



## MANDATORY VACCINATION POLICIES: LEGAL AND CONSTITUTIONAL CONSIDERATIONS FOR THE GEORGIA LOCAL GOVERNMENT EMPLOYER

A local government employer's decision whether to implement a mandatory COVID-19 vaccination policy primarily requires striking a balance between its goal of protecting its employees, residents, and community at large from the virus's spread and the statutory and constitutional protections afforded its employees under the Americans with Disabilities Act ("ADA"), Title VII of the Civil Rights Act of 1964 ("Title VII"), and the due process (liberty) and free exercise (religion) clauses of the U.S. and Georgia constitutions.

### AMERICANS WITH DISABILITIES ACT

Under the ADA, any mandatory vaccination policy implemented by a local government employer must (1) be job-related and consistent with business necessity; (2) make some provision for exempting any employee who, because of a disability, is unable to be vaccinated; and (3) make some provision for an interactive "reasonable accommodations" process to determine whether any such employee can perform his/her essential job functions without posing a threat to the health and safety of him/herself or his/her co-workers or impose an undue hardship on the employer and its operations.

#### **A. Policy must be job-related and consistent with business necessity.**

To satisfy the first of these three elements, the local government employer must establish that it has a reasonable belief, based on objective evidence, that unless vaccinated, its employees will pose a direct threat to the health and safety of the workplace. This requirement would appear to be met in view of the current public health crisis, as the [Equal Employment Opportunity Commission](#) ("EEOC") has declared that COVID-19 presents a significant risk of substantial harm to the health and safety of the workplace and, as such, constitutes a direct threat within the meaning of the ADA.

#### **B. Policy must provide for a confidential review process for evaluating exemption requests and an interactive process for identifying reasonable accommodations.**

With regard to the second and third elements of the above-stated standard, a local government employer must exempt from the vaccination requirement and provide a reasonable accommodation to any employee with a qualified disability that prevents him/her from safely taking the vaccine. Any mandatory vaccination policy should therefore include a confidential review process that applies consistent standards for medical exemptions, such as the requirement for a physician's note related to the existence of both the underlying disability and the relevant medical contraindications, and an interactive process with the employee designed to identify a reasonable accommodation. The local government employer must ensure that the documentation obtained or generated through these processes is properly secured in a confidential medical file accessible and disclosed only on a need-to-know basis.



Notwithstanding the foregoing, a local government employer is not required to exempt an employee or provide an accommodation if doing so would compromise the health and safety of the workplace or if the accommodation would impose an undue hardship. In this regard, if an unvaccinated employee is not able to work from home or from some other location outside the workplace, work outside of regular business hours, or work under some other arrangement that effectively eliminates the direct threat he/she would otherwise pose, the employer may classify him/her as unqualified for an accommodation under the policy. In examining the viability of these options, however, the employer must also make an individualized assessment as to the cost and burdensomeness of providing the employee an accommodation outside of the workplace in order to determine whether such accommodation would impose an undue hardship.

## **TITLE VII OF THE CIVIL RIGHTS ACT OF 1964**

Title VII similarly requires that a local government employer's mandatory vaccination policy be (1) job-related and consistent with business necessity; (2) make some provision for exempting any employee who, because of a sincerely held religious belief, objects to being vaccinated; and (3) make some provision for an interactive "reasonable accommodations" process to ascertain whether the employee can perform his/her essential job functions without posing a threat to the health and safety of him/herself or his/her co-workers or impose an undue hardship on the employer.

### **A. Policy must be job-related and consistent with business necessity.**

As noted in the preceding section of this article, the first of these three elements would appear to be satisfied, as the EEOC has declared that COVID-19 presents a significant risk of substantial harm to the health and safety of the workplace and, as such, constitutes a direct threat. While this pronouncement was made in connection with an updated guidance designed to address ADA issues implicated by employment practices relating to the pandemic, the [updated guidance](#) also addresses certain religious accommodation issues under Title VII "to provide a complete answer."

### **B. Policy must provide for a confidential review process for evaluating exemption requests and an interactive process for identifying reasonable accommodations.**

Under Title VII, once the local government employer receives notice that an employee's sincerely-held religious belief, practice, or observance prevents him/her from taking the vaccine, it must exempt him/her from the vaccination requirement and provide a reasonable accommodation – provided that doing so would not compromise health and safety or impose an undue hardship on the employer. In general, a religious accommodation is an adjustment to the employee's work environment designed to allow him/her to practice or observe the requirements or restrictions of his/her religion.

