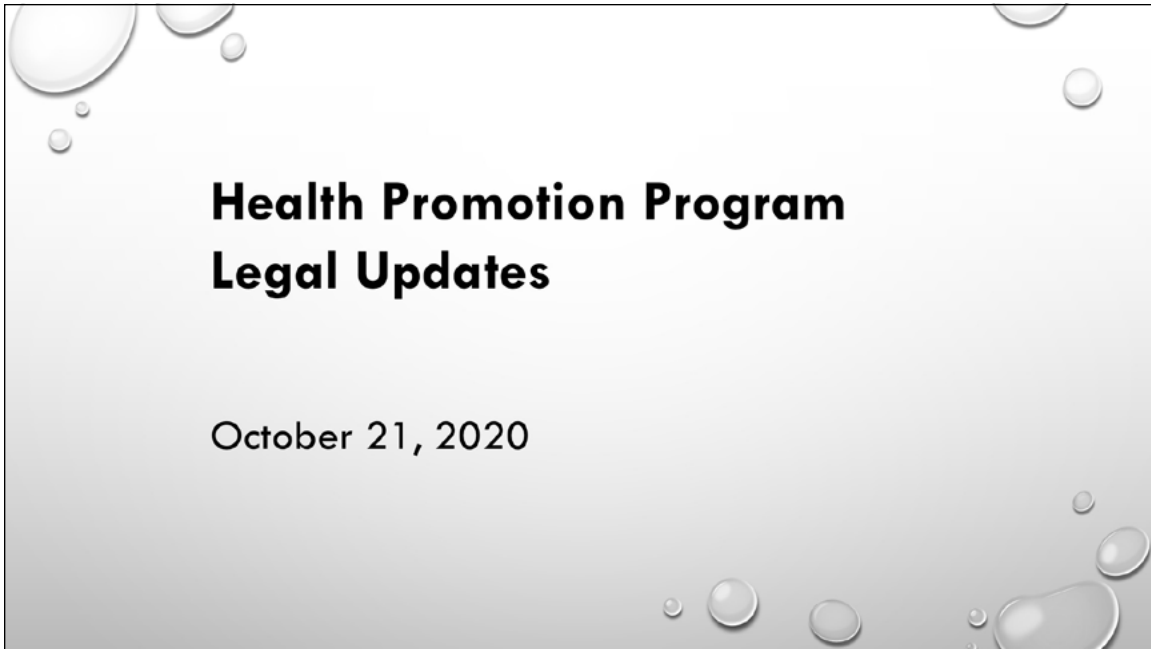


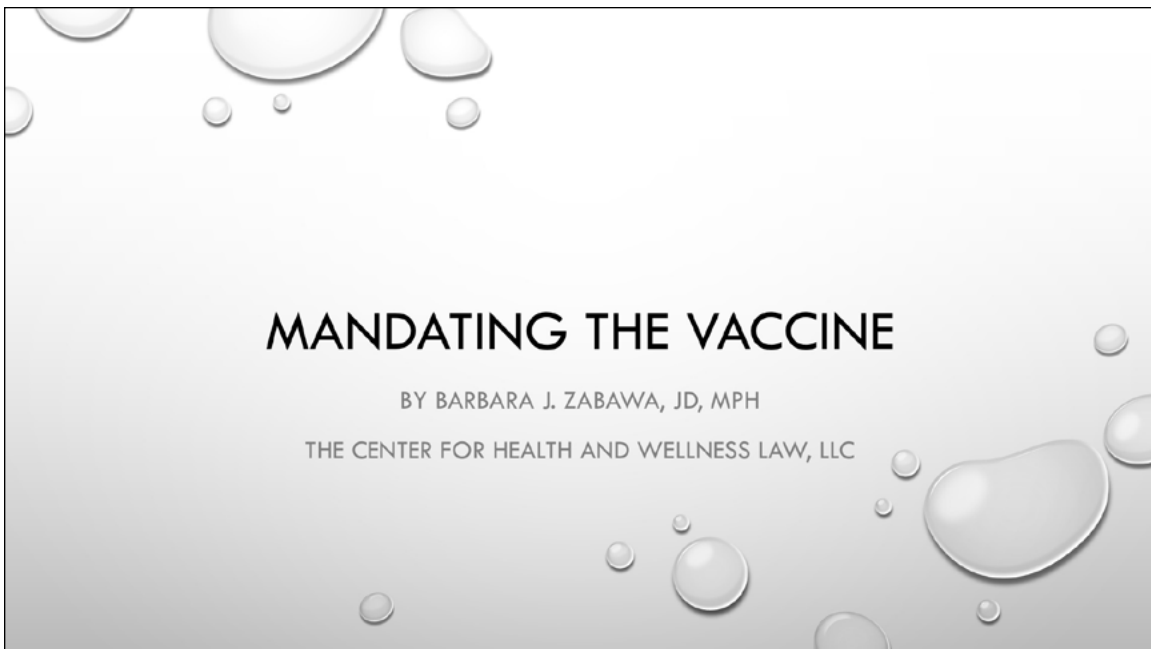
# Health Promotion Program Legal Update: Q4 – 2020 (October 21, 2020)

