

Pushing the Needle: Vaccination Mandates in the Age of COVID

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*Business has a huge role to play in helping set the tone on the importance of vaccines. . . . But to say you're going to be fired if you're scared to death to take a vaccine, that's a difficult position for CEOs to take.*¹

*The unvaccinated will set the country on fire over and over again.*²

I. INTRODUCTION

Bonnie Jacobson was employed as a waitress at the Red Hook Tavern in Brooklyn, New York, in early 2021.³ Over the Valentine's Day weekend, the Red Hook began requiring employees to be vaccinated against SARS-CoV-2 (COVID) to ensure employee and guest safety.⁴ Ms. Jacobson declined to be vaccinated until she had the opportunity to study the vaccine's possible effects upon her fertility.⁵ Ms. Jacobson was fired, one of the earliest reported terminations of an employee for refusing a COVID vaccine in the United States.⁶

The Red Hook's vaccination policy is not an outlier, but instead reflects the thinking of a significant portion of private employers and employees as reflected in recent surveys.⁷ This openness to require vaccination is

1. Matt Egan, *Major CEOs Signal Covid Vaccine Mandates Could be on the Way*, CNN (Dec. 16, 2020, 1:22 PM), <https://www.cnn.com/2020/12/16/business/ceos-covid-vaccine-mandate/index.html> [<https://perma.cc/9BJC-TFHB>] (quoting Mark Weinberger, the former CEO of EY and director at Met Life and Johnson & Johnson).

2. Apoorva Mandavilli, *The Delta Variant is the Symptom of a Bigger Threat: Vaccine Refusal*, N.Y. TIMES (Aug. 2, 2021), <https://www.nytimes.com/2021/07/25/health/coronavirus-vaccine-refusal.html> [<https://perma.cc/4LCK-AZ8R>].

3. Matthew Haag, *N.Y. Restaurant Fires Waitress Who Wouldn't Get Covid-19 Vaccine*, N.Y. TIMES (Feb. 17, 2021), <https://www.nytimes.com/2021/02/17/nyregion/waitress-fired-covid-19-vaccine-refusal.html> [<https://perma.cc/T2CN-WT2L>].

4. *Id.*

5. *Id.*

6. *Id.*

7. See, e.g., Chris Jackson et al., *Americans Divided Over When to Return to "Normal,"* IPSOS (June 14, 2022), <https://www.ipsos.com/en-us/news-polls/axios-ipsos-coronavirus-index> [<https://perma.cc/9EWF-DK7Z>] (finding that in 2021, 57% of surveyed workers support vaccination as a condition of employment); Jeffrey M. Jones & Sangeeta Agrawal, *Workers Have Strong Views on Vaccine Mandates; More in Favor*, GALLUP (Aug. 18, 2021), <https://news.gallup.com/poll/353825/workers-strong-views-vaccine-mandates-favor.aspx> [<https://perma.cc/63NL-X94Y>] (summarizing a Gallup News survey conducted between July 19–26, 2021 in which 52% of workers supported required vaccination as compared to 46% in May 2021); Sarah Kessler, *New Surveys Show How Pandemic Workplace Policies are Shifting*, N.Y. TIMES (Sept. 1, 2021), <https://www.nytimes.com/2021/09/01/business/pandemic-return-to-office.html> [<https://perma.cc/AM57-Z5MN>] (summarizing the results of an August 2021 survey of one thousand employers conducted by the workplace advisory firm of Willis Towers Watson in which 52% of employers stated that they planned to require vaccination and 78% planned on tracking employee vaccination status by the end of 2021); LITTLER, LITTLER COVID-19 VACCINE EMPLOYER SURVEY REPORT—DELTA VARIANT UPDATE 4 (Aug. 2021), <https://www.littler.com/files/>

reflected in policies in a number of fields including entertainment, financial, retail services, food processing, health care, education, technology, and transportation.⁸

littler_august_2021_vaccine_employer_survey_report.pdf [https://perma.cc/6LHD-ZGS8] (stating that 21% of surveyed employers stated that they required or were planning to require vaccination of all employees or a subset thereof).

8. See Lori Aratani & Michael Laris, *United Airlines Becomes First Carrier to Mandate Vaccine for U.S.-Based Employees*, WASH. POST (Aug. 6, 2021, 6:41 PM), <https://www.washingtonpost.com/transportation/2021/08/06/united-airlines-covid-vaccine-mandate/> [https://perma.cc/X6QQ-ZMDQ] (discussing United Airlines' requirement that U.S.-based employees show proof of vaccination five weeks after full approval of a COVID vaccine by the U.S. Food and Drug Administration (FDA) or five weeks after September 20, 2021, whichever occurred first); Matthew Boyle, *Walmart, Disney Get Tough on Unvaccinated Staff Amid Delta Surge*, BLOOMBERG (July 30, 2021, 4:33 PM), <https://www.bloomberg.com/news/articles/2021-07-30/walmart-requires-headquarters-staff-to-get-vaccinated-by-oct-4> [https://perma.cc/882M-6K5Y] (describing Walmart's vaccination requirement for campus staff and regional and divisional employees working in multiple facilities and Disney's requirement for in-person salaried and nonunion hourly employees in the United States and new hires); Ian Duncan, *Delta Air Lines to Require that Employees be Vaccinated or Pay Health Insurance Surcharge*, WASH. POST (Aug. 25, 2021, 10:00 AM), <https://www.washingtonpost.com/transportation/2021/08/25/delta-employee-vaccines-covid/> [https://perma.cc/DN8M-NXHM] (discussing Delta Airlines' requirement that unvaccinated employees wear masks while on company property, submit to weekly testing, and pay a two-hundred-dollar monthly health insurance surcharge); Heather Kelly & Gerrit De Vynck, *Google and Facebook to Require Vaccinations for In-Office Employees, Paving the Way for Rivals to Follow*, WASH. POST (July 28, 2021, 7:46 PM), <https://www.washingtonpost.com/technology/2021/07/28/google-office-vaccinate/> [https://perma.cc/N2HW-FBKR] (detailing chief executive officer Sundar Pichai's memorandum to employees requiring full vaccination as a condition of returning to Google campuses); Ben Leonard, *College Vaccine Mandates Rile GOP States*, POLITICO (June 24, 2021, 4:31 AM), <https://www.politico.com/news/2021/06/24/red-states-college-vaccine-mandates-495766> [https://perma.cc/Z5DU-47MV] (discussing the recommendation of the American College Health Association that U.S. colleges and universities require vaccination for admission, with their normal exceptions including for preexisting medical conditions); Lananh Nguyen, *Morgan Stanley Says No Vaccine, No Entry*, N.Y. TIMES (June 22, 2021), <https://www.nytimes.com/2021/06/22/business/morgan-stanley-vaccination-requirement.html> [https://perma.cc/4RT7-Y6BP] (discussing Morgan Stanley's policy requiring vaccination for all persons, including clients and visitors, entering its buildings in New York City and Westchester County); Paula Span, *Can Long-Term Care Employers Require Staff Members to Be Vaccinated?*, N.Y. TIMES (Mar. 8, 2021), <https://www.nytimes.com/2021/03/05/health/coronavirus-vaccination-elder-facilities.html> [https://perma.cc/8ZMS-N2WH] (discussing the lag in vaccination rates for employees at long-term care facilities and industry efforts to address the issue through required vaccination); Michael Corkery, *Tyson Foods Offers Workers Paid Time Off—If They Get Vaccinated*, N.Y. TIMES (Nov. 4, 2021), <https://www.nytimes.com/2021/09/03/business/tyson-vaccination-workers.html> [https://perma.cc/8AWF-C74J] (discussing Tyson Foods' program of paid administrative and sick leave for vaccinated workers and education sessions on the benefits and risks of

However, employer consensus on vaccination policies is not universal. Numerous employers have announced they will not require COVID vaccinations at the present time or in the foreseeable future.⁹ Many firms remain undecided until the U.S. Food and Drug Administration (FDA) completes the Biologics License Application approval process beyond the emergency use authorization under which two of the three COVID vaccines are presently distributed.¹⁰ There remains considerable reluctance to mandate vaccination, despite the emergency temporary standard issued by the U.S. Occupational Safety and Health Administration (OSHA) requiring private employers with one hundred or more employees to mandate vaccination,

vaccination). For a summary of the vaccination policies of 218 private employers, see *COVID-19 Vaccines: Employers & Requirements*, HEALTH ACTION ALL., <https://www.healthaction.org/resources/vaccines/covid-19-vaccines-employer-requirements-health-action-alliance> [<https://perma.cc/Y693-DBTM>].

9. E.g., Dan Diamond, *Most Employers Shy Away from Mandating Coronavirus Vaccines*, WASH. POST (May 21, 2021, 9:57 AM), <https://www.washingtonpost.com/health/2021/05/21/employers-colleges-vaccine-mandates/> [<https://perma.cc/72JH-J5TP>] (discussing the reluctance of employers to require vaccination due to “the difficult politics surrounding the coronavirus vaccines and the untested legal issues involving vaccines cleared under the Food and Drug Administration’s emergency authority”); Heidi Groover, *Employers Can Require the Coronavirus Vaccine. Here’s What Some Seattle Businesses are Doing.*, SEATTLE TIMES (Feb. 8, 2021, 11:04 PM), <https://www.seattletimes.com/business/employers-can-require-the-coronavirus-vaccine-but-most-major-seattle-businesses-are-holding-off-for-now/> [<https://perma.cc/RG5L-AKJ4>] (discussing decisions by Amazon, Boeing, Costco, and Safeway declining to require vaccination); Nguyen, *supra* note 8 (discussing voluntary reporting of vaccination status at Bank of America and JPMorgan Chase); Kevin Stankiewicz, *Employers Mandating Covid Vaccines May be Very Rare, Says Marsh & McLennan CEO*, CNBC (Dec. 24, 2020, 12:51 PM), <https://www.cnn.com/2020/12/24/covid-vaccine-marsh-mclennan-ceo-says-employer-mandates-will-be-rare.html> [<https://perma.cc/RPV5-KZXB>] (referencing the rejection of required vaccination by Ford and General Motors).

10. E.g., Egan, *supra* note 1 (discussing the reluctance of some companies to require vaccines that have only received emergency use authorization); Helena Oliviero & Kelly Yamanouchi, *Employers Must Weigh Many Issues in Considering Vaccine Mandate*, ATLANTA J. CONST. (Dec. 18, 2020), <https://www.ajc.com/news/coronavirus/employers-must-weigh-many-issues-in-considering-vaccine-mandates/AQ74AADVS5A5REHSYS6SIZKEI4/> [<https://perma.cc/U6XE-F3EV>] (discussing the decisions of Home Depot and members of the Georgia Hospital Association to await increased supply and final FDA approval before adopting vaccine policies for employees). Emergency use authorization facilitates the availability of unapproved products that might be effective to diagnose, treat, or prevent serious or life-threatening diseases and when known potential benefits outweigh known potential risks. See Emergency Use Authorization Declaration, 85 Fed. Reg. 18, 250 (Apr. 1, 2020) (granting authorization for the emergency use of COVID vaccines); see also *COVID-19 Vaccine Approval Process Overview*, ASS’N ST. & TERRITORIAL HEALTH OFFS. (Nov. 2020), <https://www.astho.org/globalassets/pdf/covid/covid-19-vaccine-approval-process.pdf> [<https://perma.cc/5ZCZ-E6UX>]. For the statutory basis for emergency use authorization, see 21 U.S.C. § 360bbb-3(a)–(l).

or weekly testing of their work forces, with substantial penalties for noncompliance.¹¹

Employer vaccination policies also face opposition in the states. Legislation has been introduced in at least thirty-six states prohibiting private companies and public entities from requiring vaccination as a condition of current or prospective employment.¹² Although these efforts have largely failed thus

11. See COVID-19 Vaccination and Testing, 86 Fed. Reg. 61, 402 (Nov. 5, 2021) (to be codified at 29 C.F.R. pts. 1910, 1915, 1917, 1918, 1926, 1928); see also *Path out of the Pandemic: President Biden's COVID-19 Action Plan*, WHITE HOUSE (Sept. 2021), <https://www.whitehouse.gov/covidplan/> [<https://web.archive.org/web/20210909210917/https://www.whitehouse.gov/covidplan/>]; Aaron E. Carroll, *Vaccination Mandates are Coming. Good.*, N.Y. TIMES (June 28, 2021), <https://www.nytimes.com/2021/06/28/opinion/covid-vaccine-mandate.html> [<https://perma.cc/QD9Y-JUP6>] (recognizing the essential nature of required vaccination to conquering disease in the United States and concluding that “[m]andates still aren’t popular; few public health measures are. But they work”); Andrea Hsu, *As Covid-19 Vaccine Nears, Employers Consider Making It Mandatory*, NPR (Nov. 25, 2020, 5:01 AM), <https://www.npr.org/2020/11/25/937240137/as-covid-19-vaccine-nears-employers-consider-making-it-mandatory> [<https://perma.cc/SL3T-QS3U>] (noting that Johnny Taylor, the president of the Society for Human Resource Management, predicted employer mandates as COVID vaccines became available); Taylor Telford, Tayler Pager & Eli Rosenberg, *Biden Meets with Business Leaders on Vaccine Mandates*, WASH. POST (Sept. 15, 2021, 3:56 PM), <https://www.washingtonpost.com/business/2021/09/15/vaccine-mandate-biden-meeting/> [<https://perma.cc/CV6Z-UES5>] (discussing business skepticism and concerns regarding the Biden administration’s mandatory vaccination policy).

12. E.g., H.B. 5402, 2021 Gen. Assemb., Jan. Sess. (Conn. 2021) (prohibiting employers from requiring proof of vaccination from current and prospective employees); H.B. 719, 2021 Leg., 2021 Reg. Sess. (Miss. 2021) (prohibiting public and private employers from requiring employees to be vaccinated as a condition of employment or continued employment); H.B. 838, 101st Gen. Assemb., 1st Reg. Sess. (Mo. 2021) (prohibiting public employers from requiring employees to be vaccinated); Substitute H.B. 248, 134th Gen. Assemb., 2021–2022 Reg. Sess. (Ohio 2021) (prohibiting employment discrimination on the basis of vaccination status); H.B. 3511, 2021–2022 Gen. Assemb., 124th Sess. (S.C. 2021) (prohibiting employers from taking “any adverse employment action . . . including . . . termination, suspension, involuntary reassignment, or demotion” based upon an employee’s vaccination status); H.B. 2242, 2021 Gen. Assemb., 2021 Sess. (Va. 2021) (prohibiting employment discrimination on the basis of vaccination status); H.B. 1065, 67th Leg., 2021 Reg. Sess. (Wash. 2021) (prohibiting public and private entities from requiring vaccination as a condition of employment until such time as vaccines are licensed for use in the United States and have been determined not to present a risk of serious adverse health effects based upon clinical trials for a period of no less than three years); S.B. 5, 2021–2022 Leg. (Wis. 2021) (prohibiting employers from requiring vaccination or evidence of vaccination as a condition of prospective or continued employment); see also Karla Grossenbacher, *Some States Put Brakes on EEOC’s Stance on Mandating Covid-19 Vaccine*, BLOOMBERG (Jan. 13, 2021, 1:01 AM), <https://news.bloomberglaw.com/us-law-week/some-states-put-brakes-on-eeocs-stance-on-mandating-covid-19-vaccine> [<https://perma.cc/CME7-GDYS>] (discussing efforts to prohibit public

far, those that have succeeded may have a chilling effect on efforts by employers to require vaccination in their workplaces.¹³ However, opposition is not universal, as evidenced by the growing number of state and local governments that require vaccination for their employees or subsets thereof.¹⁴

and private employers from conditioning employment on vaccination status in Minnesota, South Carolina, and Washington).

13. See H.B. 1547, 93d Gen. Assemb., 2021 Reg. Sess. (Ark. 2021) (prohibiting state and local governments from requiring vaccination as a condition of employment); H.B. 702, 67th Leg. 2021 Reg. Sess. (Mont. 2021) (prohibiting public and private employers from utilizing vaccination status to deny employment opportunities and discriminating based on vaccination status); H.B. 1465, 67th Leg. Assemb. Reg. Sess. (N.D. 2021) (prohibiting private employers from obtaining documentation of vaccination status before providing employment); OFF. OF THE TEX. GOVERNOR, EXEC. ORDER NO. GA-40, RELATING TO PROHIBITING VACCINE MANDATES, SUBJECT TO LEGISLATIVE ACTION. (Oct. 11, 2021); H.B. 308, 2021 Leg., 2021 Gen. Sess. (Utah 2021) (prohibiting state and local governments from requiring vaccines subject to emergency use authorization as a condition of employment); see also Sophie Quinton, *Bills to Block Mandatory Worker Vaccines Falter in the States*, PEW: STATELINE (Feb. 23, 2021), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2021/02/23/bills-to-block-mandatory-worker-vaccines-falter-in-the-states> [https://perma.cc/ZE9A-HF2X] (discussing the failure of bills prohibiting required vaccination in Indiana and Wisconsin and predicting that such bills will continue to fail as they threaten the legal obligation of employers “to maintain a safe workplace and could put the lives of workers, customers, and patients at risk”). For a summary of state laws prohibiting the imposition of COVID-19 vaccination mandates, see generally Littler Mendelson, *Mandatory Employee Vaccines—Coming to a State Near You?*, LITTLER (Mar. 14, 2022), <https://www.littler.com/publication-press/publication/mandatory-employee-vaccines-coming-state-near-you> [https://perma.cc/K5L8-U2PU]. For a summary of proposed and adopted state legislation regarding vaccination status and employment, see generally *50-State Update on Legislation Pertaining to Employer-Mandated Vaccinations*, HUSCH BLACKWELL (Feb. 23, 2022), <https://www.huschblackwell.com/newsandinsights/50-state-update-on-pending-legislation-pertaining-to-employer-mandated-vaccinations> [https://perma.cc/HMW6-YYRP].

