



## Districts' Ability to Require Vaccinations of Employees and Students

With the anticipated arrival of COVID-19 vaccines, districts will be faced with the question of whether they can legally require employees and students to receive a COVID-19 vaccine in order to be physically present in school. If so, districts will have to decide whether they want to mandate COVID-19 vaccination. At the time this article went to publication, the Food and Drug Administration (FDA) had approved an Emergency Use Authorization for a COVID-19 vaccine, but had not yet granted final approval. Prior to final FDA approval, the FDA has stated that vaccine recipients must be advised that they have the option to refuse the vaccine.<sup>1</sup> Whether the FDA, another governmental agency or new law will require that recipients have the option to refuse vaccination after the FDA grants final approval is uncertain. However, other forms of vaccinations have been mandated in the past, and the legal and policy analysis related to those mandates provide insight into the legal issues in play and the policy issues that must be considered by boards when determining whether to mandate COVID-19 vaccination. This Legal Comment will review the legal guidance with respect to mandatory vaccinations and its interplay with districts' decisions regarding whether to mandate COVID-19 vaccines once final FDA approval is granted.<sup>2</sup>

### ■ Constitutional issues

At the turn of the 20th century, Massachusetts law authorized municipalities to require vaccinations if the municipality's department of health determined it was necessary for the public health or safety of the community. Faced with an outbreak of smallpox, the city of Cambridge mandated that its adult residents receive a smallpox vaccination. A resident filed a lawsuit alleging that

this mandate violated the 14th Amendment to the U.S. Constitution by infringing on his liberty interests. The case was eventually decided by the U.S. Supreme Court, which upheld the vaccination mandate.<sup>3</sup>

While the 14th Amendment protects individuals from government intrusion upon their liberty, the court noted that those interests are not absolute and that "in every well-ordered society charged with the duty of conserving the safety of its members the rights of the individual in respect of his liberty may at times, under the pressure of great dangers, be subjected to such restraint, to be enforced by reasonable regulations, as the safety of the general public may demand."<sup>4</sup> This does not mean that states have an unlimited right to infringe individual liberties, however. The court cautioned that subsequent mandates could violate the 14th Amendment if they were administered in an "arbitrary, unreasonable manner" or exceeded the measures necessary to protect public safety.

Courts generally have upheld mandatory vaccinations for students attending school against constitutional challenges brought by families. For example, a West Virginia statute requiring mandatory vaccination of children as a condition of attending school was found constitutional because it did not infringe on either the parent's or child's right to free exercise of religion.<sup>5</sup> In New York, a state regulation permitting state officials to temporarily exclude students who were exempted from the vaccination requirement from school during an outbreak of a vaccine-preventable disease was also found to be constitutional.<sup>6</sup>

### ■ Application with respect to students

Wisconsin statutes and regulations

require mandatory vaccination of students for measles, mumps, rubella, polio, hepatitis B, varicella, diphtheria, tetanus and pertussis, but do not address, at time of publication, COVID-19.<sup>7</sup> In the absence of a statutory or regulatory change to add COVID-19 to this list, boards could face potential legal challenges if they condition a student's attendance at school on the student receiving a COVID-19 vaccine. If there is legislation addressing COVID-19, it may be in the context of the current regulatory scheme.

Current law requires districts to notify an adult student or the parent of a minor student by the 15th and the 25th day after a student is admitted to the district if the student has not complied with mandatory vaccination requirements.<sup>8</sup> The Wisconsin Department of Health Services has model notices that schools can use for this purpose.<sup>9</sup>

Students have until the 30th school day to comply with Wisconsin's mandatory vaccination law by providing the appropriate documentation of immunization or a signed waiver. Starting on the 31st school day, noncompliant students in kindergarten through fifth grade must be excluded from school if the district's compliance level with respect to vaccinations from the previous school year was less than 99%. Exclusion is optional for sixth through 12th grade and for districts that met the 99% compliance level in the previous year.<sup>10</sup>

There are four ways in which a student can comply with the mandatory vaccination law.

- 1) Obtain the required vaccine(s);
- 2) Obtain a waiver for health reasons from a licensed physician that the immunization is or may be harmful to the health of a student;
- 3) Obtain a waiver for religious

reasons, which declares an objection to immunization on religious grounds; or

- 4) Obtain a waiver for reason of personal conviction, which declares an objection to immunization on personal conviction grounds.

