



STATE OF ARIZONA
OFFICE OF THE ATTORNEY GENERAL

<p>ATTORNEY GENERAL OPINION</p> <p>By</p> <p>MARK BRNOVICH ATTORNEY GENERAL</p> <p>August 20, 2021</p>	<p>No. I21-007 (R21-006)</p> <p>Re: Whether an employer can require a COVID vaccination as a condition of employment and whether a private business can require a COVID vaccination as a prerequisite of patronage</p>
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To: The Hon. Kelly Townsend
Arizona Senate

Questions Presented

1. Whether an employer can require a COVID-19 vaccine as a condition of employment?
2. Whether a business can compel an individual to prove that they have received a vaccination before that person can patronize the business?
3. Whether, under a contract of carriage, a domestic airline carrier can require proof of vaccination as a prerequisite for flying?

Summary Answers

1. Under Arizona law, certain schools, public universities and community colleges, and state and local governments are statutorily prohibited from requiring employees to obtain a COVID-19 vaccination. *See* A.R.S. §§ 36-681, 15-1650.05(A), 15-342.05(B); 36-114; 36-184(C). Most of these statutory prohibitions will take effect on September 29, 2021.

Under federal law, a person carrying out an Emergency Use Authorization (“EUA”) activity, like administering an EUA vaccine, is required to inform a potential recipient of the option of rejecting the EUA vaccine. Therefore, a person carrying out an EUA activity, including the military, federal government, or a private employer, cannot misinform a potential recipient of an EUA vaccine by, on the one hand, telling the recipient she has an option to reject the vaccine, and, on the other hand, mandating that she receive the vaccine or sanctioning her for failure to do so.

Under federal and state law, employers who mandate vaccination must provide reasonable accommodations to employees who cannot obtain the COVID-19 vaccine due to a disability or a sincerely-held religious belief. In most cases, this will require employers to accommodate such employees by using the same measures utilized by employers for approximately the last seventeen months of the pandemic (e.g., masking, spacing, increased sanitation measures, teleworking, etc.). Any employer inquiry into a disability or sincerely-held religious belief must genuinely serve the employer’s asserted business necessity and the request must be no broader and no more intrusive than necessary.

2. Under Arizona law, effective September 29, 2021, certain educational institutions will be prohibited from requiring proof of COVID-19 vaccination from students. Under existing Arizona law currently in effect, public, private, and parochial schools are limited in conditioning student attendance on documentation of vaccines when parents have a personal objection or if a vaccine would be detrimental to a student’s health.

Under federal and state law, places of public accommodation who mandate vaccination for patrons must provide reasonable accommodations to patrons who cannot obtain the COVID-19 vaccine due to disability and they must not discriminate against customers who cannot obtain such a vaccine due to a sincerely-held religious belief.

3. Under federal regulations, domestic and foreign air carriers doing business in the United States must not refuse transportation to a customer based on a communicable disease unless the customer (1) actually has a communicable disease (2) that is a direct threat to other passengers and (3) cannot obtain a medical certificate setting forth measures for the prevention of transmission during a flight. It will be difficult for a carrier to establish that proof of vaccination is now a required preventative measure for COVID-19 when airline service has continued throughout the COVID-19 pandemic with masking and ventilation as the primary preventative measures.

Background

The coronavirus disease (“COVID-19”) prompted the U.S. Department of Health and Human Services to declare a Public Health Emergency on January 31, 2020, and the World Health Organization to declare a pandemic on March 11, 2020. *See* Alex M. Azar II, *Determination that a Public Health Emergency Exists*, U.S. Dep’t of Health & Hum. Serv. (Jan. 31, 2020);¹ *WHO Director-General’s opening remarks at the media briefing on COVID-19*, World Health Org. (Mar. 11, 2020).² On March 11, 2020, Governor Ducey declared a state of emergency under Arizona law due to COVID-19. *Declaration of Emergency* (Mar. 11, 2020).³

On May 15, 2020, President Trump and his administration announced Operation Warp Speed, a public-private partnership intended to facilitate and accelerate the development, manufacture, and distribution of a COVID-19 vaccine. Operation Warp Speed was initially funded with about \$10 billion from the CARES Act. According to the Department of Health and Human Services, the primary goal of Operation Warp Speed was to “produce and deliver 300 million doses

¹ <https://www.phe.gov/emergency/news/healthactions/phe/Pages/2019-nCoV.aspx>.

² <https://www.who.int/director-general/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020>.

³ https://azgovernor.gov/sites/default/files/declaraton_0.pdf.

of safe and effective vaccines with the initial doses available by January 2021, as part of a broader strategy to accelerate the development, manufacturing, and distribution of COVID-19 vaccines, therapeutics, and diagnostics.”⁴ Subsequently, at least eight companies were chosen for funding through Operation Warp Speed, including Johnson & Johnson (through a subsidiary called Janssen Biotech Inc.), Moderna, and AstraZeneca. Separately, Pfizer and BioNTech partnered to develop a COVID-19 vaccine. On July 22, 2020, Operation Warp Speed placed an advance-purchase order of \$2 billion with Pfizer to manufacture 100 million doses of a COVID-19 vaccine for use in the United States when authorized by the Food and Drug Administration (FDA). On December 23, 2020, the Trump Administration announced that the United States had ordered an additional 200 million doses from Pfizer.

Starting in the latter half of 2020, various versions of a COVID-19 vaccine received emergency use authorization⁵ from the FDA. First, on December 11, 2020, the FDA granted EUA to a vaccine manufactured by Pfizer for administration to individuals 16 years of age or older. The FDA later amended that EUA to include individuals 12 years of age or older. On December 18, 2020, the FDA granted EUA to a vaccine manufactured by Moderna for administration to individuals 18 years of age or older. On February 27, 2021, the FDA granted EUA to a vaccine manufactured by Janssen Biotech for administration to individuals 18 years of age or older.

Starting in early 2021, state and local governments in Arizona took steps to ensure that COVID-19 vaccinations would be available for those choosing to undergo administration. Since

⁴ Explaining Operation Warp Speed, U.S. Dep’t of Health & Hum. Servs. (Nov. 10, 2020), available at <https://www.nihb.org/covid-19/wp-content/uploads/2020/08/Fact-sheet-operation-warp-speed.pdf>.

⁵ As explained in further detail below, under an EUA, FDA may allow the use of unapproved medical products, or unapproved uses of approved medical products in an emergency to diagnose, treat, or prevent serious or life-threatening diseases or conditions when certain statutory criteria have been met, including that there are no adequate, approved, and available alternatives.

that time, over 7 million doses of a COVID-19 vaccine have been administered in Arizona, and 3.44 million Arizonans (approximately 47% of the state's population) are now fully vaccinated.

At the same time, the Arizona Legislature took steps to ensure that, in certain situations, those making the personal choice not to undergo vaccine administration would not be compelled or coerced to do so. For example, the Legislature enacted A.R.S. § 36-681, which prohibits “this state and any city, town or county of this state” from requiring “[a]ny person to be vaccinated for covid-19” or “[a] business to obtain proof of the covid-19 vaccination status of any patron entering the business establishment.” Similarly, the Legislature enacted A.R.S. § 15-342.05, providing that “[a] school district or charter school may not require a student or teacher to receive a vaccine for COVID-19.” A.R.S. § 15-342.05(B). These statutes will become effective on September 29, 2021.

The Attorney General has consistently taken steps to ensure that state and local governments in Arizona do not use the COVID-19 pandemic as a means to unlawfully restrict the individual rights and freedoms of Arizonans. For example, early in the pandemic, the Attorney General made clear that attendance at a church service is constitutionally protected and an essential activity under the Governor's Executive Order 2020-18. *See Application of Executive Order 2020-18 to Religious Worship*, Op. Ariz. Att'y Gen. No. I20-008 (R20-008) (2020). The Attorney General also questioned the Governor's legal ability to shut down some bars and restaurants based largely on the type of liquor license they hold, explaining that “[o]ur founding documents, including the Declaration of Independence, the United States Constitution, and the Arizona Constitution, each teach that the individual liberties of the People should not be restrained in the manner seen in the last eleven months without some participation from the People through their representatives in the lawmaking branch of government.” *Amicus Curiae Brief of Attorney*

General Mark Brnovich in Support of Appellants at 1–2, *Aguila v. Ducey*, No. CV- 20-0335-PR (Ariz. Feb. 18, 2021).

