

## POLICY NOTE

# Legal analysis: Does the governor have the authority to order public employees to be vaccinated?

by Paul Guppy, Vice President for Research

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### Key Findings

1. Judge David A. Larson recently wrote a legal analysis for other judges on whether Governor Inslee has the authority to impose a vaccine mandate on public employees, contractors and volunteers. This analysis was recently posted openly online.
2. The analysis concludes that the Governor's emergency powers do not give him the authority to create laws, only to waive or suspend them.
3. There is also no law or regulation that conditions public employment on any form of vaccine or other medical procedure.
4. The Governor, judges or any other state or local officials cannot mandate vaccinations as a condition of employment because no law passed by the legislature has given them the authority to do so.
5. Terminating a public employee for not performing an act that the public employer has no authority to compel would be a problematic violation of due process.
6. Legal precedents call into question attempts by government entities to require proof of vaccination for continued employment, when there is no statutory or regulatory authority to do so.
7. The Supreme Court, the Governor, and all other government bodies need to reconsider vaccine mandates that are not permitted by law.

### Introduction

In August Governor Jay Inslee, citing his emergency powers, announced that certain residents of Washington state are now subject to a mandatory COVID vaccine requirement. His order applies to "...all public employees, on-site contractors and on-site volunteers at all public and private K-12 schools, public and private two- and four-year institutions of higher education, and early learning and childcare programs serving children from multiple households."<sup>1</sup>

The Governor ordered that those covered by the mandate must comply by October 18, 2021 or face termination or other workplace sanctions.

In response, Judge David A. Larson, co-chair of the Council on Independent Courts, provided an analysis for state supreme court Chief Justice Steven C. Gonzalez and other judges on whether the Governor has the authority to impose this mandate and whether the courts should enforce the order. The analysis was later posted openly online; the text of it appears below.<sup>2</sup>

### Judge Larson's legal analysis on imposing a vaccine mandate on public employees

Chief Justice Gonzalez and Associate Justices,

I am writing this email to request reconsideration of the Supreme Court's order regarding vaccine mandates and to caution other judges in their decisions to impose such mandates in local courts.

At first, I was frustrated with this order based on prior knowledge of the law, but I decided to hope that all of us are seen by each other as acting in good faith and that we care about the proper response to COVID-19. None of us wants people to get sick or die because of our action or inaction. This has become an emotional issue for many on both

1 "Inslee issue two proclamations for facial coverings, vaccine requirements," press release, Office of Governor Jay Inslee, August 20, 2021, at <https://www.governor.wa.gov/news-media/inslee-issues-two-proclamations-facial-coverings-vaccine-requirements>.

2 The legal analysis is available at [https://judgelarson.s3.us-west-2.amazonaws.com/Judge+Dave+Larson+Letter.pdf?fbclid=IwAR1fZaRaJCysI3abg8\\_mGtK1WcP2pqc99xlrMW24xjsxvXR7Pl4SC4c7aw8](https://judgelarson.s3.us-west-2.amazonaws.com/Judge+Dave+Larson+Letter.pdf?fbclid=IwAR1fZaRaJCysI3abg8_mGtK1WcP2pqc99xlrMW24xjsxvXR7Pl4SC4c7aw8). Appendix A and Appendix B are available at [https://judgelarson.s3.us-west-2.amazonaws.com/Attachments+for+Judge+Dave+Larson+Letter.pdf?fbclid=IwAR2fYaZB\\_dTE600f8njysZJD4qjVFDRI4cdVecyU0syDEyGei9qYOsHBnIw](https://judgelarson.s3.us-west-2.amazonaws.com/Attachments+for+Judge+Dave+Larson+Letter.pdf?fbclid=IwAR2fYaZB_dTE600f8njysZJD4qjVFDRI4cdVecyU0syDEyGei9qYOsHBnIw).

sides of the debate, so it is important that we avoid attaching negative motives as we walk through the legal analysis of the issues set forth below.

We also need to avoid breaking ourselves up into constituent groups such as vaccinated versus unvaccinated or pro-vaccine versus anti-vaccine because it serves no purpose in the analysis of the legal issues at hand. We also do not need to get into a debate about the efficacy of vaccines to answer the legal questions posed.

This is merely an attempt to focus dispassionately on what the law is and not on what we want the law to be.

The issue is whether the Supreme Court or any other government official or body, has the authority under Washington law to order unvaccinated staff to be vaccinated as a condition of continued employment.

### **Only the legislature can compel vaccinations under Washington law**

It is well accepted that state statutes can mandate vaccines. *Jacobson v. Massachusetts*, 197 U.S. 11 (1905). However, in *Jacobson*, the court held:

“The authority of the State to enact this statute is to be referred to what is commonly called the police power -- a power which the State did not surrender when becoming a member of the Union under the Constitution. Although this court has refrained from any attempt to define the limits of that power, yet it has distinctly recognized the authority of a State to enact quarantine laws and “health laws of every description;” indeed, all laws that relate to matters completely within its territory and which do not, by their necessary operation, affect the people of other States.

