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EMPLOYMENT LAW **ALERT**

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Are employers obliged to grant employees leave over the holiday period where they have exhausted sick leave provisions due to COVID-19 infection or exposure?

Employers have dedicated much of the year to implementing adequate health and safety measures in the workplace, including placing employees on paid sick leave at the onset of COVID-19 symptoms or following exposure to the virus. Employers may be wondering when *"enough is enough"* and how this impacts on requests for leave this holiday season.

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The vexed issue of mandatory vaccinations

In this alert we consider two recent cases from the US that deal with the constitutionality of mandatory COVID-19 vaccinations.

The issue of mandatory vaccinations is, to say the least, a contentious one. Social media is replete with vociferous arguments both for and against mandatory vaccinations.

The Consolidated Direction on Occupational Health and Safety in Certain Workplaces, published on 11 June 2021, specifically allows employers in South Africa to implement mandatory vaccination policies in the workplace, subject to certain requirements. A number of prominent companies, acting on the consolidated direction, have moved to implement mandatory vaccination policies. Many of these companies have been threatened with legal action based on the constitutionality of mandatory vaccinations. The Commission for Conciliation, Mediation and Arbitration has also registered a few cases referred by employees that have been dismissed or suspended by their employers because they refuse to be vaccinated. These cases have been flagged as being of national importance.

In an effort to ensure that businesses are on the right side of the law, and to try to speed up the vaccination rate nationally, Business Unity South Africa (BUSA) has applied to the High Court for a declaratory order on mandatory vaccinations in the workplace.

Notwithstanding the declaratory order sought by BUSA, our courts are sure to see much litigation around this issue. As can be expected, there is little legal precedent in South Africa related to the constitutionality of measures adopted, in this case in the workplace, to eliminate and curb the spread of COVID-19. In cases where there is little legal precedent our courts will look to international precedent for guidance.

In this alert we consider two recent cases from the US that deal with the constitutionality of mandatory COVID-19 vaccinations. Both cases were brought as preliminary injunctions challenging mandatory COVID-19 vaccination policies. A person applying for an injunction must show that (i) they are likely to succeed on the merits; (ii) they will suffer irreparable harm if the injunction is not granted; (iii) the balance of equities tips in their favour; and (iv) the injunction serves the public interest.

Together Employees v Mass General Brigham Incorporated Civil Action No.21-11686-FDS (12 November 2021)

Mass General Brigham Incorporated (MGB) is a major hospital and healthcare network in Boston. On 24 June 2021 it implemented a mandatory COVID-19 policy for all its employees. The policy had a deadline for vaccination. Unvaccinated employees would be placed on unpaid leave on 20 October 2021 and, if still unvaccinated, dismissed on 5 November 2021. The policy allows for employees to apply for exemptions based on religious and medical reasons.

Together Employees is an unincorporated association of employees who were denied a religious or medical exemption by MGB. In these proceedings there were also eight individual plaintiffs. The plaintiffs filed a discrimination and retaliation claim in terms of the Civil Rights Act and the Americans with Disabilities Act (ADA) against MGB, and sought an injunction prohibiting MGB from enforcing its vaccination policy.

Those plaintiffs that applied for a medical exemption raised grounds such as anxiety and post-traumatic stress disorder, a history of chronic lymphocytic leukaemia and pregnancy. The court

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The plaintiffs, performing their essential job functions, posed a significant risk of transmitting an infectious disease to others in the workplace.

rejected these grounds as it found they did not amount to disabilities in terms of the ADA. None of the medical reasons advanced actually precluded the plaintiffs from taking the COVID-19 vaccination, in fact the guidelines from the Centre of Disease Control recommended that pregnant individuals should have a COVID-19 vaccination. Furthermore, the post-traumatic stress disorder complained of was not related to the COVID-19 vaccination.

The plaintiffs who applied for religious exemption raised grounds such as their opposition to abortion and the use of foetal cell lines in the development of COVID-19 vaccines, and their religious obligations to keep their bodies free of any foreign substances. The court rejected these grounds. It considered that the Pfizer and Moderna vaccines did not make use of any foetal cell lines in development. The plaintiffs had previously not raised any objections to other vaccinations, and the religions that they practised did not object to the COVID-19 vaccination.

The court found that on the facts before it, the plaintiffs failed to show that they were likely to succeed on the merits.

