



WYOMING LEGISLATIVE SERVICE OFFICE

Memorandum

DATE May 27, 2021

TO Members, Joint Labor, Health and Social Services Committee

FROM Elliott Browning, Staff Attorney

SUBJECT White Paper: Vaccination Requirements

Introduction

In anticipation of interim committee deliberations, the chairmen of the Joint Labor, Health and Social Services Committee (the Committee) have requested research on a variety of topics related to vaccines and vaccination requirements. This research relates to both interim topics Priority #2 and Priority #7. As a component of Priority #2: Workforce and Licensing, the Committee plans to "evaluate the legality of employer vaccination requirements."¹ Under Priority #7: COVID-19 Issues, the Committee plans to review "issues related to the COVID-19 pandemic and the state's response," which necessarily includes issues related to the ongoing COVID-19 vaccine rollout.²

This memorandum is intended to provide background information on the current status of state law with respect to vaccines and vaccination requirements.³ In particular, the following topics will be considered: employer vaccination requirements, vaccination requirements in schools and childcare facilities, the quarantine authority of the State Health Officer, and the Wyoming Fair Employment Practices Act.

Discussion

I. Employer Vaccination Requirements.

Broadly speaking, there are no provisions in Wyoming law which affirmatively authorize employers to require certain vaccinations as a precondition of employment. However, under Wyoming's Occupational Health and Safety provisions, employers "may require an employee to submit to a physical examination before employment or at any time during employment."⁴ Whether such a "physical examination" would include mandatory vaccinations is not addressed in the statute; defining the term "physical examination" within this statute would likely resolve this ambiguity. Additionally, this section

¹ Priority #2: Workforce and Licensing, Joint Labor, Health and Social Services Committee, 2021 Interim Topics.

² Priority #7: COVID-19 Issues, Joint Labor, Health and Social Services Committee, 2021 Interim Topics.

³ Note that all cited references to Wyoming law have been included in their entirety in the Appendix in the order in which they are referenced.

⁴ W.S. 27-11-113.

also specifies that employers "shall provide for a physical examination, as deemed necessary, due to exposure or contact with hazards or environmental conditions which may be detrimental to the health of the employee."⁵

This section also provides for a broad religious exemption to employer physical examination requirements, and, notably, the religious exemption specifically excludes immunizations. "Nothing in this or any other provision of this act shall be deemed to authorize or require medical examination, immunization or treatment for those who object thereto on religious grounds."⁶ Complicating the matter, this religious exemption has a caveat. The exemption does not apply, where the medical examination, immunization, or treatment "is necessary for the protection of the health or safety of others."⁷ Please refer to the Appendix to review the complete text of this statutory section.

Separately, the Wyoming Occupational Health and Safety Commission (the Commission) has authority over employers which could reasonably be argued to give employers the implied authority to require certain vaccinations. Specifically, the Commission requires that each employer "furnish to his employees, a place of employment and employment which are free from recognized hazards that are causing or that are likely to cause death or serious physical harm."⁸ Provided the COVID-19 pandemic is considered a recognized hazard that is likely to cause death or serious physical harm, employers could reasonably assert that requiring employee vaccinations is a necessary condition of providing a safe place of employment. However, this provision is not an affirmative grant of authority to employers to require vaccinations; rather, it empowers the Commission to take enforcement actions against employers who fail to meet this requirement. As such, whether this provision has any bearing on employer vaccination requirements will depend on the enforcement decisions of the Commission.

II. Vaccination Requirements in Schools and Childcare Facilities.

Unlike in the context of employment, there are mandatory immunization requirements for students attending public or private school.⁹ These requirements apply for students in kindergarten through the twelfth grade, whether the student is attending school on a full- or part-time basis. The State Health Officer, who is appointed by Director of the Department of Health, designates the immunizations required for attendance.¹⁰ Completion of this immunization requirement for students is satisfied by submission to the school of documentary proof of immunization, or "written certification by a private licensed physician or his representative or by any public health authority, that the person is fully immunized."¹¹ No school administrator shall allow a student to attend school for more than thirty days without having submitted documentary proof of immunization.¹²

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ W.S. 27-11-105(b)(vi)(A).

⁹ W.S. 21-4-309(a).

¹⁰ Currently, the following vaccinations (as appropriate for the child's age) are required to attend a Wyoming school: diphtheria, tetanus, and pertussis (DTaP/Tdap); hepatitis B (HepB); haemophilus influenzae type b (HIB); polio (IPV); measles, mumps, and rubella (MMR); pneumococcal (PCV-13); rotavirus (RV1/RV5); and varicella (VAR).

¹¹ W.S. 21-4-309(a).

