

COVID-19 Vaccine Mandates A Talk with Professor Dorit Reiss

- Federal and state authority to mandate vaccination
 - Public health is regulated at federal, state, and local levels.
 - Vaccine mandates have been imposed on certain segments of the population and in certain jurisdictions based on public health needs for over a century.
 - States' authority to impose vaccine mandates stems from its police powers to promote public health.
 - Supreme Court upholds state law allowing localities to mandate vaccines: *Jacobson v. Massachusetts*, 197 U.S. 11 (1905)
 - A Massachusetts statute allowed cities to mandate smallpox vaccinations for its residents over the age of 21 with a criminal penalty of \$5 for noncompliance. Subsequently, Cambridge adopted a regulation requiring smallpox vaccinations. Jacobson refused vaccination.
 - The Supreme Court held that the vaccine mandate was a legitimate exercise of the state's police power to protect public health. The Court noted, "[T]he liberty secured by the Constitution of the United States... does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint. There are manifold restraints to which every person is necessarily subject for the common good" (197 U.S. at 26). In this case, the Court found that the Cambridge regulation was not arbitrary, unreasonable, or beyond what was reasonably required.

- Colleges' and universities' vaccination policy for its employees and students
 - *Klaassen v. the Trustees of Indiana University*¹
 - Indiana University's policy requires staff, faculty, and students on campus to be fully vaccinated. Policy provides for religious and medical exemptions. Exempt students are required to be tested and wear masks. Students who are not vaccinated nor exempt would have their school access cards deactivated and accounts suspended. Eight students sought a preliminary injunction, claiming that the policy violates the Fourteenth Amendment.
 - Court denied the motion. Relied on *Jacobson* decision. Reviewed the policy under rational basis and found the university has a legitimate interest in the public health and safety of its employees and students and that students had other options if they did not wish to be

¹ *Klaassen, et al. v. the Trustees of Indiana University*, No. 1:21-CV-00238 (N.D. Ind. July 18, 2021).

vaccinated — they could transfer, take online classes, etc. Court also found that seven of the eight students would qualify for an exemption.

- Emergency Use Authorization of COVID-19 vaccine
 - The Food and Drug Administration issued emergency use authorization (EUA) for three COVID-19 vaccines in the U.S. Issued under § 564 of the Food, Drug, and Cosmetic Act (FDCA).² Authorization allows vaccine to be administered prior to FDA approval of the product for general distribution under its standard review.
 - Whether § 564(e)(1)(A)(ii)(III) prohibits vaccine mandates
 - With emergency use of vaccines, “to the extent practicable given the applicable circumstances,” FDA is to set “necessary or appropriate” conditions to protect the public health, including informing individuals “of the option to access or refuse the administration of the product.”
 - DOJ Office of Legal Counsel (OLC) review³
 - In its July 2021 opinion, the OLC concluded that § 564 does not prohibit entities from imposing vaccination requirements while the only vaccines for COVID-19 are available under EUA. Concluded that the “option to accept or refuse” language only requires that certain information be given to individuals when they are receiving the vaccine and does not prohibit entities from mandating vaccines.
 - Department of Veterans Affairs vaccine mandate⁴
 - On July 26th, 2021, the Department of Veterans Affairs Secretary announced that it would give agency staff and workers in a network of hospitals eight weeks to get vaccinated. Penalties for refusing to vaccinate, if not exempted from the policy, include possible termination.
 - The Department of Veterans Affairs is the first federal agency to mandate vaccination to some of its employees.
 - *Bridges v. Houston Methodist Hospital*⁵
 - In April 2021, Houston Methodist Hospital announced that it would mandate vaccinations for its employees, and that those who refused to comply would be terminated. In response, 117 employees of the hospital sued to block the mandate and termination policy, citing state and federal law, including 21 U.S.C. § 360bbb-3.

² 21 U.S.C. § 360bbb-3

³ 45 Op. O.L.C. __ (July 6, 2021), <https://www.justice.gov/olc/file/1415446/download>.

⁴ “VA Mandates COVID-19 Vaccines Among Its Medical Employees Including VHA Facilities Staff,” U.S. Department of Veterans Affairs, <https://www.va.gov/opa/pressrel/pressrelease.cfm?id=5696>.

⁵ *Bridges et al. v. Houston Methodist Hospital*, 4:21-cv-01774 (S.D. Tex. Jun 01, 2021), <https://int.nyt.com/data/documenttools/houston-methodist-court-ruling/3468984fc566cea5/full.pdf>.

- Arkansas HB 1547⁸
 - State entities and agencies cannot mandate COVID-19 vaccination as a condition of employment, receipt of services, etc.
 - Agencies cannot discriminate against those who refuse to receive the COVID-19 vaccine by inhibiting their career advancement, among other restrictions.
- Texas HB 4272⁹
 - Bars state entities from requiring documentation to certify vaccination. It would also prevent employers from discriminating, such as by not hiring, an individual because that individual does not provide proof of vaccination.
- Montana HB 702¹⁰
 - Widely bans vaccination mandates for vaccines under EUA, and bars discrimination based on vaccination status. Accordingly, both public and private employers cannot require that their employees be vaccinated and cannot discriminate against their employees for not vaccinating.
- *Norwegian Cruise Line Holdings v. Rivkees, M.D*¹¹
 - The Norwegian Cruise Line challenged Florida's SB 2006, passed in May 2021. In part, SB 2006 prohibits businesses from requiring documentation of COVID-19 vaccination for services.¹² The Norwegian Cruise Line intends to require vaccination documentation for all passengers and also plans on docking in Florida. If the Norwegian Cruise Line does not dock in Florida due to the penalties of violating SB 2006, it would lose revenue and take a less desirable path.
 - The Norwegian Cruise Line makes the following claims with regard to SB 2006:
 - Is preempted under 42 U.S.C. § 254 and CDC's regulations thereunder
 - Violates the Dormant Commerce Clause
 - Violates the First Amendment because it blocks communications between a business and its customers
 - Violates Fourteenth Amendment substantive due process

⁸ Arkansas HB 1547, <https://www.arkleg.state.ar.us/Bills/FTPDocument?path=%2FBills%2F2021R%2FPublic%2FHB1547.pdf>.

⁹ Texas HB 4272, <https://legiscan.com/TX/bill/HB4272/2021>.

¹⁰ Montana HB 702, <https://leg.mt.gov/bills/2021/billpdf/HB0702.pdf>.

¹¹ *Norwegian Cruise Line Holdings Ltd. v. Rivkees, M.D* (No. 21-22492, S.D. Fla.)

¹² SB 2006 – Emergency Management, <https://flsenate.gov/Committees/BillSummaries/2021/html/2481>.