*Barbara J. Zabawa, JD, MPH*



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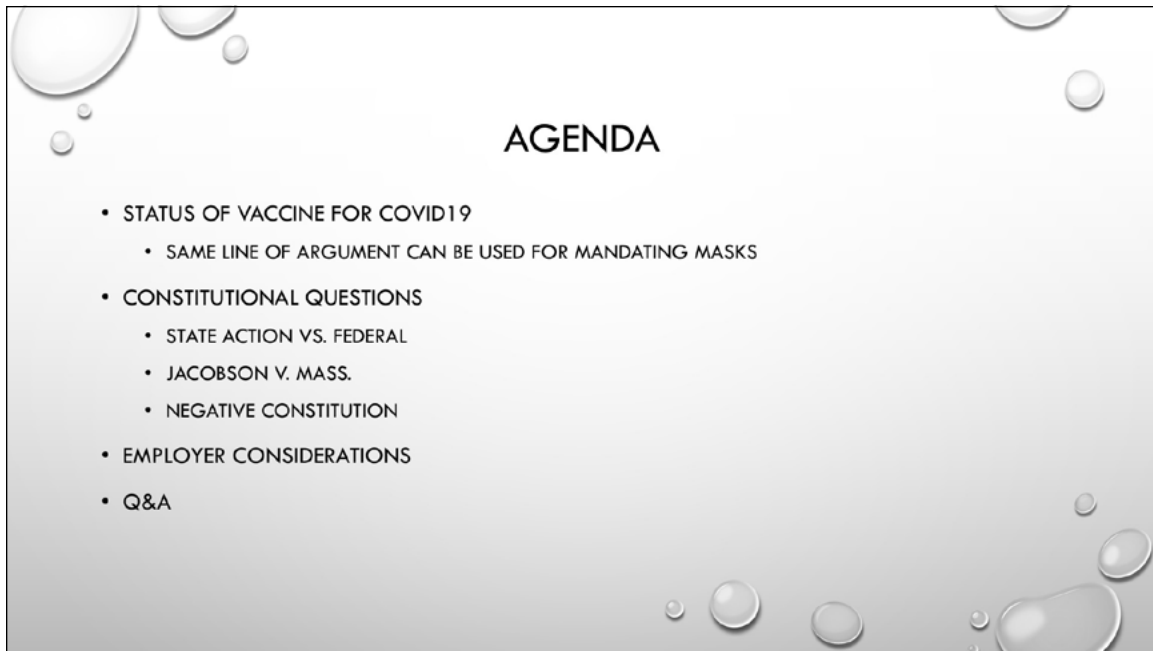


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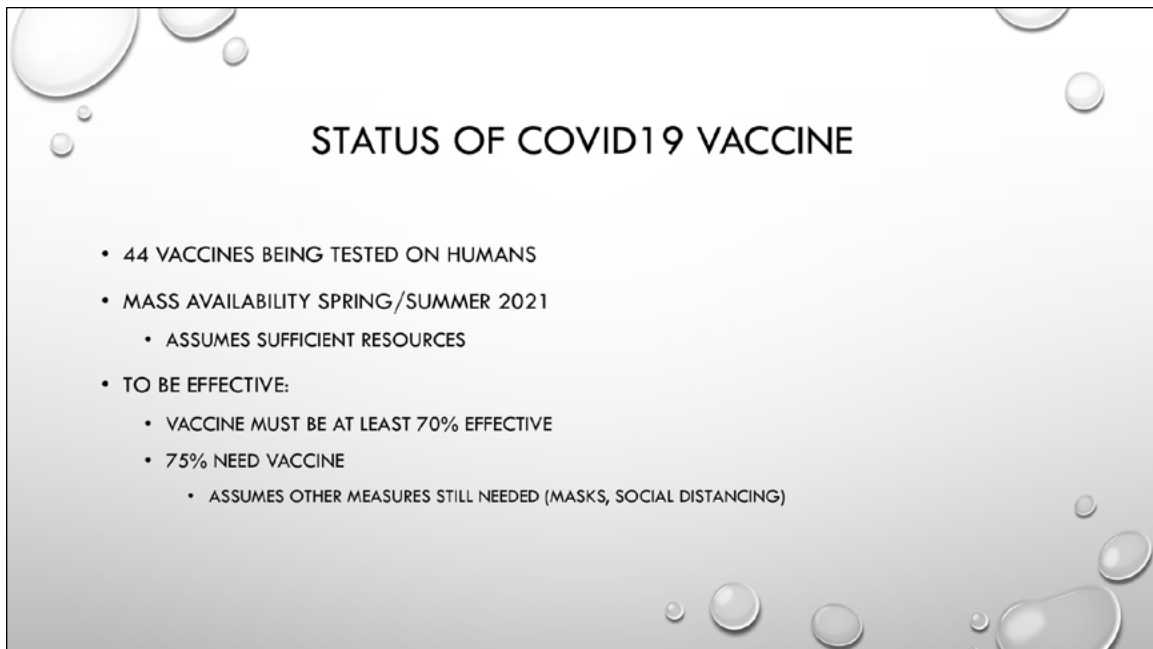
Barbara J. Zabawa, JD, MPH



