



UNIVERSITY OF CALIFORNIA
HASTINGS SCHOOL OF LAW

COVID-19 and Mandates

Dorit R. Reiss



Conflict of Interest Statement:

- The family owns stock (regular) in GSK.



Presentation Plan:

Structure

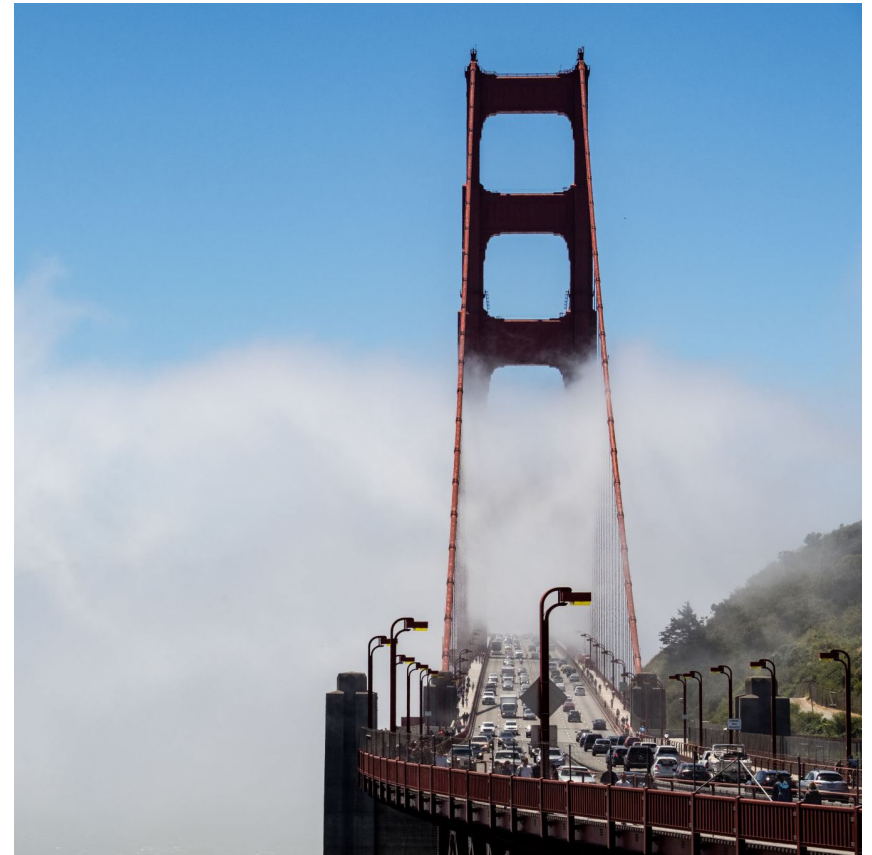
- What's going on?
- Employers mandates:
 - General
 - EUA
 - Other limits
- State and federal
- Bills limiting mandates

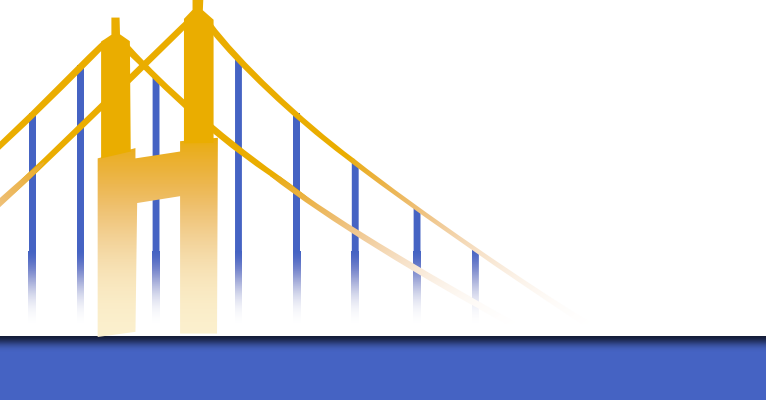




Vaccine mandates are not new:

- School mandates.
- Employer mandates.
- Others?





MANDATES IN THE WORKPLACE

Healthcare Personnel!

Are your vaccinations up-to-date?

You should be immune to:

- ✓ **INFLUENZA**
- ✓ **HEPATITIS B**
- ✓ **MEASLES/MUMPS/RUBELLA**
- ✓ **TETANUS/DIPHTHERIA/PERTUSSIS**
- ✓ **VARICELLA (CHICKENPOX)**



**Protect your patients.
Protect your family.
Protect yourself.**

Get Vaccinated!

