

# COVID-19 Vaccination and Schools: Questions & Answers from the National School Boards Association

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## **1. Where can I find the latest federal guidance on COVID-19 practices, including vaccines?**

Almost every federal department and agency offers guidance regarding COVID-19 practices, but not all discuss vaccines. Some of the most recent guidance of value to school districts includes the [usagov](#) website's COVID-19 webpage, which contains links to several federal resources, including the U.S. Department of Education's [COVID-19 Resources for Schools, Students, and Families](#).

In addition, the Centers for Disease Control and Prevention's COVID-19 website links to a number of COVID-19 resources, including its [Schools and Child Care Programs](#) page, offering guidance and resources on topics like [Operational Strategy for K-12 Schools through Phased Prevention](#), [Managing Daily Operations](#) and [Guidance for COVID-19 Prevention in Kindergarten \(K\)-12 Schools](#). It is important to check these websites frequently, as agencies are continuing to update and issue COVID-19 resources and guidance.

## **2. Has the federal government issued a mandate requiring everyone within U.S. borders to get the Covid-19 vaccination?**

No, the federal government has not issued a mandate requiring everyone within U.S. borders to get the COVID-19 vaccine. But the Supreme Court ruled over one hundred years ago that state and local governments could require individuals within their jurisdictions to be vaccinated against preventable diseases, such as smallpox. And, although no specific court case or federal law has addressed it, the Court seemed to presume that the federal government has the constitutional authority to impose mandatory vaccination under certain emergency circumstances, such as a pandemic.

In 1905, the U.S. Supreme Court issued a landmark decision in *Jacobson v. Commonwealth of Massachusetts*, upholding a Cambridge, Massachusetts regulation requiring all residents of the city to be vaccinated against smallpox, with a limited exception for children.<sup>1</sup> The Supreme Court upheld that ruling in 1922, in a case challenging San Antonio, Texas' requirement that children attending public schools must present a certificate of vaccination. In *Zucht v. King*, the Supreme Court affirmed the holding in *Jacobson* without detailed discussion.<sup>2</sup>

Today, the *Jacobson* rule is well-settled, but to date the Supreme Court has not addressed the issue of whether the federal government can impose a national vaccination mandate, so it is not clear whether the federal government has the constitutional authority to impose mandatory vaccination for COVID-19 nationwide. Both *Jacobson* and the National Childhood Vaccine Injury Act of 1986 (NCVIA), which grants federal health authorities expansive power to combat the spread of communicable disease among the public, may provide some justification that such authority exists under the U.S. Constitution.<sup>3</sup> However, there is no direct federal statutory language that spells out such authority or U.S. Supreme Court precedent establishing the federal government has such constitutional authority. According to a Johns Hopkins Bloomberg School of Public Health COVID-19 vaccine Q&A, the decision on whether COVID-19 vaccinations are made mandatory falls to the individual states.<sup>4</sup> The Q&A cites the U.S. Supreme Court decision in *Jacobson* as establishing that states have the authority to compel vaccinations.<sup>5</sup> The Q&A notes that states could elect to require that people who live within that state be vaccinated.<sup>6</sup>

The Centers for Disease Control and Prevention (CDC) clearly state that the federal government does not mandate COVID-19 vaccination for individuals.<sup>7</sup>

### **3. Do states have the authority to require their residents to get the COVID-19 vaccine? Are there any states that require it?**

*Jacobson* and its progeny suggest that states could mandate COVID-19 vaccination. Currently no state has imposed such a mandate.<sup>8</sup> States that might choose to mandate the COVID-19 vaccination for all their citizens would have to provide exemptions for people who have disabilities and those who have sincerely held religious objections to vaccinations. Those issues are discussed in more detail in FAQ 7.

### **4. In the absence of a state mandate, can school districts require employees to get vaccinated before returning to work? What legal authority would support such a requirement?**

There is no federal law specifically addressing this issue. It remains up to employers, or state and/or local laws to determine whether employees are required to get the COVID-19 vaccine. Recent U.S. Equal Employment Opportunity Commission (EEOC) guidance indicates that employers have the legal right to require as a condition of hire or continued employment that new hires and/or existing employees obtain the COVID-19 vaccine.<sup>9</sup>

If school districts update policies requiring the COVID-19 vaccine for employees, the policies must be consistent with state and local law. And school districts will still have to make exceptions for individuals with certain medical conditions or religious beliefs when imposing any requirements.

