielke R, Payne J, Gonzalez N, Conde JG. Research electronic data capture (REDCap)—a metadata-driven methodology and workflow process for providing translational research informatics support. *J Biomed Inform* 2009;42:377–81. PMID:18929686 <https://doi.org/10.1016/j.jbi.2008.08.010>
- Mounib EL, Satchi T. Automating the selection of controls in case-control studies. Cary, NC: SAS Institute; 2000. <https://support.sas.com/resources/papers/proceedings/proceedings/sugi25/25/po/25p230.pdf>
- Sui Y, Bekele Y, Berzofsky JA. Potential SARS-CoV-2 immune correlates of protection in infection and vaccine immunization. *Pathogens* 2021;10:138. PMID:33573221 <https://doi.org/10.3390/pathogens10020138>
- Wang F, Nair MS, Liu L, et al. Increased resistance of SARS-CoV-2 variants B.1.351 and B.1.1.7 to antibody neutralization. *bioRxiv* [Preprint posted online February 4, 2021]. <https://www.biorxiv.org/content/10.1101/2021.01.25.428137v2>
- Saadat S, Rikhtegaran Tehrani Z, Logue J, et al. Binding and neutralization antibody titers after a single vaccine dose in health care workers previously infected with SARS-CoV-2. *JAMA* 2021;325:1467–9. PMID:33646292 <https://doi.org/10.1001/jama.2021.3341>
- Manistry C, Otter AD, Treibel TA, et al. Antibody response to first BNT162b2 dose in previously SARS-CoV-2-infected individuals. *Lancet* 2021;397:1057–8. PMID:33640038 [https://doi.org/10.1016/S0140-6736\(21\)00501-8](https://doi.org/10.1016/S0140-6736(21)00501-8)
- Cevik M, Tate M, Lloyd O, Maraolo AE, Schafers J, Ho A. SARS-CoV-2, SARS-CoV, and MERS-CoV viral load dynamics, duration of viral shedding, and infectiousness: a systematic review and meta-analysis. *Lancet Microbe* 2021;2:e13–22. PMID:33521734 [https://doi.org/10.1016/S2666-5247\(20\)30172-5](https://doi.org/10.1016/S2666-5247(20)30172-5)

[Additional submissions by Ms. Hayes follow:]

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Only 5% Of Worshippers Say Religious Leaders Discouraged Covid Vaccines — Despite Growing Interest In 'Religious Exemptions'

Marisa Dellatto Forbes Staff

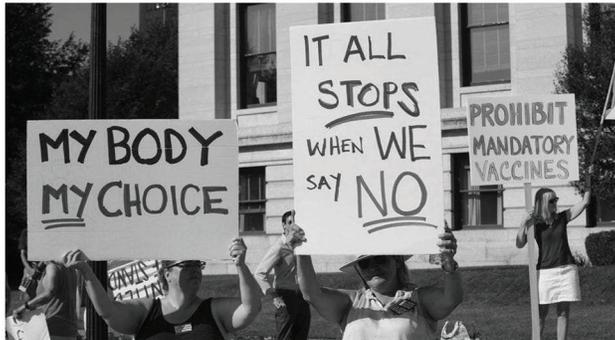
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TOPLINE As vaccine mandates become more commonplace around the country and interest in religious exemptions has increased, a new study from Pew Research Center found that very few religious leaders in the US advised their followers against getting the shot.



<https://www.forbes.com/sites/marisadellatto/2021/10/15/only-5-of-worshippers-say-religious-leaders-discouraged-covid-vaccines—despite-growing-int...> 1/4

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Anti-vaccine mandate protesters demonstrate, on August 24, 2021, outside of the Ohio Statehouse in ... [+] AFP VIA GETTY IMAGES

KEY FACTS

- According to the survey, which was conducted the week of September 20, only 5% of worshippers who attended a service in the last month said their religious leaders discouraged them from getting the vaccine.
- Instead, 39% said leaders actually encouraged their followers to get the vaccine, while 54% said their leaders did not say anything specific about the shot.
- The survey found that evangelical Christians most commonly had a church leader who discouraged the vaccines, with 4% reporting that this happened to them.
- Out of people who attended religious services at least once a month, 61% said that they have a fair amount of confidence in their religious leaders to provide guidance about the vaccine, only second to their primary care doctors (81%).

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Quinn Spin-Off

CONTRA

Despite the result of the survey, religion is still closely tied to vaccine hesitancy. False online rumors that the vaccines included fetal cells obtained through abortions has become a sticking point among pro-life Christians as they refuse the shot, according to the *Associated Press* — though some versions of some vaccines were tested on fetal cells. Because of that reason, the Catholic Church Archdiocese for the Military Services stated this week that service members have the right to refuse the mandated shot, *Military.com* reports. On Tuesday, a judge ruled that New York State must allow healthcare workers a religious exemption from getting the mandated vaccine, per *Reuters*. One pastor and Republican Senate candidate Jackson Lahmeyer announced last month that in exchange for donations to his Tulsa-based church, he will provide a signature for their religious exemption letters on any grounds — though he refused on the shot because of the fetal cell connection, the *Washington Post* reported.

KEY BACKGROUND

However, religious leaders can also positively affect the vaccine rate. In August Pope Francis urged Catholics to get the shot, calling it “an act of love.” And priests in California have contributed to 86% of Catholic Latinos being vaccinated by interacting with parishioners one-on-one and offering up their churches as vaccine sites, according to *Religion News*. According to another Pew survey from this summer, at 82% Catholics were the highest-vaccinated group in the county, more than the 75% of people who weren't affiliated with any religion who got the shot. Despite objections, mandates have been extremely effective in increasing the vaccination rate: New York's rate of vaccinated hospital and nursing home workers shot up 10% a week after a mandate went into effect and 20% of Delta Airlines unvaccinated employees got their first shot after it was announced their health insurance would be surcharged — these are just a few examples from a growing trend.

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COMMENTARY

Faithful Texans are called to protect their communities. Vaccines and masks do just that.



Julie Cloud and David Currie September 18, 2021

Attendees sing hymns during a voting rights vigil at Friendship Baptist Church in July. Credit: Bria Woods / San Antonio Report

Central to every faith community is the obligation to care for one another. As people of deep faith, we are commanded to work in service of the most vulnerable. For the past year and a half, amid a deadly pandemic that should have reinforced this responsibility to our communities, it has been disheartening to see so many faithful Texans shirk the CDC-recommended public health guidelines meant to protect ourselves and each other.

On the whole, vaccine acceptance among religious communities is up, according to a [survey](#) by the Public Religion Research Institute and Interfaith Youth Core. But certain faith communities are far more likely to refuse the vaccine. For instance, the survey found that nearly one in four white evangelical Protestants refuse to get vaccinated.

And it doesn't help when everything from masks to social distancing to vaccines, commonsense measures backed by science, have been under consistent political attack. Earlier this year, for instance, right-wing lawmakers in the state legislature and their allies lobbied to [exclude houses](#)

of worship from community health guidelines. Texas Attorney General Ken Paxton also issued a letter last year saying religious schools do not have to adhere to public health orders.

And now, Gov. Greg Abbott has extended the statewide ban on mask mandates, denying communities — including houses of worship and schools — the freedom to make their own decision on how best to keep themselves and their neighbors safe. As faith leaders, we are horrified by the prospect of denying people access to schools and houses of worship by creating unsafe environments.

Our respective faith traditions, Baptist and Methodist, run in stark contrast to these measures that disrespect the sanctity of life. And it feels more personal than ever to deny us the right to enact our own safety policies as our children and grandchildren, some not old enough to receive the vaccine, are returning to in-person learning, without schools following safety measures recommended by health care professionals nationwide.

Faith leaders can be powerful agents of change in the fight to get people vaccinated and, ultimately, end the COVID-19 pandemic. In Texas, many of our fellow clergy members are already answering the prophetic call to advocate for the health of our communities. On the federal level, the Biden administration has been working with faith leaders to spread the word about the effectiveness of the vaccine. And even our own Interfaith Alliance is part of the COVID-19 Community Corps to build vaccine acceptance in our own communities.

As people of faith, we have the responsibility to advocate for the most vulnerable, including our children. When leaders put politics ahead of the safety of our children, they have forfeited the right to be leaders. Our children need true leadership. They need leaders who push for vaccines, masking, social distancing, and following public health guidelines. True leaders live to serve and protect.



JULIE CLOUD

Julie Cloud is a native Texan and vice president of the Eula Mae and John Baugh Foundation. She is on the boards of Interfaith Alliance, SMU's Perkins School of Theology, and Good Faith Media. She is... [More by Julie Cloud](#)



DAVID CURRIE

Rev. David R. Currie is a lifelong Texas rancher and retired executive director of Texas Baptists Committed. He serves on the boards of Interfaith Alliance and Pastors for Texas Children. He and his wife... [More by David Currie](#)



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October 26, 2021

The Honorable Alma S. Adams, Chair
The Honorable Fred Keller, Ranking Member
Workforce Protections Subcommittee

The Honorable Suzanne Bonamici, Chair
The Honorable Russ Fulcher, Ranking Member
Civil Rights & Human Services Subcommittee

Education and Labor Committee
U.S. House of Representatives
2176 Rayburn House Office Building
Washington, DC 20515
Via Email: Theresa.Thompson@mail.house.gov

RE: Joint Subcommittee Hearing, "Protecting Lives and Livelihoods: Vaccine Requirements and Employee Accommodations"

Dear Chairs Adams and Bonamici, Ranking Members Keller and Fulcher, and Distinguished Members of the Committee:

It is my distinct honor to submit the following testimony on the overwhelming support for COVID-19 vaccination among people of faith as part of the Subcommittees' upcoming joint hearing entitled "Protecting Lives and Livelihoods: Vaccine Requirements and Employee Accommodations." My name is Katy Joseph and I serve as the Director of Policy and Advocacy for Interfaith Alliance Foundation, a national nonpartisan organization that champions an inclusive vision of religious freedom and works to advance policies that ensure all Americans receive equal treatment under the law.

Religious freedom is the first freedom guaranteed by the Constitution through the First Amendment's Free Exercise and Establishment Clauses. In recognition of the primacy of personal conscience, it is the freedom on which all others depend. But as with other enumerated rights and liberties, religious freedom is not without limits, particularly at a moment when our ability to address the devastating COVID-19 pandemic calls us to act collectively to protect the most vulnerable.

