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PRESENTS

UNIONS, STRIKES, AND LABOR LAW ISSUES 2021

LIVE SEMINAR WITH ZOOM OPTION

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THURSDAY, NOVEMBER 4, 2021 | 2:00 P.M. TO 3:30 P.M.

1.5 Hours CLE credit for Delaware and Pennsylvania Attorneys

CLE

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UNIONS, STRIKES, AND LABOR LAW ISSUES 2021

ABOUT THE PROGRAM

This seminar will cover Creative Labor, Unions in the Entertainment Industry: a brief history of collective bargaining and the labor movement in Hollywood, up to the recent talent agency contract campaign by the Writers Guilds and the near-strike by the union representing below-the-line crew members, the IATSE, as well as COVID and Collective Bargaining: employers, regardless of size and industry, face critical and continuing challenges with managing exposure and vaccination protocols. The discussion will focus on an employer's rights and responsibilities when fashioning and enforcing policies to address COVID exposure and mitigation.

PROGRAM

2:00 p.m. – 3:30 p.m.

Unions, Strikes, and Labor Law Issues 2021

Patric M. Verrone, Writer-Producer
Past President, Writers Guild of America, West

Aaron M. Shapiro, Esquire
Connolly Gallagher LLP

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Unions, Strikes, and Labor Law Issues 2021

Patric M. Verrone, Writer-Producer
Past President, Writers Guild of America, West

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Patric M. Verrone is a television writer, attorney, and past president of the Writers Guild of America, West. He is a graduate of Harvard College and Boston College Law School. He is admitted to practice in California and Florida; has contributed to various law reviews and legal publications; and has been an adjunct law lecturer at Loyola Law School and UCLA Extension. His television writing credits include The Tonight Show Starring Johnny Carson, The Simpsons, Pinky and the Brain, Rugrats, Futurama, and his current work includes the Netflix animated series Disenchantment and the British puppet show Spitting Image. He lives in Los Angeles with his wife, writer and novelist Maiya Williams, and a dog who wants to direct.

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November 4, 2021

DSBA CLE

Unions, Strikes & Labor Law Issues

Employer Rights and Responsibilities with Collective Bargaining and COVID Protocols

Aaron M. Shapiro
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Question: Do employers have a duty to bargain for mandatory vaccinations?

Answer: Probably not, but they will likely have to bargain over the implementation process and consequences, including discipline, testing, masking, leave, distancing or modified work hours and locations.

Collective Bargaining Law

National Labor Relations Act (NLRA)

29 U.S.C. §§ 151 – 169

Delaware Public Employment Relations Act

19 *Del. C.* §§ 1301 – 1319

Delaware Police Officers and Firefighters Employment Relations Act

19 *Del. C.* §§ 1601 – 1618

Public School Employment Relations Act

40 *Del. C.* §§ 4001 – 4019

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Key Bargaining Rights

- Delaware's three laws follow the same basic statutory scheme, and are interpreted consistently with each other. The laws are modeled – generally – on the NLRA.
- Employers and representatives are obligated to bargain over "terms and conditions" of employment, which are regarded as <u>mandatory subjects of bargaining</u>.

See: Section 1 and 7 of the NLRA

19 *Del C.* § 1302(t), § 1602(15), 14 Del. C. § 4002(t)

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Key Bargaining Rights

- Terms and conditions of employment cover wages and other forms of compensation and benefits, hours of work and working conditions.
- The scope of working conditions usually includes employee health and safety, workplace hazards, and the employer's management of its internal health and safety standards.

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Public vs. Private

The NLRA applies to private employers only, subject to interstate commerce jurisdictional requirements – the purchase and/or use of goods and services from outside of a home state can satisfy the requirements.

The NLRA does not apply to public sector employees; such employees secure bargaining rights through separate laws. There is an independent statute for federal employees (5 U.S.C. §§ 7101-7135; excludes postal workers), and each state must have its own laws.

Public vs. Private

Enabling legislation may provide some public sector employers – government entities – with greater inherent rights to manage safety and health issues that can impact their workforce and the public they serve.

Private employers have significant rights to manage their workforce and work locations.

In both sectors, the requirement to bargain for emergency response measures is typically analyzed on a case-by-case basis.

Duty to Bargain

In general, employers are not precluded from implementing mandatory vaccination policies.

This is moderated – not precluded – by state and federal law, such as the ADA, Title VII of the Civil Rights Act of 1964 protections, and similar.

Presumptively, as of December 8, 2021, employers with over 100 employees, federal contractors, and federal employees will be required to implement mandatory vaccination programs, or testing and masking in lieu of vaccinations.

https://www.whitehouse.gov/briefing-room/presidential-actions/2021/09/09/executive-order-on-requiring-coronavirus-disease-2019-vaccination-for-federal-employees/

Duty to Bargain

State and/or federal directives for mandatory vaccinations, and related measures, may not directly exempt employers from bargaining obligations.

A determination will depend on the specific mandate, discretion provided to employers and employees, the scope of legal bargaining rights, and existing contracts.

Duty to Bargain

Employers and unions may have negotiated terms that cover emergency situations and responses, including employee health and hazardous conditions.

First, look to management rights and "zipper" clauses to determine whether there are specific terms and restrictions on bargaining during the term of a contract.

Based on terms and past practices, a union may have "waived" a right to bargain over implementation of a vaccination program, or at least certain aspects.

Medical facilities may have specific terms authorizing the implementation of responses to medical emergencies.

Duty to Bargain

Sample Contract Terms

Management Rights

- The management of the Company, the direction and control of the property and operations, the power and the right to hire, and the composition, assignment, direction and determination of the size of working forces are the sole responsibility of the Company.
- The Company shall have the right to exercise full control and discipline in the conduct of its business in its interest of fulfilling its public utility obligation to provide safe and adequate service.
- All rights not expressly granted herein to the Union by this Agreement are reserved to the Company.

Duty to Bargain

Sample Contract Terms

Fully Bargained Provision ("zipper" clause)

> This Agreement represents and incorporates the complete and final understanding by the parties on all negotiable issues which were or could have been the subject of negotiations. During the term of this agreement, neither party will be required to negotiate with respect to any such matter whether or not covered by this Agreement, and whether or not within the knowledge or contemplation of either or both parties at the time they negotiated and signed this agreement.

Duty to Bargain

While employers may have the authority to implement a mandatory vaccination program, and other response steps, they will be presumably obligated to bargain over the implementation and impacts of such measures.

This is referred to as "effects" bargaining.

Unless parties have negotiated for specific steps and consequences, implementation of a "mandatory" vaccination policy will impact working conditions.

Employers are diverse, and what one employer may or may not be required to bargain for, will not necessarily be directly applicable to another employer.

Duty to Bargain

Impact / Effects bargaining:

- Refusal to get vaccinated
- Frequency of testing
- Use of leave** / paid time for testing; negative response to vaccination
- Response to positive tests
- Work assignments, work locations and hours of work
- Compensation and benefits
- Layoffs

Resources

NLRB Guidance:

https://www.nlrb.gov/guidance/memos-research/advice-memos/advice-memoranda-dealing-covid-19

Public Sector: *Regents of the University of California*, California Public Employment Relations Board, PERB Decision No. 2783-H (July 26, 2021). https://perb.ca.gov/decision/2783H/

Private litigation: *Int'l. Bhd. of Teamsters, Local 743*, C.A. No. 21-CV-03840 (N.D. Ill, July 19, 2021) – Request for declaratory and injunctive relief to compel arbitration.

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STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

AMERICAN FEDERATION OF STATE, COUNTY & MUNICIPAL EMPLOYEES LOCAL 3299; UNIVERSITY PROFESSIONAL & TECHNICAL EMPLOYEES, COMMUNICATION WORKERS OF AMERICA, LOCAL 9119, Charging Parties, v. REGENTS OF THE UNIVERSITY OF CALIFORNIA, Respondent.	Case No. SF-CE-1300-H
TEAMSTERS LOCAL 2010, Charging Party, v. REGENTS OF THE UNIVERSITY OF CALIFORNIA, Respondent.	Case No. SF-CE-1302-H PERB Decision No. 2783-H July 26, 2021

Appearances: Leonard Carder by Arthur Liou, Attorney, for American Federation of State, County & Municipal Employees Local 3299, and University Professional & Technical Employees, Communication Workers of America, Local 9119; Beeson, Tayer & Bodine by Robert Bonsall and Kena C. Cador, Attorneys, for Teamsters Local 2010; Sloan Sakai Yeung & Wong by Timothy G. Yeung and Chris Moores, Attorneys, for Regents of the University of California.

Before Banks, Chair; Shiners and Paulson, Members.

DECISION

SHINERS, Member: These consolidated cases are before the Public Employment Relations Board (PERB or Board) for a decision based on the evidentiary record from a hearing before an administrative law judge (ALJ). The operative complaints allege that the Regents of the University of California (University) violated the Higher Education Employer-Employee Relations Act (HEERA)[1] by issuing an Executive Order requiring "all students, faculty, and staff living, learning, or working" on University premises to receive an influenza vaccination by November 1, 2020,[2] without providing Charging Parties American Federation of State, County & Municipal Employees Local 3299 (AFSCME), University Professional and Technical Employees, Communication Workers of America, Local 9119 (UPTE), and Teamsters Local 2010 (Teamsters) with prior notice or an opportunity to meet and confer over the decision or its effects. The complaints further allege that this conduct interfered with employee rights.

We have reviewed the entire administrative record and considered the parties' arguments in light of applicable law. For the reasons set forth below, we find that the decision to adopt the influenza vaccination policy was outside the scope of representation because under the unprecedented circumstances of a potential confluence of the COVID-19 and influenza viruses, the need to protect public health was not amenable to collective bargaining or, alternatively, outweighed the benefits of

[1] HEERA is codified at Government Code section 3560 et seq. Unless otherwise indicated, all statutory references are to the Government Code.

[2] Subsequent dates are 2020, unless otherwise noted.

bargaining over the policy as to University employees. We also find, however, that the University was not privileged to implement the vaccination policy before completing negotiations over its effects because the University did not meet and confer in good faith prior to implementation. Based on these findings, we conclude that the University's implementation of the vaccination policy constituted an unlawful unilateral change in violation of HEERA.