According to settled principles, the police power of a State must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety. It is equally true that the State may invest local bodies called into existence for purposes of local administration with authority in some appropriate way to safeguard the public health and the public safety.

The mode or manner in which those results are to be accomplished is within the discretion of the State, subject, of course, so far as Federal power is concerned, only to the condition that no rule prescribed by a State, nor any regulation adopted by a local governmental agency acting under the sanction of state legislation, shall contravene the Constitution of the United States or infringe any right granted or secured by that instrument.

A local enactment or regulation, even if based on the acknowledged police powers of a State, must always yield in case of conflict with the exercise by the General Government of any power it possesses under the Constitution, or with any right which that instrument gives or secures.” (Id. at pp. 24-25 (citations omitted and emphasis added.)

The question is whether there is any authority “established directly by legislative enactment” permitting the Supreme Court, the Governor, or other government officials to directly or indirectly adopt vaccine mandates.

We must keep in mind that the Court in *Jacobson* was addressing a Massachusetts statute that allowed local jurisdictions to mandate vaccines. No such statute exists in our state that gives the Governor or the Supreme Court the authority to mandate vaccinations. The only vaccination mandate passed by the legislature that is currently in effect is for school-aged children. (See RCW 28A.210.) There is no statute that mandates adult vaccinations or delegates the decision to require vaccinations to any other government official or government body.

The State Board of Health is actually a creature of our State Constitution found in Article 20, Section 1. The State Board of Health operates only under “such powers as the legislature may direct.” The legislature gave the Board of Health, and not any other state official, the authority to create regulations for “the prevention and control of infectious...diseases.” RCW 43.20.050(2)(f). In addition, the legislature provided for local boards of health to enforce regulations adopted by the state board of health and local boards of health. RCW 70.05.070. (See Attachment A for a more detailed discussion of the structure of health departments in our state).

In Washington, unlike Massachusetts, the legislature has reserved to itself the decision on whether mandatory vaccines would be needed. This is evidenced by only providing for mandatory vaccines of school-aged children, not mandating vaccinations for adults, and by not delegating that specific power to either the state or local boards of health as Massachusetts did with local jurisdictions in *Jacobson*.

The State Board of Health is able to enact regulations that apply to immunizations for children because the legislature permitted that to occur by the adoption of RCW 28A.210. However, state and local boards of health cannot adopt a vaccine mandate for adults because there is no statutory authority enacted by the legislature that provides for such a mandate or delegation of that decision. (See *Jacobson*, *Supra* at p. 24.)

In addition, the Governor’s emergency powers do not give him the authority to create laws, only to waive or suspend them. (See RCW 43.06.220(2).) RCW 43.06.220 provides for limited actions that can be taken by the Governor and those powers do not include managing vaccine policy (see Attachment B for a discussion on gubernatorial power in health emergencies). The Supreme Court definitely has no legislative or executive authority to pass vaccine mandates.

There is also no law or regulation that conditions public employment on any form of vaccine or other medical procedure. This means that the Governor, the justices, and/or any other state or local officials cannot mandate vaccinations as a condition of employment because no law passed by the legislature has given them the authority to do so.

Most all public employees have a property interest in their positions, and they cannot be terminated without due process of law. In *Board of Regents v Roth*, 408 US at 564 (1972), the Court held:



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“To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims.” (408 US at p. 577.)

The Roth court held that a property interest “can... be created by ordinance, or by an implied contract. In either case, however, the sufficiency of the claim of entitlement must be decided by reference to state law.” The concepts in Roth were confirmed in *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985). “Loudermill hearings” are commonplace in jurisdictions across our state. In addition, many public employees are protected by collective bargaining agreements.

Terminating a public employee for not performing an act that the public employer has no authority to compel would be a problematic violation of due process and it would fly in the face of fundamental fairness. The monetary liability for wrongful termination would be staggering and there may even be an argument for attorney’s fees under 42 USC1983.

The reasoning above also calls into question public colleges, counties, cities, school districts, hospital districts, and other local government entities’ attempts to require proof of vaccination for continued employment when there is no statutory or regulatory authority to do so.

In conclusion, the Supreme Court, the Governor, and all other government bodies need to reconsider vaccine mandates that are not permitted by law.

*Judge David A. Larson is co-chair of the Council on Independent Courts and a member of the Civic Learning Council. He is a member of the Board of Judicial Administration Public Trust and Confidence Committee and a member of the Legislative Committee and Therapeutic Courts Committee of the District and Municipal Court Judges Association (DMCJA). He is a past member of several other DMCJA committees. He has taught new judges at the Washington State Judicial College on an annual basis since 2010. He received the Judge William Nevin Award in 2014.*

*Judge Larson was a trial lawyer in state and federal courts for twenty-three years and was active as a member of state and local bar association committees addressing court rules, professionalism, litigation, young lawyer mentoring and continuing legal education. He has been rated at the highest level of professional excellence.*

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