

June 24, 2021

MEMORANDUM OF LAW

SUBJECT: Right To Refuse EUA COVID Vaccination
Prohibition Against Coercion
Requirement for Full Disclosure of Vaccine Risk
Pursuant to Federal Law 21 USC sec 360-bbb-3
Title VII Civil Right's Act

RE: Use of coercion and mandates for the COVID EUA vaccines

SUMMARY:

Employers who intend to encourage or mandate the current COVID Emergency Use Authorization (EUA) vaccines must consider the following federal and state laws before initiating any such encouragement or mandate. Employers who encourage vaccines to the point of coercion could face severe federal and state consequences. Employers who mandate the current COVID EUA may also be subject to civil liabilities and workman's compensation claims for any adverse reactions suffered by employees.

1. The two currently available (Johnson & Johnson being currently suspended) COVID vaccinations have not been approved by the FDA for general use, but only under Emergency Use Authorization (EUA) standards, therefore **mandating any of these vaccinations is contrary to federal.**
2. The applicable law: [21 USC sec 360-bbb-3](#) Authorization for medical products for use in emergencies subsection (e)(1)(A)(ii) Condition of Authorization states that "individuals to whom the product is administered" must be informed "of the option to accept **or refuse** administration of the product..." (emphasis added).
3. Additionally, in the [CDC August 26, 2020](#) virtual Advisory Committee on Immunization Practices (ACIP) meeting, 2020, Dr. Amanda Cohn, Chief Medical Officer of the National Center for Immunizations and Respiratory Diseases for the CDC reminded meeting members that, "under an EUA, vaccines are not allowed to be mandatory. Therefore, early in the vaccination phase individuals will have to be consented and cannot be mandated to be vaccinated." Dr. Cohn would also state in the [October 22, 2020](#) meeting that "the federal government would not be mandating use of these vaccines. Organizations, such as hospitals...in the setting of an EUA, patients and individuals will have **the right to refuse the vaccine.**" (emphasis added)
4. [Under FDA guidelines](#) and federal law, because this vaccination is EUA only employers may encourage employees to take the EUA only if
 - a. (1) that encouragement does not rise to the level of **coercion**,
 - b. (2) all service members are noticed of the significant known and potential **benefits and risks** associated with the emergency use of the product, and of the extent to which such benefits and risks are unknown; and
 - c. (3) service members are informed they have the right **to accept or refuse** the vaccination. (emphasis added)
5. Additionally, an employee who refuses vaccination because of a reasonable belief that he or she has a medical condition that creates a real danger of serious illness or death (such as serious

reaction to the vaccine) may **be protected under Section 11(c) of the Occupational Safety and Health Act of 1970.**

6. Even under current [EEOC guidelines](#) (May 28, 2021), an employer **may not offer “any incentive** (which includes both rewards and penalties)” if that reward is found to be “so substantial as **to be coercive.**” These current guidelines also make clear that the exemptions available under federal are **remain intact** and every company will be required to provide reasonable accommodations under the law.
7. **Mandated vaccine is considered a part of work.** Under most state laws, an adverse reaction would be covered by **workers’ compensation.**
8. Employers that mandate or encourage employees to get vaccinated even if they partner with a health care provider or other authorized entity to administer the vaccine, may still be subject to potential **legal liability if an employee has an allergic reaction.**
9. Legal liability for the employer will be heightened by the fact that the FDA has not formally approved these vaccines and are subject only to EAU allowances.
10. Legal liability for the employer will be heightened for any employer who does not follow FDA guidelines and federal law to include informing the employees of all risks involved in taking the COVID EUA.
11. Under Title VII of the Civil Rights Act of 1964, individuals have the right to be free from discrimination based on religion. Title VII prohibits two categories discrimination. It is unlawful:
 - a. “(1) to fail or refuse to hire or to **discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment,** because of such individual’s race, color, **religion,** sex, or national origin;
 - b. (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities **or otherwise adversely affect his status** as an employee, because of such individual’s race, color, **religion,** sex, or national origin.” 42 U.S.C. § 2000e—2(a). (Emphasis added).
12. By pattern and practice, it has been shown that reasonable accommodations and alternatives to vaccination indeed exist, and these have been required all along: self-screening with temperature checks, wearing personal protective equipment (PPE), social distancing, and complying with other safety protocols until the number of COVID infections work their way down to acceptable levels. Logically, if these measures are and were effective in preventing the spread of COVID, they will continue to be effective.

KrisAnne Hall, JD
Chief Counsel
Liberty First Legal, Inc.
KrisAnneH.LFL@gmail.com