FINDINGS OF FACT[3]

The Parties

Charging Parties AFSCME, UPTE, and Teamsters are employee organizations within the meaning of section 3562, subdivision (f)(1), and exclusive representatives within the meaning of section 3562, subdivision (i). The University is an employer within the meaning of section 3562, subdivision (g). AFSCME represents the following bargaining units at the University: Patient Care Technical (EX), Service (SX), and Skilled Craft UCSC (K7). UPTE represents the following bargaining units at the University: Health Care Professionals (HX), Research Support Professionals (RX), and Technical (TX). Teamsters represents the following bargaining units at the University: Clerical & Allied Services (CX), Skilled Craft UCLA (K4), Skilled Craft UCSD (K6), Skilled Craft UCSB (K8), Skilled Craft UCI (K9), and Skilled Craft Merced (KM).

[3] The parties stipulated to many of the material facts. We have made additional factual findings based on the testimony and exhibits introduced at hearing.

University Influenza Vaccination Policies Before July 31, 2020

The University has five medical centers, which are part of the UC Davis Health, UC Irvine Health, UC Los Angeles Health, UC San Diego Health, and UC San Francisco Health systems. Before July 31, the five medical centers each maintained policies regarding influenza vaccinations for employees.

The UC Irvine Health policy entitled Influenza: Seasonal Plan for Mandatory Personnel Vaccination required an influenza vaccination for all "medical center employees, College of Health Sciences employees, licensed independent practitioners, volunteers, students, temporary workers, researchers, physicians and other College of Health Sciences faculty and staff." The policy required compliance "no later than the Friday of the week following Thanksgiving weekend of each year." The policy allowed for exemptions based on the following:

> "1. Persons with moderate (generalized rash) or severe (life-threatening) allergies to eggs, vaccine components, or prior influenza vaccines. Documentation from personal physician is required.
>
> "2. Persons with a history of Guillain-Barre Syndrome. Documentation from personal physician is required.
>
> "3. Written documentation of other medical contraindication from a medical provider. Documentation from personal physician is required.
>
> "4. Written documentation of a qualifying religious exception. Documentation from religious organization is required.
>
> "5. Pregnancy does not constitute as a contraindication. Pregnancy is condition at high risk for illness and complication."

The UC San Diego Health policy entitled Influenza: Seasonal Plan for Healthcare Worker required an influenza vaccination for "all faculty, staff, clinicians, students, contractors and volunteers at UC San Diego Health[,] . . . [which] include (but are not limited to): UC San Diego Health Hillcrest – Hillcrest Medical Center and UC San Diego Health's affiliated clinics and clinical practices, UC San Diego Health La Jolla – Jacobs Medical Center and Sulpizio Cardiovascular Center (SCVC)." The policy required compliance by the flu season as designated by the San Diego County Public Health Officer. The policy allowed for exemptions based on the following:

> "1. Persons with moderate (generalized rash) or severe (life-threatening) allergies to eggs, vaccine components, or prior influenza vaccines.
>
> "i. Persons with a history of Guillain - Barre Syndrome.
>
> "ii. Other medical contraindication from a medical provider.
>
> "iii. A qualifying religious or strongly held belief exception."

The UC San Francisco Health Policy No. 4.02.10 entitled Occupational Health Services: Influenza Vaccination for Employees and Staff required vaccination for "[a]ll UCSF Medical Center employees, faculty, temporary workers, trainees, volunteers, students, and vendors, regardless of employer. This includes staff who provide services to or work in UCSF Medical Center patient care or clinical areas." The policy required compliance by the annual onset of the flu season as published by the San Francisco Department of Public Health and deemed the flu season to be from December 15 to March 31. The policy allowed for the following exemptions:

"a. Severe allergies to eggs, vaccine components, or prior influenza vaccines.

"b. History of Guillain-Barre Syndrome.

"c. Declaration of another medical contraindication. Pregnancy is a high-risk condition for influenza illness and does not constitute an exception.

"d. Declaration of a qualifying religious contraindication to vaccination."

The UC Davis Medical Center policy entitled Employee Immunization Program required influenza vaccination for "new hires, established employees, visitors, observers, volunteers, volunteer faculty and those participating in academic/ educational pursuits." The policy required compliance by the beginning of the flu season as determined by the UC Davis Health Infection Prevention Officer and the State/Sacramento County Public Health Officer. The policy allowed for medical exemptions.

The UCLA Health policy entitled Employee Influenza Vaccination Program - Occupational Health Administrative HS IC 7404 required "all Health Care Personnel [to] receive the influenza vaccination." The policy required compliance by the annual flu season and/or by October 1. The policy allowed for exemptions for documented medical contraindication.

These vaccination policies applied to employees in the bargaining units represented by Charging Parties. With limited exceptions, employees represented by Charging Parties who worked at University locations other than the medical centers were not required to be vaccinated against the flu.

The COVID-19 Pandemic and Influenza Virus

On March 4, 2020, California Governor Gavin Newsom declared a state of emergency due to COVID-19. On March 11, 2020, the World Health Organization announced that COVID-19 had become a pandemic.

The intersection of the 2020-2021 flu season with the ongoing COVID-19 pandemic created an unprecedented public health emergency. Like COVID-19, the influenza virus is also a highly contagious serious illness that is transmitted in ways that are similar to COVID-19, thereby increasing the need to prevent and manage both illnesses simultaneously. The California Department of Public Health and the Centers for Disease Control and Prevention accordingly advised the public that being vaccinated against influenza during the 2020-2021 flu season was "more important than ever."

At the hearing, the University offered two witnesses, Dr. Arthur Reingold and Dr. Lee Riley, who were qualified by the ALJ as experts on infectious diseases. Each testified about the public policy behind mandatory influenza vaccination during the COVID-19 pandemic.

Dr. Reingold testified that during the Spring of 2020 many experts were concerned there would be a large number of people hospitalized with COVID-19 at the same time as an influenza outbreak, causing an insurmountable patient load in hospitals.[4] Dr. Reingold stated his belief that mandatory influenza vaccination policies

[4] Indeed, COVID-19 cases continued to increase during the 2020-2021 flu season. As of January 13, 2021, California reported 2,781,039 total cases and 31,102 deaths due to COVID-19. That day the state also reported a 1.9% increase in the number of COVID-19 related deaths from the prior day.

generally have the effect of increasing the rate of vaccination, and are more effective than other methods of encouraging vaccination.

Dr. Riley testified that because the pandemic is the worst in our lifetimes, managing outbreaks of two respiratory diseases like influenza and COVID-19 at the same time can place significant stress on testing and healthcare facilities. He also testified that implementing a mass vaccination effort has the effect of reducing respiratory symptoms experienced by the population, thereby reducing the number of people who may need to be tested or receive treatment. The University's experts testified that no other safety precaution by itself, such as masking, social distancing, or social isolation, was sufficient to substitute for vaccination against influenza.

The Executive Order

On July 17, 2020, Executive Vice-President of University Health Systems Dr. Carrie Byington recommended to then-University President Janet Napolitano that she issue an Executive Order requiring all students, faculty, and staff on University premises during the 2020-2021 flu season be vaccinated against influenza. In a decision memorandum to President Napolitano, Dr. Byington advised issuing such an Executive Order "[d]ue to the uncertainties regarding the COVID-19 pandemic, the unknown potential for illness when both the Influenza and SARS-CoV2 viruses have concurrent widespread community transmission, the high rates of contagion and morbidity of both of these viruses, the high attack rate of influenza in young adults, and the anticipated very high burden of illness expected from Influenza and SARS-CoV2 viruses during the 2020-21 academic year." Dr. Byington's memorandum represented the scientific opinions of professionals in the University Health System

that the University's campuses and hospitals would be healthier and safer with an influenza vaccination requirement in place.

According to Dr. Byington, "vaccinating against COVID was not possible [in July 2020]. Influenza is a known pathogen that produces every winter outbreaks of disease that strain our health system . . . I had concern that we would also experience a winter surge of COVID-19, and that if we had a combination of the normal winter surge for influenza plus a winter surge for COVID-19, that we would be at risk of overwhelming our hospital capacity." Dr. Byington testified that allowing an exemption for personal reasons while requiring such individuals wear a mask would be ineffectual against stopping the spread of both infections as the University Health System was already mandating masking for employees during the pandemic. She testified that for pandemic disease prevention to be effectual, layering of protections is required, including social distancing, environmental controls, immunization, handwashing stations, and the like. When the University issued the Executive Order, a Food and Drug Administration approved COVID-19 vaccination was not yet available.

On July 31, President Napolitano issued an Executive Order, effective for the 2020-2021 flu season, requiring that "students, faculty, and staff who are living, learning, or working" at any University location be vaccinated against influenza by November 1. Specifically, the Executive Order provides:

> "WHEREFORE AS PRESIDENT OF THE UNIVERSITY OF CALIFORNIA I DECLARE:
>
> "On the authority vested in me by Bylaw 30, Bylaw 22.1, Regents Policy 1500 and Standing Order 100.4(ee), and based on the foregoing circumstances, I hereby issue the

following order, to be effective through the 2020-2021 flu season, and direct the following:

"1. Each campus shall strongly encourage universal vaccination for all students, faculty, staff, and their families by October 31, 2020. Subject only to the exemptions and processes described below or in Attachment A:

"a. Deadline. Effective November 1, 2020, all students, faculty, and staff living, learning, or working at any UC location must receive a flu vaccine.

[¶] . . . [¶]

"c. Employees. Effective November 1, 2020, no person employed by the University or working on-site at any location owned, operated, or otherwise controlled by the University may report to that site for work unless they have received the 2020-2021 flu vaccine or an approved medical exemption. Requests for disability or religious accommodations will be adjudicated through the interactive process consistent with existing location policies and procedures.

"2. The University's health plans provide coverage for routine health maintenance vaccinations, including seasonal influenza vaccine, without copays to any covered students, faculty, staff, or their covered families.

"3. The Vice President for Human Resources or her designee shall ensure that any applicable collective bargaining requirements are met with respect to the implementation of this order.

