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CRUCIAL CASE SUMMARY

TOPIC:

***Kiel, et al. v. The Regents of the University of California, et al.*: Major Takeaways from a California Court Decision Upholding a Flu Vaccination Mandate and Implications for the COVID-19 Vaccine**

AUTHORS:

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INTRODUCTION:

On December 4, 2020, the Superior Court of California (Alameda County) denied a motion to preliminarily enjoin the University of California’s (“UC”) flu vaccination mandate in *Kiel, et al. v. The Regents of the University of California, et al.*^[2] Although the case involves California law, it rests on U.S. Supreme Court precedent and offers lessons for defending against similar challenges to mandatory COVID-19 vaccination policies at universities across the United States.

On July 31, 2020, UC’s then-President, Janet Napolitano, issued an Executive Order (“EO”) requiring that all UC students, faculty, and staff living, learning, or working at any UC location receive the flu vaccine by November 1, 2020, subject to exemptions and accommodations.^[3] Five plaintiffs – two UC employees, two students, and a law professor – sued the Regents of the University of California seeking to enjoin the EO. Plaintiffs claimed that the EO was an *ultra vires* act; violated federal and state constitutional rights to privacy, bodily integrity, and autonomy; and abridged their equal protection and First Amendment free exercise of religion rights.^[4]

In denying the motion for preliminary injunction, the court ruled that plaintiffs were unlikely to prevail on the merits and that the balance of harms favored denial of their request to enjoin UC's flu vaccination requirement. The court also concluded that the student-plaintiffs' equal protection and free exercise claims were moot because the student plaintiffs did not articulate religious objections to the flu vaccination requirement and remained eligible to apply for religious accommodations.

The denial of the preliminary injunction motion was not a final determination of the merits of plaintiffs' claims. However, within a week of the decision, plaintiffs voluntarily dismissed with prejudice their case, thus bringing a swift end to their challenge to the flu vaccination mandate.

This NACUANOTE provides a brief overview of relevant cases concerning vaccination mandates, discusses the *Kiel* decision, and offers key takeaways from the decision, especially as it relates to application to potential university policies relating to mandating COVID-19 vaccinations.

DISCUSSION:

I. Legal Background

In upholding mandatory vaccination laws against constitutional challenges, courts have repeatedly cited *Jacobson v. Massachusetts*, a 1905 landmark decision in which the U.S. Supreme Court held that a state's mandatory vaccination statute was a lawful exercise of the state's police power to protect public health and safety.^[5] More than a decade later, the U.S. Supreme Court reaffirmed *Jacobson* in *Zucht v. King*, unanimously holding that a public school system could refuse admission to a student who failed to receive a required vaccination.^[6] Since then, a long line of cases has upheld mandatory vaccination laws over constitutional challenges, with recent decisions focusing on vaccination mandates in the context of the vaccination of students as a condition of enrollment^[7] and of employees challenging termination decisions that were based on a refusal to be vaccinated in healthcare settings.^[8]

Relatedly, in California, federal and state courts have rejected constitutional challenges to California Senate Bill 277 ("SB 277"), a law enacted in 2016 which repealed nonmedical exemptions (religious and personal belief exemptions) from state-mandated immunization requirements for school-age children entering public or private schools. Federal and state courts have consistently held that the state law was narrowly circumscribed to promote the compelling governmental interest of ensuring health and safety by preventing the spread of contagious diseases.^[9] These courts have held that California's repeal of nonmedical exemptions does not violate substantive due process, the right to privacy, the freedom to exercise religion, the equal protection clause, or the fundamental interest in attending school.^[10]

II. The California Superior Court Decision

A. Background

After months of consultation with medical and public health experts, in July 2020, UC President Napolitano issued an executive order regarding flu vaccinations as part of a plan to protect the health and safety of the UC community during the anticipated confluence of the 2020-21 flu season and the COVID-19 pandemic.^[11] UC was one of dozens of U.S. colleges and universities that implemented some type of flu vaccination requirement this year.^[12]

