

# STATE AND LOCAL AUTHORITY AND A COVID-19 VACCINE MANDATE:



## A Fact Sheet for Advocates and Local Public Officials

On March 11, 2020, the World Health Organization declared the COVID-19 outbreak a pandemic; just two days later, the U.S. declared a state of emergency. As of October, 2020, over 8 million people in the U.S. have tested positive for the virus, and over 220,000 people have died.

Many state and local governments responded to COVID-19 by declaring emergencies and invoking emergency powers, issuing stay-at-home orders, closing schools and non-essential businesses, and imposing restrictions on travel, gatherings, and mask wearing. Still, COVID-19 shows no signs of abating, leaving the world waiting on the development of a vaccine. Even when a vaccine becomes available, however, ensuring that enough people get vaccinated will be crucial to achieving herd immunity.

Public health experts have begun to [discuss](#) and [publish guidelines](#) for how best to distribute a vaccine to account for a limited supply, the needs of different populations, and the inherent ethical and equity issues associated with such medical interventions. State and local governments will have roles to play in the fair, safe, and ethical allocation of a new vaccine. At some point, elected officials and public health agencies may even consider vaccine mandates as part of a public health effort to achieve herd immunity and reduce COVID-19 contagion.

This fact sheet provides an overview of state and local government authority to regulate and potentially require vaccination.<sup>1</sup> Past precedent for the use of vaccination authority at the state and local level, however, should not necessarily support the use of that authority for a COVID-19 vaccine without careful protections in place. The Local Solutions Support Center is cognizant of current-day health disparities and America's history of racist and unethical medical interventions in Black and Brown communities. Accordingly, any state or local vaccine program must be based in scientific evidence and guided by public health ethicists and experts.

NOTE: The information provided in this document does not, and is not intended to, constitute legal advice. Individuals and organizations should contact an attorney licensed to practice in their state to obtain advice with respect to a particular legal matter.

1. This fact sheet does not address the right of private employers to impose a vaccine mandate for employees.

# Overview of Vaccine Laws

Although the federal government has vital responsibility over vaccine research, regulation, and [guidance](#), this fact sheet focuses exclusively on state and local government authority.<sup>2</sup>

## a. General State Authority and Practice

State authority to mandate vaccinations is rooted in their general authority to enact laws “to provide for the public health, safety, and morals” of the states’ citizens.<sup>3</sup> States have enacted legislation mandating vaccines for certain populations, including school children and healthcare workers, and in certain situations, including public health emergencies. Courts have consistently upheld state laws mandating vaccinations, most notably in the seminal case of *Jacobson v. Massachusetts*, in which the Supreme Court upheld a state law requiring all individuals 21 and over to be vaccinated for smallpox.<sup>4</sup>

All 50 states have vaccination requirements for public school children, with exemptions for students with certain medical conditions.<sup>5</sup> Some

states also grant religious and philosophical exemptions, although the specific criteria for exemptions vary across states.<sup>6</sup> All states also mandate vaccinations for children in day-care facilities, and all but four states have enacted requirements for private school children that largely mirror the public-school requirements.<sup>7</sup>

Laws mandating certain vaccines for healthcare workers are in place in some states; the vast majority of these laws concern immunization against hepatitis B, though immunization against influenza, measles, and rubella are commonly required as well.<sup>8</sup> Many states also have vaccination laws for patients and residents of correctional facilities and facilities for the developmentally disabled.<sup>9</sup>

2. Richard Hughes IV, *Vaccine Exemptions and The Federal Government’s Role*, *Health Affairs* (Mar. 21, 2019), <https://www.healthaffairs.org/doi/10.1377/hblog20190318.382995/full>; see also Dorit Rubenstein Reiss & Y. Tony Yang, *How Congress Can Help Raise Vaccine Rates*, 96 *Notre Dame L. Rev.* (forthcoming 2020), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3581393](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3581393).

3. Wen S. Shen, Cong. Rsch. Serv., *An Overview of State and Federal Authority to Impose Vaccination Requirements* (2019), <https://fas.org/sgp/crs/misc/LSB10300.pdf>.