### **5. What issues should a school district consider before requiring all employees to receive a COVID-19 vaccine? Are there any laws that might put limitations on a school district's ability to mandate employee vaccination?**

The first issue a school district should consider in determining whether to require all employees to be vaccinated is whether there are any federal or state laws that would allow it to do so or prohibit it from doing so. Although the EEOC has provided guidance indicating that federal law does not prevent an employer from requiring all employees who enter the workplace to be vaccinated against COVID-19, school districts should look at the issue thoroughly before deciding to require employee vaccinations.<sup>10</sup>

To date, there is no federal law, rule, or regulation that requires COVID-19 vaccination, and we are unaware of any states that have mandated it. However, state laws and regulations are changing rapidly regarding the Coronavirus and COVID-19. You should work with your state school boards association or COSA attorney to determine whether state law requires or allows you to mandate vaccination.

Even if your state law does not specifically require residents or workers in certain fields to be vaccinated, you should find out whether state law supports an employer's requirement that all employees obtain the vaccination. For example, the state of Virginia, among other states, is an employment-at-will state. This means that employers have the authority to set working conditions and may discipline or dismiss employees for any reason or no reason as long as the basis for the discipline or dismissal is not in contravention of a public policy enabling the exercise of a statutorily created right. Such rights include freedoms and protections from discrimination provided by human rights statutes, civil rights statutes, and the Civil Rights Act of 1964.<sup>11</sup> Additionally, case law in many states has held that employers can generally require employees to be vaccinated.<sup>12</sup>

If your state is an employment-at-will state, you may be able to mandate vaccination of your employees due to the flexibility "at will" statutes provide. But many employment-at-will states have laws that alter the employment-at-will status regarding public education employees. For example, in Oklahoma, career teachers only may be dismissed for grounds specifically listed in state statute.<sup>13</sup> Unless a district could prove that a career teacher's failure to obtain a vaccination fits within the statutory grounds for termination, that school district in Oklahoma would not be able to terminate her for the failure to obtain the vaccine. In states that require "cause" for discipline of public school district employees, administrators should work very closely with their state school boards associations and COSA attorneys

to determine the legal limits on your authority to discipline employees who refuse to comply with any mandate requiring them to get the COVID-19 vaccine.

The basis for a particular vaccine's FDA approval may be another issue school districts will want to consider before mandating employee vaccination. The COVID-19 vaccines currently in use have emergency authorization, as opposed to full FDA approval. That means that the vaccinations have been approved temporarily and for emergency use only.<sup>14</sup> For this reason, school districts should evaluate their potential liability should they mandate vaccination, and an employee becomes ill from one of the vaccines. They also should answer questions such as these:

- If a school district does mandate COVID-19 vaccination for employees, would it need to get some sort of waiver from its insurance carrier, as the vaccine has not been fully approved by the FDA?
- If a school district makes vaccination mandatory and employees become ill due to the vaccine, would such illnesses be covered by workers' compensation, or would the school district have to use its general liability policy?
- Given the fact that many insurance companies are excluding COVID-19 illnesses from coverage, could a district find coverage that would protect it in case an employee became ill from the vaccination?
- Given the uncertainty of the long-term effects of the COVID-19 vaccines, would the costs of requiring employees to be vaccinated with these drugs increase the district's health insurance costs?

Before mandating vaccination for employees, school districts should answer these questions and others to make certain that mandatory vaccinations are suitable for their specific workforce.

Finally, even if a school district were to make COVID-19 vaccinations mandatory for employees, the Americans with Disabilities Act of 1990 (ADA) and the Civil Rights Act of 1964 (Title VII) would require an exclusion for employees who can show that they are likely to become ill after taking the vaccine, are covered by the ADA as a person with a disability, or who have a sincerely held religious belief against vaccinations.<sup>15</sup> The school districts could not mandate vaccination regarding these employees and would be required to provide reasonable accommodations to them. The school districts would also need to make certain that the requirement that all employees be vaccinated does not trigger a violation of other prohibitions against discrimination relating to race, color, religion, age, or sex.<sup>16</sup>

## **6. What sort of accommodation might a school district provide to an employee who is exempted from COVID-19 vaccination because it may make them ill, they have a condition that is defined as a disability under the ADA, or they are entitled to a Religious Accommodation under Title VII?**

Employees who cannot be vaccinated against COVID-19 because it may make them ill (e.g., Pregnant women), they have a disability as defined by the ADA, or they have a sincerely held religious belief, practice, or observance that prevents them from taking vaccinations, are entitled to a reasonable accommodation unless accommodating them poses an undue hardship to the employer.<sup>17</sup> Such accommodations may include having the person wear a face mask, work at a distance from co-workers or non-employees, work a modified shift, telework, or agree to accept a reassignment.<sup>18</sup>