The COVID-19 pandemic has impacted nearly every area of our lives. The Attorney General, however, believes strongly that government should not mandate that citizens relinquish their bodily liberty and undergo vaccination, particularly when a vaccination is being distributed and administered only through an EUA, in return for being able to participate fully in society. And only in the most limited of circumstances should government allow private parties to mandate vaccination. Americans should be allowed to choose which risks they are comfortable taking and which they are not. The law does not always reflect good public policy and our role with respect to an Attorney General opinion is to say what the law is, not what it should be.

Federal and state law currently allows some employers and businesses to impose a vaccination requirement. But there are significant restrictions on their ability to do so. Effective September 29, 2021, under Arizona law, certain schools, public universities and community colleges, and state and local governments will be statutorily prohibited from requiring a COVID-19 vaccination. Under federal law, a person carrying out an EUA activity, like administering a vaccine, is required to inform a potential recipient of the option of rejecting the EUA product. Therefore, a person carrying out an EUA activity, including the military, federal government, or a private employer, cannot misinform a potential recipient of an EUA vaccine by, on the one hand, telling the recipient she has an option to reject the vaccine, and, on the other hand, mandating that she receive the vaccine or sanctioning her for failure to do so.

Under federal and state law, employers who mandate vaccination must provide reasonable accommodations to employees who cannot obtain the COVID-19 vaccine due to a disability or a sincerely-held religious belief. In most cases, this will require employers to accommodate such

employees by using the same measures utilized by employers for approximately the last seventeen months of the pandemic (e.g., masking, spacing, teleworking, etc.).

Under federal and state law, places of public accommodation who mandate vaccination for patrons must provide reasonable accommodations to patrons who cannot obtain the COVID-19 vaccine due to disability and they must not discriminate against customers who cannot obtain such a vaccine due to a sincerely-held religious belief.

Finally, under federal regulations, domestic and foreign airlines doing business in the United States must not refuse transportation to a customer based on a communicable disease unless the customer (1) actually has a communicable disease (2) that is a direct threat to other passengers and (3) cannot obtain a medical certificate setting forth measures for the prevention of transmission during a flight.

Analysis

I. Both Federal and State Law Limit When An Employer May Require An Employee To Obtain A COVID-19 Vaccination.

A. Federal Law Limits The Ability Of Persons Carrying Out The COVID-19 Vaccination To Impose A Vaccination Requirement.

Federal law generally prohibits anyone from introducing any “new drug” or “biological product,” including a vaccine, without Federal Drug Administration (“FDA”) approval. *See* 21 U.S.C. §§ 321(g), 331(a), 355(a); 42 U.S.C. §§ 262(a), 262(i)(1). In 2003, President George W. Bush proposed an exception during times of emergency, suggesting a need for legislation “to quickly make available effective vaccines and treatments against agents like anthrax, botulinum toxin, Ebola, and plague.” Address Before a Joint Session of the Congress on the State of the Union, 1 Pub. Papers of Pres. George W. Bush 82, 86 (Jan. 28, 2003). Among the principal legislative proposals were provisions enabling FDA to authorize medical products for use during

emergencies even prior to full FDA approval. *See, e.g.*, H.R. 2122, 108th Cong. § 4 (2003).

Congress, in 2004, created the EUA process as section 564 of the Food, Drug, and Cosmetic Act (“FDCA”). *See* Pub. L. No. 108-136, § 1603(a), 117 Stat. 1392, 1684 (2003) (codified at 21 U.S.C. § 360bbb-3). Section 564 authorizes the Secretary of Health and Human Services (“HHS”)—who has delegated the authority to FDA—to authorize the introduction into interstate commerce drugs, devices, and biological products, including vaccines that have not yet obtained FDA approval. FDCA § 564(a)(1)-(2). Section 564 provides that the Secretary of HHS, to the extent practicable under the circumstances, “shall, for a person who carries out any activity for which the authorization is issued,” establish conditions necessary or appropriate to protect the public health. *Id.* § 564(e)(1)(A). Section 564 lists a number of conditions that the Secretary of HHS shall establish, including conditions designed to ensure that individuals receiving the EUA product are informed of certain information. *Id.* § 564(e)(1)(A)(ii). Most relevant here, Section 564 directs FDA to impose conditions “designed to ensure that individuals to whom the product is administered are informed . . . of the option to accept or refuse administration of the product, of the consequences, if any, of refusing administration of the product, and of the alternatives to the product that are available and of their benefits and risks.” *Id.* § 564(e)(1)(A)(ii)(III) (emphasis added). Finally, Section 564 states that “this section only has legal effect on a person who carries out an activity for which an authorization under this section is issued.”⁶ *Id.* § 564(l).

In light of the statutory language, the pertinent question is whether “a person who carries

⁶ The statute does not appear to define what it means to “carry out an activity” under an EUA. Two things, however, are clear. First, not all employers “carry out an activity” under an EUA, and thus Section 564 does not restrict all employers from mandating receipt of an EUA product; section 564 restricts only those employers carrying out an EUA activity. Second, there is no question that actual administration of an EUA vaccine constitutes carrying out an EUA activity. Thus, an employer administering an EUA vaccine to employees, like the COVID-19 vaccine, cannot also mandate that employees receive an EUA vaccine.

out an activity” under an EUA can make administration of an EUA vaccine, like the COVID-19 vaccine, mandatory. The answer is no. The statutory language is clear—the Secretary of HHS (and now FDA) must ensure that those carrying out an activity under an EUA inform those receiving an EUA vaccine of “the option to accept or refuse administration of the product.” This statutory language evinces congressional intent that those carrying out an activity under an EUA refrain from making receipt of EUA products mandatory. Notably, the statutory language does not refer to “any” option, it refers to “the” option to accept or refuse, indicating that Congress intended to create and preserve “the” option to reject EUA products—rather than merely protecting an option should those carrying out an activity under Section 564 later choose to offer one. Moreover, Section 564 requires that individuals receiving an EUA product be informed of “the consequences, if any, of refusing administration of the product, and of the alternatives to the product that are available.” There was no reason for Congress to include this language if the option to refuse administration of the product is, in reality, illusory. *See Corley v. U.S.*, 556 U.S. 303, 314 (2009) (“The Government's reading is thus at odds with one of the most basic interpretive canons, that a statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant.” (cleaned up)). Thus, while the EUA statute does not apply to all private and public employers, those persons carrying out an activity pursuant to an EUA, like administering an EUA vaccine to employees, cannot make receipt of an EUA product, including the COVID-19 vaccine, mandatory.

Events simultaneous with, and subsequent to, passage of Section 564 support that a person who carries out an activity under an EUA cannot make administration of an EUA product mandatory, including by penalizing potential recipients of an EUA product. In the legislation first creating Section 564, Congress also added the following provision to title 10 of the United States

Code:

In the case of the administration of [an EUA] product . . . to members of the armed forces, the condition described in section 564(e)(1)(A)(ii)(III) . . . and required under paragraph (1)(A) or (2)(A) of such section 564(e), designed to ensure that individuals are informed of an option to accept or refuse administration of a product, may be waived only by the President only if the President determines, in writing, that complying with such requirement is not in the interests of national security.

10 U.S.C. § 1107a(a)(1) (emphasis added). Thus, even with respect to the military, where administration of EUA products is most likely to be necessary, Congress granted members an option to accept or refuse administration, which option can only be waived by the President and only where inconsistent with national security.

Similarly, the conference report on the legislation creating Section 564 and section 1107a of title 10 described the latter provision as “authoriz[ing] the President to waive the right of service members to refuse administration of a product” under certain circumstances. H.R. Rep. No. 108-354, at 782 (2003) (Conf. Rep.) (emphasis added). This reference to the refusal option as a “right” supports that Section 564, which was incorporated by reference in section 1107a of title 10, was intended to create a right to refuse administration of a product, which right must be respected by the federal government (i.e., the governmental entity that passed Section 564) and any person who carries out an activity under an EUA.

