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Navigating the Legal Challenges of COVID-19 Vaccine Policies in Private Employment: School Vaccination Laws Provide a Roadmap

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**NAVIGATING THE LEGAL CHALLENGES OF COVID-19
VACCINE POLICIES IN PRIVATE EMPLOYMENT: SCHOOL
VACCINATION LAWS PROVIDE A ROADMAP**

Pamela Abbate-Dattilo[†]

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I. INTRODUCTION

COVID-19 created unprecedented challenges for private employers in the United States. Employers—many of whom were technologically unprepared—were forced to rapidly adapt from their on-site operations to a virtual environment supported by fully-remote employees.

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That, in addition to staying abreast of ever-evolving executive orders, new legislation and regulations, COVID-19 guidelines from federal and state public health officials, and straining to provide a host of flexible accommodations to employees with concerns about workplace safety and exposure to COVID-19. With several COVID-19 vaccines now available to the public, many of these challenges may soon be in the rearview. At least the hope is that continued distribution of the COVID-19 vaccine to the public at-large will bring herd-immunity and a return of normalcy to the American workplace.

However, the COVID-19 vaccine *itself* has already started to bring new chaos and legal challenges to private employment. In many states, the vaccine became available to the general public beginning in April 2021,¹ with the White House announcing that all American adults must be eligible for vaccination no later than May 1, 2021.² While public confidence in the vaccine has grown over time, currently, only 60-70% of Americans report that they are definitely or likely going to receive the vaccine, and only 32% have been fully vaccinated as of May 1, 2021.³ At these rates, the United

¹ Braktkton Booker, *Fauci Predicts U.S. Could See Signs of Herd Immunity by Late March or Early April*, NPR (Dec. 15, 2020), <https://www.npr.org/sections/coronavirus-live-updates/2020/12/15/946714505/fauci-predicts-u-s-could-see-signs-of-herd-immunity-by-late-march-or-early-april> [https://perma.cc/NYY4-MN9R].

² Chas Danner & Matt Stieb, *What We Know About the U.S. COVID-19 Vaccine Distribution Plan*, N.Y. MAG. (Dec. 18, 2020), <https://nymag.com/intelligencer/2020/12/what-we-know-about-u-s-covid-19-vaccine-distribution-plan.html> [https://perma.cc/X3B5-W7JX] (“Members of the general public who are not in high-risk groups will probably be able to start getting access to COVID-19 vaccines beginning in the early spring, and experts seem optimistic that, if everything goes according to plan, most Americans will be able to be vaccinated by June.”); *Fact Sheet: President Biden to Announce all Americans to be Eligible for Vaccination by May 1, 2021, Puts the Nation on a Path to get Closer to Normal by July 4th*, WHITE HOUSE (Mar. 11, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/03/11/fact-sheet-president-biden-to-announce-all-americans-to-be-eligible-for-vaccinations-by-may-1-puts-the-nation-on-a-path-to-get-closer-to-normal-by-july-4th/> [https://perma.cc/Z6EH-837H].

³ Cary Funk & Alec Tyson, *Intent to get a COVID-19 Vaccine Rises to 60% as Confidence in Research and Development Process Increases*, PEW RSCH. CTR. (Dec. 3, 2020), <https://www.pewresearch.org/science/2020/12/03/intent-to-get-a-COVID-19-vaccine-rises-to-60-as-confidence-in-research-and-development-process-increases/> [https://perma.cc/4PCP-PJH8] (“As vaccines for the coronavirus enter review for emergency use by the U.S. Food and Drug Administration, the share of Americans who say they plan to get vaccinated has increased as the public has grown more confident that the development process will deliver a safe and effective vaccine. Still, the U.S. public is far from uniform in views about a vaccine. A majority says they would be uncomfortable being among the first to take it, and a sizable minority appear certain to pass on getting vaccinated.”); Geoff Brumfiel, *Vaccine Refusal May Put Herd Immunity at Risk, Researchers Warn*, NPR (Apr. 7, 2021), <https://www.npr.org/sections/health-shots/2021/04/07/984697573/vaccine-refusal-may-put-herd-immunity-at-risk-researchers-warn> [https://perma.cc/Q442-9L9M]; *Covid-19 Vaccinations in the United States*, CDC (May 5, 2021), <https://covid.cdc.gov/covid-data->

States may not reach “herd-immunity,” which is generally defined as 80% of the population vaccinated and/or with antibodies.⁴ Additionally, there is no guarantee that everyone who initially received the vaccine will receive additional booster shots if needed once the length of the vaccine’s effectiveness is determined. As a result, the availability and distribution of the COVID-19 vaccine to the general public has once again thrust private employers in the U.S. into uncertainty. This time, the questions are: (1) whether employers should require the COVID-19 vaccine as a condition of continued employment or not; and, relatedly, whether employers should allow employees to choose for themselves whether to vaccinate but then place restrictions on non-vaccinated employees that prohibit them from entering the office or that otherwise limit their working interactions with employees, customers, vendors, and the public.

Health and government officials are pushing for widespread vaccination. Some states may go so far as to require vaccination with very limited exemptions.⁵ It seems unlikely, however, that a majority of states will implement such a requirement,⁶ and states that do require the public to receive the COVID-19 vaccine will likely face legal challenges that will play out in the courts for years.⁷

tracker/#vaccinations [https://perma.cc/J4Z3-3GET] (showing that 32% of Americans were fully vaccinated as of May 2021).

⁴ See World Health Organization, *Coronavirus Disease (COVID-19): Herd Immunity, Lockdowns and COVID-19*, WORLD HEALTH ORG. (Dec. 31, 2020), https://www.who.int/news-room/q-a-detail/herd-immunity-lockdowns-and-covid-19?gclid=CjwKCAjwjuqDBhAGEiwAdX2cj2lppPHveu_ACVht9wjBl5tW-Sd9uVwECNq-EDjMKHjP9TXWJclABoC2Y4QAvD_BwE# [https://perma.cc/TF4A-IJ8M].

⁵ See, e.g., Susan DeSantis, *New York State Bar Association Calls Upon State to Consider Mandating a Safe and Effective Vaccine if Voluntary Measures Fail to Protect Public Health*, N.Y. ST. BAR ASS’N (Nov. 7, 2020), <https://nysba.org/new-york-state-bar-association-calls-upon-state-to-consider-mandating-a-safe-and-effective-vaccine-if-voluntary-measures-fail-to-protect-public-health/> [https://perma.cc/FV8B-D7UB].

⁶ “[I]n the United States today, where even mask mandates are controversial, it is unlikely that many states will enact a compulsory vaccination policy for everyone.” Debbie Kaminer, *Could Employers and States Mandate COVID-19 Vaccinations? Here’s What the Courts Have Ruled*, CONVERSATION (July 21, 2020), <https://theconversation.com/could-employers-and-states-mandate-COVID-19-vaccinations-heres-what-the-courts-have-ruled-142330> [https://perma.cc/T9B8-SWCF] (observing further that states are unlikely to mandate the COVID-19 vaccine because “there is a risk that heavy-handed public health tactics can backfire and escalate tensions, increase mistrust of government and unintentionally increase the influence of the anti-vaccination movement.”).

⁷ See, e.g., *Jacobson v. Massachusetts*, 197 U.S. 11, 39 (1905), when the U.S. Supreme Court upheld the constitutionality of a state law that required all adults to get a smallpox vaccine or be fined. While this 100-year-old case is still good law supporting a state’s right to require public vaccination to promote public health and safety, there are multiple dimensions to a mandatory COVID-19 vaccine law that simply were not addressed in that case and could be subject to challenge. States should not be overconfident in their reliance on *Jacobson* in enacting blanket mandatory vaccine laws, especially given the current composition of the U.S. Supreme Court.

In the absence of a nationwide or statewide vaccine mandate, focus may shift to places where non-government actors will best be able to influence public vaccination: namely, places of public accommodation and private employment. In the coming months, private employers may find themselves facing immense social and political pressure to require their employees to obtain the COVID-19 vaccine. Employers may also find a competitive advantage in recruiting employees or offering services to the public if they are able to represent that they provide a “safe” environment due to a mandatory COVID-19 vaccine policy.

Non-healthcare employers requiring vaccines as a condition of employment have not been the norm throughout U.S. history, and would likely be met with resistance by a formidable segment of working Americans. A dramatic pivot in employer-vaccine policies also raises a myriad of legal issues, including, but not limited to: (1) refining the legally recognized exemptions for objecting employees; (2) the potential disparate impact of such policies on protected classes of employees; (3) employer liability for vaccine reactions by employees whom the employer required to obtain the vaccine; and (4) employer liability for the transmission of COVID-19 by employees whom the employer *allows* to be *unvaccinated*.

This Article examines the pre-COVID-19 legal paradigm for mandatory vaccine policies adopted by private employers and identifies the obstacles, ambiguities, and unresolved questions presented by the existing paradigm—all of which will likely be exasperated if mandatory vaccine policies are implemented on a wider scale. In light of these challenges, this Article evaluates the potential for state legislatures to regulate employer-mandated vaccine policies by modeling legislation off existing school vaccine laws in fifteen states.

II. THE EXISTING LEGAL FRAMEWORK: PRE-COVID-19 LEGAL CONSIDERATIONS FOR MANDATORY VACCINE POLICIES.

Some hospitals and other medical providers began adopting employer-mandatory vaccine policies in the mid-2000s—approximately fifteen years before the COVID-19 pandemic began.⁸ As a result, there is existing legal precedent with respect to mandatory vaccine policies in private employment, including employee challenges to enforcement of such policies. Section II summarizes the pre-COVID-19 legal landscape with

⁸ See generally *Robinson v. Children’s Hosp. Bos.*, No. CV 14-10263-DJC, 2016 WL 1337255, at *5 (D. Mass. Apr. 5, 2016). In deciding an employee’s challenge to a mandatory vaccine policy, the *Robinson* court noted the absence of other cases addressing mandatory vaccine policies in employment, citing only a 2007 case addressing a healthcare provider’s vaccine policy. See *id.* Our own extensive review of case law did not uncover any cases challenging *employer* mandatory vaccine policies prior to 2007; therefore, it appears that these policies did not take hold until the mid-2000s.

respect to mandatory vaccine policies implemented by private employers, identifying the legally recognized exemptions that employers must account for in implementing mandatory COVID-19 vaccine policies.

A. Private Employers Are Free to Impose a Mandatory Vaccine Policy; However, Few Non-healthcare Employers Elected to do so Pre-COVID-19.

Absent a state law directly addressing a person's right to refuse vaccines, private employers have the ability to mandate vaccines among their workforce, so long as they honor the legally recognized exceptions discussed in Section II(B)-(D). Unlike public employers, private employers need not be concerned about the Fourteenth Amendment of the U.S. Constitution, which prohibits the "State" from depriving its people of "life, liberty, or property, without due process of law."⁹ Similarly, the First Amendment of the U.S. Constitution—which protects the freedoms of speech and religion—also takes aim at government action.¹⁰ Therefore, courts have routinely recognized that neither the Fourteenth nor First Amendment "apply to private employers."¹¹ Unconstrained by the U.S. Constitution, private employers are free to enact mandatory vaccination policies so long as such policies do not run afoul of existing federal or state statutes.

Nevertheless, outside of health care providers, the existence of mandatory vaccine policies in the private employment sector was rare pre-COVID-19. As one author noted in a 2017 article that thoroughly examined mandatory vaccine policies among private employers:

Private employers do not face the same constitutional concerns as government employers and the vast majority of states have a presumption of at-will employment. Consequently, there are few legal barriers to vaccine mandates by private employers. Yet few employers outside of the healthcare industry have imposed such mandates. In

⁹ U.S. CONST. amend. XIV, § 1.

¹⁰ U.S. CONST. amend. I.

¹¹ *Harris v. Lee*, No. 13-151-DLB, 2014 WL 1612698, at *2 (E.D. Ky. Apr. 22, 2014) (citing *Regents of University of California v. Bakke*, 438 U.S. 265, 418 n.20 (1978) (Stevens, J., concurring in the judgment in part and dissenting in part)). An employee "cannot recover against a private employer based on an alleged violation of his or her First and Fourteenth Amendment rights without providing any explanation of how the employer could be bound by constitutional restrictions on government." *Childress v. Puckett Mach. Co.*, No. 3:07CV00237(HTW)(LRA), 2010 WL 11682141, at *4 (S.D. Miss. Aug. 31, 2010) (citing *Bradley v. Lockheed Martin Corp.*, 275 Fed. App'x 396, 397 (5th Cir. 2008)); see also *Price v. Lockheed Martin Corp.*, 261 Fed. App'x 761, 764 (5th Cir. 2008); *U.S. v. Reyes*, 87 F.3d 676, 680 (5th Cir. 1996) ("recogniz[ing] that the government even in its capacity as employer is nevertheless subject to certain constitutional restrictions that are inapplicable to the private employer.").

fact, many law firms have published newsletters or blog posts discouraging their clients from implementing mandatory vaccination policies and instead suggest that employers educate their employees and encourage vaccination.¹²

Presumably, employers have decided up to this point that mandating vaccines is not a priority for one or more of the following reasons: (1) the absence of a public health crisis/pandemic in recent years (i.e., the need for such a policy); (2) the administrative headache of enforcing a mandatory vaccine policy and the required exemptions; (3) concerns about invading employee privacy; (4) the unpopular nature of such a policy; and/or (5) concerns regarding liability in the event of an adverse reaction to a vaccine. Without a doubt, COVID-19 has dramatically changed this calculus. Employer interest in mandatory vaccine policies has reached unprecedented levels now that a COVID-19 vaccine is available to the public.¹³ In early 2021, COVID-19 vaccines were limited in distribution to healthcare workers and first responders.¹⁴ Shortly after, the vaccine became available to larger groups, and most states are currently vaccinating individuals over the age of 18; with increased vaccination rates, businesses are beginning to reopen.¹⁵ Employers are now faced with two pressing questions. First, can employers require the COVID-19 vaccine as a condition of employment with both current employees and new hires? Second, even if employers can enact such a policy, should they?

The answer to the first question is far easier. Unless new federal or state laws are passed regulating otherwise, private employers can implement mandatory vaccine policies subject only to: (1) the obligation to provide religious accommodations under Title VII of the Civil Rights Act of 1964 (and corresponding state laws) unless doing so would be an undue hardship;¹⁶ (2) the obligation to provide reasonable accommodations under the Americans with Disabilities Act (and corresponding state laws) unless

¹² Teri Dobbins Baxter, *Employer-Mandated Vaccination Policies: Different Employers, New Vaccines, and Hidden Risks*, 2017 UTAH L. REV. 885, 919 (2017), <https://dc.law.utah.edu/ulr/vol2017/iss5/2> [<https://perma.cc/D6WT-8N2G>].

¹³ Support for this statement is anecdotal. Hundreds of blog posts and articles have been published about this topic in recent months. Moreover, the author of this Article is a full-time practicing attorney, focusing in the area of employment law. The author has received an unprecedented number of inquiries from private employers about whether they can, or should, require the COVID-19 vaccine over the past four to five months.

¹⁴ U.S. Nat'l Libr. of Med., *COVID-19 Vaccines*, MEDLINEPLUS, <https://medlineplus.gov/covid19vaccines.html> [<https://perma.cc/33AS-RMTD>].

¹⁵ *COVID Data Tracker*, CTRS. FOR DISEASES CONTROL & PREVENTION (May 6, 2021), <https://covid.cdc.gov/covid-data-tracker/#datatracker-home> [<https://perma.cc/6AYG-SW9R>].

¹⁶ See *infra* Section II(B).

doing so would be an undue hardship;¹⁷ and (3) pregnancy discrimination/accommodation laws, both state and federal.¹⁸

As for the second question, the answer turns on whether the employer is a healthcare provider, first responder, or other entity through which its employees frequently interact with elderly or high-risk individuals. It is likely that employers who fall into that category will, in time, require the COVID-19 vaccine—even if they do not do so immediately.¹⁹ As for all other private employers, the question of whether an employer *should* require vaccines will likely turn on community infection rates, whether employees will continue to work remotely or return to in-person, whether employees travel or otherwise are at a higher risk for contracting COVID-19, and whether the employer can achieve desired vaccination rates through less aggressive means—such as through education and an incentive program. Additionally, employers will want to consider the unique dynamics of their workforce and decide whether they are willing and prepared to respond to the potential backlash from employees that may come with mandating vaccines.

