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Civil Division

December 20, 2021
Michael S. Catlett
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Office of the Arizona Attorney General
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Via email and First Class Mail

Re: Legislator Request for Investigation regarding whether certain Pima County memoranda violate A.R.S. § 23-206 or Governor's Executive Order 2021-18

Dear Mr. Catlett:

On December 8, 2021, Senator Kelly Townsend requested that your office begin an investigation, under A.R.S. § 41-194.01, into whether memoranda issued by Chief Deputy Pima County Administrator Jan Lesher on November 8, 2021 and December 7, 2021 violate A.R.S. § 23-206 or the Governor's Executive Order 2021-18. You notified us of the investigation in a letter dated December 13, 2021, and requested a response by December 21, 2021. Pima County provides the following response as requested.

I. The policy adopted by the Pima County Board of Supervisors and the announced procedure to require mandatory vaccinations for new hires, promotions, and employees working with vulnerable populations do not violate A.R.S. § 23-206.

A.R.S. § 23-206 provides that if an employer receives notice from an employee that the employee's sincerely held religious beliefs, practices or observances prevent the employee from taking the COVID-19 vaccination, then the employer shall provide a reasonable accommodation *unless the accommodation would pose an undue hardship and more than a de minimis cost to the operations of the employer's business* (emphasis added).

On November 2, 2021, the Pima County Board of Supervisors approved a plan to require COVID-19 vaccinations for those employees who work with vulnerable populations. This class of employees was defined as those employees working in-person with individuals confined either in a detention or correctional facility, as well as those that may be in a nursing home and/or assisted living facility, or who provide in-person direct services to children or the elderly on a regular or recurring basis. *See* December 7, 2021 memorandum. In addition, all new hires and promoted employees would also be

required to be fully vaccinated. As noted in the attachment to the November 8, 2021 memorandum (FAQ #2), if an employee had a sincerely held religious belief that prevented vaccination, they needed to request an accommodation. If an employee had already notified Pima County Human Resources of a sincerely held religious belief that prevented vaccination, the employee was automatically placed on the list for consideration of an accommodation per the statute.

In consultation with Pima County's Chief Medical Officer Dr. Francisco Garcia, various reasonable accommodations were considered based upon an employee's job duties. These included:

1. Telecommuting 100% of the time;

2. Working in an enclosed workspace, attending all meetings virtually, wearing a mask when not eating or drinking (not in a shared indoors area), washing hands, sanitizing work surfaces, mandatory weekly COVID-19 testing;

3. If job duties did not permit either of these accommodations, then an opportunity for reappointment to a vacant position that did not work with vulnerable populations and for which the employee met the minimum qualifications. For example, an unvaccinated corrections officer who has regular contact with inmates incarcerated in the Pima County Jail could not perform their job duties with a reasonable accommodation as outlined above. The only additional accommodation that Pima County can offer is reappointment to a position that does not involve in-person contact with a vulnerable population. For those individuals who request reappointment, they will be provided an additional 30 days (January 1, 2022, through January 30, 2022), to locate another County position for which they qualify.

While Pima County could have mandated vaccinations for all employees, subject to required reasonable accommodations under federal and State law, it took a measured approach. Currently, Pima County is experiencing the highest-level category of COVID-19 community transmission according to the CDC. There are currently few, if any, ICU beds available locally on a daily basis. Pima County, like all other employers, has a general duty to provide a safe working environment and provide safe working conditions for its employees. Pima County must also protect those individuals in its custody and those to whom it provides services. Failure to act in good faith to protect such individuals and take appropriate precautions could subject an employer to liability. *See* A.R.S. §§ 12-515, 12-516.

A total of 194 employees either notified Pima County Human Resources of a sincerely held religious belief that would prevent vaccination or specifically requested a reasonable accommodation. A total of 149 employees were accommodated or provided a modified offer, 14 requests have been denied, 26 are pending additional information (through an ongoing interactive process), 3 requests were withdrawn, and 2 employees resigned. At this time, 14 employees have requested reappointment and are undergoing the reappointment process.