The Department of Defense (“DOD”) has long held the position that title 10 restricts it from mandating an EUA vaccine without presidential approval. DOD recently informed the Department of Justice (“DOJ”) that “it has understood section 1107a to mean that DOD may not require service members to take an EUA product that is subject to the condition regarding the option to refuse, unless the President exercises the waiver authority contained in section 1107a.” 45 Op. O.L.C. ____, at 16 (July 6, 2021). And DOJ has acknowledged that “it does appear that certain members of Congress thought that section 1107a concerned a prohibition against requiring

service members to take an EUA product.” *Id.*

The FDA has explained in “Guidance for Industry and Other Stakeholders” that “the statute requires that the FDA ensure that recipients are informed to the extent practicable given the applicable circumstances . . . [t]hat they have the option to accept or refuse the EUA product and of any consequences of refusing administration of the product.” Emergency Use Authorization of Medical Products and Related Authorities, OMB Control No. 0910-0595, at 24 (Jan. 2017). As of January 26, 2021, FDA explained on its website that “FDA must ensure that recipients of the vaccine under an EUA are informed, to the extent practicable given the applicable circumstances, . . . that they have the option to accept or refuse the vaccine.” *Emergency Use Authorization for Vaccines Explained*, U.S. Food & Drug Admin., available at <https://www.fda.gov/vaccines-blood-biologics/vaccines/emergency-use-authorization-vaccines-explained> (last updated Nov. 20, 2020). In October 2020, Dr. Amanda Cohn, Senior Advisor for Vaccines at the Centers for Disease Control and Prevention (“CDC”), “reminded everyone 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.” *Advisory Committee on Immunization Practices (ACIP): Summary Report*, Dep’t of Health & Hum. Servs. Ctrs. for Disease Control & Prevention, 56 (Aug. 26, 2020), available at <https://www.cdc.gov/vaccines/acip/meetings/downloads/min-archive/min-2020-08-508.pdf>. Dr. Cohn later explained that “the federal government would not be mandating use of these vaccines,” and “in the setting of an EUA, patients and individuals will have the right to refuse the vaccine.” FDA Center for Biologics Evaluation and Research 161st Vaccines and Related Biological Products Advisory Committee Meeting, Open Session, at 156:7-8, 13-15 (Oct. 22, 2020), available at <https://www.fda.gov/media/143982/download>.

With respect to the COVID-19 vaccine itself, FDA has chosen to discharge its statutory duty to inform potential recipients of the option of accepting or rejecting the COVID-19 vaccine through facts sheets provided to both healthcare providers and recipients. Each of the FDA’s fact sheets for the three COVID-19 vaccines for which FDA has granted EUA status require that providers administering those vaccines inform the recipient or their caregiver of the option to accept or refuse the vaccine. For example, FDA’s Fact Sheet for Healthcare Providers Administering Vaccine for the Pfizer vaccine instructs providers that “you must communicate to the recipient or their caregiver information consistent with the ‘Fact Sheet for Recipients and Caregivers’ . . . prior to the individual receiving each dose of Pfizer-BioNTech COVID-19 Vaccine, including . . . [t]he recipient or their caregiver has the option to accept or refuse Pfizer-BioNTech COVID-19 Vaccine.” *Fact Sheet for Healthcare Providers administering Vaccine*, Pfizer, 8, available at <http://labeling.pfizer.com/ShowLabeling.aspx?id=14471&format=pdf> (last updated Aug. 12, 2021). Similarly, FDA’s Fact Sheet for Recipients and Caregivers for the Pfizer vaccine notifies potential recipients of the vaccine that “[i]t is your choice to receive or not receive the Pfizer-BioNTech COVID-19 Vaccine. Should you decide not to receive it, it will not change your standard medical care.” *Fact Sheet for Recipients and Caregivers*, Pfizer, 5, available at <http://labeling.pfizer.com/ShowLabeling.aspx?id=14472&format=pdf> (last updated Aug. 12, 2021).

All of the foregoing supports that when Congress created the EUA program, it intended that potential recipients of EUA products would have a real choice when it came to administration and that those persons carrying out an activity authorized under an EUA would notify potential recipients of that choice. Moreover, while the President can exempt military members from having the choice to receive an EUA product, Congress did not provide such a mechanism for the general

population. And, at least until very recently, the federal government understood that persons carrying out an activity authorized under an EUA, including federal agencies and the military, cannot mandate administration of an EUA product.

We recognize that, on July 6, 2021, the Office of Legal Counsel (“OLC”) within DOJ concluded that “section 564 of the FDCA does not prohibit public or private entities from imposing vaccination requirements, even when the only vaccines available are those authorized EUAs.” 45 Op. O.L.C. ____, at 18. That opinion, however, was based largely on the conclusion that Congress, through Section 564, did not intend to prevent all private entities, even those not subject to Section 564, from imposing a vaccination requirement. While that conclusion may have statutory support for private entities not carrying out an activity under an EUA (and who are thus not subject to Section 564)⁷, it lacks support for federal agencies and public or private entities carrying out an activity authorized under an EUA.

In addition to being contrary to federal practice under Presidents Bush, Obama, and Trump, OLC’s conclusion that a person carrying out an activity under an EUA can simultaneously comply with the requirements of Section 564 while also imposing harsh sanctions for failing to receive an EUA vaccine misconstrues the statutory text and too easily rejects the other evidence that Congress intended for potential recipients of EUA products to have real choice in deciding whether to do so. In fact, OLC acknowledges that “the EUA conditions effectively require parties administering the products to do so in particular ways” and that OLC’s “reading of section 564(e)(1)(A)(ii)(III) does not fully explain why Congress created a scheme in which potential users of the product would be

⁷ This Opinion does not address whether the federal requirement that those persons carrying out an EUA provide an option to reject receipt of an EUA product is a federal policy that preempts state law or policies under the Supremacy Clause. That issue is beyond the scope of the questions presented.

informed that they have ‘the option to accept or refuse’ the product.” *Id.* at 8, 10.

OLC then argues that, ultimately, telling a recipient that you have a choice to reject a vaccine is a true statement so long as “there is no direct legal requirement that they receive it.” *Id.* at 11. We think this reflects an overly narrow view of choice. Informing an employee that they have a choice whether to receive an EUA vaccine while simultaneously making receipt a condition of employment is a mandate, not a choice, regardless of what the subsequent punishment is for violating the mandate. Can the employee choose to quit and find alternative employment? Perhaps. But that does not change that, by mandating vaccination, the person carrying out an activity under an EUA has not provided the potential recipient with “the option to accept or refuse” the product. Very few persons carrying out an activity under an EUA will have the power to impose a “direct legal requirement that” someone receive a vaccine, at least in the manner that OLC seems to understand the nature of a direct legal requirement, and thus OLC’s interpretation would render the option to accept or reject largely meaningless.

OLC later acknowledges, moreover, that certain secondary effects can be so severe as to render the option to accept or reject illusory. As explained, DOD has long taken the position that Section 564 and title 10 restrict it from requiring EUA vaccinations. OLC attempts to explain away that position by stating that “DOD’s position reflects the concern that service members, unlike civilian employees, could face serious criminal penalties if they refused a superior officer’s order to take an EUA product.” *Id.* at 16. OLC goes on to reason that “[i]n this way, service members do not have the same ‘option’ to refuse to comply with a vaccination requirement as others member of the public.” *Id.* OLC concludes its opinion by noting that “DOD has informed us that it understandably does not want to convey inaccurate or confusing information to service members—that is, telling them that they have the ‘option’ to refuse the COVID-19 vaccine if they

effectively lack such an option because of a military order[.]” *Id.* at 18. OLC then opines that “DOD should seek a presidential waiver before it imposes a vaccination requirement.” *Id.*

Although we agree that potential criminal penalties are sufficient to render the “option” to refuse illusory, we disagree that non-military members of the public still have the “option” to refuse to comply so long as they do not face criminal penalties for refusing. It seems to us, for example, that a recipient effectively lacks the “option” to refuse where the entity administering the vaccine will terminate the recipient’s employment or prevent them from obtaining a basic life necessity for doing so.⁸ For example, the Veteran’s Administration (“VA”) should be no more willing than DOD to “convey inaccurate or confusing information” to its employees by “telling them that they have the ‘option’ to refuse the COVID-19 vaccine if they effectively lack such an option because” the VA will terminate them for refusing. Because the VA does not have the option of seeking a presidential waiver before it imposes a vaccine requirement, it should refrain from doing so. The same goes for any other federal agency or private entity that “carries out an activity for which an authorization under [Section 564] is issued.” *See* § 564(l).⁹

In sum, at the very least, Section 564 and title 10 prohibit the military¹⁰, federal agencies, and any private entity that “carries out an activity for which an authorization under [Section 564] is issued” from telling potential recipients of the COVID-19 vaccine that they have the “option”

⁸ Cataloguing all of the circumstances under which an “option” to refuse would be rendered illusory is beyond the scope of this Opinion.