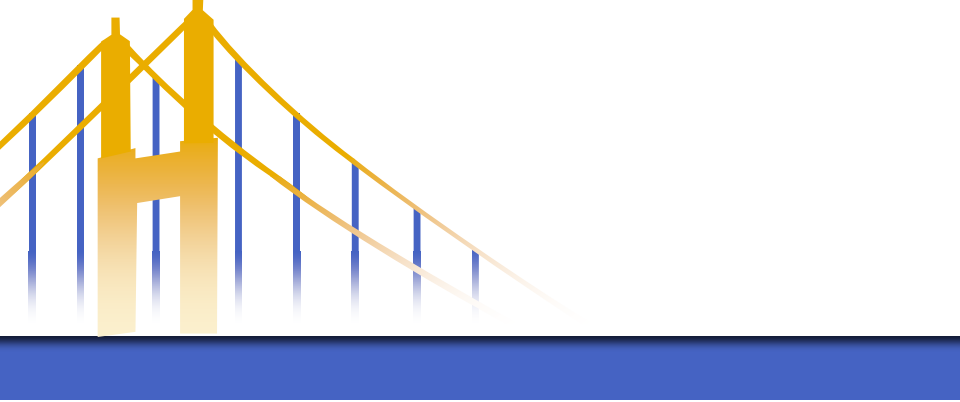
HEALTH CARE WORKERS VACCINATIONS



Limits:

- EUA
- Civil Rights Act of 1964
- ADA
- Collective Bargaining
- State law





**CAN YOU REQUIRE A
VACCINE UNDER AN EUA?**



Emergency Use Authorizations and Vaccines

S. 564(e)(1)(A)(ii)(III)

Required Conditions

“to the extent practicable given the applicable circumstances described in subsection (b)(1),
.... establish such conditions on an authorization under this section as the Secretary finds necessary or appropriate to protect the public health, including the following:



Emergency Use Authorizations and Vaccines

S. 564(e)(1)(A)(ii)(III)

(ii) Appropriate conditions designed to ensure that individuals to whom the product is administered are informed—

(III) of the option to accept or refuse administration of the product, of the consequences, if any, of refusing administration of the product , and of the alternatives to the product that are available and of their benefits and risks.”



EUA debate:

No mandate:	Mandates allowed:
“...option to accept or refuse”= no mandate.	Law mentions consequences of refusal.
Preemption by federal law.	Law does not mention private employers or states at all.
FDA and CDC statements.	CDC revised; agency statements in non-authoritative forms.
Vaccine experimental – cannot ethically mandate.	Vaccines given to over 150 million people in United States alone, strong safety and effectiveness data.



Developments:

➤ Bridges v. Houston Methodist Hospital

➤ OLC Memo



Civil Rights Act of 1964:

- Title VII
- Employers with 15 or more employees..
- Cannot “discriminate against, any individual because of his race, color, religion, sex, or national origin...”



Civil Rights Act of 1964 in practice:

- If an employee has a –
 - Sincere
 - Religious
 - Objection to a workplace rule,
- Need to provide “reasonable accommodation”
- Unless it’s an undue burden.





Civil Rights Act, 1964:

- Sincere religious belief:
 - *Fallon v. Mercy Catholic Center: Three-part test:*
 1. Religion addresses fundamental and ultimate questions.
 2. Religion = comprehensive belief system, not isolated teaching.
 3. Religion is often recognized by formal and external signs.

Policing sincerity of religious exemptions is hard.

- Cannot require letter from clergy.
- Cannot refuse just because official religion pro-vaccine.
- Test: sincerity, not rationality.
- Can require letter.