## **7. Can a school district require employees to prove that they got the COVID-19 vaccine? If so, what kind of proof can it require?**

Maybe. School districts must balance the competing priorities of privacy and transparency when asking employees to provide proof of a COVID-19 vaccine, and must be cautious about the types of questions they are asking, as the ADA generally protects employees from being required to share disability-related information with their employers.<sup>19</sup> While the EEOC has said that asking whether an employee has received a COVID-19 vaccine

is not a disability-related inquiry, subsequent questions could be, such as asking why an employee has not gotten vaccinated.<sup>20</sup> Employers may ask disability-related questions if they comply with the ADA standard of being “job-related and consistent with business necessity.”<sup>21</sup>

Generally, school districts may not tell parents whether a specific teacher has been vaccinated. State and local privacy laws typically prohibit employers from disclosing their employees’ medical information.

### **8. What should a school district consider before making employee COVID-19 vaccinations voluntary? If a school district decides to make vaccines voluntary, can it provide gifts or other “inducements” to employees to encourage them to get the shot?**

Before deciding to make employee COVID-19 vaccination completely voluntary, school districts should know the potential legal implications of that decision. There are many people who object to the vaccination even though they are not entitled to protections under the ADA or the religious accommodation provisions of Title VII. How would a school district protect other employees, students, and visitors if these employees decided not to get the vaccination? How would it manage the risk of an employee catching Coronavirus from someone who refused to be vaccinated at work? Could employees who have been vaccinated or who cannot get the vaccination for health or religious reasons sue districts because they failed to provide a safe and healthy work environment as required by the Occupational Safety and Health Administration (OSHA)?<sup>22</sup>

Will school districts be required to enhance cleaning protocols to provide for employees who choose not to be vaccinated? Will that change in protocols be expensive? What would a district’s liability exposure be if a board member contracted COVID-19 after visiting its offices if it has a significant number of employees who refuse to be vaccinated? Could employees who refuse to be vaccinated legally be required to work at home full-time? The picture for liability is not clear at this time, but since the potential for it remains vast, school districts should work with their state school boards associations and their COSA attorneys to consider legal liability as well as business expenditures in making the decision to make vaccination optional for employees.

Providing incentives to employees who volunteer to take vaccinations sounds like a good strategy on its face. Offering incentives can be a good thing if the incentives do not send a message that employees have something to fear by taking the vaccine, they are attractive enough to warrant employee participation, and they are not too expensive.

Keep in mind that incentives that are too generous could make the incentive program look involuntary. Under the ADA, participation in an employee wellness program that involves disability-related inquiries must be voluntary. The EEOC has not taken a position on whether vaccination incentive programs constitute wellness programs sufficient for scrutiny by it. In January 2021, however, it developed a proposed rule indicating that wellness programs that include disability-related questions and/or medical examinations may only offer *de minimis* (minimal) incentives to encourage employees to participate. Such *de minimis* incentives were described as “a water bottle or gift card of modest value.”<sup>23</sup> It subsequently withdrew the proposed regulation, however, leaving employers with no clear idea of how they should interpret this provision.

On May 28, 2021, the EEOC did provide additional guidance indicating that an employer may offer an incentive as long as it is not so substantial as to appear coercive.<sup>24</sup> In providing incentives, schools need to make certain that they do not discriminate against those who are excepted from a vaccination requirement because of a disability or a sincerely held religious beliefs. Finally, most state laws prohibit school districts from using public funds to pay for gifts or the kind of incentives most school districts would contemplate to encourage their employees to get the COVID-19 vaccine.<sup>25</sup> Schools should work with their state school boards associations or COSA attorneys to develop incentive programs that comply with their state laws.

## 9. Can a school district require students to get the vaccination to attend in-person school?

State law generally dictates what vaccines students must have for attending school in-person.<sup>26</sup> Every state and Washington, D.C. currently requires K-12 students to be vaccinated against some diseases.<sup>27</sup>

The vaccination requirements, including which vaccines are deemed necessary and the reasons students can opt out, vary from state to state. In all states, students may request exemption from vaccination requirements for valid medical reasons. There are 44 states that allow religious exemptions and 15 states that allow philosophical exemptions.<sup>28</sup>

## 10. Can school districts still require staff and students to wear masks and practice social distancing even if a large percentage of the staff and students have been vaccinated?