⁹ The issue whether there is a private right of action to enforce the requirements of Section 564, including under state employment statutes or common law, is beyond the scope of this Opinion. Under Arizona law, violation of a federal statute or regulation is not grounds for a statutory wrongful discharge claim. *See* A.R.S. § 23-1501(A)(3)(b); *but see* Cal. Lab. Code § 1102.5(c) (West) (“An employer, or any person acting on behalf of the employer, shall not retaliate against an employee for refusing to participate in an activity that would result in a violation of state or federal statute[.]”).

¹⁰ Again, the military can refuse to give an option to refuse an EUA vaccine if the President exempts the military from the option requirement. *See* 10 U.S.C. § 1107a(a)(1).

to refuse the COVID-19 vaccine when they effectively lack such an option, including because of threatened punishment by the person or entity (including the military or a federal agency) administering the vaccine. If the FDA eventually grants full approval to one or more of the COVID-19 vaccinations, then the option requirements in Section 564 and Title 10 will no longer apply to an entity administering a fully-approved vaccine. Moreover, if an entity does not “carr[y] out an activity for which an authorization under [Section 564] is issued,” then the entity is not subject to the restrictions contained in Section 564 and Title 10 and would only be subject to the limitations discussed in the next section (I(B)) of this Opinion.

B. State and Federal Law Require Employers To Accommodate Employees Who Have A Disability Or Sincerely-Held Religious Belief Preventing Them From Obtaining A COVID-19 Vaccine.

If an employer administers the COVID-19 vaccination to its own employees, they are subject to the restrictions discussed in Section I(A) above. Turning to those persons or entities that do not carry out an EUA activity, there is no provision of federal or state law expressly permitting employers to make administration of a COVID-19 vaccination a condition of employment. But ordinarily, in the absence of a restriction under state or federal law on an employment practice, or under the terms of a collective bargaining agreement or other employment contract, employers are free to impose whatever conditions of employment they determine to be most appropriate, particularly in at-will employment relationships which are predominant in Arizona. There are, however, exceptions to that general rule.

1. Arizona Restrictions.

Arizona law expressly forbids making a COVID-19 vaccination a condition of employment by a public entity under certain circumstances. Under A.R.S. § 36-681(A)(1), “this state and any city, town or county of this state are prohibited from establishing a covid-19 vaccine passport or

requiring . . . [a]ny person to be vaccinated for covid-19.” The next statutory section, however, makes clear that Article 4.2 does not “[p]rohibit a health care institution licensed pursuant to chapter 4 of this title from requiring the institution’s employees to be vaccinated.” A.R.S. § 36-682(2). These statutory provisions will become effective on September 29, 2021.

Existing Arizona law already in effect also prohibits state and county government from imposing vaccine mandates. The statutes governing the Arizona Department of Health Services (“ADHS”) make clear that “[n]othing in this title shall authorize the department or any of its officers or representatives to impose on any person against his will any mode of treatment.” A.R.S. § 36-114. Similarly, A.R.S. § 36-184, which sets forth the power and duties of county health departments, provides that “[t]his article does not authorize a county health department or any of its officers or representatives to impose on any person any mode of treatment against that person’s will.” *Id.* § 36-184(C); *see also* Ariz. Const. art. XII, § 4 (powers of county officers are limited to those “prescribed by law”); *Sw. Gas Corp. v. Mohave County*, 188 Ariz. 506, 509 (App. 1997) (“[T]he burden is on the county to point out the constitutional or statutory power that permits the conduct.”). Based on these statutory provisions, neither ADHS nor county officials may impose a requirement that employees (or any other citizen) receive a COVID-19 vaccination.¹¹

Similar to the restriction on state and local government employers, “[a] school district or charter school may not require a . . . teacher to receive a vaccine for COVID-19 or to wear a face covering to participate in in-person instruction.” A.R.S. § 15-342.05(B). This statutory restriction will become effective on September 29, 2021.

¹¹ The Arizona Supreme Court recently made clear that it is the Governor, and not the Attorney General, who must faithfully execute and enforce laws, such as a statutory restriction on imposing modes of treatment, unless the Legislature specifically assigns that task to the Attorney General. No such assignment has been made with respect to A.R.S. §§ 36-114 or 36-184. *See State ex rel. Brnovich v. Ariz. Bd. of Regents*, 250 Ariz. 127, 476 P.3d 307, 312-313 ¶¶ 16-21 (2020).

2. Americans With Disabilities Act.

Generally applicable federal and state employment laws also limit the circumstances under which an employer can require that an employee receive the COVID-19 vaccine. The first federal law limiting an employer in imposing a vaccine requirement is the Americans With Disabilities Act (“ADA”).

The ADA prohibits discrimination in three areas: employment (“Title I”), public services (“Title II”), and public accommodations (“Title III”). Title I bars discrimination by a “covered entity,” 42 U.S.C. § 12112(a), meaning “an employer, employment agency, labor organization, or joint labor-management committee,” *id.* § 12111(2). An “employer” under the ADA is a “person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year[.]” *Id.* § 12111(5).

“The ADA prohibits an employer from discriminating ‘against a qualified individual with a disability because of the disability.’” *Nunes v. Wal-Mart Stores, Inc.*, 164 F.3d 1243, 1246 (9th Cir. 1999) (quoting 42 U.S.C. § 12112(a)).¹² To establish a prima facie failure to accommodate claim under the ADA, the employee must show that (1) he is disabled within the meaning of the ADA, (2) he is a qualified individual that can perform the essential functions of the job with or without reasonable accommodation, and (3) he suffered an adverse employment action because of his disability. *Samper v. Providence St. Vincent Med. Ctr.*, 675 F.3d 1233, 1237 (9th Cir. 2012)

¹² The federal Rehabilitation Act provides, in relevant part, that “[n]o otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance[.]” 29 U.S.C. § 794(a). “There is no significant difference in analysis of the rights and obligations created by the ADA and the Rehabilitation Act.” *Zukle v. Regents of Univ. of Cal.*, 166 F.3d 1041, 1045 n.11 (9th Cir. 1999); 42 U.S.C. § 12133 (“The remedies, procedures, and rights set forth in [the Rehabilitation Act] shall be the remedies, procedures, and rights [applicable to ADA claims].”).

(citing 42 U.S.C. § 12112(a), b(5)(A)). “[T]o be disabled for purposes of the ADA, a person must have an impairment, that impairment must limit a major life activity, and the limitation on the major life activity must be substantial.” *E.E.O.C. v. United Parcel Serv., Inc.*, 306 F.3d 794, 801 (9th Cir. 2002). A “qualified” individual includes “an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of” the relevant “employment position.” 42 U.S.C. § 12111(8) (emphasis added).

Therefore, for an employee who cannot receive a vaccine because of a disability-related reason, the employer must consider alternatives to a mandatory vaccine that will allow the employee to perform the essential functions of his or her position, unless as discussed below the employer can establish that an unvaccinated employee poses a “direct threat” to the health or safety of the employee or others in the workplace.

Under limited circumstances, an employer is entitled to enforce a safety standard as defining an essential job function of the employment position. Employers may justify their use of “qualification standards . . . that screen out or tend to screen out or otherwise deny a job or benefit to an individual with a disability,” so long as such standards are “job-related and consistent with business necessity, and . . . performance cannot be accomplished by reasonable accommodation[.]” 42 U.S.C. § 12113(a); *see also id.* § 12112(b)(6) (defining discrimination to include “using qualification standards . . . that screen out or tend to screen out an individual with a disability . . . unless the standard . . . is shown to be job-related for the position in question and is consistent with business necessity”).

