

# Health Promotion Program Legal Update: Q1 – 2021 (February 17, 2021)

*Barbara J. Zabawa, JD, MPH*

HEALTH PROMOTION  
PROGRAM LEGAL  
UPDATES

February 17, 2021

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LEGAL FOUNDATIONS

Setting the Stage for 2021



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## AGENDA

- Sources of Law
- Types of Law and Legal Defenses
  - Negligence
  - Contract
- Litigation terminology
- Law vs. Ethics
- Update on Mandatory Vaccines
- Case Examples
- Q&A

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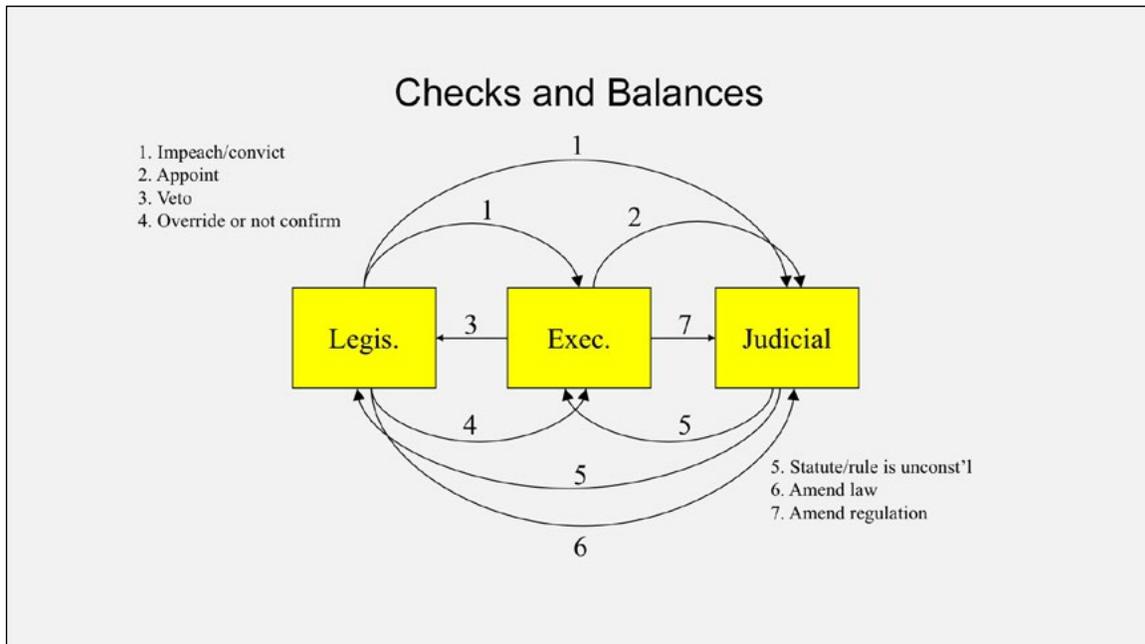
## INTRODUCTION TO LAW

- Sources of law
  - Constitution
  - Statutes
  - Administrative law (regulations)
  - Judicial decisions ("common law")
- The federal system
- The 3 branches of government
- Separation of powers

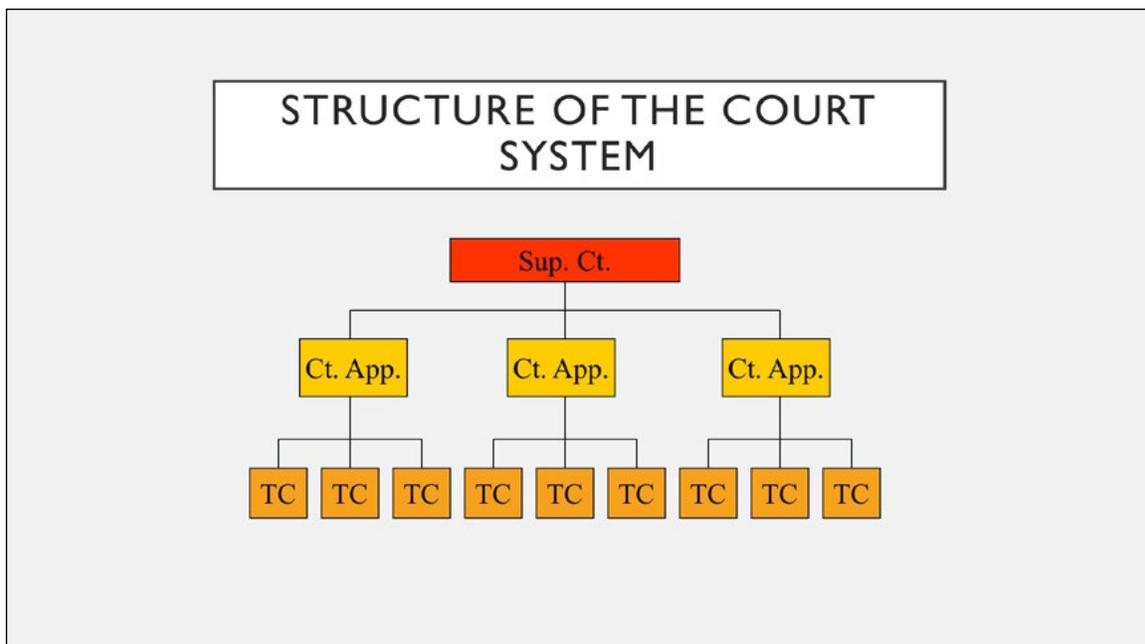
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## DIFFERENCES BETWEEN CIVIL LAW AND CRIMINAL LAW