"4. The Provost and the Executive Vice President or their designee(s) shall immediately consult with the Academic

Senate on implementation of this order with respect to members of the University's faculty.

"5. The Executive Vice President for UC Health or her designee shall provide technical guidance to the campuses at their request to facilitate execution of this mandate.

"All University policies contrary to the provisions of this Executive Order, except those adopted by the Regents, shall be suspended to the extent of any conflict, during the period of this Order.

"The Executive Vice President - UC Health shall have the authority to issue further guidance about the parameters and use of this mandate, in consultation with the Provost and the Interim Vice President - Systemwide Human Resources."

(Emphasis in original.)

Attachment A to the Executive Order provides for medical exemptions:

"**Medical Exemptions**

"A list of established medical contraindications to and precautions for flu vaccine can be found at the Centers for Disease Control and Prevention website, *Guide to Contraindications*, online at: https://www.cdc.gov/vaccines/hcp/acip-recs/general-recs/contraindications.html (scroll to ITV) and currently includes:

Contraindications:	Severe allergic reaction (e.g., anaphylaxis) after previous dose of influenza vaccine or to vaccine component.
Precautions:	Guillain-Barre Syndrome <6 weeks after a prior dose of influenza vaccine

> Moderate or severe acute illness with or without fever
>
> Egg allergy other than hives, e.g., angioedema, respiratory distress, lightheadedness, recurrent emesis; or required epinephrine or another emergency medical intervention (IIV may be administered in an inpatient or outpatient medical setting and under the supervision of a health care provider who is able to recognize and manage severe allergic conditions).

> "Any request for medical exemption must be documented on the attached Medical Exemption Request Form and submitted by an employee to the designated campus medical official (collectively an 'Authorized HCP')."

(Emphasis in original.)

On September 29, the new University President, Dr. Michael Drake, issued a revised version of the Executive Order. The revised Executive Order extended religious and disability accommodations to students but did not change the requirement that employees and other individuals must be vaccinated against influenza, have an approved medical exemption, or have a disability or religious accommodation to be on site at a University location. Employee exemptions listed in Attachment A to the revised Executive Order did not change.

In addition to the Executive Order, the University issued a "frequently asked questions" (FAQ) explaining additional details of the policy. As of October 27, the FAQ stated:

“**Frequently asked questions for employees about the 2020-21 UC influenza vaccination order** *[Revised Oct. 27, 2020]*

“**Q1. Is the flu vaccination requirement a permanent change to the Immunization Policy? Will those subject to the Executive Order be required to get the flu vaccine from now on?**

“A1. No. The new requirement is based on the University’s assessment of the current situation and will be revisited as the situation demands.

“**Q2. To whom does the order apply?**

“A2. The Executive Order mandates flu vaccination for all students, faculty, other academic appointees, and staff living, working, or learning at any UC location, subject only to medical exemptions. Individuals may also request disability and religious accommodations. If for any reason you believe you should receive an exception to the vaccination requirement, please contact your supervisor to be referred to the appropriate office to discuss whether you may be eligible.

“**Q3. Why hasn’t UC required flu immunizations of all faculty, other academic appointees, and staff in the past? ·**

“A3. Faculty, other academic appointees, and staff working in the university’s clinical facilities have long been required to participate in a flu immunization program. The additional action is needed at this time, given the unique and serious conditions of the COVID-19 pandemic in circulation simultaneously with influenza. The influenza vaccination requirement for those faculty, other academic appointees, and staff living or working on campus was deemed necessary to maintain a safe workplace. We also believe the Executive Order will contribute to the health of the entire community and ensure our health care systems and

> our communities are able to maintain capacity to care for our patients.
>
> "**Q4. Is there a penalty or consequence for faculty, other academic appointees, and staff if they do not get a flu shot?**
>
> "A4. Individuals who do not certify that they have received the 2020-2021 flu vaccine or have an approved exemption or accommodation will not have access to University facilities effective November 16, 2020. If the inability to access University facilities affects an employee's ability to perform job functions, supervisors will work with employees to find alternatives so they can continue to work."

(Emphasis in original.)

After it issued the Executive Order, the University extended the date for compliance with the vaccination policy to November 16. As of that date, individuals were not permitted to be on site at any University location if they were not vaccinated or did not have an approved exemption or accommodation. At least some employees in all of the bargaining units represented by Charging Parties are unable to work remotely and must be on site at their respective campus, medical center, or other University location to perform their work.

The University's Meetings with AFSCME and UPTE

On August 7, Peter Chester, Executive Director of Systemwide Labor Relations, sent an e-mail message to University unions announcing the new Executive Order. Teamsters sent a written demand to bargain over the decision and effects of the Executive Order on August 10. AFSCME sent a similar bargaining demand on August 17, as did UPTE on August 25. Having received no response to its demand, Teamsters renewed its demand on August 25. In response to these bargaining

demands, the University said it would not bargain the decision to issue the new influenza vaccination policy on the grounds that it was not a mandatory subject of bargaining but would bargain over effects of the policy.

UPTE and the University met at least four times. On October 8, UPTE identified specific effects it was seeking to bargain, including: "(1) time off to obtain the vaccine, (2) payment for costs associated with obtaining the vaccine, (3) the availability of clinics or sites at University facilities where workers can be vaccinated, (4) consequences for failure to obtain the vaccine, including the ability to work and whether the University intends to discipline employees who fail to comply, (5) timelines for workers to be vaccinated, and (6) exceptions to the vaccination requirements and the exemption process, including standards for religious, medical, or other accommodations." UPTE and the University executed a side letter over time off to obtain the vaccine. Although the University would not agree to UPTE's proposal to pay all costs associated with obtaining the vaccine, it did provide UPTE with a list of influenza vaccine clinics that employees could go to and suggested that employees utilize their health insurance to cover the cost of the vaccine. The University did not agree to UPTE's proposals on the remaining topics. UPTE and the University then agreed to place their negotiations on hold pending the outcome of this case.

The University and AFSCME met twice. On September 10, AFSCME identified the following impacts of the influenza vaccine requirement: "wages, benefits, hours of work, discipline, and other terms and conditions of employment, including those currently provided by our contracts, because workers who do not meet the University's new requirement will be deprived of the benefits and terms in the agreements."

AFSCME's negotiator Seth Newton Patel testified that at a mid-November bargaining session, Chester explicitly said the University would not entertain proposals about alternatives to discipline or leave without pay as consequences for failure to comply with the vaccination policy.[5] The University's negotiator, E. Kevin Young, testified that the subject of consequences for noncompliance was discussed during bargaining but did not give any detail about what those discussions included. AFSCME did not make any proposals related to the effects of the influenza vaccine requirement, and did not come to any agreement with the University regarding such effects.[6]

PROCEDURAL HISTORY

AFSCME and UPTE filed the unfair practice charge in Case No. SF-CE-1300-H on October 19, alleging that the University violated HEERA section 3571 by not providing notice and meeting and conferring with AFSCME and UPTE before issuing the July 31 Executive Order. On the same day, Teamsters filed a similar charge in

[5] Although Chester did not testify at the hearing, the statements attributed to him are not hearsay because they were made during negotiations while Chester was acting in his role as Executive Director of Systemwide Labor Relations, and therefore constitute party admissions, a recognized exception to the hearsay rule. (*Bellflower Unified School District* (2014) PERB Decision No. 2385, pp. 10-11, citing Evid. Code, § 1220; see Evid. Code, § 1222.) Because Chester's statements fall under an exception to the hearsay rule, they would be admissible in a civil action and thus can form the evidentiary basis for a factual finding. (*Bellflower Unified School District*, *supra*, PERB Decision No. 2385, pp. 8-11; PERB Reg. 32176 [PERB Regulations are codified at Cal. Code Regs., tit. 8, § 31001 et seq].)

[6] Teamsters did not introduce evidence of effects bargaining with the University because it withdrew its effects bargaining allegation at the start of the hearing.

Case No. SF-CE-1302-H.[7] Concurrently with its charge, Teamsters filed a Request for Injunctive Relief asking the Board to seek a court injunction to stay implementation of the Executive Order. The Board denied the Request on October 27.

OGC issued the complaint in Case No. SF-CE-1302-H on October 28. The complaint alleged the University violated HEERA section 3571, subdivisions (a) and (c) by issuing the Executive Order without providing Teamsters prior notice or an opportunity to meet and confer over the decision or its effects. On October 29, the Board granted Teamsters' request to expedite the case at all divisions of PERB. The University answered the complaint on November 17, denying all material allegations and asserting additional defenses.

OGC issued a largely identical complaint in Case No. SF-CE-1300-H on December 15. The University answered the complaint on January 4, 2021, again denying all material allegations and asserting additional defenses.

On December 28, the ALJ consolidated the cases for a formal hearing, which was held by videoconference on January 20, 21, 22 and 26, 2021. The parties filed closing briefs on March 19, 2021.

On March 24, 2021, the Board's Appeals Office notified the parties that the consolidated cases had been placed on the Board's docket for decision.[8] The

[7] A third charge, Case No. SF-CE-1303-H, was filed on October 20 by the International Association of Firefighters, Local 4920 (IAFF). All three cases were consolidated for hearing, but IAFF withdrew its charge on the first day of hearing.

[8] PERB Regulation 32320, subdivision (a)(1) allows the Board itself to "[i]ssue a decision based upon the record of hearing." PERB Regulation 32215 allows the Board itself to direct a Board agent to "submit the record of the case to the Board itself for decision."

University requested the cases be remanded to the ALJ for decision, arguing that the ALJ is better suited than the Board to make credibility determinations because he observed the witnesses testify at the hearing. After considering responses from Charging Parties, the Board denied the University's request.

DISCUSSION

I. Unilateral Change

HEERA section 3570 requires a higher education employer or its designee to meet and confer "with the employee organization selected as exclusive representative of an appropriate unit on all matters within the scope of representation." Refusal or failure to meet and confer as required by section 3570 is an unfair practice. (HEERA, § 3571, subd. (c).)