An employer may impose as a qualification standard “a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace,” *id.* § 12113(b), with “direct threat” being defined by the ADA as “a significant risk to the health or safety of others

that cannot be eliminated by reasonable accommodation,” *id.* § 12111(3); *see also* 29 CFR § 1630.2(r). The ADA's “direct threat” criterion ordinarily requires “an individualized assessment of the individual’s present ability to safely perform the essential functions of the job,” 29 CFR § 1630.2(r), “based on medical or other objective evidence.” *Bragdon v. Abbott*, 524 U.S. 624, 649 (1998); *see* 29 CFR § 1630.2(r) (1998) (assessment of direct threat “shall be based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence”). The factors to be considered in determining whether an individual would pose a direct threat include: “(1) the duration of the risk, (2) the nature and severity of the potential harm, (3) the likelihood that the potential harm will occur, and (4) the imminence of the potential harm.” *See Nunes*, 164 F.3d at 1248.

The ADA also provides that an employer “shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity.” 42 USC § 12112(d)(4)(A). “[B]usiness necessities may include ensuring that the workplace is safe and secure[.]” *Conroy v. N.Y. State Dep’t of Corr. Servs.*, 333 F.3d 88, 97 (2d Cir.2003). “Disability-related inquiries and medical examinations that follow up on a request for reasonable accommodation when the disability or need for accommodation is not known or obvious also may be job-related and consistent with business necessity.” U.S. Equal Emp. Opportunity Comm’n, *Enforcement Guidance on Disability–Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act (ADA)* (2000). Even when a medical inquiry is job-related and consistent with business necessity, “[t]he employer must also show that the examination or inquiry genuinely serves the asserted business necessity and that the request is no broader or more intrusive than necessary.” *Conroy*, 333 F.3d at 98; *see also Scott*

v. Napolitano, 717 F.Supp.2d 1071, 1084 (S.D. Cal. 2010) (“Upon review of the questions, the Court concludes that the questions were disability-related inquiries that were not narrowly tailored to assessing whether Plaintiff could perform the essential functions of his job.” (emphasis added)).

Based on the foregoing, for employees with disabilities that preclude vaccination, an employer may only make receipt of a COVID-19 vaccination a requirement for an employment position if obtaining the vaccine is job-related for the position in question and consistent with business necessity. Although it is impossible to address all potential situations in which an employer might make that claim, in many cases the employer will only be able to do so where it can show that failure to receive the COVID-19 vaccine poses a direct threat to the health or safety of other individuals in the workplace. The employer would bear the burden of making that showing. *See Bates v. United Parcel Serv., Inc.*, 511 F.3d 974, 993 (9th Cir. 2007) (en banc) (“The employee does not bear the burden to invalidate the employer's safety-based qualification standard.”). In attempting to make that showing, the employer would be required to show that, based on the best current medical evidence, an un-vaccinated employee poses a direct threat to the health of others in the workplace. *See Nunes*, 164 F.3d at 1248 (“To protect disabled individuals from discrimination based on prejudice, stereotypes, or unfounded fear, the Supreme Court has required an individualized direct threat inquiry that relies on the best current medical or other objective evidence.”). Relying on the four “direct threat” factors from *Nunes*, we cannot say that an employer can never satisfy the burden to show that a failure to obtain a COVID-19 vaccine would pose a direct threat, particularly depending upon the industry in which the employer operates. But we think the fact that most businesses have operated for months during the COVID-19 pandemic without requiring employees to obtain a COVID-19 vaccine will make the showing exceedingly difficult. It seems unlikely that un-vaccinated employees, who were not a direct threat

for months, will suddenly become a direct threat approximately seventeen months into the pandemic and several months after the COVID-19 vaccine became widely available.

If the employer fails to make the showing of a direct threat and the disabled employee shows that she can satisfy all other essential job functions with or without accommodation (as will almost always be the case with employees already working in a position), then a “no-exceptions” vaccine requirement may be discriminatory based on disability. *Bates*, 511 F.3d at 994 (“If the plaintiff proves that he can perform the job’s essential functions either without a reasonable accommodation or with such an accommodation, then he has met his burden to show he is qualified.”).

Even if the employer makes the required showing, the employee is still entitled to reasonable accommodation unless performance cannot be accomplished with such accommodation. “[O]nce an employee requests an accommodation . . . the employer must engage in an interactive process with the employee to determine the appropriate reasonable accommodation.” *Zivkovic v. S. Cal. Edison Co.*, 302 F.3d 1080, 1089 (9th Cir. 2002); *see also* 42 U.S.C. § 12112(b)(5)(A); 29 C.F.R. § 1630.2(o)(3). To show that “performance cannot be accomplished by reasonable accommodation,” the employer must demonstrate either that no reasonable accommodation currently available would cure the performance deficiency or that such reasonable accommodation poses an “undue hardship” on the employer, meaning a significant difficulty or expense. *See* 42 U.S.C. §§ 12113(a), 12111(10) (defining “undue hardship”). The ADA does not provide a comprehensive recitation of what is encompassed by a reasonable accommodation, but gives some examples of what the term “may include.” 42 U.S.C. § 12111(9); 29 C.F.R. § 1630.2(o)(2); *see also* 29 C.F.R. § 1630.2(o)(1) (defining “reasonable accommodation” to include “[m]odifications or adjustments” to application processes, work

environment, and access to benefits and privileges of employment). This includes “job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices . . . and other similar accommodations for individuals with disabilities.” 42 U.S.C. § 12111(9).

As applied to a reasonable accommodation for those who cannot obtain a COVID-19 vaccine due to disability, reasonable accommodation could include (but is not necessarily limited to) the types of measures utilized for much of the American workforce over approximately the last seventeen months. This includes teleworking, masking, social distancing, enhanced sanitation measures, and/or staggered work schedules. The Equal Employment Opportunity Commission (“EEOC”), the federal agency charged with enforcing the ADA, recently explained that “as a reasonable accommodation, an unvaccinated employee entering the workplace might wear a face mask, work at a social distance from coworkers or non-employees, work a modified shift, get periodic tests for COVID-19, be given the opportunity to telework, or finally, accept a reassignment.”¹³ *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*, U.S. Equal Opportunity Commission, at K.2, available at <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws> (last updated May 28, 2021) (hereinafter 5-28-21 EEOC Guidance).

3. Title VII of the Civil Rights Act of 1964.

The second federal statute limiting an employer in requiring a COVID-19 vaccination is

¹³ “The ADA standards for disability discrimination claims apply to similar claims brought under the Arizona Civil Rights Act, A.R.S. § 41-1463, as the ACRA is modeled after federal employment discrimination laws.” *Whitmire v. Wal-Mart Stores Inc.*, 359 F.Supp.3d 761, 792 (D. Ariz. 2019) (cleaned up); *see also* A.R.S. § 41-1492 *et seq.*; 1992 Ariz. Sess. Laws, ch. 224, §1(C) (the Arizonans with Disabilities Act is intended to be “consistent with the Americans with disabilities act of 1990 [] and its implementing regulations.”).

Title VII of the Civil Rights Act of 1964 (“Title VII”). Title VII prohibits employment discrimination on the basis of protected traits identified in the statute. Under 42 U.S.C. § 2000e-2(a)(1), it is “an unlawful employment practice for an employer . . . 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.”¹⁴ Title VII defines “religion” to “includ[e] all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate an employee’s or prospective employee’s religious observance or practice without undue hardship on the conduct of the employer’s business.” 42 U.S.C. § 2000e(j). “A claim for religious discrimination under Title VII can be asserted under several different theories, including disparate treatment and failure to accommodate.” *Peterson v. Hewlett-Packard Co.*, 358 F.3d 599, 603 (9th Cir. 2004)); *see also E.E.O.C. v. Abercrombie & Fitch Stores, Inc.*, 575 U.S. 768, 775 (2015) (Under Title VII, “religious practice is one of the protected characteristics that cannot be accorded disparate treatment and must be accommodated.”).