|                            | Civil Law   | Criminal Law   |
|----------------------------|---|--|
| <b>General Description</b> | Deals with disputes between private parties (individuals, organizations, and businesses). Party #1 (plaintiff) hires a lawyer who files a lawsuit claiming that Party #2 (defendant) failed to carry out a legal duty that resulted in some type of harm to Party #1. | Deals with crimes against society (e.g. conduct that reflects a violation of a federal or state statute) and the punishment of the crime. The government files the case against the defendant accused of committing the crime. |
| <b>Examples</b>            | Negligent conduct (e.g., a fitness professional or wellness coach who provides improper instruction to a client that results in harm to the client), breach of contract, noncriminal statutory violations, and civil rights violations                                | Criminal conduct such as practicing medicine or dietetics without a license (e.g., violation of a state licensing statute), theft, and sexual assault.   |
| <b>Standard of Proof</b>   | Preponderance of the evidence, meaning more likely than not (51 percent or greater) the defendant's conduct caused the harm.  | Beyond a reasonable doubt, meaning the defendant is 100 percent guilty of the crime.   |
| <b>Burden of Proof</b>     | The plaintiff has the burden of proof, e.g., needs to provide evidence that a legal duty existed and that the duty was breached.  | The prosecution (government) must prove that the defendant was guilty – the defendant is innocent until proven guilty.   |
| <b>Type of Punishment</b>  | If the court rules the defendant liable for the harm, the defendant must compensate the plaintiff (usually financial compensation for injuries or damages) and may be ordered to stop the practice causing the harm.  | If the court rules the defendant guilty of the crime, he/she is subject to fines, community service, probation, imprisonment or any combination of these.  |

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## TORT LAW

**Tort Liability:**  
Three Levels of Fault

**Intentional**  
conduct causing harm

**Negligent**  
conduct causing harm

**Strictly Liable**  
No fault, but liable for harm

Intentional Acts, e.g., assault, battery, invasion of privacy, emotional distress

Negligence, e.g., ordinary negligence and gross negligence

Strict Liability, e.g., workers' compensation, vicarious liability (*respondent superior*)

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## NEGLIGENCE

**Negligence** can be defined as failing to do something (inaction/omission) that a reasonably prudent professional would have done under the circumstances or doing something (improper action/commission) that a reasonable prudent professional would not have done under the circumstances

Negligence is “careless” conduct by either  
**OMISSION** or **COMMISSION**

Failure to Perform    Improper Performance

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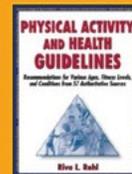
## FOUR ESSENTIAL ELEMENTS THAT THE PLAINTIFF MUST PROVE IN A NEGLIGENCE LAWSUIT

**Duty** -- the legal duty (or standard of care ) the defendant owed to the plaintiff

**Breach of Duty** -- the conduct (action/inaction) of the defendant that was a breach of the duty

**Harm** -- the plaintiff must have suffered a physical or emotional injury or damage to property

**Causation** -- the breach of duty must be the reason (cause) the harm occurred to the plaintiff



Duty (or the standard of care) will likely be determined from the testimony of expert witnesses who will introduce standards (e.g., standards, guidelines, position papers) published by professional and independent organizations.

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## Common “Legal” Defenses to Negligence

**Waiver:** A contract signed by an individual prior to participation that can absolve or protect the defendants, such as fitness/wellness staff members and the facility from their own “ordinary” negligence; waivers do not provide protection for gross negligence.

