

Chicago Daily Law Bulletin®

VOLUME 168, NO. 142

LAW BULLETIN MEDIA

A law unto ourselves: Vaccine mandates and limits of personal 'liberty' put to test

On Nov. 30, the U.S. District Court for the Northern District of Illinois denied the plaintiffs' motion for a preliminary injunction and class-wide relief to a group of employees of NorthShore University Health System who were fighting a vaccine mandate.

In *Jane Does 1-14 v. NorthShore University Health*, 21 C 5683, the court held that the plaintiffs could not demonstrate "irreparable harm" absent an order for a preliminary injunction. The injunction would have barred enforcement of NorthShore's COVID-19 vaccination requirement.

A movant for a preliminary injunction must show an irreparable injury is likely unless an injunction is granted. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008). Given that relief under Title VII includes compensatory and punitive damages, including front pay, back pay and attorney's fees, establishing "irreparable harm" is unlikely in Title VII cases.

Legal challenges to vaccine requirements are typically brought pursuant to the Americans with Disabilities Act, the free exercise clause of the First Amendment, and Title VII. Title VII and First Amendment challenges are usually the prin-

cipal lines of attack. Such challenges brought against vaccine mandates, however, are not new. Neither is the politicizing of illness and death.

The power of a state to protect its citizens during an epidemic

The same constitutional arguments centering on personal autonomy were made against the smallpox vaccine a century ago — including contradicting medical evidence and fevered conspiracy dreams against germ theory.

In *Jacobson v. Massachusetts*, 197 U.S. 11, 25 (1905), the Supreme Court upheld the power of the states to "enact quarantine laws" and "health laws of every description." Due to a smallpox epidemic in 1901, the consequence of refusing the vaccine in Massachusetts was not loss of employment but criminal penalties.

Justice John Marshall Harlan provided a meditation on the constitutional meaning of "liberty." The Constitution "does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint."

"There are manifold restraints to which every person is necessarily subject for the common good. On any other basis, organ-

BY CHRISTOPHER GARCIA

CHRISTOPHER GARCIA is an employment law attorney practicing in Chicago and the western suburbs. Garcia can be reached at cag@gar-law.com.

ized society could not exist with safety to its members. Society based on the rule that each one is a law unto himself would soon be confronted with disorder and anarchy." *Jacobson v. Massachusetts*, 197 U.S. 11, 25-26 (1905).

Even in its stay of the Occupational Safety and Health Administration's emergency temporary standard for vaccines, the 5th U.S. Circuit Court of Appeals cited with approval a state's broad police power to enforce vaccinations during an epidemic. Citing *Jacobson*, the court reaffirmed that requiring a person to "receive a vaccine or undergo testing falls squarely within the States' police power." *BST Holdings, L.L.C. v. Occupational Safety and Health*, 2021 WL 5279381.

Parties in these cases often confuse the discrete legal relationships in play between employees of a private institution in a Title

VII context, and the vastly different analysis of the exercise of federal or state police power to require vaccinations during an epidemic. The recent stays of both the OSHA and Centers for Medicare and Medicaid Services vaccination mandates were based, in part, on the courts' respective opinions that the federal government does not have the same plenary authority as do the states under the principles of federalism.

Personal liberty in private employment

In the context of a private hospital, with very few exceptions, administrators are not state actors — regardless of what federal funds the hospital receives. See *Thomas v. Nationwide Children's Hosp.*, 882 F.3d 608, 612 (6th Cir. 2018). In *Does v. NorthShore*, the court felt it necessary to emphasize that NorthShore is not a "governmental actor."

We accept many personal "restraints" in our jobs. We arrive at work when scheduled. Our duties are clearly defined. We work in specific offices, comply with dress codes, and carry required identification. And employees are required to comply with health and safety protocols. Most of these same litigants have agreed to MMR and yearly influenza

vaccines — which are not so politically charged. See discussion in *Beckerich v. St. Elizabeth Medical Center*, 2021 WL 4398027 (2021).

Some litigants confuse the right to refuse a vaccine with an illusory right to work at a specific medical institution. Hospitals require vaccination as a condition of employment. No one is being restrained and forcibly vaccinated.

Of course, any employee

may also “choose to exercise another individual liberty, no less significant — the right to seek other employment.” Id. (In *Beckerich*, the District Court for the Eastern District of Kentucky’s consideration of these constitutional arguments provides an elegant counterpoint to *Jacobson*). The protections afforded by the Constitution do not include the right to work at a hospital without being burdened

by its safety protocols.

Not long ago I heard a patron in a pizza joint scream at a young cashier for not respecting her “constitutional right to order pizza without wearing a mask.” But conspiracies are not protected liberties; and private employers, including hospitals and neighborhood pizzerias, are not state actors capable of violating the Bill of Rights with vaccine mandates and mask requirements.

The Supreme Court has always balanced individual liberty with essential limitations for the common good. The religious objections to these vaccinations are profound and require serious consideration by an employer. But a rage for absolute liberty, without consequence or responsibility, is the cry of a toddler at the center of its own tiny world. Unfortunately, the child is often “the father of the man.”