



Briefcase

January, 2020 Vol. 54, No. 1

A Publication of the OKLAHOMA COUNTY BAR ASSOCIATION

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MANDATORY EMPLOYEE VACCINATIONS

Can Employers Require the Covid-19 Vaccination of Employees?

By: Katherine Mazaheri and Chelsi Chaffin Bonano

I. Introduction

On December 14, 2020, healthcare workers across the United States became among the first people to receive the first COVID-19 vaccination.¹ The vaccine is believed to be a turning point in the Coronavirus Pandemic that has been ravaging the world for nearly a year. The supply of vaccines is currently limited; only healthcare workers and long-term care facility residents are getting vaccinated.² However, the supply is expected to increase to the point that the vaccines will be open to the public in general.³ Because the vaccine is so new, the long-term effects are still unknown. Many people are worried and feeling reluctant to get vaccinated when available to the public. The more the vaccine supply becomes available, the more

people will be wondering, “am I going to be required to get vaccinated?” In addition to these concerns, employers wanting to create a safe working environment will be asking a similar question: can I require my employees to be vaccinated? This article will explore current precedent and guidance for requiring vaccinations, exceptions, and other considerations employers should take into account before issuing a mandatory policy for vaccinations.

The United States has historical precedent for requiring mandatory vaccinations. In 1905, the United States Supreme Court upheld a state mandated compulsory vaccination program for smallpox in *Jacobson v. Massachusetts*.⁴ The Court ruled the program was constitutional; it did not violate the 14th Amendment right to liberty because it had a real and substantial relation to the protection of public safety.⁵ Over a cen-

tury later, and with a whole new group of Supreme Court Justices presiding, there is no guarantee the Supreme Court would rule the same way again. However, if the Supreme Court follows precedent set by *Jacobson*, individual states could mandate vaccinations if the legitimate goal was the protection of public safety. States, however, may be less likely to mandate vaccines given the political challenges they could face with their constituents. Employers, on the other hand, not facing such political challenges may be very eager to require their employees to be vaccinated.

There are many similarities to this pandemic and the seasonal flu, and a comparison can be drawn regarding the flu and its vaccination in the workplace. The Centers for Disease Control (CDC) recommends that everyone over the age of six months should get the flu vaccine.⁶ They also advise

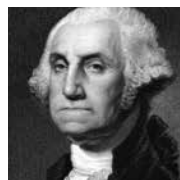
employers to encourage their employees to get the flu shot, even recommending that the employer host a flu vaccine clinic for the employees to attend with relative convenience.⁷ Additionally, the Equal Employment Opportunity Commission (EEOC) has issued its guidance for infectious diseases, like the flu, in the workplace. The EEOC advised flu vaccines may not be mandatory for all employees.⁸ This is because certain exceptions must be made for employees with disabilities and for religious accommodation requests.⁹ Furthermore, the United States Occupational Safety and Health Administration (“OSHA” has specifically stated its allowance for employers to mandate flu vaccinations, with the same exceptions being religious and medical disability.¹⁰ With these guidelines in mind, many

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January 2021

Briefcase is a monthly publication of the Oklahoma County Bar Association
119 North Robinson Ave.
Oklahoma City, OK 73102
(405) 236-8421

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For advertising information,
call 278-2830.

Postmaster: Send address changes to OCBA Briefcase, 119 North Robinson Ave., Oklahoma City, Oklahoma 73102.

Journal Record Publishing produces the Briefcase for the Oklahoma County Bar Association, which is solely responsible for its content.

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From the President



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Why Bother with New Year's Resolutions?



Hon. Don Andrews
President, OCBA

According to The History Channel, the ancient Babylonians are said to have been the first people to make New Year's resolutions, some 4,000 years ago. They were also the first to hold recorded celebrations in honor of the new year—though for them the year began not in January but in mid-March, when crops were planted. During a massive twelve-day religious festival known as *Akitu*, the Babylonians crowned a new king or reaffirmed their loyalty to the reigning king. They also made promises to the gods to pay their debts and return any objects they had borrowed. These promises could be considered the forerunners of our New Year's resolutions. If the Babylonians kept to their word, their Pagan Gods would bestow favor on them for the coming year. If not, they would fall out of their Gods' favor—a place no one wanted to be.

A similar practice occurred in ancient Rome, after the reform-minded emperor Julius Caesar tinkered with the calendar and established January 1 as the beginning of the new year circa 46 B.C. Named for Janus, the two-faced god whose spirit inhabited doorways and arches, January had special significance for the Romans. Believing that Janus symbolically looked backwards into the previous year and ahead into the future, the Romans offered sacrifices to the deity and made promises of good conduct for the coming year.

For early Christians, the first day of the new year became a traditional occasion for thinking about one's past mistakes and resolving to do and be better in the future. In 1740, the English clergyman and founder of Methodism, John Wesley, created the Covenant Renewal Service, most commonly held on New Year's Eve or New Year's Day. Also known as watch night services, scriptures were read and hymn were sung, all of which served as a spiritual alternative to the raucous celebrations normally held to celebrate the coming of the new year. Now popular within evangelical Protestant churches, especially African-American denominations and congregations, watch night services held on New Year's Eve are often spent praying and making resolutions for the coming year.

Despite the tradition's religious roots, New Year's resolutions today are a mostly secular practice. Instead of making promises to their Deity or Deities, most people make resolutions only to themselves and focus purely on self-improvement. As many as 45% of Americans say they usually make New Year's resolutions, but only

8% are successful in achieving their goals. I doubt the dismal record will hamper resolve—this year or next, or anytime soon.

Even though I consider myself a goal-oriented individual, I'm not much for New Year's resolutions. Resolutions seem cliché and rather tedious. The making and keeping of resolution can be undaunting. Why bother when even the toughest of individuals buckle under the pressure of this immense task? We all comprehend some of the more valiant and well-intentioned goals, such as losing weight, getting fit through more exercise and/or eating better, quitting a bad habit like smoking, or saving money. Some people try to think outside the box when making New Year's resolutions instead. Here are a few examples:

"Get a passport. Not to travel, just to own a passport." (from Parenting.com).

"Turn off Tinder and try to talk to people in real life." (from Metro News).

"Wave to fellow motorists at 4-way stops." (from USA Today).

"Stop inserting slightly incorrect facts into Wikipedia entries." (from Parenting.com)

"Go to work without a hangover at least twice a week." (from Metro News).

"Collect airsick bags from every major airline." (from USA Today).

"Just look at my bank balance – refusing to doesn't mean I have more money." (from Metro News).

"To randomly sew one sequin onto every piece of clothing you own." (from Mashable.com).

"Delete the Facebook app from my phone and only log in to check it once a day." (from Metro News).

"Finish a burrito from Chipotle." (from Mashable.com).

"Try extreme ironing." (from USA Today).

"Find someone to kiss besides my dog." (from Mashable.com).

"Learn a decent party trick." (from Real Buzz.com).

"Knit more sweaters for freezing trees." (from USA Today).

"Never by accident walk in on my dad cleaning the shower naked ever again." (from Mashable.com).

"Stop procrastinating...starting tomorrow." (from Twitter).

"Not make any New Year's resolutions." (from Twitter).

Hopefully, these unique resolution ideas will inspire you to think outside the box. If your box is full of cookies, candies, cakes or any other pastry, I suggest that you simply throw the box away ... and purchase a box of quinoa, kale, chia seeds, or blueberries. Best of luck! Should you fail this year, there's always 2022.