**Primary Assumption of Risk:** A defense for injuries due to “inherent risks” – injuries that just happen (are inseparable from the activity) and they are no one’s fault. However, the plaintiff must know, understand and appreciate the inherent risks and voluntarily assume them.

### Defenses That do NOT Work:

- Not enough staff
- Takes too much time
- Costs too much
- That’s how other facilities do it
- Ignorance of the law/legal duties



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## Waiver of Liability Exculpatory Language

**Waiver of Liability:** In consideration of permission to use the property, facilities, and services of ES, today and on all future dates for the duration of ES, I (on behalf of myself, my heirs, personal representatives, or assigns) **do hereby release, waive, and discharge ES, USF Board of Trustees, a public body corporate (USF) and its faculty members, students, employees, and agents from liability from any and all claims including and rising from negligence** of any member of ES, USF, and its faculty members, students, employees, or agents.

This agreement applies to 1) personal injury (including death) from incidents or illnesses arising from participation in ES activities (including, but not limited to, health and fitness assessments, supervised and unsupervised personal training activities, classes, observation, individual use of facilities or equipment, shower/locker room area, and all premises including the associated sidewalks and parking lots), and 2) any and all claims resulting from the damage to, loss of, or theft of property.

**From:** USF Exercise Science (ES) Program -- Assumption of Risk and Waiver of Liability

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## Primary Assumption of Risk Language to “strengthen” this Defense

**Assumption of Risk:** I understand that the inherent risks of muscle strength/endurance, cardiovascular, and flexibility activities vary with the activity, the physiological system(s) involved, and with the exercise equipment used.

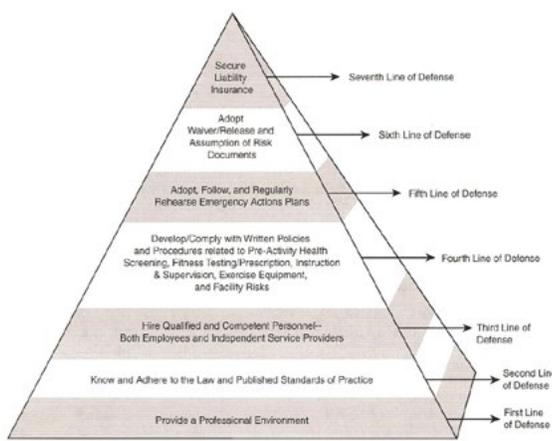
**Common minor risks** include minor muscle strains, muscle sprains, muscular fatigue, contusions, and post-exercise soreness. **More serious, but less frequent, risks** include joint injuries, torn muscles, heat-related illnesses, and back injuries. There is also the **remote risk of a catastrophic incident** (e.g., stroke, heart attack, paralysis, or death).

I have read the previous paragraphs and I **know the nature of the activities of ES, I understand the demands** of those activities relative to my physical condition and skill level, and I **appreciate the types of injuries** that may occur as a result of activities made possible through ES. **I assert that my participation is voluntary and that I knowingly assume all such risks.**

**From:** USF Exercise Science (ES) Program -- Assumption of Risk and Waiver of Liability

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**BEST DEFENSE  
AGAINST  
NEGLIGENCE:  
DO NOT  
BREACH YOUR  
DUTIES**



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## CONTRACT LAW FOUR ESSENTIAL ELEMENTS FOR A VALID CONTRACT:



| Element                 | Description   |
|-------------------------|---|
| 1. Agreement            | One party must make an offer (e.g. a wellness coach offers coaching services) and the other party must accept (e.g., a client accepts the wellness coach's offer).  |
| 2. Consideration        | Something of value that is legally bargained for by each party -- the promises made by each party (e.g., money paid by the member to join a fitness facility and the programs/services provided by the facility in exchange for the money). |
| 3. Contractual Capacity | Both parties must have contractual capacity -- both parties must be competent and of legal age (age of majority in most states is 18).  |
| 4. Legality             | The contract must be legal, e.g., it cannot violate any statutes or be against public policy.   |

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## COMMON CONTRACTS USED IN WORKPLACE WELLNESS PROGRAMS

- Third Party Contracts
  - Wellness vendors who provide HRAs, biometric screenings
  - Management companies such as EXOS, Health Fitness Corporation, Corporate Fitness Works
  - Local fitness facilities such as YMCAs
- Independent Contractors (e.g., personal fitness trainers, group exercise leaders, wellness coaches, massage therapists)
- Membership Contracts
- Waivers and Other Legally Protective Documents such as Informed Consents
- Exercise Equipment Purchases and Lease Agreements

**NOTE:** Contract law is quite complex and is essential that workplace wellness professionals consult with a competent lawyer for all contracts.

