

Vaccine Mandates And Lessons On Legal Compliance

By Alan Berkowitz, Linda Dwoskin and Rhiannon DiClemente (July 6, 2018, 1:46 PM EDT)

Whether it's measles outbreaks on a cruise, Ebola scares or regular flu season concerns, preventing the spread of disease has become a top priority for employers in the health care industry. Unfortunately, health care personnel responsible for patient care have a heightened susceptibility to exposure to diseases and possible transmission. Not surprisingly, an essential component of health care employers' efforts to prevent the spread of disease has been the implementation of mandatory employee vaccination programs. Private employers, generally, are not legally prohibited from making vaccination a condition of employment. That being said, under the Americans with Disabilities Act and Title VII of the Civil Rights Act of 1964, and analogous state law, employers who do so must be prepared to handle requests for medical or religious-based accommodations from employees who claim they cannot be vaccinated due to a disability or religious belief. Terminating or disciplining an employee who declines to get a vaccine because of a disability or religious belief exposes an employer to significant risk of a discrimination lawsuit.

This article will discuss the recent case of *Ruggiero v. Mount Nittany Medical Center*, and outline key takeaways from the case that employers should keep in mind when dealing with employees' medical accommodation requests in response to mandatory vaccination policies. Although the principles discussed in *Mount Nittany Medical Center* arose in the context of the health care industry, there are valuable lessons to be learned for all employers in the handling of accommodation requests.

Ruggiero v. Mount Nittany Medical Center

The issue of mandatory vaccination was recently addressed by the Third Circuit Court of Appeals in *Ruggiero v. Mount Nittany Medical Center*.^[1] Aleka Ruggiero was a registered nurse at Mount Nittany Medical Center. In April 2015, Mount Nittany — in an effort to prevent the spread of whooping cough — adopted a policy that required all clinical employees to obtain a Tetanus, Diphtheria and Pertussis, or Tdap, vaccine by May 15, 2015. Ruggiero did not get the vaccine by the deadline. Instead, she submitted a letter from her doctor, which vaguely stated that she was “medically exempt from receiving Tdap immunization for medical concerns.”



Alan Berkowitz



Linda Dwoskin



Rhiannon
DiClemente

Mount Nittany asked Ruggiero's doctor to clarify which of the specific contraindications or precautions set forth by the vaccine manufacturer prevented her from receiving the Tdap vaccine. The doctor replied that Ruggiero was "medically exempt from receiving the Tdap immunization due to severe anxiety with some side effects she read with [the] injection, especially with her history of having many food allergies, environmental allergy and eosinophilic esophagitis," and went on to state that because Ruggiero was "terrified" the doctor felt that "the risk of [the] Tdap injection outweigh[ed] the benefits."

Mount Nittany informed Ruggiero that the documentation provided by her doctor did not meet the definition of medical contraindication or precaution for the Tdap vaccine, and that she would be required to comply with the hospital's vaccination policy. Ruggiero offered to wear a mask (noting that Mount Nittany permitted nurses who had refused to be immunized against influenza to do so). Mount Nittany denied Ruggiero's request and terminated her employment on July 31, 2015, based on her failure to receive the vaccine.

Ruggiero sued, alleging that Mount Nittany had discriminated and retaliated against her under the ADA — which protects individuals with a disability from workplace discrimination, including vaccine refusal. Specifically, Ruggiero claimed that she was a "qualified person with a disability," that she had notified Mount Nittany of her disability, and that she requested an accommodation. Ruggiero further alleged that Mount Nittany failed to engage in a good faith interactive process with her in order to find a suitable accommodation for her disability.

Federal District Court Grants Mount Nittany's Motion to Dismiss

A federal district court in Pennsylvania granted Mount Nittany's motion to dismiss Ruggiero's ADA discrimination case.[2] The court's decision focused on two main points: (1) whether Mount Nittany had sufficient notice of Ruggiero's disability and need for an accommodation, and (2) whether Mount Nittany made a good faith effort to engage in the interactive process with Ruggiero in response to her request for an accommodation.

As to the notice question, the district court found that Ruggiero's mental and physical limitations were not known to Mount Nittany. The court stated that "simply informing an employer of a particular condition is not tantamount to providing employer with knowledge that the employee is substantially limited in some major life activity," and that "vague or conclusory statements revealing an unspecified incapacity are not sufficient to put an employer on notice of its obligations under the ADA." After reviewing the facts, the court held that while Mount Nittany may have been aware that Ruggiero suffered from anxiety and eosinophilic esophagitis after receiving her doctor's second letter, it was not clear that Mount Nittany was aware that Ruggiero had any limitations based on these alleged disabilities.

On the latter point, the district court concluded that Mount Nittany made a good faith attempt to accommodate Ruggiero, despite its lack of knowledge of her mental and physical limitations. The court found that the hospital had acted reasonably in denying her request because the medical reason given by her doctor for the exemption was not one of the contraindications or precautions recognized by the manufacturer of the Tdap vaccine.

Based on its analysis, the district court granted Mount Nittany's motion to dismiss. Ruggiero appealed.

