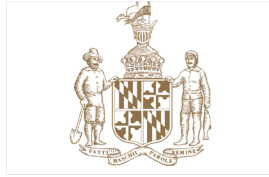


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April 8, 2021

The Honorable Jim Rosapepe
Maryland Senate
101 James Senate Office Building
Annapolis, Maryland 21401
Via email

Dear Senator Rosapepe:

You have asked for confidential advice whether the University System of Maryland (“USM”) may require that individuals receive a COVID-19 vaccination before being permitted on the College Park campus. In my view, if USM has sufficient evidence that mandatory vaccinations are reasonably required to protect the public health and safety, USM could legally mandate vaccinations. USM would likely have to provide reasonable accommodations for medical conditions or religious objections.

Most likely, if a mandatory vaccination requirement is legally challenged, a reviewing court would use the same standard the federal court did when reviewing Governor Hogan’s COVID-19 emergency orders. That is, whether it is “medically necessary and reasonable to prevent or reduce the spread of COVID-19.” *See Antietam Battlefield KOA v. Hogan*, 461 F. Supp. 3d 214 (D. Md. 2020). The court explained:

Public officials cannot responsibly exercise their broad authority to protect the health of the entire community without considering the data, the science, and the advice of experienced public health professionals.

Governor Hogan, exercising the powers given to him by the legislature in the face of the COVID-19 crisis, has made reasonable choices informed, if not dictated by, such data, science, and advice.

Id. at 242.

Moreover, courts have consistently upheld mandatory vaccination laws as a valid exercise of a State’s police powers. In *Jacobson v. Massachusetts*, 197 U.S. 11, 35 (1905), the Supreme Court held that mandating a vaccination to prevent the transmission of smallpox was a legitimate exercise of the State’s police powers that did not violate an

individual's liberty interest secured by the Fourteenth Amendment. An individual citizen's interest in bodily integrity is subject to restraint where such restraint is necessary for public health or safety. *Id.* at 27. The Court observed that although there were differing theories among health experts as to the value of vaccinations in preventing the spread of smallpox, most members of the medical profession, and a majority of the public accepted that vaccinations were effective in preventing the spread of the disease. *Id.* at 34. As such, the statute was a health law enacted in a reasonable and proper exercise of the police power. *Id.* at 35.¹

In *Zucht v. King*, 260 U.S. 174 (1922), the Court upheld school vaccination as a valid exercise of a State's police power to make vaccination a condition of attending a public or private school. *See also Davis v. State*, 294 Md. 370, 378 (1982) (stating that "[t]here is little question that a state may adopt a program of compulsory immunization for school-age children," and concluding that program did not violate First Amendment Establishment Clause). Applying *Jacobson* to mandatory vaccinations for the College Park campus, it is unlikely that a court would conclude that a COVID-19 vaccination requirement had no "real or substantial relation" to protecting public health, given its effect on reducing the spread of COVID-19, particularly if the requirement is based upon advice of public health and infectious disease experts.

With regard to students, the Supreme Court has assumed that students have a protected property interest in continued enrollment in an institution of higher education, creating procedural and substantive due process rights, including the right to be free from arbitrary state action. *See Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 223 (1985). As a result, if a vaccination mandate prevented a student from participating in the academic program it is possible that a court would find a due process right and evaluate whether the mandate was arbitrary or unreasonable, similar to the analysis in *Jacobson*. I believe, however, that it is unlikely that a court would conclude that a vaccination mandate was arbitrary, given the existence of a pandemic and the consensus among public health authorities that a sufficient percentage of vaccinated individuals is necessary to achieve "herd immunity" and allow the lifting of current broad restrictions.