Correction

The December 2020 article on Frank Miskovsky indicates he was a Special Judge. The Briefcase has subsequently learned Judge Miskovsky was in fact a County Judge County Judge. As Kent Frates explained: "That was before court reform and there were no Special Judges. A County Judge had jurisdiction over probate, guardianships and children's matters. It was an elected office. On a personal note, Frank was a good judge. As a young lawyer he always treated me and everyone else, except his brother George, courteously and fairly."

Stump Roscoe

By Roscoe X. Pound

Dear Roscoe: I've never really noticed it before, but during the recent Christmas shopping frenzy I noticed what seemed to be an uptick in stores and restaurants to the effect of "we reserve the right to refuse service to anyone." I figured the apparent uptick had to do with so many stores requiring masking in light of the pandemic. But how much teeth is there in such signs." S.M., Edmond, OK.

Dear S.M.: Happy New Year to you and all my other OCBA pals. As to your question, you may be surprised. Not only does the answer vary from state to state but also from city to city in some States. In addition, you will also find a disparity among businesses. Take, for example, restaurants and diners. The Civil Rights Act of 1964 explicitly prohibits restaurants from refusing service to patrons based on race, color, religion, or national origin. In other words, restaurants do not have a constitutional right to refuse service. However, as we have seen recently, bakeries and event venues may refuse to do business in terms of same sex marriages as per recent SCOTUS decisions. Sexual orientation and gender identification issues are not specifically enumerated in the Civil Rights laws. On the other hand, you may recall a couple of years back when Presidential press secretary Sarah Huckabee Sanders and her party were denied service at a Virginia restaurant. The owner said the denial stemmed from Ms. Sanders' support for Trump's policies. Had Ms. Sanders been refused service a short distance away in D.C., because of her political affiliation, that would have been illegal in the nation's capital. DC has a list of protected classes including political affiliation. Virginia has a similar list, but it doesn't include political affiliation.

The "refuse service to anyone" signs became popular in the 1960s when segregation remained in bloom, certain people needed to learn their place, and respectable businesses didn't want no long-haired, pinko hippies scaring decent folks like you and me. Some have argued that such signs remain with us as vestigial reminders of yesterday's prejudices. Unfortunately, one needn't spend any great amount of time reading or listening to the news to realize that "vestigial" does not accurately describe the prejudice.

Signs or no signs, most businesses have the right to refuse service for cause. Rudeness, health hazards, dress codes (fairly applied), or threatening behavior may result in a customer's refusal or ejection. Keep in mind thought, that there are wrong ways to perform

even legal acts. Businesses open to the public should embrace de-escalation in these situations. For those situations truly involving a threat to health and safety of employees and customers, summon the police or security sooner rather than later to avoid the risk of making a bad situation worse.

Dear Roscoe: I have a client who recently served as a juror in a felony case. He said that during breaks, other jurors began exchanging ethnic jokes. The accused was not a member of the groups being disparaged. He therefore did not report it. On second thought, however, he began to wonder if it might've provided the defendant with a basis for mistrial. What do you think? K.K., OKC.

Dear K.K.: Well, I think that the rule in Oklahoma adopts the federal standard that "a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions in reaching a decision upon the verdict or concerning the juror's mental processes in connection therewith, and a juror's affidavit or evidence of any statement by the juror about any of these subjects may not be received. However, a juror may testify concerning whether prejudicial facts not of record, and beyond common knowledge and experience, were improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror." Fed Rule of Evidence 606. SCOTUS, in *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855 (2017) held "that where a juror makes a clear statement that indicates he or she relied on racial stereotypes or animus to convict a criminal defendant, the Sixth Amendment requires that the no-impeachment rule give way in order to permit the trial court to consider the evidence of the juror's statement and any resulting denial of the jury trial guarantee."

That's all well and good, but in *Pena Rodriguez* the racial stereotypes at issue dealt with Hispanic stereotypes, the ethnicity of the accused. I'm not presently aware of anything definitive by either SCOTUS or the Oklahoma Court of Criminal Appeals addressing this issue. However, a Pennsylvania appellate court recently ruled, in *Commonwealth v. Rosenthal*, 233 A.3d 880 (PA Sup. 2020) that "offhand comment[s] evincing racial prejudice but not directly calling into question the integrity of verdict that *Pena-Rodriguez* stated fall outside the Sixth Amendment exception to the no impeachment rule." I can't say I'm 100% satisfied with this ruling. Stay



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tuned for further developments.

I pulled into a visitor's space in front of the office. Ordinarily, I'd use my own dedicated slot. Today, however, I found it, and the spaces on either side, occupied by a gleaming aircraft carrier length '76 Cadi Fleetwood the color of eggnog way beyond its "use by" date. Only one person drove a car like that, probably the one person around here who could get away with it. For all its age and kitschiness, it remained in cherry condition, other than its upholstery carrying the redolence of 40 years of Macanudos. Tony Segar sat in my office, his feet propped up on the desk. Rae jerked her thumb in that direction, as if I needed a warning. An aging but still hard thug named Donato parked himself lengthwise across the visitors' couch in my waiting area, half-ass reading a folded *New York Daily News*. I nodded to him as I passed by. He removed a toothpick from his mouth and raised it to me in something like a salute. He didn't look up, but he didn't miss much either.

"Roscoe," Tony greeted me amiably. He did not get up from my chair. "Coffee?" he asked.

I looked at the shallow puddle and dregs in the bottom of pot. "I'll pass, thanks," I said, and took a seat.

"Word is someone tried to pull your teeth," he said, making a pistol with his left thumb and index finger.

"I'm like a shark," I told him. "Take one tooth out and another grows in its place."

He nodded approvingly. "Yeah, I guess so. I was gonna try and help you out but I found out you was already re-heeled."

"I appreciate the thought."

He waved it off like it was no big deal. "You know you're dealing with Paddy Hughes' crew."

"If he's as good mobster-wise as he as a County Freeholder I'll probably be OK. If he'll put a short leash on the toady shaking down delis and meat markets around town, problem solved."

"Frankie Basile. Paddy gives him cover but he don't hold his leash."

"Who does?"

"Frankie went rogue a long time ago. A lot of people owe him for various and sundry. People who believe in paying their debts in cash or in kind."

"You?"

"Nah. His prices were too high. I hear he needs money now, some kinda big score scam having something to do with down The Shore. Some say if he knocked over Fort Knox he might not have enough to do whatever it is he's wanting to do."

"No help?"

The old man shrugged. "Roscoe, I keep telling you I'm retired. Oh, and Ernie's out of this one as well."

"For a retired guy I think you know a lot."

"Roger Staubach retired from football but he still reads the sports pages."

He fired up a new cigar from the butt of the old one, clapped me on the shoulder and walked put. People sometimes get the wrong impression of Tony. He comes across as jovial and avuncular, but in reality he's quite scary. My takeaway from this conversation was that when someone frightens scary people, you should always take heed.

Volunteer Opportunities

Each month in 2021, we will attempt to offer places and sites for you to find volunteer opportunities. Let us know if you have someone/someplace you want to add.

Volunteer at Palomar

Imagine yourself rushing into a strange building, children in tow. You are scared, hurt, and have no place to rest or find safety. Then, instead of walking into a gray, gloomy building, you open the door of Palomar to find a calm, reassuring voice and a safe space to sit and rest. Someone offers you coffee, and a

volunteer offers to show your children the playroom. All of a sudden, getting help seems a little less frightening, and there is a glimpse of something you did not believe you would ever find again: HOPE.

<https://palomarokc.org/volunteer>

Volunteer at OKC Salvation Army Client Choice Food Pantry

– 1001 N. Pennsylvania, Oklahoma City, OK 73107
Filling shopping carts for clients
Stock pantry
Days & Hours -- Monday through Friday, 8:30am to noon / 1pm to 3pm

Family Shelter – 1001 N. Pennsylvania, Oklahoma City, OK 73107

Teach educational classes

Lead craft time

Help with seasonal parties

Days & Hours - Monday, Friday & Saturday – 5 p.m.

