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NEWSLETTER

COVID-19 UPDATE

Can Employers Mandate COVID-19 Vaccinations?

Matthew Bernstein, Esq.

As we enter 2021 having (optimistically) finally reached a turning point in the COVID-19 pandemic with the approval and distribution of at least two viable vaccines, a popular question being asked is whether employers can mandate that their employees be vaccinated for COVID-19. From a purely legal standpoint, the answer is (perhaps stereotypically) not a definitive "yes" or "no." The answer likely depends on the field or type of employment and whether one of two possible exceptions exist for the specific employee.

Under the Americans with Disabilities Act ("ADA"), an employer may require job applicants to undergo a "medical examination" once an offer of employment is made and before the applicant begins his or her employment duties. Likewise, medical examinations of current employees have been upheld under the ADA when the examinations relate to workplace conditions, as opposed to examinations that are unnecessarily broad and intrusive. Accordingly, to be a valid medical examination, it must be: (1) job-related; (2) consistent with business necessity or justified by a direct threat; and (3) be no broader or more intrusive than necessary. Notably, the examination need not be the only way to achieve a business necessity, but it must be a *reasonably effective* method to achieve the employer's goals. Examples of where a mandatory COVID-19 vaccination might satisfy this standard would be hospitals, nursing homes, outpatient clinics, and other similar medical facilities.

Importantly, vaccines *are* considered "medical examinations" under the ADA and, therefore, workplace immunization requirements have been determined to be valid in certain contexts. For instance, healthcare systems across the U.S. have passed laws requiring their employees to be immunized against rubella, hepatitis B, influenza, pertussis, varicella, and/or H1N1.

These immunization interests are contrasted from unnecessary, broad, and/or intrusive requirements, for which courts have categorized as unlawful medical examinations (such as one employer's random alcohol breath testing policy, another employer's requirement that its employees report medical conditions that do not affect their employment even if they are nonetheless fit for duty, or when the examination probes into medical conditions unrelated to why the examination was permissibly sought in the first place).

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GET TO KNOW MATT BERNSTEIN

Favorite Places:
Dominica or San Diego

Favorite Sports Team:
Any University of Central Florida sports team

Favorite Animal:
His dog, Leia, of course

Favorite Leisure Activity:
Going to concerts

Favorite Restaurant:
Sole Luna Café (San Diego) or any Melting Pot

If I Wasn't an Attorney, What Would I Be:
A marine biologist

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THIS NEWSLETTER ISSUE INCLUDES:

COVID-19 UPDATE CONTINUED

Given the severe and dangerous health consequences of COVID-19, there is no reason to think that healthcare system employers could not seek to implement similar requirements for the COVID-19 vaccine.

Assuming an employer can establish that mandatory COVID-19 immunizations for its employees would satisfy the ADA's definition of a valid medical examination, the next step of the analysis would be to determine whether an employee may be exempted from such immunization requirement. To that end, there are two potential exemptions: (1) religion; and (2) medical disability.

First, as to the religion exemption, under Title VII of the Civil Rights Act of 1964 ("Title VII"), which applies to local, state, and federal governments, as well as private employers with 15 or more employees, a person cannot be discriminated against in the workplace for a variety of characteristics, including religion. To qualify for a religious exemption to an employer-mandated COVID-19 vaccine under Title VII, an employee would have to demonstrate that they have a sincerely held religious belief that prevents them from being vaccinated. It would not be enough for the employee to show a mere opposition to vaccination; such opposition must actually be a sincerely held religious belief. If an employee notified his or her employer that their sincerely held religious belief conflicts with a COVID-19 vaccine mandate, then the employer would be obligated to make a reasonable accommodation for that employee. However, if such an accommodation would result in an undue hardship to the employer, then the accommodation can be rejected. An undue hardship exists when accommodating the religious observance of the employee would create more than a *de minimis* cost to the employer or employee's coworkers.

As to the second exemption for medical disability, it is almost the same analysis: if the employee has a medical condition or disability preventing him or her from complying with the vaccine mandate, the employer would be required by the ADA to provide a "reasonable accommodation" to that employee unless such accommodation would place an undue hardship on the employer. However, the accommodation for medical disability can also be denied if the employee, by not complying with the mandate, would pose a "direct threat" to the health and safety of others. In other words, if the employer can show that an unvaccinated worker would present direct danger to other employees or clients/patients, that might be sufficient to overcome a request for an accommodation.

In sum, to answer the subject question succinctly – yes, an employer can likely mandate COVID-19 immunization if doing so is necessary for or is related to the employer's business and is narrowly tailored. However, an employee can request a reasonable accommodation to such a mandate for religious or medical reasons so long as granting the accommodation would not place an undue hardship on their employer or pose a direct threat to their coworkers or others.

