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Protecting Lives and Livelihoods: Vaccine Requirements and Employee Accommodations

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Chairwoman Adams, Chairwoman Bonamici, Chairman Scott, Ranking Member Foxx, Ranking Member Fulcher, Ranking Member Keller, and Members of the Education & Labor Committee and Subcommittees on Workforce Protections and Civil Rights & Human Services, my name is Doron Dorfman, and I am an Associate Professor of Law at Syracuse University College of Law, where my research focuses on health law, disability law, and employment discrimination law. I also serve as a Faculty Affiliate with the Disability Law & Policy Program and the Aging Studies Institute at Syracuse University and serve on the SUNY Upstate Medical University Ethics Committee. Thank you for the opportunity to testify before you today about how COVID vaccine requirements in the private workplace dovetail with civil rights mandates to provide religious, disability, and pregnancy modifications/accommodations.[1] The situation addressed in this testimony is one in which an employee would ask for an exemption from a vaccine requirement as a modification/accommodation. The opinions I offer today are my own.

The main question underlying this testimony is whether a COVID-19 vaccine requirement in the private workplace can stand under the current antidiscrimination doctrines, specifically the need to provide accommodations in the form of modifications from certain workplace policies to protected classes. My answer is yes, and the explanation is set forth in this testimony.

The testimony proceeds as follows: Part I briefly describes how the well-established rule on the employer's prerogative affects the ability of employers to require their employees to get the COVID-19 vaccine. It then discusses the proposed Occupational Safety and Health Administration COVID-19 Emergency Temporary Standard (hereinafter: proposed OSHA COVID ETS), which calls covered employers to require their employees to be vaccinated against COVID-19 or to produce a negative COVID-19 test before coming to work. The testimony then turns to explain the legal standards for requiring employers to provide accommodations/modifications to employees who are members of three legally protected classes. Part II discusses the accommodation mandate for employees who are religious observers, Part III discusses the accommodation mandate for employees with disabilities, and Part IV discusses the accommodation mandate for pregnant employees. Part V concludes the discussion.

Religious employees are protected under Title VII of the Civil Rights Act of 1964 (Title VII),[2] employees with disabilities are protected under Title I of the Americans with Disabilities Act (ADA),[3] and pregnant employees are protected under both statutes.[4] In regards to religious accommodations, the Supreme Court holds that the need to provide accommodations is applied in terms of the burden imposed on employers. Accordingly, an employer is not required to bear more than a *de minimis undue hardship* in terms of cost, disruption of the workforce, and burden on other employees to accommodate an employee's sincerely held religious beliefs or practices. The standard for disability accommodations is more demanding of employers than is the one for religious accommodations. To accommodate a disabled employee, the employer is required to provide *reasonable* accommodations that do not pose an *undue hardship* or a *direct threat* to the

[1] The Americans with Disabilities Act defines reasonable accommodations as including "appropriate adjustment or modifications of… policies" 42 U.S.C. § 12111(9)(B).
[2] 42 U.S.C. § 2000e.
[3] 42 U.S.C. § 12101.
[4] Although pregnancy itself is not a disability under the ADA, pregnancy-related impairments may be considered disabilities under the ADA and should be accommodated as such, 29 C.F.R. pt. 1630, app. § 1630.2(h).

employee himself or herself or to other employees. In regard to pregnant employees, the Supreme Court determined that under Title VII, an employer is obligated to treat all employees equally when they are similarly situated. Therefore, any duty to accommodate pregnant employees depends on whether other classes of employees are accommodated at the specific workplace.

My conclusion is that under all three classes, religion, disability, and pregnancy, vaccine exemptions should be allowed in limited cases under an individualized inquiry and that in those cases, a periodic testing requirement could serve as a reasonable accommodation/modification for the vaccine-exempted employees among other possible accommodations.