B. Private Employers Must Consider Religious Accommodations Under Title VII in Enforcing Any Mandatory Vaccine Policy.

In all fifty states, employers must be mindful of a potential exemption for employees from mandatory vaccine policies under Title VII

¹⁷ See *infra* Section II(C).

¹⁸ See *infra* Section II(D).

¹⁹ Many employers, including healthcare employers, have been reluctant to require the COVID-19 vaccine at this time in part because the vaccines are not fully licensed by the FDA yet. Rather, as of the date this Article was written, the COVID-19 vaccines have been authorized under an Emergency Use Authorization (EUA). According to the FDA, an EUA is a “mechanism to facilitate the availability and use of medical countermeasures, including vaccines, during public health emergencies.” See *Emergency Use Authorization for Vaccines Explained*, FDA (Nov. 20, 2020), <https://www.fda.gov/vaccines-blood-biologics/vaccines/emergency-use-authorization-vaccines-explained> [<https://perma.cc/9ADD-GZ5W>].

Under an EUA, FDA may allow the use of unapproved medical products, or unapproved uses of approved medical products in an emergency to diagnose, treat, or prevent serious or life-threatening diseases or conditions when certain statutory criteria have been met, including that there are no adequate, approved, and available alternatives.

Id. See also *Understanding the Regulatory Terminology of Potential Preventions and Treatments for COVID-19*, FDA (Oct. 22, 2020), <https://www.fda.gov/consumers/consumer-updates/understanding-regulatory-terminology-potential-preventions-and-treatments-covid-19> [<https://perma.cc/Z978-DDYE>] (“The EUA process is different than an FDA approval or clearance. Under an EUA, in an emergency, the FDA makes a product available to the public based on the best available evidence, without waiting for all the evidence that would be needed for FDA approval or clearance.”).

of the Civil Rights Act of 1964, 78 Stat. 253, as amended (“Title VII”), which requires accommodations for religious beliefs and practices.²⁰ Title VII prohibits two categories of employment practices. It is unlawful for an employer:

- (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, *religion*, sex, or national origin; or
- (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s race, color, religion, sex, or national origin.²¹

As the U.S. Supreme Court recently explained in *EEOC v. Abercrombie & Fitch Stores, Inc.*,²² a religious discrimination case: “[t]hese two proscriptions, often referred to as the ‘disparate treatment’ (or ‘intentional discrimination’) provision and the ‘disparate impact’ provision, are the only causes of action under Title VII.”²³

Religion has long been a protected class under Title VII. And under Title VII, the word “religion” is broadly defined to “includ[e] all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that [they are] unable to reasonably accommodate” a “religious observance or practice without undue hardship on the conduct of the employer’s business.”²⁴ Therefore, with respect to religion, the disparate-treatment provision forbids employers to: fail to hire, discharge or otherwise discriminate against an applicant “because of . . . ‘such individual’s . . . religion’ (which includes [their] religious practice).”²⁵ The obligation not to refuse to hire or discharge any individual because of such individual’s “religious observance and practice” imposes on employers an affirmative duty to provide reasonable religious accommodations.²⁶ “The definition imposes on an employer an ‘affirmative duty’ to reasonably accommodate the ‘religious observance and practices of its employees, unless the employer can demonstrate that such an accommodation would

²⁰ 42 U.S.C. § 2000e-2(a).

²¹ *Id.* (emphasis added).

²² 135 S. Ct. 2028 (2015).

²³ *Id.* at 2032.

²⁴ *Id.* (citing 42 U.S.C. § 2000e(j)).

²⁵ *Id.*

²⁶ *Id.* at 2034.

cause undue hardship to the conduct of its business.”²⁷ At times, even facially-neutral policies must give way to an applicant/employee’s religious observance and practice.²⁸

Employers run afoul of the religious discrimination provisions of Title VII not only when the desire to avoid an accommodation is the “but for” cause for the adverse employment decision, but when the desire to avoid an accommodation is “a motivating factor.”²⁹ Again, as the U.S. Supreme Court has explained:

An employer may not make an applicant’s religious practice, confirmed or otherwise, a factor in employment decisions. For example, suppose that an employer thinks (though . . . does not know for certain) that a job applicant may be an orthodox Jew who will observe the Sabbath, and thus be unable to work on Saturdays. *If the applicant actually requires an accommodation of that religious practice, and the employer’s desire to avoid the prospective accommodation is a motivating factor in [their] decision, the employer violates Title VII.*³⁰

Employees with firmly and sincerely held religious beliefs against vaccines may avail themselves of Title VII’s protections under existing case law, if and when private employers attempt to mandate vaccines through facially-neutral vaccine policies. Employees will need to first establish that their opposition to a COVID-19 vaccine is a “sincerely held” religious belief—which “is more often than not a difficult and delicate task.”³¹ But assuming employees clear that hurdle, employers will have to make exceptions from their facially-neutral policies to accommodate employees absent a showing that the accommodation would cause “undue hardship” to its business.³²

As of early 2016, there were few cases that addressed mandatory vaccine policies under Title VII.³³ From mid-2016 to the present, there have

²⁷ *Peterson v. Wilmar Commc’ns, Inc.*, 205 F. Supp. 2d 1014, 1018 (E.D. Wis. 2002) (citing *EEOC v. Ilona of Hungary, Inc.*, 108 F.3d 1569, 1574 (7th Cir. 1997) (citing 42 U.S.C. § 2000e(j))).

²⁸ *Abercrombie*, 135 S. Ct. at 2034. (“When an applicant requires an accommodation as an ‘aspect[] of religious ... practice,’ it is no response that the subsequent ‘fail[ure] . . . to hire’ was due to an otherwise-neutral policy. Title VII requires otherwise-neutral policies to give way to the need for an accommodation.”).

²⁹ *Id.* at 2033.

³⁰ *Id.* (emphasis added).

³¹ *Thomas v. Review Bd. of the Ind. Employment Sec. Div.*, 450 U.S. 707, 714 (1981).

³² *Abercrombie*, 135 S. Ct. at 2032.

³³ The Federal Court in Massachusetts observed in *Robinson v. Children’s Hosp. Bos.*, No. CV 14-10263-DJC, 2016 WL 1337255, at *5 (D. Mass. Apr. 5, 2016):

been a handful of on-point decisions, but limited mostly to employers who are medical providers or first responders, where there is a clear business justification for a mandatory vaccine policy. Employees have generally not been successful in litigation challenging the employer's policy under Title VII:

- In a 2016 Pennsylvania case, a federal court dismissed a religious discrimination claim under Title VII that was made by a former hospital employee who refused to obtain an influenza vaccination.³⁴ The hospital had a policy requiring its employees to “either obtain a flu vaccination or submit an exemption form to obtain a medical

Neither party cited a case directly on point. In *Chenzira v. Cincinnati Children's Hospital Medical Center*, No. 1:11-cv-00917, 2012 WL 6721098, at *4 (S.D. Ohio Dec. 27, 2012), the court denied a hospital's motion to dismiss a terminated worker's Title VII religious discrimination claim. The employee had refused to take an influenza vaccine because of her veganism, and the court found “it plausible that [she] could subscribe to veganism with a sincerity equating that of traditional religious views.” *Id.* The *Chenzira* court, however, was careful to state that its ruling “in no way addresses what it anticipates as Defendant's justification for its termination of Plaintiff, the safety of patients at Children's Hospital. At this juncture there simply is no evidence before the Court regarding what, if any, contact Plaintiff might have with patients, and/or what sort of risk her refusal to receive a vaccination could pose in the context of her employment.” *Id.* at *5.

Other cases also have not squarely confronted an employer's Title VII obligations in light of mandatory influenza vaccination policies. In *Virginia Mason Hospital v. Washington State Nurses Ass'n*, 511 F.3d 908, 911 (9th Cir. 2007), a hospital implemented a mandatory influenza immunization regime as a fitness requirement for all nurses and other employees. The nurses' union filed a grievance and an arbitrator ordered that the mandatory immunization protocol be rescinded based on his interpretation of the collective bargaining agreement. *Id.* In light of the considerable deference for arbitral decisions and citing the “clearly established public policy requiring employers to bargain with their union-represented employees over conditions of employment,” the Ninth Circuit upheld the arbitrator's decision. *Id.* at 913, 917. In *Edwards v. Elmhurst Hospital Center*, No. 11-cv-4693-RRM-LB, 2013 WL 839535, at *4 (E.D.N.Y. Feb. 15, 2013), *report and recommendation adopted*, 2013 WL 828667 (E.D.N.Y. Mar. 6, 2013), the court dismissed a hospital worker's Title VII claim because he failed to allege any adverse employment action for his refusal of the influenza vaccination. In *Zell v. Donley*, 757 F. Supp. 2d 540, 541 (D. Md. 2010), where the plaintiff claimed that his employer violated Title VII for terminating him because he refused a vaccination for religious reasons, the court did not address the merits but held that the Title VII claims were equitably tolled.

Id.

³⁴ *Fallon v. Mercy Cath. Med. Ctr. of Se. Pa.*, 200 F. Supp. 3d 553, 556 (E.D. Pa. 2016), *aff'd*, 877 F.3d 487 (3d Cir. 2017).

or religious exemption.”³⁵ A Psychiatric Crisis Intake Worker refused and was terminated.³⁶ The Pennsylvania Court dismissed the lawsuit on the grounds that the employee admitted that he did not belong to an organized religion and refused to submit an approved exemption letter on official clergy letterhead.³⁷ In other words, even if the employee firmly opposed vaccinations, the absence of proof that the belief was firmly rooted *in his religion* was fatal to the claim.

- In a case decided by the Fifth Circuit Court of Appeals in 2020, a firefighter brought an action against the City and fire chief alleging religious discrimination and retaliation in violation of Title VII and state anti-discrimination law, among other claims, based on a mandatory vaccination policy.³⁸ The City mandated that all personnel receive a TDAP vaccine (which immunizes from tetanus, diphtheria, and pertussis or whooping cough) but the firefighter (an ordained Baptist minister) requested an exemption.³⁹ Here, the validity of the employee’s religious belief did not appear to be in dispute.⁴⁰ The issue was whether the City offered a reasonable accommodation when it gave the employee two alternate options—he could be reassigned to the position of “code enforcement officer,” which did not require a vaccine, offered the same pay and benefits, and the City would cover the cost of training; or he could remain in his current position if he agreed to wear personal protective equipment (including a respirator) at all times while on duty, submit to testing for possible diseases when justified by his health condition, and keep a log of his temperature.⁴¹ The employee declined those accommodations and was terminated for insubordination in violation of the City’s Code of Conduct.⁴² The United States District Court for the Western District of Texas granted summary judgment to the employer on all claims, finding that the City had reasonably accommodated the firefighter’s request for religious accommodation.⁴³ The firefighter appealed, and the Fifth Circuit affirmed.⁴⁴

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ Horvath v. City of Leander, No. 1:17-CV-256-RP, 2018 WL 10771965 (W.D. Tex. Oct. 10, 2018).

³⁹ *Id.* at *1.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.* at *2.

⁴³ *Id.* at *9.

⁴⁴ Horvath v. City of Leander, 946 F.3d 787 (5th Cir. 2020), *as revised* (Jan. 13, 2020).

- A former employee of Pfizer brought a claim challenging Pfizer’s policy requiring its corporate aviation flight attendants to be vaccinated for yellow fever.⁴⁵ The employee, a practicing Buddhist who has adhered to a vegan diet all her adult life, refused the yellow fever vaccine on the ground that it contained animal products.⁴⁶ She alleged that in April 2017, the two managers to whom she reported gave her “an ultimatum to receive the yellow fever vaccination” within thirty days “or be terminated.”⁴⁷ She asserted that her managers ignored a letter from her doctor and her requests for exemptions from the vaccination requirement on religious and medical grounds, and that they persistently pressured her to be vaccinated or be terminated, prompting her to have a “breakdown” from all of the threats.⁴⁸ The employee contended that she was granted medical leave but was not permitted to return to work at the conclusion of that leave.⁴⁹ As a result, she alleged that Pfizer refused to reasonably accommodate her request to be exempted from the vaccination requirement.⁵⁰ Unfortunately, this case—which is one of the few non-healthcare cases on this subject—was not decided on the merits because of an arbitration agreement requiring dismissal of the district court action.⁵¹
- A prospective employee brought an action against a prospective employer for religious creed discrimination and retaliation. The plaintiff alleged that the employer withdrew its employment offer when the plaintiff, based on his veganism, refused to be vaccinated with a mumps vaccine grown in chicken embryos.⁵² The appellate court held that the plaintiff’s veganism was not a “religious creed” and dismissed the case.⁵³
- A Pennsylvania court dismissed a former hospital employee’s complaint for religious discrimination when the employee alleged that she was fired for refusing to get a flu shot.⁵⁴ The court held that the complaint failed to identify a sincerely held religious belief that conflicted with the hospital’s policy of requiring annual flu

⁴⁵ Skuse v. Pfizer, Inc., 457 N.J. Super. 539, 544 (2019), *rev’d* 236 A.3d 939 (N.J. 2020).

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.* at 544–45.

⁵¹ Skuse v. Pfizer, Inc., 236 A.3d 939, 945–46 (2020).

⁵² Friedman v. S. Cal. Permanente Med. Grp., 125 Cal. Rptr. 2d 663, *as modified* (Cal. App. 2d Dist. Sept. 24, 2002).

⁵³ *Id.*

⁵⁴ Brown v. Children’s Hosp. of Philadelphia, No. CV 18-2363, 2018 WL 5884545, at *3 (E.D. Pa. Nov. 9, 2018), *aff’d*, 794 F. App’x 226 (3d Cir. 2020).

vaccines.⁵⁵ The Court observed: “[The employee] alleges only that she advised [her employer] on a questionnaire that she was opposed to getting a flu shot. Nowhere in her amended complaint, however, does [she] identify any particular religious belief that she held and/or that conflicted with [her employer’s] requirement that all employees receive a flu vaccination.”⁵⁶

- In recent years, the EEOC has brought several employment discrimination actions pursuant to Title VII on behalf of employees who were terminated for refusing to comply with vaccination policies, including a 2016 case the EEOC brought on behalf of a human resources employee whose employment at Baystate Medical Center (“BMC”) was terminated.⁵⁷ The employee was terminated after she declined BMC’s free influenza vaccination on the grounds of her religious beliefs, and further declined to wear a mask as requested by the employer because she felt she was unable to perform the duties of her job adequately with a mask.⁵⁸ The EEOC’s decision to pursue this case is noteworthy because it is indicative of the EEOC’s view of religious exemptions to mandatory vaccine policies pre-COVID.⁵⁹ In a two-paragraph decision, the court granted summary judgment to the hospital, reasoning that the mask requirement “was itself the employment requirement, rather than merely an accommodation,” and that the EEOC’s case failed as a result.⁶⁰ The EEOC and the employee tried to argue that wearing a mask would not effectively prevent the spread of the flu.⁶¹ “The court rejected that argument, noting the employee had ‘no religious objection’ to the requirement that she wear a mask, and that the court would defer to the hospital’s ‘business and health-policy judgment.’”⁶²
- In a 2017 decision, a federal court in North Carolina allowed three former employees of Mission Hospital to proceed to trial on their

⁵⁵ *Id.* at *2.

⁵⁶ *Id.*

⁵⁷ EEOC v. Baystate Med. Ctr., Inc., No. 3:16-CV-30086-MGM, 2017 WL 4883453, at *1 (D. Mass. Oct. 30, 2017); see also *EEOC Sues Baystate Medical Center for Religious Discrimination & Retaliation*, U.S. EQUAL EMP. OPPORTUNITY COMM’N (June 2, 2016), <https://www.eeoc.gov/newsroom/eeoc-sues-baystate-medical-center-religious-discrimination-retaliation> [<https://perma.cc/Q2WW-N648>].

⁵⁸ *Baystate Med. Ctr., Inc.*, 2017 WL 4883453, at *1.

⁵⁹ *Id.* at *2.