"An employer's unilateral change in terms and conditions of employment within the scope of representation is, absent a valid defense, a per se refusal to negotiate and a violation of HEERA." (*California State Employees' Assn. v. Public Employment Relations Bd.* (1996) 51 Cal.App.4th 923, 934.) To establish a prima facie unilateral change violation, the charging party must prove that: (1) the employer took action to change policy; (2) the change in policy concerns a matter within the scope of representation; (3) the change has a generalized effect or continuing impact on represented employees' terms and conditions of employment; and (4) the employer reached its decision without first providing advance notice of the proposed change to the employees' union and negotiating in good faith at the union's request, until the parties reached an agreement or a lawful impasse. (*Regents of the University of California* (2018) PERB Decision No. 2610-H, p. 32.)

AFSCME and UPTE argue the University was required to meet and confer in good faith over both the decision to require an influenza vaccination and the foreseeable effects of that decision, and that the University did neither. Teamsters argues only that the University failed to meet and confer over the decision to adopt the vaccination policy. The University admits it refused to meet and confer over the decision to adopt the vaccination policy but argues the decision is outside the scope of representation. The University further contends that it satisfied its obligation to negotiate with AFSCME and UPTE over the foreseeable effects of the decision.

The primary issue in this case is whether the University's decision to mandate that all employees who work on University premises receive an influenza vaccination is within the scope of representation. Before reaching that issue, we briefly address the other elements of the unilateral change test as applied to the University's decision.

A. Change in Policy

There are three primary types of policy changes that may constitute an unlawful unilateral change: (1) a deviation from the status quo set forth in a written agreement or written policy; (2) a change in established past practice; and (3) a newly created policy or application or enforcement of existing policy in a new way. (*County of Merced* (2020) PERB Decision No. 2740-M, p. 9; *Pasadena Area Community College District* (2015) PERB Decision No. 2444, p. 12, fn. 6.)

Prior to July 31, 2020, each University medical center had its own policy regarding employee influenza vaccination and all provided for a medical contraindication exemption. The general medical contraindications included a form of egg allergy and/or swelling, Guillain-Barre Syndrome, or other medically documented

contraindication. Generally, the University Health System policies allowed an exemption for a history of the Guillain-Barre Syndrome, while the Executive Order changed the exemption to seemingly require a diagnosis within less than six weeks after a prior dose of the influenza vaccine. This changed one of the medical exemptions related to Guillain-Barre Syndrome.

While the UC Irvine, UC San Diego, and UC San Francisco policies had a religious exemption, only UC San Diego had a strongly held belief exemption. The Executive Order did not allow an employee to decline to receive an influenza vaccination for strongly held personal reasons. The Executive Order thus changed the types of exemptions from mandatory influenza vaccination available at UC San Diego Health.

The Executive Order also changed the date by which the employees were required to provide proof of vaccination. The UC Irvine Health System defined the beginning of the flu season as the “week following Thanksgiving weekend of each year,” while UCLA Health System defined it as October 1, and UC San Francisco defined it as December 15. The remainder defined the flu season to begin when local health departments deemed it began. By unilaterally changing the date for requiring the influenza vaccination, the Executive Order changed policy.

Finally, prior to July 31, 2020, no University or campus policy required employees working at locations other than medical centers to receive an influenza vaccination. Starting on July 31, 2020, the Executive Order required “all students, faculty, and staff living, learning, or working” on University premises to receive an influenza vaccination by November 1, 2020.

The Executive Order thus changed the written policy for a subset of medical center employees, and also created a new policy for employees who work at locations other than the medical centers, as they were not previously required to receive an influenza vaccination. We therefore easily conclude that the Executive Order constituted a change in policy.

B. Generalized Effect or Continuing Impact

"A change of policy has, by definition, a generalized effect or continuing impact upon the terms and conditions of employment of bargaining unit members." (*Grant Joint Union High School District* (1982) PERB Decision No. 196, p. 9.) As discussed *ante*, the Executive Order changed the existing written influenza vaccination policy at University medical centers and created a new vaccination policy for non-medical center employees where none existed before. While the University's new policy was only effective during the 2020-2021 flu season, the requirement of a vaccination has a generalized or continuing effect as employees may suffer the consequences of failure to obtain the vaccine well into the future. (*City of Davis* (2016) PERB Decision No. 2494-M, 24, citing *San Jacinto Unified School District* (1994) PERB Decision No. 1078 [the duration of the unilateral act does not necessarily determine whether there was a unilateral change].) Furthermore, because the University relied on the management rights clause in its contracts with Charging Parties when making the decision to require influenza vaccinations, employees could be subject to similar vaccination mandates in the future. (*City of Davis*, *supra*, PERB Decision No. 2494-M, p. 21.) Because these policy changes applied on an ongoing basis to all employees represented by Charging Parties, they have a generalized effect or continuing impact

on bargaining unit members' employment conditions. (*State of California (Departments of Veterans Affairs and Personnel Administration)* (2008) PERB Decision No. 1997-S, pp. 18-19.)

C. Notice and Opportunity to Meet and Confer

Although the amount of time varies depending on the circumstances of each case, "an employer must give notice sufficiently in advance of reaching a firm decision to allow the representative an opportunity to consult its members and decide whether to request information, demand bargaining, acquiesce to the change, or take other action." (*Regents of the University of California*, *supra*, PERB Decision No. 2610-H, p. 45.) The University issued the Executive Order on July 31, but did not provide notice of the change to Charging Parties until August 7. The University clearly did not give Charging Parties advance notice or an opportunity to meet and confer before reaching a firm decision.

D. Scope of Representation

The scope of representation applicable to the University includes "wages, hours of employment, and other terms and conditions of employment" but excludes "[c]onsideration of the merits, necessity, or organization of any service, activity, or program established by law or resolution of the regents or the directors, except for the terms and conditions of employment of employees who may be affected thereby." (HEERA, § 3562, subd. (q)(1).) The "merits, necessity, or organization" language of HEERA section 3562, subdivision (q)(1) recognizes "the right of employers to make unconstrained decisions when fundamental management or policy choices are involved." (See *Building Material & Construction Teamsters' Union v. Farrell* (1986)

41 Cal.3d 651, 663 (*Building Material*) [interpreting similar language in the Meyers-Milias-Brown Act, § 3500 et seq.].)

Under HEERA, "[a] subject is within the scope of representation" "as a 'term or condition of employment'" "if: (1) it involves the employment relationship, (2) it is of such concern to both management and employees that conflict is likely to occur and the mediatory influence of collective bargaining is an appropriate means of resolving the conflict, and (3) the employer's obligation to negotiate would not unduly abridge its freedom to exercise those managerial prerogatives (including matters of fundamental policy) essential to the achievement of the employer's mission. [Citation.]" (*California Faculty Assn. v. Public Employment Relations Bd.* (2008) 160 Cal.App.4th 609, 616; *Regents of the University of California* (2012) PERB Decision No. 2300-H, p. 21.)

As to the first prong, the Executive Order involves the employment relationship because it created new conditions that had to be met for employees to perform their work on University premises: receiving an influenza vaccination or being granted a medical exemption, or disability or religious accommodation. The first prong therefore is met.

As to the second prong, mandatory influenza vaccination is not an issue that tends to create conflict between employees and management that could be resolved through collective bargaining. In *Riverside Unified School District* (1989) PERB Decision No. 750 (*Riverside USD*), the district unilaterally changed its policy by instituting an indoor smoking ban on district premises. The Board found this subject "is not one that divides people along management-union lines, but rather tends to split smokers and nonsmokers in both camps." (*Id*. at p. 19.) The Board further found that

"[c]ollective negotiations between the District and employee organizations is not an appropriate means of dealing with this public health hazard." (*Ibid*.)

Like smoking, the subject of influenza vaccinations is not one that divides people along management-union lines, but rather splits people—students, faculty, and staff—into those who can and will get vaccinated versus those who cannot or will not get vaccinated. And just like *Riverside USD*, the Executive Order "was implemented to alleviate a potential health hazard to all persons who may enter public school facilities, as opposed to assuring the safety of employees only." (*Riverside USD*, *supra*, PERB Decision No. 750, p. 19; see *Trustees of the California State University* (2009) PERB Decision No. 1876a-H, p. 16 [collective bargaining was not appropriate to resolve conflict over parking location and availability because students' interests would not be represented at the bargaining table].) The decision to require influenza vaccinations in response to a public health hazard that affects not just employees, but also students and the general population, thus was not amenable to collective bargaining.

As to the third prong, both the courts and PERB have repeatedly recognized that a public employer's concern for employee and public safety can outweigh the benefits of bargaining. (See, e.g., *Building Material*, *supra*, 41 Cal.3d 651, 664, citing *San Jose Police Officer's Assn. v. City of San Jose* (1978) 78 Cal.App.3d 935, 948-949.) For example, decision bargaining was not required when a county decided to staff a particular shift at a health center with a non-bargaining unit sworn peace officer rather than a public safety officer within the unit because the county made the decision based on a legitimate concern for employee and public safety. (*County of Santa Clara* (2019) PERB Decision No. 2680-M, p. 11.)

The University issued the Executive Order because of grave concerns by its experts (as well as the California Department of Public Health and the Centers for Disease Control and Prevention) that the 2020-2021 flu season, combined with the ongoing COVID-19 global pandemic, had the potential to overwhelm its hospitals due to the simultaneous spread of both respiratory illnesses. Dr. Riley testified that managing outbreaks of two respiratory diseases like influenza and COVID-19 at the same time can place significant stress on healthcare facilities. Dr. Reingold explained that the convergence of COVID-19 at the same time as an influenza outbreak would cause insurmountable patient load in hospitals. Dr. Reingold also agreed that mandatory influenza vaccination policies increase the rate of vaccination, and are more effective than an optional vaccination policy. The implementation of the University's influenza vaccination policy was a direct response to a potential confluence of the COVID-19 global pandemic and an outbreak of the influenza virus causing catastrophic outcomes and needless loss of life. This potential catastrophe affected not just University employees, but also its students and the general public who may have needed to use University hospitals. Under these unprecedented circumstances, requiring the University to negotiate the decision to require influenza vaccination would abridge its right to determine public health policy during a pandemic.