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1-17

## LITIGATION TERMINOLOGY

- **Plaintiff**
  - Person bringing charges in lawsuit
- **Defendant**
  - Person against whom charges are being brought
- **Liable**
  - Legally responsible or obligated

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1-18

## LITIGATION TERMINOLOGY (CONT.)



### **Precedent**

Decisions made by judges in various courts that become rule of law and apply to other cases

- Also known as case law



### **Summary judgment**

Decision made by a court that pleads no basis for trial

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1-19

## COMPARISON OF LAW AND ETHICS

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| Table 1-1 Comparing Aspects of Law and Ethics |   |   |   |
|---|---|---|---|
|   | Law   | Ethics  | Moral Values  |
| <b>Definition</b>                             | Set of governing rules  | Principles, standards, guide to conduct                                     | Beliefs formed through the influence of family, culture, and society      |
| <b>Main purpose</b>                           | To protect the public   | To elevate the standard of competence                                       | To serve as a guide for personal ethical conduct                          |
| <b>Standards</b>                              | Minimal—promotes smooth functioning of society  | Builds values and ideals  | Serves as a basis for forming a personal code of ethics                   |
| <b>Penalties of violation</b>                 | Civil or criminal liability. Upon conviction: fine, imprisonment, revocation of license, or other penalty as determined by courts   | Suspension or eviction from medical society membership, as decided by peers | Difficulty in getting along with others                                   |
|   | Bioethics   | Etiquette   | Protocol  |
| <b>Definition</b>                             | Discipline relating to ethics concerning biological research, especially as applied to medicine   | Courtesy and manners  | Rules of etiquette applicable to one's place of employment                |
| <b>Main purpose</b>                           | To allow scientific progress in a manner that benefits society in all possible ways   | To enable one to get along with others                                      | To enable one to get along with others engaged in the same profession     |
| <b>Standards</b>                              | Leads to the highest standards possible in applying research to medical care  | Leads to pleasant interaction   | Promotes smooth functioning of workplace routines                         |
| <b>Penalties of violation</b>                 | Can include all those listed under "Law," "Ethics," and "Etiquette"; as current standards are applied and as new laws and ethical standards evolve to govern medical research and development, penalties may change | Ostracism from chosen groups  | Disapproval from one's professional colleagues; possible loss of business |

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1-20

## LAW

Rule of conduct or action formally recognized as binding by a controlling authority

➔

Enforcement made possible by penalties for disobedience

- Fines, imprisonment, or both

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1-21

## ETHICS

- Ethics are focused on standards of behavior and the concept of right and wrong
- Moral values formed through the influence of family, culture, and society serve as the basis for ethical conduct

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1-22

## CONTEMPORARY CODES OF ETHICS

- Are established by the appropriate professional organization
- Govern the behavior of members
- Increase the level of competence and standards of care within the group
- Do not have legal authority

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1-23

## ETIQUETTE

- Standards of behavior considered good manners
- Protocol
  - Standard rules of etiquette applied to a place of employment

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## DETERMINING IF A DECISION IS ETHICAL

- If you perform this act:
  - Will you have followed both the law and your organization's policies?
  - Will you promote a win-win situation as best as possible?
  - How would you react if this act was publicized in the newspaper or other media?
  - Would you want your family members to know?
  - Can you look at yourself in a mirror?