⁶⁰ James M. Paul & Andrew L. Metcalf, *Let the Masking Debate Continue, but Maybe Not in Our Hospitals*, NAT’L L. REV. (June 23, 2020), <https://www.natlawreview.com/article/let-masking-debate-continue-maybe-not-our-hospitals> [<https://perma.cc/3E44-F2HN>].

⁶¹ *Id.*

⁶² *Id.*

claims that the hospital failed to accommodate their religious beliefs.⁶³ The plaintiffs—an intake specialist, pre-school teacher, and a technician—worked with vulnerable populations for a hospital and either interacted with small children or directly with the hospital’s patients.⁶⁴ The employees requested religious exemptions to the flu vaccine requirement.⁶⁵ They contended that 250 employees at Mission Hospital have such religious exemptions to the flu requirement, but they were denied the exemption based on the timeliness of their objection.⁶⁶ The court found that a jury could side with the employees that the time limit was discriminatory, and therefore denied summary judgment.⁶⁷

This survey of Title VII religious discrimination case law demonstrates at least four things. First, pre-COVID-19, it was rare for a non-medical, non-first responder to have a policy mandating any type of vaccine as a condition of employment—which is evinced by the dearth of case law challenging such policies. Second, employees often lost their challenges to mandatory vaccine policies on the grounds that their objections were merely a reflection of a personal objection, and not a firmly held religious belief. However, as some of the cases demonstrate, well-presented, well-represented parties overcame that hurdle by clearly articulating a firmly held Christian, Buddhist, or even vegan belief,⁶⁸ all of which have been found sufficient to meet Title VII’s “religious belief” requirement.⁶⁹ Third, employers have generally found success in defending these claims on the grounds that *other accommodations* were offered to and rejected by the employees, including mask-wearing or reassignment of job duties.⁷⁰ Rarely did employers advance a strict “*full compliance or else*” defense. Fourth, implicit in each of the holdings of the cases cited above is an assumption or

⁶³ EEOC v. Mission Hosp., Inc., No. 116-CV-00118-MOCDLH, 2017 WL 3392783, at *1 (W.D.N.C. Aug. 7, 2017).

⁶⁴ *Id.* at *2.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.* at *4.

⁶⁸ In some of the cases where employees’ claims were dismissed, employees represented themselves pro se. *See, e.g.,* Brown v. Children’s Hosp. of Philadelphia, 794 F. App’x 226, 227 (3d Cir. 2020) (“As we have recently explained, to state a claim under this statute, it is not sufficient merely to hold a ‘sincere opposition to vaccination’; rather, the individual must show that the ‘opposition to vaccination is a religious belief.’”); Edwards v. Elmhurst Hosp. Ctr., No. 11 CV 4693(RRM)(LB), 2013 WL 839535, at *1, *4 (E.D.N.Y. Feb. 15, 2013), *report and recommendation adopted*, No. 11-CV-4693 RRM LB, 2013 WL 828667, at *1 (E.D.N.Y. Mar. 6, 2013) (pro se complaint dismissed on grounds that the employee failed to allege that the employer took any adverse employment action against him for explaining that his religious beliefs as a Jehovah’s Witness prevented him from complying with the vaccination mandate).

⁶⁹ *See supra* notes 24–31 and accompanying text.

⁷⁰ *See supra* notes 24–31 and accompanying text.

express recognition that a mandatory vaccine policy is important and necessary to a hospital or medical provider's business—a statement that may not hold true for other private employers. On the flip side, these cases were not decided in circumstances of a year-long pandemic. Therefore, it is difficult to predict whether future cases will apply more or less scrutiny to an employer's mandatory vaccine policy.

Nevertheless, an employer must consider religious exemptions to a mandatory COVID-19 vaccine policy under Title VII or face potential liability.

C. Private Employers Must Consider Disability Accommodations Under the ADA in Enforcing Any Mandatory Vaccine Policy.

Legal precedent demonstrates that employers must also be mindful of potential medical exemptions from mandatory vaccination policies. Employees may seek such an exemption for a variety of reasons, including allergies to vaccine ingredients, expected negative interactions with the vaccine based on medical history or present disabilities, or risk of harm from the vaccine due to a compromised immune system.⁷¹

One route employees have taken to seek enforcement of medical exemptions is the Americans with Disabilities Act ("ADA"). In a guidance document entitled *Pandemic Preparedness in the Workplace and the Americans with Disabilities Act*, the EEOC—the agency charged with enforcement of the ADA—addressed the question of whether an employer covered by the ADA could “compel all of its employees to take the influenza vaccine regardless of their medical conditions . . . during a pandemic.”⁷² The EEOC answered:

No. An employee may be entitled to an exemption from a mandatory vaccination requirement based on an ADA disability that prevents [them] from taking the influenza vaccine. This would be a reasonable accommodation barring undue hardship (significant difficulty or expense) . . .

Generally, ADA-covered employers should consider simply encouraging employees to get the influenza vaccine rather than requiring them to take it. *As of the date this

⁷¹ See Brian Dean Abramson, *Vaccine Law in the Health Care Workplace*, 12 J. HEALTH & LIFE SCI. L. 22, 28–29 (June 2019); Baxter, *supra* note 12, at 896, 920, 922.

⁷² *Pandemic Preparedness in the Workplace and the Americans with Disabilities Act*, U.S. EQUAL EMP. OPPORTUNITY COMM'N (Mar. 21, 2020), <https://www.eeoc.gov/laws/guidance/pandemic-preparedness-workplace-and-americans-disabilities-act> [https://perma.cc/XN5G-TY7F].

document is being issued, there is no vaccine available for COVID-19.⁷³

Generally, the ADA provides that employers shall not “discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.”⁷⁴ An employer discriminates against a qualified individual if it does not:

[M]ak[e] reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity.⁷⁵

Two leading federal circuit court cases address employees who brought failure-to-accommodate claims under this provision in the context of mandatory vaccination. Both involved employees from the healthcare industry,⁷⁶ who were terminated over failing to comply with their employers’ mandatory vaccine policies.⁷⁷

The Third Circuit reversed the district court’s dismissal of a failure-to-accommodate claim, concluding that the employee alleged sufficient facts to allow the claim to proceed.⁷⁸ The employee was a nurse who had failed

⁷³ *Id.* The *Pandemic Preparedness* guidance was issued in 2009, but it was updated in response to the COVID-19 pandemic on March 21, 2020. *See id.*

⁷⁴ 42 U.S.C. § 12112(a). An employer, as defined by the ADA, is “a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person.” *Id.* § 12111(5)(A).

⁷⁵ *Id.* § 12112(b)(5)(A).

⁷⁶ Both leading circuit court cases occur in the context of healthcare facilities. Medical professions are more likely than other industries to have mandatory vaccination policies “because of the increased likelihood that employees in this sector will interact with populations at increased risk of acquiring or experiencing harmful sequelae of vaccine-preventable diseases.” Y. T. Yang, Elizabeth Pendo & Dorit R. Reiss, *The Americans with Disabilities Act and Healthcare Employer-Mandated Vaccinations*, 38 VACCINE 3184, 3184 (2020). The CDC recommends a battery of vaccinations for healthcare workers, including Hepatitis B; influenza; measles, mumps, and rubella (MMR); tetanus, diphtheria, and pertussis (TDAP); and varicella (chickenpox). *Vaccine Information for Adults: Healthcare Workers*, CDC (May 2, 2016), <https://www.cdc.gov/vaccines/adults/rec-vac/hcw.html> [<https://perma.cc/5A4Y-7UYE>]. The CDC explains that these vaccines are recommended in these settings because healthcare workers “are at risk for exposure to serious, and sometimes deadly diseases” and vaccines can “reduce the chance that you will get or spread vaccine-preventable diseases.” *Id.*

⁷⁷ In one of the cases, the EEOC appeared as amicus in support of the employee. *See Ruggiero v. Mount Nittany Med. Ctr.*, 736 F. App’x 35, 38 (3d Cir. 2018).

⁷⁸ *Id.* at 41.

to receive the tetanus, diphtheria, and pertussis (TDAP) vaccine by the deadline set by her employer.⁷⁹ She requested an accommodation, claiming that she suffered from severe anxiety and eosinophilic esophagitis,⁸⁰ and submitted a doctor's note to that effect.⁸¹ Her employer denied the request because the doctor's note did not indicate that she "suffered from any of the contraindications, warnings, or precautions listed by the vaccine's manufacturer."⁸²

The Third Circuit concluded that the employee's failure-to-accommodate claim could proceed because her allegations raised three plausible inferences: that the employee had a disability under the ADA; that her employer was on notice of the employee's disability; and that her employer failed to engage in the interactive process because they rejected her proposed accommodations outright.⁸³

In 2018, the Eighth Circuit came to a different conclusion, affirming the district court's dismissal of a failure-to-accommodate claim.⁸⁴ In that case, the employee was concerned about a mandatory MMR vaccine, claiming she needed an accommodation because she had many allergies, chemical sensitivities, and a previous severe case of mumps and measles.⁸⁵ She also claimed, in the litigation, that she had been susceptible to seizures in the past for purposes of establishing a disability and potentially excusing herself from the mandatory vaccination.⁸⁶ The employee and employer discussed a rubella-only vaccine as a possible accommodation, but the employee later learned such a vaccine was not available.⁸⁷ The employee was subsequently terminated.⁸⁸

⁷⁹ *Id.* at 37–38.

⁸⁰ The Mayo Clinic defines eosinophilic esophagitis as "a chronic immune system disease in which a type of white blood cell (eosinophil) builds up in the lining of the tube that connects your mouth to your stomach (esophagus)." See *Eosinophilic esophagitis*, MAYO CLINIC, <https://www.mayoclinic.org/diseases-conditions/eosinophilic-esophagitis/symptoms-causes/syc-20372197> [https://perma.cc/6U5Q-HA5A].

⁸¹ *Ruggiero*, 736 F. App'x at 37–38.

⁸² *Id.* at 38.

⁸³ *Id.* at 41.

⁸⁴ *Hustvet v. Allina Health Sys.*, 910 F.3d 399, 411 (8th Cir. 2018). *Hustvet* also involved a separate ADA claim regarding a mandatory health assessment screening. *Id.* at 406. The screening was considered a medical examination, and thus needed to be "job-related and consistent with business necessity" under the ADA provision regarding medical examinations and inquiries. *Id.* at 407–08 (internal quotations omitted); see also 42 U.S.C. § 12112(d)(4)(A). The court concluded that the screening satisfied these requirements. *Hustvet*, 910 F.3d at 409.

⁸⁵ *Hustvet*, 910 F.3d at 405.

⁸⁶ *Id.* at 411.

⁸⁷ *Id.* at 405.

⁸⁸ *Id.*

The Eighth Circuit determined that the employee had not met her burden under the ADA because she alleged “garden-variety allergies,” which did not amount to a disability; her claims that she was susceptible to seizures may have amounted to a disability but were not reported to her employer; and regardless, past seizures do not pose a particular risk for recipients of the MMR vaccine.⁸⁹ Under these circumstances, the court determined that summary judgment in favor of the employer was appropriate.⁹⁰

These two courts may have reached opposite conclusions as to whether the respective employees’ ADA claims could proceed, but together they shed light on how failure-to-accommodate cases based on mandatory COVID-19 vaccination policies may be analyzed. Despite the outcome in the Third Circuit, the elements of a failure-to-accommodate claim may actually be difficult for employees to establish.

First, both courts considered whether the employee had a disability within the meaning of the ADA as a preliminary matter. By its plain terms, reasonable accommodations need only be discussed for “an otherwise qualified individual *with a disability*.”⁹¹ A disability is defined under the ADA as: “(A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such impairment; or (C) being regarded as having such an impairment.”⁹² The burden is on the plaintiff to show that they are disabled by demonstrating that “(1) [they] suffer from an impairment; (2) the impairment limits an activity that constitutes a major life activity under the Act; and (3) the limitation is substantial.”⁹³

⁸⁹ *Id.* at 411.

⁹⁰ *Id.*

⁹¹ 42 U.S.C. § 12112(b)(5)(A) (emphasis added). In 2008, Congress clarified the standard for disability, amending the ADA “to convey that the question of whether an individual’s impairment is a disability under the ADA should not demand extensive analysis.” ADA Amendments Act of 2008, Pub. L. 110-325, 110th Cong. § 2(b)(5), 122 Stat. 3553 (2008). The Act also explained that in the case of *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002), the Supreme Court had “created an inappropriately high level of limitation necessary to obtain coverage under the ADA.” *Id.* But, as courts have noted since the clarification, “though the ADAAA makes it easier to prove a disability, it does not absolve a party from proving one.” *Neely v. PSEG Texas, Ltd. P’ship*, 735 F.3d 242, 245 (5th Cir. 2013) (emphasis from the original removed) (providing a comprehensive discussion of the legislative intent in the passage of the ADAAA).

⁹² 42 U.S.C. § 12102(1)(A)–(C).

⁹³ *Haynes v. Williams*, 392 F.3d 478, 481–82 (D.C. Cir. 2004). Under the ADA, “major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working,” as well as “the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.” 42 U.S.C. § 12102(2)(A)–(B).

The medical conditions an employee is likely to put forward to justify an exemption from a vaccine are unlikely to rise to the level of a disability under the ADA. By way of example, consider an egg allergy. In a very small number of cases, individuals with egg allergies could experience a severe allergic reaction to vaccines that contain a small amount of egg proteins, like certain flu vaccines.⁹⁴ Applying this to the employee's burden under the ADA, they must show that the egg allergy substantially limits a major life activity.⁹⁵ Similar to the "garden-variety allergies" that did not substantially limit a major life activity in the Eighth Circuit case, this is a hurdle that the employee with the egg allergy is unlikely to clear.⁹⁶ As one author notes, medical exemptions from mandatory vaccination policies "will rarely be necessary because . . . an allergy to the vaccine by itself may not qualify the employee as disabled under the ADA, in which case no accommodation is required."⁹⁷

Further, even if an employee establishes a qualifying disability, the employee must also show "that the disability necessitates the exemption; if the disability is unaffected by vaccination, then exemption is not an accommodation of the physical or mental limitations of the disability."⁹⁸ The clearest path to show that a disability necessitates a medical exemption from vaccination is if that disability is a contraindication or precaution to the vaccine,⁹⁹ although the absence of a contraindication or precaution may not be dispositive.¹⁰⁰

According to the CDC, contraindications to vaccination are "conditions in a recipient that increases the risk for a serious adverse reaction," and when they are present, "vaccines should not be administered."¹⁰¹ "Common contraindications that justify medical exemptions include symptoms occurring immediately after vaccination that

⁹⁴ See *Influenza (Flu): Flu Vaccine and People with Egg Allergies*, CDC, <https://www.cdc.gov/flu/prevent/egg-allergies.htm> [<https://perma.cc/JZC2-X872>].

⁹⁵ See 42 U.S.C. § 12102(2); *Haynes*, 392 F.3d at 481-82.

⁹⁶ *Hustvet v. Allina Health Sys.*, 910 F.3d 399, 411 (8th Cir. 2018).

⁹⁷ *Baxter*, *supra* note 12, at 896.

⁹⁸ *Id.*

⁹⁹ *Abramson*, *supra* note 71, at 28-29. The clear connection between contraindications and precautions and a need for a medical exemption is demonstrated by the prevalence of these provisions in state statutes. See *id.* at 28. Typically, if a physician determines that such a contraindication exists, that "usually closes the question." *Id.*

¹⁰⁰ See, e.g., *Ruggiero v. Mount Nittany Med. Ctr.*, 736 F. App'x 35, 38 (3d Cir. 2018).