Contact: liz.banks@uss.salvation-army.org

Volunteer at YWCA Oklahoma City

Through the generosity of individuals, businesses and groups, YWCA Oklahoma City is able to address the needs of families in our community. Volunteers contrib-

ute unique talents, skills and knowledge that assist YWCA OKC in achieving our mission of eliminating racism and empowering women. Volunteer opportunities include:

Administrative Assistance

Child Services

Community Client Advocacy

Court Advocacy

Events/Special Projects

Our Sisters' Closet

Outreach

Prevention

Sexual Assault Program Advocacy

<https://www.ywcaokc.org/volunteer>

Handling Stress in a New Year

By Miles Pringle

2020 is gone and there is hope for better days ahead. Vaccines are starting to be distributed widely and a tumultuous election is over. That does not mean the stress caused by the pandemic is relieved. To the contrary, transmission and death rates in Oklahoma and the nation are at all-time highs, so vigilance continues to be the watchword. Moreover, the stress cause by political division does not appear to have subsided as demonstrated by the storming of the U.S. Capitol (a sentence I never thought I'd be writing about our country).

You are not alone in feeling the stress. According to the American Psychological Association, "nearly 8 in 10 adults (78%) say the coronavirus pandemic is a significant source of stress in their lives, while 3 in 5 (60%) say the number of issues America faces is overwhelming to them."¹ It also appears that younger Americans are handling the current situations worse than older generations. The APA found that 34% of Gen Z adults reported having worse mental health now than a year ago, followed closely by Gen X (21%), with millennials (19%), baby boomers (12%) and older adults (8%).² Additionally, "Gen Z adults are the most likely to report experiencing common symptoms of depression, with more than 7 in 10

noting that in the prior two weeks they felt so tired that they sat around and did nothing (75%), felt very restless (74%), found it hard to think properly or concentrate (73%), felt lonely (73%), or felt miserable or unhappy (71%)."³

Even when these omnipresent tensions subside, **and they will**, lawyers will still be afflicted with some of the highest levels of stress. You may be familiar with some of these statistics, but it is important to remember in our profession. More than 45% of attorneys experience depression during their career, well above the American average of 6.7%, with nearly 12% reporting suicidal thoughts.⁴ In fact, an old, but nevertheless alarming, report from 1997 suggested that lawyers comprise 10.8% of national suicides.⁵

So how should we deal with stress? There are many methods and we will address a few here, but first it might be helpful to understand what stress is exactly. "Stress is the body's reaction to any change that requires an adjustment or response. The body reacts to these changes with physical, mental, and emotional responses."⁶ There are two main systems involved: 1) the 'fight-or-flight' response, in which your body releases hormones that speed up blood circulation, breathing and has "profound effects on attention, working memory and long-term memory;" and, 2) following the flight-or-flight response, involves the

production of cortisol which enters the brain to affect cognition and behavior.⁷

This physical response is the body's natural reaction to help us navigate and respond to difficult situations. It is not a bad thing in and of itself and can be very helpful; however, it is not intended to be a continuing state. Consequences of chronic stress include "diseases of heart and circulation, of stomach and gut, problems with sexuality, weakening of immune-system, psychiatric disorders."⁸ All of these conditions likely create even more stress for us to deal with and can cause a feedback loop with dreadful consequences.

What causes stress? Well a lot of it depends on the person. What is stressful to one person might not be for another. With that said, there are some common triggers. Common examples include: a) living through a natural or manmade disaster; b) living with chronic illness; c) experiencing familial stressors such as an abusive relationship, an unhappy marriage, or prolonged divorce proceedings; or, d) having little work-life balance, working long hours, or having a job you hate.⁹

Regardless of what is causing the stress in your life (or if you are just looking to improve your quality of life) here are some tips from the APA:¹⁰

Try to eliminate the stress triggers. This obvious tip might be difficult to implement, but where possible try and cut/trim unnecessary stressors. For example, you can drop some responsibility, relax your standards or learn how to ask for help.

Cultivate a positive social network. Strong social support can improve resilience to stress. You can reach out strategically to friends or family members you believe will be good at listening and sympathizing. Giving support can also increase positive emotions and decrease negative emotions. Just make sure your relationships stay in balance.

Healthy eating. While some stress hormones can kill appetite, perversely, these same hormones can also cause fat and sugar cravings. You do not need a dramatic change. Just aim to consume a variety of fruits and vegetables as part of your daily diet. Avoid using substances such as alcohol to dampen the stress response since substances do not solve the root of the problem and can have serious health effects.

Meditate. This is a personal favorite. Research shows that mindfulness meditation can reduce psychological stress and anxiety. These meditation sessions do not even need to take more than 5-10 minutes a day to show improvement. All you have to do to get started is sit and breathe. Focus on the present moment; if stray thoughts intrude, acknowledge them and then let them go. Don't judge yourself for any mental wavering. Gently refocus and bring your attention back to the present moment. There are lots of audiobooks, apps, and podcasts to help you get started on your meditation journey.

Get good sleep. Stress affects sleep, which in turn affects our ability to

handle stress. Tips on better sleeping include: i) a consistent sleep routine that allows time to wind down before lights out; ii) meditation and relaxation; iii) avoiding caffeine and alcohol in the late afternoon and evening; iv) avoiding screens (the blue light can suppress the sleepy hormone melatonin, and checking social media may ramp up your emotions); and, v) exercise – a large body of research suggests that physical activity can improve sleep, especially for middle-aged and older adults.

Exercise. Movement can not only improve sleep, it can directly combat stress. In one study, working adults who participated in moderate physical activity had half the perceived stress as working adults who did not participate. Physical activity may also cancel out some of the negative effects of stress, including the impact of stress on the immune system.

Make time for fun! When we get busy we tend to drop our leisure activities, but that can have a detrimental effect overtime. Try and make time for healthy, fun activities. If you don't have a hobby, why not try something new?

Most importantly, **Seek help.** It is not a weakness to be overwhelmed by life's obligations. If you need help, ask for it, whether from a family member or a professional. You should know that the OBA offers all bar members up to six hours of free short-term, problem-focused or crisis counseling. The service is strictly confidential. For help with stress, depression or addiction, call the Lawyers Helping Lawyers (LHL) hotline (800-364-7886) to be referred to a counselor in your area. The hotline is available 24 hours a day/7 days a week. Identifying participant information is not made available to the OBA and services are provided through a separate, contracted organization. If you have a question or request that is not urgent, another option (in addition to the hotline) is to email oklahl@gmail.com. Responses to email will take place during regular Monday-Friday business hours.

Endnotes

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7. Id.

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9. Healthline, "Everything You Need to Know About Stress", available at <https://www.healthline.com/health/stress>.

American Psychological Association, "More Than 80% of Americans Report Nation's Future Is Significant Source of Stress, Survey Says", June 18, 2020, available at <https://www.apa.org/news/press/releases/2020/06/americans-future-stress>.

10. American Psychological Association, "Healthy ways to handle life's stressors When stress becomes unmanageable, try these evidence-based tools to tackle it in healthy ways", Nov. 1, 2019, available at <https://www.apa.org/topics/stress-tips>.