Across faiths and philosophies, we are united by a shared obligation to care for one another. Despite small groups and individuals seeking religious exemptions from public health measures, religious denominations and people of faith are overwhelmingly supportive of vaccines and continue to report increased vaccine acceptance. Simply put, the freedom to believe as we choose (about medical decision-making and all other matters of conscience) is protected under the First Amendment. The ability to exercise those beliefs in ways that harm others is neither protected nor warranted.

Religious Freedom Does Not Include the Right to Endanger Others

Religious freedom has a specific meaning, rooted in our rich but imperfect history. The First Amendment guarantees every American the ability to make our own decisions about religion,



including the freedom to follow the faith tradition of our choosing or to be secular or nonreligious without fear of discrimination or harm. For people of all faiths and none, this right protects us from government intrusion into our inward beliefs and our outward religious expression – up to a point.

As early as 1878, the U.S. Supreme Court recognized that one person’s free exercise of religion depends on necessary limits to our neighbors’ ability to do the same, saying, “laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices.”ⁱ In short, I cannot live out my faith if my friend or coworker mandates that I live by theirs. Beyond a certain point, the Court noted, enabling certain people of faith to disobey laws that bind everyone else would undermine our pluralist democracy and create unique privileges for some over others. Permitting these opt-outs, the justices warned, “would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself.”ⁱⁱ

The state of free exercise jurisprudence has evolved in the intervening decades, first requiring the government to articulate a compelling interest to place a significant burden on religionⁱⁱⁱ and ultimately turning over exceptions to religiously-neutral and generally-applicable laws to the “political process.”^{iv} Congress obliged with the passage of the Religious Freedom Restoration Act (RFRA) in 1993,^v with many states following suit. But the COVID crisis has created opportunities for some groups to test the boundaries of these exemptions in dangerous ways.

Religious Organizations and People of Faith Overwhelmingly Support COVID Vaccinations

Times of public crisis demand that all community leaders—religious, secular, and governmental—work together to find solutions. And as many return to in-person gatherings, faith communities across the country continue to care for and sustain one another without endangering public health. Our congregations, religious schools, and service organizations bear a duty to their employees and to the larger communities that they serve. We can, and we continue to, live out our faith without putting others at risk.

Since the start of the pandemic, every major religious denomination in the United States has spoken out in support of getting vaccinated to slow the spread of COVID-19.^{vi} Some have even instituted requirements for their staff to do so while others have stated that there is no basis for religious exemptions within their doctrine.^{vii} Within faith traditions that encompass various schools of thoughts or points of authority on the topic, leading organizations developed guidance tailored to their community.^{viii} Prominent figures have also urged adherents to get the vaccine as to protect life and care for the wellbeing of others. The Rev. Robert Jeffress of First Baptist Dallas, for instance, said that he and his staff “are neither offering nor encouraging members to seek religious exemptions from the vaccine mandates....[From my perspective,] there is no credible religious argument against the vaccines.”^{ix}

Even in this period of instability, clergy and other faith leaders remain trusted sources of information. The Pew Research Center recently found that six in ten Americans who attend a house of worship say they have “a fair amount” or “a great deal” of confidence in their religious leaders to provide reliable guidance about getting a vaccine. Black Americans who attend religious services on a regular basis are especially likely to express confident in their clergy’s guidance, with 77% expressing at least a fair amount of confidence in religious leaders to do so compared with 62% of Hispanic and 59% of white attendees.^x

So it should come as no surprise that people of faith are listening. The Public Religion Research Institute found that vaccine hesitancy decreased significantly between March and June of 2021. In June, more than seven in ten Americans (71%) identified as vaccine accepters, including two-thirds of respondents (67%) who reported that they have received at least one dose and an additional 4% who said they would get vaccinated as soon as they were able.



In the same period, Hispanic Catholics saw the greatest increase in vaccine acceptance, from 56% to 80%. White Catholics, white mainline Protestants, Black Protestants, Latter-day Saints, and the religiously unaffiliated also saw increases of eleven to fifteen percentage points. Hispanic Protestants and white evangelical Protestants remained the least likely religious groups to be vaccine accepters (56% for both groups), but both groups still saw significant increases between March and June (from 43% and 45%, respectively).^{xi}

In research like this and through Interfaith Alliance's network of state and local affiliates, we regularly witness the critical ways that religious communities are playing a central role the pandemic response. While much attention may be given to those seeking exemptions under the guise of religious freedom, the message from religious leaders and the people in the pews is overwhelmingly clear: getting vaccinated is an act of faith.

Ending This Pandemic Will Require Us to Act Collectively – For the Health and Safety of All

Central to every faith community is the obligation to care for one another. In our congregations and in our communities, we put our beliefs into practice when we abide by public health guidelines. Under the First Amendment, we have the right to believe as we choose. We do not have the right to place others at risk.

As the Workforce Protections and Civil and Human Services Subcommittees consider employee objections to vaccine requirements, I invite you to place these policies in their broader context. Earlier this year, in statehouses across the country, lawmakers introduced bills seeking to create permanent religious exemptions to emergency orders. Vaccines – and even public health emergencies – are only a small piece of these sweeping proposals that threaten to undermine crisis preparedness of all kinds.

Interfaith Alliance led twenty-six national religious organizations and denominations in a joint statement released on April 12, 2021, opposing these efforts. Signers celebrated the many “creative ways [we have found] to provide opportunities for worship during the pandemic, recognizing the spiritual sustenance and sense of community that religious practices provide.”^{xii} We continue to keep a close eye on these bills as well as legal challenges to vaccine requirements currently moving through the courts.^{xiii} Across belief and practice, we are united by “a deeply-held commitment to protecting life and the most vulnerable among us.”^{xiv}

This letter, alongside persistent advocacy by faith leaders before all levels of government, makes abundantly clear that religious communities are committed to working in partnership to promote our shared safety. Through the COVID-19 pandemic and beyond, we will continue to prioritize the health and safety of our communities and lead by example. Broad religious exemptions to vaccine requirements are unnecessary and would further endanger our communities. The right to believe as we choose is sacred – the ability to harm others is not.

Respectfully,

Katy Joseph
Director of Policy & Advocacy
Interfaith Alliance



¹ Reynolds v. United States, 98 U.S. 145 (1878).

² *Id.*

³ Sherbert v. Verner, 374 U.S. 398 (1963).

⁴ Employment Division, Dept. of Human Resources of Oregon v. Smith, 494 U.S. 872 (1990).

⁵ 42 U.S.C. § 2000bb *et seq.* (1993).

⁶ See, e.g., Chairmen of the Committee on Doctrine and the Committee on Pro-Life Activities, United States Conference of Catholic Bishops, MORAL CONSIDERATIONS REGARDING THE NEW COVID-19 VACCINES at 4 (Dec. 11, 2020), <https://www.usccb.org/resources/moral-considerations-covid-vaccines.pdf>; The Orthodox Union and the Rabbinical Council of America, COVID-19 Vaccine Guidance (Dec. 15, 2020), <https://www.ou.org/assets/Guidance-re-Vaccines.pdf>; First Presidency Message, The Church of Jesus Christ of Latter-Day Saints, The First Presidency Urges Latter-Day Saints to Wear Face Masks When Needed and Get Vaccinated Against Covid-19 (Aug. 12, 2021), <https://newsroom.churchofjesuschrist.org/article/first-presidency-message-covid-19-august-2021>. Please contact me for access to Interfaith Alliance's database of vaccine statements from U.S. religious denominations and organizations (kjoseph@interfaithalliance.org).

⁷ See, e.g., International Mission Board, Southern Baptist Convention, IMB updates vaccination policy to maximize access to unreached peoples (Sept. 8, 2021), <https://www.imb.org/2021/09/08/imb-updates-vaccination-policy-maximize-access-unreached-peoples/>; Connie Larkman, UCC National Mandates COVID-19 Vaccination for Staff (Oct. 13, 2021), <https://www.ucc.org/ucc-national-mandates-covid-19-vaccines-for-staff/>.

⁸ See, e.g., National Muslim Task Force on COVID-19 and National Black Muslim COVID Coalition, Statement Regarding COVID-19 Vaccines (Oct. 22, 2020), <https://sna.net/wp-content/uploads/2020/04/Press-Release-NMCTF-COVID-Vaccines-12.22.2020.pdf>.

⁹ Peter Smith, Many Faith Leaders Say No to Endorsing Religious Exemptions, AP (Sept. 17, 2021), <https://apnews.com/article/health-religion-united-states-coronavirus-pandemic-coronavirus-vaccine-9c942acc66ba26b4c78827b7b87c185>.

¹⁰ Pew Research Center, Most Americans Who Go to Religious Services Say They Would Trust Their Clergy's Advice on COVID-19 Vaccines (Oct. 15, 2021), <https://www.pewforum.org/2021/10/15/most-americans-who-go-to-religious-services-say-they-would-trust-their-clergys-advice-on-covid-19-vaccines/>.

¹¹ Public Religion Research Institute, Religious Identities and the Race Against the Virus: Wave 2; June 2021 (July 27, 2021), <https://www.prrri.org/wp-content/uploads/2021/07/PRRI-IFYC-Jul-2021-Vaccine.pdf>.

¹² Interfaith Alliance Foundation, 27 DENOMINATIONS AND RELIGIOUS ORGANIZATIONS RELEASE STATEMENT OPPOSING EXEMPTIONS TO EMERGENCY ORDERS (April 12, 2021), <https://interfaithalliance.org/news/27-religious-orgs-release-statement-opposing-exemptions-to-emergency-orders/>.

¹³ Mills v. Does, No. 21-1826 (1st Cir. Oct. 21, 2021).

¹⁴ See *supra*, note xii.

AP

Many faith leaders say no to endorsing vaccine exemptions

By PETER SMITH

September 17, 2021



In this Wednesday, Jan. 6, 2021 file photo, His Eminence Archbishop Elpidophoros, Primate of the Greek Orthodox Archdiocese of America throws a cross into Spring Bayou during the 115th year of the annual Epiphany celebration in Tarpon Springs, Fla. Leaders of the Greek Orthodox Archdiocese of America said Thursday, Sept. 16, 2021, that while some people may have medical conditions for not receiving the vaccine, "there is no exemption in the Orthodox Church for Her faithful from any vaccination for religious reasons." Greek Orthodox Archbishop Elpidophoros added: "No clergy are to issue such religious exemption letters," and any such letter "is not valid." (Douglas R. Clifford/Tampa Bay Times via AP)

As significant numbers of Americans seek [religious exemptions from COVID-19 vaccine mandates](#), many faith leaders are saying: Not with our endorsement.

