Updates on Legal Challenges to Health Care Employers' Voluntary COVID-19 Vaccine Mandates

September 28, 2021 – Dorsey Health Law
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On May 28, 2021, a group of Houston Methodist Hospital employees filed a lawsuit challenging the hospital's COVID-19 vaccine mandate for employees. The lawsuit, filed by 117 employees, was the first to challenge a health care employer's COVID-19 vaccine mandate. The employees' grievances included that the vaccine is unsafe and that employers may not treat an employee like "a human guinea pig." At that time, all three COVID-19 vaccines were still being administered under the Food and Drug Administration "FDA")'s Emergency Use Authorization ("EUA").

On June 12, 2021, a federal district judge dismissed the lawsuit. The judge cited several reasons in dismissing the suit, including the Equal Employment Opportunity Commission ("EEOC")'s guidance that, with medical and religious exemptions, employers can require employees to get the COVID-19 vaccine. In response to the claim that the hospital was violating employees' human rights by requiring the COVID-19 vaccine, the judge stated:

The hospital's employees are not participants in a human trial. They are licensed doctors, nurses, medical technicians, and staff members. The hospital has not applied to test the COVID-19 vaccines on its employees, it has not been approved by an institutional review board, and it has not been certified to proceed with clinical trials.

As to the employees' argument that they were being coerced into getting the vaccine or risk termination, the judge held:

If a worker refuses an assignment, changed office, earlier start time, or other directive, he may be properly fired. Every employment includes limits on the worker's behavior in exchange for his remuneration. That is all part of the bargain.

The idea that employers routinely set workplace rules by which employees can either

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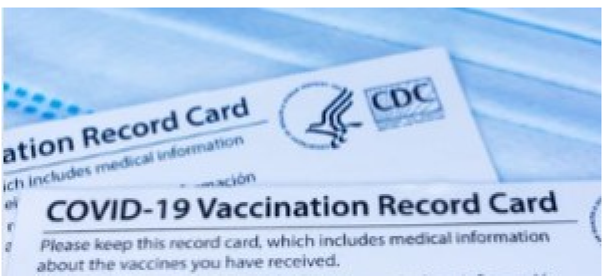
choose to abide or find other employment was central to a recent decision by a court in the Eastern District of Kentucky on September 24, 2021. That case, *Beckerich, et. al. v. St. Elizabeth Medical Center, et. al*., was filed on September 3, 2021, by 40 hospital employees challenging the hospital system's COVID-19 vaccine mandate. The employees argued several violations, including that the mandate constituted fraud on behalf of the hospital, the United States Government, the Biden Administration, and the media. One difference between the Houston Methodist and the St. Elizabeth case is that on August 23, 2021, the FDA gave full approval to the Pfizer-BioNTech COVID-19 Vaccine. That full approval likely ended the likelihood that any employees going forward will be able to seriously argue that requiring the vaccine was tantamount to human experimentation.

In denying the employees' request for a temporary injunction (which would have halted the hospital's mandate from going forward until the case could be fully decided on the merits), the court rejected the employees' attempt to make constitutional claims on the basis that the hospital, by receiving federal funds, is essentially a governmental actor. To that argument the court stated, "[p]rivate hospitals, no matter how much federal funding they may receive, are generally not state actors for purposes of constitutional questions."



The court also examined how the "greater good" should be analyzed in the context of legal challenges to COVID-19 vaccine mandates, asking, "[i]s the 'greater good' made up of many different individual liberties, is it a singular collective liberty, or is it both?" The court then looked to a United States Supreme Court case from 1905 upholding Massachusetts' small pox vaccine mandate. We previously discussed that case in an update outlining President Biden's COVID-19 Action Plan.

Like the court in *Houston Methodist*, the judge in *St. Elizabeth* noted that employers make rules all the time, and employees have a choice whether to follow those rules or find work elsewhere:

"To work at St. Elizabeth, Plaintiffs agree to wear a certain uniform, to arrive at work at a certain time, to leave work at a certain time, to park their vehicle in a certain spot, to sit at a certain desk and to work on certain tasks. They also agree to receive an influenza vaccine, which Defendants have required of their employees for the past five years. These are all conditions of employment, and '"every employment includes limits on the worker's behavior in exchange for his remuneration.' . . . If an employee believes his or her individual liberties are more important than legally permissible conditions on his or her employment, that employee can and should choose to exercise another individual liberty, no less significant – the right to seek other employment."

While these cases involve challenges to voluntary COVID-19 vaccine mandates, the legal reasoning utilized by the courts might prove to be a roadmap for challenges to the vaccine mandates that are part of President Biden's COVID-19 Action Plan. That includes an expansion of a previously announced but not yet released requirement that health care employers (previously just long term care providers) require the COVID-19 vaccination as a condition of receipt of Medicare and Medicaid funds.