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In Memoriam

Mathew M. Dowling

November 25, 1931 – December 11, 2020

Mathew M. (Matt) Dowling passed away peacefully on December 11, 2020 in Oklahoma City. Matt was born to John Wesley Dowling and Mary Elizabeth "Mayme" Hall Dowling in Oklahoma City on Thanksgiving Day, November 25, 1931. He graduated from Putnam City High School in 1950. During his senior year, he enlisted in the Marines where he planned to play the Cornet in the USMC Band. His first assignment came in February when he and several other recruits were called out of high school to hunt for "Leapy" the leopard, who had escaped from the Oklahoma City Zoo and was loose in the city. His photo on the front page of the paper came as a great surprise to his mother who did not know he had enlisted! Matt completed basic training and sniper training at Camp Pendleton. On his way to Korea during the conflict, he was taken off the ill-fated ship due to a heart defect that was never again detected. Upon return, he spent six weeks in a naval hospital where his complete colorblindness was analyzed and studied for use in camouflage development. He then received an honorable medical discharge.

Growing up, Matt attended Olivet Baptist Church where he was baptized as a child. He later joined Westminster Presbyterian Church where he served for many years as a deacon and elder. He was a founding board member of Westminster School. Later, he joined Crossings Community Church where he enjoyed

Sunday School and Men's Bible Study.

Matt graduated with a Business Degree from OU, and in 1957, he graduated from the OU School of Law. He remained an avid Sooner fan all of his life. In 1956, he married Ann Davenport and they lived in OKC until her passing in February 1977. They had two daughters, Laura and Elaine. Matt and Ann were some of the early homeowners in Quail Creek where Matt became a lifelong member of Quail Creek Golf and Country Club spending many wonderful days on the golf course and in the card room. Matt married Linda Brown in 1978 and they lived happily in Oklahoma City for 42 years.

After Law School, Matt went into the family school supply business, Dowlings Inc. He also went on to found Educational Electronics Inc (EEI) and Math-U-Matic Inc. In 1975, Matt returned to the Law opening his own practice with his childhood friend, Bob Schick. Matt was truly a general practitioner taking on many different types of cases, but he always loved criminal defense law. Toward the end of his career, he became well known for his pardon and parole work and spent many hours visiting inmates in prisons across Oklahoma. He was well known throughout the hallways of many Municipal, County, Appellate and Federal Courthouses.

Matt was a recovering alcoholic for the last 38 years. He credited AA and his return to sobriety

with saving his life. Matt loved the game of golf and enjoyed playing many pro-am tournaments around the country where he had the pleasure of playing with Bob Hope, Arnold Palmer, Bob Newhart and many others. On the golf course, in the courthouse, in the card room and at home, Matt is fondly remembered for his brilliant mind, photographic memory, creative ideas, fun loving sense of humor, incredible generosity and enduring charm. Matt was preceded in death by his parents, Doc and Mayme Dowling; his brothers, John and Dick Dowling; and his wife, Ann Dowling. He is survived by his wife of 42 years, Linda Dowling; his daughters Laura Dowling Feix (Terry) and Elaine Dowling (Monty Walls); his grandsons Mathew Cole Feix, Carson Feix (Rachel), and Tucker Feix (Holly); and his great granddaughter, Marigold Feix (Carson & Rachel) along with many nieces and nephews.

The Dowling family would like to thank Integris Hospice, Providence Home Health, caregivers Marsha and Marjorie and Physical Therapist, Ralph Redline for the loving care they provided. A Memorial Service was held on Thursday, December 17, 2020 at 10:00 am in the Sanctuary at Crossings Community Church. The family asks that social distancing be observed and masks be worn. Services were streamed at <https://vimeo.com/490957071/2eec325ada>. In lieu of flowers, please make donations to the Crossings Community Church Prison Ministry.

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GEORGE WASHINGTON AND THE RELINQUISHMENT OF POWER

By Clark Musser

As we Americans look back upon an election and the inauguration of a new president who will likely have a political agenda significantly different from his predecessor's, it seems appropriate to reflect upon the one person who, more than any other, set the precedents that when taken together form the cornerstone of modern constitutional democracies:

Relinquishments of power are peaceful and the transfers thereof from one governing authority to another are orderly.

General George Washington's relinquishment of "near ultimate power" in the immediate aftermath of the American Revolution, the restraint of power exercised by Citizen George Washington as President of the Constitutional Convention, and the refusal of President George Washington to serve a third term as chief executive of the United States established the precedents that became the foundational elements of this cornerstone. As we review each of these three episodes in Washington's life, it is important to keep in mind that nothing in world history was comparable to what he accomplished from the time he took command of the Continental Army to the time he refused to allow his name to be placed in nomination for a third term as president of the birthplace of constitutional democracy.

As historian Edward Larson expressed it, "George Washington's career has no parallel in American history and few, if any in world history."

COMMANDER IN CHIEF

Two months after the battles of Lexington and Concord, which marked the outbreak of armed conflict between the kingdom of Great Britain and its thirteen colonies in America, delegates to the Second Continental Congress elected 43-year old George Washington Commander in Chief of the Continental Army. His election was unanimous. He was charged with the responsibility of defending the thirteen colonies and waging war against Great Britain, which had the strongest economy and the mightiest military in the world. General Washington was effectively the commander in chief of an army of one; there was as yet no functioning Continental Army. Together with Congress, Washington had to create an army, supply and maintain it. Most dauntingly and against all odds, Washington had to lead his army to victory over an unrivaled economic and military juggernaut, which he accomplished—to the astonishment of the western world—over the course of the ensuing eight-year war, even today the

longest declared war in the history of the United States.

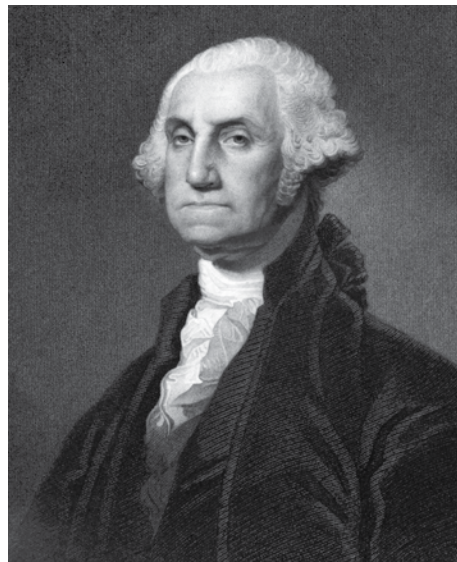
In the estimation of leading historians, such as David McCullough, Joseph Ellis, Gordon Wood, Edward Lengel and Edward Larson, no one else could have accomplished what Washington did. Without Washington as Commander in Chief, the Continental Army could not have prevailed over Great Britain.

How did His Excellency, as the general was often addressed, do it? How was Washington's victory over Great Britain, which is described by historian Peter Mancall as "the most improbable military victory in all of Western history," possible? Washington was a farmer; he had never had any formal military training. He had served courageously and displayed significant leadership abilities some 18 years earlier in the French and Indian War, but when "compared to the British officers he was sure to face on the battlefield," Ellis says, "Washington was a rank amateur." Yet despite his relative inexperience, Ellis continues, "Washington was composed, indefatigable, and able to learn from his mistakes...[and even] his critics acknowledged he could not be bribed, corrupted or compromised."

"Washington never adopted a defeatist attitude," historian Ron Chernow writes, "and his character and his leadership by example defined the Continental Army, which in turn helped mold the very character of the country."

Washington said the war was won "by a concatenation of causes" that had never before occurred in human history and "in all probability at no time, or under any [c]ircumstance, will combine again." The general called particular attention to the perseverance of the officers and soldiers of the Continental Army, "whose sacrifices would never be fully understood or appreciated." Washington's modesty would not allow him to give any credit to his own character and leadership.

