

## Education

# College COVID-19 Vaccine Requirements: Legal Issues to Consider



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A growing number of colleges and universities have announced they will require students, faculty, and/or staff to receive a COVID-19 vaccine as a prerequisite for attending the institution for the 2021-2022 academic year.<sup>[1]</sup> Higher education institutions that have announced such plans include public universities such as the University of California and California State systems and private colleges such as Georgetown and Yale. Vaccine requirements are already ubiquitous in higher education<sup>[2]</sup>, however, colleges and universities should be aware of important issues to consider when deciding whether and how to mandate COVID-19 vaccination. Counsel for an anti-vaccine group, the Informed Consent Action Group, has already sent Rutgers, the first university to announce such plans, a formal letter asking the school to rescind the requirement.<sup>[3]</sup> While such requirements are likely to be upheld, legal challenges appear inevitable.

According to the CDC as of May 4, 2021, more than 247 million COVID-19 vaccines have been administered to the United States population, resulting in 44.5% of the adult population having received at least one dose of the vaccine, and 32% of the population being fully vaccinated.<sup>[4]</sup> Though all three of the COVID-19 vaccines authorized for use in the United States are under Emergency Use Authorization (EUA)—meaning none yet have full FDA approval—all three vaccines “have been shown to be safe and effective at preventing COVID-19.”<sup>[5]</sup>

COVID-19 has had an enormous impact on higher education. While many colleges and universities have resumed some in-person activities using safety measures including testing, masks, and social distancing, vaccination offers the best chance to more fully reopen.<sup>[6]</sup> Particularly for students living in congregate on-campus settings, vaccination holds the most promise for stopping the spread of COVID-19 and protecting students and community members from severe illness.<sup>[7]</sup>

Below, we identify some of the salient legal issues colleges and universities should consider when deciding whether and if so, how, to mandate COVID-19 vaccination.

***Courts have upheld vaccine mandates, without religious or moral exemptions, for more than a century. However, the absence of religious exemptions in light of recent trends in Supreme Court jurisprudence, increases litigation risk for colleges and universities, particularly public institutions.***

The Supreme Court held that states can mandate vaccination under their police power in the seminal case of *Jacobson v. Massachusetts*.<sup>[8]</sup> The case continues to provide the foundation for the deference courts show to state measures taken to protect public health. However, some of the traditionally more conservative justices have demonstrated a growing hostility toward *Jacobson* signaling that courts in the future may provide less deference to public health measures.<sup>[9]</sup>

In the employment context, employers (including colleges and universities) are required to provide

medical-based exemptions under the Americans with Disabilities Act (ADA) and exemptions based on sincerely held religious beliefs under the Civil Rights Act.<sup>[10]</sup> The undue hardship standard under which an employer could lawfully deny such an exemption is easier to meet under the Civil Rights Act than the ADA. Employers must make reasonable accommodations for employees who claim exemptions. If colleges and universities choose to model a student vaccine requirement on these principles, increased testing, limits on on-campus living, or even a requirement that the student continue to attend school remotely are all potential accommodations.<sup>[11]</sup> The accommodations chosen should be strongly linked to the public health risks posed by unvaccinated students in order to put the institution on the strongest footing in the event of a legal challenge. And, needless to say, the extent of an accommodation should be carefully tailored to the reason an accommodation is sought.

Vaccine requirements implemented by public colleges and universities are subject to higher constitutional scrutiny than those of private institutions. Many pre-COVID-19 vaccine requirements of private colleges do not offer religious exemptions.<sup>[12]</sup> No court has held that a public college or university must offer a religious exemption and many cases have held no such exemption is required for K-12 public school vaccine requirements. However, recent Supreme Court orders involving religious liberty-based challenges to COVID-19 restrictions suggest public colleges and universities may consider offering broad-based religious exemptions in order to best protect themselves.

In 1990, the Supreme Court held in *Employment Division v. Smith*, that the Free Exercise Clause does not exempt those with religious objections from generally applicable laws.<sup>[13]</sup> However, in recent pandemic-related rulings (none of which included oral arguments or full-length opinions) the Court has moved away from *Smith* and toward a “most-favored-nation” theory of religious exemptions.<sup>[14]</sup> The Court recently enjoined California’s COVID-19 order limiting in-person gatherings, religious or secular, in people’s homes to three households as applied to religious gatherings.<sup>[15]</sup> The short opinion suggests that if any exemptions from a generally applicable law are granted, then the State must offer exemptions on the basis of religious beliefs.<sup>[16]</sup> In the vaccine mandate context, the risk is that because public college and universities must offer disability-based exemptions, under this new interpretation of the Free Exercise Clause, they would have to offer religion-based exemptions as well. In the fall of 2020, on the Court’s regular docket, it heard oral argument in *Fulton v. City of Philadelphia*, a case that presents similar questions.<sup>[17]</sup> An opinion is expected by June, which is likely to further bolster the special status of religious exemptions.