14. For a summary of state governments requiring COVID-19 vaccination in designated workplaces, see generally Mendelson, *supra* note 13. For specific vaccination requirements by state governments, see TOMAS J. ARAGON, CAL. DEP’T OF PUB. HEALTH, ORDER OF THE STATE PUBLIC HEALTH OFFICER VACCINE VERIFICATION FOR WORKERS IN SCHOOLS (Aug. 11, 2021), <https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/Order-of-the-State-Public-Health-Officer-Vaccine-Verification-for-Workers-in-Schools.aspx> [https://web.archive.org/web/20210811190847/https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/Order-of-the-State-Public-Health-Officer-Vaccine-Verification-for-Workers-in-Schools.aspx] (discussing vaccination of employees of public and private elementary and secondary schools); TOMAS J. ARAGON, CAL. DEP’T OF PUB. HEALTH, STATE PUBLIC HEALTH OFFICER UNVACCINATED WORKERS IN HIGH RISK SETTINGS (July 26, 2021), <https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/Order-of-the-State-Public-Health-Officer-Unvaccinated-Workers-In-High-Risk-Settings.aspx> [https://web.archive.org/web/20210727172256/https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/Order-of-the-State-Public-Health-Officer-Unvaccinated-Workers-In-High-Risk-Settings.aspx]; OFF. OF THE GOVERNOR OF CONN., EXEC. ORDER NO. 13D, PROTECTION OF PUBLIC HEALTH AND SAFETY DURING COVID-19 PANDEMIC—VACCINATIONS REQUIRED FOR STATE EMPLOYEES, SCHOOL EMPLOYEES AND CHILDCARE FACILITY STAFF (Aug. 19, 2021), <https://portal.ct.gov/Office-of-the-Governor/Governors-Actions/Executive-Orders/Governor-Lamonts-Executive-Orders> [https://perma.cc/HF5Z-

Reluctance to impose employer mandates may change based upon inadequate numbers of people seeking vaccination or who ultimately

ZJBX]; OFF. OF THE GOVERNOR OF CONN., EXEC. ORDER No. 13B, PROTECTION OF PUBLIC HEALTH AND SAFETY DURING COVID-19 PANDEMIC—LONG-TERM CARE FACILITY STAFF VACCINATION (Aug. 6, 2021), <https://portal.ct.gov/Office-of-the-Governor/Governors-Actions/Executive-Orders/Governor-Lamonts-Executive-Orders> [<https://perma.cc/HF5Z-ZJBX>]; OFF. OF THE GOVERNOR OF HAW, EMERGENCY PROCLAMATION RELATED TO THE COVID-19 RESPONSE (Aug. 5, 2021), <https://governor.hawaii.gov/emergency-proclamations/page/2/> [<https://perma.cc/ZW5J-N4SK>]; MD. DEPT. OF PUB. HEALTH, MDH No. 2021-08-05-01, AMENDED DIRECTIVE AND ORDER REGARDING VACCINATION MATTERS (Aug. 18, 2021), <https://health.maryland.gov/phpa/Documents/2021.09.08.01%20-%20MDH%20Order%20-%20Amended%20Vaccination%20Matters%20Order.pdf> [<https://perma.cc/YA6F-SNHD>]; OFF. OF THE GOVERNOR OF THE COMMONWEALTH OF MASS., EXEC. ORDER 595, IMPLEMENTING A REQUIREMENT FOR COVID-19 VACCINATION FOR THE COMMONWEALTH'S EXECUTIVE DEPARTMENT EMPLOYEES (Aug. 19, 2021), <https://www.mass.gov/executive-orders/no-595-implementing-a-requirement-for-covid-19-vaccination-for-the-commonwealths-executive-department-employees> [<https://perma.cc/N5PG-GC42>]; OFF. OF THE GOVERNOR OF N.J., EXEC. ORDER No. 253 (Aug. 27, 2021), https://nj.gov/infobank/eo/056murphy/approved/eo_archive.shtml [<https://perma.cc/KF22-U3TJ>]; OFF. OF THE GOVERNOR OF N.J., EXEC. ORDER No. 252 (Aug. 27, 2021), https://nj.gov/infobank/eo/056murphy/approved/eo_archive.shtml [<https://perma.cc/KF22-U3TJ>]; OFF. OF THE GOVERNOR OF N.M., EXEC. ORDER No. 2021-046, AMENDED ORDER REQUIRING STATE EMPLOYEES TO COMPLY WITH CERTAIN PUBLIC HEALTH REQUIREMENTS (July 29, 2021), <https://cv.nmhealth.org/public-health-orders-and-executive-orders/> [<https://perma.cc/M2P3-TRBA>]; OFF. OF THE GOVERNOR OF ORE, EXEC. ORDER No. 21-29, COVID-19 VACCINATION REQUIREMENT FOR STATE EXECUTIVE BRANCH (Aug. 13, 2021), <https://www.oregon.gov/gov/Pages/executive-orders.aspx> [<https://perma.cc/VCA7-25L8>]; OFF. OF THE GOVERNOR OF THE COMMONWEALTH OF VA., EXEC. DIRECTIVE No. 18, ENSURING A SAFE WORK PLACE (Aug. 5, 2021); OFF. OF THE GOVERNOR OF WASH., PROCLAMATION No. 21-14, COVID-19 VACCINATION REQUIREMENT (Aug. 9, 2021), <https://www.governor.wa.gov/office-governor/official-actions/proclamations> [<https://perma.cc/4J7S-ANSC>]. For a complete list of state vaccination requirements, see Lisa Nagele-Piazza, *More States and Cities Require Workers to Get COVID-19 Vaccines*, SHRM (Aug. 17, 2021), <https://www.shrm.org/resourcesandtools/legal-and-compliance/state-and-local-updates/pages/more-states-and-cities-require-workers-to-get-covid-19-vaccines.aspx> [<https://perma.cc/SZP9-SNWU>]. For examples of vaccination requirements by local governments, see Shashank Bengali, *San Francisco Will Require All City Employees to be Vaccinated*, N.Y. TIMES (June 24, 2021), <https://www.nytimes.com/2021/06/24/world/san-francisco-vaccine-mandate.html> [<https://perma.cc/7NG7-2LD4>] (detailing the city of San Francisco's plan to require its 35,000 employees to be vaccinated once vaccines receive final FDA approval); Lauren Hirsch & Kellen Browning, *How New York Businesses are Responding to the Mayor's Plea for Vaccine Mandates*, N.Y. TIMES (Aug. 3, 2021), <https://www.nytimes.com/2021/07/27/business/new-york-vaccine-mandates.html> [<https://perma.cc/J5XZ-YZNZ>] (discussing the announcement by New York City Mayor Bill de Blasio requiring vaccination or testing for all municipal employees).

become fully vaccinated.¹⁵ COVID vaccines are readily available to all who wish to be vaccinated.¹⁶ However, a significant number of eligible persons have not been vaccinated.¹⁷

The reasons provided for the failure or refusal to receive the COVID vaccines are diverse.¹⁸ The portion of such individuals who are vaccine

15. See Eric Levenson, *Mandates are Boosting Vaccination Rates, but Not Without a Tradeoff*, CNN (Sept. 29, 2021, 4:39 PM), <https://www.cnn.com/2021/09/29/us/vaccine-mandate-health-care/index.html> [<https://perma.cc/9E8R-NQZA>].

16. See *COVID-19 Vaccinations in the United States*, CTRS. FOR DISEASE CONTROL & PREVENTION (Dec. 21, 2021), <http://COVID.cdc.gov/COVID-data-tracker/#vaccinations> [<https://perma.cc/2YHD-4B28>]; see also Olivia Goldhill, *States are Sitting on Millions of Surplus COVID-19 Vaccine Doses as Expiration Dates Approach*, STAT (July 20, 2021), <https://www.statnews.com/2021/07/20/states-are-sitting-on-millions-of-surplus-covid-19-vaccine-doses-as-expiration-dates-approach/> [<https://perma.cc/MP7B-RWC2>].

17. See *COVID-19 Vaccinations in the United States*, *supra* note 16; see also KFF *COVID-19 Vaccine Monitor*, KAISER FAMILY FOUND., <https://www.kff.org/coronavirus-covid-19/dashboard/kff-covid-19-vaccine-monitor-dashboard/> [perma.cc/M6RM-95H5].

18. See, e.g., *COVID-19 Vaccine Monitor: June 2021*, KAISER FAMILY FOUND. (June 30 2021), <https://www.kff.org/coronavirus-covid-19/poll-finding/kff-covid-19-vaccine-monitor-june-2021/> [perma.cc/P2NF-S9FU] (finding reasons for remaining unvaccinated included newness of the vaccines and potential side effects (53% each), unwillingness to be vaccinated (43%), and lack of trust in government and perceptions that vaccination is unnecessary (38% each)); see also Lauran Neergaard & Hannah Fingerhut, *AP-NORC Poll: Only Half in US Want Shots as Vaccine Nears*, ASSOCIATED PRESS (Dec. 9, 2020), <https://apnews.com/article/ap-norc-poll-us-half-want-vaccine-shots-4d98dbfc0a64d60d52ac84c3065dac55> [<https://perma.cc/QKR7-EDN8>] (summarizing the results of a survey of 1,117 adults by the Associated Press-NORC Center for Public Affairs Research in which 70% of those who stated they would not be vaccinated expressed concerns about side effects, and 43% were concerned about contracting COVID from the vaccine); E. Allison Hagood & Stacy Mintzer Herlihy, *Addressing Heterogeneous Parental Concerns About Vaccination with a Multiple-Source Model: A Parent and Educator Perspective*, 9 HUM. VACCINES & IMMUNOTHERAPEUTIC 1790, 1790 (2013) (attributing vaccination refusal or hesitancy to safety concerns, underestimations of vaccine efficacy, distrust of the government and the medical profession, preferences for alternative treatments, and perceived violations of civil rights); James G. Hodge, Jr. & Lawrence O. Gostin, *School Vaccination Requirements: Historical, Social, and Legal Perspectives*, 90 KY. L.J. 831, 875–77 (2001–2002) (listing reasons for resisting childhood vaccination as a condition for entry to public schools as including safety concerns, the need for vaccination given the perceived low prevalence of disease, the absence of informed consent associated with mandates, conflicts with religious beliefs, and distrust of government and corporations researching, manufacturing, distributing, and profiting from vaccines); Nili Karako-Eyal, *Beyond the Ethical Boundaries of Solidarity: Increasing Vaccination Rates Through Mandatory Education to Solidarity*, 6 TEX. A&M L. REV. 345, 363 (2019) (summarizing reasons for vaccination refusal or hesitancy as based upon “low perception of the susceptibility to the disease; low perception of the severity of the disease; low perception of the effectiveness and efficiency of the vaccine; and high risk perception of the side effects of vaccines”); Dorit Rubinstein Reiss & Lois A. Weithorn, *Responding to the Childhood Vaccination Crisis: Legal Frameworks and Tools in the Context of Parental Vaccine Refusal*, 63 BUFF. L. REV. 881, 935–36 (2015) (summarizing reasons for vaccination refusal or hesitancy as based upon safety concerns, underestimations of vaccine efficacy, distrust of the government and the medical profession, preferences for alternative treatments, and perceived violations of civil rights).

rejectors, resistant, or hesitant is unknown.¹⁹ However, it is increasingly clear that the United States will not meet its goal of achieving sufficient levels of universal vaccination as to protect willingly non-vaccinated persons and those unable to be vaccinated due to age or immunocompromised status, otherwise known as “herd immunity.”²⁰ Assuming COVID will remain a serious health problem based, in part, upon vaccine rejection and resistance by a not insignificant portion of the eligible population, the question for employers becomes whether to rethink their decisions regarding

19. “Vaccine Rejectors” are those individuals “who are entrenched in their opposition to vaccines, [and] are unwilling to consider information in opposition to their beliefs.” Reiss & Weithorn, *supra* note 18, at 935–36. “Vaccine Resistant” persons are those individuals “who are willing to consider information about the safety and efficacy” but still do not get vaccinated. *Id.* at 936 (citing Hagood & Herlihy, *supra* note 18, at 1791). “Vaccine Hesitant” persons are those individuals who have “anxiety about vaccinations . . . but . . . may not be able to articulate a specific concern.” *Id.*

20. “Herd immunity” and “the herd effect” occur when a critical mass of vaccination rates within a population is reached, thereby conferring protection upon, and reducing the risk of infection to, persons who remain unvaccinated due to choice or medical necessity. See Megan Gibson, Note, *Competing Concerns: Can Religious Exemptions to Mandatory Childhood Vaccinations and Public Health Successfully Coexist?*, 54 U. LOUISVILLE L. REV. 527, 528–29 (2016); see also Mary Holland & Chase E. Zachary, *Herd Immunity and Compulsory Childhood Vaccination: Does the Theory Justify the Law?*, 93 OR. L. REV. 1, 9 (2014) (distinguishing between herd immunity as eradicating the disease from society and the herd effect as a means of controlling the infection); Allan J. Jacobs, *Do Belief Exemptions to Compulsory Vaccination Programs Violate the Fourteenth Amendment?*, 42 U. MEM. L. REV. 73, 79 (2011) (discussing the acceptance of herd immunity in the medical community and its benefit to vaccine free riders); James Lobo, Comment, *Vindicating the Vaccine: Injecting Strength into Mandatory School Vaccination Requirements to Safeguard the Public Health*, 57 B.C. L. REV. 261, 269–70 (2016) (discussing the medical and community benefits of herd immunity); Megan Joy Rials, *By the Pricking of My Thumbs, State Restriction This Way Comes: Immunizing Vaccination Laws from Constitutional Review*, 77 LA. L. REV. 209, 216–17 (2016); Eleanor H. Sills, Note, *Measles, Chickenpox, and Other Preventable Diseases: Why Stricter Vaccine Exemptions are a Must—Proposed Legislation for Stricter Vaccine Exemption Standards*, 47 FLA. ST. U. L. REV. 679, 696–97 (2020) (discussing the recognition of herd immunity by the medical community in 1923 (citing Marco Cáceres, *The Misunderstood Theory of Herd Immunity*, VACCINE REACTION (June 20, 2015), <https://thevaccinereaction.org/2015/06/the-misunderstood-theory-of-herd-immunity/> [<https://perma.cc/5RAD-ZZ6X>]]); Emma Tomsick, Note, *The Public Health Demand for Revoking Non-Medical Exemptions to Compulsory Vaccination Statutes*, 34 J.L. & HEALTH 130, 141 (2020). For a discussion of the threshold needed to achieve herd immunity against various vaccine-preventable diseases, see Dina Nathanson, Note, *Herd Protection v. Vaccine Abstention: Potential Conflict Between School Vaccine Requirements and State Religious Freedom Restoration Acts*, 42 AM. J.L. & MED. 621, 624–25 (2016).

vaccination.²¹ Whatever decisions they make, employers “likely will find themselves caught between public health imperatives, liability fears, and a restive workforce.”²²

This Article examines the positives and negatives associated with private and state government vaccination requirements. Part II of this Article discusses the history and importance of vaccination in general, followed by a description in Part II.A of the three COVID vaccines approved for use in the United States at the time of writing.²³ Part II.B concludes with a detailed examination of the U.S. Equal Employment Opportunity Commission’s (EEOC) Guidelines and Revised Guidelines regarding COVID vaccination mandates. Part III argues the case against private mandates, followed by Part IV, that suggests strategies for private employers who insist on adopting vaccination policies. Part V of this Article argues in favor of state vaccination mandates with a focus on the government’s unique advantages unavailable to private employers. This Article concludes that public health considerations should not be surrendered to a vocal minority of vaccination objectors. Despite some misgivings regarding private vaccination policies, this Article concludes that it is time for the country to heed the advice of the medical and public health communities and require vaccination regardless of the source.

II. VACCINES AND VACCINATION

Vaccination is “the medical process by which an agent similar to the disease or virus being prevented is deliberately introduced into a non-exposed individual, thereby causing the body to produce antibodies against the underlying illness.”²⁴ The development of vaccines and their widespread

21. See Adeel Hassan, *The U.S. Vaccination Story Varies Widely Across Regions*, N.Y. TIMES (May 28, 2021), <https://www.nytimes.com/2021/05/23/world/covid-vaccination-regions.html> [https://perma.cc/G5M4-VHUH].

22. GIBSON DUNN, AN EMPLOYER PLAYBOOK FOR THE COVID “VACCINE WARS”: STRATEGIES AND CONSIDERATIONS FOR WORKPLACE VACCINATION POLICIES 1 (Feb. 1, 2021).

23. During the final publication stages of this Article, the FDA authorized emergency use of the Novavax COVID-19 Vaccine on July 13, 2022. News Release, Food & Drug Admin., Coronavirus (COVID-19) Update: FDA Authorizes Emergency Use of Novavax COVID-19 Vaccine, Adjuvanted (July 13, 2022), <https://www.fda.gov/news-events/press-announcements/coronavirus-covid-19-update-fda-authorizes-emergency-use-novavax-covid-19-vaccine-adjuvanted> [https://perma.cc/AX97-FFR8].

24. Steve P. Calandrillo, *Vanishing Vaccinations: Why are So Many Americans Opting Out of Vaccinating Their Children?*, 37 U. MICH. J.L. REFORM 353, 362 (2004) (citing Hodge & Gostin, *supra* note 18, at 837 n.19); see also W. Michael McDonnell & Frederick K. Askari, *Immunization*, 278 [J]AMA 2000 (1997) (describing vaccination as an example of active immunization in which the recipient’s immune system is induced to produce antibodies against a pathogen as a result of administering an immunobiological agent in the form of a vaccine). The term “vaccination” was coined by Edward Jenner

distribution are one of the most important medical achievements of the twentieth century.²⁵ Vaccination has eradicated, prevented, or controlled numerous life-threatening and debilitating diseases such as diphtheria, measles, meningitis, polio, rubella, and tuberculosis—to name just a few—and resulted in “a dramatic reduction in morbidity and mortality due to vaccine preventable illnesses.”²⁶ On a global scale, the World Health Organization has estimated that vaccination and resultant immunization prevent between two and three million deaths on an annual basis.²⁷ Undoubtedly, “[v]accines are literally lifesavers.”²⁸

as a result of his work with cowpox. See Gibson, *supra* note 20, at 531–32 (citing Stefan Riedel, *Edward Jenner and the History of Smallpox and Vaccination*, 18 PROC. BAYLOR U. MED. CTR. 24 (2005)).

25. Overview, History, and How the Safety Process Works, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/vaccinesafety/ensuringsafety/history/index.html> [https://perma.cc/8FXF-DYX5] (“Vaccines are one of the greatest success stories in public health.”); Ctrs. for Disease Control & Prevention, *Ten Great Public Health Achievements—United States, 1900–1999*, 48 MORBIDITY & MORTALITY WKLY. REP. 241 (1999); Ctrs. for Disease Control & Prevention, *Impact of Vaccines Universally Recommended for Children—United States, 1900–1998*, 48 MORBIDITY & MORTALITY WKLY. REP. 243 (1999); Alexandra Minna Stern & Howard Markel, *The History of Vaccines and Immunization: Familiar Patterns, New Challenges*, 24 HEALTH AFF. 611, 611–12 (2005).

26. Alicia Novak, Comment, *The Religious and Philosophical Exemptions to State-Compelled Vaccination: Constitutional and Other Challenges*, 71 U. PA. J. CONST. L. 1101, 1105 (2005) (citing Ross D. Silverman, *No More Kidding Around: Restructuring Non-Medical Childhood Immunization Exemptions to Ensure Public Health Protection*, 12 ANNALS HEALTH L. 277, 281–82 (2003)); see also Hillel Y. Levin, *Why Some Religious Accommodations for Mandatory Vaccinations Violate the Establishment Clause*, 68 HASTINGS L.J. 1193, 1198 (2017) (citing MARK NAVIN, VALUES AND VACCINE REFUSAL: HARD QUESTIONS IN ETHICS, EPISTEMOLOGY, AND HEALTH CARE 4 (2016) (discussing the eradication and control of several diseases as a result of vaccination); Sandra W. Roush & Trudy V. Murphy, *Historical Comparisons of Morbidity and Mortality for Vaccine-Preventable Diseases in the United States*, 298 [J]AMA 2155, 2156 tbl.1 (2007) (finding that prior to the development of vaccines, there were 200,000 cases and 4,000 deaths attributable to pertussis and 20,000 cases and 1,800 deaths attributable to polio occurring in the United States on an annual basis).

27. See *10 Facts on Immunization*, WORLD HEALTH ORG. (Mar. 2018), <https://www.who.int/mongolia/health-topics/vaccines/10-facts-on-immunization> [https://perma.cc/U75A-7EAM]; see also Gibson, *supra* note 20, at 528 (describing the success of the World Health Organization’s Smallpox Eradication Program and the Global Polio Eradication Initiative).

28. Reiss & Weithorn, *supra* note 18, at 883; see also Robert I. Field, *Vaccine Declinations Present New Challenges for Public Health*, 33 PHARMACY & THERAPEUTICS 542 (Sept. 2008), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2730125/pdf/ptj339p542.pdf> [https://perma.cc/SVT8-C2MZ] (“[I]t would be safe to say that vaccines have saved more lives than other medical technology.”).