Where reasonable accommodations could be made, they were. There are no specific allegations that Pima County did not provide a reasonable accommodation or failed to review and process submitted requests for accommodations. However, where no reasonable accommodation could be made, the loss of employee productivity from exposure to COVID-19, the increased employee medical expenses due to exposure to COVID-19, and the exposure to potential liability all would pose an undue hardship and more than a de minimis cost to Pima County. Accordingly, in compliance with A.R.S. § 23-206, those unvaccinated employees who notified Pima County of a sincerely held religious belief were either provided a reasonable accommodation or, in their specific situation, an accommodation posed an undue hardship and more than a de minimis cost to Pima County.

II. The policy and procedures do not violate Executive Order 2021-18.

Executive Order 2021-18, issued by Governor Ducey on August 16, 2021, purports to limit the authority of local jurisdictions to impose and enforce COVID-19 vaccination mandates. However, the Executive Order fails to identify any valid source of authority for such a measure. The Executive Order therefore has no effect on Pima County's authority to mandate vaccinations for new hires, promotions, and employees working with vulnerable populations.

First, the Governor claims that A.R.S. § 36-787 gives "primary jurisdiction to the state during a public health emergency." This is a vague assertion that has no bearing on the Governor's authority to limit a county's public health powers. The "state" through its legislature – not its governor – generally has "primary jurisdiction" over the state's political subdivisions, whether or not there is a public health emergency. *See Rodgers v. Huckelberry*, 243 Ariz. 427, 429, ¶ 5 (App. 2017). And during an emergency, the Department of Health Services – not the Governor – "has primary jurisdiction, responsibility and authority for . . . [c]oordinating public health emergency response among state, local and tribal authorities." A.R.S. § 36-787(A)(2).

The Executive Order seems to imply that § 36-787 both preempts local authority over the entire field of public health for the duration of an emergency and vests such authority in the Governor. But the Governor cannot make a concrete assertion to that effect because there is no support for either proposition in the language of the statute. With respect to preemption, "'[a]bsent a clear manifestation of legislative intent to preclude local control, there is no preemption.'" *Wonders v. Pima Cty.*, 207 Ariz. 576, ¶ 9 (App. 2004), *quoting Babe's Cabaret v. City of Scottsdale*, 197 Ariz. 98, ¶ 11 (App. 1999). And there is no such intent expressed here. *Contrast* A.R.S. §§ 11-269.16 (Prohibition on regulation of auxiliary containers; state preemption), 13-3108 (Firearms regulated by state; state preemption). With respect to the Governor's authority, the statute identifies specific areas in which "the governor, in consultation with the director of the department of health services, may issue orders." A.R.S. § 36-787(B) and (C). These areas do not include restricting the ability of local jurisdictions to mandate vaccinations. And, for that matter, the Governor provides no indication that there has been any consultation with the Director of the Department of Health Services.

Second, the Governor asserts that A.R.S. § 36-787 "provides specific guidelines on when vaccination mandates may be pursued during a public health emergency." Although § 36-787 does give the Governor authority to "[m]andate treatment or vaccination of persons who are diagnosed with illness resulting from exposure or who are reasonably believed to have been exposed or who may reasonably be expected to be exposed" to a highly contagious and highly fatal disease, § 36-787(C)(1), it does not provide any guidelines for local jurisdictions on when they may impose such mandates. And as discussed above, it does not preempt such actions by local jurisdictions.

The Governor correctly states that A.R.S. § 36-787 does not give local jurisdictions authority to implement vaccination mandates and that local jurisdictions lack the "inherent police power" of the state. But again, this assertion has no bearing on the issue at hand. The County's power to enact reasonable public health and sanitary measures derives neither from an assertion of "inherent police powers" nor from § 36-787. Numerous other statutes give counties broad authority to regulate the public health. Counties may "[p]rovide for the care and maintenance of the sick of the county," A.R.S. § 11-251(5); "[a]dopt provisions necessary to preserve the health of the county, and provide for the expenses thereof," § 11-251(17); "[m]ake and enforce all local, police, sanitary and other regulations not in conflict with general law," § 11-251(31); "make regulations necessary for the public health and safety of