With respect to an employee's right to continued employment, state and federal courts in Maryland have concluded that there is no substantive due process right to continued government employment. *See Murphy-Taylor v. Hofman*, 968 F. Supp. 2d 693, 734-35 (D. Md. 2013); *Samuels v. Tschechtelin*, 135 Md. App. 483, 536 (2000). A governmental employer, however, would violate an employee's substantive due process rights where it engages in conduct that "shocks the conscience" and that is "intended to

¹ Two justices have recently criticized applying *Jacobson* broadly to every constitutional challenge to a COVID-19 related mandate. *See Calvary Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603 (2020) (Alito, J., dissenting); *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020) (Gorsuch, J., concurring). Yet *Jacobson* remains controlling precedent.

injure in some way unjustified by any governmental interest.” *Murphy-Taylor*, 968 F. Supp.2d at 735 (quoting *Slaughter v. Baltimore*, 682 F.3d 317, 321 (4th Cir. 2012)). Here, given the current pandemic and its effects, again, it is unlikely that a court would conclude that a vaccination requirement was so extreme as to “shock the conscience” or was unjustified by any governmental interest.²

If USM instituted a mandatory vaccination policy, the ADA would have to be considered. Under Title I of the ADA, an employer may not “require a medical examination or make [medical] inquiries of an employee ... unless such ... examination or inquiry is shown to be job-related and consistent with business necessity.” 42 U.S.C. § 12112(d)(4)(A). The ADA protects all employees, not just those who are disabled, from being subjected to health-related inquiries and medical examinations except under limited circumstances.

The federal Equal Employment Opportunity Commission (“EEOC”), which enforces the ADA, has stated that a vaccination is not a “medical examination” for purposes of the ADA, but that “pre-vaccination medical screening questions are likely to elicit information about a disability” and thus, “if the employer requires an employee to receive the vaccine, administered by the employer, the employer must show that these ... inquiries are job related and consistent with business necessity.” The EEOC has not provided any clarity as to the circumstances in which it might consider a mandatory COVID-19 vaccine “job related and consistent with business necessity” because of a risk of harm associated with the presence of a non-vaccinated individual in the workplace. Nevertheless, in light of its finding that the presence of a COVID-19-infected individual in the workplace causes a significant risk of substantial harm, the EEOC has advised that employers can legally require employees to submit to temperature checks (considered a medical examination) and answer questions about whether they are experiencing COVID-19 symptoms because such inquiry is necessary to prevent such harm.

The EEOC has not specifically advised on whether COVID vaccines can be legally mandated under the ADA nor has it advised specifically on the extent to which it may be permissible under the ADA to mandate that employees provide evidence of vaccination for COVID-19 as a condition of continued employment and/or continued presence in the workplace. It advises generally that “[d]uring a pandemic, employers should rely on the latest CDC and state or local public health assessments.

In addition to prohibiting medical examinations and inquiries except under limited conditions, Title I of the ADA also prohibits employers from excluding employees from the workplace for health or safety reasons except under limited

² I do not know, however, whether any employees’ contracts impose conditions upon USM’s ability to separate an employee from employment.

circumstances and it requires that employers provide reasonable accommodations to individuals with disabilities. 42 U.S.C. § 12112(b)(5). With respect to the influenza vaccine, the EEOC advised that even if an employer reasonably concluded that administering the vaccine was job-related and consistent with business necessity, an employer could not simply require all employees to be vaccinated; the employer had to make reasonable accommodations for employees' medical conditions that prevent them from receiving a vaccine, unless such accommodation would pose an undue hardship, i.e., significant expense or difficulty, to the employer.³

USM would also need to consider religious objections to vaccination. The Supreme Court has held that there is no Constitutional right to object to a mandated vaccine on the basis of religion. *See Prince v. Massachusetts*, 321 U.S. 158 (1944) (holding that States may broadly regulate the treatment of children over a parent's religious objection and stating that "the right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death"); *see also Employment Div. v. Smith*, 494 U.S. 872 (1990) (holding that generally applicable and facially neutral laws are subject to rational basis review under the Constitution's Free Exercise Clause). States may, however, enact laws providing for religious objections to immunization and Maryland has done so.

