



**THE
GAVEL
PROJECT**
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PCH COVID-19 VACCINE

EXEMPTION DEMAND FORM (By Ryan Heath, Esq.)

Phoenix Children’s Hospital (“PCH”) now mandates that all staff—including employees with existing employment contracts not including a COVID-19 vaccination requirement—become fully vaccinated or submit a completed exemption request form prior to October 1st, 2021. According to PCH, employees who refuse to provide evidence of compliance with the foregoing requirements by October 1st shall “be subject to termination.”¹ Stated differently, as a condition of continued employment with PCH after the deadline, all employees must submit evidence that they are fully vaccinated or submit a request for an exemption. Those employees who lack sufficient reasoning supporting a medical exemption and who still wish to remain unvaccinated, must complete and submit PCH’s “COVID-19 VACCINE RELIGIOUS EXEMPTION REQUEST FORM.” (Hereinafter the “Form”).

By its own actions in adopting this “mandate,” PCH demonstrates that it not only desires to ignore reality but, moreover, desires to ignore the consequences of ignoring reality, and PCH cannot afford such a luxury.

In reality, PCH’s vaccine mandate as a condition of continued employment legally constitutes a bad faith attempt at unilaterally breaching the employment contracts of all of its employees and is illegal under Arizona law. Stated differently, PCH’s actions demonstrate that it is willing to use economic coercion to violate the contractual rights of all current employees for the purpose of limiting its own liability from both a legal and a social standpoint.

Because this demand may lead some to believe that I am generally against vaccinations, allow me to quickly dispel any misconceptions. I believe that, in certain instances, the efficacy of a vaccine clearly outweighs the risks of contracting the disease against which that vaccine is designed to provide immunity. I further believe that, in some of such instances, evidence demonstrating the longitudinal safety of a given vaccine warrants the widespread use of that vaccine to inoculate those individuals who—considering their own assessment of the foregoing risks, benefits, and their personal religious ideals—freely choose to become vaccinated. Indeed, I have often used this framework and decided to receive certain vaccines. My current objections to the PCH vaccine mandate are limited to the fact that I, as an employee in the state of Arizona, have the moral and contractual right to decide whether to receive a COVID-19 vaccination, and PCH may not abdicate this decision by unilaterally modifying my employment contract.

¹ See Important Update from Bob Meyer, President and CEO – Phoenix Children’s COVID-19 Vaccine Mandate, sent via email to all employees on Friday, July 30, 2021.

THE GAVEL PROJECT

EST. 2021

By its own actions, PCH concedes the fact that the nature of this dispute is contractual. Indeed, in consideration for becoming fully vaccinated, PCH offers its employees both continued employment after October 1, 2021, and a \$100 payment (less applicable taxes) “[i]n order to reasonably compensate non-exempt/hourly employees for the time spent in connection with getting the COVID vaccine(s).”² Moreover, PCH now requires those employees who do not wish to become vaccinated to sign an Exemption Request Form.

If the Form means what it says, then it is a contract. As read, it amounts to: (1) an acknowledgement by the applicant that, as an unvaccinated healthcare professional, he or she may place patients, my family and my co-workers at heightened risk of severe illness by working while infected with the COVID-19 virus; (2) a promise by the applicant to release PCH (and its affiliates) from all claims arising from the exemption (assuming it is granted); and (3) an acknowledgement that some masking requirements for unvaccinated employees will be necessary to support the objective of infection prevention.³ In effect, the Form purports to provide PCH with certain contractual benefits and protections at the detriment of protections previously guaranteed to employees by the implied-in-fact terms of their employment contracts. Thus, by its very actions, PCH concedes the fact that this dispute is contractual.

PCH likely believes that it may adopt this provision without consequence because its employees are “at-will.” This, however, is an incorrect understanding is not in accordance with of Arizona law.

Generally, an Arizona employee is considered “at-will” so long as his or her employment contract has an indefinite duration.⁴ In an “at-will” employment relationship, either party may—at any time and for any reason (except for a few enumerated reasons protecting certain categories of workers from discrimination, **such as religion**)—terminate the employment contract without incurring liability. Accordingly, PCH seems to believe that it may now require employees, who were not traditionally required to become vaccinated against COVID-19, to become vaccinated or face termination.

