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## KNOW YOUR RIGHTS: HOW TO REQUEST A RELIGIOUS ACCOMMODATION FOR COVID-19 VACCINE MANDATES IN THE WORKPLACE

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Once again, the nation finds itself wrestling with the knotty question of how to balance the rights of the individual with the security needs of the country at large.

For good or bad, COVID-19 has changed the way we navigate the world and the way in which “we the people” exercise our rights. Those hoping to navigate this interconnected and highly technological world of contact tracing, vaccine passports and digital passes will find themselves grappling with issues that touch on deep-seated moral, political, religious and personal questions for which there may be no clear-cut answers.

While the courts may increasingly defer to the government’s brand of Nanny State authoritarianism, we still have rights. The government may try to abridge those rights, it may refuse to recognize them, it may even attempt to nullify them, but it cannot litigate, legislate or forcefully eradicate them out of existence.

Among these, we have the right to bodily integrity, a right long been recognized by the U.S. Supreme Court.<sup>1</sup> More relevant to the issue of forced vaccines is the recognition by courts that there is a constitutional right to bodily integrity that gives persons the right to refuse medical treatment.<sup>2</sup>

The right to bodily integrity has been regularly recognized by the Court.

In a case involving abortion regulations, the Court pointed out that the right to obtain an abortion previously established is based not only on the right of privacy, but also the right “of personal autonomy and bodily integrity, with doctrinal affinity to cases recognizing limits on governmental power to mandate medical treatment or to bar its rejection.”<sup>3</sup> More recently, the Court referred to the right of bodily integrity as grounds for refusing to allow the police to require drunk driving arrestees to submit to blood extractions. In so deciding, the Court wrote that such conduct “involve[s] a compelled physical intrusion beneath [the arrestee’s] skin and

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<sup>1</sup> *Rochin v. California*, 342 U.S. 165, 173 (1952)

<sup>2</sup> *Cruzan v. Director, Mo. Dept. of Health*, 497 U.S. 261, 287 (1990) (O’Connor, J., concurring) (citing *Rochin*).

<sup>3</sup> *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

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into his veins to obtain a sample of his blood for use as evidence in a criminal investigation. Such an invasion of bodily integrity implicates an individual's 'most personal and deep-rooted expectations of privacy.'"<sup>4</sup>

Whether such a claim of bodily integrity would ultimately prevail in the face of compelled or forced vaccinations would depend on the courts' balancing of the individual interest versus the state interest. For example, the Court has held that the forced blood draw from a drunk driving suspect was not unreasonable, because blood draws "are commonplace in these days of periodic physical examination, and experience with them teaches that the quantity of blood extracted is minimal, and that, for most people, the procedure involves virtually no risk, trauma, or pain."<sup>5</sup>

Courts may similarly find that the intrusion on bodily integrity from a vaccination is minimal when compared with the public interest in its administration.

### Forced vaccinations.

Forced vaccinations are quickly shaping up to be the next major legal front in the COVID-19 battle between security and individual liberty. As such, bodily integrity remains a central issue in the debate over what authority the government has in compelling the public to submit to medical treatment that may run counter to their personal beliefs.

There is precedence for such concerns. For instance, in the 1905 case *Jacobson v. Massachusetts*, the United States Supreme Court addressed mandatory vaccinations in regard to smallpox.<sup>6</sup> The Court ruled that the police power of a state absolutely included reasonable regulations established by legislature to protect public health and safety. The Court reasoned that such regulations do not violate the Fourteenth Amendment right to liberty because they fall within the many restraints to which every person is necessarily subjected for the common good: real liberty for all cannot exist if each individual is allowed to act without regard to the injury that his or her actions might cause others; liberty is constrained by law. The Court went on to determine that a state may require vaccination if the board of health deems it necessary for public health or safety.<sup>7</sup>

When determining the legality of a statute enacted to protect public health and safety, the Court found it immaterial that a portion of the medical community thought the vaccination worthless or even injurious. The state has the right to choose between opposing medical theories and to refer

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<sup>4</sup> *Missouri v. McNeely*, 569 U.S. 141, 148 (2013). See also *Winston v. Lee*, 470 U.S. 753 (1985) (recognizing right to bodily integrity, but holding that state interest allowed requiring person to submit to surgery to retrieve evidence of crime) and *Sell v. United States*, 539 U.S. 166 (2003) (recognizing liberty interest to refuse to receive anti-psychotic drugs, but finding sufficient state interest to override that interest).

<sup>5</sup> *Schmerber v. California*, 384 U.S. 757, 771 (1966).

<sup>6</sup> *Jacobson v Massachusetts*, 197 U.S. 11 (1905).

<sup>7</sup> *Jacobson v Massachusetts*, 197 U.S. 11, 25-27 (1905).