Washington was unwavering in his belief that the military must be subject to "civilian control," although he did not use the term. Washington was, Chernow writes, "*staunch in his deference to civilian control over his actions and his army...despite innumerable frustrations in dealing with bureaucratic incompetence in Congress.*" [Emphasis added.] Such deference is particularly evident in Washington's communications to members in Congress and the provincial governments, who were responsible for providing the general with materiel and troops. Despite the political leaders' continual dereliction, and oftentimes incompe-



George Washington. georgios via depositphotos.com

tence, Washington's letters were in the form of requests, never demands.

In May of 1782, by which time victory over Great Britain was assured, General Washington received a seven-page letter laced with fulsome praise from a representative of his officer corps, which suggested the general should reign as America's first monarch. Washington's immediate reply, says Chernow, "fairly breathed with horror." "Be assured," Washington wrote to the offending officer, "no occurrence in the course of the war has given me more painful sensations than your information of there being such ideas existing in the army...[that] I must view with abhorrence and reprehend with severity." "The general, for the first and only time in the war," Chernow writes, "demanded proof from his aides that his response was sealed and posted."

If General Washington would not be king, no one thereafter could ever reign over the people of America.

As momentous as the victory over Great Britain was, General Washington's actions in the immediate aftermath of the Treaty of Paris (September 1783), which formally ended the war, were more important to the preservation of independence and the individual freedoms we enjoy today. General Washington appeared before the Confederation Congress (successor to the Second Continental Congress) in December, 1783, and without equivocation surrendered his military commission with these words, "Having now finished the work assigned me, I retire from the great theater of action; and bidding an affectionate farewell to this august body under whose orders I have so long acted, I here offer my commission and take my leave of all the employments of

public life." Members of Congress and visitors in the gallery wept. Not since the great Lucius Quinctius Cincinnatus of the early Roman Republic had there been a comparable relinquishment of power, nor has there been one since General Washington's.

Thomas Jefferson would later write to the retired general, "The moderation and virtue of a single character [General Washington's] ...probably prevented this revolution from being closed, as most others have been, by a subversion of that liberty it was intended to establish."

Washington did what Julius Caesar, Oliver Cromwell, Napoleon, Lenin, Mao and Fidel Castro, could not: He relinquished his power—described by historian Allen Guelzo as "near ultimate power"—over both the military and the people. He returned to private life, fully intending never to reenter the public arena. General Washington's relinquishment of power is, according to historian Thomas Fleming, the "most important event in American history." The defeated King George III asked the American portraitist Benjamin West, "Now that Washington is victorious, will he stay on as head of the army or will he become head of state?" "I am told," said West, "he has returned to his farm." The thunderstruck king replied, "If that be so, he will be the greatest man on earth." Many in the western world agreed.

"Cromwell and later Napoleon," Ellis writes, "made themselves synonymous with [their respective revolutions] in order to justify the assumption of dictatorial power... Washington made himself synonymous with the American Revolution in order to declare that it was incompatible with dictatorial power."

As in war, as in peace, George Washington led by example.

Washington's deference to Congressional authority throughout the war, and his categorical relinquishment of power after his success as Commander in Chief mark fundamental precepts that were woven into the fabric of the United States Constitution four years later: (1) civilian control over the military; and (2) the American people will never accept governance by hereditary right or military takeover.

PRESIDENT OF THE CONSTITUTIONAL CONVENTION

In 1787, four years after American independence from Great Britain had been achieved, nearly every nation on earth was ruled by a monarch. What the Framers of the United States Constitution submitted to the thirteen states for ratification was unique: It provided for the establish-



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ment of a representative republican form of self-government with no precedent in world history, notwithstanding the city-states of ancient Greece, and the Swiss Cantons. When the Constitution was approved by the requisite nine of the thirteen states in June of 1788, it became the supreme law of the land, meaning the laws promulgated by the national government would take precedence over the laws of the ratifying states. Over the course of the ensuing nearly two and a half centuries, the Constitution has become one of the most influential secular documents in world history. We tend to take the Constitution's creation and continued existence for granted, nevertheless, when viewed in the context of the eighteenth century, it is aptly described by historian Catherine Drinker Bowen as the "Miracle at Philadelphia." The Constitution may not have been a miracle, but its ratification by "We the People" is a testament to the Framers' creativity and prescience, and perhaps above all, to their willingness to compromise. Noah Feldman, Harvard law professor and author, tells us compromise is essential to the effective governance of a constitutional democracy.

But for the presence and support of George Washington, as well as the preparation and erudition of James Madison, any attempt to create such a government would have been stillborn.

Madison (age 36) and Alexander Hamilton (age 32) were the principal initiators of what would become known as the Constitutional Convention. These two men of towering brilliance believed a new and strong national government was essen-

Most importantly, the people of the thirteen states would approve the delegates' work product only if they knew Washington--the one person on earth who had proven he could be trusted with power---had overseen the process and approved the final product.

tial to the preservation of the independence and harmony of the thirteen states. Madison and Hamilton were convinced, as was Washington, that in the absence of such a government, the states would breakup into smaller, weaker confederacies and in time succumb to a European power. Their proposed national government must therefore be fully empowered to hold the states together and thwart invasion from overseas. They foresaw a national government vested with powers superior to those of the states, which would include among other things, the power to settle disputes between the fiercely independent states, negotiate treaties with foreign countries, regulate commerce among the states, provide for a standing army to protect against foreign aggressors, stabilize the economy, and tax the people to support the objectives of the proposed national government.

Madison and Hamilton knew they had Washington's support for the Convention and for their transformational and controversial goals for nationhood, but they believed his presence at the Convention was also essential. Only if Washington attended the Convention would the states be willing

to finance the attendance of their respective delegates. Only if Washington played an active role in the Convention would the delegates persevere to the degree necessary to establish a framework for a new national government. Most importantly, the people of the thirteen states would approve the delegates' work product only if they knew Washington--the one person on earth who had proven he could be trusted with power--had overseen the process and approved the final product.

Washington was, however, reluctant to attend the Convention because he had conspicuously resigned his military commission four years earlier, with no intention of further public service. He was concerned that his presence at the Convention could be construed as a breach of promise. But Madison and others were persistent, eventually persuading the retired general that the Convention could not succeed without his presence. Citizen Washington relented and attended as a delegate from Virginia.

On May 25th, 1787 delegates from 12 of the 13 states—Tiny Rhodie or Rogues' Island, as Rhode Island was derisively called, refused to send delegates—gathered

in the Pennsylvania State House (now known as Independence Hall) in Philadelphia. The stated purpose of the Convention was to revise the Articles of Confederation, which created the Confederation Congress to oversee the Revolution. What Washington, Madison and Hamilton had in mind, however, was far more ambitious than a mere revision of the Articles. They sought a new national government to which the states would be subordinate. The first order of business was to elect a president of the Convention, and the vote for Washington was unanimous.

Opposition to the national government favored by Washington, Madison, Hamilton and others was formidable. The opponents' objections were visceral, and their numbers were significant and influential. A national government with powers superior to those of the states, the opponents believed, would be a blatant repudiation of the independence achieved four years earlier. And history was on the side of the opponents: Strong national governments seldom, if ever, relinquish power; rather, they expand their power by reducing the influence of smaller political units and depriving the people of their individual liberties. Bitter and harsh arguments flowed between the proponents and opponents. Washington spoke only twice during the Convention, and then only on procedural matters. He believed his utterances would have an undue influence on the delegates. But Washington's continual presence at the proceedings—in fact, he

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and Madison were the only two delegates who never missed a day of the Convention—coupled with the fact every delegate knew the man seated on the dais and facing them favored a fully empowered national government, compelled the delegates to move from argument to debate, and from debate to compromise in a mere four months.

