



Labornet No. 1299

Return to in-person work. Mandatory vaccination. Ruling by Court in Córdoba deals with mandatory vaccination against Covid-19 and the withholding of salary for employees who refuse vaccination. Common good: public health.

Dear All,

In the province of Córdoba, the High Court of Justice ruled on the “Return to in-person work - mandatory vaccination” for civil service.

The Regulatory Agreement [Acuerdo Reglamentario] by the High Court of Justice in Córdoba established that as of September 1, 2021, those unvaccinated employees who refuse any of the vaccines approved or authorized by the public health authorities should work in person, unless they have valid medical reasons not to do so, and consent to on-site work in the schedules planned by the departments where they work, show a negative test (PCR) result on a sample taken 72 hours before returning to work, at their own expense, and agree to periodic testing while they work in person or ask for a leave of absence without pay.

This Agreement under analysis here does not seem to be unreasonable or disproportionate, but rather an adequate or suitable strategy to protect constitutional, lawful purposes and values (such as the health of court staff, officials, magistrates, lawyers and litigants in general).

This measure is also proportional to the purposes they seek to defend (as vaccination is not mandatory, the Courts require evidence to prevent infection or further transmission), without violating any fundamental rights.

The most relevant aspects of this judgment of September 13, 2021 include:

I. The High Court of Justice of Córdoba issued this Regulatory Agreement No. 1712, Series "A" on August 20, 2021, establishing as follows:

1. As of September 1, 2021, court staff will work in person when: 1) they are fully vaccinated with any Covid-19 vaccine approved or authorized by public health authorities, regardless of their age and risk status, fourteen (14) days after receipt of the second dose, except for the provisions of article 4 hereof; 2) they receive the first dose of any of the vaccines approved by public health authorities, and do not have any coexisting medical conditions as provided by Resolution 14/21 of the General Administration, fourteen (14) days after receipt.
2. Court staff who is allowed to stay home as provided by Resolution 14/2021 of the General Administration, will continue to stay home if they receive only the first dose of any of the vaccines against COVID-19 approved by public health authorities.
3. As of September 1, 2021, **unvaccinated court staff shall work in person, unless they have valid medical reasons not to do so.** They need to opt between: a) work on site following the schedule set by the department where they work, **show a negative test (PCR) result on a sample taken 72 hours before returning to work, at their own expense, and agree to periodic testing;** or b) ask for a leave of absence without pay. If they fail to expressly consent to any of these options, a leave of absence will be automatically granted without pay.
4. In-person work under the terms of Sections 1, 2 and 3 above excludes those who are covered under Section 3 paragraphs V and VI of Resolution No. 627/2020 by the Department of Health, as amended.
5. The HR Division - Personnel and Occupational Health Offices - should be in charge of controlling, monitoring and enforcing the provisions herein.

IV.

- 1) The challenge mainly lies on the fact that this Agreement **"establishes mandatory vaccination against COVID-19 and withholding of wages for those who refuse to get vaccinated"**. Then it should be made clear that the Resolution expressly states: "3. 3. As of September 1, 2021, unvaccinated court staff shall work in person, unless they have valid medical reasons not to do so. **They need to opt between: a) work on site following the schedule set by the department where they work, show a negative test (PCR) result on a sample taken 72 hours before returning to work, at their own**

**expense, and agree to periodic testing; or b) ask for a leave of absence without pay.**

It can be inferred from the text above that vaccination for court staff at the Judiciary in Córdoba is by no means mandatory, and wages shall not be withheld for those who refuse to get vaccinated.

*It just sets the requirements for those who choose not to get vaccinated with any of the vaccines approved by public health authorities - in an attempt to reach immunity against COVID-19.*

They can also take a leave of absence if they do not accept the alternative of periodic screening. These decisions have been taken within the scope of the powers vested in the Judiciary (Section 166, subsection 2 of the Constitution of the Province of Córdoba, and Section 12, subsections 1 and 32, of the Organic Law of the Judiciary No 8435), in the performance of its government and administration functions.