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the matter to a board composed of persons residing in the affected location who are qualified to make a determination.

The courts do not become involved in legislation formed under the state's police power as long as it relates substantially to public health, morals, or safety and is not a plain, palpable invasion of rights secured by fundamental law.<sup>8</sup> It is immaterial whether or not the vaccine is actually effective, so long as it is the belief of state authorities that the mandatory vaccine will promote common welfare and is a reasonable and proper exercise of the police power.<sup>9</sup>

The Court has not revisited or altered the *Jacobson* ruling in any meaningful way since it was issued over 100 years ago. The Court reasoned it could not allow individuals to refuse vaccination while remaining within the general population because this would strip the legislative branch of its authority to care for the public health and safety when threatened by epidemic disease. The only exception to a mandatory vaccination is an offer of apparent or reasonably certain proof to the state's board of health that the vaccination would seriously impair an individual's health or probably cause death.<sup>10</sup>

All 50 states and the District of Columbia now require children receive diphtheria, tetanus, pertussis, polio, measles, rubella, and varicella vaccinations before attending public school, and all also offer a variety of vaccine exemptions for medical, religious, and philosophical reasons. Only 11 states can override these exemptions in an outbreak.

The authority for these requirements has also been upheld by the Supreme Court in a case where officials excluded a student from a public school because she refused to submit to vaccinations.<sup>11</sup> She also was barred from attending private school under ordinances providing that no child or other person shall attend a public school or other place of education without having first presented a certificate of vaccination. The trial court sustained the officials' demurrer and dismissed the bill. In upholding the officials' actions, the Supreme Court held that the ordinances conferred no arbitrary power to the administering officials, but only the broad discretion required for the protection of the public health.

That said, although the courts have upheld vaccine requirements and the imposition of sanctions for a refusal to receive, there is no indication that the courts have upheld the forced administration of vaccines upon a person.

### Compelled vaccinations.

Those in positions of power and authority have already sought to leverage that power to coerce members of the public to receive COVID-19 vaccinations. Daily, growing numbers of public and

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<sup>8</sup> *McDaniel v. Paty*, 435 US 618, 698 (1978).

<sup>9</sup> *Jacobson v Massachusetts*, 197 U.S. 1, 38 (1905).

<sup>10</sup> *Jacobson v. Massachusetts*, 197 U.S. 1, 38 (1905).

<sup>11</sup> *Zucht v. King*, 260 U.S. 174 (1922).

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private employers are requiring employees to be vaccinated against COVID-19 and using the threat of termination to force acceptance of the vaccine.<sup>12</sup>

Unfortunately, legal protections in this area are limited.

While the Americans with Disabilities Act protects those who can prove they have medical conditions that make receiving a vaccination dangerous, employees must be able to prove they have a sensitivity to vaccines.

The requirement established by Title VII of the Civil Rights Act of 1964 that employers provide religious accommodations may be invoked by employees who have sincere religious beliefs against receiving vaccinations. But an employer's duty of accommodation is not absolute, and if it can show that accommodating the worker's objections to vaccinations will interfere with its operations or workplace safety, the employee may face the choice between keeping her job or violating her religious beliefs.<sup>13</sup>

### Protocols for requesting religious accommodation in the workplace.

Title VII of the Civil Rights Act of 1964 prohibits employment discrimination based on religion.<sup>14</sup> Title VII further defines religion broadly to include not only beliefs, but also religious practices and observances. As a result, the federal employment discrimination law forbids discharging an employee because the employee chooses to engage in certain conduct, or not engage in certain conduct, that is a part of the employee's religious beliefs and practices, and holds that someone cannot be discriminated against by their employer based on their religion unless the employer cannot reasonably accommodate an employee's religious observance or practice without undue hardship on the conduct of the employer's business.<sup>15</sup>

Although there have been very few cases that have dealt specifically with Title VII's ban on employment discrimination based on religion in the context of religious objections to vaccines mandated by the employer, it appears established that if an employee holds sincerely-held religious beliefs in opposition to receiving a vaccination, an employer that has a rule requiring that vaccination must reasonably accommodate the employee's beliefs. Thus, the Equal Employment Opportunity Commission has posted guidance on this issue in relation to the COVID vaccine which provides as follows: "Once an employer is on notice that an employee's sincerely held religious belief, practice, or observance prevents the employee from getting a

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<sup>12</sup> Robin Young and Serena McMahon, Can Employers Require Workers To Get The COVID-19 Vaccine? One Expert Says It's Complicated," *WBUR* (Jan. 19, 2021), <https://www.wbur.org/hereandnow/2021/01/19/employees-vaccine-requirements>.

<sup>13</sup> "What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws," U.S. Equal Employment Opportunity Commission (Dec. 15, 2020), <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>.