¹² *Id.*

Nevertheless, Wyoming does allow parents to apply for a waiver to these mandatory immunization requirements for their children based on a religious objection or a medical contraindication. Importantly, the decision whether to grant a waiver is not discretionary: "[w]aivers shall be authorized by the state or county health officer upon submission of written evidence of religious objection or medical contraindication to the administration of any vaccine."¹³ Note, however, that these waivers do not apply to individuals with philosophical or personal objections; these exemptions are considered to be more expansive objections than those for religious or medical contraindication reasons.

Although students may receive a waiver from certain immunization requirements, in the event of "an outbreak of vaccine preventable disease," students who have received a waiver may nevertheless be excluded from school attendance.¹⁴ Specifically, "school children for whom a waiver has been issued and who are not immunized against the occurring vaccine preventable disease shall be excluded from school attendance for a period of time determined by the state or county health authority."¹⁵ However, this exclusion from school attendance would neither be considered a suspension nor would it be considered in the computation of absences. This statutory section does not address the education of students excluded from school under these circumstances.

The vaccination of young children who attend childcare facilities is regulated in a manner nearly identical to that of school-age children attending school. "All persons over eighteen (18) months old attending or transferring into a child caring facility are required to be completely immunized in a similar manner to W.S. 21-4-309 [Mandatory immunizations for children attending schools; exceptions]."¹⁶ This means that the parents of children attending childcare facilities can similarly apply for waivers to the immunization requirements for religious or medical contraindication reasons, but not on the basis of personal or philosophical objections. Please refer to the Appendix for a complete list of the facilities considered to be a "child caring facility" for the purpose of these immunization requirements.

III. Quarantine Authority of the State Health Officer.

Barring certain narrow exceptions, the State Health Officer "shall not subject any person to any vaccination or medical treatment without the consent of the person."¹⁷ However, during a public health emergency, the State Health Officer does have a limited authority to quarantine individuals who withhold or refuse to give consent to a vaccination or a medical treatment which "is reasonably needed to protect the health of others from a disease carrying the risk of death or disability."¹⁸

Note that this quarantine authority only applies during a Governor-declared public health emergency, which is defined as "an occurrence or imminent threat of an illness or health condition caused by an epidemic or pandemic disease, a novel and highly fatal infectious agent or a biological toxin that poses a substantial risk of a significant number of human fatalities or incidents of permanent or long-term

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ W.S. 14-4-116(b).

¹⁷ W.S. 35-4-113(a).

¹⁸ W.S. 35-4-113(c).

disability."¹⁹ The Governor has the sole authority to declare when a public health emergency exists and when it has ended.²⁰

IV. Wyoming Fair Employment Practices Act.

Separate from public health or vaccination-specific statutes and regulations, the Wyoming Fair Employment Practices Act also governs the conduct of employers with respect to their treatment of employees. Specifically, this law prohibits employers from engaging in an enumerated list of "discriminatory or unfair employment practice[s]."²¹ As defined by the Wyoming Fair Employment Practices Act, the term "employer" includes "the state of Wyoming or any political subdivision or board, commission, department, institution or school district thereof, and every other person employing two (2) or more employees within the state; but it does not mean religious organizations or associations."²²

Generally, the types of discriminatory actions targeted by the Wyoming Fair Employment Practices Act are those related to discrimination on the basis of "age, sex, race, creed, color, national origin, ancestry or pregnancy."²³ It is a discriminatory or unfair employment practice for an employer "to refuse to hire, to discharge, to promote or demote, or to discriminate in matters of compensation or the terms, conditions or privileges of employment" against an individual because of their status as one of these protected classes.²⁴ These or similar anti-discrimination protections are found in most, if not all, other states' laws and are also federally codified in Title VII of the Civil Rights Act.

In addition to preventing unfair employment practices by employers against these typical classes of individuals, the Wyoming Fair Employment Practices Act is unique amongst anti-discrimination laws in that it also prohibits discrimination against individuals who use tobacco products outside the course of their employment.²⁵ Specifically, the Wyoming Fair Employment Practices Act provides that it is a discriminatory or unfair employment practice "[f]or an employer to require as a condition of employment that any employee or prospective employee use or refrain from using tobacco products outside the course of his employment, or otherwise to discriminate against any person in matters of compensation or the terms, conditions or privileges of employment on the basis of use or nonuse of tobacco products outside the course of his employment."²⁶ There is an exception to this rule where "it is a bona fide occupational qualification that a person not use tobacco products outside the workplace."²⁷

Please feel free to contact me at elliott.browning@wyoleg.gov or (307) 777-7881 with any questions or for additional clarification.

¹⁹ W.S. 35-4-115(a)(i).

²⁰ *Id.*

²¹ W.S. 27-9-105(a).