The importance of vaccination extends beyond individual well-being. Vaccination has a significant impact upon social well-being. Vaccination protects not only the individual recipient, but also those with whom the recipient comes into contact, including those persons medically unable to receive vaccinations or for whom vaccination is only partially effective.²⁹ Vaccination—and the failure to vaccinate—also have enormous economic consequences. Vaccines save billions of dollars every year which would otherwise be spent treating vaccine preventable diseases.³⁰ The failure to vaccinate also bears a multibillion dollar price tag for the U.S. healthcare system.³¹ These costs are in addition to the impacts upon the labor force and productivity resulting from the continuing prevalence of vaccine preventable diseases.³²

For all of its health and economic benefits, vaccination is not without controversy. The Society of Antivaccinationists was founded contemporaneously with Edward Jenner’s development of the smallpox vaccine in 1796, based upon the belief that vaccination was “an inappropriate meddling in the work of God.”³³ More recent opposition has asserted a wide variety of reasons including “objections based on effectiveness, transmission of other diseases, fear of harmful effects . . . religious or philosophical beliefs . . . [and] governmental interference with personal autonomy.”³⁴

29. Gibson, *supra* note 20, at 541–42.

30. Martha McCarthy, *Student Vaccination Requirements: Can Nonmedical Exemptions be Justified?*, 320 EDUC. L. REP. 591, 607 (2015).

31. Healthcare costs in the United States attributable to vaccine preventable diseases are estimated at \$10 billion annually. Calandrillo, *supra* note 24, at 428–29.

32. See Lobo, *supra* note 20, at 271; see also Anthony Ciolli, *Religious & Philosophical Exemptions to Mandatory School Vaccinations: Who Should Bear the Costs to Society?*, 74 MO. L. REV. 287, 290 (estimating that more than 30,000 otherwise avoidable deaths occur in the United States annually as a result of vaccine preventable diseases (citing Calandrillo, *supra* note 24, at 428–29)); Roush & Murphy, *supra* note 26, at 2155 (stating that societal costs associated with vaccine preventable diseases “include missed time from school and work, [doctor’s] visits, and hospitalizations” (citations omitted)).

33. Calandrillo, *supra* note 24, at 388 (quoting David M. Abbey, *Letters re Antivaccination Web Sites*, 288 [J]AMA 1717 (2002)).

34. Gibson, *supra* note 20, at 535 (footnote omitted); see also Calandrillo, *supra* note 24, at 390–93 (discussing medical risks associated with vaccination); Hodge & Gostin, *supra* note 18, at 844–49 (discussing anti-vaccination sentiment in general); Novak, *supra* note 26, at 1106–07 (discussing concerns regarding the introduction of foreign substances into the human body, the lack of presence of vaccine preventable disease in the community, distrust of public health officials, personal autonomy, and religious objections); Dorit Rubinstein Reiss, *Thou Shalt Not Take the Name of the Lord Thy God in Vain: Use and Abuse of Religious Exemptions from School Immunization Requirements*, 65 HASTINGS L.J. 1551, 1553 (2014) (discussing safety concerns such as vaccine toxicity and damage to the immune system and belief in the superiority of “natural immunity” (citation omitted)); Tomsick, *supra* note 20, at 153 (attributing anti-vaccination sentiment to the belief that the government and regulatory agencies have concealed information regarding medical risk, and pharmaceutical companies are motivated by profit rather than safety) (citing Anna Kata, *A*

This controversy has only intensified as a result of the development of vaccines to combat the COVID pandemic with pro- and anti-vaccination supporters engaging in increasingly confrontational rhetoric and tactics.³⁵

A. The COVID Vaccines

The first three COVID vaccines to receive emergency use authorization from the FDA were developed by Pfizer-BioNTech, Moderna, and Johnson & Johnson Janssen.³⁶ The Pfizer-BioNTech and Moderna vaccines rely on messenger RNA.³⁷ The Johnson & Johnson Janssen vaccine relies upon

Postmodern Pandora's Box: Anti-Vaccination Misinformation on the Internet, 28 VACCINE 1709, 1713 (2010)).

35. See, e.g., *International Brotherhood of Teamsters, Local 743 v. Cent. States, Se. & Sw. Areas Health & Welfare & Pension Funds*, 566 F. Supp. 3d 872 (N.D. Ill. 2021) (denying motion to compel interest arbitration of challenge to mandatory vaccination policy pursuant to existing collective bargaining agreements); *Bridges v. Hous. Methodist Hosp.*, 543 F. Supp. 3d 525 (S.D. Tex. 2021) (dismissing wrongful termination claim that argued that COVID vaccination requirement violates the Nuremberg Code). One hundred fifty-three workers were ultimately terminated or resigned after failing to meet the June 7, 2021 deadline for vaccination. See Jesus Jiménez & Neil Vigdor, *153 Texas Hospital Workers are Fired or Resign over Mandatory Vaccine Policy*, N.Y. TIMES (June 22, 2021), <https://www.nytimes.com/2021/06/22/us/houston-hospital-covid-vaccine.html> [https://perma.cc/78ZN-8GAV]; see also Richard Pan, *Anti-Vaccine Extremism is Akin to Domestic Terrorism*, WASH. POST (Feb. 28, 2021), https://www.washingtonpost.com/opinions/anti-vaccine-extremism-is-akin-to-domestic-terrorism/2021/02/26/736aee22-787e-11eb-8115-9ad5e9c02117_story.html [https://perma.cc/RUE9-NXPK] (contending that anti-COVID vaccination campaigns are propaganda in an effort to market “alternative remedies and magical supplements,” which could result in unnecessary deaths and is thus akin to domestic terrorism); Isaac Stanley-Becker, *Resistance to Vaccine Mandates is Building. A Powerful Network is Helping.*, WASH. POST (May 26, 2021, 1:28 PM), <https://www.washingtonpost.com/health/2021/05/26/vaccine-mandate-litigation-siri-glimstad-ican/> [https://perma.cc/9NZZ-JB3R] (describing the efforts of the Informed Consent Action Network and its attorneys at the law firm of Siri & Glimstad to dissuade employers from mandating COVID vaccines through threats of litigation).

36. See *COVID-19 Vaccine Approval Process Overview*, *supra* note 10. For discussion of emergency use authorization, see *supra* note 10 and accompanying text.

37. mRNA vaccines trigger an immune response by instructing cells to produce spike proteins found on the surface of the COVID virus. See *Understanding mRNA COVID-19 Vaccines*, CTRS. FOR DISEASE CONTROL & PREVENTION (Jan. 4, 2021), [https://www.cdc.gov/coronavirus/2019-ncov/vaccines/different-vaccines/mrna.html#:~:text=Messenger%20RNA%20\(mRNA\)%20vaccines%20teach,serious%20consequences%20of%20getting%20sick](https://www.cdc.gov/coronavirus/2019-ncov/vaccines/different-vaccines/mrna.html#:~:text=Messenger%20RNA%20(mRNA)%20vaccines%20teach,serious%20consequences%20of%20getting%20sick) [https://perma.cc/8DPZ-4ANR]. These proteins are displayed on the surface of cells and generate the production of antibodies protecting recipients from infection when exposed to the actual virus. See *id.* The mRNA vaccines are relatively new although research regarding

viral vector technology.³⁸

Pfizer-BioNTech's vaccine was approved for emergency use in individuals sixteen years of age and older in December 2020, in individuals twelve through fifteen years of age in May 2021, and in individuals five through eleven years of age in October 2021.³⁹ The vaccine received full and final approval by the FDA for individuals sixteen years of age and older on August 23, 2021.⁴⁰ Moderna's vaccine was approved for emergency use in individuals eighteen years of age and older in December 2020 and received full approval for individuals eighteen years of age and older on January 31, 2022.⁴¹ On June 17, 2022, the FDA authorized emergency use of the

their development and effectiveness against infections such as influenza, Zika, rabies, and cytomegalovirus has been ongoing for many years. *Id.*

38. Viral vectors were first created in the 1970s and utilized in the development of vaccines to combat diseases such as Ebola, human immunodeficiency virus (HIV), influenza, and Zika and in gene therapy, cancer treatments, and molecular biology research. *Understanding Viral Vector COVID-19 Vaccines*, CTRS. FOR DISEASE CONTROL & PREVENTION (Apr. 13, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/different-vaccines/viralvector.html#:~:text=COVID%2D19%20viral%20vector%20vaccines,but%20a%20different%2C%20harmless%20virus> [<https://perma.cc/H3PF-5UG6>]. The COVID viral vector vaccine introduces a harmless virus into the human body which utilizes cells to produce spike proteins which are only found on the surface of the virus that causes COVID. *Id.* These spike proteins trigger the immune system to produce antibodies and activate other cells to combat what it believes to be an infection. *Id.* This learned response allows the body to combat infection when the recipient is exposed to the actual virus. *Id.*

39. Authorizations of Emergency Use of Two Biological Products During the COVID-19 Pandemic; Availability, 86 Fed. Reg. 5200 (Jan. 19, 2021); News Release, Food & Drug Admin., FDA Authorizes Pfizer-BioNTech COVID-19 Vaccine for Emergency Use in Children 5 through 11 Years of Age (Oct. 29, 2021), <https://www.fda.gov/news-events/press-announcements/fda-authorizes-pfizer-biontech-covid-19-vaccine-emergency-use-children-5-through-11-years-age> [<https://perma.cc/H9B7-C4Qg>]; Letter from Denise M. Hinton, Chief Scientist, U.S. Food & Drug Admin., to Elisa Harkins, Global Senior Dir., Pfizer Inc. (Aug. 23, 2021) (reconfirming authorization of the Pfizer-BioNTech vaccine for emergency use in individuals sixteen years of age or older on December 11, 2020 and authorizing use in individuals twelve to fifteen years of age); News Release, Food & Drug Admin., FDA Takes Key Action in Fight Against COVID-19 by Issuing Emergency Use Authorization for First COVID-19 Vaccine (Dec. 11, 2020), <https://www.fda.gov/news-events/press-announcements/fda-takes-key-action-fight-against-covid-19-issuing-emergency-use-authorization-first-covid-19> [<https://perma.cc/3UW4-9DAF>].

40. News Release, Food & Drug Admin., FDA Approves First COVID-19 Vaccine (Aug. 23, 2021), <https://www.fda.gov/news-events/press-announcements/fda-approves-first-covid-19-vaccine> [<https://perma.cc/53AG-KLL5>]; Sharon LaFraniere & Noah Weiland, *F.D.A Fully Approves Pfizer-BioNTech's Vaccine, a First for a Covid-19 Shot*, N.Y. TIMES (Oct. 7, 2021), <https://www.nytimes.com/2021/08/23/health/pfizer-vaccine-approval-fda.html?searchResultPosition=2> [<https://perma.cc/CG4T-F2J4>].

41. Authorizations of Emergency Use of Two Biological Products During the COVID-19 Pandemic; Availability, 86 Fed. Reg. at 5200; *see also* Letter from Jacqueline A. O'Shaughnessy, Acting Chief Scientist, U.S. Food & Drug Admin., to Michelle Olson, Associate Director of Regulatory Affairs, ModernaTX, Inc. (Mar. 29, 2022) (reconfirming authorization of Moderna vaccine for emergency use in individuals eighteen years of age

Pfizer-BioNTech and Moderna vaccines for individuals down to six months of age.⁴² Johnson & Johnson Janssen's vaccine was approved for emergency use in individuals eighteen years of age and older in February 2021.⁴³ However, the U.S. Centers for Disease Control (CDC) concluded that there was a "plausible causal relationship" between the vaccine and thrombosis with thrombocytopenia syndrome.⁴⁴ This relationship caused the FDA to temporarily suspend distribution of the vaccine on April 13, 2021.⁴⁵ Distribution of the vaccine resumed on April 23, 2021, with cautionary instructions for potential recipients.⁴⁶

or older on December 18, 2021); News Release, Food & Drug Admin., FDA Takes Additional Action in Fight Against COVID-19 by Issuing Emergency Use Authorization for Second COVID-19 Vaccine (Dec. 18, 2020), <https://www.fda.gov/news-events/press-announcements/fda-takes-additional-action-fight-against-covid-19-issuing-emergency-use-authorization-second-covid> [<https://perma.cc/E97H-VTCE>]; News Release, Food & Drug Admin., Coronavirus (COVID-19) Update: FDA Takes Key Action by Approving Second COVID-19 Vaccine (Jan. 31, 2022), <https://www.fda.gov/news-events/press-announcements/coronavirus-covid-19-update-fda-takes-key-action-approving-second-covid-19-vaccine> [<https://perma.cc/3MV4-ZHWQ>].

42. News Release, Food & Drug Admin., Coronavirus (COVID-19) Update: FDA Authorizes Moderna and Pfizer-BioNTech COVID-19 Vaccines for Children Down to 6 Months of Age (June 17, 2022), <https://www.fda.gov/news-events/press-announcements/coronavirus-covid-19-update-fda-authorizes-moderna-and-pfizer-biontech-covid-19-vaccines-children> [<https://perma.cc/UFW4-B3BV>].

43. Authorizations of Emergency Use of Certain Biological Products During the COVID-19 Pandemic; Availability, 86 Fed. Reg. 28,608 (May 27, 2021); *see* Letter from Denise M. Hinton, Chief Scientist, U.S. Food & Drug Admin., to Ruta Walawalkar, U.S. Vaccines, Reg. Aff., Janssen Biotech, Inc. (Feb. 27, 2021); News Release, Food & Drug Admin., FDA Issues Emergency Use Authorization for Third COVID-19 Vaccine (Feb. 27, 2021), <https://www.fda.gov/news-events/press-announcements/fda-issues-emergency-use-authorization-third-covid-19-vaccine> [<https://perma.cc/WY4T-F7YQ>].

44. *Johnson & Johnson's Janssen COVID-19 Vaccine: Overview and Safety*, CTRS. FOR DISEASE CONTROL & PREVENTION (Apr. 4, 2022), <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/different-vaccines/janssen.html> [<https://perma.cc/2NLX-FH8X>].

45. FDA Statement, Food & Drug Admin., Joint CDC and FDA Statement on Johnson & Johnson COVID-19 Vaccine (Apr. 13, 2021), <https://www.fda.gov/news-events/press-announcements/joint-cdc-and-fda-statement-johnson-johnson-covid-19-vaccine> [<https://perma.cc/Q2UQ-AEAS>].

46. *See* Letter from Marion Gruber, Dir., Off. of Vaccines Res. & Rev., Ctr. for Biologics Evaluation & Res., U.S. Food & Drug Admin., to Ruta Walawalkar, U.S. Vaccines, Reg. Aff., Janssen Biotech, Inc. 3 (Apr. 23, 2021); News Release, Food & Drug Admin., FDA and CDC Lift Recommended Pause on Johnson & Johnson (Janssen) COVID-19 Vaccine Use Following Thorough Safety Review (Apr. 23, 2021), <https://www.fda.gov/news-events/press-announcements/fda-and-cdc-lift-recommended-pause-johnson-johnson-janssen-covid-19-vaccine-use-following-thorough> [<https://perma.cc/RSY5-V3MM>]; News Release, Food & Drug Admin., Coronavirus (COVID-19) Update: FDA Limits Use of

*B. The Equal Employment Opportunity Commission
and COVID Vaccines*

On December 16, 2020, the U.S. Equal Employment Opportunity Commission (EEOC) issued its long-awaited technical assistance questions and answers, entitled *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws* (Guidelines), regarding employer-mandated COVID vaccines in anticipation of their availability to the public.⁴⁷ The EEOC updated the Guidelines on May 28, 2021, after COVID vaccines became widely available to the public (Revised Guidelines).⁴⁸

The Guidelines and Revised Guidelines addressed a broad spectrum of issues including: disability-related inquiries, the confidentiality of medical information, reasonable accommodations pursuant to the Americans with Disabilities Act (ADA) and Title VII of the Civil Rights Act of 1964, pandemic-related harassment on the basis of national origin, age and pregnancy discrimination, and the application of the Genetic Information Nondiscrimination Act.⁴⁹ Most importantly, for purposes of this Article, the Guidelines and Revised Guidelines authorized private employers to require vaccination as a condition of employment under tightly regulated circumstances relating to disabilities and religious objections to vaccination.⁵⁰

The Guidelines affirmed that employers may have a qualification standard that includes “a requirement that an individual shall not pose a direct threat to the health or safety of individuals in the workplace.”⁵¹ The determination of whether “a particular employee poses a direct threat” is to be “based on a reasonable medical judgment that relies on the most current medical knowledge,” including “the level of community spread,” statements by the CDC, and assessments by the affected employee’s

Janssen COVID-19 Vaccine to Certain Individuals (May 5, 2022), <https://www.fda.gov/news-events/press-announcements/coronavirus-covid-19-update-fda-limits-use-janssen-covid-19-vaccine-certain-individuals> [<https://perma.cc/5PKX-3VSR>].

47. U.S. EQUAL EMP. OPPORTUNITY COMM’N, WHAT YOU SHOULD KNOW ABOUT COVID-19 AND THE ADA, THE REHABILITATION ACT, AND OTHER EEO LAWS 1, § K. (Dec. 16, 2020) [hereinafter GUIDELINES].

48. U.S. EQUAL EMP. OPPORTUNITY COMM’N, WHAT YOU SHOULD KNOW ABOUT COVID-19 AND THE ADA, THE REHABILITATION ACT, AND OTHER EEO LAWS 1, § K. (May 28, 2021) [hereinafter REVISED GUIDELINES].

49. See generally REVISED GUIDELINES, *supra* note 48; GUIDELINES, *supra* note 47.

50. See REVISED GUIDELINES, *supra* note 48, § K.6.–7.; GUIDELINES, *supra* note 47, §§ A., K.

51. GUIDELINES, *supra* note 47, § K.5. (quoting 42 U.S.C. § 12113(b)). “Direct threat” is defined as “a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation.” 42 U.S.C. § 12111(3); *cf.* 42 U.S.C. § 12113(a) (providing for a defense to a claim of discrimination that the application of qualification standards is job-related, consistent with business necessity, and performance of which cannot be accomplished by reasonable accommodation).

health care provider with the employee's consent.⁵² Additional factors to be taken into account in the assessment of a direct threat include: interaction of the affected individual with others, the physical setting in which the work is performed, and existing safety measures.⁵³ Employers cannot impose qualifications if they screen out or tend to screen out disabled individuals, unless the employer can demonstrate that the unvaccinated employee would pose a direct threat to workplace safety due to "a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation."⁵⁴ A determination that an unvaccinated individual will expose co-workers to potential COVID infection constitutes a direct threat.⁵⁵

The employer's task is only half-complete upon the determination of the existence of a direct threat. The employer is prohibited from taking adverse employment action, such as excluding the employee from the workplace, unless a reasonable accommodation eliminating or reducing the threat cannot be provided without undue hardship.⁵⁶ The undue hardship determination may depend, in part, upon the vaccination status of the workforce and the amount of contact the unvaccinated individual will have with other persons whose vaccination status is unknown.⁵⁷

Employees excluded from the workplace under such circumstances cannot be automatically terminated but rather may be permitted to perform their

52. REVISED GUIDELINES, *supra* note 48, § K.5.

53. *Id.* Risk assessment based upon interaction of the affected individual with others includes "whether the employee works alone or with others . . . [and] the frequency and direct interaction the employee typically will have with other employees and/or non-employees." *Id.* The physical setting of the workplace includes whether the work is performed indoors or outdoors, the availability of adequate ventilation, and the space available for social distancing. *Id.* Existing safety measures consist of the number of partially or fully vaccinated individuals in the workplace and mask and routine screening and testing requirements. *Id.*

54. GUIDELINES, *supra* note 47, § K.5. (quoting 29 C.F.R. § 1630.2(r) (2011)); *see also* 42 U.S.C. § 12112(a), (b)(3)(A)–(B) (prohibiting discrimination against individuals with disabilities in hiring, termination, advancement, compensation, training and other terms, conditions, and privileges of employment including the application of discriminatory qualification standards).