President Napolitano signed the EO as an exercise of her authority under the bylaws and standing orders of the Regents of the University of California.^[13] On September 29, 2020, UC's current President Michael Drake, M.D., amended the Executive Order to extend the availability of religious accommodations to UC students. As stated in the EO and the revised EO, Presidents Napolitano and Drake concluded that "critical steps must be taken to reduce the likelihood of severe disease among students, faculty, and staff, particularly those on campus, and in turn to reduce the likelihood that our health systems will be overwhelmed."^[14] The EO directed that "all students, faculty, and staff living, learning, or working on premises at any UC location" were required to receive a flu vaccine – unless they received an approved medical exemption or disability or religious accommodation – by November 1, 2020.^[15]

In issuing the EO, President Napolitano considered the recommendations of UC's public health experts and administrators as well as widely adopted public health guidance from the Centers for Disease Control and Prevention ("CDC") and the California Department of Public Health ("CDPH").^[16] In opposition to plaintiffs' motion for a preliminary injunction, UC submitted nine declarations from well-regarded medical and public health experts.^[17] These experts opined on the scientific basis for the safety and efficacy of flu vaccines, as well as the flu vaccine's role in reducing the impact of influenza illness on communities and hospitals, especially during the COVID-19 pandemic. These experts also rebutted specific statements by plaintiffs' declarants.^[18]

B. The Court's Ruling

In denying plaintiffs' motion, the court determined that, pending a trial on the merits, the plaintiffs had not met their burden of proof to show all elements necessary to support issuance of a preliminary injunction.

1. Likelihood of success on the merits

a. Plaintiffs unlikely to prevail on claim that UC did not have authority to issue a flu vaccination mandate

First, plaintiffs alleged that the EO was void as *ultra vires* because UC President Napolitano did not formally consult with the Academic Senate before issuing the EO.^[19] The court disagreed with this interpretation of UC's bylaws and standing orders

and recognized the unique authority which the California Constitution grants the UC Regents to operate and control the University.[20]

b. Plaintiffs unlikely to prevail on claims that UC’s flu vaccination mandate violates federal and state privacy rights

The court also held that plaintiffs were unlikely to prevail on the merits of their claims that the UC flu vaccination mandate violated their federal and state constitutional rights to privacy, bodily integrity, and autonomy.[21]

After discussing *Jacobson* and other cases upholding vaccination mandates against various challenges,[22] the court applied the “compelling interest test” articulated by the California state court decision of *Love v. State Department of Education* to analyze whether the EO was narrowly tailored to achieve the governmental interest at stake.[23] The court found that UC’s EO is “far less restrictive” than the state vaccination requirements in cases such as *Love* and, accordingly, more easily satisfies the “narrow-tailoring standard.”[24] Significantly, UC’s EO was narrowly tailored to apply only to those who access University property for work or study (and, thus, did not apply to individuals engaging exclusively in distance learning or remote work), provided for medical exemptions and disability and religious accommodations, and was limited in duration to the 2020-21 flu season.[25] Plaintiffs argued that the EO should provide the less restrictive alternative of wearing a mask, but the court found that the evidence in this case “amply supports that requiring [a] flu vaccination is more likely to reduce transmission of the flu on UC property than proceeding under looser rules,” thereby promoting the compelling governmental interest of protecting health and safety by preventing the spread of influenza during the COVID-19 pandemic.[26]

The court also rejected plaintiffs’ argument that the EO bears no real or substantial relationship to the University’s goals of reducing the likelihood of severe disease among students, faculty, and staff, and reducing the likelihood that the health system will be overwhelmed.[27] The court found statements by plaintiffs’ declarants that the flu vaccine is ineffective, unnecessary, or unsafe to be “insufficient to credibly undermine the conclusions of recognized scientific, medical, and public health authorities.”[28]

Finally, the court noted that it is “unaware of any case in which a court has struck down a mandatory immunization imposed as a condition of attending school or college, as a condition of access to property for the purpose of employment, or as violating bodily autonomy.”[29] Plaintiffs attempted to distinguish cases in which courts had upheld vaccination requirements for school-aged children, rather than adults; however, the court rejected this distinction because plaintiffs cited no authority that a different analysis should apply to adult vaccination mandates.[30]