For additional information, please contact Matthew Bernstein at mbernstein@florida-law.com.

DIVERSITY & INCLUSION NEWS

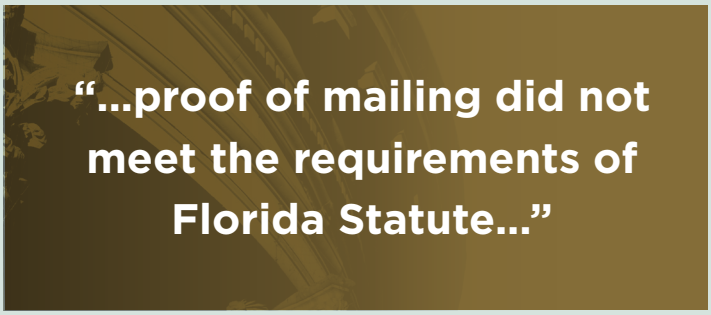
Vernis & Bowling is proud to announce that we are #RINGCertified! Recognizing Inclusion for the Next Generation (RING) is a certification program that evaluates an organization's commitment to embracing and expanding Diversity, Equity, and Inclusion initiatives. To learn more about Vernis & Bowling's diversity, inclusion and belonging efforts, contact us at diversity@national-law.com.

VERDICTS & DISPOSITIONS

Andrew Bray (Miami, FL) (PIP) obtained final Summary Judgment in favor of the Defendant in this matter based upon the cancellation of the subject insurance policy for nonpayment of premium. On October 20, 2015, Tania Alvarez purchased a Florida auto policy from Direct General. She failed to pay the monthly premium due on February 20, 2016 and the policy was canceled for nonpayment of premium effective March 5, 2016. On August 7, 2016, Ms. Alvarez was involved in a motor vehicle accident and on August 25, 2016 sought medical treatment from the Plaintiff, more than six months after she had stopped paying her premiums and six months after the policy had been cancelled. Ms. Alvarez provided her insurance information to the Plaintiff medical provider, who then later filed a PIP claim with the Defendant which was denied based upon the prior cancellation of the policy.

The PIP lawsuit was filed in 2017. Plaintiff refused to dismiss the subject lawsuit and contended that the cancellation of the policy was not properly accomplished. Plaintiff's counsel contended that the cancellation notice and proof of mailing did not meet the requirements of Florida Statute §627.728(5) as it relates to a "postal proof of mailing". Plaintiff also contended that the bulk mailing certificate and documents had a potential inconsistency as to the number of pieces mailed, as well as a lack of a date. In response, Direct General provided an affidavit regarding the process by which policies are canceled for nonpayment of premium, as well as provided the Intelligent Mail Barcode ("IMB") provided by the United States Postal Service.

Nonetheless, Plaintiff refused to concede and Defendant filed a Motion for Summary Judgment. Plaintiff filed a cross Motion for Summary Judgment. The Motion for Summary Judgment was heard via Zoom on October 8, 2020 by Judge Levitt. After hearing the arguments of counsel and receiving a number of affidavits, documents, and evidence into the record, on November 17, 2020, the Court entered an Order granting Defendant's Motion for Summary Judgment and denying Plaintiff's Motion for Summary Judgment on the same issue. The Court reserved jurisdiction to determine an entitlement to attorney's fees on the part of the defense.



Jeffrey P. Gill (Pensacola, FL) and G. Jeffrey Vernis (N. Palm Beach, FL) (Automobile Liability) obtained a Defense Verdict in the first live jury trial in the State of Florida in Panama City, Florida, since COVID-19 closed our courts.

The matter of *Streichert v. Ennis* was tried in Bay County, Florida from October 12, 2020 to October 15, 2020. This case involved an admitted negligence rear-end accident where the Plaintiff claimed to have sustained a permanent injury and a permanent and significant loss of an important bodily function as a result of an automobile accident which occurred on April 11, 2016 in Lynn Haven, Florida. The Plaintiff claimed significant and permanent injuries to her neck, back, elbow and carpal tunnel syndrome and received medical care and treatment with a chiropractor, orthopedic surgeon, neurologist and pain management physician all of whom testified either live or through records. The Plaintiff argued that she sustained three herniated discs in her neck and two in her low back as a result of this accident, together with carpal tunnel syndrome. Although the Plaintiff had been recommended for surgery, she had a severe phobia of any treatment that could possibly result in paralysis since she grew up with a mother who was a quadriplegic. Since the Plaintiff would not have surgery, she underwent pain management but there were significant gaps in treatment. The Plaintiff denied prior history of neck or back pain or problems before this accident and no records were found to prove otherwise. The Plaintiff's case was tailored to proving how her life has changed from before the accident to after the accident. The Plaintiff presented five before and after witnesses all of whom testified how significantly the Plaintiff has been affected by the injuries she received in the accident. Interestingly, the Plaintiff decided to waive her claims for economic damages and exclusively seek only non-economic damages; i.e. pain and suffering and loss of enjoyment of life. While we admitted negligence for this rear end accident, we contended that the Plaintiff was

Verdicts & Dispositions, Continued

herself partially responsible but also that she did not sustain a permanent injury or significant and permanent loss of an important bodily function as a result of the accident. In the defense case, we called a board-certified medical doctor who testified that the Plaintiff did not sustain any permanent injury or significant and permanent loss of an important bodily function as a result of the accident.