The Equal Employment Opportunity Commission (EEOC) recently listed some possible accommodations for unvaccinated employees that may come into play as long as they do not pose an undue hardship on the employer or a direct threat. Those accommodations include wearing a face mask, working at a social distance from coworkers or nonemployees, working a modified shift, working remotely (through telework), or accepting a reassignment.[5]

I. VACCINE REQUIREMENTS AND THE EMPLOYER'S PREROGATIVE

Work law in the United States operates under a simple default governance rule, that of the employer's prerogative: An employer holds sole authority in the workplace unless regulated or is contracted otherwise (either through collective bargaining agreements or individual contracts).[6] Therefore, it is the employer's prerogative to hire and terminate at will,[7] unless the employee in question is protected under a civil rights law such as Title VII or Title I of the ADA. The employer's prerogative is thus akin to an ocean through which the employer can navigate his or her ship as he or she likes, and civil rights law is akin to a small number of islands, the only obstacles through which the ship cannot sail. In the antidiscrimination context, an employee can only receive shelter on one of those islands if he or she belongs to a protected class. In this testimony, the protected classes of employees I was asked to discuss are religious observers (covered under Title VII), employees with disabilities (covered under the ADA) and pregnant employees (who can be covered under both statutes). Civil rights law requires providing accommodations to members of those three protected classes, which can include modifications to certain policies at the workplace. Failing to accommodate an employee from a protected class may be considered illegal discrimination, in violation of civil rights law.[8]

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[5] U.S. Equal Employment Opportunity Commission, *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws* § k.2, EEOC. GOV (2021), https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws.

[6] RESTATEMENT (THIRD) OF AGENCY § 7.07(f) (AM. LAW. INST. 2006) ("[A]n agent is an employee only when the principal controls or has the right to control the manner and means through which the agent performs work"); Jay M. Feinman, *The Development of the Employment At Will Rule*, 20 AM. J. LEGAL HIST. 118, 118 (1976).

[7] RESTATEMENT OF EMP'T LAW § 2.01 (AM. LAW. INST. 2015) ("Either party may terminate an employment relationship with or without cause unless the right to do so is limited by a statute, other law or public policy, or an agreement between the parties, a binding employer promise, or a binding employer policy statement").

[8] 42 U.S.C. § 12112(b)(5)(A) (2008) ("the term 'discriminate against a qualified individual on the basis of disability' includes—not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity…").

Under the rule of the employer's prerogative, employers have very broad discretion regarding the policies they can put in place to maintain the health and safety of their employees. In that respect, the employers' policies can stand as long as they do not violate their mandate to accommodate protected classes under civil rights law.

Unwillingness to become vaccinated that is unrelated to any one of the three protected classes—religion, disability, or pregnancy—is unprotected under federal law.[9] Generally speaking, an employer could, without any legal consequence, take an adverse action against an employee who refuses to be vaccinated under the well-established rules of the employer's prerogative and at-will employment.

On September 9, 2021, the Biden administration drafted a detailed emergency plan, the proposed OSHA COVID ETS, aimed at combating the spread of COVID-19, which is based on scientific data.[10] The proposed OSHA COVID ETS is an extensive six-part plan. For the sake of this testimony, I will focus on the plan's first component, which calls private employers with 100 or more employees (hereinafter: covered employers) to require COVID-19 vaccines for their employees. In case there are employees who remain unvaccinated, the covered employers will need to require these employees to produce a periodic negative COVID-19 test before being allowed into the workplace.[11] Covered employers would be required to provide employees with paid time off to allow them to get vaccinated.[12]

The proposed OSHA COVID ETS as it applies to private employers does not add to or change the legal standard allowing vaccine requirements. As nothing in antidiscrimination law prevents employers from maintaining a safe workplace, private employers have had the discretion to initiate vaccine requirements on their own.[13] Indeed, as of October 2021, one in four private employers has already initiated a vaccine requirement and an additional 13% of private employers plan to put such a requirement in place in the coming months.[14] What the proposed OSHA COVID ETS