Charging Parties urge us to follow a series of private sector decisions involving one Washington hospital that purportedly hold influenza vaccination policies are within the scope of representation—*Virginia Mason Hospital* (2012) 358 NLRB 531; *Virginia Mason Hospital* (2011) 357 NLRB 564; and *Virginia Mason Hosp. v. Washington State*

Nurses Assn. (9th Cir. 2007) 511 F.3d 908 (collectively referred to as the *Virginia Mason* decisions). Although federal judicial and administrative precedent is not binding on PERB, it may provide persuasive guidance in construing California's public sector labor relations statutes. (*County of Santa Clara* (2019) PERB Decision No. 2670-M, p. 19, fn. 20 & p. 28; *Capistrano Unified School District* (2015) PERB Decision No. 2440, p. 15, citing *Fire Fighters Union v. City of Vallejo* (1974) 12 Cal.3d 608, 616-617.) Having reviewed the proffered federal authorities, we do not find them persuasive.

First, the two National Labor Relations Board (NLRB) decisions cited by Charging Parties, *Virginia Mason Hospital*, *supra*, 358 NLRB 531 and *Virginia Mason Hospital*, *supra*, 357 NLRB 564, did not involve a vaccination mandate but rather an influenza prevention policy requiring nurses who declined to get an immunization or take antiviral medication to wear masks while on duty. (*Virginia Mason Hospital*, *supra*, 357 NLRB at p. 565.) The NLRB concluded the policy was a work rule that affected nurses' working conditions and thus was within the scope of representation. (*Id*. at p. 566.) The University's influenza vaccination mandate, in contrast, is more than a mere work rule because it applies to all individuals who work, live, or study on University premises.

Second, in *Virginia Mason Hospital*, *supra*, 511 F.3d 908, the court affirmed an arbitration award that required the hospital to bargain with the nurses' union over a mandatory influenza vaccination policy. (*Id*. at pp. 912-913.) The arbitrator reasoned that "inherent in every collective bargaining agreement" is "the foundational labor law principle that management must bargain with recognized union representatives over

terms and conditions of employment." (*Id*. at p. 915.) Although the court recognized that this principle is embodied in the National Labor Relations Act (NLRA), neither the arbitrator nor the court analyzed why this particular immunization requirement was within the NLRA's scope of representation.[9] Absent such analysis, we decline to extrapolate the court's deferential affirmance of the arbitrator's conclusion into a general holding that all mandatory vaccination policies are within the scope of representation.

Finally, and arguably most importantly, none of the *Virginia Mason* decisions addressed an influenza vaccination mandate in the context of a "once-in-a-century pandemic." (*Gompers Preparatory Academy* (2021) PERB Decision No. 2765, p. 14.) Nor did any of the *Virginia Mason* decisions balance whether the public safety justification for the influenza prevention policy outweighed the benefits of bargaining over it. Unlike the flu prevention policies in those cases, the University's decision to mandate influenza vaccinations for employees and students serves a greater public health purpose by preventing University medical centers and other healthcare facilities from being overwhelmed by a simultaneous influx of COVID-19 and influenza patients. Because the *Virginia Mason* decisions did not have to weigh such a factor, we find them unpersuasive in these circumstances.[10]

We conclude for these reasons that the University's decision to adopt a mandatory influenza vaccination policy was outside HEERA's scope of

[9] The NLRA is codified at 29 U.S.C. section 151 et seq.

[10] Because this case does not present such a situation, we express no opinion on whether a policy mandating influenza vaccination in the absence of a concurrent global pandemic would be within the scope of representation.

representation.[11] This conclusion does not end our inquiry, however, because we still must determine whether the University complied with its duty to meet and confer over reasonably foreseeable effects of the decision that are within the scope of representation. (*County of Santa Clara*, *supra*, PERB Decision No. 2680-M, pp. 11-12.)

II. Effects Bargaining

Before implementing a non-negotiable change, the parties must first negotiate over aspects of the change that impact matters within the scope of representation. (*Trustees of the California State University* (2012) PERB Decision No. 2287-H, p. 11.) Once a firm non-negotiable decision is made, the employer must "provide notice and a meaningful opportunity to bargain over the reasonably foreseeable effects of its decision before implementation, just as it would be required to do before making a decision on a mandatory subject of bargaining." (*County of Santa Clara*, *supra*, PERB Decision No. 2680-M, p. 12.)

In *Compton Community College District* (1989) PERB Decision No. 720 (*Compton CCD*), the Board identified the limited circumstances under which an employer may implement a decision on a non-mandatory subject prior to exhausting its effects bargaining obligation: (1) the implementation date is based on an immutable deadline or an important managerial interest, such that a delay in implementation beyond the date chosen would effectively undermine the employer's right to make the decision; (2) the employer gives sufficient advance notice of the decision and

[11] In light of this conclusion, we do not address the University's argument that Charging Parties contractually waived their right to meet and confer over the decision.

implementation date to allow for meaningful negotiations prior to implementation; and (3) the employer negotiates in good faith prior to implementation and continues to negotiate afterwards as to the subjects that were not resolved by virtue of implementation. (*Id*. at pp. 14-15.) The University claims it sufficiently satisfied this bargaining obligation before implementing the vaccine policy; AFSCME and UPTE disagree.[12]

We need not address whether the first and second requirements were met because the University did not satisfy the third requirement that it meet and confer in good faith prior to implementation.[13] AFSCME and UPTE claim the University was unwilling to bargain over several subjects, including payment of vaccine costs for employees who did not have insurance, the availability of influenza vaccine clinics, alternatives to unpaid leave or discipline as consequences for not getting vaccinated, when the University would begin enforcing the access ban for workers who had not complied, and exemptions to the vaccination requirement. We need not address all of these subjects because the record shows that the University refused to bargain over alternative consequences for not getting vaccinated.

The Executive Order and FAQ did not expressly state the consequences employees could face for noncompliance with the vaccination requirement; the FAQ merely said that non-compliant employees would not be allowed on University

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[12] As noted above, Teamsters withdrew its effects bargaining allegation.

[13] While it is not at issue here, vaccination requirements set by the Centers for Disease Control and Prevention, state or local public health departments, or municipalities could supply immutable deadlines for the purposes of *Compton CCD*'s first requirement.

premises as of November 16. But during negotiations the University indicated that non-compliant employees could be disciplined or put on unpaid leave.

"PERB has long held that implementation of policies that include the potential for disciplinary action may have a direct impact on wages, health and welfare benefits, and other terms and conditions of employment since such action may reduce or eliminate entitlement to those items." (*Trustees of the California State University* (2003) PERB Decision No. 1507-H, adopting proposed decision at p. 12.) Accordingly, when a non-negotiable decision has foreseeable effects on discipline, such as creating a new type of evidence that may be used to support discipline or a new ground for discipline, those effects are negotiable. (See, e.g., *Rio Hondo Community College District* (2013) PERB Decision No. 2313, pp. 14-16 [use of surveillance camera video for disciplinary purposes was a negotiable effect of non-negotiable decision to install cameras]; *Trustees of the California State University*, *supra*, PERB Decision No. 1507-H, pp. 3-4 & adopting proposed decision at pp. 12-13 [disciplinary effects of computer use policy are within the scope of representation].) And, of course, placing an employee on unpaid leave has a direct effect on wages, an enumerated subject within the scope of representation. (HEERA, § 3562, subd. (q)(1).) An employer's outright refusal to bargain over matters within the scope of representation constitutes a per se violation of the duty to bargain in good faith. (*Los Angeles Unified School District* (2018) PERB Decision No. 2588, pp. 8-10; *Mount San Antonio Community College District* (1983) PERB Decision No. 334, pp. 10-11.)

AFSCME's and UPTE's negotiators testified that the University was unwilling to discuss any alternatives to leave without pay or discipline for an employee's failure to

comply with the vaccination policy. Most notably, at a mid-November bargaining session, Chester explicitly said the University would not entertain proposals about alternatives to discipline or leave without pay as consequences for failure to comply with the vaccination policy. Although University negotiator Young testified that the subject of consequences for noncompliance was discussed during bargaining, neither he nor any other witness contradicted Charging Parties' testimony that University representatives refused to discuss alternatives to discipline or unpaid leave. Based on this evidence, we find the University outright refused to bargain over the vaccination policy's effect(s) on discipline and wages. We accordingly find the University did not meet and confer in good faith over negotiable effects of the decision to mandate influenza vaccinations.

Because the University failed to satisfy all of the requirements under *Compton CCD*, it was not privileged to implement the influenza vaccination policy prior to completing effects bargaining with AFSCME and UPTE. The University's implementation of the policy thus constituted an unlawful unilateral change in violation of HEERA.

REMEDY

A "properly designed remedial order seeks a restoration of the situation as nearly as possible to that which would have obtained but for the unfair labor practice." (*Modesto City Schools* (1983) PERB Decision No. 291, pp. 67-68.) The usual remedy for an employer's violation of its effects bargaining obligation is an order to bargain with the exclusive representative over the effects, with a limited backpay award to make employees whole for losses suffered and to mitigate as much as possible the

imbalance in the parties' bargaining positions resulting from the employer's unlawful conduct. (*County of Santa Clara*, *supra*, PERB Decision No. 2680-M, p. 14; *Bellflower Unified School District*, *supra*, PERB Decision No. 2385, pp. 12-13.)

The University's influenza vaccination policy expired by its own terms at the end of the 2020-2021 flu season. There is thus no reason to order the University to bargain with AFSCME and UPTE over foreseeable negotiable effects of that particular policy.

It is appropriate, however, to order the University to make employees whole for any losses suffered as a result of the University's failure to meet and confer in good faith over the policy's effects. Although AFSCME and UPTE presented no evidence that any employee suffered a loss as a result of noncompliance with the vaccination policy, an unfair practice finding creates a presumption that employees suffered some loss as a result of the employer's unlawful conduct. (*Bellflower Unified School District* (2019) PERB Order No. Ad-475, p. 10; *Desert Sands Unified School District* (2010) PERB Decision No. 2092, pp. 31-32.) Consistent with the presumption, AFSCME and UPTE will have the opportunity to establish in compliance proceedings that any employees they represent suffered a loss as a result of the vaccination policy, such as discipline, unpaid leave, and out-of-pocket payment of vaccine costs.