55. GUIDELINES, *supra* note 47, § K.5.

56. *Id.* § G.; *see also* 42 U.S.C. § 12112(b)(5)(A) (requiring reasonable accommodation of disabled individuals unless such accommodation would impose undue hardship on the operation of the business). For definitions of reasonable accommodation and undue hardship, *see* 42 U.S.C. § 12111(9)(A)–(B), (10)(A)–(B).

57. *See* GUIDELINES, *supra* note 47, § K.5.

work remotely.⁵⁸ However, the feasibility of remote work depends on the nature of the workforce and the individual employee's job position and duties.⁵⁹ Employers must consider all options, including telework or reassignment, prior to denying a request for accommodation.⁶⁰ These options must be evaluated in light of the proportion of employees who are partially or fully vaccinated and the extent to which the affected individual will come into contact with non-employees who may be ineligible for vaccination or whose vaccination status is unknown.⁶¹ Employers are also permitted to rely upon CDC recommendations in deciding whether an accommodation is available that will not pose an undue hardship.⁶² Employers must also explore the applicability of rights under other federal, state, and local equal employment opportunity laws, as well as the employer's own policies.⁶³ In any event, the EEOC envisions the determination of reasonable accommodation as the result of "a flexible, interactive process" between employers and affected employees.⁶⁴

The Guidelines and Revised Guidelines also addressed objections to vaccination based upon sincerely held religious beliefs.⁶⁵ An employer requiring vaccination must provide a reasonable accommodation to employees who are prevented from receiving the vaccination on the basis of a sincerely held religious belief, practice, or observance, unless the accommodation would pose an undue hardship on the employer.⁶⁶ "Undue hardship" is defined as "having more than a *de minimis* cost or burden."⁶⁷ Again, considerations relevant to this determination include the proportion of the workforce that is partially or fully vaccinated and the extent of employee

58. *Id.* § G.4.

59. *Id.* § D.1.

60. REVISED GUIDELINES, *supra* note 48, § G.4.

61. *Id.* § K.12.

62. *Id.* § K.5.

63. *Id.* § K.12.

64. *Id.* § K.6.

65. *Id.* § K.12.; GUIDELINES, *supra* note 47, § K.6.; *see also* 42 U.S.C. § 2000e-2(a)(1)–(2) (defining unlawful employment practices to include the failure or "refusal to hire or to discharge any individual, or otherwise discriminate . . . with respect to . . . compensation, terms, conditions, or privileges of employment, because of such individual's . . . religion" or limit, segregate, or classify such individual in a manner resulting in the deprivation of employment opportunities or diminution of employment status).

66. *See* GUIDELINES, *supra* note 47, § K.6. (citing 42 U.S.C. § 2000e(j)) ("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.").

67. *Id.* (emphasis omitted).

contact with non-employees, such as customers and suppliers, whose vaccination status is unknown.⁶⁸

Employers should assume that requests for religious accommodations are sincere, given that “the definition of religion is broad and protects beliefs, practices, and observances with which the employer may be unfamiliar.”⁶⁹ However, an employer is justified in requesting supporting information if there is an “objective basis for questioning either the religious nature or sincerity of a particular belief, practice, or observance.”⁷⁰ The Revised Guidelines listed numerous alternative work arrangements that an employer could provide in the event it determined that a religious accommodation was necessary.⁷¹ These arrangements are to be determined on a case-by-case basis and include: masking, social distancing, modified schedules, periodic testing, and changes in the work environment such as improved ventilation and separation of workstations, telework, and reassignment.⁷²

The Revised Guidelines addressed communications between employers and employees regarding vaccination.⁷³ Employers are permitted to encourage employees to be vaccinated and may do so by providing information to educate the workforce about COVID vaccines and the benefits of vaccination.⁷⁴ Employers are also permitted to offer vaccination incentives to employees.⁷⁵ Incentives could include time off for vaccination, especially if transportation is not readily available outside of regular work hours.⁷⁶

Encouragement and information aside, the EEOC determined that best practice for an employer seeking to require vaccination is to “notify all employees that the employer will consider requests for reasonable accommodations.”⁷⁷ Communications with employees should be coordinated through a management representative.⁷⁸ Employers must take into consideration that some of their employees may not have reliable access to the internet or may speak limited English, which may interfere with their ability to comply with

68. REVISED GUIDELINES, *supra* note 48, § K.12.

69. GUIDELINES, *supra* note 47, § K.6.

70. *Id.*

71. REVISED GUIDELINES, *supra* note 48, § K.2.

72. *Id.* § K.2.–6.

73. *See id.* § K.3.

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.* § K.5.

78. *Id.* § K.3.

vaccination policies.⁷⁹ Lack of reliable transportation may also interfere with compliance, and employers may disseminate information to their employees on low- and no-cost transportation resources available in the community and serving vaccination sites.⁸⁰

III. JUST BECAUSE YOU CAN DOES NOT MEAN YOU SHOULD: PRIVATE EMPLOYERS AND VACCINATION MANDATES

Despite the federal government's requirement and guidance, there are compelling reasons for private employers to resist mandating vaccination of their employees.⁸¹ The decision to require vaccination as a condition of employment presents numerous issues, resolution of which are plagued by legal peril and uncertain outcomes.⁸² These issues arise from a host of sources beyond equal employment opportunity and the scope of this Article, including workers' compensation and labor laws.⁸³

As an initial matter, any mandate is premature with respect to any COVID vaccine that has not yet received full Biologics License Application approval from the FDA.⁸⁴ Mandating the use of vaccinations that have been authorized for limited use or emergency use is legally problematic.⁸⁵ Individuals have the right to refuse a drug that has been approved solely for emergency

79. *Id.*

80. *Id.*

81. *See, e.g., May Employers Mandate COVID-19 Vaccines?*, HOLLAND & HART (Dec. 11, 2020), <https://www.hollandhart.com/may-employers-mandate-covid-19-vaccines> [<https://perma.cc/BFL4-AB6Y>] (raising concerns over disability and religious discrimination, as well as employer liability concerns).

82. *Id.* (stating “employers must consider the possibility of liability if employees have adverse reactions to mandated vaccines” and that “[w]hile such cases have not yet been tested in courts with respect to COVID-19, similar cases (at least in some states) suggest that adverse reactions to mandatory vaccinations may form the basis of a viable workers’ compensation claim”).

83. *Id.* (discussing liability concerns under workers’ compensation laws in the event an employee suffers an adverse reaction to a vaccine and labor law issues including paid time off to be vaccinated, proof of vaccination, mandatory re-vaccination if necessary, and termination of those employees refusing vaccination).

84. *See id.* (stating that the “Emergency Use Authorization . . . mandates less rigorous review of vaccines than that required for full FDA licensure”).

85. *See* Lawrence O. Gostin, Daniel A. Salmon & Heidi J. Larson, *Mandating COVID-19 Vaccines*, 325 [J]AMA 532 (2021); *see also supra* note 10 and accompanying text. *But see* Whether Section 564 of the Food, Drug, and Cosmetic Act Prohibits Entities from Requiring the Use of a Vaccine Subject to an Emergency Use Authorization, 45 Op. O.L.C. ___, Slip Op. at 1 (July 6, 2021), <https://www.justice.gov/olc/file/1415446/download> [<https://perma.cc/Z66B-AN3P>] (concluding that emergency use authorization as set forth in Section 564 of the Food, Drug, and Cosmetic Act “concerns only the provision of information to potential vaccine recipients and does not prohibit public or private entities from imposing vaccination requirements for vaccines that are subject to EUAs”).

use.⁸⁶ The EEOC determined that it was beyond “[its] jurisdiction to discuss the legal implications of [emergency use authorization] or the FDA approach.”⁸⁷ To date, OSHA has failed to take a position on emergency use status and mandatory vaccination.⁸⁸ Given this regulatory gap, employers should inform their employees of the right to refuse vaccines that have not been granted the FDA’s full approval, thereby rendering any “mandatory” policy with respect to these vaccines as optional in the meantime.⁸⁹

Required vaccination may also be premature pending the impact of voluntary initiatives. Unvaccinated workers undoubtedly pose a threat to others in the workplace given the ready transmissibility of the Delta and Omicron variants and the potential for serious and long-lasting negative health consequences associated with infection.⁹⁰ However, the threat may be significantly reduced as more workers, customers, and the general public are voluntarily vaccinated.⁹¹ This may result in a determination that COVID no longer poses a significant threat in the workplace.⁹² Employers may benefit from practicing restraint and awaiting the results of voluntary vaccination efforts before rushing to impose requirements, along with the accompanying administrative burdens and potentially negative effects upon the workforce.⁹³

86. See 21 U.S.C. § 360bbb-3(e)(1)(A)(ii)(III) (providing that individuals to whom a product subject to emergency use authorization is to be administered be informed “of the option to accept or refuse administration of the [EUA] 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”).

87. REVISED GUIDELINES, *supra* note 48, § K. (emphasis omitted).

88. See *Protecting Workers: Guidance on Mitigating and Preventing the Spread of COVID-19 in the Workplace*, Occupational Safety and Health Admin. (June 10, 2021), <https://www.osha.gov/coronavirus/safework> [<https://perma.cc/S8JS-6TNB>] (acknowledging only that “[v]accination is the key in a multi-layered approach to protect workers”).

89. Charles B. Jellinek & Lily J. Kurland, *Q&A COVID Workplace Vaccine Issues for Employers*, BRYAN CAVE LEIGHTON PAISNER (Feb. 1, 2021), <https://www.bclplaw.com/en-US/insights/qanda-covid-workplace-vaccine-issues-for-us-employers.html> [<https://perma.cc/6CYU-2VZT>].

90. *Id.*

91. See *Protecting Workers: Guidance on Mitigating and Preventing the Spread of COVID-19 in the Workplace*, *supra* note 88.

92. See Jellinek & Kurland, *supra* note 89.

93. See *id.* (noting that the assessment of threats to the workplace associated with COVID may change as voluntary vaccination becomes more widespread). *Contra* Joseph G. Allen, *It’s Time to Admit It: The Vaccination Campaign Has Hit Its Limit. Mandates Are the Only Way Forward*, WASH. POST (Aug. 2, 2021, 12:04 PM), <https://www.washingtonpost.com/opinions/2021/08/02/vaccine-mandates-path-forward-joe-allen/> [<https://perma.cc/>].

Vaccination mandates implicate collective interests in the workplace. Required vaccination may undermine support for vaccination, create a public opinion backlash, and reduce vaccine uptake.⁹⁴ Required vaccination risks becoming “a source of employee discontent or dissatisfaction.”⁹⁵ Employee morale may suffer as a result of a perceived overreach by employers.⁹⁶ Intra-employee conflict may ensue as co-workers will undoubtedly have divergent views about vaccines, the pandemic in general, and required vaccination in particular.⁹⁷ The potential for discord may unnecessarily detract from the goal of achieving a safe workplace post-pandemic.⁹⁸ Employers must be prepared to address any such disharmony, as well

MEY6-KQ4A] (concluding that “[t]he only way out of our covid-19 morass is to mandate vaccines”); *see also supra* note 89 and accompanying text.

94. Gostin, Salmon & Larson, *supra* note 85, at 533; *see* Lawrence O. Gostin, *Law, Ethics, and Public Health in the Vaccination Debates: Politics of the Measles Outbreak*, 313 [J]AMA 1099, 1100 (2015) (expressing concern that approaches which are deemed overly restrictive with respect to exemptions will inflame public opinion and work against vaccination policy); Reiss, *supra* note 34, at 1558 (contending that coercive vaccination policies may trigger public backlash); Victor D. Gonzalez, Note, *Religion in the Time of Measles: Prescriptions for Minimizing the Public Health Threats Associated with Religious Exemptions from Mandatory Vaccinations*, 15 CARDOZO PUB. L. POL’Y & ETHICS J. 413, 417 (2017) (expressing concern that overly restrictive policies limiting exemptions will hinder vaccination policies by “inflaming public opinion” (citing Gostin, *supra*, at 1100)); Calandrillo, *supra* note 24, at 437 (warning that approaches perceived as punishing vaccine resisters and those who are vaccine hesitant too severely risk a public relations backlash and inhibit the success of vaccination campaigns).

95. DUNN, *supra* note 22, at 4; *see also More than Half of Americans Favor Vaccine Mandates at Work, Poll Finds*, CBS NEWS (Aug. 27, 2021, 7:44 AM), <https://www.cbsnews.com/news/covid-vaccine-mandate-work-poll-americans-favor/> [<https://perma.cc/2DJM-SVKY>] (noting the risks of alienation and polarization potentially associated with vaccination mandates).

96. *See* LITTLER, *supra* note 7, at 6 (noting that 68% of surveyed employers expressed concern about the impact of required vaccination on firm culture and employee morale); *see also* Taylor Dotson & Nicholas Tampio, *Vaccine Mandates Will Backfire. People Will Resist Even More*, WASH. POST (July 31, 2021, 12:43 PM), <https://www.washingtonpost.com/outlook/2021/07/31/biden-mandate-covid-vaccine-hesitancy/> [<https://perma.cc/AT7X-SQ9R>] (“Americans from all walks of life resist being told what to put into their bodies, and many will resent any politician or institution that makes them get vaccinated, creating a crisis of legitimacy for any government, university or business that forces constituents, students or employees to get vaccinated.”).

97. *See* Ruth Zadikany, Andrew Rosenman & Cindy M. Dinh, *Mandatory Covid-19 Vaccination Policies: 10 Issues US Employers Should Consider*, MAYER BROWN (Jan. 6, 2021), <https://www.mayerbrown.com/en/perspectives-events/publications/2021/01/mandatory-covid19-vaccination-policies-10-issues-us-employers-should-consider> [<https://perma.cc/H2XD-DXCU>].

98. *See* Quinton, *supra* note 13 (discussing Professor Ross Silverman’s argument that employers in the post-pandemic workplace should focus on safety rather than requiring vaccination).

as the possibility of added administrative costs, employee attrition, and issues arising from the enforcement of any requirement.⁹⁹

Beyond collective interests, vaccination mandates implicate individual concerns. Principles of health law recognize bodily integrity as a liberty interest and place responsibility for decisions about whether to accept or refuse medical intervention with each individual adult.¹⁰⁰ Vaccination requirements transfer decision-making authority from individual employees to employers who may exercise undue control over their workforces.¹⁰¹ Employers are also not subject to democratic controls in the same manner as elected governments, which could otherwise prevent abuse.¹⁰² From this point of view, the terms of the voluntary contract underlying the private employment relationship do not include the right to disregard individual autonomy through the introduction of a foreign substance into the human body through vaccination.¹⁰³

99. LITTLER, *supra* note 7, at 6 (in which 60% of surveyed employers expressed concern about employee attrition and 42% of employers expressed concern about administrative difficulties associated with enforcement); *see also* Robert Iafolia & Louis C. LaBrecque, *Covid-19 Vaccine Mandates at Work Promise Employer Headaches*, BLOOMBERG L. (Nov. 2, 2020, 8:00 AM), <https://news.bloomberglaw.com/daily-labor-report/covid-19-vaccine-mandates-at-work-promise-employer-headaches> [<https://perma.cc/9SKG-U2PC>] (quoting James Paul, an employment law attorney, as stating that “[f]rom a practical standpoint, a company probably can’t discharge half of its workforce”); Oliviero & Yamanouchi, *supra* note 10 (stating that employers requiring vaccination “must be prepared for the possibility of having to accommodate a huge number of exemptions and the possibility of losing top-performing employees who refused to get inoculated”).

100. *See, e.g.*, Gray v. Romero, 697 F. Supp. 580, 584–85 (D.R.I. 1988) (stating that the right of individuals to make medical decisions is deeply rooted in history and tradition); *see also* Katherine Drabiak, *Disentangling Dicta: Prince v. Massachusetts, Police Power, and Childhood Vaccine Policy*, 29 ANNALS HEALTH L. & LIFE SCI., SUMMER 2020, at 173, 184 (noting “substantial tensions” between the individual liberty interest in bodily integrity and required vaccination); Ben Horowitz, Comment, *A Shot in the Arm: What a Modern Approach to Jacobson v. Massachusetts Means for Mandatory Vaccination During a Public Health Emergency*, 60 AM. U. L. REV. 1715, 1730 (2011) (arguing that the refusal of vaccination is a fundamental right derived from the right to refuse medical treatment and governmental interference should be subject to strict scrutiny).

101. Katie Attwell & Mark Navin, *Bosses Shouldn’t Demand that You Be Vaccinated*, N.Y. TIMES (Feb. 26, 2021), <https://www.nytimes.com/2021/02/26/opinion/business-economics/company-vaccine-requirements.html> [<https://perma.cc/WH4L-28VA>] (“[W]hen a company demands that its employees should be vaccinated, this dictate expresses the private power of capital over individuals in ways we should be reluctant to accept.”).

102. *Id.*

103. *Id.* (“The mere fact that workers and employers are bound together by voluntary contracts doesn’t give bosses license to make medical decisions for their employees.”). *But see* GUIDELINES, *supra* note 47, § K.1. (stating that the EEOC concluded that vaccines

Individual concerns and business considerations may be shared in this context. For example, individual concerns are implicated by the requirement that employers reasonably accommodate the sincerely held religious beliefs of their employees.¹⁰⁴ Business considerations are implicated to the extent that employers find themselves overwhelmed by requests for religious exemptions and reasonable accommodations, as each request is fact specific and requires a personalized response.¹⁰⁵ Furthermore, such requests will inevitably place employers in the uncomfortable position of deciding issues for which they are ill-suited, such as what is a religion or a sincerely held belief.¹⁰⁶

Existing case law in the education and employment fields holds that accommodation of religious objections is not necessary on any basis other than a sincerely held belief.¹⁰⁷ The Guidelines and Revised Guidelines clearly provide that exemption and accommodation requests cannot be based on personal, philosophical, or secular beliefs.¹⁰⁸ Some requests will

administered by an employer or third party with whom the employer contracts are not “medical examinations” pursuant to the Americans with Disabilities Act as they are not a procedure or a test “given by a health care professional or in a medical setting that seeks information about an individual’s physical or mental impairments or health”).

104. See GUIDELINES, *supra* note 47, § G.6., K.6.

105. See DUNN, *supra* note 22, at 4 (noting that “[w]ithout thoughtful processes, [requests for exemptions and accommodations] could put Human Resources (HR) at risk of being overwhelmed by needing to decide, on a case-by-case basis, who qualifies for an exemption”).

106. See *id.* at 6–7.

107. For employment law cases on accommodation of religious objections, see *Fallon v. Mercy Cath. Med. Ctr. of Se. Pa.*, 877 F.3d 487 (3d Cir. 2017) (upholding the termination of an employee who refused a mandatory influenza vaccination based on his opinion that vaccines were more harmful than beneficial but whose opposition was not rooted in a comprehensive belief system addressing fundamental and ultimate questions having to do with imponderable matters and possessing formal and external manifestations associated with traditional religions); *Friedman v. S. Cal. Permanente Med. Grp.*, 125 Cal. Rptr. 2d 663, 685–86 (Cal. Ct. App. 2002) (finding that veganism “reflects a moral and secular, rather than religious, philosophy” as it does not address fundamental or ultimate questions relating to human existence and the purpose of life, is not comprehensive, and lacks the formal indicia of religion). But see *Chenzira v. Cincinnati Child.’s Hosp. Med. Ctr.*, No. 1:11-CV-00917, 2012 WL 6721098, at *4 (S.D. Ohio Dec. 27, 2012) (denying defendant’s motion to dismiss a wrongful termination claim due to refusal of an influenza vaccine which was alleged to conflict with the objector’s veganism on the basis that she subscribed to her beliefs “with a sincerity equating that of traditional religious views”). For education law cases on accommodation of religious objections, see *Mason v. Gen. Brown Cent. Sch. Dist.*, 851 F.2d 47 (2d Cir. 1988) (denying an exemption to parents who were members of a “mail order church” and believed that vaccines were contrary to the human “genetic blueprint”); *Caviezel v. Great Neck Pub. Schools.*, 701 F. Supp. 2d 414 (E.D.N.Y. 2010) (denying an exemption to parents who believed vaccines caused autism and violated the sanctity of the human body).