A student must obtain a waiver for each vaccination that the student is not going to receive. Districts generally do not have the ability to challenge a student's waiver. The standard Student Immunization Record form created by DHS (Form F-04020L) contains a section for students to assert one or more of the waivers. In the case of a waiver for health reasons, a physician's signature is required; however, no additional information or signature is required for a student to claim a waiver for religious or personal conviction reasons.<sup>11</sup>

In the event of a substantial outbreak of a vaccine-preventable disease in the school or the municipality in which the school is located, as defined specifically by law, the school must exclude all students who have not received all required immunizations against the disease, including those who have waivers. This exclusion will last until the student is immunized or until DHS determines that the outbreak has subsided.<sup>12</sup>

Students with disabilities covered by Section 504 of the Rehabilitation Act or through the Individuals with Disabilities Education Act who are excluded from school for lack of vaccination generally have the right to receive a free appropriate public education as provided by law. Districts should convene a Section 504 or Individualized Education Plan team after such a student is excluded to ensure the student is still able to receive a free appropriate public education. However, guidance from the Department of Education's Office for Civil Rights has indicated that students who cannot receive vaccinations due to disabilities cannot require a district to ban other students from school who are unvaccinated and have a valid exemption.<sup>13</sup>

Additionally, under the McKin-

ney-Vento Act, districts must affirmatively assist homeless students in obtaining necessary immunizations and cannot exclude homeless students who do not have vaccination records to share with the district.<sup>14</sup> There is no explicit time limit by which homeless students must come into compliance with mandatory vaccination laws. This situation warrants a case-by-case analysis and consultation with legal counsel.

### ■ Application with respect to employees

There are different statutory considerations involved in assessing the legality of a district's vaccination requirement with respect to its employees. For example, under the Civil Rights Act of 1964 ("Title VII") and the Wisconsin Fair Employment Act, an employer cannot discriminate against an employee on the basis of the employee's religious beliefs. This prohibition requires an employer to accommodate an employee's religious beliefs, provided the accommodation does not result in an undue hardship.<sup>15</sup>

For example, a hospital in Philadelphia required employees to receive a flu vaccination. An employee objected to that policy, refused the vaccination and was terminated. The employee sued the hospital, claiming that the policy violated Title VII because it discriminated against her on the basis of her religious beliefs. A federal court upheld the dismissal. While the employee had a subjective personal belief that the vaccine might do more harm than good based upon her holistic lifestyle, the court found the employee's opposition to the flu vaccine was not based upon a sincerely held religious belief. The court held that "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.'"<sup>16</sup>

The Americans with Disabilities Act's and the Wisconsin Fair Employment Act's protections

against discrimination based on disability also come into play with respect to mandatory vaccinations. Requesting proof that an employee received the COVID-19 vaccination is not likely to elicit information about a disability and, therefore, is not a disability-related inquiry. However, subsequent 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." An employer, however, can ask for proof of vaccination if an employee poses a "direct threat" because the employee has not been vaccinated.

A "direct threat" is a significant risk of substantial harm to the health or safety of an individual employee or others in the workplace that cannot be eliminated or reduced by a reasonable accommodation. In response to the 2009 H1N1 pandemic, the Equal Employment Opportunity Commission issued guidance stating that employers may require workers to receive a flu vaccine based on the direct threat posed by H1N1. However, employers must provide reasonable accommodations to employees with disabilities that prevent them from receiving the vaccine.<sup>18</sup>

In light of the COVID-19 pandemic, the EEOC updated this guidance in March 2020 to incorporate issues related to the COVID-19 pandemic.<sup>19</sup> The EEOC determined that the COVID-19 pandemic meets the direct threat standard, but cautioned that this determination is subject to continuing analysis depending on the status of the pandemic going forward. If an employer mandates a vaccination under the direct threat standard, it must provide employees with a reasonable accommodation with respect to their disabilities, unless this causes an undue hardship on the employer.

In the case of an employee with a disability who is unable to receive a COVID-19 vaccine, the risk of

waiving the vaccine requirement is that the employee could become infected, and in turn pass on COVID-19 to employees and students who were vaccinated but were in the minority of recipients who did not develop an immune response, or pass it on to others who were unable to receive the vaccine. A district could argue that it is not required to accommodate an unvaccinated employee by allowing that person to work in school because the employee may pose a “direct threat” to others present at school.

However, districts must also consider other reasonable accommodations to eliminate or reduce the direct threat, such as changes in an employee’s work environment that allows a disabled individual to successfully perform their job duties. As applied to teachers during this pandemic, there are a range of potential reasonable accommodations, such as allowing the unvaccinated teacher to teach virtually or providing heightened safety measures at school, such as separating unvaccinated teachers from their students and co-employees or providing personal protective equipment or other barriers designed to prevent the potential transmission of COVID-19.

An employer does not need to provide any accommodation that poses an “undue hardship” on the employer. An “undue hardship” arises when provision of a certain accommodation would result in a “significant difficulty or expense” for the employer based on the nature and cost of the accommodation, the employer’s available resources and the operation of the district.