It also is appropriate to order the University to cease and desist from the unlawful conduct found in this decision, and to post physical and electronic notices of its violation. (*City of Sacramento* (2013) PERB Decision No. 2351-M, pp. 43-45.)

ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in the case, it is found that the Regents of the University of California

(University) violated the Higher Education Employer-Employee Relations Act (HEERA), Government Code section 3571, subdivision (c), by failing to meet and confer in good faith with Charging Parties American Federation of State, County & Municipal Employees Local 3299 (AFSCME), and University Professional and Technical Employees, Communication Workers of America, Local 9119 (UPTE) (collectively Unions) over negotiable effects prior to implementing the mandatory influenza vaccination policy. All other allegations in Case No. SF-CE-1300-H are DISMISSED.

Because Teamsters Local 2010 withdrew the allegation in Case No. SF-CE-1302-H that the University failed to meet and confer in good faith over negotiable effects of the Executive Order, and we find that the University was not required to negotiate over the decision to require mandatory influenza vaccinations, the complaint in Case No. SF-CE-1302-H is DISMISSED.

Pursuant to Government Code section 3563, subdivisions (h) and (m), it is ORDERED that the University, its governing board, and its representatives shall:

A. CEASE AND DESIST FROM:

1. Failing and refusing to meet and confer in good faith with the Unions by unilaterally deciding to mandate influenza vaccinations, without giving the Unions reasonable notice and an opportunity to meet and confer over foreseeable effects of the decision.

2. Interfering with employees' right to participate in the activities of an employee organization of their own choosing.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF HEERA:

1. Make employees whole for any losses suffered as a result of the University's unlawful implementation of the mandatory influenza vaccination policy. Any compensation awarded shall be augmented by interest at a rate of 7 percent per year.

2. Within 10 workdays of the date this decision is no longer subject to appeal, post at all work locations where notices to employees in AFSCME's and UPTE's bargaining units customarily are posted, copies of the Notice attached hereto as Appendix A. The Notice must be signed by an authorized agent of the University, indicating that it will comply with the terms of this Order. Such posting shall be maintained for a period of 30 consecutive workdays.[14] The Notice shall also be sent to all bargaining unit employees by electronic message, intranet, internet site, or other electronic means customarily used by the University to communicate with employees

[14] In light of the ongoing COVID-19 pandemic, the University shall notify PERB's Office of the General Counsel (OGC) in writing if, due to an extraordinary circumstance such as an emergency declaration or shelter-in-place order, a majority of employees at one or more work locations are not physically reporting to their work location as of the time the physical posting would otherwise commence. If the University so notifies OGC, or if a Unions requests in writing that OGC alter or extend the posting period, require additional notice methods, or otherwise adjust the manner in which employees receive notice, OGC shall investigate and solicit input from all relevant parties. OGC shall provide amended instructions to the extent appropriate to ensure adequate publication of the Notice, such as directing the University to commence posting within 10 workdays after a majority of employees have resumed physically reporting on a regular basis; directing the University to mail the Notice to all employees who are not regularly reporting to any work location due to the extraordinary circumstance, including those who are on a short term or indefinite furlough, are on layoff subject to recall, or are working from home; or directing the University to mail the Notice to those employees with whom it does not customarily communicate through electronic means.

in AFSCME's and UPTE's bargaining units. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced, or covered with any other material.

3. Written notification of the actions taken to comply with this Order shall be made to the General Counsel of the Public Employment Relations Board, or the General Counsel's designee. The University shall provide reports, in writing, as directed by the General Counsel or his/her designee. All reports regarding compliance with this Order shall be concurrently served on each of the Unions.

Chair Banks and Member Paulson joined in this Decision.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD
An Agency of the State of California

After a hearing in Unfair Practice Case No. SF-CE-1300-H, *American Federation of State, County & Municipal Employees Local 3299; University Professional and Technical Employees, Communication Workers of America, Local 9119 v. Regents of the University of California*, in which all parties had the right to participate, it has been found that the Regents of the University of California (University) violated the Higher Education Employer-Employee Relations Act, by failing to meet and confer in good faith with Charging Parties American Federation of State, County & Municipal Employees Local 3299, and University Professional and Technical Employees, Communication Workers of America, Local 9119 (collectively Unions) over negotiable effects prior to implementing the mandatory influenza vaccination policy.

As a result of this conduct, we have been ordered to post this Notice and we will:

A. CEASE AND DESIST FROM:

1. Failing and refusing to meet and confer in good faith with the Unions by unilaterally deciding to mandate influenza vaccinations, without giving the Unions reasonable notice and an opportunity to bargain over foreseeable effects of the decision.

2. Interfering with employees' right to participate in the activities of an employee organization of their own choosing.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE HEERA:

1. Make employees whole for any losses suffered as a result of the University's unlawful implementation of the mandatory influenza vaccination policy. Any compensation awarded shall be augmented by interest at a rate of 7 percent per year.

Dated: _____

REGENTS OF THE UNIVERSITY OF CALIFORNIA

By: _____
Authorized Agent

THIS IS AN OFFICIAL NOTICE. IT MUST REMAIN POSTED FOR AT LEAST 30 CONSECUTIVE WORKDAYS FROM THE DATE OF POSTING AND MUST NOT BE REDUCED IN SIZE, DEFACED, ALTERED OR COVERED WITH ANY OTHER MATERIAL.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 743,	)	
Plaintiff,	)	**Case No.** 21-CV-3840
v.	)	
CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS HEALTH AND WELFARE PENSION FUNDS,	)	
Defendant.	)	

VERIFIED COMPLAINT FOR
DECLARATORY, INJUNCTIVE RELIEF TO COMPEL ARBITRATION

Plaintiff, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 743 ("Teamsters" or "Plaintiff"), files this verified complaint for declaratory, injunctive relief to compel arbitration against Defendant, CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS HEALTH AND WELFARE PENSION FUND ("Central States" or "Defendant") and states as follows:

JURISDICTION AND VENUE

1. This matter arises under the laws of the United States, and this Court has jurisdiction pursuant to 28 U.S.C. § 1331, 28 U.S.C. § 1337 and the Labor-Management Relations Act, 29 U.S.C. § 185 (hereinafter "Act").

2. Plaintiff Local 743 is an affiliated union of the International Brotherhood of Teamsters (hereinafter "Local 743"). Local 743 is an unincorporated association that exists for

the purpose of representing employees in collective bargaining with employers in industries affecting commerce and is a labor organization within the meaning of 29 U.S.C. § 152(5).

3. Plaintiff's principal place of business is located in Chicago, Illinois and is within the judicial district of the United States District Court for the Northern District of Illinois.

4. Defendant's principal place of business is located in Chicago, Illinois and is within the judicial district of the United States District Court for the Northern District of Illinois.

5. Defendant is an employer engaged in interstate commerce within in the meaning of 29. U.S.C. Section 152 (2) of the Labor-Management Relations Act.

THE PARTIES AND THE CBAs

6. Plaintiff represents two separate bargaining units employed by the Defendant. One bargaining unit represents employees paid by hourly wages ("Hourly Unit"). The other bargaining unit represents employees paid by salary ("Salaried Unit").

7. At all relevant times, each Unit's wages, hours and working conditions were governed by a collective bargaining agreement ("CBA") with Defendant. The CBA between the Hourly Unit and Defendant ("Hourly CBA") is effective from April 1, 2018, to March 31, 2024. The CBA between the Salaried Unit and Defendant ("Salaried CBA") is effective from July 1, 2018, to June 30, 2024. Each CBA sets forth the specific positions each Unit represents. *See* (Exhibit A (CBA between Hourly Unit and Defendant); Exhibit B (CBA between Salaried Unit and Defendant)).

8. Section 5.2(a) of the Hourly CBA states that Defendant and the Hourly Unit "shall" negotiate "for a reasonable period of time" about mid-term changes in the CBA that modify, alter,

add to withdraws or injects any new plan of an economic nature covering the wages or other benefits" of employees. Section 5.2(b) of the Hourly CBA, entitled "Interest Arbitration on Mid-Term Changes", provides that if the parties cannot reach an agreement, "the parties **shall** proceed to an interest arbitration in which an arbitrator … determines any and all wages, benefits, and working condition issues that may arise from the Employer's proposals and the Union's counter proposals or responses." (Exhibit A) (emphasis added).

9. Each CBA also provides for final and binding grievance arbitration, for its respective Unit. (Exhibit A; Exhibit B).

10. Section 13 of the Hourly CBA provides for the resolution of disputes between the parties as follows:

> "13.1 Grievance Process
>
> In order to provide an orderly method of handling / disposing of all disputes, misunderstandings, differences, or grievances arising between the Employer and the Union and/or the employees covered by this Agreement as to the meaning, interpretation, and application of the provisions of this Agreement, such differences shall be settled in the following manner:
>
> A. An employee wishing to process a grievance shall, within five (5) scheduled workdays after the event occurs which gave rise to the grievance, or he receives knowledge of said event, submit his grievance to his supervisor who shall endeavor to adjust or answer the grievance within five (5) scheduled workdays.
>
> B. In the event the grievance is not satisfactorily adjusted in Step A, the grievance shall be reduced to writing and submitted to the Human Resources Group within thirteen (13) scheduled workdays after the event occurs which gave rise to the grievance, or the employee receives knowledge of said event. The written grievance shall identify the section and sub-section of the Agreement allegedly violated. The grievance shall state as explicitly as possible the precise nature of the grievance and the remedy requested.

> Subsequent processing of the grievance shall be confined to the grievance as written. Any settlement at Step A or Step B shall be binding upon the Employer, the Union and the aggrieved employee. In the event that the grievance cannot be settled the Employer shall submit its written answer to the grievant within ten (10) scheduled workdays of the submission of the written grievance. Management staff without direct responsibilities for the Administrative Services Group will preside over grievance hearings for Administrative Services Group grievances.
>
> C. In the event the answer in Step B is not considered satisfactory, the Employer or Union shall, within twelve (12) scheduled workdays of submission of the written grievance in Step B, submit a request in writing for binding arbitration of the dispute. …"

(Exhibit A).