The Third Circuit Revives Ruggiero's Suit

On appeal, the Third Circuit found that Ruggiero had pled facts sufficient to suggest that Mount Nittany knew of her disability, the alleged limitation it posed, and her request for accommodation. The Third Circuit also

found that Ruggiero had pled facts sufficient to suggest that Mount Nittany — in refusing her proposed accommodation without offering an alternative — had failed to engage in a good faith attempt to accommodate Ruggiero. While noting that it was a “close case,” the Third Circuit ultimately decided to reverse the district court’s grant of Mount Nittany’s motion to dismiss.

It should be noted that the Third Circuit did not address whether Ruggiero was in fact discriminated against, or whether she should have been accommodated and how. Rather, the Third Circuit was solely focused on whether Ruggiero’s allegations were sufficient, at the motion-to-dismiss stage, to allow her to proceed to discovery.

As to the notice question, the Third Circuit found that the facts alleged plausibly suggested that Mount Nittany knew of Ruggiero’s alleged disability and her desire for an accommodation. Specifically, the court pointed to the fact that Ruggiero informed her employer she had an appointment with her doctor to discuss the required vaccine, provided her employer with two doctor’s notes recommending she not receive the vaccine because of medical conditions, and sought permission to wear a mask as an alternative accommodation. The court also noted that Mount Nittany’s request for additional information from Ruggiero and her doctor to determine whether an exemption was warranted “renders implausible any suggestion that [Mount Nittany] was not on notice of Ruggiero’s desire to be accommodated.”

As to the interactive process, the court noted that Ruggiero’s request for an accommodation (either an exemption from the vaccine requirement or permission to wear a mask) was rejected by Mount Nittany without proposing an alternative. The court found this allegation sufficient to plausibly suggest that the hospital “prematurely ceased the interactive process and barred Ruggiero from the individualized inquiry to which she was entitled under the ADA.” Had Mount Nittany done more to document its efforts to find a reasonable accommodation for Ruggiero and its decision that no reasonable accommodation existed, it may have been in a stronger position to support its motion to dismiss. Mount Nittany may be able to prevail on a motion for summary judgment if discovery shows that it did in fact engage in the good faith interactive process with Ruggiero, that the proposed accommodations were not effective, or that they would place an undue hardship on the hospital.

Key Takeaways From Ruggiero v. Mount Nittany Medical Center

While it remains to be seen whether Ruggiero will prevail on her claims, the Third Circuit in Mount Nittany Medical Center clearly thought the district court demanded too much of Ruggiero at the outset of the legal process. In reversing the district court’s decision, the Third Circuit established a relatively low threshold for employees to get past the initial pleading stage. More importantly, the decision indicates that when it comes to mandatory vaccination policies, the key to legal compliance is accommodation.

Employers that impose mandatory vaccination policies should establish a process through which an employee may request an exemption or accommodation for medical or other legally protected reasons. The interactive process in the context of mandatory vaccination is no different than in the context of any other request for accommodation. When an employee makes such a request, the employer must engage in an individualized inquiry with the employee, focused on assessing the disability at issue, the particular job in question, and how best to accommodate the identified limitations.

Under the ADA, an employer is permitted to request — and should always insist on — documentation related to an employee’s disability, the functional limitations it imposes, and the effectiveness of the proposed accommodation. If the information provided by the employee or his or her health care provider is insufficient, the employer should inform the health care provider of the reasons for insufficiency and request additional

information. Like Mount Nittany, however, a request for additional information is likely to preclude an employer from claiming that it lacked notice of an employee's disability or request for accommodation at the motion-to-dismiss stage.

Further, a decision not to accommodate certain disabilities, or to offer a given accommodation only in certain circumstances, can land an employer in hot water. For example, Mount Nittany's attempt to limit exemptions to its policy only to those contraindications and precautions listed by the manufacturer of the Tdap vaccine was problematic (at least at the motion-to-dismiss stage) because it robbed Ruggiero of the opportunity to undergo an individualized inquiry. Accordingly, employers should avoid strict enforcement of mandatory vaccination policies and establishing blanket rules or practices that fail to take into account the availability of effective accommodations.

Lastly, while the ADA does not require that an employer provide the specific accommodation requested by the employee, the employer cannot simply reject the request and take no further action (like Mount Nittany did). Rather, the employer must consider the effectiveness of other accommodation options and offer reasonable accommodation unless doing so would cause an undue hardship. Possible accommodations might include exemption from the vaccination policy, modification of the employee's job duties (such as limiting or eliminating patient contact, if possible), temporary transfer to another position, or wearing a mask. Whether any of these are effective depends on the specific disability, functional limitations and position at issue. To note, guidance from the Equal Employment Opportunity Commission suggests that establishing undue hardship in the context of vaccine mandates would be extremely difficult for an employer.

In short, employers should review all requests for accommodations related to mandatory vaccination policies on an individualized basis, engage in an interactive discussion with the employee regarding his or her request, determine whether a reasonable accommodation exists, and grant such requests as may be appropriate (but especially before terminating or disciplining any employee for noncompliance).

Alan D. Berkowitz is a partner at Dechert LLP and leader of the firm's labor and employment practice.

Linda Dwoskin is special counsel and Rhiannon M. DiClemente is an associate at the firm.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

[1] *Ruggiero v. Mount Nittany Med. Cntr.*, No. 17-2227 (3d Cir., June 5, 2018)

[2] *Ruggiero v. Mount Nittany Med. Cntr.*, No. 4-167-cv-01996) (M.D. Pa., May 15, 2017).