On September 17, 1787 the Framers issued forth unto “We the People of the United States” and a skeptical world a framework for self-government, the United States Constitution. The proposed government was to be headed by a president, Congress with its Senate and House of the People, and a Supreme Court. The laws of the states would be subordinate to those promulgated by the new national government. The Constitution provided it would become effective when nine of the thirteen states ratified it, and within only nine months, the requisite number had done so. Ratification was hardly conceivable just a few months earlier.

Washington’s relinquishment of near ultimate power four years earlier assured the people of the proposed government, which he would surely head, would be one of restraint and in the best interests of We the People, not himself. Pierce Butler, delegate from South Carolina, doubted the presidential powers, which the Constitution vested in the president, would have been so great “had not many members cast their eyes toward General Washington as president and shaped their ideas of the powers to a president by their opinion of his virtue.”

By mid-1790 all thirteen states had ratified the Constitution, giving birth to a union of states, hence America’s nationhood. “The Constitution,” according to Akil Amar, a constitutional scholar at Yale, “is the Big Bang of modernity,” which Washington made possible. “In a world hitherto ruled by hereditary monarchs, traditional dogma, or military might,” writes Larson, “nothing like America’s republican experiment had ever occurred. Washington rightly called this a ‘new phenomenon in the political and moral world, and an astonishing victory gained by enlightened reason over brutal force.’”

“Without George Washington,” writes Ellis, “the Constitutional Convention could never have succeeded.”

“The people ratified Washington,” Larson tells us, “as much as they ratified the Constitution.”

James Monroe—a delegate from Virginia to the Convention and the future fifth President of the United States—wrote to Thomas Jefferson, who was serving as Minister to France, informing him of the Convention’s success. “Be assured,” Monroe declared, “[Washington’s] influence carried the government.”

By refusing to serve a third term as president and retiring from public life, Washington declined to influence who his successor would be.

“That the delegates overcame their dread of executive power,” Chernow asserts, “and produced an energetic presidency can be traced directly to Washington’s imperishable presence.”

PRESIDENT OF THE UNITED STATES

Was Washington a consequential president? After all, according to Larson, Washington did not want to be president. The 57-year old Washington “made not the slightest gesture that could be considered campaigning,” writes historian James Thomas Flexner. Washington simply allowed his name to be placed in nomination, and he was elected unanimously. He made it known to his inner circle that he did not plan to serve a full four-year term; rather, he would help organize the executive department, make sure it functioned properly, and then return to his Mount Vernon estate with his beloved wife, Martha.

Early in his first term, it became clear his vision of a secure and prosperous nation would require him to serve a full term, which he did reluctantly, but with an unflinching sense of duty and degree of excellence. As his first term drew to a close, Washington informed his Secretary of the Treasury, Alexander Hamilton, and his Secretary of State, Thomas Jefferson, that he wished to retire to his Mount Vernon estate, saying: “I want to take my spade in hand and work for my bread.”

Hamilton and Jefferson seldom agreed on anything, particularly matters of policy, but on the prospect of Washington’s retirement from office after four years, they had the shared belief that Washington’s continued service was essential to the fledgling nation’s survival. Without Washington’s continuous unifying presence, these two remarkable polymaths feared the fifteen states, which then formed the union, would disunite. As Jefferson said, “Mr. President, the North and South will hang together only if they have you to hang on to.” Ever the virtuous patriot, Washington once again subordinated his personal desires to the needs of the nation that he, more than any other single person, had forged.

Just as four years earlier, Washington made no effort to campaign; he did not even put forth a list of first term accomplishments or a pronouncement of his vision for a second term. “George Washington [did have] three main objectives under the Constitution,” writes Larson, “respect abroad, prosperity at home, and development westward.” The president’s reelection was unanimous, just as his elections for commander in chief, President of the Constitutional Convention and his first

term as president had been. No other president has been elected or reelected by unanimous vote.

During his eight years as president, he stabilized the American economy, in part by creating a national bank (forerunner to today’s Federal Reserve), initially a controversial proposal that only Washington’s enormous prestige and credibility could overcome. He established the dollar as the sole currency and a mint for the production of currency and coinage. Washington approved a plan whereby the national government, as opposed to the individual states, would repay the \$75 million debt incurred by the Confederation Congress during the war, again a highly controversial proposal because some states had already paid their share of the debt. Once the national government assumed liability for the entire war debt, the United States began making payments to creditors, thus attracting vast investments from Europe into the otherwise fragile United States economy. Washington secured the opening of the Mississippi River to commerce, and shipping soared. He settled disputes among the states and negotiated treaties with foreign powers. One such treaty required Great Britain to evacuate its northwestern forts, securing for settlement much of what would become the American Midwest.

Most importantly, Larson tells us, Washington was able to keep the United States at peace during the widening Anglo-French war. This war involved France, to which the United States owed allegiance for its invaluable assistance during the Revolution, and Great Britain, which was the United States’ most important trading partner, thus vital to the economy. President Washington, the most renowned warrior in the world, believed our nascent nation was ill-prepared for war. He thus resisted the demands of jingoistic patriots and politicians flushed with pride and power by the nation’s success in the Revolution. Had Washington allowed the United States to be drawn into the transatlantic war, the United States would have been acutely vulnerable to invasion and subjugation by a European nation.

According to Chernow, Washington’s “legacy as president was a towering one... and his catalog of accomplishments is simply breathtaking.”

“Washington’s presidency,” according to Larson, “lived up to the immense popular expectations.”

During his second term, President Washington did face harsh criticism in an increasingly hostile press. Nonetheless, if presidential polling had existed in Washington’s day, Wood believes his

approval rating at the end of his second term would have been above 90%.

In his two terms as president, Washington presided over one of the most pivotal periods in American history. “The decade of the 1790s [which included Washington’s presidency] was,” according to Wood, “the most awkward, perilous and fragile of any period in our nation’s history, save only the Civil War. It was the strength of character and virtue of George Washington that proved to be the necessary cohesion to keep our experiment in republican government from unraveling and succumbing to either a monarchy or anarchy in the name of self-government, the latter of which happened in France after the French Revolution.” The consequences of the Russian and Chinese revolutions of the twentieth century likewise afford stark contrast with the aftermath of the American Revolution. The leaders of these other revolutions would not relinquish their near ultimate power; instead, they established totalitarian governments that oversaw the extermination of millions of noncombatants in their respective nations.

His final legacy as president, his final gift to the nation he had been so instrumental in founding, was his decision, yet again, to relinquish power. President Washington refused to allow his name to be placed into nomination for a third term, establishing a precedent for relinquishing power after two terms, which was followed by all subsequent presidents until the 1940s when President Franklin D. Roosevelt ran and was reelected for a third and fourth term. The “two-term limit” precedent established by our first president was thereafter forever infused into the Constitution in 1951 by the ratification of the Twenty-Second Amendment.

By refusing to serve a third term as president and retiring from public life, Washington declined to influence who his successor would be. The next president would be elected by We the People. Washington was, in effect, telling all future generations of Americans, all future presidents and all the people of the world: We the People of the United States are sovereign; the president is their servant.

CONCLUSION

Washington’s relinquishments and restraints of power are the precedents for what would become the cornerstone of modern constitutional democracies: Relinquishments and transfers of power can and must be peaceful and orderly, devoid of blades, bullets and guillotines. Yet, we must be ever mindful that this foundational principle is not inviolable; it is vulnerable to attack and diminution by the anarchist and the demagogue. Accordingly, We the People must zealously guard this cornerstone with wisdom and humility, as personified by George Washington.

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Bar Observer

Hall Estill Elects New Shareholders to Oklahoma Offices

Hall Estill, Oklahoma's leading law firm, with offices in Tulsa, Oklahoma City, Denver and Northwest Arkansas, announces that Isaac B. Helmerich has been elected a Shareholder in the Tulsa office and Jared R. Ford has been elected a Shareholder in the Oklahoma City office.