## AGENDA

- STATUS OF VACCINE FOR COVID19
  - SAME LINE OF ARGUMENT CAN BE USED FOR MANDATING MASKS
- CONSTITUTIONAL QUESTIONS
  - STATE ACTION VS. FEDERAL
  - JACOBSON V. MASS.
  - NEGATIVE CONSTITUTION
- EMPLOYER CONSIDERATIONS
- Q&A

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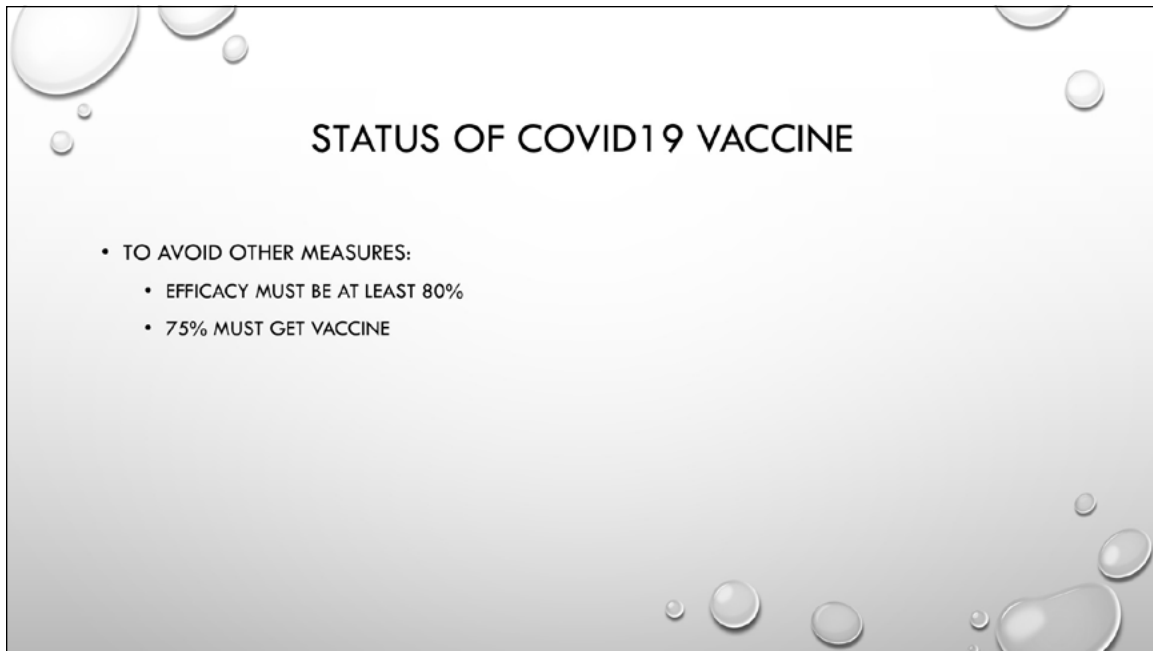
## STATUS OF COVID19 VACCINE

- 44 VACCINES BEING TESTED ON HUMANS
- MASS AVAILABILITY SPRING/SUMMER 2021
  - ASSUMES SUFFICIENT RESOURCES
- TO BE EFFECTIVE:
  - VACCINE MUST BE AT LEAST 70% EFFECTIVE
  - 75% NEED VACCINE
    - ASSUMES OTHER MEASURES STILL NEEDED (MASKS, SOCIAL DISTANCING)