“[T]he rule for disparate-treatment claims based on a failure to accommodate a religious practice is straightforward: An employer may not make an applicant’s religious practice, confirmed or otherwise, a factor in employment decisions.” *Abercrombie & Fitch*, 575 U.S. at 773. To establish a Title VII discrimination claim based on failure to accommodate, a plaintiff must first establish a prima facie case of discrimination by showing: (1) [s]he had a bona fide religious belief, the practice of which conflicted with an employment duty; and (2) the employer subjected her to an adverse employment action because of her inability to fulfill the job

¹⁴ “The Arizona Civil Rights Act is modeled after and generally identical to [Title VII]. Accordingly, we find federal Title VII case law persuasive in the interpretation of our Civil Rights Act.” *Higdon v. Evergreen Int’l Airlines, Inc.*, 138 Ariz. 163, 165 n.3 (1983).

requirement. *Berry v. Dep't of Soc. Servs.*, 447 F.3d 642, 655 (9th Cir. 2006). “Once a prima facie showing has been made, the burden shifts to [the employer] to show that it initiated good faith efforts to accommodate reasonably the employee’s religious practices or that it could not reasonably accommodate the employee without undue hardship.” *Id.* (internal citations omitted); *see also Opuku–Boateng v. State of Cal.*, 95 F.3d 1461, 1467 (9th Cir. 1996) (“Only if the employer can show that no accommodation would be possible without undue hardship is it excused from taking the necessary steps to accommodate the employee’s religious beliefs.”).

With respect to what qualifies as a religious belief, federal law broadly “define[s] religious practices to include moral or ethical beliefs as to what is right and wrong which are sincerely-held with the strength of traditional religious views.” 29 C.F.R. § 1605.1. “The fact that no religious group espouses such beliefs or the fact that the religious group to which the individual professes to belong may not accept such belief will not determine whether the belief is a religious belief of the employee or prospective employee.” *Id.* An analysis of the sincerity of a religious belief should “be measured by the employee’s words and conduct at the time the conflict arose between the belief and the employment requirement.” *EEOC v. IBP, Inc.*, 824 F. Supp. 147, 151 (C.D. Ill. 1993); *see also EEOC v. Alamo Rent-A-Car LLC*, 432 F. Supp. 2d 1006, 1012 (D. Ariz. 2006) (“Although there is a dispute of fact regarding whether Ms. Nur was permitted to wear a head covering during Ramadan in 1999 and 2000, that dispute is not relevant to the sincerity of Ms. Nur’s belief in the Fall of 2001, when Ms. Nur’s assertions of religious belief led to her termination.”).

Like the ADA, an employer’s inquiry into the sincerity of an employee’s sincerely-held religious belief should be narrowly tailored and no more intrusive than necessary. *See Thomas v. Nat’l Assoc. of Letter Carriers*, 225 F.3d 1149, 1155 n.5 (10th Cir. 2000) (“A claim of religious

discrimination under Title VII is similar to a claim under the ADA because, in both situations, the employer has an affirmative obligation to make a reasonable accommodation.”). The EEOC recently explained that an employer should ordinarily assume, without making inquiry, that an employee’s religious belief is sincerely held: “[T]he employer should ordinarily assume that an employee’s request for religious accommodation is based on a sincerely held religious belief, practice, or observance.” 5-28-21 EEOC Guidance at K.12 (emphasis added).

For purposes of religious accommodation, “an accommodation causes ‘undue hardship’ whenever that accommodation results in ‘more than a *de minimis* cost’ to the employer.” *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 67 (1986) (quoting *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84 (1977)).¹⁵ “[A]dditional costs in the form of lost efficiency or higher wages may constitute undue hardships,” as will accommodations that impose a “significant discriminatory impact on the plaintiff’s coworkers.” *Opuku-Boateng*, 95 F.3d at 1468 n.11, 12. The Ninth Circuit is skeptical of “‘hypothetical hardships’ based on assumptions about accommodations which have never been put into practice.” *Anderson v. Gen. Dynamics Convair Aerospace Div.*, 589 F.2d 397, 402 (9th Cir. 1978). “As undue hardship is not defined within the language of Title VII, courts have had to determine it on a case-by-case basis.” *Berry*, 447 F.3d at 655; *Balint v. Carson City, Nev.*, 180 F.3d 1047, 1054 (9th Cir. 1999) (“What constitutes undue hardship must be determined within the particular factual context of each case.”).

Applying this framework to mandatory COVID-19 vaccination, if an employee holds a sincerely-held religious belief that would prevent the employee from receiving a COVID-19

¹⁵ *But see Patterson v. Walgreen Co.*, 140 S. Ct. 685, 685–86 (2020) (Alito, Thomas, and Gorsuch, JJ., concurring in the denial of certiorari) (suggesting that the Court should reconsider the *de minimis* burden standard from *Hardison* because it “does not represent the most likely interpretation of the statutory term ‘undue hardship’”).

vaccine, then an employer cannot subject the employee to an adverse employment action but must instead provide a reasonable accommodation so long as doing so does not create an undue hardship.¹⁶ A sincerely-held religious belief about receiving a COVID-19 vaccine includes a moral or ethical belief against receiving a COVID-19 vaccination that has the strength of a traditional religious view. And the sincerity of that belief should be judged based on the employee's words and conduct at the time the conflict about the COVID-19 vaccine arises and not based on prior words or conduct, particularly related to the employee's prior views or conduct about non-EUA vaccinations. If the employee holds a sincerely-held religious belief, then potential accommodations, again, may include those that businesses have already been utilizing during the COVID-19 pandemic, including teleworking, masking, social distancing, and/or staggered work schedules. While we cannot anticipate all situations in which an employer will be asked to provide a reasonable accommodation, given that such measures have been utilized for approximately the last seventeen months, depending upon the employment setting, we think an employer would be hard pressed to establish that they create an undue hardship. *See* 5-28-21 EEOC Guidance at K.12 ("In many circumstances, it may be possible to accommodate those seeking reasonable accommodations for their religious beliefs, practices, or observances.").

II. State and Federal Law Limits The Circumstances In Which An Arizona Business May Require A Customer To To Show Proof Of A COVID-19 Vaccination As A Condition Of Patronage.

There is no federal law expressly requiring or authorizing businesses to require proof of

¹⁶ The Arizona Legislature recently enacted A.R.S. § 23-206 (effective September 29, 2021), which overlaps with the federal standard for accommodation of sincerely-held religious beliefs: "If an employer receives notice from an employee that the employee's sincerely-held religious beliefs, practices or observances prevent the employee from taking the covid-19 vaccination, the employer shall provide a reasonable accommodation unless the accommodation would pose an undue hardship and more than a de minimus cost to the operation of the employer's business."

having received a COVID-19 vaccination in order to enter a business establishment. The opposite is true in Arizona, where the Legislature recently prohibited the state and any city, town, or county of this state from requiring “[a] business to obtain proof of the covid-19 vaccination status of any patron entering the business establishment.” *See* A.R.S. § 36-681(A)(2) (effective September 29, 2021). Thus, in the absence of a restriction under Arizona or federal law on requiring proof of having received a COVID-19 vaccine, businesses are generally permitted to establish the conditions under which they provide goods and services.

A. Arizona Restrictions.

To date, the Arizona Legislature has only restricted certain educational institutions from requiring proof of COVID-19 vaccination from those to whom they provided educational services. Arizona law now provides that “the Arizona Board of Regents, a public university or a community college may not require that a student obtain a COVID-19 vaccination or show proof of receiving a COVID-19 vaccination . . . or disclose whether the person has been vaccinated against COVID-19[.]” A.R.S. § 15-1650.05(A). Similarly, A.R.S. § 15-342.05 provides that “[a] school district or charter school may not require a student . . . to receive a vaccine for COVID-19[.]” Finally, A.R.S. § 36-672(C)(2) now provides that “[a]n immunization for which a United States food and drug administration emergency use authorization has been issued” is not required for “school attendance.” Even if the FDA grants full approval to a COVID-19 vaccination, the Director of ADHS will be required to promulgate a rule requiring such a vaccine before it can be required for school attendance. A.R.S. § 36-672(A), (D). Title 36 broadly defines a “school” as “a public, private or parochial school that offers instruction at any level or grade through twelfth grade, except for day care facilities regulated pursuant to chapter 7.1 of this title.” *Id.* § 36-671(12). Each of the foregoing statutory restrictions will become effective on September 29, 2021.