2. The balance of harms weighed strongly in favor of UC

The court also concluded that the relative interim harms favored denial of an injunction and that plaintiffs did not make the required strong showing of irreparable harm.[31]

Plaintiffs did not demonstrate that they required access to UC property and, therefore, were subject to the EO.^[32] On the other hand, the court viewed the flu vaccination mandate as critically important to reduce burdens on an already overburdened health care system and to reduce the risk of individuals contracting and transmitting the flu during the COVID-19 pandemic.^[33] Weighing the potential harm of a heightened risk of contracting and transmitting the flu during the COVID-19 pandemic against the harm that might flow to plaintiffs from having to work or study remotely favored denial of the request for an injunction.^[34]

III. Major Take-aways and Issues to Watch as the COVID-19 Vaccine Becomes Widely Available

Kiel is a significant case for colleges and universities and, indeed, for non-healthcare employers generally, because the case upheld a university's authority to require non-clinical employees to take the flu vaccine as a condition of accessing university property, during the COVID-19 pandemic. While cases have upheld vaccination requirements for students as a condition of enrollment or for employees who work in healthcare settings, *Kiel* provides helpful authority to support a post-secondary institution's decision to require employees to take a safe and efficacious vaccine, if the non-vaccinated employee will be required to access university premises and, thus, could potentially expose other university community members to illness or worse. While the Regents of the University of California was arguably able to enjoy certain advantages in litigation, such as its broad authority to operate the University under the California Constitution and California case law regarding SB 277, the *Kiel* case nonetheless offers some lessons for colleges and universities as they consider whether to encourage or to require certain sectors of their communities to take the COVID-19 vaccine:

- **Consult state authority to enhance the likelihood that your vaccination policy will not be held to be *ultra vires*.** Especially if your institution is public, your governing board's authority to issue vaccination mandates—or to take other actions—will rest on your state's law. Examine your state constitution, relevant state statutes, appropriations acts, and executive orders to determine the breadth and depth of that authority and the procedures you must follow to exercise it. If your institution is private, review the same authorities to make sure your preferred tactics are not prohibited or reliant on permissions that must be secured from state or local officials.
- **Narrowly tailor any vaccination policy.** The court's decision was aided by UC's narrow tailoring of its flu vaccination policy. UC developed a narrowly-tailored vaccination policy aimed at reducing the likelihood of severe disease in its community and the likelihood that health systems would be overwhelmed. In addition, UC framed its flu vaccination mandate as a condition of access to University property, rather than as a condition of enrollment or employment. By doing so, UC's flu vaccination requirements applied only to those "students, faculty and staff living, learning or working on premises" who would access UC property during the 2020-2021 flu season (which was a minority of the UC

student and employee population), and permitted medical exemptions and disability and religious accommodations. UC also limited the flu vaccination mandate to the 2020-21 flu season, precisely fitting it to the goal of conserving critical healthcare resources during the pandemic. Colleges and universities considering COVID-19 vaccination mandates will probably find their policies more likely to survive challenges if they identify specific goals; if the policies are tailored with respect to location, duration, and the persons to whom they apply; and if valid medical, disability, and/or sincere religious reasons can serve as the basis for declining the vaccine.

