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Some Courts Are Banning Unvaccinated Lawyers—But Don't Resist, Unless the Client Is Impacted

The client would experience a hardship if that client's lawyer is uniquely positioned to represent the particular client's interests and is unable to be vaccinated for legitimate medical reasons, said Jason Mazzone, a constitutional lawyer at the University of Illinois College of Law.

By Charles Toutant | August 30, 2021



L-R: Josh Blackman, associate professor of law at South Texas College of Law Houston, Louis Virelli III of Stetson Law School in Florida and Jason Mazzone, with the University of Illinois Champaign Urbana Law School. Courtesy Photos

With a growing number of law firms and other employers demanding proof of a COVID-19 vaccine, along with universities, restaurants and cruise ships, will courtrooms be the next place to ban the non-inoculated?

A few federal courts have adopted policies requiring lawyers to be fully vaccinated before standing up in front of a judge. In an age where mandated precautions against the coronavirus have become divisive, it's not hard to imagine vaccination mandates for lawyers becoming the latest battle front. But the best argument for fighting such measures is based on how they impact clients, some constitutional experts said.

On Aug. 25, the U.S. District Court for the District of Maryland adopted a policy that says lawyers must have received a vaccine to enter a federal courthouse. That policy also applies to court employees, parties and witnesses in civil cases, employees of state and federal law enforcement agencies, employees of counsel and members of the press. Criminal defendants, sitting and prospective grand and petit jurors and lay witnesses in criminal cases are not covered by the policy.

Courts of appeals for the Seventh and Tenth circuits have also adopted policies requiring lawyers who argue in court to have been vaccinated.

Josh Blackman, a constitutional law professor at the South Texas College of Law Houston, said such policies interfere with the client's right to choose their own counsel and puts that lawyer's client at a disadvantage. In addition, if an unvaccinated lawyer is required to appear by Zoom but the adversary is vaccinated and is allowed to appear in person, the playing field is uneven, said Blackman, who is also an adjunct scholar at the Cato Institute.

"If you have to submit to a court of record your vaccine history, that's very personal information. Courts are stumbling into very profound privacy issues," said Blackman.

Blackman says a vaccine policy signed Aug. 11 by Chief Judge William Pryor Jr. of the U.S. Court of Appeals for the Eleventh Circuit "strikes the right balance." It says court staff, on-site contractors and visitors must disclose their vaccination status. Visitors who are not fully vaccinated must provide proof of a negative COVID test no more than three days earlier, and must wear a mask and maintain social distancing.

But Blackman doubts the mask requirement for lawyers will generate any litigation. "People don't like suing judges, so they probably won't," he said.

Requiring lawyers to be vaccinated if they want to appear in court, while novel, is consistent with the very broad authority that courts have to set rules about who can enter the courthouse and under what conditions, said Jason Mazzone, a constitutional lawyer at the University of Illinois College of Law. Requiring lawyers to get vaccinated for COVID-19 is also consistent with numerous other measures courts have adopted during the pandemic, such as mask wearing, social distancing, health screenings and temperature checks, Mazzone said.

A vaccine requirement for lawyers, particularly one with no exemptions, could create hardships for the lawyer or the lawyer's client, Mazzone said. The client would experience a hardship if that client's lawyer is uniquely positioned to represent the particular client's interests and is unable to be vaccinated for legitimate medical reasons, he said.

"On the other hand, there are very few cases in which only one lawyer can provide adequate—even excellent—representation," Mazzone said.

Some lawyers might object to a vaccine mandate, but it's important to remember that judges have the authority to approve almost everything a lawyer does in a courtroom, like using a cellphone, said Louis Virelli III, who teaches constitutional law at Stetson University College of Law in Florida.

"I don't think it's a big deal with regard to the rights of the lawyer to do their job in person. The concern that's going to matter is the litigant's access to the court. Where I think it could get complicated is the impact on the client if their attorney couldn't appear," Virelli said.

But at least in civil cases, which are not particularly time sensitive, a judge who is faced with an unvaccinated lawyer might well just let that case wait a while, and see if conditions improve, said Virelli. Perhaps the lawyer will get the vaccine or the virus will subside, he said. "It's important to remember that delay is an option," he said.

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