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Via E-mail and First-Class Mail

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Re: Legality of Covid Mitigation Requirements by Employers

Dear Sal:

This letter is in response to your request that I briefly outline the law which underlays the right of an employer to require reasonable measures from employees designed to combat the spread of Covid-19, such as masks and mandatory vaccinations. In order to fully address this issue, I think it would be helpful to take a step back and look at the legal framework which underlies governmental actions in these areas, before specifically addressing private employers.

It has long been held that the Tenth Amendment to the United States Constitution delegates to the states the right to take reasonable measures to protect the health and safety of their populations. Such actions taken by states such as California are examined by the United States Supreme Court in light of federal constitutional provisions to ensure that fundamental federal constitutional rights are not unduly infringed, but it is widely held that the latitude granted to the states in taking actions to protect their population's health and safety "must be especially broad." *Marshall v. United States*, 414 U.S. 417, 427 (1974).

The case of *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11 (1905) is illustrative. This case is over 100 years old and is still recognized as "good law". In this case, the right of the State of Massachusetts to require small pox vaccination was challenged on the grounds that it unduly restricted individual liberty under the Fourteenth Amendment to the United States Constitution. The United States Supreme Court rejected that claim, finding that it was appropriate to defer to the judgment of the legislature of Massachusetts concerning the public health emergency, and that individual liberty under the Fourteenth Amendment was not without limit.

More recently, religious liberty has been a hot topic in regards to Covid-19 public gathering restrictions. Even there, however, the focus of the cases has been on insuring that religious observance was not being treated "differently" than other forms of activity, not on whether state governments could restrict public gatherings. See *South Bay United Pentecostal Church v. Gavin Newsom, Governor of California*, _ U.S. _ 140 S. Ct. 1613 (2020).

For these reasons, federal “constitutional” challenges to mask mandates and vaccine mandates usually fail. The United States Supreme Court “balances” the needs of the state with individual liberties and defers to the state’s judgment.

It should be emphasized that these cases revolve around challenges to actions taken by a “state”.¹ The analysis regarding private employers is different. Private employers are not “state” actors, and are not subject to the same requirements in protecting “constitutional rights” as public entities. They are, however, subject to various anti-discrimination laws and union representation laws which do circumscribe their abilities to take actions in certain ways. Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act and other statutes have been invoked by individuals seeking to challenge the right of private employers to take reasonable measures to protect health and safety amongst their workforce and the public with whom they interact.

The United States Equal Employment Opportunity Commission (EEOC) has issued guidelines for private employers to follow concerning Covid-19 (see www.eeoc.gov/coronavirus). The EEOC has held that it is not discriminatory or unlawful for a private employer to follow guidelines and suggestions made by the CDC or state/local public health authorities regarding addressing Coronavirus, including mandatory mask wearing and mandatory vaccination. They have written that nothing in federal EEO laws, under the ADA, Title VII or other federal employment non-discrimination laws, prevents an employer from requiring that employees be vaccinated for Covid-19² in order to enter their workplace, so long as reasonable accommodations are available for individuals who have legitimate religious and/or medical bases to object to vaccination. For such employees, an employer must “reasonably accommodate” them by, for example, mandatory mask wearing, frequent Covid-19 testing and, where possible, working from home, “unless providing an accommodation would pose an undue hardship on the operation of the employer's business.”

Similarly, it is not a violation of the Health Insurance Portability and Accountability Act (HIPAA) for an employer to demand proof of vaccination. HIPAA is a narrow law which limits the right of a health care provider to disclose confidential patient medical information. It does not apply to the right of an employer (even one who is a health care provider) to demand the disclosure of such information from an employee where appropriate.

Finally, I wanted to address the union’s bargaining obligations and requirements where an employer seeks union agreement to institute workplace rules relating to mandatory vaccinations, mask wearing, and similar items. As you know, NUHW has a “duty of fair representation” under the National Labor Relations Act to represent its members fairly and without discrimination in collective bargaining. This obligation does not require the union to simply do whatever any one individual or group of individuals want. The union has an obligation to fairly apprise itself of the circumstances in which it is acting and to treat all employees without

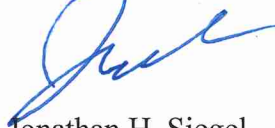
¹ States are defined as including any recognized subdivision thereof, as well as the state itself. For example, cities and counties are considered “state” actors.

² Just like they require flu vaccines.

discrimination. For example, if in the union's judgment it is in the interest of its membership to bargain for workplace rules which require vaccinations and other health measures, there is no bar to the union doing so. The union is not obliged to take action on behalf of individual members which is inconsistent with its policy views and judgment as to what is in the best interest of its members.

I hope this is helpful. Please let me know what else you need.

Very truly yours,



Jonathan H. Siegel

JHS/rar

cc: Sophia Mendoza, Secretary-Treasurer (smendoza@nuhw.org), via email
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