11. Section 12 of the Salaried CBA addresses grievances. It does not differ from the quoted language in the Hourly CBA in any way relevant to this dispute. (Exhibit B).

12. The Hourly CBA addresses vacation leave in Section 18. The Hourly CBA addresses paid time off in Section 19. Neither section allows Defendant to deduct either form of benefit time as a form of discipline. (Exhibit A).

13. The Salaried CBA addresses vacation leave in Section 26. The Salaried CBA addresses paid time off in Section 27. Neither section allows Defendant to deduct either form of benefit time as a form of discipline. (Exhibit B).

14. The parties' CBAs provide for Maintenance of Standards including wages and benefits and states, "No employee covered by this Agreement shall suffer any loss of wages or benefits through the signing of this Agreement. . . ." (Exhibit A, § 5 and Exhibit B, § 5).

THE POLICY

15. In response to the COVID-19 pandemic, and at Defendant's direction, employees represented by the Plaintiff began working remotely in Spring, 2020, and continue to work remotely. In Spring, 2021, Defendant announced that Plaintiff's members would return to "in-person" work at its facilities sometime later in 2021.

16. On or about May 26, 2021, Defendant promulgated a COVID-19 vaccination policy ("Policy"), which it intended to implement when employees returned to "in person" work. Plaintiff became aware of the Policy on or about May 26.

17. The Policy provides that if an employee has not received a COVID-19 vaccine and does not have a Defendant-approved religious or medical accommodation, he or she could not enter Defendant's facilities.

18. The Policy further provides that an employee would have paid time off deducted from his or her paid time off bank for each work day they refused to receive the vaccine, and, therefore could not report to work. Under the Policy, once an employee exhausted his or her paid time off, he or she would be subject to discipline up to and including termination. (Exhibit of earliest form of Policy, Exhibit C).

19. The Policy is a "Mid Term Change," as that term is used in section 5.2(b) of the Hourly CBA in that it is a new plan of an economic nature covering wages or other benefits.

COMMUNICATION BETWEEN THE PARTIES REGARDING THE POLICY

20. On May 27, 2021, Plaintiff issued a demand to bargain the Policy with the Defendant.

21. The parties met several times in an attempt to bargain changes to the Policy, and the parties exchanged proposals and counterproposals. However, the Defendant was unwilling to negotiate over the mandatory nature of the vaccine program.

22. The parties did not reach agreement on the issues they respectively raised.

23. On June 1, 2021, Local 743 advised Defendant that implementation of the Policy could lead to the termination of approximately 30 percent of the members of both bargaining units.

24. On June 11, 2001, a grievance was filed protesting the Policy on behalf of the Hourly bargaining unit. (Exhibit D "Hourly Grievance").

25. On June 11, 2001, a grievance was filed protesting the Policy on behalf of the Salaried bargaining unit. (Exhibit E "Salaried Grievance").

26. The remedy sought in both the Grievances was in part the rescission of the policy. *See* (Exhibit D (Hourly Grievance); Exhibit E (Salaried Grievance)).

27. On June 14, 2021, Defendant advised Local 743 that it planned to commence implementation of the Policy.

28. On June 28, 2021, Defendant distributed the Policy to its employees.

29. On July 6, 2021, Defendant informed Local 743 that it would implement the Policy for all employees.

30. Defendant set a return-to-work date of September 7, 2021. See Exhibit I. Defendant acknowledged that the grievances remained outstanding, but stated that it would make no effort to obtain an arbitrator's ruling on this matter before it implemented the Policy.

31. During the negotiations on this policy, the union requested the Defendant to delay implementation of the policy pending arbitration of the grievances filed on behalf of the hourly and salaried employees bargaining unit. The Defendant declined the request.

32. To be fully vaccinated by the September 7, 2021 return-to-work date, an employee would have to receive his or her first of two COVID-19 vaccine injection no later than July 27, 2021.

OBJECTIONS TO THE POLICY

33. The Policy provides that if a bargaining unit member is not vaccinated and does not have a religious or medical accommodation, he or she will lose paid time off, and will be subject to disciplinary procedures (including termination) once all the specified benefit time expires. *See* (Exhibit F).

34. The Policy violates both CBAs with respect to the "benefits of" employment. Neither CBA allows deductions from vacation leave or paid time off, and the parties did not contemplate that such leave would be deducted for disciplinary reasons or as a result of a personal medical choice.

35. The Policy also violates both CBAs with respect to the "terms and conditions of" employment. Defendant is creating a new "condition of" employment—an employee must receive a vaccine with unknown long-term effects or suffer a progressive loss of benefit time leading to termination. Neither CBA allows this by its text, and the parties did not contemplate this during bargaining.

36. Defendant refuses to engage in any arbitration process that would ensure that an arbitrator hears and decides this matter before Defendant implements the Policy.

37. Defendant has implemented the Policy despite its contractual requirement to engage in interest arbitration for any change in working conditions.

38. Both the hourly grievance and the salaried grievances remain unresolved. Defendant has refused the Plaintiff's request to expedite grievance arbitration.

39. Local 743 has never stated or implied that the Policy may be implemented before an arbitrator rules on it. Defendant is aware of the Union's continued opposition to the Policy.

COUNT I (INJUNCTIVE RELIEF IN AID OF INTEREST ARBITRATION ON BEHALF OF THE HOURLY UNIT)

40. Local 743 realleges and incorporates by reference Paragraphs 1 through 39 of this Complaint.

41. The Hourly CBA governs all wages, hours, benefits, and terms and conditions of employment for members of the Hourly Unit.

42. The Hourly CBA does not empower Defendant to diminish benefits of bargaining unit members for failing to receive a vaccine.

43. The Hourly CBA does not empower Defendant to unilaterally implement a new Policy of an economic nature covering wages or benefits that creates a condition of employment, and subjects employees to termination for failing to comply with the Policy.

44. Section 5.2(b) of the Hourly CBA specifies that if the Hourly Unit and Defendant cannot agree on a mid-term contract change proposed by Defendant, the parties "shall" proceed to an interest arbitration where an arbitrator "determines" all issues raised their respective proposals.

45. On or about July 8, 2021, Local 743 requested the Defendant engage in an interest arbitration proceeding to resolve the disputes about the mandatory vaccination Policy required of the employees represented by the Unit. Exhibit G.

46. As of the filing of this complaint, Defendant has declined to commence an interest arbitration proceeding. Exhibit H.

47. Defendant has announced that it will not wait for the resolution of any arbitration proceeding to implement the Policy and has implement the Policy without an arbitrator's ruling. Exhibit I.

48. Local 743, through its request for interest arbitration, seeks a determination from an arbitrator whether the mandatory vaccine requirement should be a new term and condition of employment and under what circumstances employees should be allowed to return to in-person office work, e.g., without vaccinations and subject to COVID-19 testing protocols, mask wearing, social distancing, separate areas of work for vaccinated and nonvaccinated employees and other safeguards under which employees can work in a safe environment. .

49. Only an arbitrator should resolve the issue for which Local 743 on behalf of the Hourly Unit has requested interest arbitration, but that process would likely not be completed by July 27, 2021.

50. Under the parties' Hourly CBA, Defendant may not implement its challenged Policy and potentially cause irreparable harm to Hourly Unit members before proceeding to interest arbitration, as set forth in section 5.2(b) of the Hourly CBA.

51. Defendant violates Section 5.2(b) by failing to proceed to interest arbitration and implementing the Policy before an arbitrator rules on this matter.

52. Defendant would violate federal statutes, including but not limited to 9 U.S.C. § 4, by instituting the Policy before an arbitrator rules on this matter.

53. Section 5.2(b) of the Hourly CBA constitutes a written agreement for arbitration. Defendant's refusal to arbitrate as required by the written agreement for interest arbitration is without good faith and constitutes an unjustified refusal to participate in the arbitration process.

54. The employees in the Hourly Unit have a likelihood of success on the merits, have an ascertainable right in need of protection, will suffer irreparable harm in the absence of an injunction, do not have an adequate remedy at law, and are supported by the balance of the equities.

55. Defendant's Policy would cause irreparable harm to Hourly the bargaining employees by forcing them to receive medication to which they do not truly consent.

56. Hourly Unit employees have been aggrieved by the failure and refusal of Defendant to arbitrate pursuant to a written agreement for arbitration.

57. Delaying arbitration of this matter would harm Hourly Unit employees without any corresponding legitimate benefit to Defendant.

58. The substantial number of Hourly Unit members who do not wish to receive the vaccine hold good-faith, reasonable concerns about some aspect(s) of these novel vaccines, the long-term effects of which are not known and cannot be known. These individuals have been threatened with the removal of benefits, and ultimately termination, if they do not comply with the Policy. These concerns include but are not limited to:

a. The good faith objections to the vaccine are based on concerns of employees of the impact of the vaccine on heart inflammation, fertility, allergic reactions to flu shots in general, side effects of vaginal bleeding, Bell's Palsy,

sickness for up to two weeks after receiving a flu shot, concern about impacting the immune system, and blood clots. (Florentino Dec. ¶¶ 12-15) (Exhibit J); (Garcia Dec. ¶¶ 9-16) (Exhibit K) (Tummillo Dec. ¶¶ 12-15) (Exhibit L).

b. An employee contemplating having a family has concerns that the vaccine could affect her fertility. (Florentino Dec. ¶¶ 9, 13-14) (Exhibit J).

c. An employee has stated that she has valid concerns about the long term impact on her immune system. (Tummillo Dec. ¶¶ 10-12) (Exhibit L).

d. An employee with a history of diabetes, anemia and a concern for vaginal bleeding has consulted her doctor, who has advised her that she had a valid reason not to take the vaccine. (Garcia Dec. ¶¶ 12-13) (Exhibit K).

e. Employees believe that they have no uncoerced choice but are compelled to take the vaccine or face the prospect of losing their jobs and not having sufficient income to pay basic household expenses or to pay for health insurance to cover their family members. (Florentino Dec. ¶¶ 4-8) (Exhibit J); (Garcia Dec. ¶¶ 5-8) (Exhibit K); (Tummillo Dec. ¶¶ 5-8) (Exhibit L).