Isaac joined Hall Estill in 2018 and represents clients in the areas of business and corporate law, estate planning, commercial transactions, complex commercial litigation and insurance company liquidations. He began his career at the Oklahoma Department of Commerce before moving to the private sector.

Isaac earned his J.D. from the University

of Oklahoma College of Law and has been named a Best Lawyers: One to Watch for Corporate Law. He is active in the Tulsa community and currently serves on the board of directors for the Tulsa Region of Junior Achievement of Oklahoma.

Jared joined Hall Estill in 2017 and represents clients in the areas of commercial real estate, working capital, asset-based and acquisition financing, complex business transactions, and general real property law with a particular emphasis on the energy sector.

Jared earned his J.D. from the University of Oklahoma College of Law. He is a member of the Oklahoma, Texas and New Mexico Bar Associations and is an active participant in the Oklahoma City chapters of the Urban Land Institute and Commercial

Real Estate Council.

Fenton, Fenton, Smith, Reneau & Moon Elects New President and Announces New Partner

The shareholders of Fenton, Fenton, Smith, Reneau & Moon recently elected **John A. McCaleb** to serve as the law firm's president. He graduated from the University of Oklahoma Law School in 1976. While attending law school, he was an editor for the Oklahoma Law Review and graduated Order of the Coif. For over 40 years, he has specialized in representing businesses and insurance carriers before the Oklahoma Workers' Compensation Court and Commission. He also represents businesses in retaliatory discharge claims pending before Oklahoma Workers' Compensation

Commission. In 2017, he was selected by the Journal Record as the outstanding workers' compensation defense attorney in the State of Oklahoma.

The firm also announces that **Christopher Crouch** has been named a partner in the firm. He grew up in Norman and attended the University of Oklahoma, earning a Bachelors of Science in Mathematics and a Bachelors of Business Administration in 2005. He graduated with honors from the University of Oklahoma College of Law in 2011, where he was Assistant Managing Editor of the Oklahoma Law Review. He currently practices in the areas of workers' compensation, medical fee schedule disputes, and labor and employment. He is a Barrister in the Luther Bohanon American Inn of Court.

MANDATORY

continued from page 1

employers have required flu vaccines, and it has become a standard norm in many workplaces, especially in the healthcare field.¹¹

This theme endures for the new COVID-19 vaccination. There are no set rules against an employer requiring the employees to receive vaccinations. Thus, employers may require mandatory COVID-19 vaccination of employees. However, there will be certain exceptions that must be in place. The two main exceptions will be for employees with disabilities, as covered under the Americans with Disabilities Act, and employees who has a sincerely held religious belief(s), which would be violated by receiving a vaccination under Title VII of the Civil Rights Act. If an employee qualifies for one of these two exemptions, the employer will be required to make a reasonable accommodation.¹² However, employers will have an exception to these exemptions when a reasonable accommodation is not possible.

II. Exemptions to Mandatory Employee Vaccinations

A. Americans with Disabilities Act

The Americans with Disabilities Act is a law designed to protect employees with disabilities from being discriminated against in the workplace. The law allows for these employees to request an exemption from a vaccine requirement imposed by their employers.¹³ The employer can request additional information regarding the nature of the disability and the issue the vaccine may cause if administered to the employee.¹⁴ The EEOC has provided guidance on how employees with disabilities should be treated regarding an employer's mandatory COVID-19 vaccination. The EEOC states that an "employer must show that an unvaccinated employee would pose a direct threat due to a 'significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation.'" ¹⁵ There are 4 factors that the employer should look for in determining if there is a direct threat resulting from the unvaccinated employee: duration of the risk, nature and severity of potential harm, likelihood that the harm will occur, and the imminence of the potential harm.¹⁶ If it can be concluded that the unvaccinated employee poses a direct threat, that employee can only be excluded from the workplace

if there is no way to provide a reasonable accommodation which would reduce the threat the employee poses.¹⁷ A reasonable accommodation is one that does not impose undue hardship upon the employer.¹⁸ Undue hardship is anything that results in more than a *de minimis* cost to the employer.¹⁹

If the employer decides that no reasonable accommodation can be made, the employee can be excluded, but this does not mean automatic termination.²⁰ The employee may be eligible to take leave under the Family Medical Leave Act or even under the employer's employment and leave policies.²¹ Prior to 2021, Congress had passed the Families First Coronavirus Response Act (FFCRA), which was the first nationwide act to require employers to provide their employees with extended paid leave time.²² That legislation, however, saw its sunset on December 31, 2020.²³ It has been replaced with the Consolidated Appropriations Act, which allows for employers to voluntarily continue the extended leave time provided through the FFCRA in an exchange for payroll tax credit.²⁴ In addition to the changing laws, other applicable guidelines may be necessary for an employer to access the situation to determine the correct course of action.

B. Title VII of the Civil Rights Act

Title VII of the Civil Rights Act protects employees from mandatory vaccinations when the vaccination would violate their sincerely held religious belief. Like the ADA exemption, employees with a sincerely held religious belief can request to be excused from the mandatory vaccination policy imposed by their employer.²⁵ If the employer objects to the religion or the sincerity of the belief, the employer may inquire additional information to support the employee's claim but should also be cautious about prying for too much information.²⁶ The EEOC suggests that employers should ordinarily assume that the employee's request is based on a sincerely held religious belief.²⁷ The employer should be prepared to provide a reasonable accommodation to the employee with a sincerely held religious belief, so long as that accommodation does not cause undue hardship on the employer.²⁸ If the employer is unable to provide a reasonable accommodation to the employee not able to receive a Covid-19 vaccination, the employer may exclude the employee from the workplace.²⁹ This does not mean that the employer may

immediately resort to automatic termination of the employee.³⁰ Just as with the disability analysis, other guidelines may be necessary to assess the situation. The employee may also be eligible to take leave under the Family Medical Leave Act or the employer's leave policies.

A religious accommodation is not to be taken lightly. With the recent shift in the Supreme Court, the Court has leaned towards the side of protecting religious liberties, and it is likely a trend that will continue. In November 2020, the Supreme Court ruled in *Roman Catholic Diocese v. Cuomo* against state imposed Covid-19 restrictions on religious gatherings in churches and synagogues.³¹ The state Covid restrictions allowed "essential" businesses to admit as many people as they wanted, but the churches were limited to no more than 10 people.³² These regulations could not be viewed as neutral because a church was being treated more harshly than a business that was deemed essential,³³ which included everything from bicycle repair shops to liquor stores.³⁴ In a *per curiam* decision, the Court emphasized: "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."³⁵ "[E]ven in a pandemic, the Constitution cannot be put away and forgotten."³⁶ This strong support for the First Amendment could mean that the Court and lower courts will side with employees requesting religious accommodations in mandatory vaccination programs, perhaps even when an undue hardship on the employer is argued.

III. Exception to the Exemptions

A. Undue Hardships

This area of inquiry can be considered the exception to the exceptions. If an employee has successfully received an exemption based on disability or religious belief, but it has been decided that no reasonable accommodation can be made without causing undue hardship on the employer, the employee can be terminated. As mentioned above, an undue hardship is anything that has more than a *de minimis* cost to the employer. *De minimis* is defined as something small or trivial.³⁷ The burden of proving a reasonable accommodation will be on the employee; the burden of proving the undue hardship will be on the employer.³⁸

In each situation, the court will need to do a case-by-case analysis to determine any undue hardship.³⁹ The Supreme Court has

previously ruled against an airline employee seeking to always have Saturdays off due to his religious beliefs.⁴⁰ The Court said that giving the employee Saturdays off was an undue hardship on the employer, who would now have to find a way to cover the Saturdays in which the employee was no longer working.⁴¹ Certain factors will point more towards undue hardship, such as requiring the employer to spend more money or the need to have other staff cover for the employee because the employee is not vaccinated.