Although state and local mandates may change as COVID case counts go down, school districts may still require vaccinated staff and students to wear masks and to practice social distancing. CDC issued guidance saying that fully vaccinated adults can “resume activities without wearing a mask or staying 6 feet apart, except where required by federal, state, local, tribal, or territorial laws, rules, and regulations, including local business and workplace guidance.”<sup>29</sup> In the school context, however, CDC recommends schools maintain at least 3 feet of physical distance between students within classrooms, combined with indoor mask wearing by people who are not fully vaccinated, to reduce transmission risk. When it is not possible to maintain a physical distance of at least 3 feet, such as when schools cannot fully re-open while maintaining these distances, it is especially important to layer multiple other prevention strategies, such as indoor masking. The CDC also recommends that “schools should be supportive of people who are fully vaccinated, but choose to continue to wear a mask, as a personal choice or because they have a medical condition that may weaken their immune system.” School administrators will need to ensure their selected mask use policy does not conflict with local or state policies and regulations.<sup>30</sup> It is recommended that school districts monitor factors like vaccination rates, the growth of coronavirus variants, virus spread, and additional public health guidance as they plan for the next school year.

## 11. What are some practices school districts can employ in protecting staff and students from Coronavirus?

The following are some practices districts can follow in protecting employees and students from contracting Coronavirus and becoming ill with COVID-19:

1. Follow closely and become familiar with recent CDC guidance to have the latest and best information on protecting your employees and students from contracting the Coronavirus or COVID-19.
2. Consider partnering with local and state health departments on developing best practices to protect employees and students from becoming ill with COVID-19.
3. Become familiar with rules, regulations, and guidance from the United States Department of Education and their state departments of education on the educational aspect of the pandemic. The United States Department of Education has developed several guidance documents giving school districts information on educating students during a pandemic.<sup>31</sup>
4. Work with your state school boards association and COSA attorney to develop and update policies that address issues related to the Coronavirus such as testing, protocols for in-person school, alternatives for those who cannot attend in-person school, voluntary or mandatory vaccination for employees, vaccinations for children over 12, whether students and staff will be required to wear masks and to observe social distancing, sports protocols, and reasonable accommodation for persons who are exempt from taking the vaccine.
5. Communicate with parents consistently and in a way that does not confuse them. The communication should be clear; it should be thorough; and the messaging should begin well before the school year begins.
6. Communicate with the media about critical information like when in-person school will begin, and what protocols will be in place, including whether masking or vaccination will be required.



## Endnotes

- <sup>1</sup> *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11 (1905).
- <sup>2</sup> *Zucht v. King*, 260 U.S. 174 (1922)(finding that the city ordinances did not confer “arbitrary power, but only that broad discretion required for the protection of the public health”).
- <sup>3</sup> National Childhood Vaccine Injury Act of 1986, 42 U.S.C. §§ 300aa- 1 to 300aa-34.
- <sup>4</sup> Joanne Rosen, *Can COVID-19 Vaccines Be Mandatory in the U.S. and Who Decides?* Johns Hopkins Bloomberg School of Public Health (Nov. 17, 2020), [Can COVID-19 Vaccines Be Mandatory in the U.S. and Who Decides? - COVID-19 - Johns Hopkins Bloomberg School of Public Health \(jhsph.edu\)](#).
- <sup>5</sup> *Id.*
- <sup>6</sup> *Id.*
- <sup>7</sup> The Centers for Disease Control and Prevention, *Myths and Facts about COVID-19 Vaccines* (Last Updated June 3, 2021), [Myths and Facts about COVID-19 Vaccines | CDC](#).
- <sup>8</sup> Immunization Action Coalition, *State Laws and Mandates By Vaccine* (Last Updated May 24, 2021), [State Mandates on Immunization and Vaccine-Preventable Diseases \(immunize.org\)](#).
- <sup>9</sup> Equal Employment Opportunity Commission, *What you should know about COVID-19 and the ADA, the Rehabilitation Act & Other EEOC Law*,(Last Updated May 28, 2021), <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws#D>.
- <sup>10</sup> *Id.*
- <sup>11</sup> The Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq (1964) (Title VII); *Bowman v. State Bank of Keysville*, 331 S.E. 2d 797 (1985); *Johnston v. William E. Woods and Associates*, 787 S.E. 2d 103,105 (2016).
- <sup>12</sup> *Head v. Adams Farm Living, Inc.*, 775 S.E. 2d 904, 909 (N.C. Ct. App. 2015); *Freidman v. Southern California Permanente Medical Group*, 102 Cal. App. 4<sup>th</sup> 39 (Ct. App. Calif., 2002).
- <sup>13</sup> 70 OK Stat § 70-6-101.22 (2014).
- <sup>14</sup> Food and Drug Administration, *FDA Takes Additional Action in Fight Against COVID-19 by Issuing Emergency Use Authorization for Second COVID-19 Vaccine*, [https://www.fda.gov/news-events/press-announcements/fda-takes-additional-action-fight-against-covid-19-issuing-emergency-use-authorization-second-covid#:~:text=Today%2C%20the%20U.S.%20Food%20and,SARS%2DCoV%2D2\);](https://www.fda.gov/news-events/press-announcements/fda-takes-additional-action-fight-against-covid-19-issuing-emergency-use-authorization-second-covid#:~:text=Today%2C%20the%20U.S.%20Food%20and,SARS%2DCoV%2D2);) Food and Drug Administration, *Emergency Use Authorization of Medical Products and Related Authorities: Guidance for Industry and Stakeholders*, <https://www.fda.gov/regulatory-information/search-fda-guidance-documents/emergency-use-authorization-medical-products-and-related-authorities>.
- <sup>15</sup> American with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 328 (1990); the Civil Rights Act of 1964 § 7, 42 U.S.C. § 2000e et seq. (1964).
- <sup>16</sup> The Equal Employment Opportunity Commission, *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act & Other EEOC Laws*, (Last Updated May 28, 2021), <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>.
- <sup>17</sup> *Id.*
- <sup>18</sup> *Id.*
- <sup>19</sup> Americans With Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 328 (1990). This protection is not absolute, of course, as employees may be required to submit certain information, such as a doctor’s note to return to work, in certain situations.
- <sup>20</sup> Equal Employment Opportunity Commission, *What you Should Know about the COVID-19 and the ADA, the Rehabilitation Act & Other EEOC Laws*, (Last updated on May 28, 2021), <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>.
- <sup>21</sup> Americans With Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 328 (1990).
- <sup>22</sup> United States Department of Labor, Occupational Health and Safety Administration, *OSHA Worker Rights and Employer Responsibilities*, <https://www.osha.gov/workers/employer-responsibilities>.