The trial lasted four days and the jury returned a verdict finding the Plaintiff 30% at fault for this rear-end accident and found no permanent injury or permanent or significant loss of an important bodily function and therefore the Plaintiff received $0. We had filed a Proposal for Settlement earlier in the case and our motion to tax attorney's fees and costs is pending.

Ashley M. Arias, Esq. (Hollywood, FL) (First Party Property) obtained Summary Judgment in State Court of Broward County for Citizens Property Insurance Corporation. The Plaintiff in this case was a water mitigation company who performed services at an Insured's property following a covered loss. With respect to mitigation services, the subject policy had a Reasonable Emergency Measures provision which limits the amount of such measures to the greater of $3,000.00 or 1% of Coverage A.

"...Plaintiff did not produce any documents requesting to exceed the $3,000..."

Over 2 months after the Plaintiff completed its services, it submitted its documents to Citizens, including an invoice totaling $8,739.81. Notably, Plaintiff did not produce any documents requesting to exceed the $3,000 limit as required under the policy. Upon receipt of this invoice, Citizens afforded coverage to the Plaintiff, pursuant to the Reasonable Emergency Measures policy provision, in the amount of $3,000.

Shortly after receiving payment, Plaintiff filed a Breach of Contract action against Citizens alleging that Citizens had breached the policy of insurance by not issuing payment to the Plaintiff for its entire invoice. After discovery was completed, Citizens filed a Motion for Summary Judgment, showing that Citizens did not breach the policy as it paid full limits in accordance with the limitation, conditions, terms, exclusions, and endorsements under the policy. Citizens also showed that the Plaintiff never requested to exceed the policy limit as required under the policy. During oral arguments Plaintiff claimed that the invoice that was provided to Citizens was an "implied" request to exceed the policy limit. However, the Court agreed that Citizens did not breach the policy of insurance and further stated that she found it "absurd" that the Plaintiff could claim to have requested to exceed the reasonable emergency measures policy limit two months after its services were completed. After the oral arguments, Citizens' Motion was granted in its entirety.

Michael Becker (Atlanta, GA) (Automobile Liability) obtained a Dismissal with Prejudice on behalf of Mercury Insurance Company in the matter of *Martin v. Garcia*. Plaintiff Carola Martin alleged she sustained injuries in a motor vehicle accident with an uninsured driver and served her insurance carrier, Mercury Insurance Company, seeking uninsured motorist benefits. After Plaintiff failed to respond to written discovery for over ten months, the trial court on Mercury's motion dismissed the Plaintiff's case with prejudice and assessed attorney's fees against her and in Mercury's favor as sanctions for her noncompliance.

Courtney Lucke and Christopher Blain (Tampa, FL) (Premises Liability) were successful in obtaining a Summary Judgment in the Middle District Federal Court in Florida on a Premises Liability matter. The Plaintiff tripped and fell over an uneven sidewalk joint while walking his dog in the community where he lived. Plaintiff filed this action asserting the owner, Sun Communities, was negligent for failing to maintain the sidewalk in a safe condition. Although we admitted that Defendant owed a duty to maintain its premises in a reasonably safe condition and warn of known dangers, we argued that no duty was breached as the condition was open and obvious and therefore not dangerous and that Plaintiff had actual knowledge of the condition living in

the community. We further argued that the incident itself was solely due to Plaintiff failing to watch where he was walking. As a result of the fall, Plaintiff suffered injuries to his knee that required surgery. The court agreed with our position and further noted that "the landowner is not required to foreclose all risk that the invitee (Plaintiff) will injure himself during an inattentive moment." Sun Communities' Motion for Summary Judgment was granted.