[its] inhabitants," A.R.S. § 36-183.02(A); and "adopt quarantine and sanitary measures to prevent the spread of an infectious or contagious disease within its jurisdiction," § 36-624. The Governor cannot, through the exercise of his executive authority, take away the statutory authority delegated to counties by the Legislature. *See Rios v. Symington*, 172 Ariz. 3, 12 (1992) (Governor lacks the "power to make legislative decisions" and cannot "compromise the achievement of underlying legislative purposes and goals") (internal quotation marks and citations omitted).

In addition, the Arizona Supreme Court has held that the authority of county health departments is coextensive with that of the Arizona Department of Health Services (ADHS) and has recognized that counties may enact public health measures "equal to or more restrictive" than ADHS rules. *Marsoner v. Pima County*, 166 Ariz. 486, 488-89 (1991); see also A.R.S. § 36-136(J) (counties can adopt "ordinances and rules [that] do not conflict with state law and are equal to or more restrictive than the rules of the director").

Moreover, with respect to requiring its own employees to be vaccinated, Pima County need not rely solely on its public health authority. Counties have general powers to make and enforce necessary rules and regulations for their own government and to perform acts necessary for the full discharge of their duties. A.R.S. §§ 11-251(21) and (30). This includes adopting appropriate employment policies and, for example, providing for benefits for county employees. § 11-251(51). And the County Administrator is charged with managing the general County workforce under § 2.12.070 of the Pima County Code.

The Governor further cites A.R.S. ¶¶ 36-114 and 36-184 as "limit[ing] the imposition of a specific treatment on a person and mandat[ing] that violation of such is a class 3 misdemeanor." But both those sections contain the caveat "provided that sanitary or preventive measures and quarantine laws are complied with by the person." *Id.* And vaccination is the quintessential preventive measure. *See, e.g., Maricopa Cty. Health Dep't v. Harmon*, 156 Ariz. 161 (App. 1987).

The Governor also states that "vaccination passports and mandates have previously been prohibited by executive order." But the order he is apparently referring to, Executive Order 2021-09 (Apr. 19, 2021), suffers from the same defects that the Attorney General identified in the Governor's prior order on mask mandates, Executive Order 2021-06. In his opinion on the earlier order, the Attorney General concluded that "[a]lthough Pima County Resolution 2020-96 requiring face coverings conflict[ed] with Governor Ducey's statements in Executive Order 2021-06, the Pima County Resolution [wa]s not likely preempted." Ariz. Op. Att'y Gen. No. I21-003. The Attorney General found that although the Governor might have had authority to override the County Resolution in that case "through Title 36 and ADHS" – although such an assertion of authority "may well be subject to challenge in court" – the fact "that the Governor [wa]s attempting to preempt counties solely through Executive Order, and did not instruct ADHS to issue rules, ha[d] created serious issues regarding preemption." *Id.* And although EO 2021-09 cites Title 36 and specifically A.R.S. § 36-787, it does not instruct ADHS to promulgate regulations that could be binding on the County.

Finally, the Governor relies upon Senate Bill 1824, which "included a new statute A.R.S. 36-681 which prohibits the state and any city, town or county from requiring a person to be vaccinated against COVID-19." However, this statute was held to be unconstitutional before it could come into effect. *Ariz. School Bds. Assoc. Inc. v. State of Ariz.*, 2021 WL 4487632 (Sep. 27, 2021), *aff'd* 2021 WL 5105289 (Nov. 2, 2021). Accordingly, Executive Order 2021-18 does not legally prohibit Pima County's adopted policies and procedures.

III. Conclusion

As Pima County's policy and procedures do not violate A.R.S. § 23-206 and are not legally prohibited by Executive Order 2021-18, the Attorney General must conclude that Pima County has not violated any provision of state law or the Arizona Constitution and must take no further action.

Sincerely,

Daniel Jurkowitz
Jonathan Pinkney
Deputy County Attorneys