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Testimony: Public Hearing on House Bill 262
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House Labor and Industry Committee
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Good morning Chairs Cox and Mullery, and Members of the Labor and Industry Committee. One year into the coronavirus pandemic, there have been 112 million global cases of COVID-19, 28 million in the United States alone.[1] The virus has killed more than 500,000 Americans.[2] As vaccines are approved for emergency use and the country works to return to normalcy, questions arise regarding how to keep society safe while protecting individuals' rights in the process. These are important questions to consider, and I thank the Committee for tackling the difficult issues provoked by the pandemic.

HB 262: THE RIGHT TO REFUSE ACT[3]

House Bill 262 prohibits employers from taking adverse employment actions—including discharging, refusing to hire, retaliating, or discriminating—against employees or prospective employees because they refuse to participate in an "invasive medical test" or vaccination, or if they inform others about the "right to refuse." Under the bill's definitions it would not apply to medical testing or screening "required by Federal or State law; intended to screen for the illegal use of drugs except for the use of marijuana; or is necessary to comply with workplace safety standards issued under the Occupational Safety and Health Act of 1970." The bill creates a right of action for employees so they can bring a civil lawsuit against their employer based on

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* A copy of Professor Foreman's biography is attached to this testimony.
[1] Johns Hopkins, *Coronavirus Resource Center*, https://coronavirus.jhu.edu/map.html (last visited Feb. 22, 2021).
[2] *Id.*
[3] https://www.legis.state.pa.us/cfdocs/billInfo/billInfo.cfm?sYear=2021&sInd=0&body=H&type=B&bn=262.

retaliation or discrimination in violation of the act. Possible relief for such a lawsuit includes reinstatement, restitution, attorney fees and costs, as well as "other legal and equitable relief." While I was asked to provide a broad overview of the federal laws regarding mandatory workplace testing, I have noted some technical questions the Committee may wish to examine as the Committee considers this proposed legislation.

1. Is the bill intended to prohibit nasal swabs, saliva testing, or other means of testing for COVID-19 or similar pathogens?
2. In the absence of an express directive under federal or state law requiring universal medical tests or screening, what is the breath of the preemption in cases where this testing is mandated on an industry or facility basis?
3. Should the relief provided be consistent with that provided under the Pennsylvania Human Relations Act addressing unlawful discrimination in the workplace?

THE LEGAL LANDSCAPE

The proposed bill would directly affect an employer that implemented a COVID-19 related vaccination requirement for employees. Several federal statutes are implicated by employer vaccination requirements, and I will review where that law currently stands on the most significant federal laws.

The Equal Employment Opportunity Commission (EEOC) enforces federal workplace anti-discrimination laws, including the Americans with Disabilities Act and Title VII. In its most recent guidance, the EEOC indicated it would be permissible for an employer to implement a COVID-19 vaccination requirement.[4] Although employers can mandate vaccines for employees, such requirements are subject to some limitations under federal law.

[4] *See* U.S. Equal Employment Opportunity Commission, *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws* Section K.5 (Dec. 16, 2021) [hereinafter EEOC COVID-19 Guidance], https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws.

Americans with Disabilities Act (ADA)

One limitation to a mandated vaccine requirement is an individual who has an objection to getting the vaccination based on their disability. Assuming the person has a disability[5] covered under the ADA, the ADA requires the employer to explore "reasonable accommodations"[6] for the employee that would not cause "undue hardship" to the employer. In the context of the ADA, undue hardship is defined as "significant difficulty or expense,"[7] and determining possible accommodations requires a "flexible, interactive process."[8]

While obviously the law in this area is developing rapidly, the courts have addressed vaccine requirements in other contexts. For example, in *Ruggiero v. Mount Nittany Medical Center*, an employer that rejected an employee's disability-based vaccine accommodation request of either an exemption or mask usage, while not offering any alternatives, stopped the interactive process too soon and likely did not give the employee reasonable accommodation.[9] EEOC guidance explains that COVID-19 undue hardship considerations may be impacted by "[t]he prevalence in the workplace of employees who already have received a COVID-19 vaccination and the amount of contact with others, whose vaccination status could be

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[5] The ADA defines disability as "a physical or mental impairment that substantially limits one or more major life activities of such individual; a record of such an impairment; or being regarded as having such an impairment." 42 U.S.C. § 12102(1).