- **Become familiar with your state’s vaccination requirements for school-aged students and other persons.** In applying to UC the cases upholding vaccination requirements for school-aged students, the *Kiel* court was not persuaded that a distinction should be made between state vaccination requirements for school-aged students and adult students or employees, in balancing their constitutional and privacy rights against the state interest. For UC, then, it was helpful that state legislators have required California schoolchildren to be vaccinated as a condition of enrollment in public or private school since 2016 regardless of their parents’ personal or religious beliefs, with exceptions only for medical contraindications. Plaintiffs tried to distinguish these cases as not applicable to adult vaccination requirements, but the court rejected that distinction on the basis that plaintiffs did not cite any authority in support of that argument. Thus, colleges and universities considering COVID-19 vaccination policies should similarly examine state law in the jurisdictions in which they are located to determine whether there is helpful (or unhelpful) authority.[\[35\]](#) Postsecondary institutions should also consider any laws or regulations that apply to them as employers, such as the Americans with Disabilities Act or Title VII, in considering how to craft COVID-19 vaccination policies.[\[36\]](#)
- **Marshal your medical and public health evidence about the threat of illness and the safety of vaccines.** The court carefully considered expert declarations from both parties and guidance from the CDC and CDPH attesting to the record of the safety and efficacy of flu vaccines. The court devoted considerable attention in its opinion to analyzing statements made by plaintiffs’ and UC’s declarants in their respective declarations.[\[37\]](#) Relying on the opinions of UC’s well-regarded experts and guidance from the CDC and CDPH, the court concluded that there was an insufficient foundation for plaintiffs’ declarants’ claims that the flu vaccine was not safe or effective. Based on this analysis, any potential university COVID-19 vaccine policies should be narrowly crafted to align with current guidance from recognized medical, public health, and scientific authorities, such as the CDC and your state’s public health department. Campus environmental health and safety departments may be able to provide campus-specific evidence to help colleges and universities calibrate their policies to their risks. Developing these relationships now will make it easier to readily identify potential affiants and witnesses, in the event that litigation occurs. COVID-19 vaccines have not yet been tested in adolescents[\[38\]](#) and pregnant people[\[39\]](#),

the duration of some vaccine efficacy studies have been cut short, and various unknowns remain about the long-term effects of all COVID-19 vaccines. It is also worth noting that the COVID-19 vaccine was approved by the U.S. Food and Drug Administration under an Emergency Use Authorization. As such, colleges and universities should consider allowing well-supported exceptions to any COVID-19 vaccination requirements.

CONCLUSION:

This California decision confirms that when courts consider whether a college or university can make vaccination a condition of access to university property (or enrollment, or employment), courts will examine whether a vaccination requirement is narrowly tailored, as well as rooted in scientific and medical evidence about its safety and efficacy. Colleges or universities considering a COVID-19 vaccination requirement for certain or all sectors of their communities should understand the nuances of their state vaccination laws, tailor policies as narrowly as possible, and be prepared to support legal arguments with competent, admissible evidence, such as declarations from relevant experts and statements by public health agencies such as the CDC.

END NOTES:

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[2] *Kiel, et al. v. The Regents of the Univ. of Cal., et al.*, No. HG20072843 (Cal. Super. Ct. Dec. 4, 2020).

[3] In September 2020, UC's new President Michael V. Drake, M.D. amended the [Executive Order](#), extending religious accommodations to UC students. The Executive Order, as amended, is referred to as the "Executive Order" or "EO."

[4] *Kiel* at 2. Plaintiffs were represented by attorneys associated with the Children's Health Defense.

[5] *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) (upholding law requiring adult smallpox vaccination, punishable by fine). *Jacobson* relied in part on the California Supreme Court's decision in *Abeel v. Clark*, which upheld the State's public school vaccination requirements. *Id.* at 32-33; *Abeel v. Clark*, 84 Cal. 226, 230 (1890) (stating that "it was for the legislature to determine whether the scholars of the public schools should be subjected to [vaccination]").

[6] *Zucht v. King*, 260 U.S. 174 (1922).

[7] See, e.g., *Phillips v. City of New York*, 775 F.3d 538, 542–43 (2d Cir. 2015) (upholding vaccination mandate for school children and holding that substantive due process challenge was foreclosed by *Jacobson*; “as *Jacobson* made clear, [mandatory vaccination] is a determination for the legislature, not the individual objectors”); *Workman v. Mingo Cty. Sch.*, 667 F. Supp. 2d 679 (S.D. W.Va. 2009) (holding that mandatory immunization program for school children did not violate free exercise, equal protection, or due process rights); see also *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (a parent “cannot claim freedom from compulsory vaccination for the child more than for himself on religious grounds”).

[8] See, e.g., *Hustvet v. Allina Health Sys.*, 910 F.3d 399 (8th Cir. 2018) (affirming summary judgment for healthcare employer where employee who worked with potentially vulnerable clients was terminated for refusing MMR vaccine); *Fallon v. Mercy Catholic Med. Ctr. of Se. Pa.*, 877 F.3d 487 (3d Cir. 2017) (affirming dismissal of medical center employee’s religious discrimination claim under Title VII, based on termination for refusal to receive flu vaccine).