59. This court has jurisdiction to compel arbitration pursuant to the collective bargaining agreement and federal arbitration law, 9 U.S.C. § 4.

WHEREFORE, Plaintiff requests this Court to enter an order:

a. For temporary, preliminary, and permanent injunctive relief preventing Defendant from implementing any part of the Policy until an arbitrator has issued a ruling in the Hourly Interest Arbitration;

b. Awarding Plaintiff reasonable attorneys' fees as have been expended in the prosecution of this Complaint and Petition; and

c. Awarding any other and further relief as this Court may deem to be just and proper under the circumstances.

COUNT II [PLED IN THE ALTERNATIVE TO COUNT I]
(INJUNCTIVE RELIEF IN AID OF GRIEVANCE ARBITRATION ON BEHALF OF THE HOURLY UNIT)

60. Local 743 realleges and incorporates by reference Paragraphs 1 through 59 of this Complaint.

61. The Hourly CBA governs all matters of wages, benefits, and terms and conditions of employment for members of the Hourly Unit.

62. The Hourly CBA does not empower Defendant to diminish benefits of bargaining unit members for failing to receive a vaccine.

63. The Hourly CBA does not empower Defendant to implement a new condition of employment, then discipline bargaining unit members for failing to comply with the new Policy.

64. Section 13 of the Hourly CBA sets forth the parties' procedures for processing grievances.

65. A grievance was filed protesting the policy on behalf of the Hourly bargaining unit on June 11, 2021. Exhibit D. The Hourly Unit at all times has complied with Section 13.

66. As of the filing of this Complaint, the Hourly bargaining unit grievance remains unresolved.

67. As of the filing of this Complaint, Local 743 and Defendant have not reached an agreement on the issues raised by the Hourly bargaining unit.

68. Defendant has implemented the Policy and refused to retract the Policy until the parties receive an arbitrator's ruling on the matter before July 27, 2021. Exh. I.

69. Local 743 on behalf of Hourly bargaining Unit, through the Hourly grievance seeks a determination from an arbitrator whether the Policy or Defendant's actions in implementing it violates the Hourly CBA.

70. The Hourly bargaining unit grievance can only be decided through the arbitration process; however, that process could take several months to complete and likely will not be completed by July 27, 2021.

71. Section 13 of the Hourly CBA constitutes a written agreement for arbitration. Defendant has declined to arbitrate this grievance on an expedited basis.

72. Implementation of the Policy before this issue is ruled on by an arbitrator violates federal statutes, including but not limited to 9 U.S.C. § 4.

73. The Hourly bargaining unit employees have been aggrieved by the failure and refusal of Defendant to arbitrate on an expedited basis prior to implementation of the Policy.

74. The employees in the Hourly Unit have a likelihood of success on the merits, have an ascertainable right in need of protection, will suffer irreparable harm in the absence of an injunction, do not have an adequate remedy at law, and are supported by the balance of the equities.

75. Defendant's Policy would cause irreparable harm to Hourly the bargaining employees by forcing them to receive medication to which they do not truly consent.

76. Delaying arbitration of this matter would harm Hourly bargaining unit employees without any corresponding legitimate benefit to Defendant.

77. The substantial number of Hourly Unit members who do not wish to receive the vaccine hold good-faith, reasonable concerns about some aspect(s) of these novel vaccines, the long-term effects of which are not known and cannot be known. These individuals have been

threatened with the removal of benefits, and ultimately termination, if they do not comply with the Policy. These concerns include but are not limited to:

a. The good faith objections to the vaccine are based on concerns of employees of the impact of the vaccine on heart inflammation, fertility, allergic reactions to flu shots in general, side effects of vaginal bleeding, Bell's Palsy, sickness for up to two weeks after receiving a flu shot, concern about impacting the immune system, and blood clots. (Florentino Dec. ¶¶ 12-15) (Exhibit J); (Garcia Dec. ¶¶ 9-16) (Exhibit K) (Tummillo Dec. ¶¶ 12-15) (Exhibit L).

b. An employee contemplating having a family has concerns that the vaccine could affect her fertility. (Florentino Dec. ¶¶ 9, 13-14) (Exhibit J).

c. An employee has stated that she has valid concerns about the long term impact on her immune system. (Tummillo Dec. ¶¶ 10-12) (Exhibit L).

d. An employee with a history of diabetes, anemia and a concern for vaginal bleeding has consulted her doctor, who has advised her that she had a valid reason not to take the vaccine. (Garcia Dec. ¶¶ 12-13) (Exhibit K).

e. Employees believe that they have no uncoerced choice but are compelled to take the vaccine or face the prospect of losing their jobs and not having sufficient income to pay basic household expenses or to pay for health insurance to cover their family members. (Florentino Dec. ¶¶ 4-8) (Exhibit J); (Garcia Dec. ¶¶ 5-8) (Exhibit K); (Tummillo Dec. ¶¶ 5-8) (Exhibit L).

78. This court has jurisdiction to compel arbitration and to order an injunction in aid of arbitration pursuant to the collective bargaining agreement and federal arbitration law, 9 U.S.C. § 4.

WHEREFORE, Plaintiff requests this Court to enter an order:

a. For temporary, preliminary, and permanent injunctive relief preventing Defendant from implementing any part of the Policy until an arbitrator has ruled on the Salaried Grievance;

b. Awarding Plaintiff reasonable attorneys' fees as have been expended in the prosecution of this Complaint and motion to compel; and

c. Awarding any other and further relief as this Court may deem to be just and proper under the circumstances.

COUNT III (INJUNCTIVE RELIEF IN AID OF GRIEVANCE ARBITRATION ON BEHALF OF THE SALARIED UNIT)

79. Local 743 realleges and incorporates by reference Paragraphs 1 through 78 of this Complaint.

80. The Salaried CBA governs all matters of wages, benefits, and terms and conditions of employment for members of the Salaried bargaining unit.

81. The Salaried CBA does not empower Defendant to diminish benefits of bargaining unit members for failing to receive a vaccine.

82. The Salaried CBA does not empower Defendant to implement a new condition of employment, then discipline bargaining unit members for failing to comply.

83. Section 12 of the Salaried CBA sets forth the parties' procedures for processing grievances.

84. Salaried bargaining unit member Cindy McGinnis filed the salaried grievance against the Policy on June 11, 2021. Exhibit E. The Local 743 at all times has complied with Section 12.

85. As of the filing of this Complaint, the salaried grievance remains unresolved.

86. As of the filing of this Complaint, Local 743 and Defendant have not reached an agreement on the issues raised by the salaried grievance.

87. Defendant has announced that it does not plan to wait for the resolution of the salaried grievance to implement the Policy and has implemented the Policy without an arbitrator's ruling. Defendant has further announced that it will take no measures to ensure that the salaried grievance is heard before July 27, 2021. Exh. I.

88. The Local 743, through the salaried grievance, seeks a determination from an arbitrator whether the Policy, or Defendants' actions in implementing it, violates the Salaried CBA.

89. The salaried grievance can only be decided through the arbitration process; however, that process could take several months to complete and likely will not be completed by July 27, 2021.

90. The employees in the Salaried Unit have a likelihood of success on the merits, have an ascertainable right in need of protection, will suffer irreparable harm in the absence of an injunction, do not have an adequate remedy at law, and are supported by the balance of the equities.

91. Defendant's Policy would cause irreparable harm to the Salaried bargaining unit employees by forcing them to receive medication to which they do not truly consent.

92. Delaying arbitration of this matter would harm Salaried bargaining unit employees without any corresponding legitimate benefit to Defendant.

93. The substantial number of Salaried Unit members who do not wish to receive the vaccine hold good-faith, reasonable concerns about some aspect(s) of these novel vaccines, the long-term effects of which are not known and cannot be known. These individuals have been threatened with the removal of benefits, and ultimately termination, if they do not comply with the Policy. These concerns include but are not limited to:

a. The good faith objections to the vaccine are based on concerns of employees of the impact of the vaccine on heart inflammation, fertility, allergic reactions to flu shots in general, side effects of vaginal bleeding, Bell's Palsy, sickness for up to two weeks after receiving a flu shot, concern about impacting the immune system, and blood clots.

b. Employees believe that they have no uncoerced choice but are compelled to take the vaccine or face the prospect of losing their jobs and not having sufficient income to pay basic household expenses or to pay for health insurance to cover their family members.

94. Defendant's Policy would cause irreparable harm to Salaried bargaining unit employees by forcing them to receive medication to which they do not truly consent.

95. If Defendant implements the Policy before this issue is ruled on by an arbitrator, it will violate federal statutes, including but not limited to 9 U.S.C. § 4.

96. Section 12 of the Salaried CBA constitutes a written agreement for arbitration. Defendant's refusal to arbitrate this grievance on an expedited basis is without good faith and constitutes an unjustified refusal to participate in the arbitration process.

97. The Salaried bargaining unit has been aggrieved by the failure and refusal of Defendant to arbitrate on an expedited basis prior to implementation of the Policy.

98. Delaying arbitration of this matter would harm Salaried unit employees and its members without any corresponding legitimate benefit to Defendant.

99. The substantial number of Salaried, bargaining unit employees who do not wish to receive the vaccine hold good-faith, reasonable concerns about some aspect(s) of these novel vaccines, the long-term effects of which are not known and cannot be known. These individuals have been threatened with the removal of benefits, and ultimately termination if they do not comply with the Policy.

100. This court has jurisdiction to compel arbitration pursuant to the collective bargaining agreement and federal arbitration law, 9 U.S.C. § 4.

WHEREFORE, Plaintiff requests this Court to enter an order:

a. For temporary, preliminary, and permanent injunctive relief preventing Defendant from implementing any part of the Policy until an arbitrator has ruled on the Salaried Grievance;

b. Awarding Salaried Unit reasonable attorneys' fees as have been expended in the prosecution of this Complaint and Petition; and

c. Awarding any other and further relief as may be just and proper under the circumstances.

Respectfully submitted,

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VERIFICATION

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury under the laws of the United States of America that the foregoing Verified Complaint for Declaratory, Injunctive Relief to Compel Arbitration is true and correct to the best of my knowledge and belief.

Dated: July 19, 2021.

Debra Simmons-Peterson