¹⁰¹ *Vaccine Recommendations and Guidelines of the ACIP: Contraindications and Precautions*, CDC (Nov. 17, 2020), <https://www.cdc.gov/vaccines/hcp/acip-recs/general-recs/contraindications.html> [<https://perma.cc/C98W-CWN9>] [hereinafter *Vaccine Recommendations and Guidelines*].

are suggestive of an anaphylactic reaction, hypersensitivity to any component of the vaccine, and immunological deficiencies.”¹⁰²

Less serious than a contraindication, “[a] precaution is a condition in a recipient that might increase the risk for a serious adverse reaction, might cause diagnostic confusion, or might compromise the ability of the vaccine to produce immunity,” but may still allow for a vaccine “if the benefit of protection from the vaccine outweighs the risk for an adverse reaction.”¹⁰³ A comprehensive list of contraindications and precautions to commonly-used vaccines can be found on the CDC website in Table 4-1.¹⁰⁴

Because vaccines for COVID-19 just recently became available, the extent of contraindications and precautions for the vaccines are not fully known yet.¹⁰⁵ The extent of these contraindications and precautions and their prevalence must be weighed by an employer in determining whether to implement a mandatory vaccine policy and, if so, which medical exemptions to accommodate.¹⁰⁶

And finally, existing failure-to-accommodate cases teach us that where an employee has demonstrated a condition that may qualify them for a medical exemption, an employer need only engage in the interactive process, and may not be required to make an accommodation.¹⁰⁷

Employers do not need to make any accommodations in the case of individuals posing “a direct threat to the health or safety of other individuals in the workplace,”¹⁰⁸ or when accommodations would impose “undue hardship” for the employer.¹⁰⁹ “The term ‘direct threat’ means a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation.”¹¹⁰ EEOC guidance states that individuals with

¹⁰² Abramson, *supra* note 71, at 28-29 (internal quotation marks omitted) (internal citations omitted).

¹⁰³ *Vaccine Recommendations and Guidelines*, *supra* note 101.

¹⁰⁴ *Id.*

¹⁰⁵ See *First Responders, Front-Line Healthcare Workers will get COVID-19 Vaccine First*, U.S. PHARMACIST (Oct. 14, 2020), <https://www.uspharmacist.com/article/first-responders-frontline-healthcare-workers-will-get-covid19-vaccine-first> [<https://perma.cc/5D2C-2W7M>].

¹⁰⁶ At least one author believes that the circumstances of COVID-19 would completely absolve employers of the need to accommodate medical exemptions. In a draft essay, Debbie Kaminer wrote that, under the ADA’s provisions, accommodations do not need to be made for employees who pose a “direct threat” or when the accommodations would pose undue hardship on the employer, accommodations are unlikely to be required “in the midst of the COVID-19 pandemic, with its severe health and economic implications.” Debbie Kaminer, *Vaccines in the Time of COVID-19: How Government and Businesses Can Help Us Reach Herd Immunity*, 102, 120-21 (Nov. 15, 2020), at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3712739 [<https://perma.cc/AMF8-UYMJ>].

¹⁰⁷ See *Ruggiero v. Mount Nittany Med. Ctr.*, 736 F. App’x 35, 41 (3d Cir. 2018).

¹⁰⁸ 42 U.S.C. § 12113(b).

¹⁰⁹ *Id.* § 12112(b)(5)(A).

¹¹⁰ *Id.* § 12111(3).

COVID-19 pose a direct threat to others in the workplace—however, it remains to be seen whether the EEOC will maintain that position when a majority of the population has been vaccinated, and hospitalization numbers and deaths continue to decrease.¹¹¹ “The term ‘undue hardship’ means an action requiring significant difficulty or expense, when considered in light of the factors set forth in subparagraph (B).”¹¹² Requested accommodations will likely mirror pre-vaccine precautions, including masks and other personal protective equipment, and hygiene and sanitation measures.¹¹³ Because these measures have seen widespread use since March 2020, undue hardship may be more difficult for an employer to prove. Regardless, employees may have a difficult time establishing that an employer violated the ADA by failing to accommodate a medical exemption to a mandatory COVID-19 vaccination policy.

But the uncertainties of medical exemptions from mandatory vaccination policies do not fall on employees alone. Employers considering a mandatory vaccination policy may have an additional ADA provision to contend with depending on the terms of their policy. The medical examination and inquiry provision of the ADA states:

A covered entity shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination

¹¹¹ *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*, U.S. EQUAL EMP. OPPORTUNITY COMM’N (Dec. 16, 2020), <https://www.eeoc.gov/wysk/what-you-should-know-about-COVID-19-and-ada-rehabilitation-act-and-other-eeo-laws> [https://perma.cc/W8JU-SN5M] [hereinafter *What You Should Know About COVID-19*].

¹¹² 42 U.S.C. § 12111(10)(A). These factors include:

- (i) the nature and cost of the accommodation needed under this chapter;
- (ii) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility;
- (iii) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and
- (iv) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.

Id. § 12111(10)(B)(i)–(iv).

¹¹³ Vaccines that do not include the relevant contraindication or precaution have also been used to accommodate medical conditions, but such an option would depend on the availability of alternative COVID-19 vaccines, which is uncertain at this point.

or inquiry is shown to be job-related and consistent with business necessity.¹¹⁴

This provision differs from the reasonable accommodation provision in two significant ways. First, the provision is *not* limited to individuals with disabilities. Guidance issued by the EEOC explains that “the use of the term ‘employee’ in this provision reflects Congress’s intent to cover a broader class of individuals and to prevent employers from asking questions and conducting medical examinations that serve no legitimate purpose.”¹¹⁵ To effectuate that purpose, any employee has the right to challenge a medical examination or disability-related inquiry.¹¹⁶ Second, the provision requires that examinations or inquiries be “job-related and consistent with business necessity.”¹¹⁷

An employer’s mandatory vaccination policy does not necessarily implicate the medical examination and inquiry provision. Employers need to be cautious, however, about the interaction between the different provisions of the ADA depending on the terms of the policy they would like to implement. For instance, if the policy includes a health screener or request for proof of immunity—asking if the employee has been vaccinated or has had COVID-19—that could be an inappropriate inquiry under the ADA.¹¹⁸

Ultimately, unlawful examination and inquiry claims related to vaccination may fail given the nature of the COVID-19 pandemic. In December 2020, the EEOC published guidance expressing its position that “asking or requiring an employee to show proof of receipt of a COVID-19 vaccination” is *not* a disability-related inquiry.¹¹⁹ However, the EEOC cautions that “subsequent employer questions, such as asking why an individual did not receive a vaccination, may elicit information about a disability and would be subject to the pertinent ADA standard that they be ‘job-related and consistent with business necessity.’”¹²⁰ The EEOC has also issued guidance on the related subject of antibody testing. The EEOC explained that antibody testing does not meet the “job-related and consistent

¹¹⁴ 42 U.S.C. § 12112(d)(4)(A).

¹¹⁵ U.S. EQUAL EMP. OPPORTUNITY COMM’N, EEOC-CVG-2000-4, ENFORCEMENT GUIDANCE: DISABILITY-RELATED INQUIRIES AND MEDICAL EXAMINATIONS OF EMPLOYEES UNDER THE AMERICANS WITH DISABILITIES ACT (ADA) (2000).

¹¹⁶ *Id.*

¹¹⁷ 42 U.S.C. § 12112(d)(4)(A).

¹¹⁸ See Baxter, *supra* note 12, at 896 (“It is possible that some courts will find that an employer is barred by the ADA from even inquiring about whether an employee is vaccinated.”). This was the claim brought in the Eighth Circuit case alongside the failure-to-accommodate claim, although it was ultimately unsuccessful. See *Hustvet v. Allina Health Sys.*, 910 F.3d 399 (8th Cir. 2018).

¹¹⁹ *What You Should Know About COVID-19*, *supra* note 111.

¹²⁰ *Id.*

with business necessity” standard for medical examinations or inquiries, and is therefore not allowed under the ADA.¹²¹ This determination was based on CDC guidance that antibody testing “should not be used to determine immune status in individuals until the presence, durability, and duration of immunity are established” and “should not be used to make decisions about returning persons to the workplace.”¹²² Antibody testing could eventually meet the business necessity standard if the CDC changes its guidance as to the reliability of antibody tests in determining immune status.¹²³ And, if the CDC establishes the reliability of a vaccine in determining an individual’s immune status long-term, the EEOC would be likely to conclude that a vaccine meets the “job-related and business necessity” standard.¹²⁴

It is worth noting that the ADA merely provides a floor for medical exemptions from mandatory vaccine policies. There is a gap between the medical conditions an employee might put forth to request an accommodation and the substantially-limiting disabilities that employers are legally required to accommodate. State anti-discrimination laws and local anti-discrimination ordinances may impose broader obligations on employers to provide medical exemptions from vaccine policies. To account for this, employers could model their policies after state vaccination statutes¹²⁵ or the policies of local healthcare facilities, which generally provide more generous medical exemptions.

In Minnesota, for example, a child subject to mandatory vaccination before attending school can receive a medical exemption “[i]f a statement, signed by a physician, is submitted to the administrator or other person having general control and supervision of the school or child care facility stating that an immunization is contraindicated for medical reasons or that laboratory confirmation of the presence of adequate immunity exists.”¹²⁶ And in a case discussing a mandatory flu vaccination policy at a

¹²¹ *Id.*

¹²² *Antibody Testing Interim Guidelines*, CDC (Aug. 1, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/lab/resources/antibody-tests-guidelines.html> [<https://perma.cc/F3ZB-65C8>].

¹²³ Samuel R. Bagenstos & Lindsay F. Wiley, *The Personal Responsibility Pandemic: Centering Solidarity in Public Health and Employment Law*, MICH. L. PUB. L. & LEGAL THEORY RES. PAPER SERIES 52 (July 2020).

¹²⁴ Preliminary results for vaccines show promising results. *See, e.g.*, Katie Thomas, *New Pfizer Results: Coronavirus Vaccine is Safe and 95% Effective*, N.Y. TIMES (Nov. 18, 2020), <https://www.nytimes.com/2020/11/18/health/pfizer-covid-vaccine.html> [<https://perma.cc/B4EB-88AA>]; Denise Grady, *Early Data Show Moderna’s Coronavirus Vaccine is 94.5% Effective*, N.Y. TIMES (Nov. 16, 2020), <https://www.nytimes.com/2020/11/16/health/Covid-moderna-vaccine.html> [<https://perma.cc/9F68-EZ9X>].

¹²⁵ *See* Abramson, *supra* note 71, at 28–29 (“All jurisdictions that have vaccination mandates provide for at least some degree of medical exemptions.”).

¹²⁶ MINN. STAT. § 121A.15, subdiv. 3(c) (2020).

healthcare facility, the employer did not accommodate the plaintiff based on an autoimmune disease that was not linked to the required vaccine, but several employees did receive accommodations because they were either allergic to eggs or had past adverse reactions to the flu vaccine, based on the employer's internal policies.¹²⁷ These policies—which are more generous than the ADA's requirements—could inform the medical exemptions a private employer might choose to allow in their own policy, outside of the ADA's more formal accommodations.

D. Private Employers Must Consider Exemptions for Pregnant Women.

Federal law prohibits discrimination on the basis of pregnancy pursuant to the Pregnancy Discrimination Act (PDA) of 1978.¹²⁸ The PDA, which was an amendment to Title VII, does not affirmatively require reasonable accommodations for pregnant women.¹²⁹ However, pregnancy-related conditions *may* qualify as a disability under the ADA, triggering reasonable accommodation obligations.¹³⁰ In addition, a variety of state laws similarly prohibit pregnancy discrimination *and* require reasonable accommodations for pregnant women.¹³¹

¹²⁷ *Head v. Adams Farm Living, Inc.*, 775 S.E.2d 904, 913–14 (N.C. Ct. App. 2015).

¹²⁸ THE PREGNANCY DISCRIMINATION ACT OF 1978 (Oct. 31, 1978), <https://www.eeoc.gov/statutes/pregnancy-discrimination-act-1978> [<https://perma.cc/S4M6-4GSS>].

¹²⁹ *Id.*

¹³⁰ *See, e.g.*, *Kande v. Dimensions Health Corp.*, No. GJH-18-2306, 2020 WL 7054771, at *4 (D. Md. Dec. 2, 2020) (recognizing that “other courts have consistently found that, while pregnancy alone is insufficient to state a claim under the ADA, complications related to pregnancy may be found to be impairments that substantially limit a major life activity such that they constitute disabilities.”); *see also id.* (citing *Penaloza v. Target Corp.*, 549 F. App'x 844, 848 n.2 (11th Cir. 2013)) (“Pregnancy is generally not considered a disability, although a pregnancy-related impairment may be considered a disability if it substantially limits a major life activity.”); *Cerrato v. Durham*, 941 F. Supp. 388, 392 (S.D.N.Y. 1996) (“[C]ourts have distinguished between a normal, uncomplicated pregnancy itself and a complication or condition arising out of the pregnancy and have found that, under particular circumstances, the pregnancy-related condition can constitute a ‘disability’ within the meaning of the ADA.”). The *Kande* court also noted that the EEOC has stated that “[a]lthough pregnancy itself is not an impairment within the meaning of the ADA, and thus is never on its own a disability, some pregnant workers may have impairments related to their pregnancies that qualify as disabilities under the ADA, as amended.” *Kande*, 2020 WL 7054771, at *4 (citing U.S. EQUAL EMP. OPPORTUNITY COMM'N, EEOC-CVG-2015-1, ENFORCEMENT GUIDE: PREGNANCY DISCRIMINATION AND RELATED ISSUES (2015)).

¹³¹ For example, Minnesota's Women's Economic Security Act, section 181.9414 of the Minnesota Statutes provides that “an employer must provide reasonable accommodations to an employee for health conditions related to pregnancy or childbirth if she so requests . . . unless the employer demonstrates that the accommodation would impose an undue hardship”

Therefore, employers will need to consider exemptions for pregnant women or risk litigating the following claims:

- Employers who excuse non-pregnant or male employees from obtaining the vaccine on other grounds—such as a medical condition—may be subject to a disparate treatment claim under the PDA for refusing to provide a similar exemption to pregnant women.¹³²
- Certain conditions related to pregnancy (e.g., gestational diabetes or preeclampsia) may constitute disabilities under the ADA that would trigger the employer's obligation to reasonably accommodate the pregnant employee.¹³³ Refusal to provide such accommodations may subject an employer to liability under the ADA and state law.¹³⁴

The need for employers to consider exempting pregnant (and potentially nursing) women from a vaccine requirement is heightened by the fact that none of the currently available vaccines have been *fully* tested on pregnant or lactating women.¹³⁵ Moreover, employers should be cautious about demanding that unvaccinated pregnant women work from home until they can be vaccinated—as this may also lead to a discrimination claim based on pregnancy, disability, or sex.

III. ADDITIONAL LEGAL RISKS FOR EMPLOYERS PRESENTED BY A COVID-19 VACCINE POLICY.

¹³² See THE PREGNANCY DISCRIMINATION ACT OF 1978 (Oct. 31, 1978), <https://www.eeoc.gov/statutes/pregnancy-discrimination-act-1978> [<https://perma.cc/S4M6-4GSS>].

¹³³ *Pregnancy*, JAN, <https://askjan.org/disabilities/Pregnancy.cfm#:~:text=For%20example%2C%20the%20following%20pregnancy,functioning%20of%20a%20bodily%20system> [<https://perma.cc/HZG7-WLM5>] (“To have a disability under the ADA, an individual must have an impairment that substantially limits one or more major life activities.”).

¹³⁴ See U.S. EQUAL EMP. OPPORTUNITY COMM’N, *Pandemic Preparedness in the Workplace and the Americans with Disabilities Act* (Mar. 21, 2020), <https://www.eeoc.gov/laws/guidance/pandemic-preparedness-workplace-and-americans-disabilities-act> [<https://perma.cc/XN5G-TY7F>].

¹³⁵ *Dose-Confirmation Study to Evaluate the Safety, Reactogenicity, and Immunogenicity of mRNA-1273 COVID-19 Vaccine in Adults Aged 18 Years and Older*, U.S. NAT’L LIB. OF MED. (July 10, 2020), <https://www.clinicaltrials.gov/ct2/show/NCT04405076?term=moderna&cond=sars-cov-2&draw=2&rank=3> [<https://perma.cc/A5JF-C88S>]; see also *Vaccinating Pregnant and Lactating Patients Against Covid-19*, AM. COLL. OF OBSTETRICIANS & GYNECOLOGISTS (Dec. 2020), <https://www.acog.org/clinical/clinical-guidance/practice-advisory/articles/2020/12/vaccinating-pregnant-and-lactating-patients-against-covid-19> [<https://perma.cc/7BB5-M66N>] (“Vaccines currently available under EUA have not been tested in pregnant women. Therefore, there are no safety data specific to use in pregnancy.”).