Importantly, the standard for demonstrating that a requested accommodation would pose an undue hardship is significantly lower under Title VII than under the ADA. In this regard, the employer need only show that the requested accommodation would impose "more than de minimis cost" to its



operation or, as alluded to above, that it would compromise workplace safety, decrease productivity or efficiency, infringe upon the rights of other employees, or result in other employees having to perform more than their share of burdensome or potentially dangerous tasks. Other considerations relevant to the undue hardship analysis in the context of a mandatory vaccination policy include the assessment of the public risk posed at a particular time, the availability of effective alternative means of infection control, and potentially the number of employees who actually request an accommodation.

### **C. What religious beliefs are entitled to accommodation under Title VII?**

The EEOC and courts have consistently found that Title VII defines religion very broadly to include not only traditional, organized religions such as Christianity, Judaism, Islam, Hinduism, and Buddhism, but also religious beliefs that are new, uncommon, not part of a formal church or sect, only subscribed to by a small number of people, or that seem illogical or unreasonable to others. Moreover, an employee's belief or practice can be treated as "religious" under Title VII even if the employee is affiliated with a religious group that does not espouse or recognize that individual's belief or practice, or if few — or no — other people adhere to it.

Importantly, while social, political, or economic philosophies, as well as mere personal preferences, are not "religious" beliefs protected by Title VII, the EEOC and some courts have taken the position that certain non-theistic moral or ethical beliefs may qualify as "religious," provided they are sincerely held with the strength of traditional religious views. For instance, at least one court has declined to dismiss a Title VII religious accommodation claim brought by a vegan who refused to comply with her employer's mandatory flu vaccine policy on the grounds that the vaccine contained and/or was produced using animal by-products. On the other hand, it does not appear that any court to date has extended such protection to those who adhere to the growing anti-vaccination movement.

### **D. What steps may a local government employer take to verify a request for exemption on religious grounds?**

Because the definition of religion is broad and protects beliefs and practices with which the local government employer may be unfamiliar, the local government employer should ordinarily assume that an employee's request for religious exemption is based on a sincerely-held religious belief. If, however, an employee requests a religious exemption and the employer has an objective, documentable, basis for questioning either the religious nature or the sincerity of a particular belief or practice, it would be justified in seeking additional supporting information.

When the local government employer requests additional information, employees should provide information that addresses the employer's reasonable doubts. That information need not, however, take any specific form. For example, written materials or the employee's own first-hand explanation may be sufficient to alleviate the employer's doubts about the sincerity or religious nature of the employee's professed belief such that third-party verification is unnecessary. An employee who fails to cooperate with the local government employer's reasonable request for verification of the



sincerity or religious nature of a professed belief risks losing any subsequent claim that the local government employer improperly denied an exemption.

Like the “religious” nature of a belief or practice, the “sincerity” of an employee’s stated religious belief is usually not in dispute. Nevertheless, there are some circumstances in which the local government employer may assert as a defense that it was not required to provide accommodation because the employee’s asserted religious belief was not sincerely held. Factors that — either alone or in combination — might undermine an employee’s assertion that he/she sincerely holds the religious belief at issue include: whether the employee has behaved in a manner markedly inconsistent with the professed belief; whether the accommodation sought is a particularly desirable benefit that is likely to be sought for secular reasons; whether the timing of the request renders it suspect (e.g., it follows an earlier request by the employee for the same benefit for secular reasons); and whether the local government employer otherwise has reason to believe the accommodation is not sought for religious reasons.

## **CONSTITUTIONAL CONSIDERATIONS**

The primary constitutional issues directly implicated by a local government employer’s implementation of a mandatory vaccination policy derive from the Due Process Clause (liberty) of the Fourteenth Amendment and the Free Exercise Clause (religion) of the First Amendment. Violations of these constitutional provisions are actionable under 42 U.S.C. § 1983 (“Section 1983”).

### **A. Due Process Clause.**

#### **1. Liberty interests.**

The Due Process Clause of the Fourteenth Amendment protects an individual’s right to or interest in life, liberty, and property from state and local governmental intrusion or interference. Mandatory vaccination policies implicate liberty interests; specifically, the Supreme Court has recognized that a person possesses a constitutionally protected liberty interest in bodily integrity, such that the compulsory injection of medication into his/her body represents a substantial interference with that interest. Put another way, liberty includes the right to make decisions about bodily integrity and medical treatment without governmental interference.