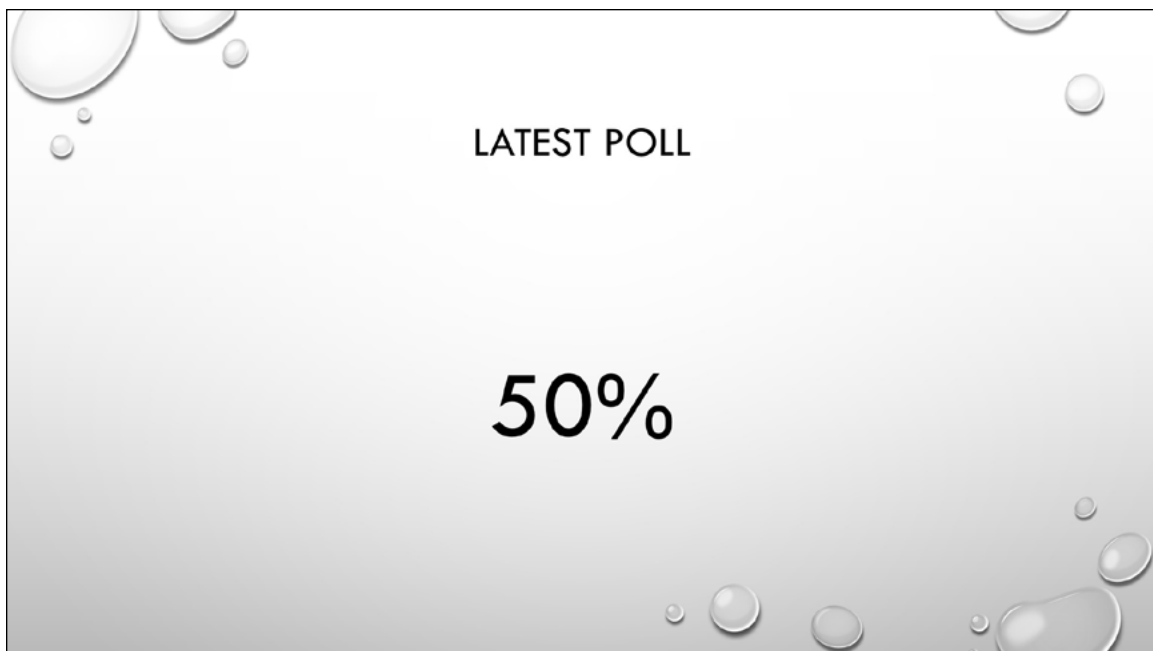
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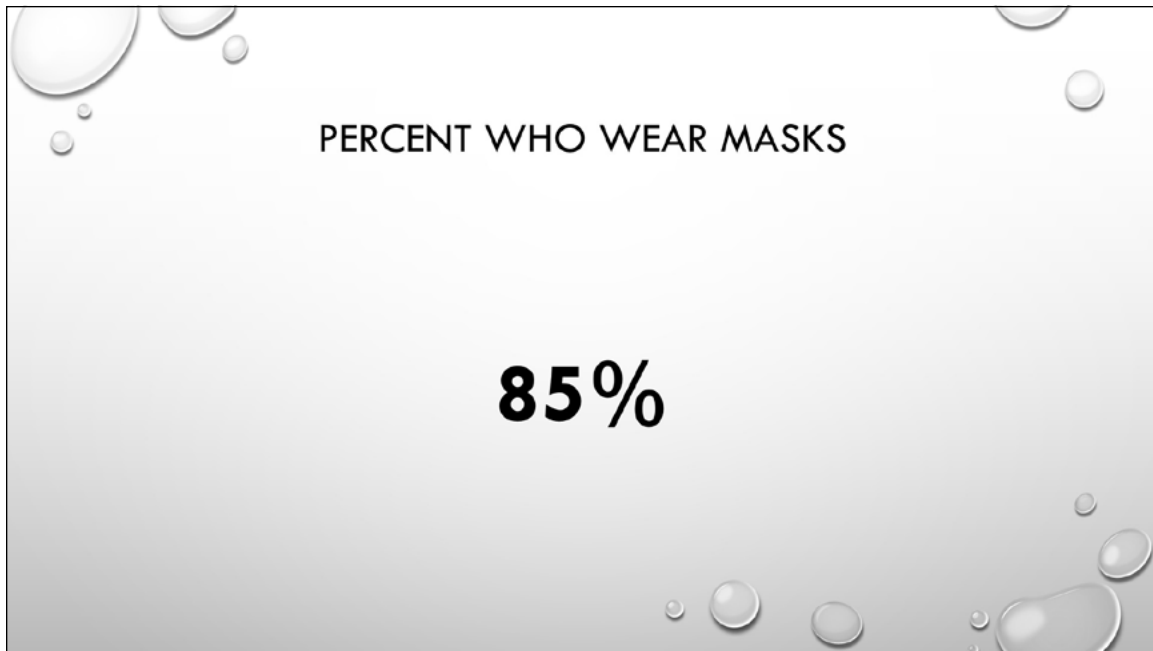
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**GROWING FRUSTRATION**

- 10/18/20 NY TIMES ARTICLE ABOUT GROWING FATIGUE AMONG AMERICANS
- “CITIZENS HAVE MADE HUGE SACRIFICES,” SAID DR. HANS KLUGE, THE W.H.O.’S REGIONAL DIRECTOR FOR EUROPE. “IT HAS COME AT AN EXTRAORDINARY COST, WHICH HAS EXHAUSTED ALL OF US, REGARDLESS OF WHERE WE LIVE, OR WHAT WE DO.”
- IN MANY STATES, [BUSINESSES ARE OPEN](#) AND OFTEN OPERATING FREE OF RESTRICTIONS, EVEN AS HOSPITALIZATIONS HAVE BEEN DRIVEN UP BY CORONAVIRUS PATIENTS.

A slide with a light gray background and water droplet graphics in the corners. The text is centered.

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## GROWING FRUSTRATION

- 10/18/20 DALLAS MORNING NEWS ARTICLE: "EMPLOYERS COULD REQUIRE VACCINATIONS, IF NECESSARY"
- "ECONOMIC FACTORS WILL HAVE A LOT TO DO WITH HOW THIS UNFOLDS, ESPECIALLY AMONG WORKERS WHO ARE FACING THE PUBLIC."
- "IF WE HAVE A VACCINE THAT'S SAFE AND WORKING, THEY'RE [EMPLOYERS] GOING TO BECOME FRUSTRATED AND TIRED WITH JUST ASKING [FOR EMPLOYEES TO TAKE THE COVID19 VACCINE]."
- "COMPANIES THINK IF THEY JUST ASK NICELY AND TELL THE UPSIDE, EMPLOYEES WILL DO IT. BUT THERE'S GOING TO BE SOME HOLDOUTS."