Leaders of the Greek Orthodox Archdiocese of America [said Thursday](#) that while some people may have medical reasons for not receiving the vaccine, "there is no exemption in the Orthodox Church for Her faithful from any vaccination for religious reasons."

The Holy Eparchial Synod of the nationwide archdiocese, representing the largest share of Eastern Orthodox people in the United States, urged members to “pay heed to competent medical authorities, and to avoid the false narratives utterly unfounded in science.”

“No clergy are to issue such religious exemption letters,” Greek Orthodox Archbishop Elpidophoros said, and any such letter “is not valid.”

Similarly, the Evangelical Lutheran Church in America issued a recent statement encouraging vaccine use and saying that “there is no evident basis for religious exemption” in its own or the wider Lutheran tradition.

The Roman Catholic Archdiocese of New York laid out its own stance during the summer, saying that any priest issuing an exemption letter would be “acting in contradiction” to statements from Pope Francis that receiving the vaccine is morally acceptable and responsible.

Both the Vatican and the U.S. Conference of Catholic Bishops have said Catholics can receive the vaccines in good conscience given the lack of alternatives and the goal of alleviating suffering — even while objecting to research with even a remote connection to abortion.

A number of dioceses have adopted policies similar to New York’s, and bishops in El Paso, Texas, and Lexington, Kentucky, have mandated vaccines for employees.

But other Catholic jurisdictions are more accommodating of exemptions. The Colorado Catholic Conference, the policy arm of the state’s bishops, has posted online a template for a letter that priests can sign saying an individual parishioner may draw on Catholic values to object to the vaccines. South Dakota’s bishops have also taken that stance.

At issue for many Catholics and other abortion opponents is that the most widely used COVID-19 vaccines were tested on fetal cell lines developed over decades in laboratories, though the vaccines themselves do not contain any such material.

The issue is becoming more heated as public- and private-sector employers increasingly impose mandates.

A clerical letter wouldn’t necessarily be needed for someone to be granted an exemption — federal law requires employers make reasonable accommodations for “sincerely held” religious beliefs — though a clergy endorsement could help bolster a person’s claim.

The Rev. Robert Jeffress of First Baptist Dallas, a Southern Baptist megachurch, said he and his staff “are neither offering nor encouraging members to seek religious exemptions from the vaccine mandates.”

“There is no credible religious argument against the vaccines,” he said via email. “Christians who are troubled by the use of a fetal cell line for the testing of the vaccines would also have to abstain from the use of Tylenol, Pepto Bismol, Ibuprofen, and other products that used the same cell line if they are sincere in their objection.”

The Church of Jesus Christ of Latter-day Saints does not provide religious exemptions for vaccines for members, according to church spokesman Eric Hawkins. Leaders of the Utah-based faith have made pleas for members to get vaccinated even as doctrine acknowledges it’s up to individual choice.

The church’s Brigham Young University has asked students to report their vaccination status but is not requiring vaccinations, and the church is also requiring U.S. missionaries serving in foreign countries to be vaccinated.

Some other religious groups, such as the Orthodox Union, an umbrella organization for Orthodox Judaism, and the United Methodist Church, have encouraged people to get vaccines but have not issued policy statements on exemptions.

The Fiqh Council of North America, made up of Islamic scholars, has advised Muslims to receive the Pfizer or Moderna vaccines and to debunk “baseless rumors and myths” about them.

Associated Press writers Brady McCombs in Salt Lake City and David Crary in New York contributed to this report.

Associated Press religion coverage receives support from the Lilly Endowment through The Conversation U.S. The AP is solely responsible for this content.



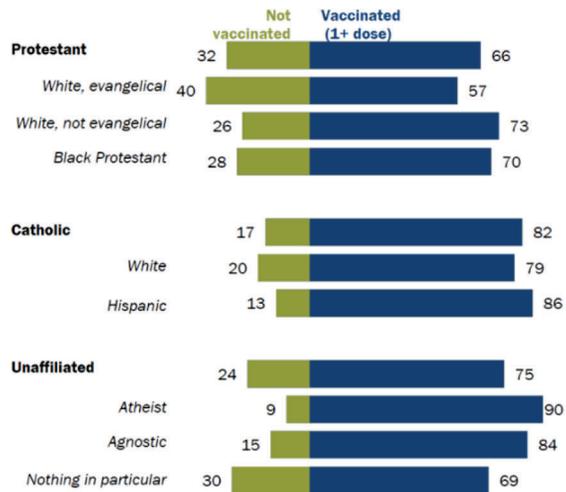
PEW RESEARCH CENTER | SEPTEMBER 17, 2021



White evangelical Protestants less likely to have been vaccinated for COVID-19 than other religious groups

White evangelical Protestants less likely to have been vaccinated for COVID-19 than other religious groups

% of U.S. adults who say they are ...



Note: Respondents who did not give an answer are not shown.

Source: Survey conducted Aug. 23-29, 2021.

"Majority in U.S. Says Public Health Benefits of COVID-19 Restrictions Worth the Costs, Even as Large Shares Also See Downsides"

PEW RESEARCH CENTER

Bloomberg

Business

U.S. Evangelical Leaders Preach Covid Vaccine Benefits to Their Followers

By

[Jonathan Levin](#)

March 26, 2021, 7:00 AM EDT

Updated on March 26, 2021, 10:03 AM EDT

Three months into the U.S. effort to inoculate its way to herd immunity, White evangelical Christianity's biggest names are coming out in favor of Covid-19 vaccines. Their followers' response suggests that won't be enough to overcome the country's largest pocket of vaccine resistance, just as infections are rebounding.

Franklin Graham, son of pioneering televangelist Billy Graham, told his Facebook followers this week that Jesus Christ would advocate vaccination, basing his interpretation on the biblical parable of the Good Samaritan. The posting came after a run of appearances from megachurch leader Robert Jeffress on [Fox News](#) and the Christian Broadcasting Network telling viewers that Christianity encourages looking out for others.

Their statements could persuade holdouts as the U.S. rushes to get shots in arms and fast-spreading Covid-19 variants take hold across the country, boosting hospital admissions for the virus in seven states. This week, the seven-day average in new cases jumped the most since Jan. 12, the clearest sign yet that U.S. is entering another upswing after months of decline.



Rev. Franklin Graham
Photographer: Justin Sullivan/Getty Images

Jeffress and Graham wield “extraordinary influence,” said Randall Balmer, a Dartmouth College professor of religion who credits them with helping bring their communities to Donald Trump. The ex-president’s personal life and character appeared out of line with evangelical Christians’ historical values.

“Among a segment of the population that apparently is resistant to the vaccines, I think their voices will carry weight,” Balmer said.

Only half of White evangelical Christians say they will probably get vaccinated or have already done so. That’s the lowest acceptance rate among religions tracked by a Pew Research Center poll, and is a massive challenge to the country’s effort to curb the spread of the virus.

Those Christians also are overwhelmingly tied to the Republican Party. President Joe Biden said faith leaders are one of the country’s best hopes for reaching vaccine holdouts. The task is urgent. Rochelle Walensky, director of the U.S. Centers for Disease Control and Prevention, warned this week that the variants could propel another surge. On Thursday, the U.S. posted 1,270 new Covid-19 deaths, bringing the total to nearly 547,000.

Even in the face of that threat, the response to Graham’s message shows it won’t be easy to win over people, Balmer said. Graham, who runs the Samaritans’ Purse charity and is himself an evangelist, has been pilloried by hundreds of followers on social media. Some cited scripture and some trafficked in conspiracy theories. Some said they could no longer follow Graham after such an endorsement.

It’s possible those voices are overamplified. The Graham post got 46,000 “thumbs up” and nearly 7,000 “hearts.” which by far outnumber the responses

peddling conspiracy theories, as 39-year-old Brandia Deatherage noted in the comments section.

“I am a Christian and very much look up to his father, Billy Graham, and I was pleasantly surprised that Franklin took a public stand in favor of the vaccine,” Deatherage, a real-estate broker and writer in Washington, North Carolina, said in a phone interview Thursday.



Pastor Robert Jeffress
Photographer: Mandel Ngan/AFP/Getty Images

It's hard to disentangle political views from religious ones, since voting patterns show about 4 in 5 White evangelicals supported Trump. Only about 41% of self-described Republicans say they want the vaccine as soon as possible or have already gotten it, versus 75% of Democrats, according to the Feb. 15-23 KFF Covid-19 Vaccine Monitor poll.

Biden, Vice President Kamala Harris and former Vice President Mike Pence all got the vaccine publicly in a show of support, but Trump had done so privately and didn't initially tell anyone. In an interview with Fox News' Maria Bartiromo on March 16, he finally appeared to give perhaps his clearest endorsement, saying the shots are safe, effective and that he would “recommend it to a lot of people that don't want to get it.”

Charles Mathewes, a professor of religious studies at the University of Virginia, said there was nothing in scripture that leads to an interpretation about Covid-19 vaccines; rather, some people were simply projecting political beliefs through their biblical interpretations.

“It's very hard to figure out what kind of theological language would mobilize them to change their views,” he said.

Jeffress, leader of 14,000-member First Baptist Dallas church and a major evangelical voice for years, echoed the notion that politics may be driving the resistance.

“Many Christians have allowed their view to be shaped by their politics, rather than their faith,” said Jeffress, who supported Trump and calls himself an informal adviser and friend to the former president. “They have an idea that this is a Joe Biden initiative. That’s ludicrous. I give Joe Biden credit for the distribution of the vaccine, but there would be no vaccine to distribute if it were not for Donald Trump.”

Jeffress said he hasn’t personally heard from the Biden administration about its vaccine outreach to evangelicals, but said Biden was correct to single out religious leaders as an important part of the campaign.

In recent sermons, Jeffress didn’t address Covid-19 from the pulpit. But speaking by phone from Dallas, he said that he wasn’t intentionally avoiding the subject at church. He said the members of his community are aware of his stance, and that he has brought it up in other church contexts outside the sermon.

“Our congregation has seen my appearances, and they know that I believe that the most Christian thing we can do is not just to look out for our own interests, but look out for the interests of others, as Paul wrote in [Philippians 2](#),” Jeffress said, referring to an epistle in the New Testament that tells Christians: “Do nothing from selfishness or empty conceit.”

Among a certain segment of the population, preachers aren’t the only effective persuaders.

“Elvis got the polio vaccine back in the 1950s, and it actually helped a lot,” said Ryan Burge, a Baptist minister and political science professor at Eastern Illinois University, who has encouraged his community to get the shots. “So pastors taking that same role today may be a very good idea.”