In addition to grappling with potential religious, medical, and pregnancy exemptions under Title VII, the PDA, and the ADA (and corresponding state and local laws), employers who choose to enact mandatory vaccine policies will also be confronted with a number of unknown legal risks. This Article highlights just two of these. First, employers may be confronted with adverse impact claims under Title VII due to current data indicating that women, particularly pregnant women, and African Americans appear to be significantly less likely than males and Caucasians to obtain the COVID-19 vaccine.¹³⁶ No existing case law addresses the potential for a vaccine policy to have an adverse impact on a protected class of employees, but such claims seem more than plausible given recent data reflecting racial disparities between vaccinated and unvaccinated Americans.¹³⁷ Second, employers could also face workers' compensation and tort claims if employees who are required to be vaccinated as a condition of employment suffer adverse reactions, or if an employer fails to take reasonable steps to prevent an *unvaccinated* employee from transmitting COVID-19 to a customer, vendor, or member of the public.¹³⁸

A. Employers Who Enact Mandatory Vaccine Policies Face Potential Adverse Impact Discrimination Claims under Title VII.

Not a single pre-COVID-19 case addresses the potential for a mandatory vaccine policy to run afoul of Title VII because it has an *adverse impact* on a protected class. Nevertheless, the potential for adverse-impact discrimination must be considered by an employer contemplating enacting a mandatory COVID-19 vaccine policy because current data demonstrates that there may be a substantial gap between men and women who choose to vaccinate, as well as between Caucasians and African Americans.¹³⁹

¹³⁶ *Vaccinating Pregnant and Lactating Patients Against Covid-19*, *supra* note 135; Andis Robeznieks, *How to Overcome COVID-19 Vaccine Hesitancy Among Black Patients*, AMA (Dec. 29, 2020),

<https://www.ama-assn.org/delivering-care/public-health/how-overcome-covid-19-vaccine-hesitancy-among-black-patients> [https://perma.cc/T6XV-S42C].

¹³⁷ See Amy Schoenfeld Walker, Anjali Singhvi, Josh Holder, Robert Gebeloff & Yuriria Avila, *Pandemic's Racial Disparities Persist in Vaccine Rollout*, N.Y. TIMES (Mar. 3, 2021), <https://www.nytimes.com/interactive/2021/03/05/us/vaccine-racial-disparities.html> [https://perma.cc/C9GT-YEJD]; Catherine Richert & Dan Kraker, *State Data Shows Disparities in Race, Ethnicity of Who's Getting COVID-19 Vaccine*, MPR NEWS (Mar. 3, 2021), <https://www.mprnews.org/story/2021/03/05/state-data-shows-disparities-in-race-ethnicity-of-whos-getting-vaccinated> [https://perma.cc/6EV4-3VZR].

¹³⁸ *Id.*

¹³⁹ See Funk & Tyson, *supra* note 3; Michael W. Chapman, *Gallup: Only 50% Willing to Take COVID-19 Vaccine - Women, Only 44%*, CNSNEWS (Oct. 12, 2020),

1. *Title VII Recognizes a Disparate Impact Theory of Employment Discrimination.*

As noted above, Title VII recognizes two theories of discrimination. A plaintiff may establish discrimination “by proving either that the employer acted with a discriminatory motive (a ‘disparate treatment’ claim), or that its action was the result of a process that, while apparently ‘fair in form,’ was ‘discriminatory in operation’ (a ‘disparate impact’ claim).”¹⁴⁰ The U.S. Supreme Court, in *Griggs v. Duke Power Co.*, thus read Title VII to focus on “the consequences of employment practices, not simply the motivation” behind them.¹⁴¹

“Pursuing a disparate impact claim is often a complicated endeavor.”¹⁴² Such claims “follow a three-part analysis involving shifting evidentiary burdens.”¹⁴³ The plaintiff “bears the initial burden of [making] a prima facie showing of disparate impact.”¹⁴⁴ This requires the plaintiff to “(1) identify a specific employment practice or policy; (2) demonstrate that a disparity exists; and (3) establish a causal relationship between the two.”¹⁴⁵ Unlike disparate treatment, however, “a disparate impact claim does not require the plaintiff to show that the defendant *intended* to discriminate against a particular group.”¹⁴⁶ Plaintiffs alleging a disparate impact claim must “isolat[e] and identify[] the specific employment practices that are allegedly responsible for any observed statistical disparities.”¹⁴⁷ Title VII requires evidence that “goes beyond . . . show[ing] that there are statistical disparities in the employer’s work force.”¹⁴⁸

Once that prima facie showing is made, “the defendant has two avenues of rebuttal.”¹⁴⁹ The first avenue is to undermine (or challenge) the

<https://www.cnsnews.com/article/national/michael-w-chapman/gallup-only-50-willing-take-COVID-19-vaccine-women-only-44> [<https://perma.cc/3PC7-JT3R>].

¹⁴⁰ *Davis v. District of Columbia*, 925 F.3d 1240, 1248 (D.C. Cir. 2019) (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971)) (emphasis added).

¹⁴¹ *Mandala v. NTT Data, Inc.*, 975 F.3d 202, 207 (2d Cir. 2020) (citing *Griggs*, 401 U.S. at 432); see also *M.O.C.H.A. Soc’y, Inc. v. City of Buffalo*, 689 F.3d 263, 273 (2d Cir. 2012).

¹⁴² *Mandala*, 975 F.3d at 207.

¹⁴³ *Id.* (citing *Gulino v. N.Y. State Educ. Dep’t*, 460 F.3d 361, 382 (2d Cir. 2006) (citing 42 U.S.C. § 2000e-2(k)(1))).

¹⁴⁴ *Id.*

¹⁴⁵ *Chin v. Port Auth. of N.Y. & N.J.*, 685 F.3d 135, 151 (2d Cir. 2012) (internal quotation marks and citations omitted).

¹⁴⁶ See *Ricci v. DeStefano*, 557 U.S. 557, 577–78 (2009) (emphasis added); *M.O.C.H.A. Soc’y, Inc.*, 689 F.3d at 273; see also *Chaidez v. Ford Motor Co.*, 937 F.3d 998, 1006–07 (7th Cir. 2019).

¹⁴⁷ *Wards Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642, 656 (1989) (quoting *Watson v. Fort Worth Bank & Tr.*, 487 U.S. 977, 994 (1988)).

¹⁴⁸ *Wal-mart Stores, Inc. v. Dukes*, 564 U.S. 338, 357 (2011); *Watson*, 487 U.S. at 994 (pointing to “overall sex-based disparity” in workforce is not enough).

¹⁴⁹ *Gulino v. N.Y. State Educ. Dep’t*, 460 F.3d 361, 382 (2d Cir. 2006).

plaintiff's disparate impact or causation analysis.¹⁵⁰ "If the defendant is successful in doing so, that ends the matter. Alternatively, the defendant can concede that the identified policy has a disparate impact, but nevertheless defend it as 'job related for the position in question and consistent with business necessity.'" ¹⁵¹

If the defendant demonstrates the business necessity of the challenged policy, the burden then shifts back to the plaintiff, "who has one last chance to prove [their] case."¹⁵² "Namely, they must show that other methods exist to further the defendant's legitimate business interest 'without a similarly undesirable [discriminatory] effect.'" ¹⁵³

2. *Available Data Suggests that a Mandatory COVID-19 Vaccine Policy May Have Disparate Impact on Women or Minority Employees.*

At the time this Article was written, available data suggests that women may be more likely than men to refuse or decline a COVID-19 vaccine for religious, medical, pregnancy, or personal reasons.¹⁵⁴ Consider the following evidence of a potential disparity between men and women, as well as between Caucasians and African Americans, with respect to their willingness to be vaccinated against COVID-19:

- In October 2020, results from a Gallup poll showed that 50% of Americans were willing to be vaccinated against COVID-19.¹⁵⁵ Only 44% of women reported being willing to take the vaccine, compared to 56% of men—a difference of 12 percentage points.¹⁵⁶

¹⁵⁰ *Id.*; see also *Watson*, 487 U.S. at 996.

¹⁵¹ *Mandala v. NTT Data, Inc.*, 975 F.3d 202, 208 (2d Cir. 2020) (quoting *Ricci*, 557 U.S. at 578); see also *Gulino*, 460 F.3d at 382 (showing the three-part analysis with shifting evidentiary burdens).

¹⁵² *Mandala*, 975 F.3d at 208.

¹⁵³ *M.O.C.H.A. Soc'y, Inc. v. City of Buffalo*, 689 F.3d 263, 274 (2d Cir. 2012) (quoting *Watson*, 487 U.S. at 998); see also *Gulino*, 460 F.3d at 382.

¹⁵⁴ See Chapman, *supra* note 139. See also EJ Dickson, *Why are Fewer Women than Men Planning to get a COVID Vaccine?*, ROLLING STONE (Dec. 4, 2020), <https://www.rollingstone.com/culture/culture-news/women-men-covid-19-vaccine-1099020/> [<https://perma.cc/2WYC-6TTV>]; Beth JoJack, *Which U.S. Demographics are Likely to Refuse a COVID-19 Vaccine?*, MED. NEWS TODAY (Jan. 21, 2021), <https://www.medicalnewstoday.com/articles/which-us-demographics-are-more-likely-to-refuse-a-covid-19-vaccine#Reasons-behind-vaccine-decisions> [<https://perma.cc/NSC7-7AS3>].

¹⁵⁵ Chapman, *supra* note 139.

¹⁵⁶ See *id.* The question posed was: "If an FDA-approved vaccine to prevent COVID-19 was available right now at no cost, would you agree to be vaccinated?" *Id.* "Results for this Gallup poll are based on self-administered web surveys conducted Sept. 14-27, 2020, with a random

- In September 2020, a poll of U.S. voters showed that women were 20% less likely than men to receive a COVID-19 vaccination if a vaccine became available in 2020.¹⁵⁷ While 69% of male respondents said they would receive a vaccine, only 49% of women said the same.¹⁵⁸
- Pregnant women were initially excluded from the COVID-19 vaccine trials, although at the time of writing this Article, trials on pregnant women are finally underway.¹⁵⁹
- Older females have historically experienced higher adverse reactions to vaccines than men.¹⁶⁰ As one study published by the American Physiological Society notes:
Aged females consistently report more adverse reactions than males in response to the seasonal and pandemic influenza vaccines (10, 22, 25, 32, 36, 49, 57, 58, 82), the pneumococcal vaccines (24, 101), the herpes zoster vaccine (55), and the tetanus and pertussis vaccines (7, 42, 113). While both males and females experience similar types of adverse reactions, the proportion of female

sample of 2,730 adults, aged 18 and older,' reported the survey firm. The margin of error is +/- 3 percentage points." *Id.*

¹⁵⁷ See Daniel Villarreal, *Women 20% Less Likely to Take COVID-19 Vaccine if One's Available in 2020*, NEWSWEEK (Sept. 16, 2020), <https://www.newsweek.com/women-20-less-likely-take-COVID-19-vaccine-if-ones-available-2020-1532469> [<https://perma.cc/K9KY-56ER>]. "The poll of 3,758 individuals—conducted by the Washington, D.C. newspaper The Hill and the market research company HarrisX—examined people's openness to receiving the vaccine based on gender, age, race, political party support, preferred presidential candidate as well as education and income levels." *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ See Laura E. Riley & Brenna L. Hughes, *Pregnancy and Lactating Women Should not be Excluded From Covid-19 Drug, Vaccine Trials*, STAT (Sept. 28, 2020), <https://www.statnews.com/2020/09/28/pregnancy-lactation-no-reason-exclude-women-COVID-19-drug-vaccine-trials/> [<https://perma.cc/S7T4-KJJZ>]; see also Ruth Farrell, Marsha Michie & Rachel Pope, *Pregnant Women in Trials of COVID-19: A Critical Time to Consider Ethical Frameworks of Inclusion in Clinical Trials*, NAT'L INST. OF HEALTH, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7323073/> [<https://perma.cc/TAQ6-8R5B>] (researching the exclusion of pregnant women from various COVID-19 trials); see also Julie Steenhuisen, *Large U.S. COVID-19 Vaccine Trials will Exclude Pregnant Women for Now*, REUTERS (July 31, 2020), <https://www.reuters.com/article/us-health-coronavirus-vaccines-pregnancy/large-u-s-COVID-19-vaccine-trials-will-exclude-pregnant-women-for-now-idUSKCN24W1NZ> [<https://perma.cc/XA9A-JT8E>] ("The first two COVID-19 vaccines to enter large-scale U.S. trials will not be tested in pregnant women this year, raising questions about how this vulnerable population will be protected from the coronavirus, researchers told Reuters.")

¹⁶⁰ Ashley L. Fink & Sabra K. Klein, *Sex and Gender Impact Immune Responses to Vaccines Among the Elderly*, 30(6) PHYSIOLOGY (BETHESDA) 408-16 (Nov. 2015).

vaccines reporting local reactions, such as injection site pain, redness, and swelling, as well as systemic reactions, including joint or muscle pain, headache, back and abdominal pain, fever, chills, and hypersensitivity reactions is consistently greater than for males . . . Whether differences in adverse reactions among aged males and females reflect a gender-based reporting bias or a sex difference in inflammation has not been resolved.¹⁶¹

- On the other hand, it has been reported that *younger* women are more likely to experience side effects from the COVID-19 vaccine, including blood clots.¹⁶²
- Pre-Covid-19, studies showed that African Americans were less likely than other demographics to get the flu vaccine, “viewing potential side effects of the vaccine as a greater risk than catching the flu itself.”¹⁶³ One study found that African Americans tended to have “greater regret of side effects” than White vaccinated individuals.¹⁶⁴ After analyzing 838 White and 819 African American study participants, the researchers found that 41% of African

¹⁶¹ *Id.*

¹⁶² Melinda Wenner Moyer, *Women Report Worse Side Effects After a Covid Vaccine*, N.Y. Times (Mar. 8, 2021), <https://www.nytimes.com/2021/03/08/health/vaccine-side-effects-women-men.html> [<https://perma.cc/NV8N-GVDU>].

¹⁶³ See Carole Ellis, *Older Women and African Americans Less Likely to get Flu Vaccines*, CONTAGION LIVE (Mar. 24, 2017), <https://www.contagionlive.com/view/older-women-african-americans-less-likely-to-get-flu-vaccines> [<https://perma.cc/AD5E-3S3M>] (citing a study published in *Risk Analysis: An International Journal*). Another study in 2016 found:

The clearest racial divide [among focus group participants] in vaccine confidence was between White and African American participants’ different levels of trust in the government’s role in vaccination. White participants expressed greater trust in government, while African American participants voiced lower trust, with particular concerns regarding the government’s motives. . . . This distrust extended into conspiracy theories including believes that the government was experimenting on minorities as ‘guinea pigs’, that the vaccines were being diluted and distributed in Black communities, or that vaccines were a form of population control. Additionally, the legacy of the Tuskegee Syphilis Study emerged in every focus group as a justification for distrust.

Sandra Quinn, Amelia Jamison, Donald Musa, Karen Hilyard & Vicki Freimuth, *Exploring the Continuum of Vaccine Hesitancy Between African American and White Adults: Results of a Qualitative Study*, PLOS CURRENTS: OUTBREAKS (Dec. 29, 2016), <https://currents.plos.org/outbreaks/article/exploring-the-continuum-of-vaccine-hesitancy-between-african-american-and-white-adults-results-of-a-qualitative-study/> [<https://perma.cc/SJ7C-TL63>].

¹⁶⁴ Ellis, *supra* note 163.