108. See REVISED GUIDELINES, *supra* note 48, § K.; GUIDELINES, *supra* note 47, §§ D., K.

undoubtedly fall clearly on one side or the other.¹⁰⁹ For example, an employer need not grant an accommodation to an employee who expresses fear of vaccination or harbors general beliefs about their safety and efficacy.¹¹⁰ A denial under such circumstances may be legally justified but inadvisable from a practical standpoint, given the previously noted negative spillover effects upon employee morale.¹¹¹

But how should employers address objections lacking clear religious provenience or sincerity? The EEOC allows for inquiry by an employer if there is an objective basis for questioning the religious nature of a belief or its sincerity.¹¹² However, the parameters of such inquiry are limited.¹¹³ For example, third party verification is permissible, but letters from clergy or church officials are highly discouraged.¹¹⁴ The absence of membership in a religious congregation may not be determinative.¹¹⁵ Further, acceptance of vaccination by the objector's religion is also not conclusive.¹¹⁶ Cases in the education context have recognized individual objections to vaccines as sincerely held religious beliefs despite the endorsement of vaccination

109. *What You Should Know: Workplace Religious Accommodation*, EEOC (Mar. 6, 2014), <https://www.eeoc.gov/laws/guidance/what-you-should-know-workplace-religious-accommodation#main-content> [<https://perma.cc/U4M6-N33D>].

110. See Raeann Burgo & Chantell C. Foley, *Religious Objections to Mandated COVID-19 Vaccines: Considerations for Employers*, FISHER PHILLIPS (Jan. 7, 2021), <https://www.fisherphillips.com/news-insights/religious-objections-to-mandated-covid-19-vaccines-considerations-for-employers.html> [<https://perma.cc/JR56-U525>].

111. See *supra* note 96 and accompanying text.

112. See REVISED GUIDELINES, *supra* note 48, § K.12.; GUIDELINES, *supra* note 47, § K.6.

113. *Section 12: Religious Discrimination*, EEOC (Jan. 15, 2021), <https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination> [<https://perma.cc/NUL2-55EZ>].

114. See Jellinek & Kurland, *supra* note 89 (advising employers seeking third party verification to refrain from insisting on “‘a note from a priest or clergy,’ as one would request a note specifically from a medical provider with respect to a disability”).

115. See, e.g., *Maier v. Besser*, 341 N.Y.S.2d 411, 413–15 (N.Y. Sup. Ct. 1972) (granting an exemption from a required certificate of immunization to a child of a parent who subscribed to Christian Scientist beliefs despite the absence of membership in the church).

116. See, e.g., PONTIFICAL COUNCIL FOR PASTORAL ASSISTANCE TO HEALTH CARE WORKERS, *NEW CHARTER FOR HEALTH CARE WORKERS*, 52–53 (The Nat'l Catholic Bioethics Ctr. trans. 2017) (2016) (endorsing vaccination as a practice by the Roman Catholic Church); Geoffrey S. Nelson, *Mormons and Compulsory Vaccination*, MORMON PRESS (Mar. 30, 2015), https://www.mormonpress.com/mormon_vaccination [<https://perma.cc/58HF-8BK7>] (endorsing vaccination for members of the Church of Jesus Christ of Latter-Day Saints). For a general discussion of acceptance of vaccination by various religions, see John D. Graberstein, *What the World's Religions Teach, Applied to Vaccines and Immune Globulins*, 31 VACCINE 2011 (2013).

by the objector's faith tradition.¹¹⁷ Equally challenging are beliefs with which the employer may be completely unfamiliar or about which the employer may hold misperceptions.¹¹⁸ The EEOC's counsel is general and hypothetical.¹¹⁹ Thus, it is in human resource offices across the country where the rubber of the EEOC Guidelines will meet the road of religious reality.¹²⁰ Given the pitfalls associated with this reality, foregoing or resisting vaccination mandates is the safest course of action for employers.

IV. THE INSISTENT EMPLOYER: STRATEGIES FOR AN EFFECTIVE VACCINATION POLICY

It is important to note that foregoing or resisting vaccination mandates does not render employers powerless. There are a host of policies short of mandates that employers may implement to ensure the health of their employees and the safety of their workplaces.¹²¹ Incentive programs, remote working arrangements, mandatory testing, and social distancing are some of the options available to employers.¹²² All of these initiatives fundamentally operate as encouragement programs with varying degrees of coercion.

Reiss and Weithorn have identified several forms of coercion in their research relating to parental reluctance with respect to childhood vaccination.¹²³ Some of these measures are inapplicable or ill-suited to employers.¹²⁴

117. See, e.g., *Berg v. Glen Cove City Sch. Dist.*, 853 F. Supp. 651, 655–56 (E.D.N.Y. 1994) (granting an exemption from vaccination to the child of a Jewish parent based upon her sincere and genuine interpretation of Hebrew scripture despite the fact that the branch of Judaism to which she subscribed did not oppose vaccination).

118. See, e.g., *Zhang Jingrong v. Chinese Anti-Cult World All.*, 311 F. Supp. 3d 514, 559–60 (E.D.N.Y. 2018) (concluding that Falun Gong was a religion as followers were motivated by sincere and meaningful beliefs that occupied a place in their lives comparable to that filled by orthodox belief in God, possessed leaders and texts, and offered a path to salvation for adherents); *EEOC v. United Health Programs of Am. Inc.*, 213 F. Supp. 3d 377, 400–02 (E.D.N.Y. 2016) (holding that conflict resolution systems known as “Onionhead” and “Harnessing Happiness” were religions as they addressed ultimate concerns, had established rituals, made reference to God, and had a strong focus on transcendence and spirituality); see also *In re Sherr v. Northport-East Northport Union Free Sch. Dist.*, 672 F. Supp. 81, 92 (E.D.N.Y. 1987) (describing the determination of which denominations may qualify for an exemption as an “inherently tricky proposition”).

119. *Structure of Office of General Counsel*, EEOC, <https://www.eeoc.gov/structure-office-general-counsel> [<https://perma.cc/ESD8-5B2Z>].

120. EQUAL EMP. OPPORTUNITY COMM’N, No. 915.003, EEOC COMPLIANCE MANUAL § 12 (2008).

121. *Employer Responsibilities*, OCCUPATIONAL SAFETY & HEALTH ADMIN., <https://www.osha.gov/workers/employer-responsibilities> [<https://perma.cc/H3RV-77KJ>].

122. See Jellinek & Kurland, *supra* note 89.

123. See Reiss & Weithorn, *supra* note 18, at 966–79.

124. Inapplicable or ill-suited options include use of force in the form of court orders, mandates enforced by the threat of criminal sanctions, cost internalization through the

However, at least four of these options, specifically, conditioned access, procedural tightening, persuasion through education, and positive incentives, are readily adaptable by employers.¹²⁵

Access mandates condition the privilege of employee access to the workplace on compliance with the employer's requirement to undergo vaccination.¹²⁶ The EEOC permits employers to condition access on vaccination status with accommodations as deemed appropriate.¹²⁷ Employer denials are similar to those utilized in the educational field with respect to vaccination status as a condition of access to the benefits and opportunities of public and private education.¹²⁸

imposition of tort liability for failure or refusal to vaccinate, and mandated transparency through the publication of the names of unvaccinated individuals. *See id.*

125. *See id.*

126. *See id.* at 968–69 (discussing conditioning access to benefits with compliance with vaccine requirements in the educational sphere as a means of combatting vaccine hesitancy of parents of school age children).

127. *See supra* notes 50–53 and accompanying text.

128. The MMR vaccine for measles, mumps, and rubella is required in all fifty states as a condition for attendance in elementary and secondary schools and at childcare centers. *MMR Vaccine Mandates for Child Care and K-12*, IMMUNIZE.ORG (Dec. 20, 2019), <https://www.immunize.org/laws/mmr.asp> [<https://perma.cc/RF3C-AT7U>]. Elementary and secondary schools are subject to mandatory varicella vaccination in all states with the exception of Alaska, Idaho, Mississippi, Nevada, and South Dakota. *Varicella Vaccine Mandates for Child Care and K-12*, IMMUNIZE.ORG (Jan. 20, 2020), <https://www.immunize.org/laws/varicella.asp> [<https://perma.cc/EHC2-LAG7>]. Childcare centers are subject to mandatory varicella vaccination in all states with the exception of South Dakota. *Id.* Forty-eight states require vaccination for hepatitis B for childcare centers and elementary and secondary schools. *Hepatitis B Vaccine Mandates for Child Care and K-12*, IMMUNIZE.ORG (Nov. 30, 2019), <https://www.immunize.org/laws/hepb.asp> [<https://perma.cc/7R9R-W8EF>]. All fifty states require the polio vaccine for those students attending childcare centers and elementary schools and the DTaP vaccine for diphtheria, tetanus, and pertussis for those students attending childcare centers and elementary and secondary schools. *See Polio Vaccine Mandates for Child Care and K-12*, IMMUNIZE.ORG (Jan. 31, 2020), <https://www.immunize.org/laws/polio.asp> [<https://perma.cc/HX8R-YA6E>]; *DTaP Vaccine Mandates for Child Care and Elementary Schools*, IMMUNIZE.ORG (Dec. 12, 2019), <https://www.immunize.org/laws/dtap.asp> [<https://perma.cc/4ZUL-Q56T>]; *Tdap Vaccine Mandates for Elementary and Secondary Schools*, IMMUNIZE.ORG (Jan. 20, 2020), <https://www.immunize.org/laws/tdap.asp> [<https://perma.cc/8MEC-VVFP>]. Vaccination for haemophilus influenza is required in all fifty states for those attending daycare centers. *Hib Vaccine Mandates for Child Care*, IMMUNIZE.ORG (Dec. 18, 2019), <https://www.immunize.org/laws/hib.asp> [<https://perma.cc/23AX-9MYT>]. Other vaccines are subject to fewer requirements. *See, e.g., PCV Vaccine Mandates for Child Care*, IMMUNIZE.ORG (Jan. 21, 2020), <https://www.immunize.org/laws/pneuconj.asp> [<https://perma.cc/NAJ3-JSV4>]; *Hepatitis A Vaccine Mandates for Child Care and K-12*, IMMUNIZE.ORG (July 19, 2021), <https://www.immunize.org/laws/hepa.asp> [<https://perma.cc/97TY-WT2A>]; *MenACWY*

Alternatively, employers may permit unvaccinated employees to enter the workplace but segregate them from other workers and subject them to additional requirements such as masking and frequent testing.¹²⁹ Such “limited quarantine policies” are moderately coercive and create the potential for employee stratification on the basis of vaccination status with the potential for resultant conflict.¹³⁰ However, individual freedom is not directly constrained, and those refusing vaccination are not denied the benefits associated with employment.¹³¹ Rather, these policies allow individuals to make their own choices without surrendering autonomy, albeit at some inconvenience and the loss of unfettered access to the workplace and their fellow vaccinated co-workers.

For instance, “[p]rocedural [t]ightening” strategies focus on enhancing rigor with respect to processes by which employees seek exemptions from vaccination policies.¹³² The goal of these strategies is to increase vaccination rates by creating more complex and rigorous processes which, in turn, deter employees from seeking vaccination exemptions.¹³³ Some employees may simply choose to accept vaccination rather than undertake an administrative process that may ultimately prove unsuccessful.¹³⁴ There is a direct correlation between procedural complexity and the number of exemptions sought and

Vaccine Mandates for Elementary and Secondary Schools, IMMUNIZE.ORG (July 19, 2021), https://www.immunize.org/laws/menin_sec.asp [<https://perma.cc/9LEE-5NAH>]; *MenACWY Vaccine Mandates for Colleges and Universities*, IMMUNIZE.ORG (Feb. 19, 2020), <https://www.immunize.org/laws/menin.asp> [<https://perma.cc/TGM5-YYA4>]; *Hepatitis B Vaccine Mandates for Colleges and Universities*, IMMUNIZE.ORG (Nov. 30, 2019), <https://www.immunize.org/laws/hepbcollege.asp> [<https://perma.cc/78PF-L7DC>]; *Rotavirus Vaccine Mandates for Child Care and Pre-K*, IMMUNIZE.ORG (July 19, 2021), <https://www.immunize.org/laws/rotavirus.asp> [<https://perma.cc/MPS9-MYY5>]; *Influenza Vaccine Mandates for Child Care and Pre-K*, IMMUNIZE.ORG (Feb. 28, 2022), https://www.immunize.org/laws/flu_childcare.asp [<https://perma.cc/4KB7-8ART>]; *HPV Vaccine Mandates for Elementary and Secondary Schools*, IMMUNIZE.ORG (July 19, 2021), <https://www.immunize.org/laws/hpv.asp> [<https://perma.cc/4SCY-SB44>].

129. See *supra* note 72 and accompanying text.

130. See Reiss & Weithorn, *supra* note 18, at 969; see also Edward A. Fallone, *Preserving the Public Health: A Proposal to Quarantine Recalcitrant AIDS Carriers*, 68 B.U. L. REV. 441, 461 (1988) (referring to policies which selectively restrict individuals from participation in certain activities as “modified quarantine”).

131. See Reiss & Weithorn, *supra* note 18, at 972 (noting that rejectors of vaccine mandates have the freedom to do so but may incur costs for their choice).

132. *Id.* at 974–75, 979.

133. See Gonzalez, *supra* note 94, at 437 (citing Louis R. Caplan, *Vaccination Policies and Rates of Exemption from Immunization, 2005–2011*, 367 NEW ENG. J. MED. 1170, 1171 (2012)) (noting that states with “difficult non-medical exemption policies” had a higher average exemption rate than states with easier policies).

134. Levin, *supra* note 26, at 1240 (citing NAVIN, *supra* note 26, at 211–12).

ultimately granted.¹³⁵ There is considerable support for such a correlation in research relating to religious exemptions to school vaccination requirements.¹³⁶ This correlation is also supported in administrative law literature examining “the role of procedural mechanisms and institutional design in controlling and managing behavior.”¹³⁷

Of course, any procedural tightening must be within the bounds of the Guidelines and Revised Guidelines. However, if properly implemented, there are several strategies that deter applications for exemptions while providing adequate protection pursuant to the ADA and Title VII.¹³⁸ A counseling requirement as a condition to seeking an exemption may prove useful in this regard without imposing an undue burden upon the individual seeking an exemption.¹³⁹ Such counseling would consist of a review of educational materials provided by the federal or state government, an acknowledgement that the failure to be vaccinated increases the risk of personal infection as well as the infection of co-workers and family members, and that such infections may prove to be life-altering or life-threatening.¹⁴⁰ Counseling could be informal, by providing employees with information, or more intensive, through the use of internal or external medical personnel.¹⁴¹ More stringent counseling requirements such as the use of quizzes to verify

135. See Rials, *supra* note 20, at 218 (“[T]he higher the rate of complexity in the process of applying for exemptions, the lower the rate of actual exemptions, and the lower the rate of complexity, the higher the rate of exemptions.”).

136. For summaries of research correlating procedural complexity with lower numbers of exemptions in the context of school immunization requirements, see Calandrillo, *supra* note 24, at 434–35; Karako-Eyal, *supra* note 18, at 362–63; Reiss & Weithorn, *supra* note 18, at 964.

137. Reiss & Weithorn, *supra* note 18, at 961 n.307; see also Matthew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243, 273 (1987); William F. West, *Formal Procedures, Informal Processes, Accountability, and Responsiveness in Bureaucratic Policy Making: An Institutional Policy Analysis*, 64 PUB. ADMIN. REV. 66 (2004).

138. See Y. Tony Yang & Ross D. Silverman, *Legislative Prescriptions for Controlling Nonmedical Vaccine Exemptions*, 313 [J]AMA 247, 247–48 (2015).

139. *Id.* at 247.

140. See Gonzalez, *supra* note 94, at 441.

141. See Ross D. Silverman, *No More Kidding Around: Restructuring Non-Medical Childhood Immunization Exemptions to Ensure Public Health Protection*, 12 ANNALS HEALTH L. 277, 293–94 (2003) (advocating mandatory consultation with medical personnel as a condition of granting exemptions to school immunization requirements); see also McCarthy, *supra* note 30, at 598. The required participation of medical personnel is consistent with state laws relating to exemptions from mandatory immunizations as a condition of school attendance. See, e.g., OR. REV. STAT. § 433.267 (2021); WASH. REV. CODE § 28A.210.090 (2022).

informed consent in clinical trials should most likely be avoided as unduly intrusive upon employee rights.¹⁴² However, there is nothing overly intrusive about requiring renewal of exemption status periodically.¹⁴³ Regardless of form, compliance with counseling and renewal requirements should be memorialized in signed statements.¹⁴⁴

As noted by Reiss and Weithorn, counseling requirements are not excessive given the risks associated with unvaccinated status and do not impose “insurmountable barriers” for those seeking exemptions.¹⁴⁵ Most individuals seeking exemptions could overcome these procedural obstacles.¹⁴⁶ Even if they fail as a deterrent, these obstacles enhance the accuracy of the exemption process by requiring documentation and bolstering informed decision-making.¹⁴⁷ Additionally, some employees may decide to be vaccinated to avoid the time and effort associated with undergoing counseling.¹⁴⁸

Persuasion through education is closely related to procedural tightening and emphasizes “interventions that strive to change attitudes and minds” through “information, logic, and reason to empower an individual to make his or her own wise choices.”¹⁴⁹ Educational intervention is permissible pursuant to the Revised Guidelines and is a requirement in several states which permit religious or philosophical exemptions to school immunization dictates.¹⁵⁰

Although the Revised Guidelines do not specify the content, there are several components to an effective employee education program. Such a program should focus on the benefits of vaccination in general, the COVID vaccines in particular, the remoteness of risks associated with vaccination, and the avoidable risks that unvaccinated persons impose on themselves

142. *But see* Reiss, *supra* note 34, at 1596 (discussing how a suggestion for “[a] somewhat rigorous educational requirement seems appropriate, potentially with a short quiz at the end” in order to obtain an exemption from school immunization requirements).

143. *See, e.g.,* Reiss & Weithorn, *supra* note 18, at 974; Sills, *supra* note 20, at 696; Silverman, *supra* note 141, at 294; Yang & Silverman, *supra* note 138, at 248.

144. *See* Devin W. Quackenbush, Note, *Religion’s Hepatitis B Shot: The Arkansas General Assembly Established an Overly Broad Religious Exemption to Mandatory Immunization After the District Court Invalidated the Original Religious Exemption—McCarthy v. Ozark School District*, 42 CREIGHTON L. REV. 777, 819 (2009) (arguing in favor of signed statements in the form of affidavits). Written statements are also consistent with state laws relating to exemptions from mandatory immunization as a condition of school attendance. *See, e.g.,* HAW. REV. STAT. § 302A-1156(2) (2022); UTAH CODE ANN. § 53G-9-302 (LexisNexis 2022).

145. Reiss & Weithorn, *supra* note 18, at 975.

146. *See id.*

147. *Id.*

148. *Id.*

149. *Id.* at 965 (emphasis omitted).