²² W.S. 27-9-102(b).

²³ W.S. 27-9-105(a)(i).

²⁴ *Id.*

²⁵ W.S. 27-9-105(a)(iv).

²⁶ *Id.*

²⁷ *Id.*

Appendix

I. Employer Vaccination Requirements.

27-11-113. Physical examination of employees; religious exemption.

Any employer may require an employee to submit to a physical examination before employment or at any time during employment, and shall provide for a physical examination, as deemed necessary, due to exposure or contact with hazards or environmental conditions which may be detrimental to the health of the employee. Nothing in this or any other provision of this act shall be deemed to authorize or require medical examination, immunization or treatment for those who object thereto on religious grounds, except where such is necessary for the protection of the health or safety of others. The results of such examinations shall be furnished only to the department, the employer and, upon request, to the employee and the employee's physician. The employer shall pay for such examination.

27-11-105. Occupational health and safety commission; powers and duties of commission and department.

(b) The commission has the following powers and duties:

(vi) To require the employer to be charged with the following duties:

(A) Each employer shall furnish to his employees, a place of employment and employment which are free from recognized hazards that are causing or that are likely to cause death or serious physical harm;

II. Vaccination Requirements in Schools and Childcare Facilities.

21-4-309. Mandatory immunizations for children attending schools; exceptions.

(a) Any person attending, full or part time, any public or private school, kindergarten through twelfth grade, shall within thirty (30) days after the date of school entry, provide to the appropriate school official written documentary proof of immunization. For purposes of this section, documentary proof of immunization is written certification by a private licensed physician or his representative or by any public health authority, that the person is fully immunized. Documentation shall include month, day and year of each required immunization received against vaccine preventable disease as designated by the state health authority. No school administrator shall permit a student to attend school for more than thirty (30) calendar days without documentary proof of immunization. If immunization requires a series of immunizations over a period of more than thirty (30) calendar days, the child shall be permitted to attend school while receiving continuing immunization if the school administrator receives written notification by a private licensed physician or his representative or by a public health official, specifying a written schedule for necessary immunization completion within the medically accepted time period. Waivers shall be authorized by the state or county health officer upon submission of written evidence of religious objection or medical contraindication to the administration of any vaccine. In the presence of an outbreak of vaccine preventable disease as determined by the state or county health authority, school children for whom a waiver has been issued and who are not immunized against the occurring vaccine preventable

disease shall be excluded from school attendance for a period of time determined by the state or county health authority, but not suspended from school as provided in W.S. 21-4-305. Children excluded from school attendance under this section shall not be counted in the aggregate number of pupils absent as defined in W.S. 21-13-101(a)(i).

(b) The school administrator shall be responsible for an audit of the immunization status of any child enrolled in the school in accordance with rules and regulations prescribed by the department of health.

(c) The written documented proof of immunization on a form provided by the state health officer shall be an integral part of the child's school record.

(d) For purposes of this section:

(i) "State health officer" means the person appointed by the director of the department of health pursuant to W.S. 9-2-103;

(ii) "County health officer" means the licensed medical officer designated by the county commissioners to serve as health officer for his county;

(iii) "Immunized" or "immunization" means initial immunization and any boosters or reimmunizations required to maintain immunization pursuant to the immunization standards and recommendations issued by the state health officer.

14-4-116. Mandatory immunizations for children attending child caring facilities.

(a) As used in this section "child caring facility" means a facility required to be certified under W.S. 14-4-102.

(b) All persons over eighteen (18) months old attending or transferring into a child caring facility are required to be completely immunized in a similar manner to W.S. 21-4-309.

(c) The operator of the child caring facility shall be responsible for an audit of the immunization status of any child attending the child caring facility in a similar manner to W.S. 21-4-309.

14-4-101. Definitions.

(a) As used in W.S. 14-4-101 through 14-4-115:

(vi) "Child caring facility" means any person who operates a business to keep or care for any minor at the request of the parents, legal guardians or an agency which is responsible for the child and includes any of the following privately operated facilities:

(A) Children's institutions;

(B) Child placing agencies whether for permanent or temporary placement;

(C) Foster homes not supervised by the state, any local government, school district or agency or political subdivision thereof;

(D) Group day care agencies;

(E) Detention homes;

(F) Public or private receiving homes;

(G) Correctional schools;

(H) Repealed By Laws 2013, Ch. 193, § 2.

(J) Ranches for children whether for summer operation only or otherwise;

(K) Day or hourly nurseries, nursery schools, kindergartens or any other preschool establishment not accredited by the state board of education;

(M) Boarding homes not supervised by the state, any local government, school district or agency or political subdivision thereof;

(N) Boards of cooperative educational services established under W.S. 21-20-104 and providing services to children with disabilities of any school district; and

(O) Except as provided under subparagraph (a)(vi)(N) of this section, any other person not legally related to a minor, having legal or physical care, custody or control of the child, receiving payment therefor and not supervised by the state, any local government, school district or agency or political subdivision thereof.