However, even where an employment contract is “at-will,” the Supreme Court of Arizona has found that employers and their employees may “create a different relationship beyond one at will and define the parameters of that relationship, based upon the totality of their statements and actions.”⁵ Such parameters can be either express (*i.e.*, written) or implied-in-fact. A contractual term is implied in fact where it can be

² See Important Update from Bob Meyer, President and CEO – Phoenix Children’s COVID-19 Vaccine Mandate, sent via email to all employees on Friday, July 30, 2021.

³ As written, the Form’s defined parameters of masking requirements are too vague and open to change to be acceptable.

⁴ See *e.g.*, *Robertson v. Wal-Mart Stores, Inc.*, 44 P.3d 164, 169 (Ct. App. 2002).

⁵ *Demasse v. ITT, Corp.*, 984 P.2d 1138, 1143 (1999) (internal punctuation and citations omitted).

THE GAVEL PROJECT

EST. 2021

“inferred from the statements or conduct of the parties and[, therefore,] becomes enforceable as an express term.”⁶

At the time of hiring, statements made by the employer regarding policies are considered implied-in-fact provisions if a reasonable employee would conclude that the statement constitutes a commitment by the employer. More specifically, an implied-in-fact contract term arises from a statement only if, at the time of hiring, “it discloses a promissory intent or is one that the employee could reasonably concluded constituted a commitment by the employer.”⁷ Statements, such as those found in employee handbooks describing company policies relative to the employee’s duties are not generally considered implied-in-fact contract terms. However, such a written policy becomes an implied-in-fact contract term “when a reasonable person could conclude that both parties intended that the employer’s (or employee’s) right to terminate the employment relationship at will had been limited.”⁸

PCH’s traditional vaccination policies have been limited. Indeed, at the time of hiring PCH has traditionally provided its employees with an enumerated list of vaccines that were required as a contingent precedent to securing employment. Because a reasonable employee presented with a list of specified vaccination requirements cannot be logically expected to assume that he or she would be required to get any other vaccination—apart from what is listed—PCH’s policies governing vaccine requirements are implied-in-fact contractual terms.

Generally, Arizona recognizes no legal difference between the enforceability of an implied-in-fact employment term and an express provision in employment contracts.⁹ Thus, once an implied-in-fact employment term arises—neither party may unilaterally modify it.¹⁰ Consequently, to legitimately modify a contract, whether the terms be implied-in-fact or express, there must be: “(1) an offer to modify the contract, (2) assent to or acceptance of that offer, and (3) consideration.”

In effect, PCH’s vaccination mandate legally constitutes a mere offer to change the employment relationship because the requirement seeks to modify an existing contractual right of its employees. Consequently, the offer to modify my employment contract must be supported by assent to or acceptance of that offer and consideration.

Setting aside the fact that I hereby expressly reject PCH’s offer to modify my employment contract, PCH’s vaccine mandate fails for lack of consideration because continued employment alone does not

⁶ *Robertson*, 44 P.3d 164 at 169 (citing *Wagenseller v. Scottsdale Mem’l Hosp.*, 710 P.2d 1025, 1036 (1985)) (internal punctuation and citations omitted).

⁷ *Demasse*, 984 P.2d 1138, at 1143 (internal punctuation and citations omitted).

⁸ *Id.*

⁹ *Id.*, at 1144.

¹⁰ *Id.*, at 1144.

THE GAVEL PROJECT

EST. 2021

constitute acceptance under Arizona law. In Arizona, “consideration necessary to modify an existing contract requires a bargained for exchange to support the employees’ relinquishment of the protections they are entitled to under the existing contract.”¹¹

Here, there is no consideration apart from an offer for continued employment after October 1st, 2021. As noted above, the \$100 payment (less applicable taxes) is being provided to employees who comply with the mandate “[i]n order to reasonably compensate [them] for the time spent in connection with getting the COVID vaccine(s)[,]” as opposed to compensating them for the act of injecting a novel vaccination into their bodies.

According to its own words and actions, PCH’s current demand of its employees to get vaccinated prior to October 1, 2021, or face termination fails for lack of consideration because continued employment alone is insufficient consideration in Arizona. With respect to consideration, the Arizona Supreme Court has expressly rejected PCH’s planned course of action as illegal.

In the words of the Court:

Continued employment alone is not sufficient consideration to support a modification to an implied-in-fact contract. Any other result brings us to an absurdity: the employer’s threat to breach its promise of job security provides consideration for its rescission of that promise.¹² Continued employment after issuance of a new handbook [purporting to modify an implied-in-fact contractual term] does not constitute acceptance, otherwise the illusion (and the irony) is apparent: to preserve their right under the existing contract, plaintiffs would be forced to quit. . . . Thus, the employee does not manifest consent to an offer by modifying an existing contract without taking affirmative steps, beyond continued performance, to accept.