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## CAN EMPLOYERS MANDATE VACCINE?

- YES, BUT NOT FOR ALL EMPLOYEES
- EEOC: ENCOURAGE EMPLOYEES
  - FOR FLU VACCINE

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# Health Promotion Program Legal Update: Q4 – 2020 (October 21, 2020)

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## ADA-RELATED FAQs

- **MAY AN EMPLOYER COVERED BY THE ADA AND TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 COMPEL ALL OF ITS EMPLOYEES TO TAKE THE INFLUENZA VACCINE REGARDLESS OF THEIR MEDICAL CONDITIONS OR THEIR RELIGIOUS BELIEFS DURING A PANDEMIC?**
- NO. AN EMPLOYEE MAY BE ENTITLED TO AN EXEMPTION FROM A MANDATORY VACCINATION REQUIREMENT BASED ON AN ADA DISABILITY THAT PREVENTS HIM FROM TAKING THE INFLUENZA VACCINE. THIS WOULD BE A REASONABLE ACCOMMODATION BARRING UNDUE HARDSHIP (SIGNIFICANT DIFFICULTY OR EXPENSE). SIMILARLY, UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, ONCE AN EMPLOYER RECEIVES NOTICE THAT AN EMPLOYEE'S SINCERELY HELD RELIGIOUS BELIEF, PRACTICE, OR OBSERVANCE PREVENTS HIM FROM TAKING THE INFLUENZA VACCINE, THE EMPLOYER MUST PROVIDE A REASONABLE ACCOMMODATION UNLESS IT WOULD POSE AN UNDUE HARDSHIP AS DEFINED BY TITLE VII ("MORE THAN DE MINIMIS COST" TO THE OPERATION OF THE EMPLOYER'S BUSINESS, WHICH IS A LOWER STANDARD THAN UNDER THE ADA).
- GENERALLY, ADA-COVERED EMPLOYERS SHOULD CONSIDER SIMPLY ENCOURAGING EMPLOYEES TO GET THE INFLUENZA VACCINE RATHER THAN REQUIRING THEM TO TAKE IT.

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## CAN EMPLOYERS MANDATE VACCINE?

### SAME FOR COVID19 VACCINE?

- EEOC HAS SAID IN GUIDANCE THAT COVID19 MET "DIRECT THREAT STANDARD"
- PERMITS MORE WORKPLACE CONTROLS THAN ADA USUALLY ALLOWS
- EEOC GUIDANCE NOTES THAT IT DID NOT FACTOR IN THE EXISTENCE OF COVID19 VACCINE WHEN WRITTEN
  - WILL EEOC UPDATE ITS GUIDANCE?

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## ADA

- A **“DIRECT THREAT”** IS “A SIGNIFICANT RISK OF SUBSTANTIAL HARM TO THE HEALTH OR SAFETY OF THE INDIVIDUAL OR OTHERS THAT CANNOT BE ELIMINATED OR REDUCED BY REASONABLE ACCOMMODATION.”<sup>14</sup> IF AN INDIVIDUAL WITH A DISABILITY POSES A DIRECT THREAT DESPITE REASONABLE ACCOMMODATION, HE OR SHE IS **NOT PROTECTED BY THE NONDISCRIMINATION PROVISIONS OF THE ADA.**
- ASSESSMENTS OF WHETHER AN EMPLOYEE POSES A DIRECT THREAT IN THE WORKPLACE MUST BE BASED ON OBJECTIVE, FACTUAL INFORMATION, “NOT ON SUBJECTIVE PERCEPTIONS . . . [OR] IRRATIONAL FEARS” ABOUT A SPECIFIC DISABILITY OR DISABILITIES. THE EEOC’S REGULATIONS IDENTIFY FOUR FACTORS TO CONSIDER WHEN DETERMINING WHETHER AN EMPLOYEE POSES A DIRECT THREAT:
  - THE DURATION OF THE RISK;
  - THE NATURE AND SEVERITY OF THE POTENTIAL HARM;
  - THE LIKELIHOOD THAT POTENTIAL HARM WILL OCCUR; AND
  - THE IMMINENCE OF THE POTENTIAL HARM.

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## CAN EMPLOYER MANDATE VACCINE?

- **EXCEPTIONS:**
  - **ADA**
    - **DISABILITY PREVENTS TAKING VACCINE**
    - **CAN ASK FOR HEALTH PROVIDER CERTIFICATION**
      - **UNLESS UNDUE HARDSHIP TO EMPLOYER**
      - **“SIGNIFICANT DIFFICULTY OR EXPENSE”**

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## REASONABLE ACCOMMODATION EXAMPLES

- MINIMIZE EMPLOYEE INTERACTIONS WITH COWORKERS/PUBLIC
- REMOTE WORK
- MASK AND OTHER PPE WEARING

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## CAN EMPLOYER MANDATE VACCINE?

