

SEPTEMBER 16, 2021

BANNER HEALTH
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NOTICE TO CEASE AND DESIST

ALL MANDATORY COVID-19 MITIGATION POLICIES, MANDATED TESTING/SCREENING AND MANDATED COVID VACCINATIONS FOR ALL EMPLOYEES

CEO PETER FINE and VP HR NAOMI CRAMER~

This letter serves as formal notice to immediately *cease and desist* all actions related to mandating Covid Vaccinations, Covid-19 Mitigation, Self-Screening and Reporting Policies and Procedures as conditions of employment with BANNER HEALTH. As detailed below, many of the requirements contained in your policies are in direct violation of State and Federal Law. You are on notice that if the dispute escalates or results in a constructive or retaliatory firing, a lawsuit may be brought against you.

This letter is designed to inform you of the law regarding, among other things, the constitutional privacy rights implications of mandating measures that treat employees differently according to their vaccination status.

I. MASKS, TERMINATIONS, AND OTHER “MITIGATION” REQUIREMENTS MUST NOT BE TIED TO COVID-19 VACCINATION STATUS

The United States Constitution, as well as the State of Arizona’s Constitution, protect the fundamental rights of we the people. These rights are inherent, guaranteed by the mere fact that we were born human. According to the US and Arizona Constitution, all persons are born equally free, and have certain natural, inherent, and inalienable rights, among which are the rights of enjoying and defending life and liberty, of equal protection under the law, equal privileges, and immunities to all citizens, of acquiring, possessing, and protecting property, and of seeking and obtaining safety and happiness. U.S. Const. Bill of Rights; AZ. Const. art. II, § 13

The discharge or disciplining of an employee for refusing to either wear a mask, be required to endure a meaningless “covid-19” test in the form of PCR nasal swabs, or to take the COVID-19 Vaccine—all of which are approved for emergency use only and therefore *may not be mandated*, is a violation of that employee’s due process right to life and liberty under the Fourteenth Amendment, his/her right to equal protection under that amendment, and an invasion of the zone of privacy and right to bodily integrity which have been held to emanate from various Bill of Rights amendments, including the first, fourth, fifth and ninth. The constitutionally protected zone of privacy and right to bodily integrity have been articulated in many Supreme Court cases, including *Mapp v. Ohio*, 367 U.S. 643 (1961), *Griswold v. State of Connecticut*, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965); and *Roe v. Wade*, 410 US 113 (1973).

Most relevant for the purpose of this letter, in *Whalen v. Roe*, 429 U.S. 589, 599-600, 97 S.Ct. 869, 876-77, 51 L.Ed.2d 64 (1977), the U.S. Supreme Court clarified that the constitutional right of privacy extends to two types of interests:

"One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions." *Whalen*, 429 U.S. at 599-600 (footnotes omitted).

Further, the constitutional right to informational privacy has been recognized in the Ninth Circuit (and implicitly upheld by the Supreme Court). *See, Nelson v. Nat’l Aeronautics and Space Admin.*, 530 F.3d 865 (9th Cir. 2008), *petition for rehearing en banc denied*, 568 F.3d 1028 (9th Cir. 2009), *rev’d on other grounds*, 562 U.S. 134, 131 S.Ct. 746, 178 L.Ed.2d 667 (2011).

Additionally, as a State Employer, BANNER HEALTH is subject to the unconstitutional conditions doctrine. Under this doctrine, where a constitutional right "functions to preserve spheres of autonomy . . . the [u]nconstitutional conditions doctrine protects that sphere by preventing governmental end-runs around the barriers to direct commands." *United States v. Scott*, 450 F.3d 863, 866 (9th Cir. 2005) *quoting*, Kathleen M.

Sullivan, *Unconstitutional Conditions*,” 450 F.3d 867 102 Harv. L.Rev. 1413, 1492 (1989). “[T]he government

may not condition public employment upon compliance with unconstitutional conditions.” (emphasis added) *Shuman v. City of Philadelphia*, 470 F.Supp. 449, 457 (D. PA. 1979). “The unconstitutional conditions doctrine vindicates the Constitution’s enumerated rights by preventing the government from coercing people into giving them up.” *Id.*

You are hereby notified that BANNER HEALTH Covid policies and information violate the privacy interests articulated above, and present unconstitutional conditions, including, but not limited to the following statements made by BANNER HEALTH to all employees:

- As listed in the July 2021 “Frequently Asked Questions: Mandatory Covid-19 Vaccine” from Banner Health: “*Is getting the Covid-19 vaccines safe?*” BANNER HEALTH’S statement: “*There are no reported serious safety concerns with the Covid-19 vaccines*” is a statement to deliberately deceive the employee. There are now significant, factual reports of deaths from all the current EUA vaccines, as well as hundreds of thousands of adverse reactions.
- As listed in the July 2021 “Frequently Asked Questions: Mandatory Covid-19 Vaccine” from Banner Health: “*Will I lose my job if I don’t get the vaccine?*” BANNER HEALTH states: “*Obtaining the Covid-19 vaccination or having an approved exemption on file is a requirement for continued employment beginning November 1, 2021. We don’t know yet if a booster will be required annually but if it is, that will also be mandatory*”. This mandated vaccination policy that BANNER HEALTH now requires an employee to provide proof of vaccinated status as a condition of employment. While the statement says, “approved exemption”, it goes on to state “booster will be required annually and will also be mandatory.” An EUA “vaccine” or any vaccine, or medical procedure cannot be mandated against a person’s will. While BANNER HEALTH may state these conditions as a “business necessity,” the fact remains that mandating a vaccine violates the privacy right in *Nelson*. It also implicates the unconstitutional conditions doctrine set forth in *United States v. Scott*, 450 F.3d 863, 866, among others, because it is essentially an end-run around the employees’ constitutional right to privacy.
- As listed in the Banner Health “Talking Points: Safe and Verified” the implementation of the Safe and Verified program is a deliberate discriminatory process of dividing employees by vaccinated and unvaccinated status with a visual representation Icon on their ID nametag. This is reminiscent of the “gold star” placed on the Jews during the Holocaust. In addition, Point #3 allows for employees who are vaccinated to be “incentivized” by “*All team members who submit proof of vaccination will qualify for any and all incentive programs, including random drawings, \$25 per trip mileage reimbursement, two hours of pay per dosage (non-exempt team members only) and 500 My Well-Being Virgin Pulse Points.*” This is not only a direct violation of the Civil Rights Act of 1964, but also BANNER HEALTH’s own Equal Employment Opportunity (Policy#7330 & 13791) which includes: “*Banner intends to provide equal opportunity in all areas of its employment practices and to ensure that no employees are unlawfully discriminated against on the basis of race, color, religion, sex, age national origin, disability, veteran status, genetic information, sexual orientation, or any other characteristics protected by law. This policy extends to recruiting/hiring, working conditions, corrective action, termination, training programs, promotions, and any other privilege of employment.*”
- As stated in BANNER HEALTH’s EMPLOYEE HANDBOOK, under “Workplace Policies” last updated 10/25/2016

POLICY: Harassment-Free Environment(Policy#7649) *Banner is committed to maintaining a work environment that is free from unlawful discrimination and harassment. In keeping with this commitment, we will not tolerate unlawful harassment of our employees by anyone, including any leader, co-worker, or third party (such as a vendor or a patient). Unlawful harassment includes unwelcome conduct, whether verbal, physical, or visual, based on a person’s race, color, national origin, sex, religion, age, disability, genetic information, or veteran status (some state laws also prohibit harassment based on sexual orientation). These types of harassment are forms of discrimination and are illegal. Unlawful harassment that affects job benefits, interferes with an individual’s work performance, or creates an intimidating, hostile, or offensive work environment will not be tolerated.*” BANNER HEALTH’s mandating of an EUA vaccination is violating its own Harassment and Discrimination policies, as well as Constitutional, Federal, and State law. The division of employees being “vaccinated or unvaccinated” has created an intimidating, hostile and offensive work environment for the employees choosing their personal rights to not be injected with an “experimental gene therapy” shot.

REFERENCES OF VIOLATIONS: “Title V11 of the Civil Rights Act of 1964 and Civil Rights Act of 1991(stated in law): (b) COMPENSATORY AND PUNITIVE DAMAGES. -

“(1) DETERMINATION OF PUNITIVE DAMAGES. - A complaining party may recover punitive damages under this section against a respondent (other than a government, government agency or political subdivision) if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual

- BANNER HEALTH is directly and substantively violating its own EEO policy, as well as the constitutional rights and laws set forth to protect employees in the workplace.
- It is illegal for the president of the United States under the U.S. Constitution to mandate a “law”, executive order, or any other type of directive on the people of the United States. It is outside the scope of his authority under our firmly seated Constitution.
- All of the above measures also violate the right to equal protection as granted by the Fourteenth Amendment, by treating employees differently according to their medical status.

A: COVID19 Vaccines may not be mandated as conditions of employment

The requirements set forth in the Covid Mitigation Policies may result in a hostile work environment for unvaccinated employees. In any event, they are coercive, and may act as “de facto” vaccination mandates, which are unlawful.

Any compulsory Covid-19 vaccination requirement is a violation of Federal and state law. I urge BANNER HEALTH to advise all employees that they have the right to either refuse or to take any COVID-19 vaccine **and that refusal will not result in any requirement to follow unnecessary and discriminatory “mitigation” measures, including and up to termination.** Any other action is contrary to law as demonstrated below.