There is no doubt that the parties to a contract may by their mutual agreement accept the substitution of a new contract for an old one with the intent to extinguish the obligation of the old contract, but one party to a contract cannot by its own acts release or alter its obligations. The intention must be mutual.

PCH’s mandate that its employees become vaccinated as a term of continued employment after October 1, 2021, is not only morally repugnant and a sad attempt at paternalistic virtue-signaling, but also clearly illegal and, therefore, void as a matter public policy.

¹¹ *Id.*, at 1145.

¹² *Id.*

THE GAVEL PROJECT

EST. 2021

For the foregoing reasons, let it be known that I reject to recognize PCH's policy as legitimate, and I plan to continue working for PCH under the terms of my existing contract after October 1st, 2021. Should PCH disagree with the foregoing and breach my employment contract—I shall bring an action for wrongful termination.

I shall now take a moment to address my objections specific to the Form. In so doing, I will assume *arguendo* that PCH's offer to modify my employment contract is supported by *adequate consideration—such as an offer for a 40% increase in my base pay and an agreement by PCH to waive the protections afforded to it under Arizona workers' compensation system for any injuries that I may sustain from adverse reaction to the vaccination.*

The Form claims that, “in order to protect myself, staff, patients and families,” PCH requires that I receive the COVID-19 vaccination “on an annual basis, unless granted by an exemption.” It further explains, “[a] religious exemption may be granted if a vaccination violates the tenets of a personally held religious belief.”

If the contractual provision of this Form limited and adequate consideration present (as described above), the legally effective terms could amount to an acceptable offer. However, the Form also has several objectionable provisions—including the following:

1. The Form requires the applicant to specifically define the sincerely held religious belief(s) supporting his or her exemption.
2. Additionally, PCH reserves the right to (*without any limitation*) demand that the applicant provide documentation or other authority supporting the need for an accommodation.
3. PCH further reserves the right to discuss the nature of the applicant's “religious belief(s), practice(s) and accommodation with [the applicant's] religion's spiritual leader (if applicable) or religious scholars to address the accommodation request.
4. PCH reserves the right to review each exemption request on a case-by-case basis to determine *if* a reasonable workplace accommodation can be made.
5. PCH also reserves the right to deny any request “if it is not reasonable or creates an undue hardship on [PCH].”
6. PCH reserves the right to exclude unvaccinated individuals from certain work areas and alter the scope of the individual's work responsibilities and duties, without providing a clear definition of how such decisions are made.
7. The exemption seeker also must promise to comply with testing and other preventative requirements as specified in the exemption approval *or as may otherwise be requested by PCH.*
8. If one's exemption request is approved, *he or she will be required to wear a mask in any PCH facility—at all times*—in accordance with the PCH Mask Protocol, which PCH presumably reserves the right to change without limitation.

THE GAVEL PROJECT

EST. 2021

9. **Perhaps most shockingly**—*PCH reserves the right to re-asses one's requested exemption "as PCH deems appropriate."*
10. Finally, PCH reserves the additional right to terminate the applicant if it concludes that—based on its sole discretion—the Form contains any false or misleading information.

Not only does the Form ask the employee to specifically define the religious beliefs supporting the exemption, it grants PCH the right to doctrinally challenge the veracity of the individual's claim by bringing in purported "experts" in the individual's religious beliefs to redefine the parameters of such beliefs as PCH sees fit. In other words, the Form amounts to nothing more than illusory promises. As drafted, PCH's "COVID-19 VACCINE RELIGIOUS EXEMPTION REQUEST FORM," without any justification under Arizona law, asks employees to protect it from liability under the duress of economic turmoil. This is unacceptable.

To make myself perfectly clear, even if the mandate is later deemed legal, I demand religious exemption from the policy for reasons that are entirely my own. You have no right to question beliefs on to discriminate against me for such. Moreover, to the extent that I may have ever given PCH any reason to believe that I plan on abiding by their COVID-19 vaccine mandate, I hereby expressly revoke a such notion, for whatever perceptions PCH might hold in this regard are a product of economic duress caused by PCH's unjustified threats.

ID Number:

Name (print):

Sign:

Date:

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