[6] The ADA defines reasonable accommodation as including "making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities." 42 U.S.C. § 12111(9).

[7] To analyze whether an accommodation would pose undue hardship, factors to be considered include: "(i) the nature and cost of the accommodation needed . . . ; (ii) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility; (iii) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and (iv) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity." 42 U.S.C. § 12111(10).

[8] *See* EEOC COVID-19 Guidance at Section K.5.

[9] *See Ruggiero v. Mount Nittany Medical Center*, 736 Fed. Appx. 35, 40-41 (3rd Cir. 2018).

unknown."[10] Current circumstances related to the pandemic may lead to accommodations posing an undue hardship that would not have posed such a hardship before.[11]

The ADA also allows employers to implement a qualification standard that an individual must not pose a "direct threat"[12] to themselves or to others.[13] The EEOC has determined that an employee who enters the workplace infected with COVID-19 *does* pose a direct threat to the health of others.[14] Due to the threat posed, an employer has the ability to administer COVID-19 testing to employees both before allowing them to return to the workplace and periodically to ensure no infected individuals are at the workplace.[15] The testing meets the ADA's business necessity standard as long as it complies with current CDC guidance.[16]

However, to determine if an unvaccinated employee would pose a direct threat, employers need to conduct an individualized assessment of several factors, including: "the duration of the risk; the nature and severity of the potential harm; the likelihood that the potential harm will occur; and the imminence of the potential harm."[17] This assessment includes whether an unvaccinated employee would expose others at the workplace to COVID-19.[18] According to the EEOC, if no reasonable accommodations will mitigate an employee's direct threat assessment, an employer can exclude the employee from the workplace, but cannot necessarily

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[10] EEOC COVID-19 Guidance at Section K.5.
[11] *See id.* at Sections D.9-D.11.
[12] The ADA defines direct threat as "a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation." 42 U.S.C. § 12111(3). While the text of the definition speaks of harm to others, in *Chevron U.S.A., Inc. v. Echazabal*, 536 U.S. 73 (2002), the Supreme Court ruled that this defense also applies to direct threats to the worker's own health.
[13] EEOC COVID-19 Guidance at Section *K.5.*
[14] *See id.* at Section A.6.
[15] *See id.*
[16] *See id.*
[17] *See id.* at Section K.5.
[18] *See id.*

fire the worker.[19] If an employer must exclude the employee from the workplace, the employer may need to provide accommodations such as working remotely.[20]

An employer that administers the vaccines directly or through a contracted third party may also implicate the ADA through pre-vaccination medical screening questions. Because those questions are "likely to elicit information about a disability," the employer must show such questions are "job-related and consistent with business necessity."[21] If the vaccine is offered on a voluntary basis, or if the vaccine is administered by a third party not contracted with the employer, the pre-vaccination questions do not need to meet the business necessity standard.[22]

Title VII – Religious Accommodations

Under Title VII, an employer cannot discriminate based on religion. If an employee were to have a religious objection to receiving a vaccine, the employer is required to make efforts to accommodate the individual in line with Title VII requirements. When an employee seeks a religious accommodation, an employer must attempt to make reasonable accommodations that would not cause the employer "undue hardship."[23] For Title VII, the undue hardship standard is lower than the standard for the ADA, and has been interpreted by the Supreme Court to mean "no more than a de minimis cost."[24] There are currently two pending petitions for certiorari before the Supreme Court requesting the Court revisit the Title VII undue hardship standard.[25] According to EEOC COVID-19 guidance, if an employer cannot provide an exemption or reasonable accommodation for an employee who has a religious objection to a vaccination, it is

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[19] *See* EEOC COVID-19 Guidance at Section K.5.
[20] *See id.*
[21] *Id.* at Section K.2.
[22] *See id.*
[23] *See* 42 U.S.C. § 2000e (2); 42 U.S.C § 2000e(j).
[24] *TWA v. Hardison*, 432 U.S. 63, 84 (1977).
[25] *See* Petition for Writ of Certiorari, *Dalbertise v. GLE Assocs., Inc.*, 814 Fed. Appx. 495 (11th Cir. 2020) (No. 19-1461); Petition for Writ of Certiorari, *Small v. Memphis Light Gas and Water*, 952 F.3d 821 (6th Cir. 2020) (No. 19-1388). These cases are scheduled to go to conference before the Supreme Court Justices on Feb. 26, 2021.