Ashley Maconeghy (Atlanta, GA) (Auto Liability) obtained a Dismissal with Prejudice on behalf of the named Defendant in the matter of *Kellogg v. Sounder*. Sharhonda Kellogg alleged she sustained injuries in a motor vehicle accident with Allstate's insured, Steven Sounder. After receiving the assignment, Ms. Maconeghy realized that although the Defendant was served, it was not until 210 days after the expiration of the applicable statute of limitations. She filed a Motion to Dismiss based on a lack of diligence in serving the Defendant. Plaintiff's counsel filed a lengthy Response citing the Judicial Emergency Order of the Georgia Supreme Court and trying to excuse her lack of diligence, using the COVID-19 pandemic as a scapegoat. In a four-page Order, the Judge cited case law from the Defendant's Brief and ruled for the Defendant, granting the Motion to Dismiss with Prejudice.

Christopher Blain and Courtney Lucke (Tampa, FL) (Automobile Liability) obtained a favorable ruling in a court-ordered non-binding arbitration. The claim involved an automobile accident that took place in a parking lot. The Defendant was attempting to back out of a parking space when a collision took place with Plaintiff's vehicle. Both parties provided different versions of what happened, pointing the finger at the other party at fault. Following the accident, Plaintiff complained of shoulder, back and neck pain for which she received treatment. At the arbitration, we argued that Plaintiff failed to meet her burden of proof that the Defendant was at fault for causing the accident and that Plaintiff's injuries were preexisting and not caused by the accident. After arguments were heard, the arbitrator came down with a ruling finding no liability against the Defendant and awarded nothing to the Plaintiff.

Jeffrey Raasch (Atlanta, GA) (Premises Liability) obtained Summary Judgment in a Premises Liability case. The Plaintiff filed this case to recover for a broken ankle and other injuries she received when eating at an Olive Garden restaurant near Atlanta on August 14, 2018. When the Plaintiff was sliding out of the booth where she and her family had just finished eating, the Plaintiff said the top portion of the bench on which she had been sitting had stuck to her buttocks for some unknown reason. As she stood up, the bench continued sticking to her rear-end through her pants, but then it suddenly came loose, supposedly ejecting her from the booth. She then said the bench top fell between her feet and tripped her as she was in the process of getting up from the table.

"...the Plaintiff would need to have her home and car modified to assist her getting around.."

However, the Plaintiff testified in her deposition that not only had her family eaten at the booth without incident, but she remembered looking at the bench before she sat on it and "everything was 100% copacetic" with it. The manager gave an Affidavit saying that his restaurant never had a problem like this with any of their benches before and they were inspected every morning before the restaurant opened. The Court granted the Summary Judgment based on all of these factors. No appeal was filed.

The Plaintiff's attorney had demanded a settlement in the mid-six figures pre-suit and said that due to complications from the broken ankle, the Plaintiff would need to have her home and car modified to assist her getting around. He also said he was going to probably double or triple the demand (to an amount closer to seven figures once he had a "life-planning expert" determine how much money she would need to "get around the rest of her life." Dekalb County, GA is one of the most liberal jurisdictions in the State of GA and its juries have a long track record of awarding extremely large verdicts.

STAY UP TO DATE

STAY UP-TO-DATE WITH ALL THINGS VERNIS & BOWLING

Vernis & Bowling is proud to announce that **Shanthy Bala, Esq.** in the firm's Ft. Myers, FL office has been recognized in the Business Observer's 2020 40 Under 40 selections.

Each year, the ***Business Observer*** selects 40 individuals under 40 years old from the Gulf Coast business community. Carefully selected from nominations and original reporting, these individuals represent the best and brightest from Tampa to Naples.

In selecting this year's honorees, the paper's editors looked for candidates who are entrepreneurial, even if they don't own their own businesses.

"There are a lot of publications that do similar lists each year," says Business Observer Executive Editor Kat Hughes. "We wanted our list to stand apart as a group of young professionals who aren't afraid to take charge and take risks in their business. They are willing to try new things and put their ideas into action. To us, this is what it means to be a business leader, and we feel these 40 individuals embody that spirit."

SFLG
SOUTH FLORIDA LEGAL GUIDE

G. Jeffrey Vernis, Managing Partner, has been selected to appear in the 2021 South Florida Legal Guide as a Top Lawyer. This annual publication features the top legal professionals and litigation support CPAs in South Florida.

THE FLORIDA BAR 1950

Vernis & Bowling is proud to announce that the Florida Bar has selected Shanthy Bala, Esq. (Ft. Myers, FL) as the 20th Judicial Circuit's 2021 FL Bar President's Pro Bono Service Award honoree. Twenty legal professionals were selected throughout the state, one for each circuit, out of 107,000 legal professionals total. Congratulations to Shanthy on this well-deserved honor!

Grandma's Place

Employees in the firm's North Palm Beach, FL office collected donations for Grandma's Place, a local organization that provides shelter and loving care to children who have suffered abuse or neglect and have been removed from their homes.

WEAR RED DAY

Vernis & Bowling's employees celebrated National Wear Red Day to raise awareness about heart disease.

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