

# **The University of California can require COVID-19 vaccinations**

## **Overview**

As we continue the steady march toward full-scale reopening, colleges and universities across the country are preparing their return to in-person instruction in a post-pandemic world. Some colleges have announced that they will require students to be vaccinated before they return to campus, while California's postsecondary institutions are assessing their public health safety plans for next fall. Yesterday the University of California and California State University announced that they will "require COVID-19 vaccinations for all students, faculty and staff on campus properties this fall once the Food and Drug Administration gives formal approval to the vaccines and supplies are sufficiently available." This article analyzes whether the University of California can require COVID-19 vaccines for students returning to campus, and concludes that University can require its students to be vaccinated for COVID-19 — or any other infectious disease.

## **Analysis**

In what has become a rote feature of pandemic commentary, we first note that over a century ago the U.S. Supreme Court held that it is within a state's police power to enact compulsory immunization laws.<sup>[1]</sup> And as my colleagues previously explained, California courts have long recognized the state's authority to mandate vaccination, and state's courts have rejected challenges to vaccination requirements on nearly every conceivable legal basis dating back to the late 19th century.<sup>[2]</sup> Not long before the COVID-19 pandemic, state and federal courts rejected a series of challenges to a California law that repealed the "personal belief" exemption to the state's immunization requirements for schoolchildren.<sup>[3]</sup> Each decision reaffirmed the same essential principle: compulsory vaccination laws promote the state's compelling interest in protecting public health and safety by preventing the spread of contagious disease.

These cases, however, all address the state's authority to enact compulsory vaccination laws directed at schoolchildren. The University has authority to do the same for its (mostly) adult students. The University has a "unique constitutional status," established by the California constitution as a "public trust . . . with full powers of organization and government."<sup>[4]</sup> The California Supreme Court has described the University as "a branch of the state itself," which has "virtual autonomy in self-governance."<sup>[5]</sup> To that end, the University's Regents "may . . . exercise quasi legislative powers," within their sphere; they have "the general rule-making or policy-making power in regard to the University, and are . . . fully empowered with respect to the organization and government of the University."<sup>[6]</sup>

Given this broad grant of authority, it is surely within the University's power to order compulsory vaccination on appropriate terms. The University's recent experience during the COVID-19 pandemic confirms its ability to issue comparable regulations. In the summer and fall of 2020, the University of California's President ordered all students, faculty, and staff to receive a flu vaccine as a condition to accessing campus property during the 2020-2021 academic year (subject to medical exemptions and disability or religious accommodations).<sup>[7]</sup>

That order passed muster in court: in December 2020, a trial court denied a preliminary injunction in a case challenging the University's vaccination order.<sup>[8]</sup> The court found that the order was within the University's power: "The Regents is fully empowered with respect to the organization and the government of the University and the power of the Board of Regents to operate, control and administer the University is 'virtually exclusive.'"<sup>[9]</sup> The court then concluded that, based on the host of federal and state cases upholding compulsory vaccination laws (including *Jacobson*, *Abeel*, *Whitlow*, *Brown*, and *Love*), the plaintiffs failed to establish a probability of prevailing on their claims.

The University's 2020 flu-vaccine order may serve as a roadmap for a future COVID-vaccine policy. It has several notable features: First, it is suggestive. The order directed campuses to "strongly encourage universal vaccination," but did not require universal vaccination outright. Second, the vaccine mandate is tied to

campus access. Vaccination is required for those “living, learning or working” on University premises. Third, it provides some flexibility. The order permits individuals to receive medical exemptions, and disability or religious accommodations. Of course, some of those accommodations were optional — case law suggests the University can lawfully forgo religious exemptions.<sup>[10]</sup> Each of these features softens the impact that would be present with an across-the-board mandate, without materially diminishing its overall effectiveness in preserving health and safety in the University’s community.

## Conclusion

This article should not be read as endorsing the University’s just-announced mandatory vaccination policy. There are many reasons an institution might prefer to “strongly encourage” vaccination, rather than require it outright. This analysis assumes that the COVID vaccines are approved as safe for University students, and that those vaccines are made easily and cheaply available to them. But some campus community members may lack ready access to the vaccine; some may have underlying health conditions that impact their decision; some will have religious objections, personal-autonomy concerns, or have other concerns. State and local governments unquestionably “have the primary responsibility for addressing COVID-19 matters” such as vaccination programs.<sup>[11]</sup> Still, government actors should not take lightly the power to conscript citizens into action against their will, particularly on matters of personal health and bodily autonomy. But as the law currently stands, it is within the University’s power to adopt this policy.

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1. *Jacobson v. Massachusetts* (1905) 197 U.S. 11; *see also Zucht v. King* (1922) 260 U.S. 174. ↑
2. *Abeel v. Clark* (1890) 84 Cal. 226. ↑
3. *Love v. State Dept. of Ed.* (2018) 29 Cal.App.5th 980, 985; *Brown v. Smith* (2018) 24 Cal.App.5th 1135; *Whitlow v. Cal. Dep. of Ed.* (S.D. Cal. 2016) 203

F.Supp.3d 1079. ↑

4. *Miklosy v. Regents of Univ. of Cal.* (2008) 44 Cal.4th 876, 889 (internal citation omitted, quoting Cal. Const., art. IX, § 9(a)). ↑
5. *Id.* at 889, 890 (quoting *Campbell v. Regents of Univ. of Cal.* (2005) 35 Cal.4th 311, 321); see also *id.* at 890 (concluding that “the University functions in some ways like an independent sovereign”). ↑
6. *Id.* (citation omitted). The University is, of course, subject to the state’s police power. *San Francisco Labor Council v. Regents of Univ. of Cal.* (1980) 26 Cal.3d 785, 789. So California’s legislature could, for example, specify by statute what vaccinations the Regents may, must, or may not require. ↑
7. Univ. of Cal., Executive Order (issued July 31, 2020, revised Sept. 29, 2020), <https://ucnet.universityofcalifornia.edu/news/2020/08/img/2020-21-flu-vaccination-executive-order.pdf>. ↑
8. *Kiel v. Regents of Univ. of Cal.*, Alameda Cty. Super. Ct. case no. HG20-072843. ↑
9. Slip Op., p. 7 (quoting *San Francisco Labor Council*, 26 Cal.3d at 788). ↑
10. See *Love v. State Dept. of Education* (2018) 29 Cal.App.5th 980, 985–986 and *Brown v. Smith* (2018) 24 Cal.App.5th 1135, 1138 (rejecting multiple challenges to a California mandatory vaccine statute that omitted religious exemptions). ↑
11. *County of Los Angeles Department of Public Health v. Superior Court of Los Angeles County* (2021) 61 Cal.App.5th 478 (quoting *Calvary Chapel Dayton Valley v. Sisolak* (2020) 140 S.Ct. 2603, 2614 (Kavanaugh, J., dissenting)). ↑