

Employer-Mandated Vaccination Challenge Dismissed

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On Saturday, June 14, 2021, a federal judge in Texas dismissed the lawsuit filed by employees and former employees against Houston Methodist Hospital challenging its policy requiring all employees to be vaccinated against COVID-19. The holding may provide some degree of reassurance to employers that have decided to require employees to be vaccinated against COVID-19.

The plaintiffs claimed that (1) they were wrongfully discharged, (2) the vaccine mandate violates public policy, (3) the vaccine mandate violates the Food, Drug, and Cosmetic Act ("FDCA") provisions on emergency use authorization ("EUA"), (4) the vaccine mandate violates federal laws on human test subjects, and (5) the vaccine mandate violates the Nuremberg Code. The plaintiffs sought damages as well as declaratory and injunctive relief.

Judge Lynn N. Hughes of the U.S. District Court for the Southern District of Texas issued a four-page order holding that the plaintiffs failed to state any claim on which relief could be granted.

First, the plaintiffs' wrongful discharge claim failed because Texas state law "only protects employees from being terminated for refusing to commit an act carrying criminal penalties to the worker," and "[r]eceiving a COVID-19 vaccination is not an illegal act."

Second, the plaintiffs' claims based on a public-policy exception to at-will employment failed because "Texas does not recognize [an] exception to at-will employment" based on "public policy," and even if it did, the Hospital's vaccine mandate would not qualify for an exception. This determination was based on Supreme Court precedent holding that due process is not violated by involuntary quarantine to prevent transmission of contagious diseases or by mandatory vaccination requirements, as well as non-binding guidance from the Equal Employment Opportunity Commission that employers can mandate vaccination for employees, as long as they do so subject to reasonable accommodation requirements under the Americans with Disabilities Act and Title VII.

Third, Judge Hughes rejected the plaintiffs' arguments that the Hospital's vaccine mandate violated the provisions of the FDCA that require the Secretary of Health and Human Services to ensure that recipients of products authorized for emergency use under § 21 U.S.C. § 360bbb-3 are informed of the "option to accept **or refuse** administration of the product." (Emphasis added.) The opinion explained that there is no private right of action under Section 360bbb-3, and the provision "neither expands nor restricts the responsibilities of private employers"—and in fact "does not apply at all to private employers."

Fourth, the opinion rejected the plaintiffs' argument that they were being unlawfully forced to participate in a human trial and that the vaccination policy violated the Nuremberg Code. "Equating the injection requirement to medical experimentation in concentration camps is reprehensible," Judge Hughes commented.

Finally, Judge Hughes explained that the Hospital's vaccine mandate does not amount to

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coercion. Just as the FDCA provides, an employee “can freely choose to accept or refuse a COVID-19 vaccine; however, if she refuses, she will simply need to work somewhere else.... Every employment includes limits on the worker's behavior in exchange for his remuneration. That is all part of the bargain.”

Judge Hughes' reasoning is consistent with that of many employers who have implemented or considered a vaccination mandate. Although the order does not eliminate all risk to employers that a vaccine mandate could be found unlawful—it will not be binding precedent on other courts faced with similar challenges to employer-mandated vaccines in the future—it should provide some degree of reassurance to employers, particularly with regard to its holding that the FDCA EUA provisions do not create employment rights and are not susceptible to a private right of action.

Gibson Dunn lawyers are available to assist in addressing any questions you may have about these developments. Please contact the Gibson Dunn lawyer with whom you usually work, any member of the firm's Labor and Employment practice group, or the following authors:

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