4. *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) (upholding a state law requiring all individuals 21 and over to be vaccinated for smallpox); see also *Workman v. Mingo Cnty. Bd. of Educ.*, 419 F. App’x 348, 352–54 (4th Cir. 2011) (upholding West Virginia’s immunization requirements for children attending public schools and concluding that state and county officials did not violate plaintiff’s right to religious freedom in refusing to admit her unvaccinated daughter to school).

5. Shen, *supra* note 3, at 2.

6. Nat’l Conf. of State Legis., *States with Religious and Philosophical Exemptions from School Immunization Requirements* (June 26, 2020), <https://www.ncsl.org/research/health/school-immunization-exemption-state-laws.aspx>.

7. CDC, Off. for State, Tribal, Local, and Territorial Support, *State School Immunization Requirements and Vaccination Laws 7–10* (Feb. 2017), <https://www.cdc.gov/phlp/docs/school-vaccinations.pdf> (last visited Oct. 7, 2020).

8. Twenty-one states require healthcare facilities to offer or make available a vaccine to any employee, while 15 states require facilities to make sure that all employees are vaccinated and arrange for immunization where necessary. Megan C. Lindley et al., *Assessing State Immunization Requirements for Healthcare Workers and Patients*, 32 *Am. J. Preventative Med.* 459, 460–61 (2007), [https://www.ajpmonline.org/article/S0749-3797\(07\)00085-2/pdf](https://www.ajpmonline.org/article/S0749-3797(07)00085-2/pdf); CDC, *Vaccination Laws*, <https://www.cdc.gov/phlp/publications/topic/vaccinationlaws.html> (last updated Feb. 28, 2018).

9. Lindley et al., *supra* note 8, at 462; see also CDC, *State Immunization Laws for Healthcare Workers and Patients*, <https://www2a.cdc.gov/vaccines/statevaccsApp/default.asp> (last updated Jan. 6, 2016) (allowing visitor to search by facility, vaccination type, and state to identify laws requiring vaccination of patients and residents through 2014).



## b. General Municipal Authority and Practice

Like states, municipalities may also have the authority to impose vaccination requirements. In upholding a municipal ordinance requiring smallpox vaccination for public school children, the Supreme Court recognized that *Jacobson v. Massachusetts* had long “settled that a state may, consistently with the federal Constitution, delegate to a municipality authority to determine under what conditions health regulations shall become operative.”<sup>10</sup> The exact source for this delegation of municipal authority—whether grounded in “home rule” or by statutory delegation of public-health authority—depends on the state and municipality.

Many states expressly delegate their police power to municipalities to enact health regulations.<sup>11</sup> Courts have interpreted this grant of general authority to include the power to impose local vaccine laws.<sup>12</sup>

In some states, however, such authority may be limited or nonexistent if the state has preempted municipalities from regulating vaccinations or public health more generally. Similarly, authority may be lacking in a Dillon’s Rule state that has not conferred a grant of such authority—express or implied—to municipalities.<sup>13</sup>

### See Also: *Decision Tree Resources for Local Governments Responding to COVID-19*

#### General Policies:

<http://bit.ly/LSSC-General-DecisionTree>

#### For Policies About Housing and Homelessness

<http://bit.ly/LSSC-Housing-DecisionTree>

#### For Policies About Expanding Broadband Access

<http://bit.ly/LSSC-Broadband-DecisionTree>

## 1. Specific Municipal Authority to Enact Local Vaccine Laws

Some states expressly grant municipalities the specific authority to impose vaccine mandates, typically under public health laws.<sup>14</sup> This includes municipal authority to mandate immunization for school children (with appropriate state delegation). In 2018, for example, a court upheld a New York City Board of Health mandate requiring flu vaccinations for children who attend city-regulated childcare facilities, concluding that the Board’s authority to issue such a mandate fell within the powers delegated to the New York City Department of Health and Mental Hygiene in the New York City Administrative Code.<sup>15</sup>

Local governments have also enacted vaccination ordinances aimed at food service workers. Last year, a handful of counties in Missouri and Kentucky imposed mandatory Hepatitis A vaccinations for food service workers in response to outbreaks of the virus across 29 states.<sup>16</sup>

## 2. Municipal Emergency Authority

Municipal governments generally have the authority to enact emergency ordinances to address public emergencies affecting the life, safety, health, or property of residents, including the authority to order vaccinations for the general population in responding to an emergency outbreak. For example, New York City declared a 2019 measles outbreak affecting some communities to be a public health emergency, and every unvaccinated adult and child living or working in certain zip codes was required to get the measles, mumps, and rubella (MMR) vaccine.<sup>17</sup>

10. *Zucht v. King*, 260 U.S. 174, 176 (1922).