[9] Although beyond the scope of the analysis brought forth in this testimony, it is important to mention that the Supreme Court rejected constitutional challenges to vaccine requirements, so long as they do not involve a protected class under antidiscrimination law. In the 1905 case *Jacobson v. Massachusetts*, The Court determined that a smallpox vaccine requirement imposed by the Board of Health of Cambridge, Massachusetts, did not violate the due process right to bodily integrity of a priest at the Evangelical Lutheran Augustana Church priest in Cambridge. The Court determined that there is no constitutional right to harm other citizens by refusing a vaccine. Justice John Marshall Harlan, who wrote the opinion, explained, "the liberty secured by the Constitution . . . does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint . . . On any other basis, organized society could not exist with safety to its members." See *Jacobson v. Massachusetts*, 197 U.S. 11, 26 (1905).

[10] WHITE HOUSE, PATH OUT OF THE PANDEMIC: PRESIDENT BIDEN'S COVID-19 ACTION PLAN (2021), https://www.whitehouse.gov/covidplan/.

[11] *Id.*

[12] *Id.*

[13] This is also the stance taken by the EEOC in its updated guidelines regarding vaccination published on October 13, 2021: "The federal EEO laws do not prevent an employer from requiring all employees physically entering the workplace to be fully vaccinated against COVID-19, subject to the reasonable accommodation provisions of Title VII and the ADA and other EEO considerations." U.S. Equal Employment Opportunity Commission, *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*, supra note 5, § k.1.

[14] WHITE HOUSE, WHITE HOUSE REPORT: VACCINATION REQUIREMENTS ARE HELPING VACCINATE MORE PEOPLE, PROTECT AMERICANS FROM COVID-19, AND STRENGTHEN THE ECONOMY 11 (October 7, 2021), file:///Users/dorondorfman/Downloads/Vaccination-Requirements-Report.pdf.

intends to do is to make this practice uniform and apply the vaccine requirement to *all* covered employers as part of the efforts to curb the pandemic.

The question at the heart of the testimony is this: Can employers require their employees to get vaccinated? The answer is yes as long as it is consistent with civil rights laws' requirements to accommodate employees who are religious observers, people with disabilities, or those who are pregnant. The option to get tested periodically instead of getting vaccinated suffices as an accommodation under the circumstances. Employers could thus legally require vaccination of all their employees.

To establish this conclusion, I will turn to review the legal standards for accommodating employees who maintain religious observances, disabled employees, and pregnant employees and then apply the standards to the vaccine requirement.

II. RELIGIOUS ACCOMMODATIONS

Religion is not clearly defined under Title VII. Yet the Supreme Court famously recognized religion to be "[a] sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualified for the exemption…"[15] Later the Court expanded the category to include moral and ethical beliefs that assumed the function of religion in the individual's life.[16] Courts are allowed to inquire as to the sincerity of an employee's religious belief and assert a finding on whether a "bona fide religious belief" is found.[17] The employer is entitled to make a "limited inquiry into the facts and circumstances of the employee's claim" about his or her religious beliefs underlying the accommodation request.[18]

The rule on accommodating religious beliefs is found in Section 701(j) to Title VII, which reads:

> The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to *reasonably accommodate* to an employee's or prospective employee's religious observance or practice *without undue hardship* on the conduct of the employer's business.[19] [emphasis added]