(Updates with death toll in seventh paragraph. A previous version corrected name of Dartmouth College in fourth paragraph.)

OPINION | MARIE MAINARD O'CONNELL: Our moral duty

We're called to love, protect others

by MARIE MAINARD O'CONNELL SPECIAL TO THE DEMOCRAT-GAZETTE

| August 28, 2021 at 3:40 a.m.

Nearly 80 percent of Arkansans claim to be Christian. As a pastor and mother of three public school children, I know the heartache of seeing fellow believers rail against lifesaving covid-19 precautions at a time when our common viral enemy should unite us in mission.

I must reveal what many pastors believe, yet we are reluctant to say publicly: that we have a religious obligation during the pandemic to protect others as much as possible, even at the cost of our personal and political preferences.

For many, it is far easier to pray for God's intervention than to call our fellow Christians to be better disciples. But the answers to the pandemic are right in front of us. It is Bible-based that God desires us to do at least three things: Mask up, get vaccinated, and be kinder than we want to be to those with whom we disagree.

As Christians, we outline our actions by John 13:34-35: "A new command I give you: Love one another. As I have loved you, so you must love one another. By this everyone will know that you are my disciples if you love one another."

Christ's love is sacrificial; he saw people in deep distress and healed them at a cost to his time and energy. Loving others as God loves us is the highest call, and in a pandemic, we love by healing, protecting, and limiting the spread of covid-19 in as many ways as possible. We set aside all other agendas to answer: "What do others need?"

Covid-19 vaccines are a gift from God for the healing of the nations, their development made possible by the Holy Spirit through the collaboration of scientists blessed to find

formulas faster than usual. Rather than doubt such a miracle is possible, let us praise that, through God's power, it came to pass.

Vaccines are the best way to reduce the spread of the disease, cost of treatment, and amount of individual and societal suffering. Refusal to take the vaccine may be an unfaithful choice if that choice is rooted in disbelief of God's truth revealed in science, denial of one's mortality, fear of discomfort, or a selfish insistence that you are more important than the community.

How dare we put God to the test when we are given this gift? One may believe that vaccine or mask mandates are unconstitutional, but know that you then place the idol of a man-made idea above the very call of Christ to love as Christ loved you.

Masks are a tool for protection, as kids under 12 require the community to take precautions when the vaccine is not yet available to them. Online learning was almost impossible for my family to maintain, and the only tools capable of making the classroom safe are social distancing and masks. Though both may be awkward and imperfect, they work and neither causes child illness like the Delta variant.

When we teach our children that their momentary discomfort is more important than the health of their peers, we undermine their ability to apply Christ's compassion to everyday life.

The moral duty to create universal masking for children in schools stems from the unfortunate truth that not all parents will give these tools to their children, and masking only works if all participate equally. A current Arkansas bill politicizes masks further by permitting parents to opt out of this basic health precaution and take tax dollars home or to private schools--let us name this form of theft from the needy.

Children recognize unfairness, and universal masking is the only option to support teachers to manage classrooms, insist on the innate value of each learner, and protect the most vulnerable students. "What you do to the least of these, you have done also to me." Where vaccines are not feasible, masks offer the best protection from needless suffering.

But what of kindness? Each snide remark, every retweet or post that mocks a person or viewpoint disparages the image of God that dwells in the face of others. I urge us to return to love. Nothing changes the heart other than the experience of love, the knowledge that you matter.

I find love best demonstrated by listening. The journey out of our pit will not be found in the media, but in actual conversations with those we care for, sharing vulnerable words that begin "I worry for you when," and "I want to know more about why."

We are so divided as the body of Christ that we do not wish to hear any other perspective than our own; we avoid and disparage our brethren of other stripes, to the great harm of our overall witness. Hear instruction from Ephesians 4:31-32: "All bitterness, anger and wrath, shouting and slander must be removed from you, along with all malice. And be kind and compassionate to one another, forgiving one another, just as God also forgave you in Christ."

Christians are being asked to choose between the selfless call of Christ, and our preference to exercise our rights. The Constitution is the law of the land, but we are to be ruled by God's law of love.

To choose one's liberties over the needs of the weak is, for a Christian, sinful.

Rev. Marie Mainard O'Connell is pastor at Park Hill Presbyterian Church in North Little Rock.

10/25/21, 9:55 AM

Will Evangelical Leaders Receive the COVID-19 Vaccine? - National Association of Evangelicals



Will Evangelical Leaders Receive the COVID-19 Vaccine?

JANUARY/FEBRUARY 2021

According to the January Evangelical Leaders Survey, an overwhelming majority (95 percent) of evangelical leaders said they would receive a COVID-19 vaccination when it becomes available to them. This is much higher than the general public in which roughly a quarter are reluctant to get the vaccine. A very high percentage (89 percent) of evangelical leaders also said they would encourage others to get the vaccine.

Walter Kim, president of the National Association of Evangelicals (NAE), said, “While some have concerns about the newness of the vaccine, possible side effects or efficacy, a careful look at the science behind the vaccines is convincing and the Christian ethic to love is compelling.”

Kim recently hosted a [podcast conversation with Dr. Francis Collins](#), director of the National Institutes of Health and a devoted Christian, in which they discussed safety, efficacy and ethical questions related to the vaccine. In their survey responses, other evangelical leaders noted that the body of evidence for vaccination is adequate to not only get the vaccine but to encourage others to do so.

In addition to the scientific support, many evangelical leaders described the Christian obligation to care for others as a main motivation in receiving the vaccine. Leaders also noted how they look forward to things returning to normal, both personally and for their ministry or work.

“On a practical level, I travel internationally so it will most likely be required for me to get the vaccine,” said Greg Williams, president of Grace Communion International. “But in the same way that we encourage people to wear masks and social distance, we will speak to the vaccination issue as a means for self-care as well as being mindful of others. COVID-19 has demonstrated that we are a global community and as Christians we must hear the call to be our neighbor’s keeper.”

Nicole Martin, vice president of church engagement at the American Bible Society, emphasized that acceptance of the COVID vaccine will be “especially important for vulnerable communities and people of color.”

Gabriel Salguero, president of the National Latino Evangelical Coalition, added, “COVID-19 has disproportionately impacted communities of color and as such many evangelicals of color are at the forefront of promoting vaccination in our communities. In addition, the historic distrust given adverse experiences with health services needs to be overcome and healed.”

10/25/21, 9:55 AM

Will Evangelical Leaders Receive the COVID-19 Vaccine? - National Association of Evangelicals

Carla Sunberg, general superintendent at Church of the Nazarene, noted that promoting vaccination and other public health measures is not the same as giving medical advice, and that people should consult their doctors. "I am very much in favor of the vaccine. At the same time, church leaders should not step into the medical realm in terms of encouraging individuals to get the vaccine for whom it may not be prudent. I think churches can certainly encourage people to take it for the sake of others, but be careful to not give personalized medical advice," she said.

Kim said, "With great hope, we look forward to the day that we can break bread together in one another's homes, give hugs to those who feel isolated, and otherwise care for one another in the normal ways that we have missed. This is a step in that direction and an answer to our prayers."

The Evangelical Leaders Survey is a poll of the Board of Directors of the National Association of Evangelicals. They include the CEOs of denominations and representatives of a broad array of evangelical organizations including missions, universities, publishers and churches.

[Additional submissions by Mr. Keller follow:]



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October 26, 2021

The Honorable Alma S. Adams
Chairwoman
Subcommittee on Workforce Protections
House Committee on Education and Labor
U.S. House of Representatives
2436 Rayburn House Office Building
Washington, D.C. 20515

The Honorable Suzanne Bonamici
Chairwoman
Subcommittee on Civil Rights & Human Services
House Committee on Education and Labor
U.S. House of Representatives
2231 Rayburn House Office Building
Washington, DC. 20515

The Honorable Fred Keller
Ranking Member
Subcommittee on Workforce Protections
House Committee on Education and Labor
U.S. House of Representatives
1717 Longworth House Office Building
Washington, D.C. 20515

The Honorable Russ Fulcher
Ranking Member
Subcommittee on Civil Rights & Human Services
House Committee on Education and Labor
U.S. House of Representatives
1520 Longworth House Office Building
Washington, DC. 20515

Dear Chairwoman Adams, Chairwoman Bonamici, Ranking Member Keller, and Ranking Member Fulcher:

On behalf of NFIB, the nation's leading small business advocacy organization, thank you for holding this important subcommittee hearing titled *"Protecting Lives and Livelihoods: Vaccine Requirements and Employee Accommodations."*

NFIB supports the right of small business owners to make decisions about employee vaccine and testing requirements that meet the needs of their individual business and conditions of their community. We strongly oppose efforts by the Biden Administration to direct the Occupational Safety and Health Administration (OSHA) to issue an Emergency Temporary Standard (ETS) requiring small businesses with 100 or more employees to mandate employees be vaccinated against COVID-19, tested weekly, or terminated.

Under the Occupational Safety and Health (OSH) Act, OSHA has authority to issue an ETS only when the Secretary has made two specific determinations. First, that “employees are exposed to grave danger” and, second, that an “emergency standard is necessary to protect employees from such danger.”¹ This extreme limitation makes sense. An ETS takes immediate effect upon publication and denies the agency the notice and comment process that is “basic to our system of administrative law . . . for the robust debate of competing and frequently complicated policy considerations having far-reaching implications.”² At this late stage in the pandemic, particularly as conditions related to the Delta Variant continue to improve, NFIB does not believe that OSHA can meet the high bar necessary to deny small business owners their rights to OSH Act and Administrative Procedure Act (APA) notice and comment rulemaking. Employers now have more than 19 months of experience and have implemented extensive federal and state guidance and requirements to maintain a safe workplace to protect their employees against COVID-19 exposure. Moreover, there is limited evidence indicating the workplace is a major source of the pandemic’s spread.

The likely requirements of the pending ETS raise significant concerns about the standard’s feasibility.³ COVID-19 testing remains expensive with wide variations in costs,⁴ and NFIB has serious concerns about the ability of many small businesses to afford such a substantial new expense, if imposed upon the employer. In addition to the cost of testing, small businesses may also have to bear numerous other related costs, including wages and travel expenses for employees seeking testing off the job site.⁵ These concerns are only magnified when also considering how a nationwide testing mandate could affect availability of testing supplies. The potential for difficulties in employers obtaining testing raises numerous questions, including will employers be required to furlough workers in situations where testing is unavailable, will leave for workers unable to obtain testing be paid-leave at the employer’s expense, and how will employers establish if testing is available or unavailable. Additionally, actions by state officials and state lawmakers attempting to shield workers from vaccine mandates will also leave many small employers having to weigh complicated federal preemption issues in determining how to comply with competing state and federal law.