1-24

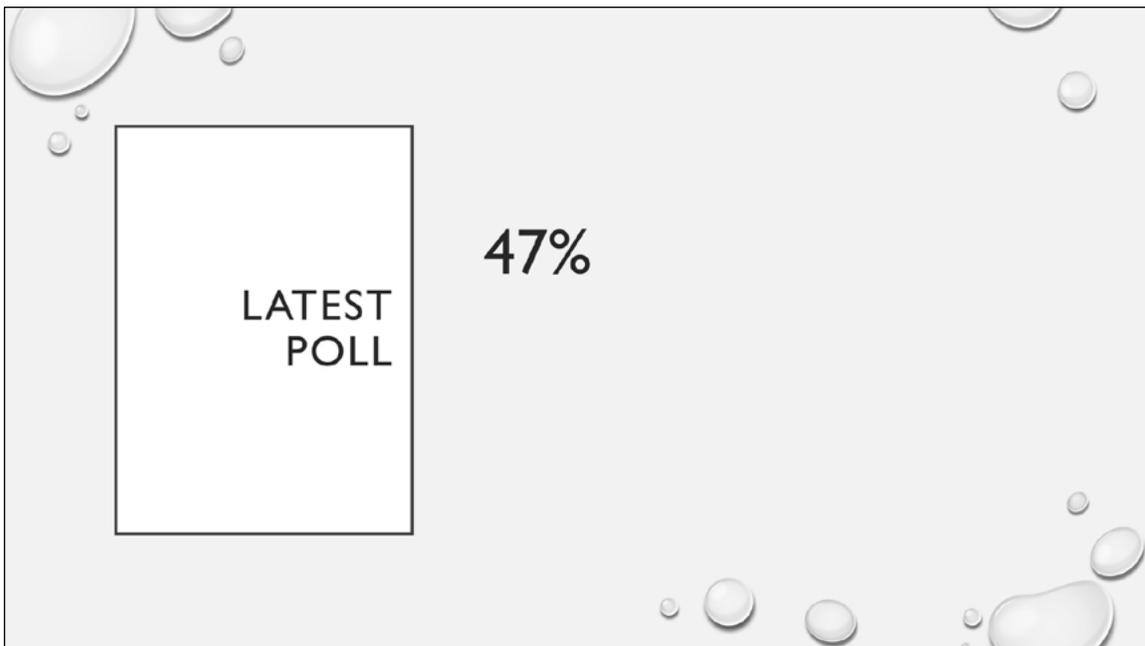
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