

AN EDUCATIONAL UPDATE FROM
THE SOUTHEAST LAW INSTITUTE™, INC.

To: Interested Persons
Date: September 2021
From: A. Eric Johnston
Re: To Vaccinate or Not Vaccinate, That is the Question

We are receiving multiple calls about a person's rights related to vaccinations. Some persons object to wearing a mask. We are not aware a religious exemption reason for that, although it may exist. Certainly, there are medical reasons to be exempted from wearing a mask. We wish to address concerns based on present conditions in law, but with a caveat that this is an area developing on almost a daily basis. This memo should not be considered legal advice and any person with a need for a specific legal answer should contact us for a referral to a participating attorney or contact an attorney of your choice.

On August 23, 2021, the FDA gave final approval to the use of the Pfizer vaccine. Until then it had only emergency approval, which did not permit employers to require vaccination. With final approval, those demands will be made and litigation to establish legal parameters is sure to follow.

There are medical exemptions for vaccination and masking. We are not healthcare providers and do not provide advice on those issues. If a person has medical issues that would prohibit vaccination or limit the wearing of a mask, those should be carefully and properly explained by a qualified physician. We have seen abuse by physicians who simply state the person should not be required to wear a mask for medical reasons. If there is actually a medical reason, it should be articulated. There are masking lawsuits in progress.

On the other hand, religious exemptions for vaccination fit in an entirely different category. A person should articulate the basis for their religious belief. Courts have long held judges cannot substitute their belief or knowledge for a person's sincerely held belief. As long as the person sincerely has that religious belief, that should be sufficient. Confirmation by your pastor or others may not be required, but confirmation may be helpful. There may be a question of fact of whether a person actually has a religious belief. There has been a mixture of opinion on how much religious explanation must be given to an employer. It should be detailed enough to explain your position and the employer should not interrogate the employee further.

There is a diverse universe of opinions on vaccination. One of the most commonly heard is that the person objects to the vaccination due to the person's view on sanctity of life and the development of some vaccines from aborted children. That is a very valid objection. The question of fact would be whether the particular vaccine was based on that modality. Some religions may have concerns about the introduction of living organisms into their bodies.

Though it will vary from state to state, there are few state laws that may regulate this issue. For Alabama, there is no state law that permits an employer to require an employee to have a vaccination or otherwise be fired. On the federal level, Title VII regulates employers with 15 or more employees. It prohibits discrimination in the terms and conditions of employment based on several immutable characteristics and religion. Under Title VII, an employer is required to make a reasonable accommodation of that belief, but must only minimally burden the employer. It may be reasonable to permit an unvaccinated employee to continue employment as long as he or she wears a mask and is regularly tested, does not congregate in crowded conditions, avoid personal contact, *et cetera*. While that accommodation may take place in most business environments, it may not be so easily accomplished in a medical environment. It would be more difficult to accommodate religious beliefs with healthcare providers who have close contact with sick people. Accommodation may consist of changing the healthcare workers' duties and employing some protective measures. The employer is required to try accommodation. EEOC enforcement may be available.

Church schools have encountered the issue. Many parents have objected to child vaccination, when church schools have required it. To vaccinate or not are acceptable positions under religious freedom principles. Church and church schools are private non-government actors and are entitled to conduct their business as they see fit. At this time, there are no laws attempting to regulate that. If there will be, it is likely they will be litigated.

Church schools are required to have immunization certificates for students who attend. This has been the law for a long time and has not been an issue. Regulations, however, permit both a religious and medical exemption for the student. The state may accept the exemption, but the church school is not required to accept it.

Generally speaking, church and private employer actions are not the acts of the state and therefore constitutional objections do not apply. Government is given authority by its "police powers" to regulate healthcare. Such regulation is subject to constitutional restrictions and is not unlimited. We have not in modern times suffered through a pandemic such as this and there are many unanswered questions. These will be resolved, one way or the other, in the coming weeks and months. Please contact us as situations arise and we will monitor this for updates on the law. For a comprehensive review of present law, visit our friends at firstliberty.org.