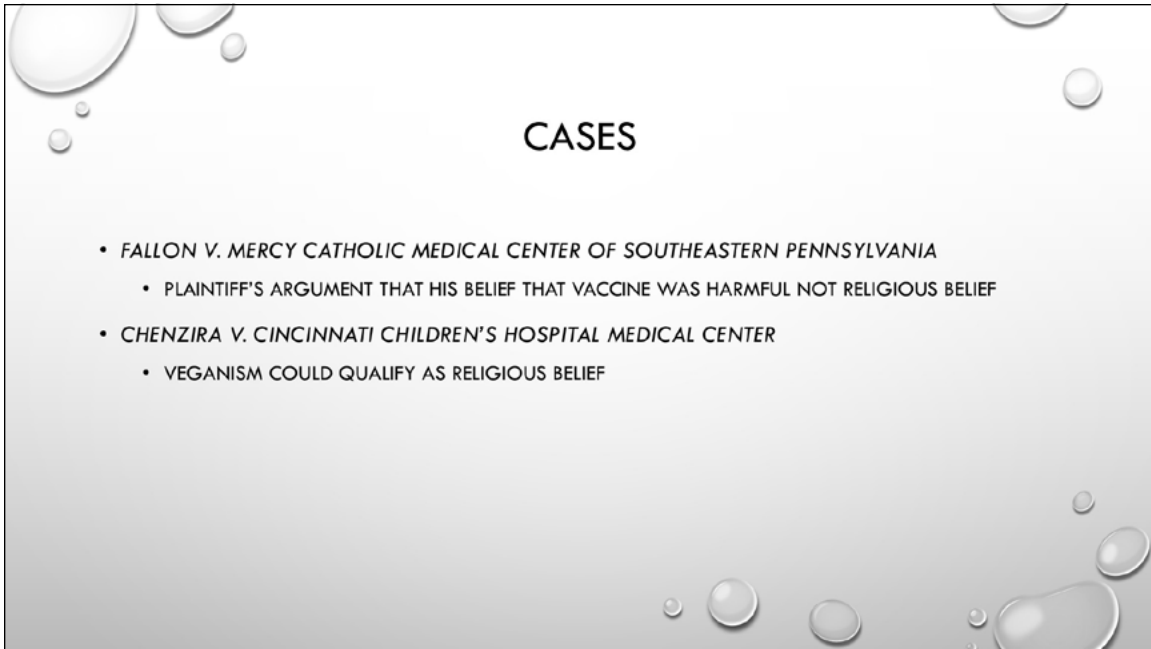
- EXCEPTION:
  - TITLE VII
    - SINCERELY HELD RELIGIOUS BELIEF
    - HARDER TO VERIFY
    - MAY EXTEND BEYOND MAINSTREAM RELIGIONS

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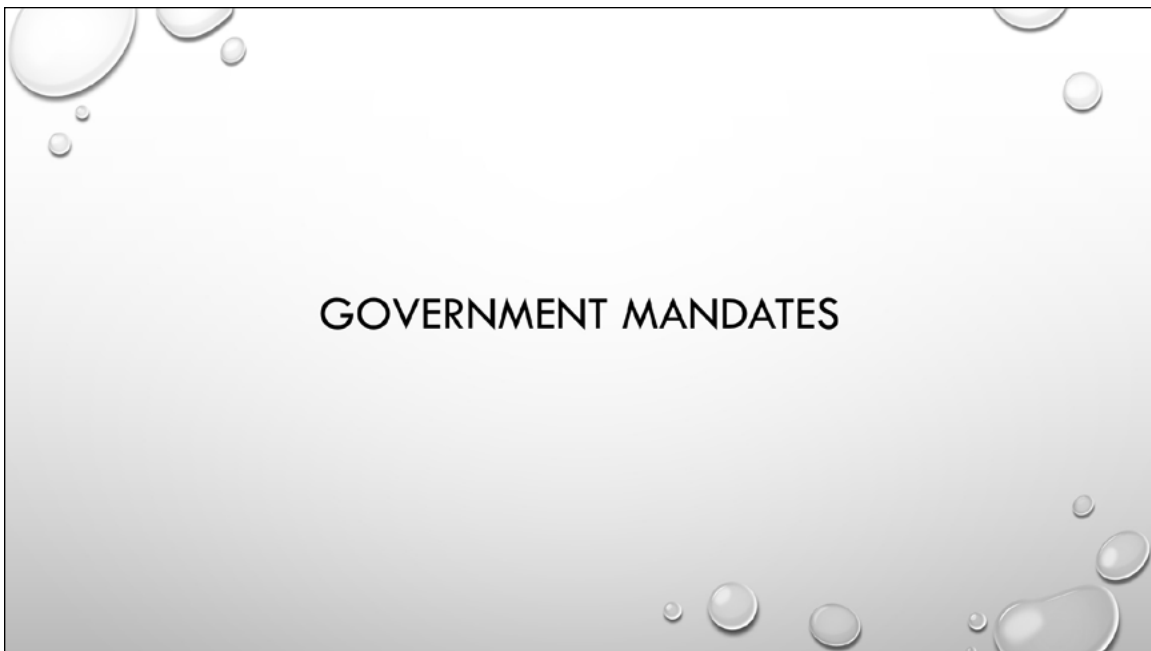