[15] *United States v. Seeger*, 380 U.S. 163, 176 (1965).
[16] *Welsh v. United States*, 398 U.S. 333, 342-343 (1970). See also the Equal Employment Opportunity Commission's (EEOC) definition of religion adopting the construction of the Supreme Court in the Seeger and Welsh cases, 29 C.F.R. § 1605.1 ("In most cases whether or not a practice or belief is religious is not at issue. However, in those cases in which the issue does exist, the Commission will define 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.")
[17] *E.E.O.C. v. Union Independiente de la Autoridad de Acueductos y Alcantarillados de Puerto Rico* 279 F.3d 49, 56-57 (1st Cir. 2002) ("The requirement that the employee have a 'bona fide religious belief' is an essential element of a religious accommodation claim. Title VII does not mandate an employer or labor organization to accommodate what amounts to a 'purely personal preference.'. . . In order to satisfy this element, the plaintiff must demonstrate both that the belief or practice is religious and that it is sincerely held").
[18] EEOC, *Questions and Answers: Religious Discrimination in the Workplace*, EEOC-NVTA-2008-2 § 8 (July 22, 2008), https://www.eeoc.gov/laws/guidance/questions-and-answers-religious-discrimination-workplace.
[19] 42 USC § 2000e(j).

The law on religious accommodations has evolved in the courts in a much more stringent way compared with how the law on disability accommodations has.[20] Despite the seemingly broad language of the statute, the Supreme Court has interpreted the obligation narrowly.[21] The leading case on the issue is *Trans World Airlines v. Hardison* handed down by the Supreme Court in 1977.[22] In light of the Court's analysis in the case, the standard in religious accommodations cases is that anything more than a "*de minimis* cost" would create an undue hardship on the employer and would allow the employer not to accommodate the religious employee.[23] The EEOC provided some guidance on when a religious accommodation possesses more than *de minimis* cost, stating that:

> [C]osts to consider include not only direct monetary costs but also the burden on the conduct of the employer's business. For example, courts have found undue hardship where the accommodations… Impairs workplace safety.[24]

When applying this *de minimis* standard to the case of vaccine requirements, it is easy to conclude that an exemption from vaccination *and* from periodic testing (which could be offered as alternative) creates an undue burden as it holds a great chance of impairing the safety of other employees due to the significant risk of contracting the highly contagious COVID-19. Therefore, no employer should grant any request for such exemption as the basis for a religious accommodation.

In a subsequent case, the Supreme Court determined that once an employer offers the religious employee a reasonable accommodation, that satisfies the employer's duty under Title VII, even if the employee views a different accommodation as better responding to his or her needs.[25] In the circumstances before us then, granting employees who do not wish to get vaccinated due to their religious observance the option of being tested periodically is likely a reasonable accommodation that satisfies the legal obligation to accommodate religious beliefs under Title VII. This is unless the testing requirement violates the employee's sincerely held religious views, a case that seems hypothetical.

The conclusion is therefore that a vaccine requirement satisfies the legal standards for providing religious accommodations at the workplace.

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[20] JOSEPH A. SEINER, EMPLOYMENT DISCRIMINATION: PROCEDURE, PRINCIPLES, AND PRACTICE 473 (2nd ed. 2019).
[21] CHARLES A. SULLIVAN & MICHAEL J. ZIMMER, CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION 378 (9th ed. 2017).
[22] 432 U.S. 63 (1977).
[23] As Justice White wrote for the majority opinion: "To require TWA to bear more than a de minimis cost in order to give respondent Saturdays off would be an undue hardship." See *Id*, at 65.
[24] EEOC, *Questions and Answers: Religious Discrimination in the Workplace*, *supra* note 18, § 9.
[25] *Ansonia Bd. Of Educ. v. Philibrok* 476 U.S. 60, 61 (1986) ("Neither the terms nor the legislative history of § 701(j) supports the Court of Appeals' conclusion that an employer's accommodation obligation includes a duty to accept the employee's proposal unless that accommodation causes undue hardship on the conduct of the employer's business. An employer has met its obligation under § 701(j) when it demonstrates that it has offered a reasonable accommodation to the employee. The employer need not further show that each of the employee's alternative accommodations would result in undue hardship").