<sup>14</sup> 42 U.S.C. § 2000e-2(a).

<sup>15</sup> 42 U.S.C. § 2000e(j).

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COVID-19 vaccine, the employer must provide a reasonable accommodation unless it would pose an undue hardship.”<sup>16</sup>

For an employee who objects to an employer’s vaccine requirement, the first step is to give notice to the employer of the religious objection to receiving the vaccine. The notice should be given to the appropriate human resources officer or supervisor that is responsible for enforcing the vaccine requirement. It should also note the following: (1) the specific vaccination mandate the religious objection relates to and when notice of that mandate was received; (2) that the employee has sincerely-held religious beliefs and/or practices that would be violated if forced to receive the vaccine; (3) then nature and basis of the religious beliefs and/or practices that conflict with the vaccination; and (4) a specific request for an accommodation of those religious beliefs as required by Title VII of the federal Civil Rights Act.

**The Rutherford Institute has provided a [form letter](#) for use in providing an employer notice of the conflict with religious beliefs and requesting an accommodation.**<sup>17</sup>

In setting forth and describing the religious beliefs that are the basis for the accommodation request, it is important to know that under the law “the definition of religion is broad and protects beliefs, practices, and observances with which the employer may be unfamiliar. Therefore, the employer should ordinarily assume that an employee’s request for religious accommodation is based on a sincerely held religious belief, practice, or observance.”<sup>18</sup> It is helpful if the description of the pertinent religious beliefs can refer to religious texts or the teachings of religious leaders as the basis for the beliefs. However, it is not necessary that the belief have been adopted as the formal doctrine or position of an established religious organization or endorsed by church hierarchy.

Religious beliefs and practices that are sincerely-held and protected by the Constitution and Title VII can be wholly personal and can even be at odds with the beliefs of others of the same faith. As the Supreme Court has held, “the guarantee of free exercise [of religion] is not limited to beliefs which are shared by all of the members of a religious sect. Particularly in this sensitive area, it is not within the judicial function and judicial competence to inquire whether [an employee] or his fellow worker more correctly perceived the commands of their common faith. Courts are not arbiters of scriptural interpretation.”<sup>19</sup>

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<sup>16</sup> What you should know about COVID-19 and the ADA, the Rehabilitation Act, and other EEO laws, U.S. Equal Employment Opportunity Commission, (Updated May 28, 2021), <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eoo-laws>.

<sup>17</sup> Model Vaccine Religious Exemption Letter, [https://www.rutherford.org/files\\_images/general/2021\\_Vaccine\\_Exemption\\_Form\\_Letter.pdf](https://www.rutherford.org/files_images/general/2021_Vaccine_Exemption_Form_Letter.pdf)

<sup>18</sup> What you should know about COVID-19 and the ADA, the Rehabilitation Act, and other EEO laws, U.S. Equal Employment Opportunity Commission, (Updated May 28, 2021), section K.12, <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eoo-laws>.

<sup>19</sup> *Thomas v. Review Bd. of the Indiana Employment Security Div.*, 450 U.S. 707 (1981).

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Once notice of the conflict with religious beliefs is given and an accommodation requested, the employer is required by law to attempt to find a reasonable accommodation, i.e., a modification of the employees work conditions, that allows the employee to continue to work without violating his or her religious beliefs. Examples of reasonable accommodations that exempt employees from vaccination requirements include (1) permitting an unvaccinated person to enter the physical workplace while wearing a facemask, working at a social distance from coworkers or nonemployees, working a modified shift, or getting periodic COVID tests, (2) telecommuting, or (3) reassignment.<sup>20</sup> Reassignment should be the last resort.<sup>21</sup>

What constitutes a reasonable accommodation will depend on all the circumstances surrounding the workplace and the employees' duties. In the healthcare worker setting, for example, teleworking might not be a real option because employees have to directly interact with patients. But the employer is required to consider and explore options for accommodating the employee, and the employee is allowed to offer suggestions as to what accommodation would be agreeable and remove the conflict with his religious beliefs.<sup>22</sup>

However, the obligation of an employer is to provide a "reasonable" accommodation, not any accommodation whatsoever. The Supreme Court has held that an employer is not required to provide a particular accommodation if it imposes an "undue hardship" on the employer and its operations.<sup>23</sup> Courts have indicated that an undue hardship consists of more than "de minimis" costs, which can entail not only monetary concerns, but also the employer's burden in conducting its business.<sup>24</sup>

A reasonable accommodation also may create an undue hardship if it causes more than a de minimis impact on co-workers.<sup>25</sup> For example, in one case a court ruled that granting a health care employee's request for no vaccination while allowing her to keep her patient care position would have been an undue hardship because it would have increased the risk of transmitting flu to the already vulnerable patient population.<sup>26</sup> And having the woman avoid only the most vulnerable patients would have been unworkable and been more than a de minimis cost.<sup>27</sup>

If an employer refuses to offer an accommodation or offers one the employee does not believe resolves the conflict with his religious beliefs, the employee can file a claim with the EEOC or

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<sup>20</sup> What you should know about COVID-19 and the ADA, the Rehabilitation Act, and other EEO laws, U.S. Equal Employment Opportunity Commission, (Updated May 28, 2021), section K.12, <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>.

