



# Peace Officers Research Association of California

## Legal Defense Fund

August 16, 2021

### PORAC LDF Members:

With the recent rise in COVID-19 cases, states are mandating public employees to either get vaccinated or submit to regular COVID-19 testing. President Biden announced a similar vaccine mandate for all federal workers. Law firms have fielded multiple inquiries about your employers mandating the vaccine. The first question is: Can you be terminated if you refuse to get the vaccine? The short answer is yes. Law firms will face an uphill battle trying to defeat vaccine mandates because vaccine mandates have been legal since the beginning of the 20th Century. This letter addresses the current law on vaccine mandates and related issues.

### States/Local Governments Can Mandate Vaccinations

Over 100 years ago, the Supreme Court decided that states can mandate that their citizens get vaccinated. In *Jacobson v. Commonwealth of Massachusetts* (1905) 197 U.S. 11, the Court upheld a local law in Cambridge, Massachusetts requiring inhabitants receive the smallpox vaccine. The Court's ruling relied on the principles that an individual's right to liberty and bodily autonomy is not absolute, and that states have the authority to take actions necessary to protect the health and wellbeing of their citizens (commonly referred to as states' "police powers").

The Supreme Court did not revisit government mandated vaccinations again until 1922 in *Zucht v. King* (1922) 260 U.S. 174. The *Zucht* Court held that mandating vaccines for only one group of people (in this case school children), did not violate individuals' Fourteenth Amendment rights to due process or equal protection. This same logic would likely apply to a mandate that first responders or public safety officers be vaccinated, even if the same requirement is not applied to the general public.

On August 12, 2021, U.S. Supreme Court Justice Barrett refused to block Indiana State University's COVID-19 vaccine mandate. (Docket No. 21A15). Eight students sought an emergency appeal of a ruling upholding the efficacy of *Jacobson*. *Klaassen v. Trustees of Indiana University* (7th Cir., Aug. 2, 2021, No. 21-2326) 2021 WL 3281209. Interestingly, the Seventh Circuit noted "this case is easier than *Jacobson* for the University, for two reasons." First, *Jacobson* sustained a vaccination requirement without any exceptions for adults, whereas the university permitted religious and medical exceptions. Second, the mandate did not apply to the entire public, but was only a condition of attending the university. The Court further noted that universities have many conditions of enrollment that individuals may not like, and students who do not wish to be vaccinated have ample educational opportunities elsewhere.

Multiple California appellate courts have upheld *Jacobson* and *Zucht*, ruling that when it comes to mandatory vaccinations, finding the need for public safety outweighs individuals' rights to privacy or bodily autonomy. In *Brown v. Smith* (2018) 24 Cal.App.5th 1135 and *Love v. State Dept. of Education* (2018) 29 Cal.App.5th 980, California appellate courts upheld Senate Bill No. 277, which repealed the personal belief exemption to California's immunization requirements for school children. Thus, the courts limited the exemptions available

(once full FDA approval is received) to: 1) a sincerely held religious belief, practice or observation; or 2) a medical accommodation.

In the Texas case *Bridges v. Houston Methodist Hospital* (S.D. Tex., June 12, 2021, No. CV H-21-1774) 2021 WL 2399994, Houston Methodist Hospital implemented a policy requiring staff to be vaccinated or face termination. A number of employees sued claiming wrongful termination after they refused to be vaccinated. The court cited *Jacobson* as proof that an employer can mandate vaccines. The court also dismissed the employees' arguments that the COVID-19 vaccine was distinguishable because it had only received "emergency" approval. The court concluded: "Bridges can freely choose to accept or refuse a COVID-19 vaccine; however, if she refuses, she will simply need to work somewhere else... Every employment includes limits on the worker's behavior in exchange for his remuneration. That is all part of the bargain." (*Id.* at p. \*2.) It is important to note that this case dealt with a private employer. However, the rationale is applicable to public employers and employees.