"lawful for the employer to exclude the employee from the workplace," but not to "automatically terminate the worker."[26]

By way of example of how a court may address a request for a religious accommodation exemption from a mandatory vaccine, one court determined that an employer met the *de minimis* standard when it offered to reassign the individual to a position that may indirectly result in a loss of income, or offered to allow the unvaccinated person to stay in the current position, but insisted they wear personal protective equipment while on duty.[27] Further, for the exemption to apply, the individual must have a "sincerely held religious belief" to obtain an accommodation. EEOC guidance urges employers to assume requests for religious accommodations are based on religious beliefs.[28] However, courts have found general anti-vaccination beliefs, unrelated to religious convictions, do not count as religious beliefs and so do not require employers to provide a reasonable accommodation.[29]

Occupational Safety and Health Administration

The Occupational Safety and Health Administration (OSHA), within the Department of Labor, creates industry health and safety standards applicable to most private sector employers and employees. Under the Occupational Safety and Health Act (OSH Act), an employer has a general duty to provide a workplace that is "free from recognized hazards that are causing or are likely to cause death or serious physical harm."[30] OSHA has issued guidance related to COVID-19 and safety in the workplace, but that guidance is informational and in the form of advisory recommendations.[31] Existing standards regarding personal protective equipment, bloodborne

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[26] EEOC COVID-19 Guidance at Section K.7.
[27] *See Horvath v. City of Leander*, 946 F.3d 787, 792 (5th Cir. 2020).
[28] *See* EEOC COVID-19 Guidance at Section K.6.
[29] *See Fallon v. Mercy Catholic Medical Center*, 877 F.3d 487, 492-93 (3rd Cir. 2017).
[30] 29 U.S.C. § 654(a)(1) (OSH Act, General Duty Clause).
[31] U.S. Department of Labor, OSHA, *Protecting Workers: Guidance on Mitigating and Preventing the Spread of COVID-19 in the Workplace* (Jan. 29, 2021), https://www.osha.gov/coronavirus/safework.

pathogens, and an employer's general duty are applicable to the ongoing pandemic, but OSHA has yet to create a standard specifically addressing COVID-19.[32]

Pennsylvania has not created an approved "state plan" regarding occupational safety and health, so OSHA standards apply to most private employers and employees in the Commonwealth. The force of federal occupational safety and health standards creates the possibility of preemption issues when the General Assembly seeks to create laws about the same topic. The Supreme Court has determined that for states without approved state plans, occupational safety and health standards are precluded by any OSHA standards pertaining to the same issue.[33] To regulate about an issue covered by an OSHA standard, the state law must be one of general applicability to the public, like a traffic law.[34] In the absence of an OSHA standard, however, it is possible for a state without a state plan to regulate about an issue.[35]

OSHA's guidance during the pandemic has thus far been non-mandatory, and no specific standard regarding COVID-19 or airborne infectious diseases has been promulgated.[36] However, the situation is fluid, and President Biden issued an executive order calling on OSHA to make a determination regarding the necessity of a COVID-19 emergency temporary standard by March 15, 2021.[37] The executive order listed mask wearing as an example for a temporary standard.[38] In the past, OSHA has created standards that allow for, and suggest, vaccinations for employees in the context of bloodborne pathogens, like hepatitis B.[39] If OSHA were to implement an

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[32] U.S. Department of Labor, OSHA, *COVID-19 Regulations*, https://www.osha.gov/coronavirus/standards.
[33] *See Gade v. National Solid Wastes Management Ass'n*, 505 U.S. 88, 98-100 (1992).
[34] *See id.* at 107.
[35] Jane Flanagan et al., *How States and Localities Can Protect Workplace Safety and Health* 3 (May 2020), https://lwp.law.harvard.edu/files/lwp/files/state_local_workplace_protection_lwp_nelp.pdf.
[36] *See id.* at 4.
[37] *Executive Order on Protecting Worker Health and Safety*, Exec. Order No. 13,999, 86 Fed. Reg. 7211 (Jan. 21, 2021), https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/21/executive-order-protecting-worker-health-and-safety/.
[38] *See id.*
[39] *See* OSHA Standard 1910.1030(f), https://www.osha.gov/laws-regs/regulations/standardnumber/1910/1910.1030.

emergency temporary standard about COVID-19 in the coming weeks, and it mandates vaccine requirements by employers, it is possible HB 262 would run into preemption problems.