#### **2. Substantive due process.**

Conceptually, due process is comprised of both procedural and substantive components. Procedural due process does not prohibit governmental intrusion on or interference with a person’s liberty interest, but requires that certain procedures be followed relating to the provision of notice to the person affected and an opportunity for him/her to be heard with regard to the proposed intrusion or interference. Conversely, substantive due process is premised on the notion that, regardless of the fairness of the procedures employed, a governmental intrusion upon or interference with a person’s



liberty interest must be justified, with the applicable legal standard varying depending upon the relative importance of the liberty interest. While it is unclear precisely what level of legal scrutiny a court would apply to a local government employer's mandatory vaccination policy, it appears that such a policy would survive a due process challenge if found to be supported by a compelling governmental interest and narrowly tailored to achieve its purposes.

### **3. Policy must be supported by compelling government interest.**

The first element of this standard would almost certainly be satisfied given the existence of a national public health state of emergency. For over a century, the Supreme Court has recognized that state and local governments have a compelling interest in protecting public health and safety, particularly during epidemics, outbreaks, and other circumstances creating a heightened risk of infection. On this basis, compulsory vaccination laws have been upheld as a proper exercise of governmental police power, even when they directly interfere with parents' rights to make decisions affecting their children – a liberty interest regarded as fundamental and therefore subject to the highest level of strict scrutiny.

### **4. Policy must be narrowly tailored.**

In view of the foregoing, the survival of a local government employer's mandatory vaccination policy under a due process challenge will almost certainly turn on whether it satisfies the second element of the above-stated standard; i.e., whether the policy is narrowly tailored to achieve its purposes. A policy is not narrowly tailored under this standard if there are alternative means by which the local government employer may accomplish its goal of protecting the health and safety of its employees, its residents, and the community, while placing less of a burden on the constitutionally protected liberty interests of those affected. Some observers have therefore suggested that to satisfy the "narrowly tailored" standard, a mandatory vaccination policy should cover only employees who are required to report to the workplace or interact with coworkers or members of the public or whose duties and responsibilities would cause them to pose a direct threat to the health and safety of others if not vaccinated. In any event, in drafting mandatory vaccination policies, local governmental employers must remain mindful of the possibility of having to demonstrate that there are no alternative means available that would be equally effective in achieving the policy's health and safety objectives while at the same time infringing less on the liberty interests of the employees and others affected by the policy.

## **B. Free Exercise of Religion Clause.**

The First Amendment provides that the government "shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof ...." The constitutional right protected by this clause has been described as that to reach, hold, practice, and even change beliefs freely according to the dictates of conscience. As such, the Supreme Court has held that the Free Exercise Clause of the First Amendment prohibits government interference with religious belief and – within certain limits – religious practice.



## 1. Policy must be neutral, of general applicability, and untainted by discriminatory animus.

The “within certain limits” disclaimer attached to the “religious practice” component of the clause is most evident when the clause is invoked to challenge a “neutral law of general applicability;” i.e., a law that is neutral on its face with regard to religious beliefs or practices, that applies to a broad range of persons without regard for their religious beliefs or practices, and that was not motivated by religious animus or enacted with the intent to interfere with religious beliefs or practices. If a law – and by reasonable extension, a policy – satisfies this standard, then the fact that its application to a given person interferes with his/her religious practices does not constitute a violation his/her rights under the Free Exercise Clause.

## 2. No accommodation obligation under Free Exercise Clause.

In view of the foregoing, the [Supreme Court](#) has determined that when the law in question is neutral and of general applicability, the Free Exercise Clause imposes no obligation on the government to accommodate a given religious practice determined to be incompatible with its requirements or prohibitions. Rather, any such accommodation obligation must be imposed through the “political process;” i.e., legislatively. As noted above, in the case of mandatory vaccination policies applicable to employees, an accommodation obligation was legislative imposed on employers through Title VII.

## C. Indirect constitutional limitations.

### 1. Freedom of speech.

The Free Speech Clause of the First Amendment protects certain expression by local government employees to the extent that expression relates to a matter of public concern. Local government employers must remain mindful of the potential application of the Free Speech Clause when reacting to any employee expression in opposition to the mandatory vaccination policy. Furthermore, in the First Amendment context, expression is broadly construed, and arguably encompasses non-compliance.

While the potential applicability of the Free Speech Clause to employee opposition to a mandatory vaccination policy will not preclude a local government employer from taking action – particularly when the opposition takes the form of non-compliance – certain steps (beyond the scope of this article) should be taken to ensure that the action taken does not run afoul of the First Amendment.

### 2. Georgia Whistleblower Act.

Although not a constitutional issue, it also bears noting that certain employee expression, including non-compliance, can in some instances constitute a protected disclosure under the [Georgia Whistleblower Act](#).