California courts will most likely uphold COVID-19 vaccine mandates as well. In December 2020, the Alameda County Superior Court upheld the University of California's flu vaccine mandate because it was "narrowly tailored" to reduce transmission of the flu. The court reiterated that there was no case in which a court struck down a mandatory vaccine imposed as a condition of attending school or college, as a condition of access to property for the purpose of employment, or as violating bodily autonomy.

It is well-settled law that governments can mandate that employees be vaccinated. However, this authority is not absolute. Government employers may still be required to make accommodations for people with medical conditions that make vaccination a risk or for people with sincere religious beliefs. These narrow exemptions are discussed below.

### **Medical Exemption**

An individual that suffers adverse medical consequences—such as an allergic reaction—to vaccinations may be entitled to a reasonable accommodation under the ADA and FEHA.

The ADA and FEHA require that employers provide a reasonable accommodation for an employee's disability. The employee must first put their employer on notice and request accommodation to begin an interactive process. In addition, employees must put forward medical documentation to substantiate their claim of a disability.

### **Religious Exemption**

Individuals with sincerely held religious objections to the COVID-19 vaccine may also seek a religious accommodation to a vaccination requirement under Title VII of the Civil Rights Act.

An employer must make reasonable accommodations for employees sincerely held religious beliefs unless an employer demonstrates that he is unable to reasonably accommodate... *without undue hardship* on the conduct of the employer's business. Thus, an employer is obligated to try to reasonably accommodate an employee's religious beliefs to the extent it does not cause an undue hardship on the business, and failure to do so violates Title VII. This does not mean that the employer is required to offer an employee his or her preferred accommodation. Rather, the accommodation offered simply must be reasonable. Thus, if the employee does not accept the reasonable accommodation, the employee may be terminated.

## **Right to Bargain over the Impacts and Effects of Mandatory Vaccinations**

While mandating vaccination is legal, *the impacts and effects of such a decision fall within the scope of bargaining*. PERB recently held the decision to adopt an influenza vaccination policy was outside the scope of representation because the need to protect public health was not amenable to collective bargaining or, alternatively, outweighed the benefits of bargaining over the policy. However, the University's implementation of the vaccination policy constituted a unilateral change, in violation of HEERA, because the University was not privileged to implement the policy before completing negotiations over its effects. (*Regents of the University of California* (2021) PERB Decision No. 2783-H.) The University had not met and conferred in good faith before implementation of the policy.

Labor leaders should demand to bargain over the impacts and effects of any vaccination policy. And, if the failure to get vaccinated could lead to discipline, the policy itself may be subject to decision bargaining. Employers must provide notice and opportunity to meet and confer prior to mandating vaccines. Employers can offer employees incentives to get vaccines, but it cannot be so large that it is coercive.

## **Vaccine Mandates are Not Forced Medical Experiments or Human Testing**

An employer cannot be criminally liable for mandating vaccines. Only the person who is primarily responsible for the conduct of a medical experiment and who willfully fails to obtain the subject's informed consent and thereby exposes a subject to a known substantial risk of serious injury shall be guilty of a misdemeanor punishable by imprisonment in the county jail for a period not to exceed one year or a fine of fifty thousand dollars (\$50,000), or both. (H&S Code § 24176.)

Employees are not being forced to take the vaccine. They can freely choose not to take the vaccine. Moreover, the employer is not testing the vaccine on its employees. Human testing occurred before the vaccine was authorized for emergency use. Pfizer and other pharmaceutical companies tested vaccines on human subjects. Those human subjects gave their consent to be tested. An example of forced human testing would look like the following: co-workers come into your office, hold you down, and jab you with the vaccine without consent. That is not happening here. Your employer is mandating the vaccine to keep others safer. If you do not want to take the vaccine, you do not have to take the vaccine. However, the employer may terminate you because you are not abiding by the conditions of your employment.

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See next page for concurring law firms:

**We, the following law firms, concur with the opinions and conclusions set forth above.**

- Adams, Ferrone & Ferrone
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