

COVID litigation update: Employer vaccine mandates still hold up

Lawsuits filed by employees who for religious reasons didn't want to get covid shots mandated by their employers began flying out of plaintiff attorneys' offices almost as soon as the FDA approved the shots. And we diligently kept track of them, usually every Friday. While the lawsuits have dwindled, they haven't vanished. Here are two recent cases we've run across.

Employee fired for not getting shots still hasn't suffered irreparable harm

Employees' objections to getting shots based on their religious beliefs began with a bang last year. But the employee losing streak continues.

In the latest [example](#), a doctor who worked with seriously ill children failed to comply with the vaccine mandate at the hospital where he worked. He was first suspended for six months and then fired, after which he sued for religious discrimination under Title VII.

Doctor: He faced irreparable harm because his skills were atrophying and finding a new job was difficult. *His requested relief:* A preliminary injunction forcing the hospital to reinstate him.

Trial court: The doctor failed to show irreparable injury—the lynchpin for granting a preliminary injunction—from losing his job. The court also concluded Title VII afforded him adequate remedies, other than an order reinstating him.

A federal appellate court upheld the ruling. *Court:* An employee may be able to justify a finding of irreparable injury for the deterioration of their professional skills pending the outcome of a lawsuit, but this isn't the case. Such harm is too speculative to be irreparable. Responding to the doctor's second argument, the court said difficulty finding a new job alone doesn't amount to irreparable harm.

This case isn't over. The doctor and the hospital will still have their day in court.

The case is *Halczenko v. Ascension Health*.

Covid testing is still covered under group health plans

Covid testing was free for individuals, but some entity was still paying for them. For employees, test providers directly billed their group health insurers. This arrangement, however, hasn't satisfied the insurers, which keep denying claims for covid testing. So far, courts have ruled for the providers.

A federal trial court in New Jersey has similarly [ruled](#) against a group health insurer's motion to dismiss a lawsuit brought by a medical practice.

When the insurer refused to pay, the practice sued for the improper denial of benefits under ERISA.

Hitch: The practice couldn't identify any plan provision entitling it to reimbursement.

Unhitch: Instead, it said the Families First Coronavirus Response Act required insurers to cover covid testing, which meant this legal obligation was incorporated as a term of the plan and enforceable by an ERISA plaintiff, which it was, after the patients assigned their claims to it.

The trial court agreed. *Court:* The bottom line is this—Congress mandated health insurance plans to cover covid testing, raising it to the status of a benefit of those plans. Congress also allows insureds to sue for benefits due them. It stands to reason that an insured can sue under ERISA when an insurer denies coverage for covid testing.

The case is *Open MRI and Imaging of RP Vestibular Diagnostics, P.A., v. Cigna Health & Life Ins. Co.*