***The legal ramifications of mandating a vaccine for which there is emergency use authorization rather than full FDA approval are unclear.***

Colleges and universities have long required students to receive certain vaccines as a condition of attendance. All of the vaccines that schools have previously required, however, have had full FDA approval. As noted, the FDA has only granted COVID-19 vaccines emergency use authorization (EUA). The statute creating emergency use authorization states that individuals must be notified “of the option to accept or refuse administration of the product, of the consequences, if any, of refusing administration of the product, and of the alternatives to the product that are available and of their benefits and risks.”<sup>[18]</sup> This suggests that vaccines authorized “under an EUA . . . are not allowed to be mandatory.”<sup>[19]</sup> However, the EEOC has suggested that employers can mandate COVID-19 vaccines while authorized for emergency use and many colleges and universities have mandated COVID-19 tests at the EUA stage for in-person students.<sup>[20]</sup> The EUA status of the vaccines required may be a basis for litigation in the future.

To the extent the EUA status of the vaccines is an issue, however, it may be a short-lived one. Pfizer plans to apply for full FDA approval by the end of May<sup>[21]</sup> and Moderna is also expected to soon apply for full approval now that both companies have over six months of clinical data.

***State policies could limit the ability of colleges and universities to mandate COVID-19 vaccination.***

Institutions must also take into account state-specific legal requirements. In Texas, the Governor signed an executive order prohibiting state agencies from conditioning any service on documentation of vaccination status for a COVID-19 vaccine administered through emergency use authorization.<sup>[22]</sup> The order also bars any public or private entity receiving public funds including grants from requiring a consumer to provide documentation of vaccination status as a condition of receiving a service or entering a place.<sup>[23]</sup> It appears highly plausible a student could successfully challenge a college vaccine mandate based on this order.<sup>[24]</sup> Florida has recently passed legislation specifically prohibiting educational institutions from requiring documentation of COVID-19 vaccination as a condition of attendance or enrollment.<sup>[25]</sup> Educational institutions are defined to include postsecondary public and private institutions. This legislation, which goes into effect July 1, is not limited to vaccines with EUA status and appears to directly limit colleges' ability to require proof of vaccination status.<sup>[26]</sup> As of this writing, seven states appear to have a version of prohibitions on "vaccine passports" either through an executive order or legislation, in place: Arizona, Arkansas, Idaho, Montana, and Utah in addition to Florida and Texas.<sup>[27]</sup> Institutions should closely monitor the evolving political environment in their particular states especially as many near the end of their legislative sessions. Legislators have already introduced at least 32 bills across 25 states aimed at limiting or prohibiting COVID-19 vaccine mandates.<sup>[28]</sup>

***International students present additional issues for colleges and universities that decide to mandate that students receive the COVID-19 vaccine prior to returning to campus.***

Though there were significant drops in international student enrollment this school year due to the pandemic, in the 2019-2020 school year, over one million international students were enrolled in US institutions of higher education.<sup>[29]</sup> Students coming from outside the United States may not have been given an opportunity to receive a COVID-19 vaccine in their home countries prior to arriving on campus.<sup>[30]</sup> Institutions must also consider policies for international students who received a COVID-19 vaccine that the FDA has not authorized for use in the United States, such as the AstraZeneca vaccine.<sup>[31]</sup> Given that international students "from much of the world remain blocked from entering the country,"<sup>[32]</sup> schools should consider how COVID-19 mandates might lead to even fewer international students returning to campus. For international students as well as others who may have not had equal access to vaccination prior to the academic year, schools should have mechanisms in place for students to receive the vaccine once they arrive on campus and have a plan to accommodate these students until they are fully vaccinated.<sup>[33]</sup>

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In addition to deciding whether to mandate COVID-19 vaccines, colleges and universities must grapple with a bevy of other related decisions. Schools that mandate COVID-19 vaccines must decide how they will implement the mandate (i.e., via enrollment agreements), what kind of proof they will deem acceptable, and how they will treat validly-exempt unvaccinated students.<sup>[34]</sup> On the other hand, schools that decide not to make COVID-19 vaccines a condition to students' return to campus must consider how they will incentivize students to get vaccinated, how to educate students about the benefits of vaccination, and how they will protect students, faculty, and staff from outbreaks. In addition to the public health effects of whichever approach an individual institution chooses to take, the school must also carefully consider the legal ramifications and an ongoing legal strategy to best protect itself in the face of ongoing dissent and potential litigation.

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