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# Health Promotion Program Legal Update: Q4 – 2020 (October 21, 2020)

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## INDIVIDUAL RIGHTS IN A PUBLIC HEALTH CONTEXT

- POLICE POWERS
  - REPRESENT GOVERNMENT AUTHORITY TO REQUIRE INDIVIDUAL CONFORMANCE WITH ESTABLISHED STANDARDS OF CONDUCT
  - STANDARDS ARE DESIGNED TO PROMOTE AND PROTECT THE PUBLIC'S HEALTH, SAFETY, AND WELFARE, AND TO PERMIT GOVERNMENT CONTROL OF PERSONAL, CORPORATE, AND OTHER PRIVATE INTERESTS.

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## INDIVIDUAL RIGHTS IN A PUBLIC HEALTH CONTEXT

- PREVAILING VIEW IS THAT THE CONSTITUTION EMPOWERS GOVERNMENT TO ACT IN THE NAME OF PUBLIC HEALTH BUT DOES NOT REQUIRE IT TO DO SO.
- THIS INTERPRETATION REFERS TO WHAT IS KNOWN AS THE “NEGATIVE CONSTITUTION”—THE IDEA THAT THE CONSTITUTION DOES NOT REQUIRE GOVERNMENT TO PROVIDE ANY SERVICES, PUBLIC HEALTH OR OTHERWISE.
- THIS APPROACH TO CONSTITUTIONAL LAW DERIVES FROM THE FACT THAT THE CONSTITUTION IS PHRASED MAINLY IN NEGATIVE TERMS.

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## JACOBSON V. MASSACHUSETTS



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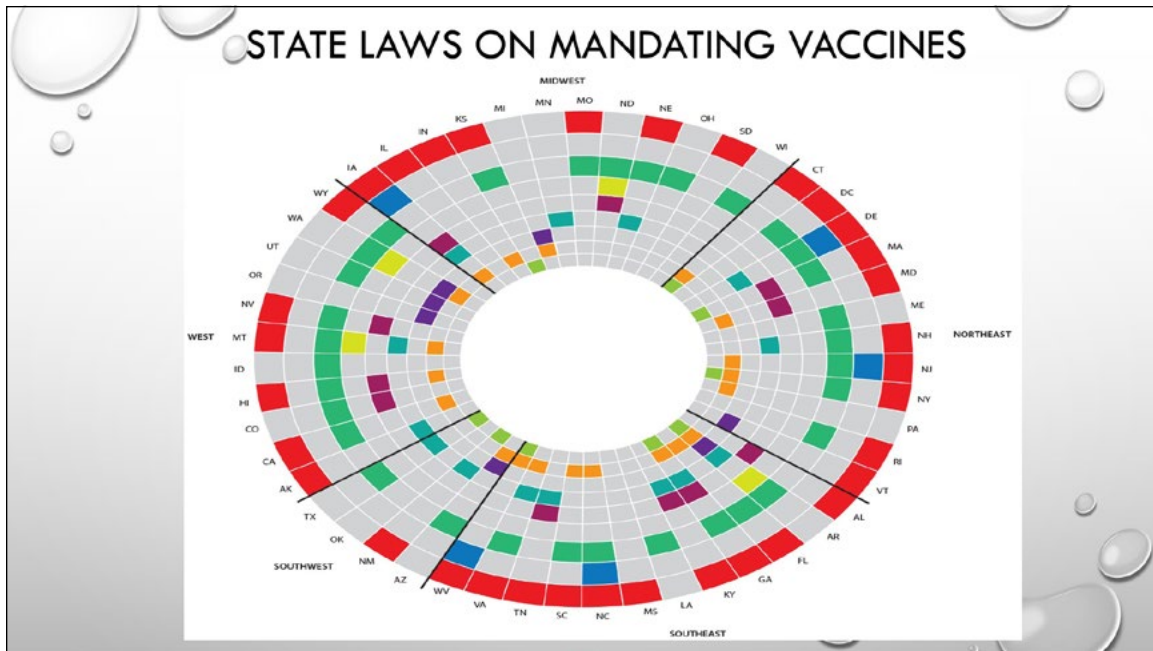
## QUOTE FROM JACOBSON V. MASS.

- "THE POSSESSION AND ENJOYMENT OF ALL RIGHTS ARE SUBJECT TO SUCH REASONABLE CONDITIONS AS MAY BE DEEMED BY THE GOVERNING AUTHORITY OF THE COUNTRY ESSENTIAL TO THE SAFETY, HEALTH, PEACE, GOOD ORDER, AND MORALS OF THE COMMUNITY. EVEN LIBERTY ITSELF, THE GREATEST OF ALL RIGHTS, IS NOT UNRESTRICTED LICENSE TO ACT ACCORDING TO ONE'S OWN WILL. IT IS ONLY FREEDOM FROM RESTRAINT UNDER CONDITIONS ESSENTIAL TO THE EQUAL ENJOYMENT OF THE SAME RIGHT BY OTHERS. IT IS, THEN, LIBERTY REGULATED BY LAW."