III. Quarantine Authority of the State Health Officer.

35-4-113. Treatment when consent is not available; quarantine.

(a) Except as provided by subsection (b) of this section, W.S. 14-4-116 and 21-4-309, the state health officer shall not subject any person to any vaccination or medical treatment without the consent of the person.

(b) During a public health emergency, the state health officer may subject a person to vaccination or medical treatment without consent in the following circumstances:

(i) If the parent, legal guardian or other adult person authorized to consent to medical treatment of a minor child cannot be located and consulted and the vaccination of or medical treatment for the minor child is reasonably needed to protect the public health or protect the minor child from disease, death, disability or suffering;

(ii) If the person authorized to consent on behalf of an incompetent person cannot be located and consulted and the vaccination of or medical treatment for the incompetent person is reasonably needed to protect the public health or protect the incompetent person from disease, death, disability or suffering.

(c) If a person withholds or refuses consent for himself, a minor or other incompetent when the vaccination or medical treatment is reasonably needed to protect the health of others from a disease carrying the risk of death or disability, then the person for whom the vaccination or medical treatment is refused may be quarantined by the state health officer.

35-4-115. Definitions.

(a) As used in this article:

(i) "Public health emergency" means an occurrence or imminent threat of an illness or health condition caused by an epidemic or pandemic disease, a novel and highly fatal infectious agent or a biological toxin that poses a substantial risk of a significant number of human fatalities or incidents of permanent or long-term disability. The governor shall declare when a public health emergency exists or has ended;

(ii) "Quarantine" means:

(A) The physical separation and confinement of an individual or group of individuals that has been, or may have been, exposed to, or is reasonably believed to be infected with, a contagious or possibly contagious disease, from nonquarantined individuals, to prevent or limit the transmission of the disease to nonquarantined individuals;

(B) The isolation of a geographic area where individuals are located who have been or are reasonably believed to have been exposed to or infected by a contagious or possibly contagious disease; or

(C) The physical separation and confinement of an individual or group of individuals or the isolation of a geographic area where a public health emergency of unknown effect has occurred or is reasonably believed to have occurred.

IV. Wyoming Fair Employment Practices Act.

27-9-102. Definitions.

(b) "Employer" shall mean the state of Wyoming or any political subdivision or board, commission, department, institution or school district thereof, and every other person employing two (2) or more employees within the state; but it does not mean religious organizations or associations.

27-9-105. Discriminatory and unfair employment practices enumerated; limitations.

(a) It is a discriminatory or unfair employment practice:

(i) For an employer to refuse to hire, to discharge, to promote or demote, or to discriminate in matters of compensation or the terms, conditions or privileges of employment against, a qualified disabled person or any person otherwise qualified, because of age, sex, race, creed, color, national origin, ancestry or pregnancy;

(ii) For a person, an employment agency, a labor organization, or its employees or members, to discriminate in matters of employment or membership against any person, otherwise qualified, because of age, sex, race, creed, color, national origin, ancestry or pregnancy, or a qualified disabled person;

(iii) For an employer to reduce the wage of any employee to comply with this chapter;

(iv) For an employer to require as a condition of employment that any employee or prospective employee use or refrain from using tobacco products outside the course of his employment, or otherwise to discriminate against any person in matters of compensation or the terms, conditions or privileges of employment on the basis of use or nonuse of tobacco products outside the course of his employment unless it is a bona fide occupational qualification that a person not use tobacco products outside the workplace. Nothing within this paragraph shall prohibit an employer from offering, imposing or having in effect a health, disability or life insurance policy distinguishing between employees for type or price of coverage based upon the use or nonuse of tobacco products if:

(A) Differential rates assessed employees reflect an actual differential cost to the employer; and

(B) Employers provide written notice to employees setting forth the differential rates imposed by insurance carriers.

(b) The prohibitions against discrimination based on age in this section apply only to persons at least forty (40) years of age.

(c) It is not a discriminatory practice for an employer, employment agency or labor organization to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension or insurance plan, which is not a subterfuge to evade the purposes of this chapter, except that no employee benefit plan shall excuse the failure to hire any individual, and no seniority system or employee benefit plan shall require or permit involuntary retirement of any individual protected under this chapter because of age. Involuntary retirement is not prohibited if permitted under Title 29, United States Code § 631(c).

(d) As used in this section "qualified disabled person" means a disabled person who is capable of performing a particular job, or who would be capable of performing a particular job with reasonable accommodation to his disability.