1. Covid-19 Vaccines are experimental

COVID-19 vaccines are not approved by the Federal Food and Drug Administration (“FDA”). The COVID-19 vaccines are only approved under an Emergency Use Authorization (“EUA”), for investigational use only. COVID-19 vaccines lack requisite studies and are not approved medical treatments. The FDA’s guidance on EUA medical products requires the FDA to “ensure that recipients are informed to the extent practicable given the applicable circumstances ... That they have the option to accept or refuse the EUA product ...” 21 U.S. Code Section 360bbb-3(e)(1)(A) of the Federal Food, Drug, and Cosmetic Act (the “FD&C Act”) vests the Secretary of Health and Human Services with the permissive authority to grant EUAs providing those appropriate conditions designed to ensure that individuals to whom the product is administered are informed, and in pertinent part:

1. that the Secretary has authorized the emergency use of the product;
2. of the significant known and potential benefits and risks of such use, and of the extent to which such benefits and risks are unknown; and
3. of the option to accept or refuse administration of the product, of the consequences, if any, of refusing administration of the product, and of the alternatives to the product that are available and of their benefits and risks.

The right to avoid the imposition of human experimentation is fundamental, rooted in the Nuremberg Code of 1947, has been ratified by the 1964 Declaration of Helsinki, and further codified in the United States Code of Federal Regulations. In addition to the United States regarding itself as bound by these provisions, these principles were adopted by the FDA in its regulations requiring the informed consent of human subjects for medical research. It is unlawful to conduct medical research, even in the case of an emergency, unless steps are taken to secure informed consent of all participants.

Any attempt to force anyone to take a COVID-19 vaccine is a violation of Federal law and the conditions under which the COVID-19 vaccine has been authorized for use. The law is clear, experimental medical treatment cannot be mandated. Thus, 21 U.S. Code § 360bbb–3, Section (e)(1)(A) does not permit

BANNER HEALTH to *coerce* an employee to accept an unapproved vaccine on penalty of discipline or discharge, or other sanctions, including discriminatory treatment as set forth in the Policies.

Moreover, as BANNER HEALTH must be aware, the vaccines have only been shown to reduce symptoms of the recipient and not prevent infection or transmission. This is extremely important, because the argument for mandated vaccines is that they are necessary to protect society at large. There is no argument to be made that a competent person can be compelled to have a medical intervention “for the greater good” when such intervention has been shown to, at *most*, benefit the single recipient. However, even if society could be benefited in some way from mandated vaccination, the constitutional rights articulated in the Supreme Court cases cited above would prohibit it. These constitutional protections reaffirm basic human right to bodily autonomy, privacy, and the right to voluntary, informed consent.

Forced vaccination is not only unconstitutional and unethical, but it also violates the tenets fundamental to a free society. There is no pandemic exception to the law or the Constitution.

B: Masks may not be mandated as conditions of employment

The mandate for *any* individual to wear a mask against COVID-19 for employment violates federal law for the same reason that experimental vaccination mandates do, namely that all COVID-19 masks, whether surgical, N95 or other respirators, are authorized under EUA only. Again, EUA products are by definition experimental and thus require the right to refuse. *See, e.g. Doe #1 v. Rumsfeld*, 297 F.Supp.2d 119 (2003) (the U.S. military could not mandate EUA vaccines to soldiers).

C: PCR tests cannot be mandated as conditions of employment

The mandate for any individual to be forced to accept or adhere to a PCR test COVID-19 for employment violates Federal law for the same reason that experimental vaccination mandates do, namely that all PCR tests are authorized under EUA only. Again, EUA products are by definition experimental and thus require the right to refuse. *See, e.g. Doe #1 v. Rumsfeld*, 297 F.Supp.2d 119 (2003) (the U.S. military could not mandate EUA vaccines to soldiers). Subsequently, PCR tests have been proven to be ineffective and unreliable in providing true data on the existence of the Covid-19 “virus”.

II: The Arizona Whistleblower Act

As a State employer, BANNER HEALTH is also advised that the Arizona Employment Protection Act (AEPA), Ariz. Rev. Stat. § 23-1501(3)(c)(ii) et seq., protects employees who speak up about employer acts. It prohibits retaliatory action against an employee for “refusing to commit an act that would violate State law.” Ariz. Rev. Stat. § 23-1501(3)(c)(i). Since, as set forth above, the policies set forth in BANNER HEALTH Covid-19 policies, are unlawful, an employee’s unwillingness to follow them constitutes “refusing to participate in an unlawful act.” A successful litigant can obtain treble damages and attorney's fees in a Whistleblower action.

For all the above statements and facts, you are hereby on notice that if you illegally or irresponsibly mandate “mitigation” procedures and forced vaccinations as a condition of employment such as those set forth in the BANNER HEALTH Covid policies, which violate constitutional protections, signatory below may have no choice but to take legal action. Legal action can and may place an additional fine of \$2,000,000 to be paid by you personally to each employee whose rights are violated by your illegal and unconstitutional mandates. We urge you to comply with the U.S. Constitution, Federal and State law and cease and desist these illegal requirements.

Sincerely,

Signature

Printed Name

COPY TO: Arizona Attorney General Mark Brnovich
2005 N Central Avenue, Phoenix, AZ 85004