And they are entirely consistent with the measures that the High Court of Justice has been taking at each step of the way to fight the pandemic, still ongoing. As a matter of fact, from the first agreement (Regulatory Agreement No 1620, Series A, dated March 16, 2020), it has been made clear that "public health" is at stake, and **"according to our constitutional provisions, health is first and foremost 'common good' (Section 59, Constitution of the Province of Córdoba).**

Then this Agreement is justified on the grounds that **"it has been issued to protect a collective legal interest, which in this case is public health".**

- 2) It is an undeniable legal fact that *considering the delicate national and global epidemiological situation, the institutional duty has always been to protect public health, even more so when the development of an essential state function depends on it.*

Therefore, the regulations passed cannot be seen as an arbitrary encroachment on individual rights and liberties of **those who could be deemed conscientious objectors to vaccination.**

It is not a restriction of rights, but rather it is a case of coordination of the rights of the Appellants and the rest of society, when a value so dear to human existence, such as health, may be compromised.

It is out of the question that each individual has the inalienable right to self-determination and privacy (National Constitution, Section 19, and Section 11.2, of

the American Convention on Human Rights [ACHR], among many others) as this is a private, individual decision.

Now, if individual decisions go beyond their protected area and eventually harm third parties (National Constitution, Section 19) or affect common good, the State should take part and cannot be questioned in constitutional terms.

This is not only because our system does not accept absolute rights, but also because **the State has regulatory powers in health-related matters**, for example (Constitution of the Province of Córdoba. Section 59), and rights must be exercised in accordance with its regulations (National Constitution, Sections 14 and 28).

Consequently Regulatory Agreement No. 1712, Series A, dated August 20, 2021 was carefully drafted to ensure in-person work as from September 1, 2021. Back then and except for those who are exempted or allowed to stay home for medical reasons, **the general rule is to show proof of vaccination within the framework of the strategic vaccination plan launched by the national and provincial governments.**

Based on the precedent by the Supreme Court of Justice of Argentina, "**vaccination not only protects the individual who receives it, but also goes beyond that personal scope to directly affect public health, where one of the primary goals is to prevent or reduce further transmission**" (Judgment of June 12, 2012, in re NN or U., V. on people protection and caregiving, Recital N° 11).

But, at the same time, a specific alternative was also considered for those who had chosen not to get vaccinated: see # III of the operative part of the aforementioned Agreement. Consequently, the argument of an allegedly constitutional violation of the rights of conscientious objectors cannot be used or put forward because instead of an arbitrary imposition, they have been given the possibility of keeping their beliefs and refuse vaccination; **they can opt for a leave of absence (without pay) or simply prove that they have not been infected/sick, precisely so as not to harm third parties (National Constitution, Section. 19) and considering that health is common good** (Constitution of the Province of Córdoba. Section 59).

- 3) Again, in case of an extraordinary event such as the pandemic, the Regulations issued by the Supreme Court help meet the needs for protection of the entire community that has been badly hit.

In fact, if this disaster is not duly taken care of, it would compromise social peace and common good and well-being, which are the essential goals of the rule of law. Therefore, in the performance of the government and administration functions vested in the High Court of Justice, the following national and provincial

provisions are duly observed; in particular, Joint Resolution No 4/2021 (Official Gazette April 9, 2021), by the Department of Health and the Department of Labor; Resolution No. 62/2021 (Official Gazette of June 28,2021), by the Secretary of Management and Civil Service, and Resolution No. 166/2021 (Official Gazette of April 4, 2021) by the General Secretary of the Government of the Province of Córdoba.

- 4) The Appellants argue that this Agreement is arbitrary and coercive for **"those who refuse vaccination on grounds of conscientious objection, who should ask for a leave of absence without pay for an indefinite period of time or until they decide to get vaccinated"**. It has been said that the right to privacy should be constitutionally observed together with the general welfare, and the limit is when private, moral convictions harm third parties (in this case the health of those who go to the Courts in Córdoba for essential State services). Now it is worth mentioning that the Regulation issued by the High Court of Justice is based on the first part of the provisions of Section 14 of the National Constitution (rights are exercised in accordance with the laws regulating their exercise), interpreted in the light of the preamble in relation to the pressing need to protect public health, without which the general well-being of the community cannot be achieved, and it must be promoted and guaranteed. In addition, according to the International Covenant on Economic, Social and Cultural Rights, which has constitutional standing (National Constitution, Section 75 subsection 22), the States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health (Article 12).

Then the steps to be taken by the States Parties to this Covenant to achieve the full realization of this right shall include (Article 12.2, subsection c) "The prevention, treatment and control of epidemic, endemic, occupational and other diseases". As a result, the Regulation by the High Court of Justice cannot be considered arbitrary or coercive in any way, since the adopted provisions are reasonable and justified based on the known facts and the need to safeguard common good.