III. DISABILITY ACCOMMODATIONS

The ADA defines a person with a disability as a person having a physical or mental impairment that substantially limits one or more major life activities, a person with a record of such an impairment, or someone regarded as having such an impairment.[26] In the ADA Amendments Act of 2008, Congress instructed federal courts to adopt a broad interpretation of the definition of disability and to reject the previous strict and narrow interpretation of the term. [27] To receive protection under the ADA, in addition to being a person with a disability, the individual needs to be qualified for the job, meaning that he or she "with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires."[28]

One of the primary goals for the ADA was to integrate people with disabilities into the labor market.[29] To achieve this mission, Title I to the ADA, which covers employment discrimination, includes an accommodations mandate that imposes an active duty on employers to provide reasonable accommodations with the goal of removing barriers to allow equal opportunities for and participation by disabled people. The accommodation mandate is broad and includes within it "appropriate adjustment or modifications of… policies."[30] Failing to provide reasonable accommodations or modifications for a known disability constitutes discrimination.[31] Nevertheless, and as stated previously, a person who is not qualified is not covered under the ADA and should therefore not be accommodated.

An employee may not be qualified for the job if he or she presents a direct threat in the workplace. Posing a direct threat means "a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation."[32] According to the ADA regulations, the assessment of whether an employee presents a direct threat, and thus is not qualified and should not be accommodated, should be made on an individual basis and "be based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence."[33] In *Chevron U.S.A. v. Echazabal*, the Supreme Court recognized that the direct threat defense available to employers allows them to screen out employees with disabilities not only for risks that he or she would pose to others but also for risks to his or her own health or safety.[34]

Applying these standards to the vaccine requirements, in case an employee requests an exemption from vaccination and an alternative periodic testing as an accommodation/modification, an employer can claim that on the basis of the scientific and medical knowledge at hand, not being vaccinated or not knowing the employee's COVID-19 status could cause an outbreak at the

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[26] 42 U.S.C. § 12102(1).
[27] 42 U.S.C. § 12101(b).
[28] 42 U.S.C. § 12111(8).
[29] SAMUEL R. BAGENSTOS, LAW AND THE CONTRADICTIONS OF THE DISABILITY RIGHTS MOVEMENT 29 (2009).
[30] 42 U.S.C. § 12111(9)(B).
[31] 42 U.S.C. §12112(b)(5)(A) ("the term 'discriminate against a qualified individual on the basis of disability' includes… not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity").
[32] 42 U.S.C. § 12111(8).
[33] 29 C.F.R. § 1630.2(r).
[34] 536 U.S. 73, 78-79 (2002).

workplace.[35] This would put the rest of the employees, as well as the employee asking for the disability accommodation, at significant risk to their health or safety. This is specifically the case, as people with certain disabilities are at an increased risk of infection, severe illness, and complications from contracting COVID-19 because of underlying medical conditions.[36] An unvaccinated or regularly untested employee will under these circumstances be considered unqualified for the job and therefore not be entitled to protection under the ADA.

The conclusion is therefore that a vaccine requirement satisfies the legal standards for providing disability accommodations in the workplace.

IV. PREGNANCY DISCRIMINATION

Although pregnancy itself is not a disability under the ADA, pregnancy-related impairments (such as gestational diabetes) may be considered disabilities under the ADA and should be accommodated as such.[37] In 1978, Congress passed an amendment to Title VII known as the Pregnancy Discrimination Act (PDA), which prohibits discrimination against pregnant women. The second clause of Section 701(k), which embodies the antidiscrimination mandate and is relevant for our discussion, reads as follows:

> [W]omen affected by pregnancy, childbirth, or related medical conditions *shall be treated the same for all employment-related purposes*, including receipt of benefits under fringe benefit programs, *as other persons not so affected but similar in their ability or inability to work*…[38] [emphasis added]

Yet in the decades following the enactment of the PDA, federal courts tended not to find that employers' denials of accommodations for pregnant women constituted violations of the PDA. Courts concluded that the pregnant employee failed to identify anyone "similar in their ability or inability to work" who had been treated more favorably and thus failed to make a viable claim under the PDA.[39] In 2015, the Supreme Court was called to interpret the clause in *Young v. United Parcel Service*.[40] The Supreme Court in *Young* rejected the district and appellate courts' trend of approving employer refusals to accommodate pregnancy. The holding in *Young* sends a strong message to employers; if there are any policies accommodating an appreciable number of employees but not pregnant women, then unless the employer can show *sufficiently strong* reasons