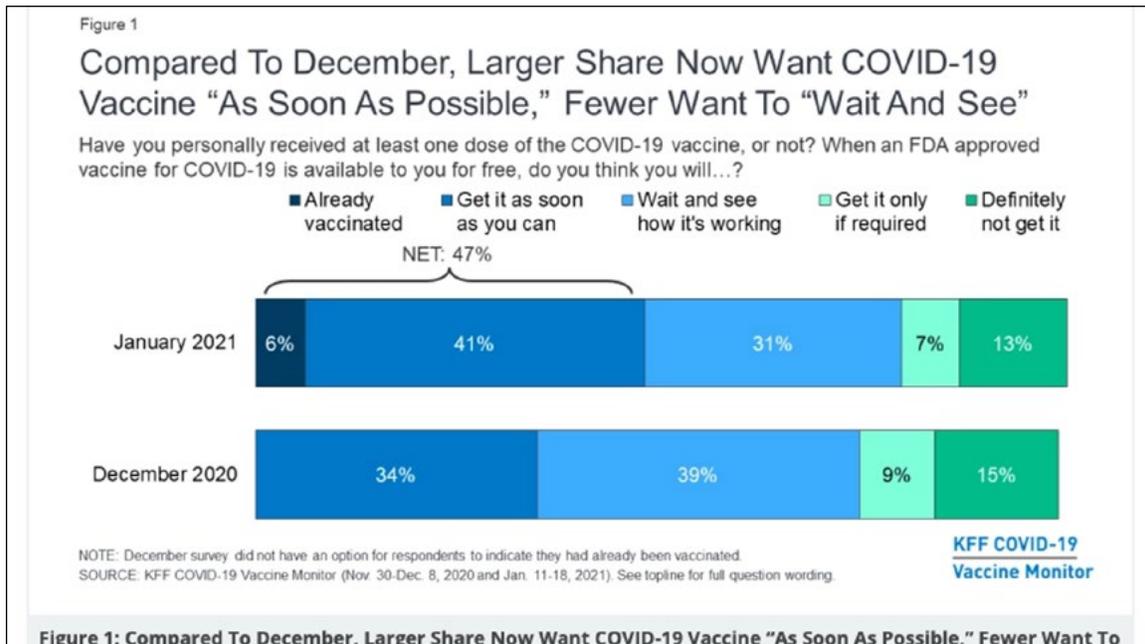
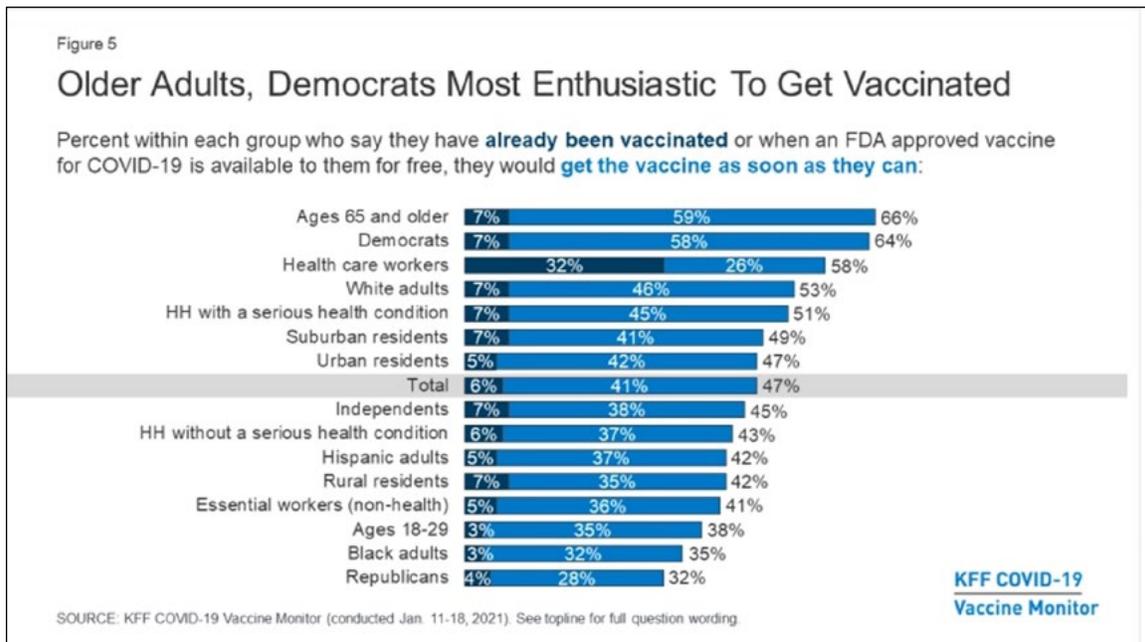