Existing state law currently in effect also limits the ability of schools to require students to obtain vaccinations. In 1990, the Arizona Legislature passed a series of statutes governing the ability of schools to require students to be vaccinated. In A.R.S. § 15-872, the Legislature provided that “[a] pupil shall not be allowed to attend school without submitting documentary proof to the school administrator unless the pupil is exempted from immunization pursuant to § 15-873.” A.R.S. § 15-872(B). Documentary proof of a vaccination is not required to attend school if “[t]he parent or guardian submits a signed statement . . . that due to personal beliefs, the parent or guardian does not consent to the immunization of the pupil.” *Id.* § 15-873(A)(1). Documentary proof of vaccination is also not required if the parent or guardian provides a written certification by a physician or nurse practitioner “that states one or more of the required immunizations may be detrimental to the pupil’s health and that indicates the specific nature and probable duration of the medical condition or circumstance that precludes immunization.” *Id.* § 15-873(A)(2). Students who lack documentary proof of vaccination may attend school except during “outbreak periods of communicable immunization-preventable diseases as determined by the department of health services or local health department.” *Id.* § 15-873(C). These vaccination exceptions are broadly applicable to any “school,” which is defined as “a public, private or parochial school that offers instruction at any level or grade through twelfth grade[.]” *Id.* § 15-871(12). Thus, no public, private, or parochial school may condition admission or attendance solely on documentary proof of a vaccine, including the COVID-19 vaccine, when one of the two exceptions in § 15-873(A) is satisfied.

B. The Americans With Disabilities Act.

Generally applicable federal and state accommodation laws also limit the circumstances under which a business can require that a patron show proof of the COVID-19 vaccine. The first

federal law limiting a business that is a public accommodation from requiring proof of vaccination is the ADA.

Title III of the ADA prohibits discrimination in public accommodations and establishes a “general rule” that: “No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.” 42 U.S.C. § 12182(a). The ADA broadly defines “public accommodation” to include, among other businesses, hotels, restaurants, movie theaters, stadiums, grocery stores, clothing stores, gas stations, hospitals, amusement parks, private schools, senior citizens centers, bowling alleys, and golf courses. *See id.* § 12181(7).

The ADA defines discrimination to include:

[A] failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such goods, services, facilities, privileges, advantages, or accommodations[.]

Id. § 12182(b)(2)(A)(ii). Title III also prohibits places of public accommodation from denying disabled individuals “the opportunity . . . to participate in or benefit from the goods, services, facilities, privileges, advantages, or accommodations of an entity.” *Id.* § 12182(b)(1)(A)(i).

To prevail on a policies or practices claim under Title III, a claimant must establish that “(1) he is disabled as that term is defined by the ADA; (2) the defendant is a private entity that owns, leases, or operates a place of public accommodation; (3) the defendant employed a discriminatory policy or practice; and (4) the defendant discriminated against the plaintiff based upon the plaintiff’s disability by (a) failing to make a requested reasonable modification that was (b) necessary to accommodate the plaintiff’s disability.” *Karczewski v. DCH Mission Valley*, 862

F.3d 1006, 1010 (9th Cir. 2017). “If Plaintiff establishes a prima facie case, then Defendant ‘must make the requested modification unless it proves that doing so would alter the fundamental nature of its business.’” *Id.* (citation omitted). “[W]hether a particular modification is ‘reasonable’ involves a fact-specific, case-by-case inquiry that considers, among other factors, the effectiveness of the modification in light of the nature of the disability in question and the cost to the organization that would implement it.” *Id.* at 1011.

Thus, if a patron with a disability preventing receipt of a COVID-19 vaccination desires to enter a place of accommodation, but cannot do so because of a policy that all patrons show proof of such a vaccine, then the patron with a disability must request a reasonable modification necessary to accommodate the patron’s disability. In many circumstances, the types of reasonable modifications will include the same reasonable modifications discussed above with respect to employees who cannot obtain a COVID-19 vaccine due to disability. Again, it is impossible to analyze all potential circumstances in which a customer might require a modification due to an inability to obtain a COVID-19 vaccination, but in most circumstances those modifications discussed above (in § I(B)(2)) should be considered reasonable. And it is difficult to imagine many circumstances where those modifications would alter the fundamental nature of a business.

C. Title II of the Civil Rights Act of 1964.

Title II of the Civil Rights Act of 1964, dealing with discrimination in places of public accommodation, was codified at 42 U.S.C. § 2000a. Title II provides the following:

All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin.

42 U.S.C. § 2000a(a). The overriding purpose of Title II was “to [re]move the daily affront and humiliation involved in discriminatory denials of access to facilities ostensibly open to the general

public.” *Daniel v. Paul*, 395 U.S. 298, 307-08 (1969). Title II broadly defines a place of accommodation as including, among other businesses, hotels, restaurants, cafeterias, movie theaters, concert halls, and sports arenas. 42 U.S.C. § 2000a(b).

Once the plaintiff shows that an establishment is a place of public accommodation, the Act proscribes “any and all efforts to deny one of the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodation of that place because of discrimination.” *United States v. DeRosier*, 473 F.2d 749, 752 (5th Cir. 1973) (internal quotations omitted). “The statute is not limited to proscribing discrimination only as to the enjoyment of those devices which make the establishment a place of public accommodation.” *Id.* Courts, relying on cases arising under Title VII and § 1981, have required a plaintiff alleging a violation of Section 2000a to allege facts which show that she was deprived of equal use and enjoyment of a covered facility’s services and facts which demonstrate discriminatory intent.¹⁷ See *Akiyama v. U.S. Judo, Inc.*, 181 F. Supp. 2d 1179, 1185 (W.D. Wash. 2002) (“Absent more, the fact that a proprietor has decided to offer his or her services to the public in a way which could impact a religious practice or belief . . . raises no inference of discrimination or other conduct which Congress sought to censure through the enactment of Title II.”). A plaintiff may prove discriminatory intent, motive, or purpose by direct evidence or by circumstantial evidence, including evidence of the difference in treatment. *Bridgeport Guardians, Inc., v. Delmonte*, 553 F.Supp. 601, 606 (D.Conn.1983) (citing *Schwabenbauer v. Bd. of Educ.*, 667 F.2d 305, 309 (2d Cir.1981)).

If a business applies a policy that all customers must show proof of COVID-19 vaccination to enter a business establishment, discriminatory intent will be difficult to prove. If a public accommodation, however, makes exceptions for customers with non-religious reasons for

¹⁷ Only injunctive relief is available as a remedy for violation of Title II. 42 U.S.C. § 2000a-3(a).

choosing not to obtain a COVID-19 vaccine, then the public accommodation must make the same exception for customers with religious reasons for choosing not to get vaccinated.

D. Arizona’s Public Accommodations Law.

The Arizona Legislature has made clear that “[d]iscrimination in places of public accommodation against any person because of race, color, religion, sex, national origin or ancestry is contrary to the policy of this state and shall be deemed unlawful.” A.R.S. § 41-1442(A). To eliminate such discrimination, Arizona law provides that “[n]o person, directly or indirectly, shall refuse to, withhold from or deny to any person, nor aid in or incite the refusal to deny or withhold, accommodations, advantages, facilities or privileges thereof because of race, color, religion, sex, national origin or ancestry[.]” *Id.* § 41-1442(B). “Places of public accommodation” under § 41-1442 include

all public places of entertainment, amusement or recreation, all public places where food or beverages are sold for consumption on the premises, all public places which are conducted for the lodging of transients or for the benefit, use or accommodation of those seeking health or recreation, and all establishments which cater or offer their services, facilities or goods to solicit patronage from members of the general public.

A.R.S. § 41–1441.

There is virtually no case law interpreting or applying § 41-1442. At a minimum, however, its language indicates that, like its federal counterpart, it protects against a public accommodation intentionally discriminating against a customer based on the customer’s religion, and that disparate treatment between religious and non-religious customers could show discriminatory intent. Thus, if a public accommodation accepts non-religious reasons for refusing a vaccine requirement, the public accommodation must also accept religious reasons for doing so.

III. Federal Law Limits The Circumstances Under Which A Domestic Airline May Require Vaccination.

There is no federal statute or regulation expressly allowing a domestic airline to require

proof of COVID-19 vaccination to access air transportation services. There are, however, two statutes that prohibit a domestic airline from doing so in certain situations.