BELIEVE IT OR NOT



IT REALLY EXISTS OR NOT

By Robin A Smile, after an original version by Vian - This is a retouched picture, which means that it has been digitally altered from its original version. Modifications made by Robin A Smile after a first version by Vian. This image includes elements that have been taken or adapted from this file: The meeting of day and night in a mountain valley - photomontage.jpg. This image includes elements that have been taken or adapted from this file: Braunschweig Brunswick Einhorn (2006).JPG. This image includes elements that have been taken or adapted from this file: Rainbow-diagram-ROYGBIV.svg. This image includes elements that have been taken or adapted from this file: 37 coma berenices.jpg., CC BY-SA 4.0, <https://commons.wikimedia.org/w/index.php?curid=87732844>

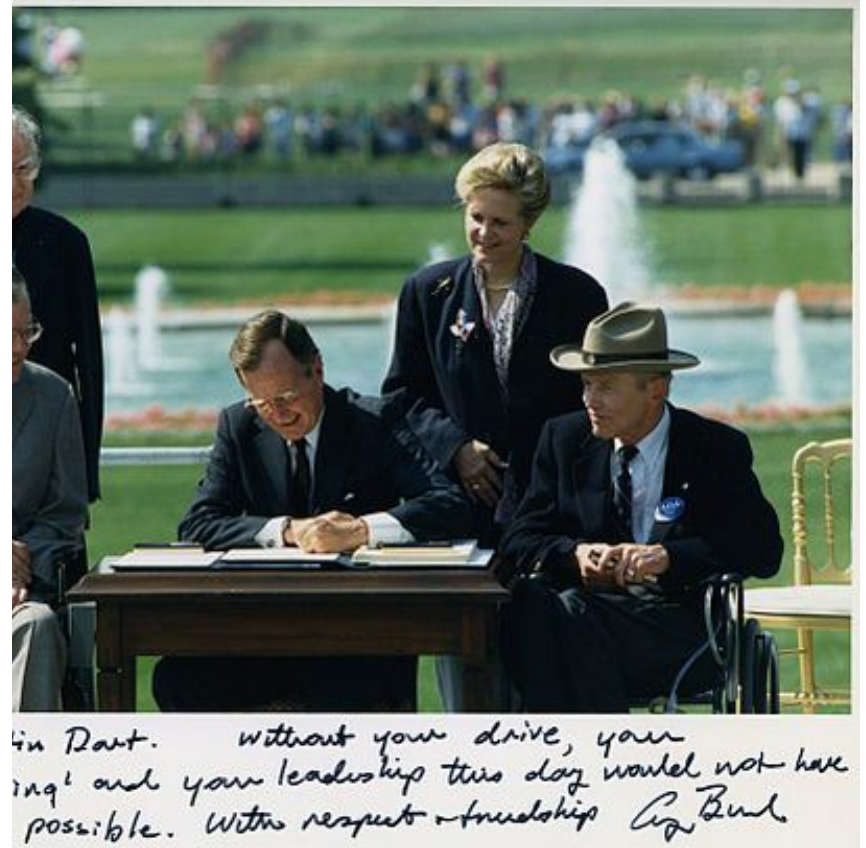
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- CDC 2019-nCoV Reagent Kit (R1)**
 For Research Use Only (RUO)
 Primary and secondary reagents for the detection of 2019-nCoV RNA using RT-PCR technology.
Not for Use in Diagnostic Procedures
 Capable of detecting 2019-nCoV RNA
 Store in the dark and at 2-8°C for up to 12 months.
 Refer to product insert for instructions for use.
 Kit Contents:
 1. PCR reagent (20 µL) and primer (20 µL) (1 vial)
 2. PCR reagent (20 µL) and primer (20 µL) (1 vial)
 3. PCR reagent (20 µL) and primer (20 µL) (1 vial)
 4. PCR reagent (20 µL) and primer (20 µL) (1 vial)

A stylized graphic of a bridge or structure, featuring yellow vertical supports and blue diagonal cables against a white background.

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American With Disabilities Act

- Disability?
- Accommodation.
- Undue burden?
- Direct threat?



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Factors for undue burden under ADA:

- The cost of the accommodation
 - including sources available to offset it;
- The resources of the facility, size and numbers of employees.
- The type of operations.
- The impact of the accommodation on the facility's operations and on other employees.

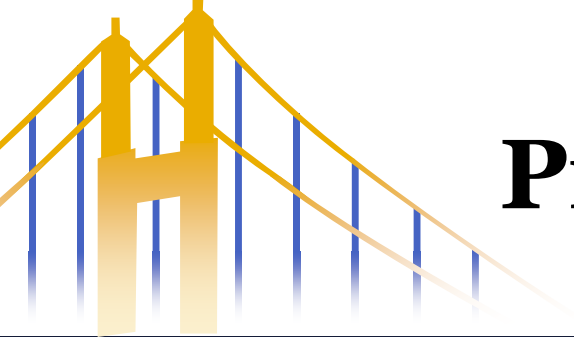


Collective bargaining?