Figure 1: Compared To December, Larger Share Now Want COVID-19 Vaccine “As Soon As Possible,” Fewer Want To

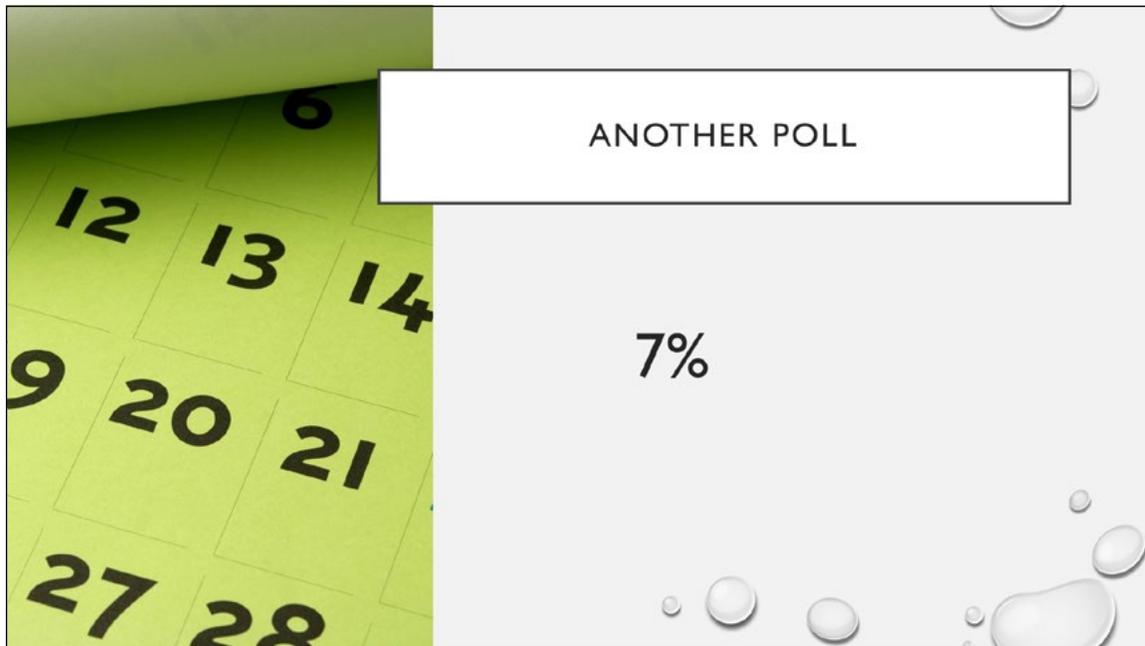
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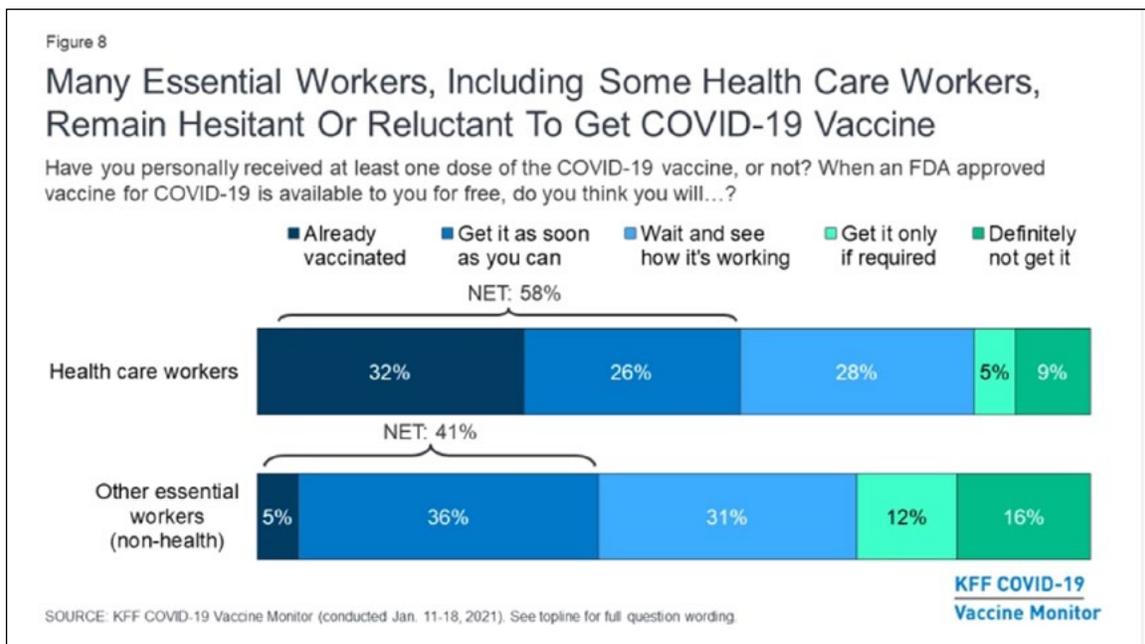
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**Table 1: Reasons For Vaccine Hesitancy By Party Identification, Age, and Race/Ethnicity**

| AMONG THOSE WHO WOULD DEFINITELY NOT OR PROBABLY NOT GET VACCINATED: Percent who say each of the following is a <b>major reason</b> why: | Total | Party ID    |            | Age   |     | Race/Ethnicity |       |
|--|-------|-------------|------------|-------|-----|----------------|-------|
|  |       | Independent | Republican | 18-49 | 50+ | Black          | White |
| Worried about possible side effects  | 59%   | 59%         | 54%        | 58%   | 63% | 71%            | 56%   |
| Do not trust the government to make sure the vaccine is safe and effective   | 55    | 52          | 56         | 55    | 53  | 58             | 54    |
| Vaccine is too new and want to wait and see how it works for other people  | 53    | 54          | 41         | 57    | 46  | 71             | 48    |
| Politics has played too much of a role in the vaccine development process  | 51    | 46          | 53         | 47    | 59  | 54             | 49    |
| The risks of COVID-19 are being exaggerated  | 43    | 40          | 57         | 40    | 51  | 33             | 49    |
| Don't trust vaccines in general  | 37    | 43          | 31         | 37    | 38  | 47             | 36    |
| Do not trust the health care system  | 35    | 34          | 36         | 32    | 42  | 28             | 36    |
| Worried that they may get COVID-19 from the vaccine  | 27    | 30          | 18         | 26    | 26  | 50             | 21    |
| Don't think they are at risk of getting sick from COVID-19   | 20    | 18          | 23         | 18    | 26  | 20             | 19    |

NOTE: Sample size too small to report separately among Democrats and Hispanics who say they definitely or probably won't get vaccinated. See Appendix A for tables based on total.