It can be concluded that this Agreement is not unreasonable or disproportionate. It is intended to protect constitutional, lawful purposes and values (such as the protection of the health of the rest of the court employees, officials, magistrates, lawyers and litigants in general). This action is also proportional to the purposes they seek (as vaccination is not mandatory, the Courts require evidence to prevent or reduce transmission), without violating any fundamental right.

This is precisely what the Supreme Court of Justice has ruled in a similar case: **"Based on the foregoing, the measure in question does not imply an unreasonable encroachment on privacy (...) because it is moved by the greatest common good, the adequate performance of its duties- and it is proportionate to its purposes"** (Judgment of December 17, 1996, in re " B., RE v / Argentine Federal Police on *amparo* action", Recital No 12).

- 5) The provisions of this Regulatory Agreement No 1712 Series "A" under analysis imply restrictions strictly limited in time, within the framework of the COVID-19 pandemic and due to the detection of new highly transmissible variants in the province, which should be coupled with periodic controls by this Court in light of the local epidemiological situation, in order to determine its effective term, which will not be extended beyond what is strictly necessary to achieve its purpose.

In addition, its requirements are adequate to the objectives sought, in accordance with scientific data from experts in the field. By adopting the provisions under analysis, **this Court has sought to return to in-person work at the Judiciary, but with reasonable measures to prevent or reduce further transmission.**

On the one hand, **it seeks to protect the right to health of the group of workers who have been asked to work on site - who must do so regardless of their age and risk status, fourteen days after receipt of the second dose - full vaccination** (Section 1.1), with express exceptions (Section 4) -, and the rest of the members of the community who go to Court in person.

On the other hand, it is intended to reduce the impact that such a measure may have on public health, both of which are of undisputed social relevance. It is worth mentioning that **based on the available scientific data, unvaccinated people disproportionately help spread the virus, that is why experts think that control actions targeting this population help mitigate the social impact, as compared to non-targeted measures** (INSTITUTO PASTEUR, "EPIDÉMIOLOGIE DU SARS-COV-2 DANS UNE POPULATION VACCINÉE ET IMPLICATIONS POUR LE CONTRÔLE D'UN REBOND AUTOMNAL", Paris, last update September 5 2021, available at: <https://modelisation-covid19.pasteur.fr/evaluate-control-measures/impact-partially-vaccinated-population/?s=03>).

This Regulation does not seem to be unreasonable or disproportionate, but rather adequate or suitable to achieve constitutionally valid purposes, such as the protection of the health of court staff and people in general.

It is worth remembering that, as the Inter-American Commission on Human Rights has pointed out, **in the current circumstances of the COVID-19 pandemic, which poses a genuine risk, States should take immediate steps, with all due diligence, to prevent harm to the right to health, personal safety and life. These measures should be focused as a priority on preventing contagion, and providing appropriate medical treatment for those who need it** (Inter-American Commission on Human Rights, Pandemic and Human Rights in the Americas, Resolution No. 1/2020).

This Regulatory Agreement is aimed at prevention based on the Court's own powers of management and organization of its staff - Section 166, subsection 2, Constitution of the Province of Córdoba and Section 12 of Act No. 8435.

- 6) Finally, the measure adopted is part of the legitimate exercise of the right to change working conditions ("ius variandi") at the Public Administration, which is objectively justified on the grounds of better civil service (High Court of Justice, Court of Appeals Panel, "Comoglio, Edelweis Margarita v Comuna de Colonia Anita - Jurisdiction - Direct appeal", Judgment No. 61/2018). In this case in particular, the fundamental right to privacy of each individual or the scope of unquestionable protection by our Basic Law (Supreme Court of Justice of Argentina, Judgments: 306: 1892 and 329: 5266, among others) have not been affected because vaccination is not mandatory and the only requirement for those who refuse vaccination is to agree to periodic testing or ask for a leave of absence without pay, in an attempt to strike a perfect balance between the right to individual self-determination and common good.

The rights of Court staff, and the rights of the whole population, should take into account minimum requirements of coexistence and tolerance, and the achievement of goals aimed at the common good. Then this measure meets the constitutional principles of suitability, necessity and proportionality, as explained above.

Please feel free to contact us for further information.

Best regards,

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