Americans surveyed opted to receive the vaccine compared to 47% of White Americans.¹⁶⁵

- The U.S. Department of Health and Human Services Office of Minority Health reports that “African American adults are less likely than non-Hispanic White adults to have received a flu vaccine in the past year or to have ever received the pneumonia vaccine.”¹⁶⁶ For example, in 2015, Non-Hispanic Black individuals ages 65 and older were 10 percent less likely to have received the influenza (flu) shot in the past 12 months, as compared to non-Hispanic Whites of the same age group.¹⁶⁷ Further, African American women are 10 percent less likely to have received an HPV vaccine than White women.¹⁶⁸
- With respect to the COVID-19 vaccine, studies are finding that Black Americans are the most skeptical of the vaccine than any other group.¹⁶⁹ And as of March 2021, state-reported race and ethnicity information regarding recipients of the COVID-19 vaccine showed that the vaccination rate for Black people in the United States was, at that time, half that of White people, and the gap for Hispanic people is even larger.¹⁷⁰

Assuming these polls and statistics hold true for the COVID-19 vaccine in the coming months, a mandatory vaccine policy could have a disparate impact on women, African Americans, or other protected classes. Applying the disparate impact burden-shifting analysis, a group of employees could: (1) identify a specific policy at issue (i.e., mandatory vaccine policy); (2) use statistics to show the disparity between women/men and Caucasians/African Americans with respect to participation in the COVID-19 vaccine; and (3) establish a causal link between (1) and (2), especially if women or African Americans are turned down for employment at a higher rate than men or Caucasians on the basis of failing to prove they have obtained the COVID-19 vaccine.¹⁷¹ Assuming an employee or group

¹⁶⁵ *Id.*

¹⁶⁶ See *Immunizations and African Americans*, U.S. DEP'T OF HEALTH & HUM. SERVS.: OFF. OF MINORITY HEALTH, <https://minorityhealth.hhs.gov/omh/browse.aspx?lvl=4&lvlid=22> [https://perma.cc/CS9V-AVGF].

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ Kashmiri Gander, *Third of Americans Say They won't get a COVID-19 Vaccine, with Black Americans the Most Skeptical*, NEWSWEEK (June 10, 2020), <https://www.newsweek.com/american-COVID-19-vaccine-skeptical-1509895> [https://perma.cc/6FMS-A2VC].

¹⁷⁰ See Schoenfeld Walker et al., *supra* note 137; Richert et al., *supra* note 137.

¹⁷¹ Whether an employee or group of employees could successfully make such a showing is beyond the scope of this Article, but under existing case law and EEOC guidance, such a result is far from certain. Often, to make a showing of disparate impact, discrimination must

of employees could make this initial showing, the burden would then shift to the employer to show that the policy is “job related for the position in question and consistent with business necessity.”¹⁷²

A hospital, medical provider, or first responder will likely have little trouble establishing the necessity of a mandatory vaccine policy.¹⁷³ Retail, restaurant, and other industries that heavily interface with the public may also be able to make a case that the policy is a “business necessity,” at least for customer-facing employees. But other private employers may not be able to overcome this hurdle, especially when remote work has proven effective for many companies over the past year.

Moreover, employers who *can* show a business necessity for the policy are not done there. An employee prevails on an adverse impact claim if, notwithstanding a showing that the policy is a business necessity, the

occur “on the basis of immutable characteristics.” *Willingham v. Macon Tel. Pub. Co.*, 507 F.2d 1084, 1091 (5th Cir. 1975). In *Willingham*, the Fifth Circuit explained that objections to grooming codes or hair length policies, for instance, were not immutable characteristics and were thus not protected. *Id.*; see also *Brown v. D.C. Transit System, Inc.*, 523 F.2d 725, 728 (D.C. Cir. 1975); *Knott v. Mo. Pac. R. Co.*, 527 F.2d 1249, 1252 (8th Cir. 1975). Similarly, at least one court has found that there can be no disparate impact claim where “the rule is one that the affected employee can readily observe, and nonobservance is a matter of individual preference.” *Garcia v. Gloor*, 618 F.2d 264, 270 (5th Cir. 1980) (concluding that employer rule requiring bilingual employees to speak English during work hours was not discriminatory).

But even in *Garcia*, the court’s determination was highly fact dependent, and the court implied that the result may have been different if the employee had been able to equate their preferred language to national origin or if the effect of the rule was “invidious to Hispanic Americans.” *Id.* And in an EEOC decision, the Commission found a hair grooming policy had an adverse impact on African Americans because the wearing of a certain hairstyle had been appropriated as a cultural symbol. EEOC Decision No. 71-2444, 1971 WL 3898, 4 Fair Empl. Prac. Cas. (BNA) (1971); see also *Ramsey v. Hopkins*, 320 F. Supp. 477 (N.D. Ala. 1970). While failure to comply with a mandatory COVID-19 vaccination policy could generally be considered a mutable characteristic or matter of individual preference, under the right set of facts, a discrimination claim equating such failure with gender or race is possible.

¹⁷² *Mandala v. NTT Data, Inc.*, 975 F.3d 202, 208 (2d Cir. 2020) (quoting *Ricci v. DeStefano*, 557 U.S. 557, 578 (2009)); see also *Gulino v. N.Y. State Educ. Dep’t*, 460 F.3d 361, 382 (2d Cir. 2006).

¹⁷³ See, e.g., *Potter v. St. Joseph’s Med. Ctr.*, No. A18-0736, 2018 WL 6729836, at *5 (Minn. Ct. App. Dec. 24, 2018).

Essentia’s influenza vaccination policy is reasonable. Essentia’s policy, requiring all staff not otherwise exempted, to receive the influenza vaccine was based upon Essentia’s aspiration to “have zero preventable harm for patients and staff.” We agree with the ULJ’s determination that, because it is a healthcare institution, [the employer] reasonably “requires staff to get flu vaccinations for the maximum protection of patient health.” The vaccination policy provided exemption for those employees unable to be vaccinated for religious or medical reasons.

Id.

employee demonstrates that other methods exist to achieve the same desired outcome, without the discriminatory effect.¹⁷⁴ That would include social distancing, wearing a mask, working remotely, and all of the precautions employers are currently requiring employees to take.

In summary, adverse impact claims have not been tested against mandatory vaccine policies in the courts up to this point. However, as noted above, mandatory vaccine policies have traditionally been implemented only by health care employers, who generally have a clear and unmistakable business necessity for a mandatory vaccine policy. As more and more private employers begin to require vaccines due to COVID-19, adverse impact claims will likely arise. These cases may turn, in large part, on whether the statistics bear out an actual adverse impact on a protected class. That is, will women actually receive the COVID-19 vaccine at a much lower rate than men? Will pregnant women receive the vaccine at lower rates than men and non-pregnant women? Will African Americans continue to be significantly less likely to obtain a vaccine, or will concerns over contracting COVID-19 prevail over concerns about vaccine side effects?

B. Employer Liability for Workers' Compensation Claims and Torts.

A second area of relatively uncharted waters includes employer liability for negligence and other tort claims if an employee suffers an adverse reaction from a required vaccine or, alternatively, an unvaccinated employee interacts with a customer, vendor, or member of the public and transmits COVID-19.

Presumably, an employee who suffers an adverse reaction to a vaccine that was required as a condition of employment would be entitled to workers' compensation benefits. A handful of courts who have considered employee injuries or illnesses resulting from an employer-mandated vaccine have found that the employer is liable for the employee's injuries and even death under the Workers' Compensation Act.¹⁷⁵ However,

¹⁷⁴ *Mandala*, 975 F.3d at 208.

¹⁷⁵ *Alewine v. Tobin Quarries*, 33 S.E.2d 81, 87 (S.C. 1945).

We think there is sufficient evidence to support the conclusion of the Industrial Commission that the infection of the vaccination wound was an accident which arose out of and in the course of deceased's employment and that the employer is liable under the [Workers' Compensation] Act for the death of the deceased resulting from such infection.

Id.; *Washington Hosp. Ctr. v. D.C. Dep't of Emp. Servs.*, 821 A.2d 898, 900 (D.C. 2003) (finding that employee's injuries resulting from pre-employment MMR inoculation occurred in course of employment entitling employee to workers' compensation benefits); *Anderson v. Chatham Elecs.*, 175 A.2d 256, 258 (N.J. Super. Ct. App. Div. 1961).

[W]hen the employer asks the employee to expose himself to vaccination, inoculation, blood test, etc., he asks the employee to submit

if an employer encourages but does not require a vaccine, an employee has no workers' compensation rights—although that may depend on how strongly the employer encourages the vaccine and whether the employer offers it on-site,¹⁷⁶ during working hours.¹⁷⁷ Therefore, under existing case

to a risk of infection, which the employee might not otherwise do. There would be no liability if the employer merely asked an employee who claimed he had been vaccinated to produce a doctor's certificate to that effect.

Id.; *Moore v. St. Francis Cabrini Hosp.*, 679 So.2d 943, 945 (La. Ct. App. 1996). At the time of the injury, St. Frances Cabrini was providing a preventative service to its employee, Ms. Moore. Since the treatment was a benefit offered by St. Frances Cabrini to prevent an employee from contracting hepatitis B and was only made available to St. Frances Cabrini employees, St. Frances Cabrini was functioning not only as a health care provider but also as an employer taking care of its employee and complying with federal labor requirements. Therefore, we hold as a matter of law that since St. Frances Cabrini was functioning in a dual capacity and the dual capacity doctrine has been legislatively abrogated, the Moores' exclusive remedy against St. Frances Cabrini is under the Workers' Compensation Law.

Id.; *Cf. Smith v. Seamless Rubber Co.*, 150 A. 110, 111 (Conn. 1930) (holding no workers' compensation benefits allow for an employee who suffered injury from a vaccine where the vaccination was encouraged—and paid for—by the employer but not actually required by the employer to receive benefits).

¹⁷⁶ Employers may be immune from tort liability to employees who suffer an adverse reaction from a vaccine when the vaccine is offered onsite by the employer under the Public Readiness and Emergency Preparedness Act (PREP Act). The PREP Act declaration provides immunity from liability (except for willful misconduct) for claims of loss caused, arising out of, relating to, or resulting from administration or use of countermeasures to diseases, threats and conditions determined by the Secretary to constitute a present, or credible risk of a future public health emergency. The immunity extends to “entities and individuals involved in the development, manufacture, testing, distribution, administration, and use of such countermeasures.” *See* Health & Human Services Dept., *Declaration Under the Public Readiness and Emergency Preparedness Act for Medical Countermeasures Against COVID-19*, NAT'L ARCHIVES (Mar. 17, 2020), <https://www.federalregister.gov/documents/2020/03/17/2020-05484/declaration-under-the-public-readiness-and-emergency-preparedness-act-for-medical-countermeasures> [https://perma.cc/ZG5R-FJL5].

¹⁷⁷ *See, e.g., Howard Delivery Serv., Inc. v. Zurich Am. Ins. Co.*, 547 U.S. 651, 662–63 (2006) (quoting P. Lencsis, *Workers Compensation: A Reference and Guide* 9 (1998)).

The invention of workers compensation as it has existed in this country since about 1910 involves a classic social trade-off or, to use a Latin term, a *quid pro quo* What is given to the injured employee is the right to receive certain limited benefits regardless of fault, that is, even in cases in which the employee is partially or entirely at fault, or when there is no fault on anyone's part. What is taken away is the employee's right to recover full tort damages, including damages for pain and suffering, in cases in which there is fault on the employer's part.

Id.; *Graham v. Stonehouse Const., LLC*, No. CV116019292S, 2011 WL 3199456, at *1 (Conn. Super. Ct. June 28, 2011).

law, it appears that if an employer requires vaccines and an injury or death results, the employee would be eligible for workers' compensation benefits, and the employer would be immune from tort liability. However, the employer will assume the financial consequences of any injuries—including an increase in insurance premiums, paying potential sick time, absorbing the costs associated with business disruption, and taking on the risk of a tangential employment claim under the ADA, Family Medical Leave Act (FMLA), and other federal or state leave laws in the event of a serious reaction.

On the other hand, employers who choose not to implement vaccination policies—or who choose to implement such policies but provide exemptions for certain employees—could find themselves subject to a civil lawsuit if an unvaccinated employee transmits COVID-19 to a customer, vendor, or member of the public.¹⁷⁸ Third-parties are ineligible for workers' compensation benefits,¹⁷⁹ therefore, an employer can find no immunity from tort liability in those circumstances. The critical questions in a negligence lawsuit under these circumstances will be: did the employer have a *duty* to the third party, and did the employer *violate its duty* by either failing to require its employees to obtain vaccines or failing to disclose to the

[T]he exclusivity provision in the [Workers' Compensation A]ct, manifests a legislative policy decision that a limitation on remedies under tort law is an appropriate trade-off for the benefits provided by workers' compensation. That trade-off is part and parcel of the remedial purpose of the act in its entirety. Accordingly, our caselaw on workers' compensation exclusivity reflects the proposition that these statutes compromise an employee's right to a common law tort action for work related injuries in return for relatively quick and certain compensation.

Id.

¹⁷⁸ Since March 2020, a number of wrongful death lawsuits have been filed against private companies and their owners when a customer or patient contracted COVID-19 from an employee. *See, e.g.,* Block v. Big Blue Healthcare, Inc., No. 2:20-CV-2262-HLT-JPO, 2020 WL 4815076, at *1 (D. Kan. Aug. 19, 2020) (plaintiffs filed wrongful death lawsuit against owners and operators of care facility after their mother contracted and died of COVID-19—alleging that they were negligent in failing to protect against COVID-19 infections); Estate of Maglioli v. Andover Subacute Rehab. Ctr. I, 478 F.Supp.3d 518, 522 (D.N.J. Aug. 12, 2020) (plaintiffs asserted state-law claims of negligence, wrongful death, and medical malpractice on behalf of residents and patients at Defendants' nursing care facilities who contracted COVID-19); Dorety v. Princess Cruise Lines Ltd., No. 2:20-CV-03507-RGK-SK, 2020 WL 6748719, at *1 (C.D. Cal. Sept. 17, 2020) (spouse filed lawsuit against cruise line after her husband contracted COVID-19 on ship and died, seeking “for loss of society, companionship, pecuniary loss, loss of inheritance, loss of consortium, and mental anguish as a result of the death.”).

¹⁷⁹ Amy DelPo, *Are You Eligible for Workers' Compensation Benefits?*, NOLO, <https://www.nolo.com/legal-encyclopedia/are-you-eligible-workers-compensation-32963.html> [https://perma.cc/NZAQ-WEA3].

third party that the employee was unvaccinated?¹⁸⁰ At least one article published a few years before the COVID-19 pandemic began predicted that employers could face tort liability for *failing* to require employee vaccination.¹⁸¹ This theory has not yet been tested in the courts.

These unknown, competing legal risks create an unparalleled risk to employers to make the “right call” as to mandatory vaccine policies. Given the number of parties with a vested interest in ensuring that enough people are vaccinated in order to obtain herd immunity—*i.e.*, government at all levels and the public at large—employers should not be compelled to bear that risk unmitigated.

IV. MAKING THE CASE FOR STATE LEGISLATION EASING THE BURDEN ON EMPLOYERS WHO CHOOSE TO IMPLEMENT MANDATORY VACCINE POLICIES.

¹⁸⁰ *See, e.g.*, Domagala v. Rolland, 805 N.W.2d 14, 22 (Minn. 2011) (“To recover for a claim of negligence, a plaintiff must prove (1) the existence of a duty of care, (2) a breach of that duty, (3) an injury, and (4) that the breach of the duty of care was a proximate cause of the injury.”).

¹⁸¹ Baxter, *supra* note 12, at 922–23. Baxter concluded, before COVID-19, the following as to the risk of legal liability for a business failing to require employees to vaccinate:

The risk of legal liability is probably small for most businesses. While a business has a duty to its customers, in most cases courts are unlikely to hold that the duty encompasses protecting customers from vaccine-preventable diseases. Unless the employees pose a greater risk than the public, there is no reason to believe that a business must protect its customers from risks that the customer is likely to encounter anywhere else. Courts would also need to consider the extent to which customers are responsible for protecting themselves by getting vaccinated. Finally, proving that the customer contracted a vaccine-preventable disease from the employee of a particular business may be difficult.

However, the threat of liability may be greater for businesses that target customers who are unlikely or unable to be vaccinated. For example, a store that specializes in clothes and furnishings for infants can expect customers to bring their infants into the store with them, and those infants may be too young to be vaccinated against many diseases. A judge or jury could find that it is foreseeable that unvaccinated and vulnerable infants would encounter employees of the store and that the business’s duty of reasonable care includes an obligation to ensure that the employees do not pose an unreasonable risk of harm to customers or their infants. Other factors that may affect liability include whether an employer allowed or encouraged employees to stay at work when they are sick, whether the employer encouraged vaccination and how successful any voluntary program has been, and whether the workplace is cleaned and disinfected adequately and frequently.

Id.