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- Yes, but not for all employees
- EEOC: Latest guidance in dec. 2020
  - Can mandate, with exceptions

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ADA FAQs

- For any COVID-19 vaccine that has been approved or authorized by the Food and Drug Administration (FDA), is the administration of a COVID-19 vaccine to an employee by an employer (or by a third party with whom the employer contracts to administer a vaccine) a “medical examination” for purposes of the ADA? (12/16/20)
- No. The vaccination itself is not a medical examination. As the Commission explained in [guidance on disability-related inquiries and medical examinations](#), a medical examination is “a procedure or test usually given by a health care professional or in a medical setting that seeks information about an individual’s physical or mental impairments or health.” Examples include “vision tests; blood, urine, and breath analyses; blood pressure screening and cholesterol testing; and diagnostic procedures, such as x-rays, CAT scans, and MRIs.” If a vaccine is administered to an employee by an employer for protection against contracting COVID-19, the employer is not seeking information about an individual’s impairments or current health status and, therefore, it is not a medical examination.
- Although the administration of a vaccination is not a medical examination, pre-screening vaccination questions may implicate the ADA’s provision on disability-related inquiries, which are inquiries likely to elicit information about a disability. If the employer administers the vaccine, it must show that such pre-screening questions it asks employees are “job-related and consistent with business necessity.”

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ADA FAQs

- If an employer requires vaccinations when they are available, how should it respond to an employee who indicates that he or she is unable to receive a COVID-19 vaccination because of a disability? (12/16/20)
- The ADA allows an employer to have a [qualification standard](#) that includes “a requirement that an individual shall not pose a direct threat to the health or safety of individuals in the workplace.” However, if a safety-based qualification standard, such as a vaccination requirement, screens out or tends to screen out an individual with a disability, the 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.” [29 C.F.R. 1630.2\(r\)](#). Employers should conduct an individualized assessment of four factors in determining whether a direct threat exists: the duration of the risk; the nature and severity of the potential harm; the likelihood that the potential harm will occur; and the imminence of the potential harm. **A conclusion that there is a direct threat would include a determination that an unvaccinated individual will expose others to the virus at the worksite.** If an employer determines that an individual who cannot be vaccinated due to disability poses a direct threat at the worksite, the employer cannot exclude the employee from the workplace—or take any other action—unless there is no way to provide a reasonable accommodation (absent [undue hardship](#)) that would eliminate or reduce this risk so the unvaccinated employee does not pose a direct threat.

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|---|---|
| <div data-bbox="289 1318 630 1570" data-label="Section-Header"><h2>CASE EXAMPLE #1</h2></div> | <ul style="list-style-type: none"><li>• Terry, a wellness professional works for ABC Company, a manufacturing company. ABC surveyed its employees about the COVID19 vaccine and learned that 20% of the surveyed employees said they would refuse the COVID19 vaccine unless forced to be vaccinated by their employer. ABC has experienced a lot of absences throughout 2020 and early 2021 due to illness, much of it COVID19 related. As a result, ABC's leadership decides to mandate the vaccine for employees. ABC's leadership asks Terry to promote the vaccine in the 2021 wellness program, such as communicating the upsides for employees to get vaccinated. Terry is personally opposed to receiving the vaccine and doesn't believe it is entirely safe as it is only been approved as an emergency measure by the FDA.</li><li>• 1. Can ABC require its employees to receive the vaccine?</li><li>• 2. Should ABC require its employees to receive the vaccine?</li><li>• 3. Is it illegal, unethical, or both for Terry to refuse to promote the vaccine at work?</li></ul> |
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## CASE EXAMPLE #2

- The county in which ABC Company operates decides it will mandate the COVID19 vaccine for everyone residing in the county. As a result, ABC does not have to mandate the vaccine for its employees because most of its employees reside in the county. However, Terry is opposed to the county mandating a vaccine and decides to join a lawsuit opposing the vaccine mandate. Specifically, Terry argues that because the vaccine is under emergency approval, the county has no legal authority to mandate the vaccine.
- 1. Can Terry sue the County?
- 2. What are Terry's chances of winning the lawsuit?

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## JACOBSON V. MASSACHUSET TS

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QUOTE FROM  
JACOBSON V.  
MASS.

- “The possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, good order, and morals of the community. Even liberty itself, the greatest of all rights, is not unrestricted license to act according to one’s own will. It is only freedom from restraint under conditions essential to the equal enjoyment of the same right by others. It is, then, liberty regulated by law.”

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KEY DIFFERENCE IN  
JACOBSON

Small pox vaccine had  
been around for almost  
a century

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## Q&A REMINDER

The following Q&A session does NOT constitute legal advice and should not be used as such. It is for educational purposes only.

WELCOA Members should retain legal counsel to obtain definitive answers.

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## QUESTIONS?

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