### Policy issues

Whether boards should require employees to be vaccinated for COVID-19 involves important policy considerations. Many boards have addressed this with respect to the flu vaccine and the considerations are similar with respect to COVID-19. For example, mandatory vaccinations

have been criticized by those who generally oppose vaccines and by those who object to governmental mandates. Boards should consider the response they will receive from the public, employees and students if they attempt to adopt and enforce a vaccine mandate.

In addition, implementing a vaccine mandate will require districts to go through the reasonable accommodation process for each employee who refuses the vaccine on medical or religious grounds. Boards may create potential liability if they do not carefully observe the reasonable accommodation requirements of these laws, and the process can be both time consuming and contentious, depending upon the number of employees claiming a right to reasonable accommodation. Furthermore, boards that choose to require vaccines as a condition of employment will be required to pay for the cost of the vaccines. That will include the cost of receiving the vaccine itself as well as paying the employee for the time required to receive the vaccine. Finally, there may be issues under workers’ compensation laws if an employee suffers adverse reactions to a vaccine required by an employer. Districts should consult with their workers’ compensation insurance providers on this issue.

### Conclusion

Even if boards may legally mandate COVID-19 vaccinations for their employees and students, there are certain exceptions that will apply and procedures which must be followed. If a board does not require employees or students to receive COVID-19 vaccinations, the board can still actively promote, provide information about and recommend that they receive that vaccine. While there will likely be more federal and state guidance about COVID-19 vaccines, the legal and practical considerations addressed above provide a background framework for boards to consider in addressing their legal options. ■

### End Notes

1. “Emergency Use Authorization for Vaccines Explained” (11/20/2020) [fda.gov/vaccines-blood-biologics/vaccines/emergency-use-authorization-vaccines-explained](https://www.fda.gov/vaccines-blood-biologics/vaccines/emergency-use-authorization-vaccines-explained).
2. This Legal Comment was written by Michael J. Julka; Steven C. Zach; and Brian P. Goodman of Boardman & Clark LLP, WASB Legal Counsel. For additional information on this topic, see Wisconsin School News: “Compensatory Education Services for Students with Disabilities” (May 2020); “ADA Issues During the COVID-19 Pandemic” (Aug. 2020); “The Duty to Provide Reasonable Accommodations to Employees” (Aug. 2017); and “Religious Dress and Grooming Practices by Employees” (June 2014).
3. *Jacobson v. Massachusetts*, 197 U.S. 11 (1905).
4. *Id.* at 29.
5. *Workman v. Mingo Cty. Bd. of Educ.*, 419 F. App’x 348 (4th Cir. 2011) (unpublished).
6. *Phillips v. City of New York*, 775 F.3d 538 (2d Cir. 2015).
7. Wis. Admin. Code DHS s. 144.03.
8. Wis. Admin. Code DHS s. 144.07(1m).
9. Wis. Dep’t of Health Servs., Wisconsin School Immunization Requirements 2020-2021 (June 2020), [dhs.wisconsin.gov/publications/p4/p44545.pdf](https://dhs.wisconsin.gov/publications/p4/p44545.pdf).
10. See Wis. Stat. s. 252.04(5)(b).
11. Wis. Admin. Code DHS ss. 144.04, 144.05.
12. Wis. Admin. Code DHS s. 144.07(10).
13. See Dep’t of Educ., Office for Civil Rights, Fact Sheet: Addressing the Risk of Measles in Schools while Protecting the Civil Rights of Students with Disabilities (Mar. 2015), [rems.ed.gov/docs/ED\\_Measles\\_OCR\\_fact\\_sheet\\_2015-3-6\\_Clean\\_508.pdf](https://rems.ed.gov/docs/ED_Measles_OCR_fact_sheet_2015-3-6_Clean_508.pdf).
14. 42 U.S.C. s. 11432(g)(3)(C)(iii).
15. See, e.g., *Robinson v. Children’s Hosp. Bos.*, No. CV 14-10263-DJC, 2016 WL 1337255, at \*10 (D. Mass. Apr. 5, 2016) (unpublished).
16. *Brown v. Children’s Hosp. of Phila.*, 794 F. App’x 226, 227 (3d Cir. 2020) (unpublished).
17. 42 U.S.C. s. 12112(d)(4)(A); EEOC, What You Should Know About COVID-19 and The ADA, The Rehabilitation Act, and Other EEO Laws (Dec. 16, 2020), [eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws](https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws).
18. EEOC, Pandemic Preparedness in the Workplace and the Americans with Disabilities Act, (March 21, 2020), [eeoc.gov/laws/guidance/pandemic-preparedness-workplace-and-americans-disabilities-act](https://www.eeoc.gov/laws/guidance/pandemic-preparedness-workplace-and-americans-disabilities-act).
19. See footnote 17.