¹ 29 U.S.C. 655(c).

² *NRDC v. National Highway Traffic Safety Administration*, 894 F.3d 95, 115 (2d Cir. 2018).

³ An OSHA standard – including an ETS – must be economically feasible in order to be “necessary” under section 6(c)(1)(B) of the OSH Act. See *Am. Textile Mfrs. Inst. v. Donovan*, 452 U.S. 490, 513 n. 31 (1981) (Cotton Dust) (“any standard that was not economically . . . feasible would a fortiori not be ‘reasonably necessary or appropriate’ under the Act”); *Natl’ Maritime Safety Ass’n v. Occupational Safety & Health Admin.*, 649 F.3d 743, 752 (D.C. Cir. 2011). A standard is economically feasible if it does not “threaten” the existence of, or cause massive economic dislocations within, a particular industry or alter the competitive structure of that industry. *United Steelworkers of Am. v. Marshall*, 647 F.2d 1189, 1265 (D.C. Cir. 1980).

⁴ See Robert LaFolla, et al., *Covid Testing Costs Hit Employers’ Wallets as Biden Pushes Shots*, Bloomberg Law, Sept. 29, 2021,

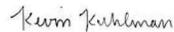
<https://news.bloomberglaw.com/daily-labor-report/covid-testing-costs-hit-employers-wallets-as-biden-pushes-shots>; Nisha Kurani, et al., *COVID-19 Test Prices and Payment Policy*, Apr. 28, 2021, <https://www.healthsystemtracker.org/brief/covid-19-test-prices-and-payment-policy/>.

⁵ This is despite Section 4(b)(4) of the OSH Act’s specific prohibition any standard affecting in any manner “any workmen’s compensation law or to enlarge or diminish or affect in any other manner the common law or statutory rights, duties, or liabilities of employers and employees under any law with respect to injuries, diseases, or death of employees arising out of, or in the course of, employment.” 29 U.S.C. § 653(b)(4).

Regardless of the answers to these questions and concerns, small employers implementing the ETS will have to shoulder administrative costs of tracking vaccination status and testing, including safeguarding the privacy of employees' personal health information and juggling absences and leave requests. Undoubtedly, larger companies will track vaccination status and testing through occupational health services or outside vendors. This will not be the case at many small businesses with 100 or more employees, which often only employ one, or at most two human resource employee(s). For these businesses, tracking this information will be difficult and expensive.

In short, the imposition of a federal vaccine and testing mandate ETS raises serious concerns regarding its lawfulness under the OSH Act and its feasibility in implementation for small businesses, and it deprives small business owners of the freedom to make decisions for their own businesses about whether or not to require vaccination or testing, or not. NFIB research demonstrates that a record number of small employers continue to be unable to find qualified employees.⁶ The issuance of a COVID-19 vaccine and testing ETS will likely only serve to make the situation materially worse. As the subcommittee examines the likely effects of the Biden Administration's proposed ETS at this hearing, NFIB hopes that its affect on small businesses will be closely examined.

Sincerely,



Kevin Kuhlman
Vice President, Federal Government Relations
NFIB

⁶ *NFIB Small Business Jobs Report*, NFIB Research Center, September 2, 2021, <https://www.nfib.com/foundations/research-center/monthly-reports/jobs-report>.

SUBMISSION FOR THE RECORD
TO THE
HOUSE EDUCATION AND LABOR WORKFORCE PROTECTIONS SUBCOMMITTEE
AND CIVIL RIGHTS AND HUMAN SERVICES SUBCOMMITTEE
ON BEHALF OF THE
THE NATIONAL ASSOCIATION OF CONVENIENCE STORES, NATSO, REPRESENTING
AMERICA'S TRAVEL CENTERS AND TRUCK STOPS, AND SIGMA: AMERICA'S
LEADING FUEL MARKETERS
FOR THE OCTOBER 26, 2021 JOINT HEARING
"PROTECTING LIVES AND LIVELIHOODS: VACCINE REQUIREMENTS AND
EMPLOYEE ACCOMMODATIONS"

The National Associations of Convenience Stores, NATSO, Representing America's Travel Centers and Truck Stops, and SIGMA: America's Leading Fuel Marketers (together, "the Associations") respectfully submit this statement to the House Education and Labor Workforce Protections Subcommittee and Civil Rights and Human Services Subcommittee (Subcommittees) record for the hearing, "Protecting Lives and Livelihoods: Vaccine Requirements and Employee Accommodations."

NACS is an international trade association representing the convenience store industry with more than 2,200 retail and 1,600 supplier companies as members, the majority of whom are based in the United States. NATSO currently represents more than 4,000 travel plazas and truck stops nationwide, comprised of both national chains and small, independent locations. SIGMA represents a diverse membership of approximately 260 independent chain retailers and marketers of motor fuel. Collectively, the Associations represent over 2.3 million employees and are responsible for approximately 90 percent of the motor fuel sold in the United States.

The Associations are concerned with President Biden's executive order (EO) directing businesses with more than 100 employees to either require workers to be vaccinated against COVID-19 or produce a negative COVID-19 test weekly. To be clear, the Associations support the intent behind the vaccine mandate and efforts to increase vaccinations in the United States. The Occupational Safety and Health Administration's (OSHA's) forthcoming Emergency Temporary Standard (ETS), however, will have far-reaching consequences beyond the laudable objective of moving past the COVID-19 pandemic.

An aggressive vaccine and testing mandate will trigger employee retention challenges and lead workers, who would rather quit their job than receive the COVID-19 vaccine, to migrate to employers with fewer than 100 employees or the unemployment rolls. That mass exodus will complicate already fragile labor markets and create challenges for many businesses that are currently struggling to remain open. Many of the Associations' members have initiated programs designed to incentivize their workforces to get vaccinated, including meaningful bonus payments and extra paid time off. These have been modestly successful, but there remains reluctance from certain employees.

If the Associations' members were to lose additional employees on top of the current labor shortage, they could be forced to shutter locations and/or leave retail fuel outlets with limited fuel supply. And, the driver shortage confronting the commercial trucking industry is getting worse. It is a daily struggle to ensure our locations are supplied with enough food, fuel and other items that the public expects us to offer. As we have seen with previous supply disruptions (such as the early days of the COVID-19 pandemic and the Colonial Pipeline shutdown), consumers often make a run on essential products such as fuel and food when faced with a limited supply. Panic buying exacerbates supply chain issues and leaves consumers without the essential products they need—including fuel, food, and medical supplies. Without flexibility, especially for businesses essential to the supply chain, the vaccine and testing mandate will cause current supply chain problems to graduate from inconvenient disruption to an unambiguous and self-imposed catastrophe.

Furthermore, the Associations remain concerned with the lack of clarity surrounding the ETS. As the Associations indicated in a letter to OSHA recently, we believe that the ETS must answer the following questions:

1. Will the ETS only be applicable during the current state of emergency or will it be a permanent requirement?
2. Will employers be required to pay for the regular testing for employees?
3. Will employers be required to provide paid time off for regular testing of employees?
4. How will employers be expected to collect and safeguard testing results for their employees?
5. What type of information will OSHA request from employers, or will employers be required to collect from employees, to verify vaccination and testing status?
6. Will businesses be required to track lot numbers, which vaccines were received, and the dates employees received vaccines?
7. Considering there now exist various different types of COVID-19 tests, will the ETS specify what type of test(s) must be taken by employees?
8. What measures will employers be required to implement to enforce vaccine or testing mandates?
9. Will employers be required to dismiss employees due to refusal to get vaccinated or tested?
10. Will employees who lose their jobs because they refuse to be tested or vaccinated be eligible for unemployment payments?
11. Will employees who refuse to be tested or vaccinated and leave their employment to work for an employer with fewer than 100 employees be able to evade a requirement that they be tested or vaccinated?
12. For businesses with high turnover rates, what can businesses do to provide a reasonable amount of time for new employees to get vaccinated?
13. Will the COVID-19 vaccine requirement mean that eligible employees need to receive booster shots?
14. OSHA requires record retention for 30 years after employment. Will this be required for all the testing and vaccine records compiled based upon the ETS?
15. What HIPAA restrictions and requirements will apply to testing and vaccine information? Will businesses need management personnel to undertake regular training on HIPAA?
16. How will the ETS define "under the weather" for the purposes of time off post-vaccination, and do we have to pay for a set period of time?
17. Does a family member feeling "under the weather" trigger a requirement?
18. Will employees with a religious or medical exemption be required to test weekly? If so, who pays for those tests? If an employer objects to those religious beliefs, will the employer still be forced to pay for testing to support those beliefs when other employees are required to be vaccinated?
19. What proof do employees have to provide for negative tests? Will an attestation of vaccination or negative test be sufficient?
20. Will joint employers be treated as one company, or will each company be treated separately? How will any costs be split among joint employers?
21. Can we legally ask, "Are you vaccinated" during the hiring process?
22. Can we refuse to hire any new employees who are not already vaccinated?

23. What happens when an employee tests positive for COVID-19?
24. Do employees who have received one dose of a two-dose sequence have to test weekly?
25. Will employees who have received a second dose but are not yet two weeks past that second dose need to test weekly?

The Associations appreciate the Subcommittees' attention to this important matter and urge the Subcommittee to pursue policies that provide flexibility to businesses essential to the supply chain.

CONSTRUCTION INDUSTRY SAFETY COALITION

October 26, 2021

The Honorable Alma S. Adams
Chairwoman
Subcommittee on Workforce Protections
U.S. House Committee on Education
and Labor
Washington, DC 20515

The Honorable Fred Keller
Ranking Member
Subcommittee on Workforce Protections
U.S. House Committee on Education
and Labor
Washington, DC 20515

The Honorable Suzanne Bonamici
Chairwoman
Subcommittee on Civil Rights
and Human Services
U.S. House Committee on Education
and Labor
Washington, DC 20515

The Honorable Russ Fulcher
Ranking Member
Subcommittee on Civil Rights
and Human Services
U.S. House Committee on Education
and Labor
Washington, DC 20515

Dear Chairwomen Adams and Bonamici and Ranking Members Keller and Fulcher:

The Construction Industry Safety Coalition (CISC)¹ appreciates the opportunity to submit comments for the record for the Oct. 26, 2021, joint subcommittee hearing, "Protecting Lives and Livelihoods: Vaccine Requirements and Employee Accommodations."

