

LEGAL UPDATES

UPDATED: JUNE 14, 2021

PUBLISHED: JUNE 3, 2021

Service

Labor & Employment

Professional

JENNA BROFSKY

KANSAS CITY:

816.983.8305

JENNA.BROFSKY@

HUSCHBLACKWELL.COM

[DISMISSED]: First Lawsuit Filed Challenging Private Employer-Mandated COVID-19 Vaccine

UPDATE:

On June 12, 2021, the hospital's motion to dismiss this lawsuit in its entirety was granted. The Court found that the hospital's policy of mandating the COVID-19 vaccine aligned with its business of saving lives without spreading the virus, and that employees were free to accept or refuse the COVID-19 vaccine. The Court explained that if employees refused, they would simply need to work somewhere else, and that the policy was not a violation of law.

Specifically, the Court found there was no violation under Texas employment law because there was no illegal act employees were forced to commit. Additionally, there was no violation of public policy, based on Supreme Court precedent and the Equal Employment Opportunity Commission's (EEOC) guidance, which confirms the ability of private employers to require their employees to be vaccinated against COVID-19. Lastly, the Court found that the plaintiffs had misconstrued the federal law regarding emergency use authorization and that such does not apply to private employers.

On May 28, 2021, 117 unvaccinated nonmanagerial employees from Houston Methodist Hospital filed a lawsuit to challenge the hospital's vaccine mandate in *Jennifer Bridges et al. v The Methodist Hospital*. This appears to be the first lawsuit against a private employer mandate of the COVID-19 vaccine.[1]

According to the petition, the hospital system implemented a policy on April 1, 2021, which would require vaccination of all covered employees, and was to be implemented in phases. The policy permitted employees to submit required documentation for exemption based on either a medical condition or sincerely

held religious beliefs. The petition asserts that defendants have been arbitrarily denying exemptions.

As alleged, the first phase of employees to be vaccinated included management personnel. Those who did not receive the vaccine by April 15 were to be placed on a two-week suspension, however, executives and managers were 100% compliant and no leave was necessary. As further alleged, after Phase I was complete, the hospital allegedly informed all nonmanagers (Phase II employees) that they would need to be vaccinated by June 7 or provide proof of vaccination by this date. Failure to comply with the policy would result in a 14-day suspension and, if still out of compliance, employment termination.

In their petition, plaintiffs take aim at the emergency use authorization status of the vaccine, claiming that employees are being forced to be “injected with an experimental vaccine.” They also go as far as to liken the vaccine policy to medical experiments in Nazi Germany concentration camps and claim that this is a violation of the Nuremberg Code.

Count One alleges wrongful discharge under a public policy exception to the employment at-will doctrine under Texas law. According to the petition, *Sabine Pilot* provides that employees may sue for wrongful termination if they are fired for refusing to perform an illegal act. Plaintiffs claim that the hospital system is requiring plaintiffs to commit and engage in an illegal act and have been discharged for this reason. The petition does not allege what exactly the “illegal act” is that plaintiffs are being required to commit.

Count Two alleges violation of a federal law related to certain products approved for emergency use; 21 U.S.C. § 360bbb-3. Section (e)(1)(A) provides that individuals being administered a covered product must be informed of the option to accept or refuse administration of said product, and of the consequences of refusing administration, as well as informed of the potential risks and benefits. Plaintiffs claim that the hospital violated (e)(1)(A), including by not permitting plaintiffs to refuse the vaccine while continuing employment, and by failing to advise plaintiffs of the “known and potential benefits and risks of such emergency use of the product, and of the extent to which such benefits and risks are unknown.”

Plaintiffs are seeking declaratory and injunctive relief by asking the Court to find that 21 U.S.C. § 360bbb-3 preempts the vaccine policy and prohibiting the hospital from enforcing the policy.

What this means to you

It does not appear that the federal statute expressly prohibits a private employer from requiring vaccination as a condition of employment. Further, the federal agency tasked with enforcing federal antidiscrimination law, the EEOC, has clarified that employers can require COVID-19 vaccinations for their employees on the same day this suit was filed.

As more employers begin to mandate vaccination, particularly in the healthcare industry, this lawsuit will be one to watch.

Contact us

For questions on vaccine policies or other COVID-19-related questions, please reach out to Natalie Holden, Jenna Brofsky, Lowell Pearson or your Husch Blackwell attorney.

Your Comprehensive COVID-19 Legal Resource

Since the pandemic's onset, Husch Blackwell has continually monitored state-by-state orders regarding capacity, masking, vaccines, and more. We regularly address your FAQs and provide you with easy-to-use COVID-19 tools about returning to work and navigating federal programs. Contact our industry-specific legal teams or your Husch Blackwell attorney to plan through and beyond the pandemic.

[1] There have been a few lawsuits under similar theories filed against public employers, including a county detention facility in New Mexico and a school district in California.