Unless the Secretary declares an emergency or disease epidemic, [Maryland Department of Health] may not require the immunization of an individual if: (1) The individual objects to immunization because it conflicts with the individual's bona fide religious beliefs and practices; or (2) The individual is a minor and the individual's parent or guardian objects to immunization because it conflicts with the parent or guardian's bona fide religious beliefs and practices.

Md. Code, Health-Gen. § 18-403(a).

In addition, employees' religious objections to vaccination are protected by Title VII of the Civil Rights Act of 1964, which makes it an unlawful employment practice for an employer to discriminate against an employee based upon his or her religion. 42 U.S.C. § 2000e-2(a)(1). The federal law requires that once an employer receives notice that an employee's "sincerely held religious belief, practice, or observance" prevents the employee from taking a vaccine, the employer must provide a reasonable

³ See Equal Employment Opportunity Comm'n, *Pandemic Preparedness in the Workplace and the Americans with Disabilities Act*, <https://www.eeoc.gov/laws/guidance/pandemic-preparedness-workplace-and-americans-disabilities-act>.

accommodation unless it would pose an undue hardship, “more than de minimis cost” to the operation of the employer’s business.⁴

Finally, there may be a legal issue with mandatory vaccinations because the FDA has granted only an emergency use authorization (“EUA”) for the distribution of vaccines developed by Pfizer/BioNTech, Moderna, and Johnson & Johnson. The EUA process permits temporary approval of medical products based on significantly less data and a lower standard than is normally required for FDA approval. No court has yet considered the question of whether a COVID-19 vaccination with only temporary emergency authority may be mandated. That very question, however, is pending before at least two federal courts. A case in the United States District Court for the District of New Mexico filed in February of this year involves a detention center employee challenging a local government requirement that first responders receive a COVID-19 vaccination as a condition of continued employment. School employees in California have brought a similar case in the United States District Court for the Central District of California last month.

The law at issues is 21 U.S.C. § 360bbb-3, “Authorization for medical products for use in emergencies,” authorizes the FDA to issue an EUA, and requires that certain conditions be imposed upon the authorization as the Secretary of the United States Department of Health and Human Services (HHS) finds “necessary or appropriate to protect the public health,” including a requirement to ensure that individuals receiving the medical product are informed that they have “*the option to accept or refuse administration of the product, of the consequences, if any, of refusing administration of the product,* and of the alternatives to the product that are available and of their benefits and risks.” (emphasis added). Under 10 U.S.C. § 1107a, the President may under certain circumstances waive the requirement that is “designed to ensure that individuals are informed of an option to accept or refuse administration” of an emergency use authorized product. As of December 2020, a patient fact sheet for the Moderna vaccine included language that the patient has a right to refuse the vaccine.

On the other hand, informal guidance on the CDC’s website includes the following statement:

The Food and Drug Administration (FDA) does **not** mandate vaccination. However, whether a state, local government, or employer, for example,

⁴ Equal Employment Opportunity Comm’n, *EEOC Compliance Manual*, Section 12: Religious Discrimination 56-65 (2008), <https://www.eeoc.gov/policy/docs/religion.pdf>.

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may require or mandate COVID-19 vaccination is a matter of state or other applicable law.⁵

Because the language of the federal law is open to interpretation, USM would likely be able to successfully defend a mandate with testimony from health experts that although the vaccines are currently under an EUA, given experience with the vaccine so far and the progress of the studies, the evidence indicates that the full license will be granted in the next several months and that the USM's decision to mandate is reasonable and necessary to control COVID-19 and prevent campus outbreaks.

Sincerely,



Sandra Benson Brantley
Counsel to the General Assembly

⁵ https://www.cdc.gov/coronavirus/2019-ncov/vaccines/recommendations/essentialworker/workplace-vaccination-program.html#anchor_1615585395585 (emphasis in original) (last visited March 29, 2021).