As of the date this Article was written, 24% of Americans have received a COVID-19 vaccine.¹⁸² Voluntary vaccination may not result in herd immunity, which the World Health Organization defines as at least 80%—possibly higher.¹⁸³ In that case, one of three scenarios will likely play out. First, there is the potential that states will require the public to obtain the vaccine. For example, the New York State Bar Association passed a resolution—before a vaccine was even approved by the FDA—urging the state to consider enforcing mandatory COVID-19 vaccination, *even if* people object for “religious, philosophical or personal reasons.”¹⁸⁴ Given that approximately 40% of Americans self-reported that they will not, at least *immediately*, obtain the COVID-19 vaccine,¹⁸⁵ statewide mandatory vaccine laws will likely be the exception, not the norm, because such mandates would be wildly unpopular. Moreover, any such statutes will almost certainly result in immediate constitutional challenges that will leave the public in an uncertain state for months or years to come. If a state chooses to impose mandatory vaccines, employers would be relieved of the burden of deciding whether to mandate vaccines among their workforces. But because most states will likely be hesitant to take this heavy-handed approach for political reasons, employers should not expect this scenario to play out.

The second scenario is that states enact legislation *prohibiting* employers and other private businesses from adopting mandatory vaccine policies. This scenario is also unlikely, even in states where individual liberties and individual privacy rights are closely guarded. Republicans will be loath to pass legislation that second-guesses an employer’s business decision to enact a mandatory vaccine policy, and both Democrats and Republicans will be loath to enact any legislation that *discourages* public vaccination.

If Americans obtain the vaccine at the previously self-reported rate of 60-70%, the U.S. will fall short of achieving herd immunity.¹⁸⁶ Therefore,

¹⁸² Katie Adams & Maia Anderson, *States Ranked by Percentage of Population Vaccinated: April 18*, BECKERS HOSPITAL REV. (Apr. 17, 2020), <https://www.beckershospitalreview.com/public-health/states-ranked-by-percentage-of-population-vaccinated-march-15.html> [https://perma.cc/WE37-6VH5].

¹⁸³ *Coronavirus Disease (COVID-19): Herd Immunity, Lockdowns and COVID-19*, WORLD HEALTH ORG. (Dec. 31, 2020), https://www.who.int/news-room/q-a-detail/herd-immunity-lockdowns-and-covid-19?gclid=CjwKCAjwjuqDBhAGEiwAdX2cjyGBMjWsUYE9twLlx398Y53mAEB_CfU0mzyg2ef6HJGITD5WqKtYBoCiHUQAvD_BwE# [https://perma.cc/3FWD-HC9F].

¹⁸⁴ DeSantis, *supra* note 5; see also *New York Lawyers Recommend Mandatory COVID-19 Vaccinations*, PRECISION VACCINATIONS (Nov. 8, 2020), <https://www.precisionvaccinations.com/new-york-lawyers-recommend-mandatory-COVID-19-vaccinations> [https://perma.cc/5SQB-GFU9].

¹⁸⁵ See Funk & Tyson, *supra* note 3.

¹⁸⁶ *Coronavirus disease (COVID-19): Herd immunity, lockdowns and COVID-19*, World Health Org. (Dec. 31, 2020), <https://www.who.int/news-room/q-a-detail/herd-immunity->

if neither the first nor second scenario plays out, the pressure will likely fall on employers and places of public accommodations to make the COVID-19 vaccine a condition of employment or entrance in order to obtain herd immunity. Employers that choose to implement a mandatory vaccine policy would do so under the existing legal paradigm—which has been largely untested outside of the healthcare setting, as virtually every Title VII and ADA case arises in the healthcare setting. Widespread implementation of mandatory workplace vaccine policies will bring an unprecedented number of objections, legal challenges, lawsuits, and charges of discrimination that will tax the existing legal framework. Litigation before different state and federal agencies and courts will inevitably result in conflicting decisions that will serve to add further uncertainty and unpredictability for both employers and employees. Given the known and unknown legal risks discussed in Sections II and III, non-healthcare employers will likely be reluctant to require vaccines, instead opting for incentive-type programs that merely encourage—but do not compel—vaccination.

If government and health officials set their sights on private employers as the vehicle to achieve herd immunity, employers may feel pressured to require (not just encourage) employees to obtain the COVID-19 vaccination, notwithstanding that the existing legal paradigm seems insufficient for an orderly execution and administration of such policies. Employers and employees alike would benefit from a consistent standard of enforcement, which leads to scenario three: states adopt new legislation that sets forth a consistent set of rules and standards that will apply to employers who *choose* to mandate vaccines. The legislation would protect employee rights by affording clear and consistent exemptions that are slightly broader than those currently required under Federal law and mitigate risk for employers by providing certain immunity and minimizing disputes over exemptions.¹⁸⁷

lockdowns-and-covid-19 [https://perma.cc/39AM-DVAL] (defining herd immunity as 80% to 95% of the public being vaccinated); Cary Funk & Alec Tyson, *Growing Share of Americans say They Plan to get a COVID-19 Vaccine - or Already Have*, PEW RESEARCH CTR. (Mar. 5, 2021), <https://www.pewresearch.org/science/2021/03/05/growing-share-of-americans-say-they-plan-to-get-a-covid-19-vaccine-or-already-have/> [https://perma.cc/4KQG-YFWC] (reporting that 70% of Americans self-report that they plan to get a COVID-19 vaccine).

¹⁸⁷ The proposed legislation discussed *infra* is not intended to address healthcare employers, who have a heightened need to encourage or require vaccination by their employees. For instance, broader exemptions than those currently required by Title VII and the ADA may not be prudent in a healthcare setting.

A. *School Vaccine Laws Provide the Roadmap.*

Legislation concerning non-healthcare mandatory vaccine policies in employment need not be crafted from ground zero. All fifty states currently have legislation requiring vaccines for students who attend school, and this legislation provides a framework for legislation regulating employer-mandated vaccine policies.

The exemptions set forth in these state statutes are particularly pertinent for employers. Although exemptions “vary from state to state, all school immunization laws grant exemptions to children for medical reasons.”¹⁸⁸ Forty-five states and Washington D.C. grant religious exemptions for people who have religious objections to immunizations.¹⁸⁹ Fifteen states allow philosophical exemptions for those who object to immunizations because of personal, moral, or other beliefs.¹⁹⁰ Minnesota is one of those fifteen states.¹⁹¹ In Minnesota, the following exemptions are recognized by statute:

...

(c) If a statement, signed by a physician, is submitted to the administrator or other person having general control and supervision of the school or child care facility stating that an *immunization is contraindicated for medical reasons* or that *laboratory confirmation of the presence of adequate immunity exists*, the immunization specified in the statement need not be required.

(d) If a notarized statement signed by the minor child’s parent or guardian or by the emancipated person is submitted to the administrator or other person having general control and supervision of the school or child care facility stating that the person has not been immunized as prescribed in subdivision 1 *because of the conscientiously held beliefs of the parent or guardian of the minor child or of the emancipated person, the immunizations specified in the statement shall not be required*. This statement must also be forwarded to the commissioner of the Department of Health.

...

¹⁸⁸ See *States with Religious and Philosophical Exemptions from School Immunization Requirements*, NAT’L CONF. OF STATE LEGISLATURES (June 26, 2020), <https://www.ncsl.org/research/health/school-immunization-exemption-state-laws.aspx> [https://perma.cc/3DAM-FERK].

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

(g) If a person who is not a Minnesota resident enrolls in a Minnesota school online learning course or program that delivers instruction to the person only by computer and does not provide any teacher or instructor contact time or require classroom attendance, the person is not subject to the immunization, statement, and other requirements of this section.¹⁹²

Note that the vaccine exemptions that schools must recognize in Minnesota are *broader* than the exemptions employers would be required to give under existing employment laws. For instance, while Title VII only requires employers to provide an accommodation for a sincerely held *religious* belief, Minnesota’s school vaccine law exempts individuals with a “conscientiously held belief.”¹⁹³ Consequently, some of the cases cited in Section II(B), in which religious discrimination claims under Title VII were thrown out when employees with sincerely held *moral* beliefs against vaccines could not tie their beliefs to a specific religious belief, would likely have come out differently under Minnesota’s school vaccine law. Additionally, Minnesota’s school vaccine law provides for a medical exemption if verified by a physician—regardless of whether the individual seeking the exemption has a medical condition that qualifies as a disability under the ADA.¹⁹⁴ For example, allergies—which often do not constitute a disability under the ADA—would qualify for a medical exemption under the school vaccine law with physician support.

Another difference is that under Minnesota’s school vaccine law, proof of immunity satisfies the immunization requirement¹⁹⁵—which may or may not qualify as a “reasonable accommodation” to an employer’s mandatory vaccine policy under the ADA. And finally, Minnesota’s school vaccine law explicitly exempts students who are participating in school exclusively through online learning over a computer.¹⁹⁶ As for employers, while it may be prudent to exclude remote workers from a mandatory vaccine policy, there is no statute that would require employers to make such an exclusion.

Exemptions adopted by the fourteen other states that recognize philosophical objections to school vaccines provide further insight into how state legislatures might craft legislation aimed at regulating employer-mandated vaccine policies.

TABLE 1:
Medical, Religious or Philosophical Statutory
Exemptions in Fourteen States

¹⁹² MINN. STAT. § 121A.15, subdiv. 3 (2020) (emphasis added).

¹⁹³ *Id.*

¹⁹⁴ *See id.* § 121A.15, subdiv. 3(c).

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* § 121A.15, subdiv. 3(g).

State	Statute	Medical, Religious or Philosophical Exemptions
Arizona	Ariz. Rev. Stat. Ann. § 15-872, 873	<p>Exemption recognized when:</p> <p>“1. The parent or guardian of the pupil submits a signed statement to the school administrator stating . . . that <i>due to personal beliefs</i>, the parent or guardian does not consent to the immunization of the pupil.</p> <p>2. The school administrator receives written certification that is signed by the parent or guardian and by a physician or a registered nurse practitioner, that states that one or more of the required immunizations <i>may be detrimental to the pupil’s health and that indicates the specific nature and probable duration of the medical condition or circumstance that precludes immunization.</i>”¹⁹⁷</p> <p><i>But:</i> “Pupils who lack documentary proof of</p>

¹⁹⁷ ARIZ. REV. STAT. ANN. §§ 15-872, 873 (emphasis added).

		<p>immunization shall not attend school during outbreak periods of communicable immunization-preventable diseases as determined by the department of health services or local health department.”¹⁹⁸</p>
<p>Arkansas</p>	<p>Ark. Code Ann. § 6-18-702</p>	<p>“. . . This section shall not apply if the parents or legal guardian of that child object thereto on the grounds that immunization conflicts with the religious <i>or philosophical beliefs of the parent or guardian.</i>”¹⁹⁹</p> <p><i>But:</i> “(a) At the discretion of the Department of Health, the unimmunized child or individual may be removed from day care or school during an outbreak if the child or individual is not fully vaccinated; and (b) The child or individual shall not return to school until the outbreak has been resolved and the</p>

¹⁹⁸ *Id.*

¹⁹⁹ ARK. CODE ANN. § 6-18-702 (emphasis added).

		Department of Health approves the return to school.” ²⁰⁰
Colorado	Colo. Rev. Stat. § 25-4-902, 903	<p>“A student is exempted from receiving the required immunizations in the following manner:</p> <p>(a) By submitting to the student’s school a completed certificate of <i>medical exemption</i> from a licensed physician, physician assistant authorized pursuant to section 12-240-107 (6), or advanced practice nurse that the physical condition of the student is such that one or more specified immunizations <i>would endanger his or her life or health or are medically contraindicated due to other medical conditions</i>; or</p> <p>(b) . . . By submitting to the student’s school either a completed certificate of completion of the online education module or a completed certificate of nonmedical exemption signed by</p>

²⁰⁰ *Id.*

		<p>one parent or legal guardian, an emancipated student, or a student eighteen years of age or older that the parent, legal guardian, or student is an adherent to a <i>religious belief whose teachings are opposed to immunizations or has a personal belief that is opposed to immunizations.</i>²⁰¹</p>
Idaho	Idaho Code Ann. § 39-4801, 4802	<p>“(1) Any minor child whose parent or guardian has submitted to school officials a certificate signed by a physician licensed by the state board of medicine stating that the <i>physical condition of the child is such that all or any of the required immunizations would endanger the life or health of the child</i> shall be exempt from the provisions of this chapter.</p> <p>(2) Any minor child whose parent or guardian has submitted a signed statement to school officials stating their objections <i>on religious</i></p>

²⁰¹ COLO. REV. STAT. §§ 25-4-902, 903 (emphasis added).

		<i>or other grounds</i> shall be exempt from the provisions of this chapter. ²⁰²
Louisiana	La. Stat. Ann. § 17:170(A); 40:31.16	“Nothing in this Part shall be construed to require immunization or tracking of any child otherwise exempt from immunization requirements for <i>medical or religious reasons</i> . ²⁰³
Michigan	Mich. Comp. Laws Ann. § 333.9208, 9215	“(1) A child is exempt from the requirements of this part as to a specific immunization for any period of time as to which a physician certifies that a specific immunization <i>is or may be detrimental to the child’s health or is not appropriate</i> . (2) A child is exempt from this part if a parent, guardian, or person in loco parentis of the child presents a written statement to the administrator of the child’s school or operator of the group program to the effect that the requirements of this part cannot be

²⁰² IDAHO CODE ANN. §§ 39-4801, 4802 (emphasis added).

²⁰³ LA. STAT. ANN. §§ 17:170(A); 40:31.16 (emphasis added).

		met <i>because of religious convictions or other objection to immunization.</i> ²⁰⁴
North Dakota	N.D. Cent. Code Ann. § 23-07-17.1	<p>“Any minor child, through the child’s parent or guardian, may submit to the institution authorities either a certificate from a licensed physician stating that the physical condition of the child is such that immunization would <i>endanger the life or health of the child</i> or a certificate signed by the child’s parent or guardian whose <i>religious, philosophical, or moral beliefs are opposed to such immunization.</i> The minor child is then exempt from the provisions of this section.”²⁰⁵</p> <p><i>But:</i> “When, in the opinion of the health officer, danger of an epidemic exists from any of the communicable diseases for which immunization is required under this section, the</p>

²⁰⁴ MICH. COMP. LAWS ANN. § 333.9208, 9215 (emphasis added).

²⁰⁵ N.D. CENT. CODE ANN. § 23-07-17.1 (emphasis added).

		exemptions from immunization against such disease may not be recognized and children not immunized must be excluded from an institution listed in subsection 1 until, in the opinion of the health officer, the danger of the epidemic is over.” ²⁰⁶
Ohio	Ohio Rev. Code Ann. § 3313.671	<p>“A pupil who presents a written statement of the pupil’s parent or guardian in which the parent or guardian declines to have the pupil immunized for <i>reasons of conscience, including religious convictions</i>, is not required to be immunized.”²⁰⁷</p> <p>“A child whose physician certifies in writing that such immunization against any disease is <i>medically contraindicated</i> is not required to be immunized against that disease.”²⁰⁸</p>
Oklahoma	Okla. Stat. Ann. tit. 70, § 1210.191, 192	“Any minor child, through the parent,

²⁰⁶ *Id.*²⁰⁷ OHIO REV. CODE ANN. § 3313.671 (emphasis added).²⁰⁸ *Id.* (emphasis added).

		<p>guardian, or legal custodian of the child, may submit to the health authority charged with the enforcement of the immunization laws of this state:</p> <p>1. A certificate of a licensed physician as defined in Section 725.2 of Title 59 of the Oklahoma Statutes, stating that the <i>physical condition of the child is such that immunization would endanger the life or health of the child</i>; or</p> <p>2. A written statement by the parent, guardian or legal custodian of the child <i>objecting to immunization of the child</i>; whereupon the child shall be exempt from the immunization laws of this state.”²⁰⁹</p>
Oregon	Or. Rev. Stat. Ann. § 433.267	<p>Exemption recognized when one of the following is presented:</p> <p>“(b) A document signed by a physician or a representative of the local health</p>

²⁰⁹ OKLA. STAT. ANN. tit. 70, §§ 1210.191, 192 (emphasis added).