The court considered the nature of MGB's business and specifically that it maintains the highest level of patient care. It must ensure that it protects patients, staff and visitors. The plaintiffs, performing their essential job functions, posed a significant risk of transmitting an infectious disease to others in the workplace. This risk could not be eliminated through any reasonable accommodation such as masking, social distancing and periodic testing.

The court distinguished the fact that MGB allowed unvaccinated patients into its hospitals as MGB's physicians had an ethical duty to treat all patients requiring medical care, including unvaccinated people. This did not, however, extend to the employment relationship.

The plaintiffs requested that they be accommodated by not being vaccinated. The court found that this would place an undue hardship on MGB as permitting the requested accommodation would create a greater risk of infection within its facilities.

The court considered that MGB had engaged in an interactive process with each plaintiff in that each application for exemption was considered on an individual basis, and where additional information was required, the respective committees sent follow-up questions that were tailored to each individual.

The court found that the plaintiffs had failed to make out a case for retaliation against MGB. It considered that MGB's policy was a neutral policy of general applicability and that the consequences were based on the employee's non-vaccination and not on their religion or disability.

The court found further that the loss of employment did not amount to irreparable harm, as contended by the plaintiffs, as they had remedies available in a wrongful termination of employment claim which would allow them to claim monetary damages to compensate for their loss of employment.

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In considering the balance of equities the court accepted that the plaintiffs would experience economic hardship if they lost their jobs. However, that harm had to be weighed against MGB's interest in protecting its patients, visitors and staff from exposure to COVID-19, and the legitimate and critical public interest in preventing the spread of COVID-19 by increasing the vaccination rate.

In considering the balance of equities the court accepted that the plaintiffs would experience economic hardship if they lost their jobs. However, that harm had to be weighed against MGB's interest in protecting its patients, visitors and staff from exposure to COVID-19, and the legitimate and critical public interest in preventing the spread of COVID-19 by increasing the vaccination rate. The court found that the balance weighed in favour of the broader public interest. The plaintiffs' motion for a preliminary injunction was denied.

Thoms v Maricopa County Community College District (CV-21-01781-PHX-SPL) (9 November 2021)

Mesa Community College (MCC) is a community college within the Maricopa County Community College District (District). It offers associate degrees in applied science in nursing. As part of their coursework nursing students must complete a three-day clinical rotation at a clinical partner of MCC's to obtain practical experience. Without the practical experience the nursing students will not be able to graduate. Prior to enrolment, students are required to agree to meet the placement requirements of MCC's "*most stringent*" clinical partner, including any vaccination requirements.

The plaintiffs, Emily Thoms and Kamaleilani Moreno, are nursing students who were assigned to do their course work at Mayo Clinic, which requires students to show that they have been vaccinated for COVID-19 before they may complete the coursework. Mayo Clinic requires universal vaccination and does not allow for religious exemptions. The plaintiffs have sincere religious objections to receiving the COVID-19 vaccination due to the use of foetal cell lines (procured from abortions) in the testing, development and production of COVID-19 vaccinations.

The plaintiffs filed a claim against the District in terms of the First Amendment Free Exercise clause and Arizona's Free Exercise of Religion Act (FERA). They sought a temporary restraining order or a preliminary injunction restraining enforcement of the District's vaccine mandate and requiring accommodations and a declaratory judgment that the vaccine mandate is unconstitutional.

At the time that the plaintiffs listed their preferences for clinical placements, Moreno listed Mayo Clinic as it did not, at that stage, require universal COVID-19 vaccinations. The plaintiffs were assigned to Mayo Clinic. On 16 September 2021 Mayo Clinic informed the District of its universal vaccination requirement.

The plaintiffs were informed that by 30 September 2021 they would have to provide proof of having had a COVID-19 vaccination or submit a declination form and request religious and/or medical exemptions. The plaintiffs were warned that even if they submitted an accommodation request, the District could not modify the requirements outlined by its clinical partner.

The plaintiffs submitted their declination forms and requested for religious accommodation. The District denied the requested for religious accommodation but approved alternative reasonable accommodation, including the ability to participate in on-campus instruction and activities while unvaccinated, the ability to withdraw from classes with a clinical component along with an exception to the tuition refund policy, and the potential of taking an "*incomplete*" grade for these classes until they could be placed in clinicals in spring or summer of 2022, provided that it had a clinical partner that did not require mandatory vaccinations.