- <sup>23</sup> Amy Karloff Halevy & Amber K Dodds, *Vaccine Incentives: How Employers Can Encourage Employee Vaccination*” The National Law Review (Feb. 1, 2021), <https://www.natlawreview.com/article/vaccine-incentives-how-employers-can-encourage-employee-vaccination>; U.S. Equal Emp. Opportunity Comm’n, Amendments to Regulations Under the American With Disabilities Act (proposed Jan. 7, 2021), <https://www.eeoc.gov/newsroom/eeoc-provides-proposed-wellness-rules-review>.
- <sup>24</sup> Equal Employment Opportunity Commission, *What you Should Know about the COVID-19 and the ADA, the Rehabilitation Act & Other EEOC Laws*, (Last updated on May 28, 2021), <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws#K>.
- <sup>25</sup> N.J.S.A. Const. Art. 8, § 3, ¶ 3 (prohibits states, counties, or municipal corporations from appropriating public funds for the use of any society, association or incorporation); M.C.L.A. 380.634 (2021)(requires intermediate school boards to adopt and implement policies that prohibit the district from using public funds or district funds to purchase alcohol, gifts, etc.); *Jordan v. California Dept. of Motor Vehicles*, 100 Cal.App.4th 431, 499 (Cal. Ct. App. 4th Dist.).
- <sup>26</sup> To date, no state requires students to receive a COVID-19 vaccine.
- <sup>27</sup> National Conference of *State Legislatures, States With Religious and Philosophical Exemptions From School Immunization Requirements*, (Last Updated on April 30, 2021), <https://www.ncsl.org/research/health/school-immunization-exemption-state-laws.aspx>.
- <sup>28</sup> *Id.*
- <sup>29</sup> Centers for Disease Control and Prevention, *Operational Strategy for K-12 Schools through Phased Prevention*, (Last Updated on May 15, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/community/schools-childcare/operation-strategy.html>.
- <sup>30</sup> Center for Disease Control and Prevention, *Guidance for COVID-19 Prevention in Kindergarten (K)-12 Schools* (Last Updated July 9, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/community/schools-childcare/k-12-guidance.html>.
- <sup>31</sup> Department of Education, *Ed Covid-19 Handbook Volume 1*, <https://www2.ed.gov/documents/coronavirus/reopening.pdf>; Department of Education, *Ed Covid-19 Handbook Volume 2*, <https://www2.ed.gov/documents/coronavirus/reopening-2.pdf>; Department of Education, *U.S Department of Education Releases COVID-19 Handbook Volume 3: Strategies for Safe Operation and Addressing the Impact of COVID-19 on Higher Education Students, Faculty, and Staff*, (June 4, 2021), <https://www.ed.gov/news/press-releases/us-department-education-releases-covid-19-handbook-volume-3-strategies-safe-operation-and-addressing-impact-covid-19-higher-education-students-faculty-and-staff>.