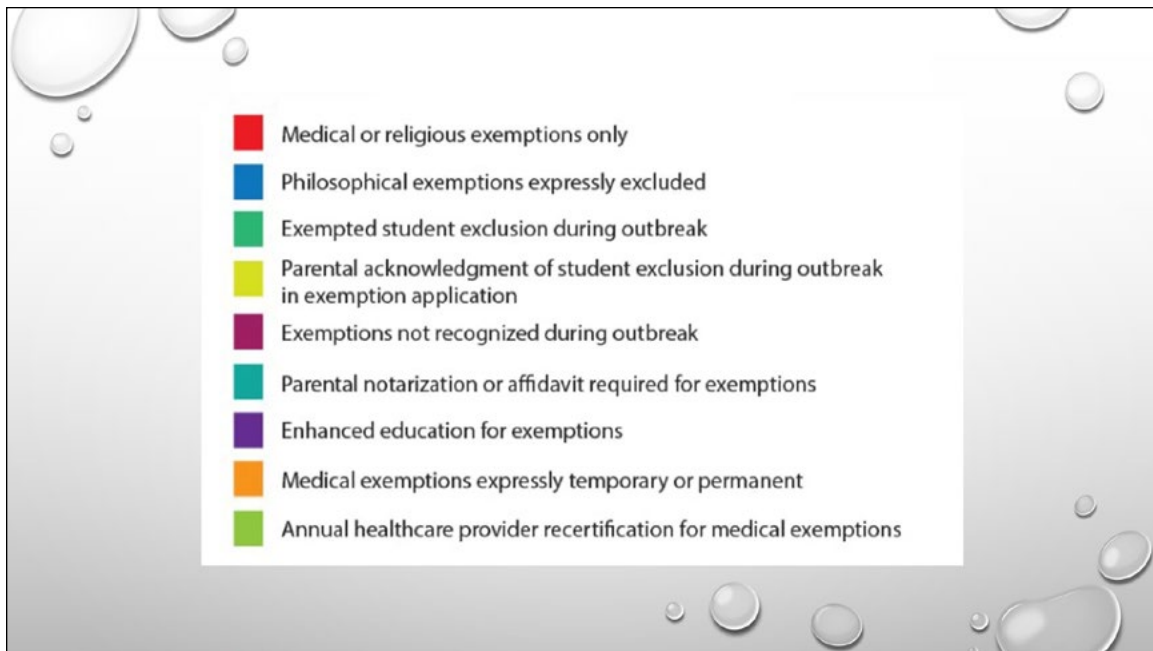
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# Health Promotion Program Legal Update: Q4 – 2020 (October 21, 2020)

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## BOTTOM LINE: WEIGH LEGAL RISKS

- MANDATE VACCINE
  - LEGAL RISKS: DISCRIMINATION CLAIMS UNDER ADA OR TITLE VII
    - WORKER'S COMPENSATION CLAIMS IF EMPLOYEES GET SICK FROM VACCINE
- DON'T MANDATE VACCINE
  - LEGAL RISKS: WORKERS WHO RECEIVED VACCINE GET SICK BECAUSE NOT ENOUGH IMMUNITY, SUE EMPLOYER FOR PUBLIC NUISANCE (MCDONALD'S CASE)
  - EMPLOYEE RECRUITMENT/RETENTION RISK (COULD GO EITHER WAY, DEPENDING ON EMPLOYEE FEAR OF CONTRACTING THE VIRUS)

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## ADA-RELATED FAQS

- **WHEN AN EMPLOYEE RETURNS FROM TRAVEL DURING A PANDEMIC, MUST AN EMPLOYER WAIT UNTIL THE EMPLOYEE DEVELOPS INFLUENZA SYMPTOMS TO ASK QUESTIONS ABOUT EXPOSURE TO PANDEMIC INFLUENZA DURING THE TRIP?**
- NO. THESE WOULD NOT BE DISABILITY-RELATED INQUIRIES. IF THE CDC OR STATE OR LOCAL PUBLIC HEALTH OFFICIALS RECOMMEND THAT PEOPLE WHO VISIT SPECIFIED LOCATIONS REMAIN AT HOME FOR SEVERAL DAYS UNTIL IT IS CLEAR THEY DO NOT HAVE PANDEMIC INFLUENZA SYMPTOMS, AN EMPLOYER MAY ASK WHETHER EMPLOYEES ARE RETURNING FROM THESE LOCATIONS, EVEN IF THE TRAVEL WAS PERSONAL.

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## Q&A REMINDER

The following Q&A session does NOT constitute legal advice and should not be used as such. It is for educational purposes only.

WELCOA Members should retain legal counsel to obtain definitive answers.

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## QUESTIONS?

- FOR MORE INFORMATION, CONTACT:

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