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For a FERA claim to prevail a plaintiff must show that the action or refusal to act is motivated by a religious belief, that the belief is sincerely held, and that the governmental action substantially burdens the exercising of the religion.

The District did, however, offer accommodations to students who were assigned to clinical partners that did not require universal COVID-19 vaccination by extending the deadline to comply with its *"most stringent"* clinical partner's requirements until they had completed the autumn term of 2021. This in effect allowed them to comply with the clinical site's vaccination requirements and not those of the District's *"most stringent"* clinical partner.

The plaintiffs then proposed various other alternatives that they complete instead of the in-person clinicals. These included simulated clinicals, extra assignments, finding new clinical sites and swapping their clinical placements with vaccinated students at sites that did not require universal vaccination. The District rejected their proposals as unfeasible and unreasonable. It had, however, offered alternatives to in-person clinicals for non-religious reasons. Moreno also testified about how the District had previously allowed her to complete two case studies to make up for missing an in-person clinical. The District then made a final accommodation offer to the plaintiffs. It encouraged them to complete the academic components of the course in the autumn semester, following which it would allow them to withdraw from the clinicals without penalty (receiving an incomplete) and, if it had a clinical partner who did not require universal vaccination in the spring 2022 semester, it would place the plaintiffs at that site to complete the clinical requirements and graduate. By that stage the plaintiffs had already filed their suit.

The court first examined the plaintiffs' likelihood of success on the FERA and First Amendment claims. In terms of the FERA government may substantially burden a person's exercise of religion only if it demonstrates that the application of the burden to the person is both in furtherance of a compelling governmental interest and the least restrictive means furthering that compelling governmental interest. For a FERA claim to prevail a plaintiff must show that the action or refusal to act is motivated by a religious belief, that the belief is sincerely held, and that the governmental action substantially burdens the exercising of the religion.

The plaintiffs argued that the District's policy placed a substantial burden on them because it forced them to choose between abiding by their religious beliefs on the one hand, and not receiving their nursing degrees in December 2021 on the other. The District argued that a delay in completing the coursework did not amount to a substantial burden. The court found that denying the plaintiffs their degrees in December 2021 could not be characterised as trivial, technical or *de minimus*. The plaintiffs would be prevented from becoming licenced and employed as nurses. They would not be able to join the profession they had devoted themselves to for two years. This was a substantial burden as they would either have to compromise their religious beliefs to graduate, or adhere to their beliefs and give up the nursing degree to which they were otherwise entitled.

The court found that the District had been able to accommodate other students and that it had feasible and less restrictive means of ensuring that it could continue to provide nursing students with clinical opportunities without substantially burdening their religious beliefs.

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The court agreed that the loss of First Amendment freedoms, even for short periods of time, constituted irreparable harm.

The court also found that the District's policy would most likely fail the First Amendment's strict scrutiny. It weighed up the District's interest in stemming the spread of COVID-19 and found that this could not be justified where the District had loosened its policy for other students, such as those at clinical sites that did not have universal vaccination requirements, allowing them to remain unvaccinated and making them as likely as the plaintiffs to spread the virus.

The court agreed that the loss of First Amendment freedoms, even for short periods of time, constituted irreparable harm. It found that constitutional violations could not be adequately remedied through damages. In addition, the plaintiffs had shown that they had a likelihood of success on the merits and had shown a likelihood that their right to free religious exercise would be violated if the restraint or injunction was not granted.

In deciding the balance of equities and the public interest the court found that protecting religious liberty and conscience is in the public interest as free exercise "*is undoubtably fundamentally important*". It further found that in was also in the public interest to allow the plaintiffs to graduate in December 2021 as there was a critical shortage of nurses in Arizona and granting the injunction would not only serve the public interest by protecting religious liberty but also ensuring that qualified nurses are able to enter the workforce.

The District was restrained from enforcing the requirement that nursing students satisfy the vaccination policies of their assigned clinical partners and that nursing students must complete their assigned in-person clinical rotations in order to complete their academic programmes. The District was ordered to accommodate the plaintiffs in such a way that they could complete the clinical components of their coursework and complete their academic programmes as scheduled in December 2021.