## INDEPENDENT CONTRACTORS AND VOLUNTEERS

Workers who are employed by an independent contractor but covered by a local government employer's mandatory vaccination policy because they provide services for the employer are protected under Title VII and the ADA's prohibitions on third-party interference. Specifically, both the [EEOC](#) and the [Eleventh Circuit Court of Appeals](#) have determined that Title VII and the ADA prohibit a covered third-party employer (i.e., the local government) from discriminatorily interfering with an individual's employment opportunities with another employer (i.e., the contractor). Importantly, this "third-party interference" theory of recovery is not the same as the "joint employer" theory – meaning that a local government employer who is confident that it is not a joint employer with a contractor providing workers may still find itself facing a Title VII (or ADA) claim if the application of its mandatory vaccination policy to such a worker allegedly interferes with his/her employment status with the contractor.

Volunteers usually are not protected "employees" under either Title VII or the ADA. However, a volunteer may qualify as an "employee" if the local government employer for whom he/she provides services controls his/her work performance and he/she also receives "significant remuneration" for performing such services.

Notwithstanding the foregoing, it must be noted that an employment relationship is not a prerequisite to the assertion of a claim against a local government employer under either Section 1983 or Title II of the ADA. As previously stated, the former provides a cause of action based on alleged violations of federal constitutional rights which, in the context of a mandatory vaccination policy, would likely invoke the religious freedom provision of the First Amendment and the Due Process Clause of the Fourteenth Amendment). The latter prohibits discrimination against qualified individuals with disabilities in all programs, activities, and services of public entities. The [Eleventh Circuit](#) has previously held that Title II of the ADA is sufficiently broad to encompass employment-related matters, which is also consistent with applicable [regulations](#).

## CONCLUSION

A mandatory vaccination policy adopted and implemented by a local government employer should withstand any legal or constitutional challenge, provided:

- The policy is adopted for the purpose of promoting public health and safety by protecting its employees, residents, and community at large from the spread of COVID-19;
- The policy is of general application, is facially neutral, and is not adopted for the purpose of disadvantaging any person or class of persons due to their disability(ies), religious beliefs and practices, or any other protected status of activity;
- The policy is narrowly tailored to accomplish these health and safety-related goals and remain job-related and consistent with business necessity, with due consideration given to whether there are



alternative means by which the goals may be accomplished which would place less of a burden on the statutorily and constitutionally protected rights of those affected;

- The policy expressly allows employees with disability and/or religious-based objections to the mandatory vaccinations to request exemptions and provides for confidential review processes by which such requests can be meaningfully evaluated;
- The policy provides for or allows the local government employer to engage in an interactive process with each employee exempted from the mandatory vaccination requirement for the purpose of attempting to identify a reasonable accommodation that would enable the employee to perform his/her essential job functions without posing a threat to the health and safety of him/herself or his/her co-workers or impose an undue hardship on the employer and its operations; and
- The policy is applied and enforced uniformly with regard to all employees.

Finally, local government employers are encouraged to consult with employment law counsel as needed to ensure that any mandatory vaccination policies they adopt and implement meet all applicable constitutional and legal standards, are applied in a manner consistent with those standards, and are promptly and effectively modified as needed to remain consistent with any changes in the legal landscape.



This resource was prepared by the [Public Sector Group](#) of Elarbee, Thompson, Sapp & Wilson, LLP, a legal practice group specializing in the representation of state and local government clients throughout Georgia primarily in matters relating to labor and employment. It was designed to serve as a guide for the benefit and use of the [Georgia Municipal Association](#) and its membership, as well as other state and local government clients, during the declared public health emergency relating to COVID-19.

This resource was prepared based on the most current information and legal analysis available; however, because the legal landscape relating to the pandemic is necessarily fluid, this resource will subject to periodic updates and revisions. As such, it is not intended, and should not be interpreted or relied upon, as legal advice. GMA members are encouraged to consult with their attorneys or outside counsel as needed. Elarbee Thompson's Public Sector Group is also available for consultation by contacting R. Read Gignilliat (404.582.8442 / [gignilliat@elarbeethompson.com](mailto:gignilliat@elarbeethompson.com)) or Sharon P. Morgan (404.582.8406 / [morgan@elarbeethompson.com](mailto:morgan@elarbeethompson.com)). As always, GIRMA members may contact Elarbee Thompson's Public Sector Group directly via the [GIRMA Helpline](#) (800.721.1998 / [girmahelpline@elarbeethompson.com](mailto:girmahelpline@elarbeethompson.com)).