Specifically, we would like to express our concerns related to the U.S. Department of Labor's Occupational Safety and Health Administration's forthcoming COVID-19 vaccination and testing Emergency Temporary Standard, which will apply to employers with 100 or more employees as required by President Biden's Path Out of the Pandemic COVID-19 Action Plan.² For your consideration, please find attached a Sept. 27, 2021, letter from the CISC to James Frederick, Acting Assistant Secretary of Labor for Occupational Safety and Health, which details some of the key issues of concern to the construction industry.

In the letter, we reiterate the proactive measures taken by the coalition and the construction industry to address COVID-19. This includes the CISC's efforts to increase vaccinations among the construction workforce.

We also describe how and why the construction industry is low risk and, thus, applying the ETS to the construction industry would not be appropriate under the Occupational Safety and Health Act of 1970. There is no "grave danger" in the construction industry that would warrant applying the ETS to the industry.

Finally, CISC discusses some key considerations related to how OSHA should craft any standard related to vaccinations and testing based upon the experience of CISC association members and their

¹The CISC is comprised of numerous trade associations representing virtually every aspect of the construction industry. Workplace safety and health is a priority for all members of the Coalition, and each is committed to helping create safer construction jobsites for workers. <https://www.buildingsafely.org/>.

² <https://www.whitehouse.gov/covidplan/>.

member companies. How the ETS is crafted will have significant, lasting impacts. We detail concerns from the construction industry, including workforce shortages that would be exacerbated by the ETS, employer and employee obligations for vaccinations and testing, paperwork burdens, recordability of adverse reactions to the COVID-19 vaccine, cost of paid time off for vaccinations and adverse reactions and availability of testing kits.

The CISC appreciates your consideration of the Sept. 27 letter. We would be happy to meet with the subcommittee to discuss this letter and to answer any questions the subcommittee may have.

Sincerely,

The Construction Industry Safety Coalition

CONSTRUCTION INDUSTRY SAFETY COALITION

September 27, 2021

James “Jim” Frederick
Principal Deputy Assistant Secretary
U.S. Department of Labor
Occupational Safety and Health Administration
Room: S2315
200 Constitution Ave., NW
Washington, DC 20210

Re: Construction Industry Safety Coalition
Emergency Temporary Standard on COVID-19 – Vaccines/Testing

Dear Mr. Frederick:

The Construction Industry Safety Coalition (“CISC” or the “Coalition”)¹ respectfully submits this letter to the Occupational Safety and Health Administration (“OSHA” or the “Agency”) for the Agency’s consideration as it works to implement President Biden’s “Path out of the Pandemic COVID-19 Action Plan (the “Plan”).” As part of that Plan, President Biden has directed OSHA to develop a rule to “require all employers with 100 or more employees to ensure their workforce is fully vaccinated or require any workers who remain unvaccinated to produce a negative test result on at least a weekly basis before coming to work.”² The rule will also require employers with more than 100 employees to provide paid time off for the time it takes for workers to get vaccinated or to recover if they are “under the weather” post-vaccination.

The CISC supports the President’s goal of increasing vaccinations among the population and has undertaken numerous efforts to increase worker awareness of – and access to – vaccines in the construction industry. However, the Plan provides little detail as to how OSHA is to apply and craft the regulatory approach to implement President Biden’s mandate. How OSHA applies the standard will have significant implications for the construction industry and for the construction workforce, particularly since OSHA has generally characterized the construction industry as low risk. Given the importance of this initiative, the CISC is submitting this letter to ensure that OSHA understands some of the key issues of concern to the construction industry.

Disappointedly, OSHA has stated that it will not be accepting formal public comment as it develops the Emergency Temporary Standard. The CISC respectfully requests that OSHA reconsider this and open a public docket to receive comments from the public as it considers how

¹ The CISC is comprised of numerous trade associations representing virtually every aspect of the construction industry. Workplace safety and health is a priority for all members of the Coalition, and each is committed to helping create safer construction jobsites for workers.

² See <https://www.whitehouse.gov/covidplan/>.

to proceed with this important initiative. Even a short comment period would allow stakeholders with experience with vaccinations and testing to provide information to OSHA, which would be very valuable as OSHA considers the ETS.

In this letter, we reiterate the proactive measures taken by the Coalition and the construction industry to address COVID-19. This includes the CISC's efforts to increase vaccinations among the construction workforce. We also describe how and why the construction industry is low risk and, thus, applying the ETS to the construction industry would not be appropriate under the Occupational Safety and Health Act of 1970 ("OSH Act" or "Act"). There is no "grave danger" in the construction industry that would warrant applying the ETS to the industry. And finally, we discuss some key considerations related to how OSHA should craft any standard related to vaccinations and testing based upon the experience of CISC members and member companies.

1. The Construction Industry's Proactive Efforts to Mitigate the Impact of COVID-19 on Construction Workers.

As you know, from the outset of the pandemic the construction industry has been at the forefront of efforts to protect construction employees from the virus. The CISC developed a "COVID-19 Exposure Prevention Preparedness and Response Plan" (the "Response Plan")³ in March of 2020, which has been made available in both English and Spanish and provided at no cost to the construction industry. The CISC updated the plan four times to account for changes in guidance from the Centers for Disease Control and Prevention ("CDC"). The Response Plan is tailored to the construction environment, which OSHA has generally classified as low risk (*see* discussion below). In addition to the Response Plan, the CISC organized two safety stand downs related to COVID-19, one in April 2020 and the other in January 2021.

Of particular relevance to the President's Plan, from April 19-23, 2021, CISC members partnered with the CDC to conduct a "Vaccine Awareness Week in Construction" campaign to raise awareness of the safety, effectiveness, and benefits of COVID-19 vaccination among construction workers. The CISC encouraged participation in Vaccine Awareness Week, distributed education materials and a new industry public service announcement, and encouraged participation in the CDC and National Institute for Occupational Safety and Health ("NIOSH") vaccination education webinars for the industry.

2. The Construction Industry is Low-Risk for COVID-19.

Even though the construction industry has supported the CDC's vaccination efforts across the country, any COVID-19 ETS applicable to construction is unsupported at this time. An ETS is only permitted upon a showing that there is a "grave danger" from exposure to a hazard in the

³ See <http://www.buildingsafely.org/covid-19-coronavirus/>.

workplace and the ETS is immediately needed to address the hazard. OSHA cannot make this showing in the construction industry.

As a general matter, construction operations are low risk with respect to the transmission and spread of COVID-19. Early in the pandemic, OSHA explained that the level of risk of occupational exposure to COVID-19 “depends in part on the industry type, need for contact within 6 feet of people known to be, or suspected of being, infected with SARS-CoV-2, or requirement for repeated or extended contact with persons known to be, or suspected of being, infected with SARS-CoV-2.”⁴ Workers, such as construction workers, that have minimal occupational contact with the general public or other coworkers are generally considered to have a low exposure risk.

OSHA established a webpage further analyzing when certain types of construction work fall into the various COVID-19 risk exposure categories. According to OSHA’s own assessment, most construction work poses “low exposure risk”; construction work only crosses into “high exposure risk” when it takes place at indoor work sites occupied by people such as other workers, customers, or residents *suspected* of having or *known* to have COVID-19, including when an occupant of the site reports signs and symptoms consistent with COVID-19. Therefore, construction work is unlikely ever to pose a “high exposure risk” or “very high exposure risk.”⁵

In the June ETS published by OSHA applicable to healthcare services and healthcare support services, the Agency describes the high risk of COVID-19 transmission posed by indoor work environments with close human contact. The preamble to the ETS acknowledges that “the primary way the SARS-CoV-2 virus spreads from an infected person to others is through the respiratory droplets” and that “most commonly this occurs when people are in close contact with one another in indoor spaces (within approximately six feet for at least fifteen minutes) (CDC, May, 2021).”⁶ OSHA later references a study by the European Centre for Disease Prevention and Control, which found that “indoor settings contributed to 95% of reported clusters.” And the preamble further acknowledges that “a number of factors – often present in healthcare settings – that can increase the risk of transmission: Indoor settings, prolonged exposure to respiratory particles, and lack of proper ventilation (CDC, May 6, 2020).”⁷ While these factors may be commonly present in healthcare settings, they *certainly are not common occurrences in construction environments*.

Indeed, the low-risk nature of construction work was further recognized in the recent CDC guidance on vaccine booster shots. In that guidance, the CDC recommended that certain occupations at increased risk for COVID-19 exposure and transmission should receive booster shots. This included the following occupations:

⁴ Guidance on Preparing Workplaces for COVID-19, OSHA (2020) (available at <https://www.osha.gov/sites/default/files/publications/OSHA3990.pdf>).

⁵ COVID-19 Control and Prevention: Construction Work, OSHA (last visited Feb. 23, 2021) (available at <https://www.osha.gov/coronavirus/control-prevention/construction>).

⁶ 86 Fed. Reg. 32376, 32392 (June 21, 2021).

⁷ *Id.* at 32393.

- First responders (healthcare workers, firefighters, police, congregate care staff)
- Education staff (teachers, support staff, daycare workers)
- Food and agriculture workers
- Manufacturing workers
- Corrections workers
- U.S. Postal Service workers
- Public transit workers
- Grocery store workers

Notably, the construction industry is *not* included on this list of high-hazard industries.⁸

OSHA initially proposed in a draft rule submitted to the Office of Management and Budget to include all of industry in the ETS that is currently in effect. OSHA reconsidered this, however, and ultimately limited the June ETS to just health care services and healthcare support services. Even with current COVID-19 case counts, there is no evidence to support a finding of a “grave danger” within the low-risk construction industry. OSHA lacks the authority to issue an ETS mandating vaccinations – or any requirements through an ETS – unless it can demonstrate that the statutory requirements are met. OSHA cannot do so here.⁹

3. Key Issues of Concern.

Irrespective of the legal authority that OSHA has to promulgate the rule, the CISC is concerned with how OSHA approaches any ETS and the potential impacts on the construction industry and the construction workforce. The Plan leaves many unanswered questions. For example, who is responsible for paying for and managing weekly testing? Will employees be able to opt out of testing for any reason, or only those reasons recognized by other federal law? What kind of tests will be permitted and what proof of testing will be required? What does “under the weather” mean for purposes of paid time off following vaccinations?