Comment

These cases illustrate that the issue of mandatory vaccinations is a vexed one. Although precedent in the US is not binding on our courts, it may well guide our courts in their approach to this issue. The courts in the two cases we have considered approached the issue of mandatory vaccinations from different angles. The *Together Employees* case focussed more on the rights of the employer in protecting its patients, visitors and staff from exposure to COVID-19, and the legitimate and critical public interest in preventing the spread of COVID-19. In contrast, the *Thoms* case focused more on the rights of the individual to free religious exercise.

It is clear from these cases that courts internationally may adopt very different approaches to the constitutionality of mandatory vaccinations. These two cases in particular may also reflect the ideological and political differences in approach in the US. The *Together Employees* case was decided in Massachusetts, a traditionally Democratic state, while the Thoms case was decided in Arizona, a traditionally Republican state.

Employment Law Practice

Are employers obliged to grant employees leave over the holiday period where they have exhausted sick leave provisions due to COVID-19 infection or exposure?

It is not reasonable or fair to select which employees may or may not enjoy their annual leave entitlements on the basis of health or on the basis that an employee has exhausted their sick leave entitlement, as the entitlement to annual leave is distinct from the entitlement to sick leave.

Employers have dedicated much of the year to implementing adequate health and safety measures in the workplace, including placing employees on paid sick leave at the onset of COVID-19 symptoms or following exposure to the virus. Employers may be wondering when "*enough is enough*" and how this impacts on requests for leave this holiday season.

Sick leave has been taken at unprecedented rates in the past year. This raises a number of pertinent questions, including: What are employers to do if their employees have exhausted all their paid sick leave entitlement due to COVID-19 infection or exposure and they nevertheless request leave over the holiday period? Is the position different where the employee contracted or was exposed to COVID-19 at the workplace?

In terms of sections 6(3)((b)(iii) and 6(7)(c) of the Consolidated Direction on Occupational Health and Safety Measures in Certain Workplaces, dated 11 June 2021, employees excluded from the workplace due to COVID-19 symptoms or exposure will use their paid sick leave entitlements under the Basic Conditions of Employment Act 75 of 1997 (BCEA) during the period(s) of absence. When sick leave under the BCEA has been exhausted, employees can apply for illness benefits in terms of the Unemployment Insurance Act 63 of 2001.

Missing work due to COVID-19 exposure, the effects of long COVID, or any other health ailment may result in employees' extended absence from the workplace. Employers may be tempted to refuse annual leave requests from employees who have been absent from work due to ill health and who have exhausted their sick leave entitlement under the BCEA. However, it is not reasonable or fair to select which employees may or may not enjoy their annual leave entitlements on the basis of health or on the basis that an employee has exhausted their sick leave entitlement, as the entitlement to annual leave is distinct from the entitlement to sick leave. In addition, and in terms of the BCEA, employees are afforded a minimum number of days annual leave a year in recognition of the importance of them having leisure time away from work.

Notwithstanding the importance of annual leave, it remains reasonable and lawful for an employer to refuse an employee's leave application based on its operational needs, such as where the timing of the leave will have a detrimental effect on the business, or if the business is short staffed at the time.

Are employers obliged to grant employees leave over the holiday period where they have exhausted sick leave provisions due to COVID-19 infection or exposure?

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There is no distinction between employees who contracted COVID-19 at work or any other employees when considering the grounds to grant or refuse annual leave.

Case law

It has long been established that employees do not have a right to take annual leave based solely on when it suits them. The court in *Ludick v Rural Maintenance* [2014] 2 BLLR 178 (LC) reiterated that section 20(10)(a) of the BCEA contemplates employees enjoying their annual leave at a time mutually agreed between the employer and employee.

Based on their operational needs, employers may potentially block out periods of the year which are particularly busy, during which time employees will not be permitted to take annual leave. This is permissible having regard to section 20(10)(b) of the BCEA, which provides that an employer may determine the time at which leave may be taken, where no agreement is reached.

Employers may, in appropriate circumstances, refuse an employee's request for annual leave, provided that the employee is not being singled out for different treatment because they may have taken all their sick leave entitlement and, in addition, the employee is not prevented from using their annual leave entitlement in the annual leave cycle or the six months following the completion of the cycle.

There is no distinction between employees who contracted COVID-19 at work or any other employees when considering the grounds to grant or refuse annual leave.

Gillian Lumb and Amy King

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