- Is there a union?
- Does collective bargaining agreement require negotiating with union before mandate?




Alpha Stock Images - <http://alphastockimages.com/>
Original Author: Nick Youngson - link to - <http://www.nyphotographic.com/>
Original Image: <http://www.picserver.org/highway-signs2/c/collective-bargaining.html>



Privacy in the workplace

HIPAA vs HIPPA vs HIPPO

	HIPAA	HIPPA	HIPPO
Name	Health Insurance Portability and Accountability Act	Health Information Privacy Protection Act	Hippopotamus
Protects health coverage for people who change jobs.	✓	✗	
Requires medical providers to give patients access to their personal health information	✓	✗	
Requires medical providers to protect the privacy of health information	✓	✓	
Prohibits stores and restaurants from asking for proof of vaccination	✗	✓	
Prohibits stores and restaurants from requiring you to wear a mask	✗	✓	
Prohibits anyone from asking you for any health information for any reason	✗	✓	
History	Passed by Congress and signed into law by President Bill Clinton in 1996.	Invented by people on the internet during the COVID-19 pandemic.	
Is it a real	✓	✗	✓

A stylized graphic of a bridge with yellow towers and blue cables, positioned in the top left corner of the slide.

The ADA and privacy

- Just asking for vaccination status is not a “disability related inquiry”.

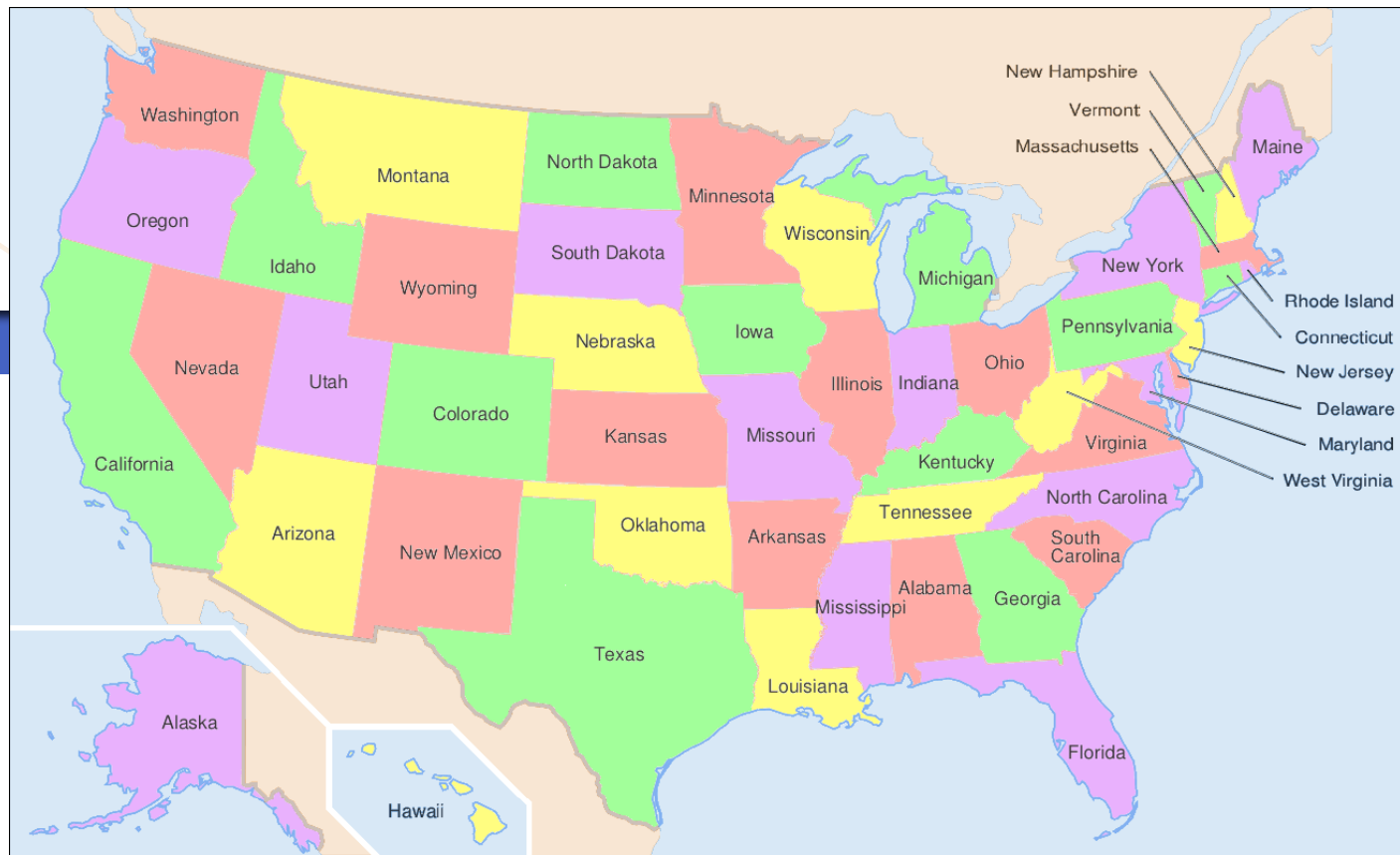
<https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>