Despite the efforts of a range of stakeholders, vaccine hesitancy remains an ongoing, complicated reality in the industry. How the ETS is crafted will have significant, lasting impacts. The CISC details a few of its concerns below.

A. Workforce Shortages

⁸ <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/booster-shot.html>.

⁹ As the CISC has previously stated to OSHA, the issue before the Agency is whether conditions support the development of an ETS, not whether OSHA might have the rulemaking authority to issue a standard pursuant to Section 6(b)(5) of the OSH Act. Because an ETS deprives the public of notice and an opportunity for comment and takes effect immediately, the legal standards for promulgation are much higher than those required by Section 6(b)(5). OSHA cannot meet those high standards here.

The Plan calls for OSHA to issue an ETS requiring that employers with 100 or more employees either mandate vaccines or require weekly testing of unvaccinated employees. The construction industry is dominated by small employers, although the Small Business Administration (“SBA”) definition of a “small business” in construction is not generally determined by the number of employees. Thus, many SBA-defined small businesses have over 100 employees.¹⁰

The construction industry has experienced significant workforce shortages. For example, in 2021, it is estimated that construction companies will need to hire *430,000 more workers* than they employed in 2020, according to an analysis of U.S. Bureau of Labor Statistics data performed by the Associated Builders and Contractors.¹¹ In residential construction, one of the primary headwinds in the housing market is the ongoing, chronic labor shortages and availability of skilled workers.¹²

Any rule that is developed by OSHA must be crafted in a way so as not to further disrupt the make-up of the construction workforce. This could arise through vaccine-hesitant workers potentially leaving the industry depending upon how any vaccine mandate is specifically implemented. This is of particular concern to the construction industry that already has a very transient workforce. OSHA must consider the impact on the workforce as it finalizes any ETS.¹³

B. Employer and Employee Obligations for Vaccinations and Testing

Further to the above, how OSHA specifically apportions the cost of testing will potentially impact how the workforce reacts to the mandate and, indeed, how effective the rule will be in actually increasing vaccinations among workers.

According to the Plan, the rule will require employers to ensure their workforce is vaccinated or require any unvaccinated employee to “produce a negative test result on at least a weekly basis.” The language in the Plan does *not* mandate that employers pay for and manage the weekly testing process. In fact, it suggests that *employees* would be responsible for producing the test result. Since the Plan separately requires employers to pay for time off for vaccinations and any adverse side effects from vaccinations, the failure of the Plan to specifically apportion the cost for testing is significant. A regulatory approach that (1) permits employees to opt out of mandatory vaccinations for any reason in lieu of weekly testing, *and* (2) requires employers to pay for the

¹⁰ <https://www.sba.gov/document/support-table-size-standards>.

¹¹ <https://www.abc.org/News-Media/News-Releases/entryid/18636/abc-the-construction-industry-needs-to-hire-an-additional-430-000-craft-professionals-in-2021>.

¹² <https://eyeonhousing.org/2021/09/builder-confidence-steadies-as-material-and-labor-challenges-persist/>; <https://nahbnow.com/2021/07/labor-scarcity-will-increase/>.

¹³ The CISC notes that OSHA has not previously limited application of a safety and health standard to employers with over 100 employees. Thus, the Agency does not have experience in assessing the impact of such a limitation on workforce mobility. OSHA must consider this in its economic analysis of the impacts of the rule.

testing will place a significant burden and cost on employers and will also not accomplish the President's goal of increasing vaccinations.

Vaccine hesitancy among workers is a complicated issue and, based upon the experience of CISC members, if given the choice many currently unvaccinated workers will choose to be tested weekly, rather than get the vaccine. This is particularly the case if employers are required to manage and pay for the testing. Placing an administrative and financial responsibility on workers – who choose not to get vaccinated – to get tested and produce the results weekly, may encourage these same workers to get the vaccine instead. This policy would also best support the President's goal of increasing vaccinations.

C. Paperwork Burdens

The Plan is silent on how OSHA may (or may not) require employers to document vaccines or weekly testing. This is another area that OSHA must "fill-in-the-gaps" with respect to the ETS. The CISC strongly encourages OSHA to consider the paperwork burdens of any approach it takes.

Mandating and recording proof of vaccinations is a significant undertaking in its own right, particularly in the construction industry that has a highly transient workforce. Requiring employers to document and maintain records of weekly testing would be an incredibly difficult burden to meet.

The CISC also notes that even if OSHA were to be silent in the ETS on documenting proof of vaccinations or weekly testing, during the course of an OSHA inspection compliance officers may request such documentation. Absent direction to the contrary, OSHA enforcement of the rule may result in unintended paperwork burdens, which OSHA must also consider.

D. Recordability of Adverse Reactions to the COVID-19 Vaccine

OSHA recently determined that adverse reactions from employer-mandated vaccines should not be considered OSHA recordable events.¹⁴ The CISC appreciates OSHA's position on this and encouraged the Agency to take this position in previous correspondence and meetings with the Agency. OSHA has stated, however, that this position is based on the Agency's enforcement discretion and will be reevaluated in May of 2022.

When OSHA implements the ETS mandate, the CISC strongly encourages the Agency to specifically include in the rule an exception to work-relatedness for employees who experience adverse reactions to the mandatory vaccines, should those reactions result in medical treatment beyond first aid, days away from work, or restricted duty. This would provide certainty to employers and would further encourage vaccines in the workplace, which is the overall policy objective of the Plan.

¹⁴ <https://www.osha.gov/coronavirus/faqs#reporting>.

E. Cost of Paid Time Off for Vaccinations and Adverse Reactions

The Plan calls for employers to provide paid time-off for vaccinations *and* when employees are “under the weather” from adverse reactions to the vaccine. This requirement will have a significant economic impact on the construction industry, particularly if it is coupled with a requirement that employers manage and pay for alternative weekly testing (*see* discussion above). COVID-19 vaccines have been widely available for at least six months. The vaccines are free. For the last six months, construction workers have been able to access the vaccines. A worker’s decision not to do so at this point, is not due to availability or the need to take time off from work to do so. In CISC member experience, it is due to a *decision* not to take the vaccine.

Moreover, the CISC is concerned with the Plan’s direction for employers to pay for time off for employees that are “under the weather.” While the CISC understands that individuals may experience adverse reactions from taking vaccines and this may limit their ability to work, it is important that OSHA specifically define and limit this requirement in any ETS. Without this, employers will be left trying to implement a vague and potentially expensive provision with no direction from the Agency.

F. Availability of Testing Kits

And finally, CISC members are reporting that testing kits remain difficult to obtain. As you know, the State of California has had extensive testing requirements for months due to its COVID-19 Emergency Temporary Standard. These requirements have proven almost impossible to comply with, as the demand for testing and testing kits has surpassed the supply. The CISC is very concerned that a federal OSHA standard will put further strains on test kit availability, making it infeasible for employers to comply with the rule.

Furthermore, there are significant concerns with testing reliability, which can impact costs. OSHA needs to review and assess what tests would be “acceptable” for purposes of any weekly testing requirement. The more reliable the tests, the more expensive they may be. These issues must be analyzed by the Agency before publishing any final rule.

4. Conclusion.

The CISC appreciates OSHA’s consideration of this information. Construction is generally low-risk for COVID-19 exposure and the industry has been proactive at protecting its employees throughout the pandemic. OSHA must ensure that it fully considers all of the very difficult issues involved in implementing the Plan through an ETS. The CISC has significant concerns with this overall rulemaking effort and, again, requests that OSHA seek formal public comment on the rule.

Sincerely,

The Construction Industry Safety Coalition

American Road and Transportation Builders Association
American Society of Concrete Contractors
American Subcontractors Association
Associated Builders and Contractors
Associated General Contractors
Association of Equipment Manufacturers
Association of the Wall and Ceiling Industry
Concrete Sawing & Drilling Association
Construction & Demolition Recycling Association
Distribution Contractors Association
Independent Electrical Contractors Association
Interlocking Concrete Pavement Institute
International Council of Employers of Bricklayers and Allied Craftworkers
Leading Builders of America
Mason Contractors Association of America
National Asphalt Pavement Association
National Association of Home Builders
National Association of the Remodeling Industry
National Demolition Association
National Framers Council
National Roofing Contractors Association
National Utility Contractors Association
Natural Stone Council
Natural Stone Institute
Specialized Carriers & Rigging Association
Tile Roofing Industry Alliance



National Association of Home Builders

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Government Affairs

James W. Tobin III
Executive Vice President & Chief Lobbyist

October 26, 2021

The Honorable Alma Adams
Chairwoman
U.S. House of Representatives
Subcommittee on Workforce Protections
Washington, DC 20515

The Honorable Fred Keller
Ranking Member
U.S. House of Representatives
Subcommittee on Workforce Protections
Washington, DC 20515

The Honorable Suzanne Bonamici
Chairwoman
U.S. House of Representatives
Subcommittee on Civil Rights and Human Services
Washington, DC 20515

The Honorable Russ Fulcher
Ranking Member
U.S. House of Representatives
Subcommittee on Civil Rights and Human Services
Washington, DC 20515

Dear Chairwomen Adams and Bonamici and Ranking Members Keller and Fulcher:

On behalf of the more than 140,000 members of the National Association of Home Builders (NAHB), I would like to thank the Education and Labor Subcommittees on Workforce Protections and Civil Rights and Human Services for holding a joint hearing on "Protecting Lives and Livelihoods: Vaccine Requirements and Employee Accommodations." NAHB supports the President's goal of increasing vaccination rates but has concerns surrounding the U.S. Department of Labor's Occupational Safety and Health Administration's forthcoming COVID-19 vaccination and testing Emergency Temporary Standard (ETS). The ETS's lack of stakeholder input, the low-risk of COVID-19 transmission in the home building industry and therefore troubling legality of the ETS's applicability to the industry, as well as the ETS's possible exacerbation of labor shortages and supply chain problems in the construction and related industries is particularly troubling for NAHB. Due to the low risk of COVID-19 transmission in the construction industry, NAHB believes home building should be exempted from the ETS.

Single family and multifamily home building were designed as "Essential Infrastructure Business" by the Department of Homeland Security and our members have worked safely throughout the pandemic to house our nation. NAHB has worked to promote safety during this time, encouraging our members to hold safety stand-downs to educate workers on the importance of COVID-19 safety, offering various safety resources and promoting and supporting vaccination efforts across the country. Safety has been a primary focus of our industry, even as by the very nature of most construction work, exposure risk to COVID-19 is low by OSHA's own guidance.