11. See, e.g., Miss. Code Ann. § 41-3-57 (West 2020) (“Any municipality may pass public health laws or ordinances.”).

12. *Zucht*, 260 U.S. at 176; see also *Garcia v. New York City Dep’t of Health & Mental Hygiene*, 106 N.E.3d. 1187 (N.Y. 2018).

13. “Dillon’s Rule” is an approach under which local governments may only exercise authority expressly delegated or necessarily or fairly implied by powers expressly granted, with doubts about scope construed against the local government. John F. Dillon, *Commentaries on the Law of Municipal Corporations* 449–50 (5th ed. 1911).

14. For example, the Alabama Code grants all municipalities “the power to adopt all necessary ordinances and enforce the same to prevent the introduction or spread of contagious, infectious, or pestilential diseases in such cities or towns and, to that end, may provide for a system of compulsory vaccination and enforcement of the same.” Ala. Code § 11-47-132 (2020).

15. *Garcia*, 106 N.E.3d. at 1202.

16. Tommy Tobin, *Missouri County Imposes Mandatory Hepatitis A Vaccines for Food Service Workers*, Forbes (Aug. 21, 2019), <https://www.forbes.com/sites/tommytobin/2019/08/21/county-imposes-mandatory-hepatitis-a-vaccines-for-food-service-workers/#e4c9fa43e2ac>.

17. Susan Scutti, *New York City Declares a Public Health Emergency amid Brooklyn Measles Outbreak*, CNN (Apr. 9, 2019), <https://www.cnn.com/2019/04/09/health/measles-new-york-emergency-bn/index.html>; Jonathan Allen, *Judge Upholds New York City’s Mandatory Measles Vaccination Order*, Reuters (Apr. 18, 2019), <https://www.reuters.com/article/us-usa-measles/judge-upholds-new-york-citys-mandatory-measles-vaccination-order-idUSKCN1RU1XH>.

# Vaccine Mandates in the Time of COVID-19

Notwithstanding the broad authority discussed above, there is some precedent that inadequate attention to public health protocols in the development and deployment of a vaccine can make any mandate to take that vaccine legally vulnerable. In 2009, a New York State health commissioner ordered every healthcare worker to get the H1N1 vaccine. An emergency nurse and the state Public Employees Federation sued, pointing in part to concerns that the vaccine had been rushed into production without adequate testing. Persuaded by this argument, the New York State Supreme Court issued a stay of the mandate.<sup>18</sup> Given the politicization and expedited timeframes of [Operation Warp Speed](#), this H1N1 case may foreshadow challenges to any future COVID-19 vaccine mandate.

In light of the foregoing, states—and likely many municipalities, too—have the authority to enact laws requiring COVID-19 immunization for certain high-priority populations or even the general population. For municipalities, this authority could derive from a state grant of specific authority to enact local vaccine laws, a state grant of more general authority to enact public health regulations, or the municipality’s emergency powers.

For more information about state and local authority, please contact the [Local Solutions Support Center](#).

## Resources

- [Centers for Disease Control and Prevention, Public Health Law Program](#)
- [The Network for Public Health Law](#)

## Acknowledgements

The Local Solutions Support Center thanks Dorit Reiss, Professor of Law, UC Hastings Law, for her thoughtful review and feedback, as well as Alison Hung, 2020 Local Democracy Summer Fellow, for her research support.

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18. The case never proceeded to a full trial because the state ultimately withdrew the mandate for an unrelated reason: a shortage in vaccine supply. See Wendy E. Parmet, *Pandemic Vaccines—The Legal Landscape*, 362 New Eng. J. Med. 1949, 1951 (2010), <https://www.nejm.org/doi/pdf/10.1056/NEJMp1000938> (describing order in *Brynien v. Daines*, N.Y. Sup. Ct. No. 8853-09); Joe Nocera, *When New York Mandated Vaccinations, Workers Sued*, Bloomberg Businessweek (Mar. 23, 2020), <https://www.bloomberg.com/news/articles/2020-03-23/can-states-mandate-vaccinations-for-health-care-workers>.