- Medical exemptions are disability related inquiry. They’re –
 - Allowed.
 - Require careful handling and privacy protections.



California Confidentiality of Medical Information Act

- Okay to ask for information for a medical exemption.
- Required to protect any medical information provided.
- Can you require a mask?
 - Definitely, if there are other exemptions (e.g. religious).
 - Likely, if only medical exemption.

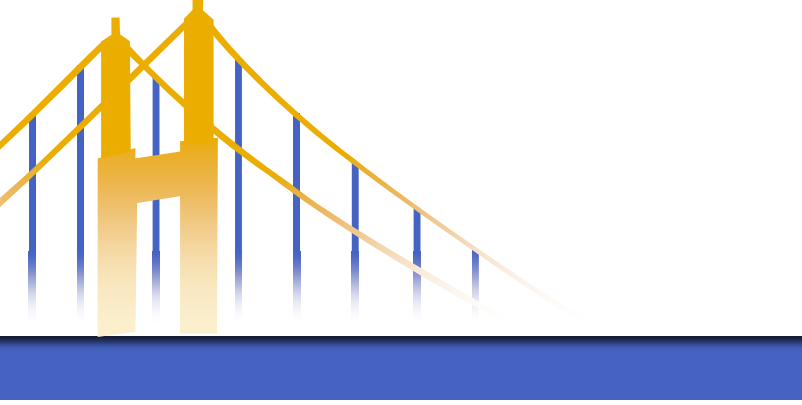


STATE MANDATES

States have plenary authority, but...

- *Jacobson v. Massachusetts* –
 - Power, but:
 - Circumstances.
 - Limits.
- New York, 2019.
- Narrower is better.
- EUA?
- Religious freedom?





THE FIRST AMENDMENT'S FREE EXERCISE CLAUSE

The Federal Framework:

Jacobson v.
Mass.

1905

Cantwell v.
Conn.

1940

The Federal Framework:

Employment
Division v.
Smith

Church of
Lukumi
Babalu

RDC v.
Cuomo

1991

1993

2020



Fulton v. City of Philadelphia

- Not clear, especially with shadow docket.
- No majority to overturn *Smith* – yet.
- *Lukumi* exception: hostility to religion.
- *Fulton* exception: no discretionary exception.
- Any secular exception?
- Medical exception?





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A stylized graphic of a bridge with yellow towers and blue and yellow cables, located in the top left corner of the slide.

State laws limiting vaccine passports

- Governor E.Os.
- Statutes.





Montana:

“..it is an unlawful discriminatory practice for: (a) a person or a governmental entity to refuse, withhold from, or deny to a person any local or state services, goods, facilities, advantages, privileges, licensing, educational opportunities, health care access, or employment opportunities based on the person's vaccination status or whether the person has an immunity passport; “





North Dakota

“A private business located in this state may not require a patron or customer to provide any documentation certifying vaccination or post-transmission recovery to gain access to, entry upon, or services from the business. This subsection does not apply to a health care provider including a long-term care provider.”





Iowa

“Notwithstanding any provision of law to the contrary, a business or governmental entity shall not require a customer, patron, client, patient, or other person who is invited onto the premises of the business or governmental entity to furnish proof of having received a vaccination for COVID-19,..”



IOWA





Montana:

“..it is an unlawful discriminatory practice for: (b) an employer to refuse employment to a person, to bar a person from employment, or to discriminate against a person in compensation or in a term, condition, or privilege of employment based on the person's vaccination status or whether the person has an immunity passport;”





Thank you!

Questions? Comments?

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