A. The Wendell H. Ford Aviation and Reform Act for the 21st Century.

Domestic airlines in the United States are primarily governed by federal law. In 2000, Congress passed the Wendell H. Ford Aviation and Reform Act for the 21st Century. Although that Act focused primarily on passenger safety and consumer protection, it also contained a non-discrimination provision. That non-discrimination provision states that “[a]n air carrier or foreign air carrier may not subject a person in air transportation to discrimination on the basis of race, color, national origin, religion, sex, or ancestry.” 49 U.S.C. § 40127(a). This language tracks the language in Title II and, at a minimum, prohibits an air carrier from making non-religious exemptions to a vaccine requirement without also making religious exemptions. Courts have held, however, that there is no private right of action for air passengers to enforce § 40127(a)—only the federal government can enforce the discrimination restriction—and so there is little case law discussing what more, if anything, the statute may prohibit. *See Shebley v. United Cont’l Holdings, Inc.*, 357 F. Supp. 3d 684, 691 (N.D. Ill. 2019) (collecting cases) (agreeing “with the majority of federal courts to have considered the issue and find[ing] that the statute does not confer a private right of action.”).

B. The Air Carrier Access Act.

In 1986, Congress passed the Air Carrier Access Act (“ACAA”), which prohibits commercial airlines from discriminating against passengers with disabilities. ACAA provides that “[i]n providing air transportation, an air carrier, including (subject to section 40105(b)) any foreign air carrier, may not discriminate against an otherwise qualified individual on the following grounds: (1) the individual has a physical or mental impairment that substantially limits one or

more major life activities[.]” 49 U.S.C. § 41705(a)(1).¹⁸

After passage of ACAA, the Secretary of Transportation, issued a detailed rule that “prohibits both U.S. and foreign carriers from discriminating against passengers on the basis of disability; requires carriers to make aircraft, other facilities, and services accessible; and requires carriers to take steps to accommodate passengers with a disability.” 14 C.F.R. § 382.1. That rule explains that “[a]s a carrier, . . . [y]ou must not discriminate against any qualified individual with a disability, by reason of such disability, in the provision of air transportation.” *Id.* § 382.11(a)(1). Similarly, a carrier “must not exclude a qualified individual with a disability from or deny the person the benefit of any air transportation or related services that are available to other persons, except where specifically permitted by this Part.” *Id.* § 382.11(a)(3); *see also id.* § 382.19(a) (“As a carrier, you must not refuse to provide transportation to a passenger with a disability on the basis of his or her disability, except as specifically permitted by this part.”).

With respect to passengers who actually have a communicable disease, a carrier may not refuse to provide transportation to the passenger, and may not require the passenger to provide a medical certificate, unless the carrier determines the passenger’s condition poses a direct threat. *Id.* § 382.21(a)(1), (4). In assessing whether a passenger’s condition poses a direct threat, the carrier “must consider the significance of the consequences of a communicable disease and the degree to which it can be readily transmitted by casual contact in an aircraft cabin environment.” *Id.* § 382.21(b)(2). The rule then gives three examples of communicable diseases and analyzes whether they would be a direct threat. Neither the common cold nor AIDS pose a direct threat,

¹⁸ There is no private right of action to enforce ACAA. *See Segalman v. Sw. Airlines Co.*, 895 F.3d 1219, 1225 (9th Cir. 2018) (“[W]e conclude that Congress did not intend to create an implied private cause of action to remedy violations of the ACAA.”). If a carrier violates ACCA or its implementing regulation, a passenger must file a complaint with the Secretary of Transportation. *See* 14 C.F.R. §§ 302, 382.159.

and even SARS only “probably poses a direct threat.” *Id.* § 382.21(b).

If a passenger has a communicable disease that poses a direct threat, the carrier may require a medical certificate. *Id.* § 382.23(c)(1). A medical certificate “is a written statement from the passenger’s physician saying that the disease or infection would not, under the present conditions in the passenger’s case, be communicable to other persons during the normal course of a flight.” *Id.* § 382.23(c)(2). “The medical certificate must state any conditions or precautions that would have to be observed to prevent the transmission of the disease or infection to other persons in the normal course of a flight.” *Id.* If the passenger provides a “medical certificate . . . describing measures for preventing transmission of the disease during the normal course of the flight, [a carrier] must provide transportation to the passenger, unless [the carrier is] unable to carry out the measures.” *Id.* § 382.21(c).

These regulations strongly imply that (1) a communicable disease qualifies as a disability under ACAA and (2) a carrier may not refuse transportation to a passenger merely because the passenger cannot show proof that the passenger has been vaccinated against a communicable disease and thus could have the communicable disease. There is no provision allowing a carrier to refuse transportation out of fear that a passenger might have a communicable disease; the passenger must actually have a communicable disease. If passengers who are known to have a communicable disease like SARS cannot be denied transportation if they have a medical certificate describing preventative measures, then we think it unlikely that passengers who are merely at risk of having COVID-19 may be refused transportation without proof of vaccination, a more stringent requirement than a medical certificate. We think this is particularly true given that it is now being reported that even those who have been vaccinated can purportedly contract COVID-19 and spread it to others. If true, then vaccination does not qualify as a “measure[] for preventing transmission

during the normal course of the flight,” and thus refusing transportation merely because a passenger has not been vaccinated is impermissible. We also think it is unlikely that a carrier could establish that proof of vaccination is suddenly a required preventative measure for COVID-19 when, to our knowledge, airlines have never required proof of vaccination for other communicable diseases posing a direct threat and airline service has continued throughout the COVID-19 pandemic with masking and ventilation as the primary preventative measures.

Conclusion

The COVID-19 pandemic has impacted almost every aspect of our lives. Many Arizonans have been forced to adjust daily routines and behaviors to promote safety and well-being. Similarly, public and private organizations have re-evaluated and updated operational policies and procedures. Nevertheless, Arizona’s founding document reminds us that “[a] frequent recurrence to fundamental principles is essential to the security of individual rights and the perpetuity of free government.” Ariz. Const. art. II, § 1. This is particularly important to remember during a public health emergency, when personal liberties are also at great risk. One such fundamental principle is that individuals should be free, without coercion, to make medical decisions regarding vaccinations that they feel are best for themselves and their families. A proper balance between individual liberties and public health policies may have yet to be achieved by policymakers. But an Attorney General Opinion must explain the law as it currently exists, and not how the Attorney General or others might desire it. With that in mind, the current law regarding mandatory vaccination in Arizona is as follows.

Employers

Under Arizona law, certain schools, public universities and community colleges, and state and local governments are statutorily prohibited from requiring employees to obtain a COVID-19

vaccination. *See* A.R.S. §§ 36-681, 15-1650.05(A), 15-342.05(B); 36-114; 36-184(C). Most of these statutory prohibitions will become effective on September 29, 2021.

Federal law requires a person carrying out an Emergency Use Authorization (“EUA”) activity, like administering an EUA vaccine, to inform a potential recipient of the option of rejecting the EUA vaccine. Therefore, a person carrying out an EUA activity, including the military, federal government, or a private employer, cannot misinform a potential recipient of an EUA vaccine by, on the one hand, telling the recipient she has an option to reject the vaccine, and, on the other hand, mandating that she receive the vaccine or sanctioning her for failure to do so.

Under federal and state law, employers who mandate vaccination must provide reasonable accommodations to employees who cannot obtain the COVID-19 vaccine due to a disability or a sincerely-held religious belief. In most cases, this will require employers to accommodate such employees by using the same measures utilized by employers for approximately the last seventeen months of the pandemic (e.g., masking, spacing, increased sanitation measures, teleworking, etc.). Any employer inquiry into a disability or sincerely-held religious belief must genuinely serve the employer’s asserted business necessity and the request must be no broader and no more intrusive than necessary.

Businesses

Effective September 29, 2021, Arizona law will prohibit certain educational institutions from requiring proof of COVID-19 vaccination from students. Under existing Arizona law currently in effect, public, private, and parochial schools are limited in conditioning student attendance on documentation of vaccines when parents have a personal objection or if a vaccine would be detrimental to a student’s health.

Similar to employers, under federal and state law, businesses that are places of public accommodation and that mandate vaccination for patrons must provide reasonable accommodations to patrons who cannot obtain the COVID-19 vaccine due to disability and they must not discriminate against customers who cannot obtain such a vaccine due to a sincerely-held religious belief.

Airlines

Under federal regulations, domestic and foreign airlines doing business in the United States must not refuse transportation to a customer based on a communicable disease unless the customer (1) actually has a communicable disease (2) that is a direct threat to other passengers and (3) cannot obtain a medical certificate setting forth measures for the prevention of transmission during a flight. It will be difficult for a carrier to establish that proof of vaccination is now a required preventative measure for COVID-19 when airline service has continued throughout the COVID-19 pandemic with masking and ventilation as the primary preventative measures.

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