150. *See* REVISED GUIDELINES, *supra* note 48, § K.3. For a discussion of educational requirements as a condition of obtaining a religious or philosophical exemption from school immunization mandates, *see* Karako-Eyal, *supra* note 18, at 356–60.

and those with whom they interact, including their co-workers.¹⁵¹ More intensive educational programs may include information regarding the approval process for vaccines and safety profiles for specific vaccines.¹⁵² However the program is structured, it should focus on the personal consequences of non-vaccination and avoid giving additional publicity to vaccine misinformation.¹⁵³

Incentives refer to “the offering of positive benefits or privileges as a reinforcement or reward for . . . compliance with vaccine recommendations” beyond those ordinarily available to employees.¹⁵⁴ Employers are permitted to incentivize employees to receive COVID vaccines.¹⁵⁵ Numerous employers have opted for incentives of various types and sizes rather than vaccination mandates.¹⁵⁶

151. See Gonzalez, *supra* note 94, at 438 (advocating educational content that “increase[s] public knowledge about the life-saving benefits of vaccinations, about the remote risks posed by . . . vaccinations, and about the avoidable risks that non-vaccinations impose” (citing Silverman, *supra* note 141, at 293)).

152. Priya Shetty, *Experts Concerned About Vaccination Backlash*, 375 LANCET 970, 971 (2010) (discussing the suggestion of “educational classes that teach the public what the safety profiles of different vaccines are, before they are allowed to opt out of vaccination”).

153. See Tomsick, *supra* note 20, at 154 (concluding that “educational efforts that are not focused on vaccine misinformation, but rather focus on the personal consequences . . . have been more successful” (citing Christopher A. Swingle, *How Do We Approach Anti-Vaccination Attitude?*, 115 MO. MED. 180, 181 (2018))).

154. Reiss & Weithorn, *supra* note 18, at 963 (emphasis omitted).

155. See REVISED GUIDELINES, *supra* note 48, § K.3., K.16.–21.

156. See, e.g., Attwell & Navin, *supra* note 101 (discussing Target’s payment of workers for travel time to vaccination appointments and issuance of vouchers for those unable to afford transportation); Analisa Novak, *Many U.S. Workers Support Employers Making COVID-19 vaccine Mandatory, Survey Shows*, CBS NEWS (Jan. 14, 2021, 1:01 PM), <https://www.cbsnews.com/news/workers-support-employers-making-covid-vaccine-mandatory/> [<https://perma.cc/23YU-E4NH>] (discussing Dollar General’s payment of four hours of regular pay to employees willing to be vaccinated); Leslie Josephs, *United Airlines CEO Wants to Make Covid Vaccines Mandatory for Employees—and Encourages other Companies to do the Same*, CNBC (Jan. 22, 2021), <https://www.cnbc.com/2021/01/22/united-airlines-ceo-wants-to-make-covid-vaccines-mandatory-for-its-employees.html> [<https://perma.cc/8XDS-D3CY>] (discussing Chobani’s payment of six hours of regular pay to employees willing to receive Pfizer or Moderna’s vaccines); Jenny G. Zhang, *Trader Joe’s and Other Grocers Will Pay Employees to Get Vaccinated*, EATER (Jan. 20, 2021, 12:46 PM), <https://www.eater.com/22240674/trader-joes-aldi-instacart-will-pay-employees-to-get-covid-vaccine> [<https://perma.cc/5J3U-U2TD>] (discussing Trader Joe’s payment of four hours of regular pay to employees willing to be vaccinated); Dustin Jones, *Kroger Offers \$100 Bonus to Employees Who Get Vaccinated*, NPR (Feb. 6, 2021, 12:59 PM), <https://www.npr.org/2021/02/05/964660657/kroger-offers-100-bonus-to-employees-who-get-vaccinated>, [<https://perma.cc/879C-YHGY>] (discussing Kroger’s offer to pay

However, incentives present potential problems for individual employers and public health in general. The Revised Guidelines prohibit incentives that are “so substantial as to be coercive.”¹⁵⁷ Large financial incentives will most likely be deemed coercive, especially to the extent that they compel employees to disclose medical information in response to pre-vaccination screening questions.¹⁵⁸ Incentives should be limited to time off work in order to be vaccinated, token gift cards, and other *de minimis* benefits.¹⁵⁹

The Revised Guidelines remove the prohibition upon substantial incentives if they rely upon voluntary self-reporting of vaccination received by employees from third parties unaffiliated with their employers.¹⁶⁰ However, employers are unlikely to offer sizable incentives to avoid disruption in the workplace, minimize administrative burdens associated with record-keeping, and with the knowledge that comparable incentives must be offered to those employees who do not participate in the program due to preexisting medical conditions, religious beliefs, or disabilities.¹⁶¹ For these reasons, it is unlikely that employers will offer substantial benefits as incentives to employees willing to be vaccinated.¹⁶²

As a result, incentives may prove weak, as demonstrated by declining vaccination rates.¹⁶³ Incentives are also unlikely to change the attitudes of vaccine rejectors and sufficient numbers of the vaccine hesitant in order to be as effective as is necessary to bring the pandemic under control, let alone reach herd immunity.¹⁶⁴ Furthermore, incentives may increase resistance and hesitancy by linking payments with the perception of risk, thereby increasing fear amongst unvaccinated employees.¹⁶⁵

one hundred dollars to employees who are unable to be vaccinated upon completion of “an education and safety course”).

157. REVISED GUIDELINES, *supra* note 48, § K.16.–17.

158. *Id.*

159. Jellinek & Kurland, *supra* note 89.

160. See REVISED GUIDELINES, *supra* note 48, § K.18.

161. See *supra* notes 94–97, 158 and accompanying text; Jellinek & Kurland, *supra* note 89.

162. See *supra* notes 157–58 and accompanying text.

163. See *supra* note 18 and accompanying text.

164. See *supra* note 18 and accompanying text; see also *COVID-19 Vaccine Monitor: May 2021*, KAISER FAMILY FOUND. (May 28, 2021), <https://www.kff.org/coronavirus-covid-19/poll-finding/kff-covid-19-vaccine-monitor-may-2021/> [<https://perma.cc/JR2C-M43T>] (finding that incentives to vaccinate including state-run lotteries and payments, paid time off from work to get vaccinated and recover from any side effects, free transportation to vaccination sites, complimentary tickets to concerts and sporting events, and coupons for food and drink motivated no more than 49% of individuals to be vaccinated).

165. Span, *supra* note 8 (quoting Emily Largent, a bioethicist at the University of Pennsylvania, as stating “[t]here’s good evidence from behavioral economics that offering money signals taking risks. These vaccines really are safe and effective, so we don’t want to solidify people’s fears”).

Preferred policies for employers should combine minimal coercion, feasibility, and effectiveness in such a manner as to balance employee autonomy and the collective interests of the employer and community.¹⁶⁶ Relevant considerations include the production of benefits and avoidance of harm, respect for autonomous choice and privacy, fair distribution of benefits and burdens, transparency, development and maintenance of trust, and adequate participation.¹⁶⁷ There is no one uniform policy that achieves this balance for every employer. The weighting of these considerations and resulting draft and implementation of effective and proportionate policies, based upon necessity, will be unique to every employer.¹⁶⁸ That said, every policy should share the same goal: the minimization of conflict between individual values and rights, public health, and the employer's interests.¹⁶⁹ The achievement of this goal may best be accomplished through the least restrictive or intrusive alternatives, rather than the heavy hand of employer mandates.¹⁷⁰

166. See Reiss & Weithorn, *supra* note 18, at 956 (contending that “[i]n the context of childhood vaccination, a policy preference for the least coercive approach that is feasible and effective helps strike the best balance among the public’s health, the well-being of the children who would receive vaccinations, and the interests of parents to make decisions about their children’s healthcare” (emphasis omitted)).

167. Reiss & Weithorn, *supra* note 18, at 957 (citing James F. Childress et al., *Public Health Ethics: Mapping the Terrain*, 30 J.L. MED. & ETHICS 170, 171–72 (2002)).

168. See Childress, *supra* note 167, at 172. Reiss and Weithorn defined “effectiveness” as “the likelihood that the policy will achieve the . . . health benefits on which it is grounded.” Reiss & Weithorn, *supra* note 18, at 957 n.298. Proportionate policies are defined as those in which “the probable . . . health benefits outweigh the infringed moral considerations, such as autonomy or privacy.” *Id.* Policies are deemed necessary to the extent that they target and seek to accomplish “the essential nature and importance of the . . . health goals sought.” *Id.* Reiss and Weithorn also included that “justification” in the weighting of considerations and policy formation, which he defines as communications which educate the public, maintain governmental accountability, and strengthen public trust. *Id.* at 958 n.298. Although utilized in the context of public vaccination policy, Reiss and Weithorn’s definition of justification is readily transferable to the private employment sector which has undeniable interest in educating employees, maintaining corporate accountability, and strengthening public and private trust.

169. See Reiss & Weithorn, *supra* note 18, at 957 n.298.

170. See *supra* note 166 and accompanying text; see also Childress, *supra* note 167, at 173. But see Ezra Klein, *What if the Unvaccinated Can’t Be Persuaded?*, N.Y. TIMES (July 29, 2021), <https://www.nytimes.com/2021/07/29/opinion/covid-vaccine-hesitancy> [<https://perma.cc/9AVE-TBN4>] (contending that the strength of views and sources of information utilized in making cost-benefit calculations for unvaccinated individuals make it unlikely that any appeal will be successful).

V. BECAUSE YOU CAN MEANS YOU SHOULD: THE CASE FOR STATE GOVERNMENT VACCINATION MANDATES

To the extent vaccination requirements become necessary, state governments are best positioned to impose them.¹⁷¹ State governments have considerable leeway to impose vaccination requirements which may not be available to the federal government, given the recent case law.¹⁷² Unlike employer mandates, there is considerable precedent for state government requirements.¹⁷³ These precedents are both industry- and sector-specific and also applicable to the public at large.¹⁷⁴

An example of an industry-specific policy may be found in vaccination requirements for healthcare workers.¹⁷⁵ These policies may require that health care workers, as broadly defined, receive enumerated vaccines as a condition of employment.¹⁷⁶ Other states require specific subsets of such workers to receive vaccines.¹⁷⁷

171. See Klein, *supra* note 170 (arguing that a “national vaccination mandate” would not be feasible).

172. See, e.g., BST Holdings, L.L.C. v. OSHA, 17 F.4th 604, 619 (5th Cir. 2021) (staying enforcement of OSHA’s emergency temporary standard requiring vaccination of employees of companies with one hundred or more employees); Kentucky v. Biden, No. 3:21-cv-00055-GFVT, 2021 WL 5587446, at *14 (E.D. Ky. Nov. 30, 2021) (staying enforcement of the Safer Federal Workforce Task Force’s standard requiring vaccination of federal contractors); Louisiana v. Becerra, No. 3:21-CV-03970, 2021 WL 5609846, at *17 (W.D. La. Nov. 30, 2021) (staying enforcement of the Centers for Medicare and Medicaid Services’ standard requiring vaccination of healthcare workers); Missouri v. Biden, 4:21-cv-01329-MTS, 2021 WL 5564501, at *15 (E.D. Mo. Nov. 29, 2021) (staying enforcement of the Centers for Medicare and Medicaid Services’ standard requiring vaccination of healthcare workers); see also Reiss & Weithorn, *supra* note 18, at 952 (contending that “[s]tates have substantial leeway to impose legal requirements aimed at increasing rates of childhood immunization”). But see *In re MCP* No. 165, 21 F.4th 357, 388 (6th Cir. 2021) (lifting stay of enforcement of OSHA’s emergency temporary standard requiring vaccination of employees of companies with one hundred or more employees).

173. See Reiss & Weithorn, *supra* note 18, at 894–901 (discussing *Jacobsen v Massachusetts*, 197 U.S. 11 (1905), where the Supreme Court upheld the state of Massachusetts’s vaccination requirement to limit the spread of smallpox, and its viability).

174. See *id.*

175. *Id.* at 904 n.104 (discussing vaccination requirements for healthcare workers in New York).

176. Brian Dean Abramson, *Vaccine Law in the Healthcare Workplace*, 12 J. HEALTH & LIFE SCI., no. 3, June 2019 at 22, 25–28. For a summary of state government vaccination requirements for healthcare workers, see *Vaccination Laws*, CTRS. FOR DISEASE CONTROL & PREVENTION (last reviewed Feb. 16, 2022), <https://www.cdc.gov/phlp/publications/topic/vaccinationlaws.html> [<https://perma.cc/5D33-68DV>].

177. See, e.g., NEB. REV. STAT. § 71-467 (2022) (requiring employees of acute care hospitals to be vaccinated for diphtheria, influenza, pertussis, and tetanus); ILL. ADMIN. CODE tit. 77, § 250.1820(f)(3) (2022) (requiring personnel working in hospital nurseries to provide proof of immunity or vaccination for rubella); MD. CODE REGS. 10.06.01.12(D), .15(D) (2022) (requiring hospital employees born after 1956 to document receipt of

Vaccination as a condition of admission to public and private schools is an example of a sector-specific policy.¹⁷⁸ All fifty states require vaccination against certain communicable diseases as a condition for school attendance.¹⁷⁹ The vast majority of school vaccination laws apply to both public and private schools.¹⁸⁰ These policies are not uniform, but are nevertheless unanimous or nearly unanimous with respect to several diseases.¹⁸¹ These mandates are of paramount importance due to the absence of federal vaccination requirements as a condition of admission to educational institutions.¹⁸² These requirements, and those applicable to healthcare workers, exemplify governmental expertise in the fields of public health and vaccination, expertise which is lacking in the vast majority of private businesses.¹⁸³

Broader precedent applicable to the public at large is found in U.S. Supreme Court jurisprudence. In *Jacobson v. Massachusetts*, the Court held that the government could compel smallpox vaccination in the interest of preventing disease spread, despite the potential conflict with the liberty interests of adult citizens.¹⁸⁴ According to the Court, the government could restrict the exercise of individual liberty interests that endanger the general welfare.¹⁸⁵ This restriction on liberty was based upon a “social compact” in which individuals submitted to laws designed to secure “the common

vaccines for measles and rubella); N.M. CODE R. § 7.7.2.21(C) (2022) (requiring employees of designated hospitals who are in direct contact with pediatric patients and female patients of childbearing age to provide proof of immunity or vaccination for rubella); OHIO ADMIN. CODE, 4715-20-01(A) (2022) (requiring dentists and dental health care workers to provide proof of immunity from or vaccination for hepatitis B); OKLA. ADMIN. CODE § 310:667-5-4(a)(1) (2022) (requiring hospital workers born after 1957 to document their immunity to measles, mumps, rubella, and varicella).

178. Abramson, *supra* note 176, at 25–29, 34–35.

179. See CTRS. FOR DISEASE CONTROL & PREVENTION, STATE SCHOOL IMMUNIZATION REQUIREMENTS AND VACCINE EXEMPTION LAWS 8 tbl.A1, 9 tbl.A2 (2022), <https://www.cdc.gov/php/docs/school-vaccinations.pdf> [<https://perma.cc/72KT-MJAK>]. For a comprehensive overview of state vaccination requirements as a condition for attendance at public and private educational institutions, see generally Hodge & Gostin, *supra* note 18.

180. See Ctrs. for Disease Control & Prevention, *supra* note 179, at 1, (noting that public school vaccination laws often are equally applicable to private educational institutions). All fifty state school vaccination laws are applicable to day care facilities. Abbie Goldbas, *The Law and Immunization in the United States*, 31 INT’L J. CHILDBIRTH EDUC., no. 2, April 2016, at 41, 42.

181. See *supra* note 128 and accompanying text.

182. See Hodge & Gostin, *supra* note 18, at 833–34, 889–90.

183. See INST. OF MED. OF THE NAT’L ACADS., THE FUTURE OF THE PUBLIC’S HEALTH IN THE 21ST CENTURY 97 (2003).

184. *Jacobson v. Massachusetts*, 197 U.S. 11, 25, 37–39 (1905).

185. *Id.* at 26–31.

good, for the protection, safety, prosperity, and happiness of the people.”¹⁸⁶ The legal authority for the restriction of liberty rested with Massachusetts’ police power, which “must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety.”¹⁸⁷ This exercise of police power was not extraordinary, as “persons and property are subjected to all kinds of restraints and burdens, in order to secure the general comfort, health, and prosperity of the State.”¹⁸⁸

The Court imposed three conditions upon the state’s authority to compel vaccination.¹⁸⁹ First, a vaccination requirement must be based upon a public health necessity and could not be imposed in “an arbitrary, unreasonable manner,” or go “far beyond what was reasonably required for the safety of the public.”¹⁹⁰ Second, any vaccination requirement must have a “real or substantial relation” to public health and be a proportionate response, rather than “a plain, palpable invasion of rights.”¹⁹¹ The third condition was harm avoidance: That the requirement does not pose a health risk to recipients.¹⁹² Subject to these conditions, implementation of vaccination requirements was left to the discretion of the states.¹⁹³

The U.S. Supreme Court has only decided one case directly addressing vaccination in the years since *Jacobson*.¹⁹⁴ The evolution of constitutional jurisprudence has led some commentators to speculate on whether

186. *Id.* at 27 (quoting MASS. CONST. pt. 1, art. VII). The Court described the necessity of the primacy of the social compact over individual liberty as follows:

[T]he liberty secured by the Constitution . . . does not import an absolute right in each person to be . . . wholly freed from restraint. There are manifold restraints to which every person is necessarily subject for the common good. On any other basis organized society could not exist with safety to its members. Society based on the rule that each one is a law unto himself would soon be confronted with disorder and anarchy. Real liberty for all could not exist under the operation of a principle which recognizes the right of each individual person to use his own, whether in respect of his person or his property, regardless of injury that may be done to others.

Id. at 26.

187. *Id.* at 25 (citation omitted).

188. *Id.* at 26 (quoting *Thorpe v. Rutland & Burlington R.R. Co.*, 27 Vt. 140, 150 (1854)).

189. *Id.* at 28, 31, 36–37.

190. *Id.* at 28 (citing *Wis., Minn. & Pac. R.R. Co. v. Jacobson*, 179 U.S. 287, 301 (1900)).

191. *Id.* at 31 (quoting *Mugler v. Kansas*, 123 U.S. 623, 661 (1887)).

192. *Id.* at 36–37. The Court concluded that to require immunization with the knowledge that harm would occur would be “cruel and inhuman in the last degree.” *See id.* at 38–39.

193. *Id.* at 25 (concluding that “[t]he mode or manner in which those results are to be accomplished is within the discretion of the State”).

194. *See Zucht v. King*, 260 U.S. 174, 176–77 (1922) (upholding a local government requirement of vaccination as a prerequisite for enrollment in school).

Jacobson's largely deferential standards remain viable.¹⁹⁵ The advent of tiered scrutiny begs the question of what level of scrutiny would be applicable to similar requirements considered by today's courts.¹⁹⁶ Modern perceptions of liberty interests allow individuals to refuse unwanted medical interventions.¹⁹⁷ Would such interests permit a current objector to successfully resist government-mandated vaccination?¹⁹⁸ Additionally, the Court has never addressed religious or philosophical objections in the context of a vaccination requirement.¹⁹⁹

195. See, e.g., James Colgrove & Ronald Bayer, *Manifold Restraints: Liberty, Public Health, and the Legacy of Jacobson v. Massachusetts*, 95 AM. J. PUB. HEALTH 571, 571, 575 (2005); Lawrence O. Gostin, *Jacobson v. Massachusetts at 100 Years: Police Power and Civil Liberties in Tension*, 95 AM. J. PUB. HEALTH 576, 580 (2005); Horowitz, *supra* note 100, at 1730–45; Wendy K. Mariner, George J. Annas & Leonard H. Glantz, *Jacobson v. Massachusetts: It's Not Your Great-Great-Grandfather's Public Health Law*, 95 AM. J. PUB. HEALTH 581 (2005); Reiss & Weithorn, *supra* note 18, at 894–901; Christopher Richins, *Jacobson Revisited: An Argument for Strict Judicial Scrutiny of Compulsory Vaccination*, 32 J. LEGAL MED. 409, 446–47 (2011); Michael H. Shapiro, *Response, Updating Constitutional Doctrine: An Extended Response to the Critique of Compulsory Vaccination*, 12 YALE J. HEALTH POL'Y L. & ETHICS 87, 91–122 (2012).