Further, similar to how the ADA treats mandatory medical testing and vaccines, under OSHA's whistleblower protections, there are exceptions to the mandatory testing for employees who refuse vaccines because of a "reasonable belief that he or she has a medical condition that creates a real danger of serious illness or death …." [40] This exemption is consistent with the ADA exemptions regarding direct threat.

Conclusion

All the major federal laws which address employer mandatory medical testing and vaccines have incorporated some level of defense for employers. Inclusion of an employer defense recognizes the conflicting duties employers have: to provide a safe working environment for workers; to protect the safety of the public; and to respect a worker's rights in securing and maintaining employment, as well as the worker's interest in protecting the integrity of their own body. As drafted, HB 262 contains no defenses similar to those provided in the ADA, OSHA and religious accommodation context.

Again, I thank the Committee for tackling these difficult issues, and I welcome any questions Committee members may have.

[40] U.S. Department of Labor, OSHA, *Standard Interpretations: OSHA's Position on Mandatory Flu Shots for Employees* (Nov. 9, 2009), https://www.osha.gov/law-regs/standardintrepretations/2009-11-09.

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Michael L. Foreman Biography

Professor Michael Foreman served as the Associate Dean of Clinics and Experiential Learning at Penn State Law until this summer when he gave up those responsibilities to focus on the work of the school's Civil Rights Appellate Clinic which he directs. His clinic focuses primarily on appellate representation in civil rights issues and employment discrimination cases. He has served as counsel on numerous cases in the United States Supreme Court and the federal appellate courts.

Most recently he argued *Coleman v. Maryland Court of Appeals*. In addition to other merits work in the employment area, the clinic has served as counsel on *amicus* briefs filed with the United States Supreme Court in many of its key employment cases including *Comcast Corporation v. National Association of African American-Owned Media*, *Fort Bend County v. Davis*, *Encino Motor Cars LLC v. Navarro et. al.*, *Mach Mining Inc. v EEOC*, *Nassar v. Southwestern Medical Center*, *Vance v. Ball State*, *Thompson v. North American Stainless, LP, Staub v. Proctor Hospital, Rent-A-Center, West, Inc. v. Jackson, Gross v FBL Financial Services, Inc.*, *Ricci v. DeStefano*, and *Pyett v. 14 Penn Plaza, LLC.*

In the circuit courts, most recently his clinic has served as counsel on the merits, or for amici in *Doe v. the Law School Admissions Council*, Nos 17-3230 and 3357, *Baptiste v. Lynch* (3d Cir. No. 14-4476); *Jones v. The City of Boston*, (1st Cir. No. 15-2015); *Lopez v. The City of Boston* (1st Cir. No. 14-1952); *DeMasters v. Carilion* (4th Cir. No. 13-22278); *Ellis v. Ethicon* (3d. Cir. Nos. 10-1919, 12-1361).

Professor Foreman is frequently called upon to testify before Congress and the EEOC on the impact of the Supreme Court decisions affecting civil rights and employment issues. He also teaches the Advanced Employment Discrimination and The Employment Relationship courses.

Prior to joining Penn State Law, he was Deputy Director of Legal Programs for the Lawyers' Committee for Civil Rights Under Law. Professor Foreman was also acting Deputy General Counsel for the U.S. Commission on Civil Rights, where he served as the lead attorney for the Commission's investigation of the voting irregularities in the 2000 presidential election. A recipient of the Carnegie Medal for Outstanding Heroism, Professor Foreman has been honored by Shippensburg University with the Jesse S. Heiges Distinguished Alumnus Award. He was also selected by Harvard Law School to as a Wasserstein Fellow, which recognizes dedicated service in the public interest field.