		<p>department stating that the child should be exempted from receiving specified immunization <i>because of indicated medical diagnosis</i>; or</p> <p>(c) A document, on a form prescribed by the authority by rule and signed by the parent of the child, stating that the parent is declining one or more immunizations on behalf of the child . . . [due to] <i>religious or philosophical belief</i>”²¹⁰</p>
Pennsylvania	28 Pa. Code § 23.84	<p>“(a) <i>Medical exemption.</i> Children need not be immunized if a physician or the physician’s designee provides a written statement that immunization <i>may be detrimental to the health of the child.</i> When the physician determines that immunization is no longer detrimental to the health of the child, the child shall be immunized according to this subchapter.</p>

²¹⁰ OR. REV. STAT. ANN. § 433.267 (emphasis added).

		<p>(b) <i>Religious exemption.</i> Children need not be immunized if the parent, guardian or emancipated child objects in writing to the immunization <i>on religious grounds or on the basis of a strong moral or ethical conviction similar to a religious belief.</i>²¹¹</p>
<p>Texas</p>	<p>Tex. Educ Code Ann. § 38.001</p>	<p>“(c) Immunization is not required . . . if the person applying for admission . . . submits to the admitting official:</p> <p>(A) an affidavit or a certificate signed by a physician who is duly registered and licensed to practice medicine in the United States, in which it is stated that, in the physician’s opinion, the immunization required poses a significant <i>risk to the health and well-being of the applicant or any member of the applicant’s family or household</i>; or</p> <p>(B) an affidavit signed by the applicant or, if a</p>

²¹¹ 28 PA. CODE § 23.83, 84 (emphasis added).

		<p>minor, by the applicant's parent or guardian stating that the applicant declines immunization for <i>reasons of conscience, including a religious belief.</i>"²¹²</p> <p><i>But:</i> "(f) A person who has not received the immunizations required by this section for reasons of conscience, including because of the person's religious beliefs, may be excluded from school in times of emergency or epidemic declared by the commissioner of public health."²¹³</p>
Utah	Utah Code Ann. § 53G-9-303	<p>"A student qualifies for a medical exemption...if the student's legally responsible individual provides to the student's school... a written notice signed by a licensed health care provider stating that, <i>due to the physical condition of the student, administration of the vaccine would endanger the student's life or health.</i></p>

²¹² TEX. EDUC. CODE ANN. § 38.001 (emphasis added).

²¹³ *Id.*

		<p>. . . A student qualifies for a personal exemption . . . if the student’s legally responsible individual provides to the student’s school a completed vaccination exemption form, <i>stating that the student is exempt from the vaccination because of a personal or religious belief.</i>²¹⁴</p>
Wisconsin	Wis. Stat. Ann. § 252.04	<p>“The immunization requirement is waived if the student, if an adult, or the student’s parent, guardian, or legal custodian submits a written statement to the school, child care center, or nursery school objecting to the immunization for <i>reasons of health, religion, or personal conviction.</i>”²¹⁵</p>

In summary, these fourteen states recognize exemptions not just for religious beliefs, but for “personal beliefs,”²¹⁶ “personal conviction,”²¹⁷ “reasons of conscience,”²¹⁸ “strong moral or ethical conviction,”²¹⁹ and/or

²¹⁴ UTAH CODE ANN. § 53G-9-303 (emphasis added).

²¹⁵ WIS. STAT. ANN. § 252.04 (emphasis added).

²¹⁶ ARIZ. REV. STAT. ANN. § 15-873.

²¹⁷ WIS. STAT. ANN. § 252.04.

²¹⁸ OHIO REV. CODE ANN. § 3313.671; TEX. EDUC CODE ANN. § 38.001.

²¹⁹ 28 PA. CODE § 23.84.

“philosophical beliefs.”²²⁰ Administration of the exemptions is simple: a sworn statement is provided to the appropriate authorities. Some states build in safeguards, including allowing officials to exclude attendance by a non-vaccinated student during an outbreak and requiring parents to receive certain education or literature on the effectiveness of vaccines *before* receiving an exemption.²²¹

Each of these concepts could be adopted for legislation aimed at vaccine policies adopted by non-healthcare employers. Alternatively, in the absence of new state legislation, these concepts could be voluntarily implemented into an employer’s vaccine policy. While the law only *requires* the limited employment exemptions discussed in Section II, there is no reason that an employer cannot *choose* to offer more generous exemptions to ease the administrative burden of reviewing exemption requests and to make the policy less objectionable to employees. Employers seeking to strike a balance between their desire to obtain herd immunity within their workforce and strong employee opposition to forced vaccines might adopt a policy that requires vaccines *but* allows for each of the exemptions enumerated in Minnesota’s school vaccine law.

At first blush, it may seem that the Minnesota school vaccine exemptions are so broad that they would not gain compliance at a rate higher than simple voluntary compliance. However, the conclusion that mandatory school vaccine laws have been successful in preventing the transmission of communicable diseases within schools, notwithstanding the surprisingly broad exemptions in fourteen states, is well-supported.²²² If medical, religious, and philosophical exemptions have worked for schools—which have a compelling need for vaccination requirements—then they can work for private, non-healthcare employers. Indeed, schools have a *more* compelling need than non-healthcare employers to require vaccines, and as a result, the exemptions should not be *more restrictive* in employment settings.

Adoption of school vaccine law exemptions in employment policies does more than protect employee rights and mitigate against employee

²²⁰ ARK. CODE ANN. § 6-18-702.

²²¹ See e.g., ARIZ. REV. STAT. ANN. § 15-873; N.D. CENT. CODE ANN. § 23-07-17.; TEX. EDUC. CODE ANN. § 38.001.

²²² Kevin M. Malone & Alan R. Hinman, *Vaccination Mandates: The Public Health Imperative and Individual Rights*, in *LAW IN PUBLIC HEALTH PRACTICE* 262, 269–270, 274, 280 (Richard A. Goodman et al., eds., 2d ed. 2007), https://www.cdc.gov/vaccines/imz-managers/guides-pubs/downloads/vacc_mandates_chptr13.pdf [<https://perma.cc/2XXW-GBE8>]. “School vaccination requirements have been a key factor in the prevention and control of vaccine-preventable diseases in the United States.” *Id.* at 280; “Since 1981, vaccination levels in school entrants have been 95% or higher for diphtheria and tetanus toxoids and pertussis vaccine (DTP), polio vaccine, and measles vaccine.” *Id.* at 270; “Nationwide, fewer than 1% of school entrants have medical, religious, or philosophic exemptions to mandatory vaccination.” *Id.* at 274.

opposition to a mandatory vaccine policy. It would add certainty to who qualifies for an exemption, how an exemption is met, and streamline an employer's administrative process for granting requested exemptions.

B. Limiting Employer Exposure for Liability.

When it comes to mandatory vaccine policies, employers should be concerned about potential liability beyond employment claims for religious, disability, and pregnancy discrimination. What if an employer requires vaccination and an employee experiences an adverse reaction? Take, for example, an employee with allergies. Such an employee may not qualify for an exemption from the vaccine policy under the ADA but could very well have a physical reaction to the vaccine. What is an employer's liability in those circumstances, when the employer *knows* an employee has allergies and opposes the vaccine, but does not provide an accommodation because the employee is not disabled under the ADA? Conversely, what happens if an employer chooses *not* to have a mandatory vaccine policy, knowingly exposes non-vaccinated employees to the public, and then an employee transmits COVID-19 to a member of the public? Can an employer be held liable for negligence or wrongful death for *failing* to have a mandatory vaccine policy?²²³

There is some legal precedent on these issues, but it is not clear enough and can vary from state to state. We can let the law develop through trial-and-error and various legal challenges, or states can proactively tackle the potential for employer liability through legislation. Indeed, in the absence of legislation limiting employer liability and clarifying employee exemptions, employers will likely opt for voluntary vaccination policies that *encourage* but do not *require* vaccination. If states want employers to play a more critical role in helping to achieve herd immunity through mandatory vaccine policies, they will need to provide adequate safeguards for employers and employees.

Legislation should balance the broader employee exemptions recommended in Section IV(A) with employer concerns about liability. Here, state workers' compensation laws provide inspiration. Workers' compensation laws—which have been around for 110 years²²⁴—are a trade-off between employers and employees. These statutes guarantee wage loss and medical benefits for employees injured on the job without regard to

²²³ One author addressed this very topic two years ago, likely without knowing just how relevant her analysis would become in 2020, see Baxter, *supra* note 12.

²²⁴ *Howard Delivery Serv., Inc. v. Zurich Am. Ins. Co.*, 547 U.S. 651, 662–63 (2006) (workers' compensation statutes have existed in this country since 1910).

employee fault.²²⁵ But they also cap employer exposure by precluding employees from pursuing tort claims, even if an employer was negligent in allowing the injury to occur.²²⁶ In this way, they are a compromise of employer and employee rights, and have severely curbed tort litigation between employers and employees arising out of workplace injuries.

A similar “trade-off” could be reflected in state legislation regulating employer-mandated vaccine policies. State legislation could clarify and affirm that should an injury arise from a vaccine required by an employer, an employee’s sole remedy will be in workers’ compensation. This caps an employer’s exposure for unanticipated physical reactions to a COVID-19 vaccine. It also guarantees wage loss benefits and paid medical expenses for employees who obtained the vaccine because it was a requirement of the job. The legislation could further specify that an employer is immune from liability if it encourages (but does not require) vaccination, even if it offers vaccines on-site. Additionally, state legislation could specify that employers have immunity from third-party liability if an employee transmits COVID-19 to a third party, co-employee, or member of the public, *if the employer has a mandatory vaccine policy that comports with the statute*. That is, if the employer has taken all reasonable precautions to prevent transmission by adopting and enforcing a mandatory vaccine policy that recognizes the statutorily enumerated exemptions, the employer cannot be held liable for transmission by an employee. In this scenario, the trade-off is employer immunity (an employer win) for broader exemption rights (an employee win). The state also wins because immunity may encourage employers to mandate rather than encourage vaccines, thereby assisting with obtaining herd immunity. Employers who merely encourage vaccines would not receive the same immunity protections.

C. *The Multi-Faceted Benefits of State Legislation Regulating Employer-Mandated Vaccine Policies.*

First and foremost, state legislation aimed at non-healthcare employer-mandated vaccine policies should give employers a *choice* as to whether or not to implement mandatory vaccine policies. No employers

²²⁵ Congressional Research Service, *Workers’ Compensation: Overview and Issues*, FED’N OF AM. SCIENTISTS (Feb. 18, 2020), <https://fas.org/sgp/crs/misc/R44580.pdf> [<https://perma.cc/A48F-ZU2G>].

²²⁶ *Howard Delivery Serv., Inc.*, 547 U.S. at 663 (“Workers’ compensation regimes thus provide something for employees—they ensure limited fixed payments for on-the-job injuries—and something for employers—they remove the risk of large judgments and heavy costs generated by tort litigation.”); see also Roy Lubove, *Workmen’s Compensation and the Prerogatives of Voluntarism*, 8 LAB. HIST. 254, 258–62 (1967) (workers’ compensation programs were adopted by nearly every State in large part because employers anticipated significant benefits from the programs; other programs workers’ groups sought to make mandatory—notably, health insurance—were not similarly embraced).

should be required to implement mandatory vaccine policies, as there is a myriad of reasons that employers in certain geographic areas, or with certain other safeguards already in place, may not need or want such a policy.

Second, for employers who *choose* to implement mandatory vaccine policies, state legislation could aid employers and employees by: (1) specifying the exemptions that must be granted by employers, modeled after the state's existing school vaccine laws, which are broad enough to capture all legally required exemptions and then some; and (2) cap employer liability for vaccine injuries and/or COVID-19 transmission for employers who adopt and enforce policies consistent with the state legislation. The benefits of this legislation²²⁷ are as follows:

- Removes the uncertainty around what constitutes a “religious belief” by expanding the exemption to conscientious or philosophical belief. This, in turn, minimizes litigation.
- Reduces the administrative burden on human resources departments of private employers to scrutinize and evaluate requested exemptions, as the exemptions are met through presentation of a sworn statement.
- Allows, but does not require, employers to exclude remote workers who are not physically present in the office (and who do not interact with customers directly) and therefore present little to no risk to other employees of the company.
- Softens the edges of a mandatory vaccine policy, making the policy less offensive to employees who strongly object to the COVID-19 vaccine, reducing conflict with employees over policy enforcement.
- One set of clearly articulated exemptions is more likely to lead to uniform and consistent decisions among state and federal courts and government agencies as disputes arise.
- Reduces the risk of a disparate impact discrimination claim because the exemptions are broad enough that most sincerely objecting women, pregnant women, and/or African Americans could satisfy the exemption requirements.
- Still allows employers to achieve the goal of having a workforce that is highly vaccinated for COVID-19. Simply having the policy will boost vaccination participation by employees, and will allow employers to communicate to customers, vendors, and other third parties that the employer has a policy requiring COVID-19 vaccination. Employers could offer incentives to employees (e.g.,

²²⁷ In lieu of state legislation, employers could adopt mandatory vaccine policies that follow the same basic guidelines discussed in this Section. However, potential liability would remain unsettled as employers cannot set the parameters for their own liability through an employment policy.

cash bonuses or additional PTO days) on top of the policy to further boost participation.

- Facilitates vaccine education because objecting employees could be required to verify, before receiving an exemption, that educational materials on the benefits and effectiveness of the COVID-19 vaccine have been provided.
- Caps employer liability for vaccine reactions by ensuring such illnesses are treated as workers' compensation injuries. It also ensures employees will receive wage loss benefits and paid medical expenses in the event of a vaccine reaction.
- Creates employer immunity for employee transmission of COVID-19 to other employees or third parties so long as the employer enacts a policy consistent with the statute—a trade-off for employers providing broader employee exemptions than are currently required by law.

V. CONCLUSION

Several COVID-19 vaccines were made available to the public at-large in the spring of 2021. As vaccine hesitancy continues and the prospects of reaching herd immunity remain uncertain, states are faced with the challenging decision of whether to make vaccination mandatory. Currently, 60-70% of Americans say they plan to obtain the COVID-19 vaccine, short of the 80+% needed for herd immunity. State actions mandating COVID-19 vaccination would be massively unpopular and, in turn, are highly unlikely.

In the absence of a state law mandating the COVID-19 vaccine, lawmakers, government officials, and public health officials will likely turn to the entities most able to influence public participation: employers and places of public accommodations. Under the current legal paradigm, employers have the right to choose whether to impose mandatory vaccine policies. On the surface, mandatory vaccination policies have curb appeal. But in practice, employers are steering away from such policies given: (1) the unpopularity of such a policy; (2) the fact that a heavy-handed policy could actually foster more objection, distrust, and backlash; (3) the ambiguity surrounding religious and medical exemptions under Title VII, the ADA, and state laws requiring reasonable accommodations for disabled employees; (4) the administrative headache of evaluating and granting or denying exemptions; (5) the potential for disparate impact claims; and (6) the liability exposure if an employee suffers an adverse reaction to a vaccine she only received because her employer required it.

Private employers should not be forced to bear the burden of these uncharted waters. Instead, state legislatures should work now to draft legislation that protects both employers and employees with respect to

mandatory vaccine policies. The legislation should model existing state laws addressing school vaccines by providing clear and well-defined exemptions that are verified through an affidavit of the objecting individual or her doctor. The legislation could further model certain school vaccine laws that require education on the effectiveness and benefits of a vaccine before an employee's exemption request is granted—thereby increasing education and perhaps correcting misinformation that surfaces regarding the effectiveness and safety of a COVID-19 vaccine. As for employer liability, state legislation should provide that employee injuries resulting from a mandatory vaccine are subject to the exclusivity of workers' compensation, guaranteeing wage loss and medical benefits for employees while capping employer liability. And the legislation should provide immunity for employers who follow the statute's requirements in the event of a transmission of COVID-19 by an employee, notwithstanding the employer's vaccine policy.

COVID-19 will not be around forever. But the legal precedent we set in response to the COVID-19 vaccine will. We must, therefore, think beyond our current pandemic in crafting a legal framework that will work now—and in the future. That is, a framework that delicately balances the rights of employees to raise medical, religious, and personal objections to vaccination; the interests of employers in promoting the COVID-19 vaccine with their employees but limiting exposure/liability for illness and injuries; the public interest in achieving herd immunity; and the interest of courts in not being overwhelmed with employment litigation arising out of unregulated, wildly-inconsistent mandatory vaccine policies.