196. See, e.g., *Calvary Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603, 2608 (2020) (Alito, J., dissenting) (concluding that “it is a mistake to take language in *Jacobson* as the last word on what the Constitution allows public officials to do during the COVID-19 pandemic”); *Klaassen v. Trs. of Ind. Univ.*, 549 F. Supp. 3d 836, 865 (N.D. Ind. 2021), *vacated*, 24 F.4th 638 (7th Cir. 2022) (“*Jacobson* was written before the modern tiers of constitutional scrutiny, so a legitimate question is the extent to which *Jacobson* applies with full force today.”); see also Reiss & Weithorn, *supra* note 18, at 895–96 (citing *Jacobson*, 197 U.S. at 25) (characterizing *Jacobson*'s “highly deferential standard of reasonableness . . . as a rudimentary precursor to a rational basis test” and, as such, noting that the Court failed to review “the means used by the state to achieve its goal of protecting the public health” (footnote omitted)).

197. See, e.g., *Cruzan v. Dir. of Mo. Dep't. of Health*, 497 U.S. 261, 278–79 (1990) (discussing the refusal or withdrawal of procedures to prolong life); *Washington v. Harper*, 494 U.S. 210, 221–22 (1990) (“We have no doubt that . . . respondent possesses a significant liberty interest in avoiding the unwanted administration of antipsychotic drugs under the Due Process Clause of the Fourteenth Amendment.”).

198. See, e.g., Horowitz, *supra* note 100, at 1732 (contending that freedom from vaccination is equivalent to the right to be free from unwanted medical interventions, thereby requiring strict scrutiny of mandates).

199. See Reiss & Weithorn, *supra* note 18, at 898 (noting that although *Jacobson* was a reverend, he was unable to assert a religious objection to vaccination as the First Amendment's Free Exercise Clause would not be held applicable to the states through the doctrine of incorporation until 1940).

Questioning of the continued viability of *Jacobson* remains, however, nothing more than speculation.²⁰⁰ To the contrary, the Court has not disavowed either its reasoning or the result.²⁰¹ Rather, the Court has cited *Jacobson* with approval on numerous occasions, and the opinion has been cited hundreds of times by federal and state courts.²⁰² It has been noted that although “different fact patterns might yield different results,” the principles elucidated in *Jacobson* remain “sound and well-established.”²⁰³

Furthermore, the Court issued its opinion in *Jacobson* at a time not unlike today, involving “an easily-transmitted disease with a high fatality rate during an epidemic.”²⁰⁴ Infectious diseases, such as smallpox, were a leading cause of death in 1905, in a manner similar to COVID, which was a leading cause of death in the United States in 2020 and 2021.²⁰⁵ The continued viability of *Jacobson* may be an open question with respect to less lethal and transmissible diseases and in the absence of the threat of

200. *Klaassen*, 549 F. Supp. 3d at 865 (noting that “[n]o Supreme Court opinion has overruled or abrogated *Jacobson*”).

201. *Id.*

202. As of April 21, 2022, the opinion in *Jacobson* had been cited on 83 occasions by the U.S. Supreme Court and 1,050 occasions by federal and state courts. *Jacobson v. Commonwealth of Massachusetts*, WESTLAW, [https://www.westlaw.com/Document/197bdcd899cc111d9bc61beebb95be672/View/FullText.html?transitionType=Default&contextData=\(sc.Default\)](https://www.westlaw.com/Document/197bdcd899cc111d9bc61beebb95be672/View/FullText.html?transitionType=Default&contextData=(sc.Default)) (choose “Cases” from the “Citing References” dropdown; then click “Filters”; then click “Jurisdiction”; then apply the “Federal” and “State” filters).

203. Reiss & Weithorn, *supra* note 18, at 901.

204. *Id.* (citing *Smallpox Disease Overview*, CTRS. FOR DISEASE CONTROL & PREVENTION (Dec. 30, 2004), <http://bt.cdc.gov/agent/smallpox/overview/disease-facts.asp> [<https://web.archive.org/web/20150331075826/bt.cdc.gov/agent/smallpox/overview/disease-facts.asp>]). Smallpox had a higher fatality rate than COVID-19. *Compare Mortality Risk of COVID-19*, OUR WORLD IN DATA (Aug. 24, 2022), <https://ourworldindata.org/mortality-risk-covid> [<https://perma.cc/352T-4JEA>] (illustrating that the case fatality rate of COVID-19 reached approximately 14.5%), with Reiss & Weithorn, *supra* note 18, at 901 (citing *Smallpox Disease Overview*, *supra*) (stating that the case fatality rate of smallpox reached 30%). The analogy presented in this Article between smallpox and COVID-19 is based on the comparable high mortality rate.

205. See Jared Ortaliza et al., *COVID-19 Continues to be a Leading Cause of Death in the U.S. in June 2021*, PETERSON-KFF HEALTH SYSTEM TRACKER (July 1, 2021), <https://www.healthsystemtracker.org/brief/covid-19-continues-to-be-a-leading-cause-of-death-in-the-u-s-in-june-2021/> [<https://perma.cc/VE6Q-Z99D>]; see also *COVID-19 Mortality Overview*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/nchs/covid19/mortality-overview.htm> [<https://perma.cc/QV42-C4TP>] (finding that COVID resulted in 1,106,938 excess deaths in the United States between February 2020 and April 2022); Dan Keating, Akilah Johnson & Monica Ulmanu, *The Pandemic Marks Another Grim Milestone: 1 in 500 Americans Have Died of COVID-19*, WASH. POST (Sept. 15, 2021, 9:00 AM), <https://www.washingtonpost.com/health/interactive/2021/1-in-500-covid-deaths/> [<https://perma.cc/B86Q-A87D>] (noting that 1 in 500 Americans in the United States had died of COVID as of September 2021 including 1 in 35 Americans over the age of 85 years, 1 in 150 Americans between the ages of 65 to 84 years, and 1 in 780 Americans between the ages of 40 and 64 years).

community spread.²⁰⁶ But such is not the case with respect to COVID, and thus the holding in *Jacobson* remains on point and a good fit for present circumstances.²⁰⁷ *Jacobson*'s precursive endorsement of rational basis review in the context of smallpox is well-suited for the national, state, and local medical emergency posed by COVID.²⁰⁸ This fit only improved with the FDA's full biologics license approval of the Pfizer-BioNTech, Moderna, and Johnson & Johnson Janssen vaccines, thereby significantly undercutting arguments that such vaccines fail to meet the third condition set forth in *Jacobson* by posing a health risk to recipients.²⁰⁹

Even assuming that the standards set forth in *Jacobson* are outdated, a COVID vaccination requirement would survive constitutional scrutiny as a compelling state interest.²¹⁰ The courts that have addressed this issue have done so largely in the context of religious objections to mandatory immunization as a requirement for school attendance.²¹¹ Nevertheless, there is no reason to believe that the finding of a compelling state interest

206. See Reiss & Weithorn, *supra* note 18, at 901.

207. See *id.*

208. *Klaassen v. Trs. of Ind. Univ.*, 549 F. Supp. 3d 836, 865–66 (N.D. Ind. 2021), *vacated*, 24 F.4th 638 (7th Cir. 2022) (upholding Indiana University's COVID vaccination requirement for students in light of the holding in *Jacobson* and "modern tiers of constitutional scrutiny" and concluding that "[s]hould the court have this melding of history and modernity wrong in faithfully adhering to the Fourteenth Amendment's plain original meaning of 'life' and 'liberty,' comfort should come in knowing that *Jacobson*, whether rational basis review by any other name, leads to the same result today").

209. See *supra* notes 41–43 and accompanying text.

210. See Gibson, *supra* note 20, at 543 ("[I]t is likely, given the strong compelling [state] interest . . . that a well drafted and narrowly tailored vaccination policy could survive strict scrutiny review." (citing Horowitz, *supra* note 100, at 1747)).

211. See, e.g., *McCarthy v. Boozman*, 212 F. Supp. 2d 945, 948 (W.D. Ark. 2002) ("It has long been settled that individual rights must be subordinated to the compelling state interest of protecting society against the spread of disease."); *In re Sherr v. Northport-East Northport Union Free Sch. Dist.*, 672 F. Supp. 81, 88 (E.D.N.Y. 1987) ("It has been settled law for many years that claims of religious freedom must give way in the face of the compelling interest of society in fighting the spread of contagious diseases through mandatory inoculation programs."); *Diana H. v. Rubin*, 171 P.3d 200, 209 (Ariz. Ct. App. 2007) ("Because Arizona has not expressed a compelling state interest in overriding Diana's continuing fight to direct the religious upbringing of her child while [the child] remains dependent . . . we vacate the juvenile court's order . . ."); *Wright v. DeWitt Sch. Dist. No. 1*, 385 S.W.2d 644, 648 (Ark. 1965) (permitting the state to infringe upon the right to free exercise of religion for the good of the community); *Brown v. Stone*, 378 So. 2d 218, 223 (Miss. 1979) (upholding a state program requiring immunization as a condition for admission to public schools on the basis of a compelling public interest despite religious objections).

in school immunization cases would be inapplicable to a broader mandate designed to stem the spread of a highly-transmissible disease presenting a significant risk of death or serious illness in the midst of a once in a century pandemic.²¹² To the contrary, the diseases addressed in the school vaccination cases, while highly contagious and presenting the risk of serious illness and death, are not of the present magnitude of COVID.²¹³ Furthermore, the state interest in school vaccination has proven to be more compelling than the free exercise of religion, which is perhaps the highest right guaranteed by the federal and state constitutions.²¹⁴ If the state's interest in eradicating childhood diseases is powerful enough to overcome objections based upon a liberty interest as fundamental as free exercise,²¹⁵ most assuredly it is equally powerful in the context of the COVID pandemic.

Public emergency laws provide an additional basis for finding a compelling state interest for vaccination requirements. The Model State Emergency Health Powers Act (MSEHPA) serves as a starting point in this discussion.²¹⁶ Drafted in the wake of the attacks of September 11, 2001, and amplified concerns about bioterrorism, MSEHPA was designed to be implemented during a public health emergency which was defined, in part, as “an occurrence or imminent threat of an illness or health condition that is believed to be caused by . . . the appearance of a novel or previously controlled or eradicated infectious agent.”²¹⁷ This imminent threat of illness or adverse health condition must present a “high probability” of a large number of deaths, serious or long-term disabilities, or widespread exposure posing a significant risk of substantial future harm.²¹⁸ All three of these conditions are clearly met by COVID.²¹⁹

MSEHPA authorizes public health authorities to vaccinate persons against infectious disease during a public health emergency and quarantine persons who are unable or unwilling to undergo vaccination for health, religious,

212. See Colgrove & Bayer, *supra* note 195, at 571–72.

213. For example, in the decade prior to the development of the measles vaccine in 1963, there were approximately three to four million infections on an annual basis resulting in five hundred deaths and forty-eight thousand hospitalizations. See *Measles History*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/measles/about/history.html> [<https://perma.cc/TPE5-GWTY>]. By comparison, there were 50.7 million COVID infections resulting in 803,593 deaths at the time of preparation of this Article in December 2021. See *COVID-19 Vaccinations in the United States*, *supra* note 16.

214. See, e.g., *In re Sherr*, 672 F. Supp. at 88.

215. *Id.*

216. LAWRENCE O. GOSTIN, *The CTRS. FOR L. & THE PUB.'S HEALTH AT GEORGETOWN & JOHNS HOPKINS UNIVS.* § 603 (Dec. 21, 2001).

217. *Id.* §104(m)(1)(ii). For a discussion of the factors motivating the drafting of MSEHPA, see Horowitz, *supra* note 100, at 1728.

218. GOSTIN, *supra* note 216, §104(m)(2)(i)–(iii).

219. See sources cited *supra* note 16.

or philosophical reasons.²²⁰ The laws in numerous states either duplicate²²¹ or closely track MSEPHA's public health emergency language.²²² A smaller number of statutes endorse MSEPHA's vaccination provision.²²³

220. GOSTIN, *supra* note 216, § 603(a)(1)–(3).

221. *See, e.g.*, ALA. CODE § 31-9-3(4) (2013); DEL. CODE ANN. tit. 20, § 3132(11)(a)–(b) (2022); GA. CODE ANN. § 31-12-1.1(2) (2022); IOWA CODE § 135.140(6) (2022); LA. STAT. ANN. § 29:762(12) (2022); N.J. STAT. ANN. § 26:13-2 (2022); OKLA. STAT. tit. 63, § 6104(2)(a)–(b) (2022); OR. REV. STAT. § 433.442(4) (2021); WIS. STAT. § 323.02(16) (2022); WYO. STAT. ANN. § 35-4-115(a)(i) (2022).

222. *See, e.g.*, ARIZ. REV. STAT. ANN. § 36-787(A) (2021) (defining a state of emergency as “an occurrence or imminent threat of an illness or health condition that is caused by . . . an epidemic or pandemic disease . . . that poses a substantial risk of a significant number of human fatalities or incidents of permanent or long-term disability”); CONN. GEN. STAT. § 19a-131(8) (2022) (“‘Public health emergency’ means an occurrence or imminent threat of a communicable disease . . . caused by . . . an epidemic or pandemic disease . . . that poses a substantial risk of a significant number of human fatalities or incidents of permanent or long-term disability.”); FLA. STAT. § 381.00315(1)(c) (2021) (“‘Public health emergency’ means any occurrence, or threat . . . which results or may result in substantial injury or harm to the public health from infectious disease”); 20 ILL. COMP. STAT. § 3305/4 (2022) (“Disaster means an occurrence or threat of widespread or severe damage, injury or loss of life . . . resulting from . . . [an] epidemic”); IND. CODE § 10-14-3-1(a), (b)(22) (2021) (“‘[D]isaster’ means an occurrence or imminent threat of widespread or severe damage, injury or loss of life . . . resulting from . . . [an] [e]pidemic.”); MD. CODE ANN., PUB. SAFETY § 14-3A-01(b) (LexisNexis 2022) (“‘Catastrophic health emergency’ means a situation in which extensive loss of life or serious disability is threatened imminently because of exposure to a deadly agent.”); N.M. STAT. ANN. § 12-10A-3(G) (2022) (“‘[P]ublic health emergency’ means the occurrence or imminent threat of exposure to . . . a highly infectious . . . agent, including a threatening communicable disease, that poses an imminent threat of substantial harm to the population of New Mexico or any portion thereof.”); N.C. GEN. STAT. § 130A-475(d) (2011) (“‘[P]ublic health threat’ means a situation that is likely to cause an immediate risk to human life, an immediate risk of serious physical injury or illness, or an immediate risk of serious adverse health effects.”); S.C. CODE ANN. § 44-4-130(P), (R)(2) (2022) (stating that a public health emergency is “the occurrence or imminent risk of a qualifying health condition” which is defined as “an illness or health condition that may be caused by . . . [an] epidemic or pandemic disease . . . and that poses a substantial risk of a significant number of human fatalities, widespread illness, or serious economic impact to the agricultural sector”); S.D. CODIFIED LAWS § 34-22-41 (2022) (“[A] public health emergency is an occurrence or imminent threat of an illness, health condition, or widespread exposure to an infectious . . . agent that poses a significant risk of substantial harm to the affected population.”); TEX. HEALTH & SAFETY CODE ANN. § 81.003(7)(A)–(B)(ii) (West 2021) (defining a public health disaster as a declaration by the governor of the existence of an immediate threat from a communicable disease that “poses a high risk of death or serious harm to the public; and creates a substantial risk of harmful public exposure”); VA. CODE ANN. § 32.1-48.06 (2006) (defining “[c]ommunicable disease of public health threat” as a readily transmissible infectious agent “found to create a risk of death or significant injury or impairment”).

223. *See, e.g.*, ARIZ. REV. STAT. ANN. § 36-787(C)(1) (2022) (authorizing the governor to order vaccination of persons who are diagnosed with or believed to have been exposed

State governments have an additional interest in requiring vaccinations based upon the nature of the COVID pandemic and associated illnesses. From this point of view, the weight of the state interest depends upon “the nature, communicability, and consequences” of the vaccine-targeted disease.²²⁴ Applying this standard, states have a compelling interest in vaccinating against diphtheria and smallpox, given their highly contagious nature, methods of transmission, serious potential complications, and lower effectiveness of post-infection treatment.²²⁵ This interest is less significant with respect

to or may reasonably be expected to be exposed to “a highly contagious and highly fatal disease with transmission characteristics similar to smallpox”); CONN. GEN. STAT. § 19a-131e(a) (2022) (empowering the state commissioner of public health to order vaccination of individuals “within a geographic area as the commissioner deems reasonable and necessary in order to prevent the introduction or arrest the progress of [a] communicable disease”); DEL. CODE ANN. tit. 20, § 3137(1) (2022) (authorizing the director of the Delaware Emergency Management Agency to “direct vaccination of persons as protection against infectious disease and to prevent the spread of contagious or possibly contagious disease”); FLA. STAT. § 381.00315(2)(d)(4) (2022) (empowering the state health officer to order vaccinations for “communicable diseases that have significant morbidity or mortality and present a severe danger to public health”); GA. CODE ANN. § 31-12-3(a) (2022) (authorizing the Georgia Department of Public Health and county boards of health to mandate vaccination against “contagious or infectious disease where the particular disease may occur, whether or not the disease may be an active threat”); IOWA CODE § 135.144(6) (2022) (empowering the Iowa Department of Public Health to order vaccination against “an infectious disease and to prevent the spread of communicable or potentially communicable disease”); 20 ILL. COMP. STAT. 2305/2(e) (2022) (authorizing the state department of public health to order the administration of vaccines “as necessary in order to prevent the probable spread of a dangerously contagious or infectious disease”); LA. STAT. ANN. § 29:764(A)(2)(e) (2021) (authorizing mandatory vaccination as part of a disaster emergency plan); MD. CODE ANN., PUB. SAFETY § 14-3A-03(b)(3)(ii) (LexisNexis 2022) (authorizing mandatory vaccination “[i]f medically necessary and reasonable to treat, prevent, or reduce the spread of the disease or outbreak believed to have been caused by the exposure to a deadly agent”); MINN. STAT. § 12.39(1) (2021) (empowering the state commissioner of health to order vaccination of individuals who have been infected or exposed or reasonably believed to have been infected or exposed to a communicable disease); N.J. STAT. ANN. § 26:13-14(a) (West 2022) (authorizing the commissioner of health to “[r]equire vaccination of persons as protection against infectious disease and to prevent the spread of a contagious or possibly contagious disease”); N.M. STAT. ANN. § 12-10A-13(A) (West 2022) (authorizing the state secretary of health to vaccinate persons “to prevent infection by a threatening communicable disease and to protect against the spread of that disease”); S.C. CODE ANN. § 44-4-520(A)(1) (2022) (empowering the department of health and environmental control to vaccinate persons against infectious or contagious disease or possibly contagious disease during a public health emergency); VA. CODE ANN. § 32.1-48(A) (2022) (allowing the commissioner of health to require “immediate immunization of all persons in case of an epidemic of any disease of public health importance for which a vaccine exists”); WIS. STAT. § 252.041(1)(a) (2022) (permitting the state department of health to order vaccination in order to address a public health emergency).