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[35] In late August 2021, the FDA fully approved the Pfizer vaccine and found it to be safe and effective, meeting the agency's standard of approval, U.S. FOOD & DRUG ADMIN., FDA APPROVES FIRST COVID-19 VACCINE (2021), https://www.fda.gov/news-events/press-announcements/fda-approves-first-covid-19-vaccine.

[36] Centers for Disease Control & Prevention, *People with Disabilities*, CDC.GOV https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-disabilities.html. An estimated 83% of people under the age of sixty-five who died from COVID were people living with underlying medical conditions that meet the legal definition of disability, including heart disease, cancer, kidney disease, diabetes, and lung disease. See: Jonathan M. Wortham et al., *Characteristics of People Who Died with COVID-19—United States, February 12–May 18, 2020*, 69 CENTERS FOR DISEASE CONTROL & PREVENTION: MORBIDITY & MORTALITY WEEKLY REPORT 923, 924 (2020), https://www.cdc.gov/mmwr/volumes/69/wr/mm6928e1.htm.

[37] 29 C.F.R. pt. 1630, app. § 1630.2(h).

[38] 42 U.S.C. § 2000e(k).

[39] Joanna L. Grossman & Gillian Thomas, *Making Sure Pregnancy Works: Accommodation Claims After Young v. United Parcel Service, Inc.*, 14 HARV. L. & POL'Y REV. 319, 325 (2020).

[40] 575 U.S. 206 (2015).

for not accommodating pregnant women, the employer will be violating the PDA.[41] According to the Court, the pregnant employee will also need to show that the employer's policies not accommodating her impose a *significant burden* on pregnant employees.[42]

In conclusion, the significance of *Young* for employers is that failing to accommodate pregnant women while accommodating other employees is risky under Title VII and that employers are advised to accommodate pregnancy to avoid liability.[43] This means that the doctrine on pregnancy accommodations is relational to the other accommodated groups at the workplace.

For the purposes of this testimony, in a situation in which pregnant employees ask for an exemption from the vaccine, the employer will need to make sure to treat her the same way as an employee who is "similarly situated but outside the protected class,"[44] one who is "similar in their ability or inability to work."[45] Because I cannot think of any situations in which other protected groups should be exempted from both the vaccine and periodic testing requirements, I do not envision instances in which pregnant women would be exempted from those either.

The conclusion is therefore that a vaccine requirement satisfies the legal standards for providing pregnancy accommodations at the workplace.

V. CONCLUSION

After considering the statutory standards and the legal doctrines developed by the Supreme Court for accommodating employees who are religious observers, people with disabilities, and pregnant women, I conclude that these standards do not contradict a vaccine requirement whether it was independently initiated by private employers or was put in place because of the proposed OSHA COVID ETS. The option to get tested periodically instead of being vaccinated can be considered in and of itself a reasonable accommodation among other possible accommodations.

Chairwoman Adams, Chairwoman Bonamici, Chairman Scott, Ranking Member Foxx, Ranking Member Fulcher, Ranking Member Keller, and members of the committee and subcommittee, I am appreciative of your focus on this important issue, and I thank you for the opportunity to testify before you today. I look forward to answering your questions.

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[41] *Id*. at 208.
[42] *Id*.
[43] Bradley A. Areheart, *Accommodating Pregnancy*, 67 ALA. L. REV. 1125, 1128 n. 7 (2016) ("certainly, *Young* has made it more likely that employers will voluntarily extend pregnancy accommodations simply as a matter of being safe rather than sorry").
[44] Young, *supra* note 40, at 206
[45] 42 U.S.C. § 2000e(k).