<sup>21</sup> What you should know about COVID-19 and the ADA, the Rehabilitation Act, and other EEO laws, U.S. Equal Employment Opportunity Commission, (Updated May 28, 2021), section K.12, <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>.

<sup>22</sup> *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60 (1986).

<sup>23</sup> *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977).

<sup>24</sup> *Beadle v. City of Tampa*, 42 F.3d 633, 636 (11<sup>th</sup> Cir. 1995).

<sup>25</sup> *Harrell v. Donahue*, 638 F.3d 975, 980 (8<sup>th</sup> Cir. 2011).

<sup>26</sup> *Robinson v. Children's Hospital Boston*, 2016 WL 13337255, at \* 9 (D. Mass. 2016).

<sup>27</sup> *Robinson v. Children's Hospital Boston*, 2016 WL 13337255, at \* 9 (D. Mass. 2016) at \*10.

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an equivalent state agency charged with enforcing employment discrimination laws alleging religious discrimination by the employer. A claim should be filed promptly as there are time limits on filing such a claim. The agency is then obligated to investigate the claim and may intervene on behalf of the employee and seek to require the employer to take steps to accommodate the employee. If the agency declines to step in on behalf of the employee, it will issue a “right to sue” letter allowing the employee to bring a claim in court asserting a violation of Title VII by the employer.

With respect to filing a claim, it is important to note that the ability of an employee to proceed with a filing with the EEOC or state agency may be affected by an arbitration agreement entered into in connection with the employment.

It has been increasingly common for employers to have new or current employees sign arbitration agreements in which the employee waives the right to file employment discrimination claims with the EEOC or other agency and requires such claims to be submitted to arbitration.<sup>28</sup> Employees considering filing employment discrimination claims should review available records to determine whether they have entered into such an arbitration agreement and how its terms affect the way in which they seek to enforce any religious discrimination claim.

### Religious accommodations at colleges and universities, and in the military.

While individuals within the workplace, at colleges and universities, and in the military have a right to request and seek an exemption to vaccine mandates based on their religious beliefs, vaccine requirements imposed by colleges, universities and the U.S. military are not subject to Title VII’s religious accommodation requirement or procedures.

Thus, the process for requesting a religious accommodation to a COVID-19 vaccine mandate—and the determination of whether such a request will be granted—will vary depending on the environment and state laws. It must also be noted that, if granted, such an accommodation can and likely will also require other concessions on the part of those seeking exemptions, such as the wearing of masks and routine COVID-19 testing.

*In the case of colleges and universities*, the ability to seek and obtain an exemption based on religious beliefs will depend upon the law of the state in which the school is located and upon the policies and regulations adopted by the school. The procedure for seeking an exemption is usually established by the college/university and persons seeking such an exemption should follow the established procedure.

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<sup>28</sup> *Circuit City Stores v. Adams*, 532 U.S. 105 (2001)

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*In the case of U.S. military personnel who are required to be vaccinated against COVID-19,<sup>29</sup> it may be possible to seek an exemption from any vaccine, either temporary or permanent, for a variety of reasons including health issues or religious beliefs. For service members who have religious objections to receiving a vaccine, the path for how they might seek an exception to the vaccine is defined by their individual military service's regulations.<sup>30</sup>*

### **Defending your rights**

The Rutherford Institute stands ready to defend your rights if they are violated by the government. For 40 years, we have assisted, without charge, persons deprived of their liberty by government officials. **Should you have further questions or need legal assistance in exercising your constitutional rights, please contact the Legal Department at [legal@rutherford.org](mailto:legal@rutherford.org).**

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<sup>29</sup> Lolita C. Baldor, "COVID vaccine to be required for military under new US plan," *Associated Press* (Aug. 9, 2021), <https://apnews.com/article/coronavirus-vaccine-us-military-requirement-pentagon-3975940c732352f72e41f6e34a3a2669>.

<sup>30</sup> C. Todd Lopez, "Services Will Make Call on Religious Exemptions to COVID-19 Vaccines," *U.S. Department of Defense* (Aug. 10, 2021), <https://www.defense.gov/Explore/News/Article/Article/2726774/services-will-make-call-on-religious-exemptions-to-covid-19-vaccines/>.