224. See Hope Lu, Note, *Giving Families Their Best Shot: A Law-Medicine Perspective on the Right to Religious Exemptions from Mandatory Vaccination*, 63 CASE W. RES. L. REV. 869, 901 (2013).

225. See *id.* at 892–93; Nathanson, *supra* note 20, at 625–26.

to hepatitis A and sexually transmitted diseases, which are not casually communicable, result in less serious health complications, and are subject to effective post-infection medical interventions.²²⁶ For the reasons previously elaborated, COVID in general, and the Delta and Omicron variants in particular, clearly meet the standards established by smallpox and diphtheria sufficiently enough to constitute a compelling state interest in mandatory vaccination.²²⁷

Context and the resultant state interest in vaccination may be described by other means. For example, applying principles of public health law, COVID constitutes an ongoing threat that has been inadequately controlled through less coercive means, such as testing, contact tracing, and quarantine.²²⁸ Rising numbers of infections, hospitalizations, and deaths are convincing evidence of the uncontrolled nature of the threat and the need for intrusion upon individual autonomy through mandatory vaccination.²²⁹ The concept of “focusing events” in political science literature—which consist of “sudden, rare events that affect a relatively large number of people and thereby attract media coverage and capture the attention of larger publics and policymakers”²³⁰—also supports the existence of a compelling state interest to require vaccination. The intensity of media coverage may “galvanize the public” to the dangers associated with non-vaccination and cause policymakers to place the majority’s interest in vaccination above that of minority objectors.²³¹ Clearly, the advent of COVID is such a focusing event, which should cause state governments to overcome inertia and act in a manner consistent with the desires of the majority for improved health and a way forward through the pandemic.²³²

There is state law precedent for a context-based approach to vaccination. For example, Washington prohibits personal belief exemptions for vaccinations deemed essential to the health and welfare of school age children—

226. See Lu, *supra* note 224, at 892 (noting that sexually transmitted infections are not casually communicable diseases); Nathanson, *supra* note 20, at 626 (noting that Hepatitis A is transmitted through the consumption of infected food and water).

227. See *supra* notes 205, 207–08 and accompanying text.

228. Michelle M. Mello, Ross D. Silverman & Saad B. Omer, *Ensuring Uptake of Vaccines against SARS-CoV-2*, 383 NEW ENG. J. MED. 1296, 1297 (2020).

229. *Id.*

230. Timothy D. Lytton, *Clergy Sexual Abuse Litigation: The Policymaking Role of Tort Law*, 39 CONN. L. REV. 809, 854 (2007) (citing THOMAS A. BIRKLAND, AFTER DISASTER: AGENDA SETTING, PUBLIC POLICY, AND FOCUSING EVENTS 22–27 (1997)). See generally Thomas A. Birkland, *Focusing Events, Mobilization, and Agenda Setting*, 18 J. PUB. POL’Y 53 (1998).

231. Levin, *supra* note 26, at 1237 (citing Lytton, *supra* note 230, at 854).

232. See *id.*

specifically, measles, mumps and rubeola—but allows exemptions for other vaccines.²³³ Similar language may be found in other state statutes.²³⁴ Although these statutes are not without issues, they nonetheless define a compelling state interest in certain vaccinations deemed essential to public health.²³⁵

Regardless of the precise language or basis utilized to describe the underlying events resulting in the creation of a compelling state interest, all of the above circumstances must be prefaced on the availability of adequate vaccines for the targeted population and the failure of voluntary efforts and less coercive forms of persuasion.²³⁶ Both of these preconditions were satisfied in the United States by mid-2021.²³⁷

The authority for requiring vaccination for COVID thus exists in the states. The question remains whether state governments should exercise this authority. The answer to that question is resoundingly in the affirmative.

State governments are uniquely positioned to formulate, implement, and enforce effective vaccination requirements to a far greater degree than

233. WASH. REV. CODE §§ 28A.210.080, 090(c) (2022).

234. See, e.g., ALA. CODE § 16-30-3 (2022) (providing that “[i]n the absence of an epidemic or immediate threat thereof,” parents can object “on grounds that [vaccination] conflicts with his religious tenets and practices”); MASS. GEN. LAWS ch. 76, § 15 (2022) (providing that “[i]n the absence of an . . . epidemic of disease declared by the department of public health, no child whose parent or guardian states in writing that vaccination or immunization conflicts with his sincere religious beliefs shall be required to present [a] physician’s certificate in order to be admitted to school”).

235. See, e.g., Tomsick, *supra* note 20, at 136–37 (questioning the basis for determining when there is a threat of an epidemic which overrides objections to vaccination, whether such statutes deem exemptions injurious to public health, and whether the preventative nature of vaccines is inconsistent with post-pandemic declarations of public health emergencies).

236. See, e.g., Timothy J. Aspinwall, *Religious Exemptions to Childhood Immunization Statutes: Reaching for a More Optimal Balance Between Religious Freedom and Public Health*, 29 LOY. U. CHI. L.J. 109, 114–15 (1997) (contending that “Religious advocates reasonably can claim that the state has no moral authority to force citizens to subordinate their religious beliefs to public health mandates when the state has not done all it can do to advance the public health through voluntary means”); Mello, Silverman & Omer, *supra* note 228, at 1297–98 (stating that availability to targeted populations and lack of success of voluntary efforts should be preconditions to vaccination mandates).

237. See *COVID-19 Vaccinations in the United States*, CTRS. FOR DISEASE CONTROL & PREVENTION (Aug. 10, 2021, 4:23 PM), https://covid.cdc.gov/covid-data-tracker/#vaccinations_vacc-total-admin-rate-total [https://web.archive.org/web/20210810233655/https://covid.cdc.gov/covid-data-tracker/#vaccinations_vacc-total-admin-rate-total] (documenting that eight months after the approval of the Pfizer-BioNTech and Moderna vaccines for emergency use, only 50.3% of the eligible population in the United States was fully vaccinated); see also Mello, Silverman & Omer, *supra* note 228, at 1298 (contending that voluntary efforts with respect to COVID should be limited to “a matter of weeks” rather than months given the costs associated with the failure of non-coercive means).

the industrial sector.²³⁸ State governments can implement uniform vaccination requirements across broad swathes of industries without fear of fragmented approaches varying from industry to industry, among industry participants, or different regions.²³⁹ This uniformity leads to greater efficiency than would otherwise exist in individual industry approaches.²⁴⁰ Although enforcement would undoubtedly be costly and require additional or reallocated public resources, which may be scarce, these burdens are more readily assumable by state governments which have access to greater resources and enforcement experience, including those related to vaccination requirements in public schools.²⁴¹ There is a growing willingness of state governments to exercise this authority in a wide variety of areas including state employees, health care workers, and higher education.²⁴²

State governments are also better able to implement wide-ranging communication and public education strategies necessary to effectuate vaccination requirements.²⁴³ These strategies are essential for several reasons. Initially, it is incumbent upon governments to communicate information

238. See *supra* Part V; WEN W. SHEN, CONG. RSCH. SERV., R46745, STATE AND FEDERAL AUTHORITY TO MANDATE COVID-19 VACCINATION 4–8 (2022).

239. See *supra* notes 172–80 and accompanying text.

240. See *supra* Part III (noting that private sector employers may resist implementing vaccine mandates resulting in an ineffective and fragmented approach).

241. See Reiss & Weithorn, *supra* note 18, at 956 (discussing efficiency considerations in the context of vaccination policy).

242. See, e.g., *What Colleges Require the COVID-19 Vaccine?*, BESTCOLLEGES (Mar. 22, 2022), <https://www.bestcolleges.com/news/2021/10/11/list-of-colleges-that-require-covid-19-vaccine/> [<https://perma.cc/L7GE-E22R>]; Jim Brunner, Joseph O’Sullivan & Paige Cornwell, *Washington State Employees, Health Care Worker Must Be Vaccinated Against COVID*, SEATTLE TIMES (Aug. 9, 2021, 7:28 PM), <https://www.seattletimes.com/seattle-news/gov-jay-inslee-expected-to-announce-covid-19-vaccine-mandate-for-washington-state-employees/> [<https://perma.cc/QL92-J7Z2>] (discussing vaccination requirements for public employees in California, New York, and Washington and for healthcare workers in Washington); Marina Villeneuve, *NY to Require State Employees to Get Vaccines, or Get Tested*, SEATTLE TIMES (July 28, 2021, 5:43 PM), <https://www.seattletimes.com/seattle-news/health/ny-to-require-state-employees-to-get-vaccines-or-get-tested/> [<https://perma.cc/4KHL-CBUW>] (discussing vaccination requirements for patient-facing workers in state-owned hospitals and veterans homes in New York); see also *supra* note 14 and accompanying text.

243. Given that the state government already has the infrastructure for vaccination policies, it may be more efficient to “favor extension, alteration, or application in a new context of an existing and familiar tool, rather than creation of a new tool from scratch.” See Reiss & Weithorn, *supra* note 18, at 956.

about vaccine safety and efficacy, including knowledge limitations.²⁴⁴ This is especially the case in circumstances in which the government is seeking to compel vaccination. These communications also shape social attitudes and, in particular, instill public trust.²⁴⁵ Building trust is a necessary component of an effective policy, not only in persuading individuals to voluntarily vaccinate, but also in “more coercive interventions . . . to secure the compliance of those who cannot be persuaded.”²⁴⁶ For those who are persuadable, communication is essential to informed consent and ensuring that the decision to be vaccinated is “the product of competent, voluntary, and informed choices.”²⁴⁷ For those who are unpersadable, information nevertheless has value in its own right, although it may ultimately prove ineffectual in securing individual consent.²⁴⁸

The superiority of governmental resources, experience, and expertise extend beyond the vaccines themselves to include the aggregation and publication of related information.²⁴⁹ For example, unlike individual industry or business policies, a broad governmental requirement would result in a sweeping collection of data regarding vaccination and noncompliance. Such information may influence individual and collective decisions regarding travel, the establishment or relocation of businesses, and general risk assessment. Such information may also prove crucial to healthcare providers and nongovernmental organizations in targeting campaigns to increase vaccine uptake.²⁵⁰ The collection and dissemination of such information, which

244. See Mello, Silverman & Omer, *supra* note 228, at 1297 (noting the importance of “transparent communication of the best available evidence about the vaccine’s safety and efficacy” (citing Sarah Schaffer DeRoo, Natalie J. Pudalov & Linda Y. Fu, *Planning for a COVID-19 Vaccination Program*, 323 [J]AMA 2458, 2458 (2020))).

245. See Reiss & Weithorn, *supra* note 18, at 955–56.

246. *Id.*

247. *Id.* at 954 (citing TOM L. BEAUCHAMP & JAMES F. CHILDRESS, *PRINCIPLES OF BIOMEDICAL ETHICS* 117–21 (6th ed. 2009)). For a general discussion of individual autonomy in healthcare decision making and the doctrine of informed consent, see BEAUCHAMP & CHILDRESS, *supra*.

248. See Reiss & Weithorn, *supra* note 18, at 958 (“Financial and other incentives, together with education, may change the calculus for Vaccine Resistant parents. It is doubtful that anything short of mandates or direct coercion will change the behavior of Vaccine Rejector parents.”).

249. For example, the Coronavirus Aid, Relief, and Economic Security Act requires that “[e]very laboratory that performs or analyzes a test that is intended to . . . diagnose a possible case of COVID-19 shall report the results from each such test, to the Secretary of Health of Human Services.” Coronavirus Aid, Relief, and Economic Security (CARES) Act, Pub. L. No. 116-136, §18115(a), 134 Stat. 281, 574 (2022).

250. See Tomsick, *supra* note 20, at 136 (“[T]hese records [of vaccination rates] equip nongovernmental organizations and health care providers with the information they need to target efforts to increase vaccination rates.” (citing Caitlin Cardenas-Comfort & Mary Majumder, *Laws About Transparent School Vaccination Reporting: Public Health Context and Ethics*, 109 AM. J. PUB. HEALTH 1687, 1688 (2019))).

only governments may do on a macro-scale, are consistent with their previously discussed communication and transparency obligations.²⁵¹

Finally, governments are better positioned than industry to deflect criticism, absorb blame, and punish non-compliance, if necessary.²⁵² Although private employers may choose to terminate individual employees, only governments possess broad power to punish non-compliance on a collective basis.²⁵³ Potential penalties related to employment may include the suspension or termination of public employees and stay-at-home orders of private and public employees who are members of high priority groups refusing vaccination.²⁵⁴ These penalties are in addition to other non-employment-related means of compelling vaccination, such as denial of tax credits and access to nonessential government services and public schools, transportation, and facilities.²⁵⁵ Other potential government-imposed penalties include criminalization of non-vaccination or the imposition of civil fines.²⁵⁶ This is not to advocate for these extremes, but rather merely to note that they are exclusively available to governments.²⁵⁷

Although industry may be criticized as shirking its leadership role, a restrained approach allows it to avoid controversy to a greater degree and protect profits and reputation. For many industries battered by nearly two years of pandemic-related financial crises and controversies over issues

251. See *supra* notes 244–47 and accompanying text.

252. See, e.g., Catherine Rampell, *Where's the Nanny State When We Need It? Require the Vaccine!*, WASH. POST (Aug. 9, 2021, 6:30 PM), <https://www.washingtonpost.com/opinions/2021/08/09/wheres-that-nanny-state-when-you-need-it/> [https://perma.cc/5NQ7-YLZZ] (urging state and local governments to “play bad cop” and “be the fall guy” by requiring COVID vaccines for their constituents).

253. This statement by no means is intended to minimize the power of the private sector which may include punishment beyond employment-related penalties such as increased health insurance premiums for self-insured companies and denial of access to business premises and private transportation. See, e.g., Michael Lederman, Maxwell J. Mehlman & Stuart Youngner, *Defeat COVID-19 by Requiring Vaccination for All. It's Not Un-American, It's Patriotic.*, USA TODAY (Aug. 10, 2020, 12:28 AM), <https://www.usatoday.com/story/opinion/2020/08/06/stop-coronavirus-compulsory-universal-vaccination-column/3289948001/> [https://perma.cc/MH95-AUWW] (listing various means by which governments and the private sector could punish those refusing vaccination).

254. Mello, Silverman & Omer, *supra* note 228, at 1298.

255. Lederman, Mehlman & Youngner, *supra* note 253.

256. See Mello, Silverman & Omer, *supra* note 228, at 1298.

257. See *id.* (noting that criminal penalties and civil fines are poor public health policy choices as they disadvantage the poor, invite legal challenges, and fuel distrust of government without increasing vaccine uptake).

such as mask mandates, passivity in the face of government leadership may be a welcome development.²⁵⁸

VI. CONCLUSION

Regardless of their public or private origin, COVID vaccinations will remain contentious for the foreseeable future. Controversy swirls around questions of individual autonomy versus contributing to the collective good, the political weaponization of the pandemic in general, and vaccination in particular, all in an increasingly divided nation. In such a highly polarized society, the pandemic and vaccination have become additional logs on the cultural fires that have increasingly consumed the country in recent years.

Given these circumstances, skepticism regarding the efficacy of vaccination requirements is understandable. Successful public health policies rely heavily upon a substantial degree of voluntary cooperation.²⁵⁹ The underlying assumption in a cooperative approach is that the underlying policy is consistent with social attitudes and values.²⁶⁰ Although there is increasing support for required COVID vaccination, the consistency of such support with social norms is highly dependent on numerous factors beyond health considerations.²⁶¹ Cooperation may be compelled through requirements, but coercive policies lacking widespread social support are difficult and expensive to enforce and may promote evasion and workarounds.²⁶²

The social controversy regarding vaccination requirements has unavoidable spillover into the political arena. Mandates and other forms of vaccination coercion require political action, but such policies may encounter difficulties navigating the political process.²⁶³ Reiss and Weithorn aptly note that “not everything that’s normatively desirable is politically feasible.”²⁶⁴ The political feasibility of vaccination mandates is dependent on many of the same factors relevant to determining social support.²⁶⁵ This determination

258. See Rampell, *supra* note 252 (“Public officials must be willing to make unpopular, sometimes controversial decisions that take the heat off private industry and protect the public welfare.”).

259. Reiss & Weithorn, *supra* note 18, at 955 (contending that “[p]ublic health policy success typically depends on a substantial degree of voluntary cooperation”); see also Lawrence O. Gostin, Scott Burris, & Zita Lazzarini, *The Law and the Public’s Health: A Study of Infectious Disease Law in the United States*, 99 COLUM. L. REV. 59, 120–21 (1999).

260. See Reiss & Weithorn, *supra* note 18, at 955.

261. See, e.g., KFF COVID-19 Vaccine Monitor, *supra* note 17 (finding significant differences in vaccination rates and willingness to be vaccinated depending upon race, gender, age, education, income, geographic location, and political affiliation).

262. Reiss & Weithorn, *supra* note 18, at 955.

263. *Id.* at 956.

264. *Id.*

265. See *supra* notes 259–60 and accompanying text.

is further complicated by the unpredictability associated with human aspects of politics such as negotiation and compromise, the impact of data gleaned from polling, and self-preservation in the form of ensuring election, reelection, and continued incumbency.²⁶⁶ Electoral politics may result in changes to the composition of legislative bodies with a resultant impact on administrative agencies and the makeup of the judicial branch. Such changes contribute to unpredictability given their often unknown future impact.²⁶⁷ All of these factors may serve to render coercive health policies, such as vaccination mandates, politically unfeasible. That said, what is impossible today may prove within the realm of reality tomorrow, not only due to changes in the political climate, but also in response to escalating public health crises, such as rapidly expanding outbreaks of vaccine preventable disease and COVID's highly contagious Delta and Omicron variants in particular.²⁶⁸

These hurdles may cause some to dismiss mandates as socially unsupported and politically unpalatable. However, the alternative is even more distasteful, specifically, the surrender of public health to the control of a minority who refuse vaccination. Public health considerations are not limited to physical well-being, but also include the mental and emotional well-being of a population battered relentlessly by an unforgiving disease. This surrender is also a ceding of control over individual and collective economic well-being, which cannot be recovered without widespread vaccination.

Such a result is inconsistent with social welfare and is politically indefensible. It is also inconsistent with the law. One need look no further than *Jacobson v. Massachusetts* for rejection of minority control of public health. The Court recognized that the creation of a minority privilege to defy the will of the public presents “the spectacle . . . of the welfare and safety of an entire population being subordinated to the notions of a single individual who chooses to remain a part of that population.”²⁶⁹ The Court refused “to hold it to be an element in the liberty secured by the Constitution of the United States that . . . a minority of persons . . . should have the power thus to dominate the majority when supported in their action by the authority of the State.”²⁷⁰

266. See Reiss & Weithorn, *supra* note 18, at 956 & n.295.

267. *Id.* at 956 n.295.

268. *Id.* (noting that “increasing outbreaks of vaccine preventable diseases may facilitate adoption of new policies not previously politically-feasible”).

269. *Jacobson v. Massachusetts*, 197 U.S. 11, 37–38 (1905).

270. *Id.* at 38.

Such a result was indefensible in 1905 and should remain so over one hundred years later.

The COVID vaccines, not unlike their smallpox counterpart at issue in *Jacobson*, offer us a respite, if not a complete escape, from the pandemic and the opportunity to begin to repair the enormous damage inflicted in its wake. The country has been repeatedly reminded of this fact by members of the medical and public health communities. It is time the country heeds this advice and, by coercion or mandate, requires vaccination as a condition of employment in designated industries and sectors.