An ETS is only permitted upon showing that there is a "grave danger" from exposure to a hazard in the workplace and the ETS is immediately needed to address the hazard. However, construction is low-risk for transmission of COVID-19 and workers in our field are not in "grave danger." The "grave danger" designation is meant to establish a high threshold for action and not to circumvent the regular standard-setting process, which is clearly the case here. NAHB believes that there is no "grave danger" and OSHA therefore lacks the authority to issue a COVID-19 vaccination and testing ETS for residential construction under the Occupational Safety and Health Act of 1970.

In addition to the question surrounding the legality of the ETS as applied to construction, the ETS is problematic on several fronts. There are many unanswered questions including: who is responsible for paying and managing weekly testing; will employees be able to opt out of testing for reasons recognized by other federal laws; what does "under the weather" mean for purposes of paid time off following vaccinations? These unanswered questions pose a significant hurdle for all employers.

NAHB is concerned that a vague rule will further exacerbate both labor shortages and supply chain challenges. Labor shortage is a systemic problem in the construction industry and one which consistently ranks at the top of our member's concerns. An ETS with little clarity on employer and employee questions could further exacerbate

labor shortages. This would ripple out beyond just home builders to include other companies that we depend on to supply building materials.

Supply chain problems have led to scarcity and high prices on almost every good or material that goes into constructing an American home. According to the Bureau of Labor Statistics Producer Price Index, the average price of goods used as inputs to residential construction has risen year-to-date 13.2%, more than triple the rate of core inflation over the same period. From steel mill products and plastic piping to copper pipe and wood windows and doors, prices are up dramatically year-to-date and are driving growing concerns of a coming slowdown in housing.

Our nation is currently facing a housing affordability crisis which will only worsen if further disturbances occur to the construction labor pool and supply chain. NAHB supports efforts to increase the vaccinated population, but such efforts must be done in a legal way that would not further increase labor shortages and provide clarity to our nation's home builders. It is due to these reasons; home builders should be excluded from the ETS.

Sincerely,

A handwritten signature in black ink, appearing to read "James W. Tobin III". The signature is stylized and cursive.

James W. Tobin III



NATIONAL STONE, SAND
& GRAVEL ASSOCIATION

October 26, 2021

The Honorable Bobby Scott
Chairman
House Committee on Education and Labor
2176 Rayburn House Office Building
Washington, DC 20515

The Honorable Virginia Foxx
Ranking Member
House Committee on Education and Labor
2101 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Scott and Ranking Member Foxx:

As the House Committee on Education and Labor Subcommittees on Workforce Protections and Civil Rights and Human Services examine vaccine mandates in the workplace, I am writing to share our concerns regarding the obligations of the executive order requiring vaccinations or COVID-19 testing through an Emergency Temporary Standard (ETS) at the Occupational Safety and Health Administration (OSHA) or the Mine Safety and Health Administration (MSHA).

NSSGA represents aggregates producers and those who manufacture equipment and services that support the construction industry. Our members are essential to the work of this country, and we represent most of the crushed stone, sand and gravel produced in the United States. Our members employ more than 100,000 hard-working men and women, across OSHA and MSHA sites, who are responsible for the essential raw materials found in every home, building, road, bridge, and public works project.

Since the start of the COVID-19 pandemic, aggregates operators have taken aggressive actions to protect workers, as they continue to produce America's essential building materials. We support the overall goal of vaccinating Americans against COVID-19 and have launched a national vaccination campaign in concert with our member companies. Our member companies have also taken action to encourage vaccinations, including providing time off to get the shot; additional vacation days; and offering cash rewards and other incentives, valued in the thousands of dollars, to employees and their family members who get vaccinated. NSSGA has also partnered with MSHA to amplify their vaccine campaign message and is working with the agency as they pilot a program to bring vaccine vans to mine sites.

NSSGA shares your strong desire to protect American workers, and we are proud of our partnership with the Department of Labor (DOL), especially MSHA, to achieve this mission. However, we are concerned that this rushed and heavy-handed mandate will drive uncertainty, cost increases, and liabilities that clearly impact our ability as a nation to effectively produce building materials.

First, having the ETS apply to companies with 100 or more employees is already driving workers who are resistant to the vaccine to leave larger companies and work at smaller operations to avoid the mandate. Further, we are seeing other employees, especially those closer to retirement age, leave the workforce altogether to avoid being vaccinated or forced into weekly testing. All this is already occurring prior to implementation of the ETS. The threat it presents, combined with the arbitrary 100-employee application threshold, is already impacting the



strained workforce at a time when demand for aggregates is at a record high, while finding and retaining employees is more difficult for employers than ever before.

Similar to the COVID-19 ETS issued in June, we would encourage the vaccine and testing mandates apply to industries that are at the most risk of contracting COVID-19. The aggregates industry has proven for almost two years we can safely operate, even during the height of the pandemic. For our members who are subject to MSHA, their work in quarries is socially distant by nature (for example, a single operator working in the enclosed cab of a haul truck), and the vast majority of the work is done outside. For our members who are subject to OSHA (for example, vertically integrated companies that both operate quarries and have an asphalt paving or construction business) their office workers are able to work from home, and construction or paving crews work outside, in well-ventilated areas or in a socially distant manner. These conditions have been proven to significantly decrease the risk of COVID-19 or other airborne illnesses. NSSGA members are still following federal and local health guidelines, keeping employees separate and masked, encouraging vaccines and testing, and taking many other effective steps to address COVID-19.

It is no secret there are still millions of American families hesitant to receive a vaccine. Regardless of their reasons, it is irresponsible for the federal government to shift the burden of requiring vaccines to employers. Many of those who are hesitant will seek extraordinary measures to avoid being vaccinated. It is inevitable that once enacted, this ETS will drive legal opportunities for advantageous lawyers to exploit our members, targeting them with litigation and legal fees.

Our association, along with many other trades and businesses would appreciate the opportunity to comment and provide input on any ETS prior to its implementation. Working with industry, rather than forcing an untested mandate upon them, will lead to lower costs, less lawsuits and better results that improve the safety of our employees and help end the COVID-19 pandemic. It will also help maintain much-needed stability in the workforce.

We appreciate your consideration of the aggregates industry concerns of the unintended impacts the vaccine mandate ETS will have on our industry. We look forward to being partners with you and your team across the Department, as we work together to promote safe and healthy workplaces that produce and supply the building materials needed to build back America.

Sincerely,



Michael W. Johnson
President and CEO
National Stone, Sand & Gravel Association

cc: Members of the House Education and Labor Committee



[Additional submission by Ms. Stefanik follows:]



October 21, 2021

TO: The Honorable Charlotte A. Burrows
Chair
Equal Employment Opportunity Commission
131 M Street, NE
Washington, DC 20507

CC : Jocelyn Samuels
Vice Chair
Equal Employment Opportunity
Commission
131 M Street, NE
Washington, DC 20507

Keith E. Sonderling
Commissioner
Equal Employment Opportunity
Commission
131 M Street, NE
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Janet Dhillon
Commissioner
Equal Employment Opportunity
Commission
131 M Street, NE
Washington, DC 20507

Andrea R. Lucas
Commissioner
Equal Employment Opportunity
Commission
131 M Street, NE
Washington, DC 20507

Dear Chair Burrows:

The HR Policy Association represents the chief human resources officers of more than 390 of the largest employers in the United States. Collectively, HR Policy represents employers of more than 11 million Americans, or nearly nine percent of the U.S. workforce. Two-thirds of HR Policy Association member companies are federal contractors and as such are directly impacted by the [Safer Federal Workforce Task Force guidance on COVID-19 workplace safety for federal contractors and subcontractors](#). Our member companies will also be responsible for the implementation of and compliance with the forthcoming Emergency Temporary Standard for private sector employers.

HR Policy and its members understand the importance of President Biden's COVID-19 vaccination efforts, and have been working with the administration to provide greater understanding of the new COVID-19 vaccine guidance for federal contractors and subcontractors. Although HR Policy and its members are taking significant steps towards achieving the Biden administration's vaccination goals, the vaccine mandates for federal contractors and the forthcoming Emergency Temporary Standard for larger private sector employers raise significant compliance questions. Specifically, these vaccine mandates raise several important employment law and policy questions that must be answered as part of the successful implementation and compliance with the mandates.

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Within the Equal Employment Opportunity Commission's jurisdiction, chief among these questions are those related to medical and religious exemptions under the Americans with Disabilities Act and Title VII, respectively, and the associated reasonable accommodation process. There are also privacy and recordkeeping questions associated with the ADA and the Genetic Information Nondiscrimination Act.

The EEOC has previously provided guidance on some of these issues as they relate to COVID-19 and COVID-19 vaccines which was invaluable for employers in crafting their workplace safety policies and protocols. Accordingly, HR Policy is seeking additional guidance from the EEOC on the questions referenced above and others implicated by the vaccine mandate for federal contractors and the forthcoming Emergency Temporary Standard for private employers that fall within the EEOC's jurisdiction.

Specifically, HR Policy seeks guidance on medical and religious exemptions from the vaccine mandates and what may constitute reasonable accommodations for those employees who are exempt. Our members that have already instituted vaccine requirements are receiving thousands of exemption requests and would benefit enormously from additional guidance from the EEOC on these issues, including suggested templates for the interactive processes associated with such exemptions.

Additionally, HR Policy seeks guidance from the EEOC on any recordkeeping or privacy concerns under the ADA, GINA, or other statutes that may be raised by compliance with federal vaccine mandates, including receipt and storage of employee vaccine records. Finally, HR Policy strongly encourages the Commission to finish and publish its rules and guidance on wellness programs and incentives, particularly as they relate to vaccination. Indeed, employers need to expeditiously develop comprehensive wellness policies to not only respond to the current pandemic, but also to plan for how best to cope with future infectious disease challenges. Guidance from the EEOC on wellness issues will certainly constructively help inform development of such policies.

We strongly encourage the EEOC to act quickly and provide much-needed guidance on these important issues to ensure that employers are able to comply with federal vaccine mandates as efficiently as possible. Thank you for considering our thoughts and guidance request, and we look forward to working with and your colleagues on this and other issues going forward.

Sincerely,



Timothy J. Bartl
President & CEO
HR Policy Association
1001 19th St. N.
Suite 1002
Arlington, VA 22209



G. Roger King
Senior Labor & Employment Counsel
HR Policy Association
1001 19th St. N.
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[Whereupon, at 1:01 p.m., the Subcommittees adjourned.]