[9] See, e.g., *Love v. State Dep’t. of Educ.*, 29 Cal. App. 5th 980, 989–90 (2018) (holding that SB 277 upheld a compelling government interest, was narrowly circumscribed, and did not violate right to privacy or bodily autonomy).

[10] See *Whitlow v. California*, 203 F. Supp. 3d 1079 (S.D. Cal. 2016) (holding that plaintiffs were not likely to succeed on the merits of their claims that SB 277 violated their right of freedom to exercise religion, the Equal Protection Clause, the right to due process, or the right to education provided by the California Constitution); *Brown v. Smith*, 24 Cal. App. 5th 1135 (2018) (same).

[11] *Kiel, et al. v. The Regents of the Univ. of Cal., et al.*, No. HG20072843 at 3–5 (Cal. Super. Ct. Dec. 4, 2020) (providing text of EO); see also [University of California Executive Order](#) (issued July 31, 2020 and revised Sept. 29, 2020).

[12] UC submitted flu vaccination policies from twenty U.S. colleges and universities as evidence in support of its opposition to plaintiffs’ motion for preliminary injunction.

[13] *Kiel* at 7.

[14] *Id.* at 5 (citing revised Executive Order).

[15] *Id.*

[16] *Kiel* at 4–5.

[17] The nine declarations were from medical and public health experts, including epidemiologists and professors of infectious disease and vaccinology. In addition to experts from the University of California, UC submitted declarations from non-UC experts as well, such as the former Dean of the Harvard School of Public Health, the Associate Director of the Emory University Vaccine Center, and the former Director of the U.S. National Immunization Program of the Centers for Disease Control and Prevention.

[18] *Kiel* at 12–14.

[19] *Id.* at 7–8.

[20] *Id.*

[21] *Id.* at 8.

[22] *Id.* at 8–10. The court implicitly balanced the plaintiffs’ constitutional privacy interests against the relevant state interests and found that plaintiffs’ privacy rights were outweighed by UC’s interest in protecting the health and safety of its community members.

[23] *Id.* at 11–12 (referring to *Love v. State Dep’t of Educ.*, 29 Cal. App. 5th 980 (2018)).

[24] *Id.* at 11.

[25] *Id.* at 11, n.3.

[26] *Id.* at 11–12.

[27] *Id.* at 12.

[28] *Id.*

[29] *Id.* at 14.

[30] *Id.* at 15.

[31] *Id.*

[32] *Id.*

[33] *Id.*

[34] *Id.* at 15–16.

[35] For example, in August 2020, Massachusetts implemented a new flu vaccine requirement for all students 6 months or older up to age 30 who are attending Massachusetts child care, pre-school, grade school, or colleges or universities, with the stated purpose of reducing flu-related illness and the overall impact of respiratory illness during the COVID-19 pandemic. Massachusetts’ flu vaccination requirement is now being challenged in federal court. See *Henry, et al. v. Baker, et al.*, No. 20-cv-12032 (D. Mass. 2020).

[36] For example, on December 16, 2020, the Equal Employment Opportunity Commission (EEOC) issued new guidance relating to certain employment law implications of employer COVID-19 vaccination programs. See U.S. Equal Employment Opportunity Commission, [“What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws”](#) (Part K, “Vaccinations”) (updated Dec. 16, 2020).

[37] *Kiel* at 12–14.

[38] See Sumathi Reddy, [“When Will Covid Vaccines Be Available for Kids?”](#) *Wall St. J.* (Dec. 14, 2020); Berkeley Lovelace Jr., [“CDC adviser says kids could get Covid vaccine in the second half of 2021”](#) *CNBC* (Dec. 4, 2020).

[39] See Centers for Disease Control and Prevention, [“Pregnancy and Breastfeeding Considerations: COVID-19 Vaccination Considerations for People Who Are Pregnant”](#) (updated Dec. 15, 2020); Laurel Wamsley, [“Pregnant People Haven’t Been Part of Vaccine Trials. Should They Get the Vaccine?”](#) *NPR* (Dec. 11, 2020).

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