B. Is Requiring the Vaccine a Job-Related or Business Necessity?

Employers with companies that have a lot of interaction with the public will have a stronger justification for requiring the vaccination than companies where employees can segregate easily or continue remote employment.⁴² The most impacted industry in this pandemic has been that of healthcare workers. It will also be the industry that is going to continue to be in contact with ill patients, strengthening the justification that there is a business necessity for employers to require vaccinations. If employers in such a field can show that the employee's lack of vaccination constitutes a substantial safety risk to the workplace and the patients and that an accommodation would cause an undue hardship upon the employer, there would be a case made for terminating the refusing employee, even if the refusal were for a religious belief or disability.⁴³

Lower courts have taken a similar approach when dealing with the flu vaccine.⁴⁴ In *Robinson v. Children's Hospital Boston*, a federal district court in Massachusetts allowed the termination of a hospital employee who was refusing the flu shot under a religious belief.⁴⁵ The hospital tried to find somewhere she could work without being around patients, but no spot could be secured.⁴⁶ Allowing the employee to stay with her patients would have created an undue hardship on the employer, and thus termination was necessary because no reasonable accommodation could be made beyond what the hospital had already provided for the employee.⁴⁷ Although the Supreme Court has already protected churches against the strict COVID restrictions, it has yet to be seen if the Court would side with the employee or the employer, especially in sit-

Book Notes

BY KYLE PRINCE

Getting More – Stuart Diamond: Authored by one of the world’s leading experts on negotiation, *Getting More* provides a fresh perspective on the often misplaced strategy of “getting to yes” in negotiations. Rather, *Getting More* is about finding the deeper emotional wants & needs which drive your counterpart and incorporating them to obtain the best result for you. For a better, more practical, example, *Getting More* provides as follows:

“Regina was 5. Her room was dirty. Always. Her dad, Dennis, was at wits end. Finally, he thought about Regina’s perceptions. ‘I want to be a princess,’ she often said. So they talked about princesses. Dad gazed over the room strewn with toys. Then dad said, ‘Does this look like a princess’s room?’ Regina looked at the mess and thought about it. She cleaned up her room. And kept it clean.”

Even if you only use the wisdom in *Getting More* to manipulate your loved ones into not only performing household chores, but *wanting* to perform household chores, you must remember: with great power comes great responsibility.

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Never Split the Difference: Negotiating as if your Life Depended on It – Chris Voss with Tahl Raz: In contrast to the academic approach of *Getting More*, *Never Split the Difference* provides a more direct look at the entire spectrum of negotiation tactics. Despite being written by a former hostage negotiator for the FBI, this strategies in this book aren’t exclusive only for your next high-stakes mediation or terrorist negotiation, but are widely applicable to all walks of life whether it be buying a house, obtaining a raise, or dealing with personal relationships.

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Bargaining for Advantage – G. Richard Shell: “As director of the world-renowned Wharton Executive Negotiation Workshop, Professor G. Richard Shell has taught thousands of business leaders, lawyers, administrators, and other professionals how to survive and thrive in the sometimes rough-and-tumble world of negotiation. His systematic, step-by-step approach comes to life in this internationally acclaimed book—now in its third edition and available on more than ten languages. Shell combines lively stories about world-class negotiators from J. P. Morgan to Mahatma Gandhi with proven bargaining advice based on the latest negotiation research.”

Gift Exchange



Chili Pepper Connoisseurs Judge Don Andrews and Katherine Mazaheri-Franze exchange their specialty jars.

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uations where the employee is around many patients and the employer will be arguing that a vaccination is a business necessity.

IV. Other Issues to Consider

A. FDA Approval

The Covid-19 vaccination has been rolled out to specific groups of people under an Emergency Use Authorization from the United States Food and Drug Administration.⁴⁸ This, however, is not an official license, and getting the vaccine officially approved may not happen until well into the future. It may be advised to be cautious about requiring employees to get vaccines that have not been officially approved yet.⁴⁹ There could be legal risks associated with the lack of official FDA approval.⁵⁰ Until complete approval has been achieved by the FDA, employers are simply advised to encourage employees to get the vaccination, rather than requiring them to do so.⁵¹

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8. *EEOC Opposes Mandatory Flu Shots for Workers*, SHRM, <https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/eec-opposes-mandatory-flu-shots.aspx> (last visited December 15, 2020).
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B. Policies

Commentary on this topic suggests that if the employer is going to require mandatory Covid-19 vaccinations as a condition of employment, then it is “best practice” and “in the employer’s best interest” that the employer pay all costs associated with getting the employee vaccinated.⁵² It is also extremely important for employers to apply their mandatory vaccinations in a uniform manner, so as not to risk appearing discriminatory, ultimately resulting in lawsuits brought against the employer.⁵³

C. Title II of the Genetic Information Nondiscrimination Act

Title II of the Genetic Information Nondiscrimination Act (GINA) prohibits the use of genetic information in employment decisions. The EEOC made it clear that requiring employees to receive the vaccine or asking for proof of the vaccine does not result in the acquisition or disclosure of genetic information as prohibited by GINA.⁵⁴ Because some of the COVID-19 vaccines use mRNA technology, there

is a question about whether that modifies the genes and therefore violates GINA.⁵⁵

11. *Employers Should Prepare for COVID-19 Vaccine in the Workplace*, Phillips Murrah, <https://phillipsmurrah.com/2020/12/employers-should-prepare-for-covid-19-vaccine-in-the-workplace/> (last visited December 15, 2020) (hereinafter *Employers Should Prepare*).
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16. *Id.*
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18. *Id.*
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20. *EEOC Guidance*, *supra* note xii, (quoting 29 C.F.R.

is a question about whether that modifies the genes and therefore violates GINA.⁵⁵ However, the CDC has said that the mRNA does not interact with the DNA in any way.⁵⁶ Therefore, there is no violation of GINA by requiring employees to get vaccinated.⁵⁷

V. Conclusion

As the Covid-19 vaccinations slowly become more available, the laws on mandatory vaccinations become very relevant. Americans are less likely to see state mandated vaccinations, and instead are more likely to see a mandate from their employers. Employers can mandate the Covid-19 vaccination of their employees. However, they will be subjected to the laws of the Americans with Disabilities Act and Title VII of the Civil Rights Act, which will mean that exemptions will be required for those employees with disabilities and for those employees with sincerely held religious beliefs against vaccinations. The employer will need to make reasonable accommodations for the employee to remain unvaccinated. Reasonable accommodations must not cause an undue hardship on

the employer. In some fields, it will be very difficult to provide a reasonable accommodation for that employee. Termination may be more justifiable. However, for employers who can have the unvaccinated employee segregated from the other employees, possibly through remote work or in an area located away from the other staff, termination is not going to be as justifiable. The analysis will always require a balancing of the employee’s rights with the employer’s desire to create a safe workspace.

There is also the option that employers simply strongly encourage or incentivize employees to get vaccinated, rather than making it mandatory. This choice provides an alternative to dealing with the exemptions and reasonable accommodations and may be the best plan while the vaccine is currently lacking official FDA approval. Either way, employers will be encouraged to work with their employees in this difficult time to make the reasonable accommodations necessary to ensure that everyone stays safe, feels secure in their rights, and maintains a happy working environment, in person or remotely.

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23. *Id.*
24. *Id.*
25. *When Employers Can Require COVID-19 Vaccinations*, *supra* note xiii.
26. *Id.*
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