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### SUPREME COURT'S NO-MANDATORY-VACCINATION MANDATE: WHAT IT MEANS FOR EMPLOYERS

6 May 2022

#### **Background**

In its recent judgment in the case of *Jacob Puliye v Union of India and Others* [Writ Petition (Civil) Number 607 of 2021] (*Jacob Puliye*), the Supreme Court of India (Court) held that the restrictions imposed on individuals who have not fully vaccinated themselves against COVID-19 cannot be considered to be constitutional. Notably, the judgment comes at a time when the health crisis in the country emanating from the outbreak of COVID-19 appears to have generally become manageable compared to the significantly graver situation that had existed from time to time in the past two years.

#### **Case for and against the petition**

In the case at hand, the petitioner, a member of the National Technical Advisory Group on Immunization, approached the Court requesting *inter alia* for a declaration to the effect that vaccination mandates are unconstitutional in any manner or form, including as a precondition to accessing any benefits or services. The petitioner directed the attention of the Court to certain orders, circulars and guidelines issued by various state governments in the context of COVID-19 in the year 2021 and argued that imposing inoculation for access to "resources, public places and means of earning livelihood" would be in violation of the fundamental rights of unvaccinated persons.

While the Government of India submitted that COVID-19 vaccination has always been voluntary for all, the state governments of Tamil Nadu, Maharashtra, Delhi, and Madhya Pradesh, contended that the restrictions imposed on unvaccinated persons was in public interest, hence justifiable.

#### **Court's analysis and discussion**

At the outset, the Court observed that while courts do not, and should not, intervene in policy decisions such as those in relation to vaccination, the judiciary does have the power to strike down a policy for reasons of *mala fides*, unreasonableness, arbitrariness, or unfairness. In the words of the Court:

*"The rule of prudence is that courts will be reluctant to interfere with policy decisions taken by the Government, in matters of public health, after collecting and analysing inputs from surveys and research. However, this does not mean that courts have to abdicate their right to scrutinize whether the policy in question is formulated keeping*

*in mind all the relevant facts and the said policy can be held to be beyond the pale of discrimination or unreasonableness, bearing in mind the material on record".*

After noting the above aspects, the Court did note that the material on record made it clear that vaccination is a "crucial public health intervention" against the backdrop of the crisis unleashed by the COVID-19 pandemic.

Having said that, on the issue of vaccination as a mandate rather than a recommendation, the Court reviewed domestic and international judicial positions and noted that every individual has a right to refuse any medical treatment that he / she / they do not desire. It further observed that if the government is of the view that the decision against vaccination may result in a higher possibility of the concerned individuals "spreading the infection to other people, contributing to mutation of the virus, or burdening the public health infrastructure", the government may impose reasonable restrictions on such individuals. As far as vaccination mandates are concerned, the Court was of the view that there is lack of reasonableness in the imposition of such mandate and in the consequent differential treatment between vaccinated and unvaccinated individuals in respect of access to or use of public places, considering that "both vaccinated and unvaccinated individuals presently appear to be susceptible to transmission of the virus at similar levels."

After noting the above, the Court directed that, till the time the COVID-19 infection spread was low in the country and subject to any new finding that may justify vaccination mandate, "all authorities in this country, including private organisations and educational institutions, review the relevant orders and instructions imposing restrictions on unvaccinated individuals in terms of access to public places, services and resources."

#### **Comment**

The issue of mandatory vaccination of individuals has been the subject matter of debate ever since the policy of vaccination itself was rolled out by the Government of India. The debate became more evident as state governments began imposing restrictions on unvaccinated persons including in relation to access to workplace. Several state governments including Tamil Nadu, Karnataka, and West Bengal required private employers to ensure that their entire staff is vaccinated against COVID-19, although the orders carrying such restrictions were recalled and rescinded as the COVID-19 positivity rate witnessed substantial reduction in the country.

As regards the Court's pronouncement in *Jacob Puliyeel*, what is crucial to note is that the entire observations of the Court were primarily focused on the aspect of access to "public places, services and resources". In its judgment, the Court has not discussed the juxtaposition of an individual's right to remain unvaccinated against a private employer's duty of care and responsibility of safe workplace as well as its right to limit the access to its workplace to only such employees who are vaccinated against COVID-19. Notably, the issue before the court as also emphasised by the petitioner was in relation to the state governments' orders regarding restrictions on unvaccinated persons and not private employers' mandates in this regard. The word 'public places', which remained the focus of the Court in the ruling, has been interpreted by courts in the past to refer to places which the public ordinarily and frequently has access to, by right, permission, usage, or otherwise.

Nevertheless, in the specific context of private employers, courts have held that an employer has a duty of taking reasonable care to ensure safety of its workmen (reference *Shovana Mukherjee v River Steam Navigation Company Limited* [(1977) ILR 1 Cal 9] and *JF Pareira v Eastern Watch Company Limited* [1984 SCC OnLine Bom 108]). Of course, the degree of reasonableness would depend on several subjective factors including the nature of business operations. Till the time specific rulings are rendered by the judiciary on the subject matter of vaccination mandates by private employers

against the backdrop of COVID-19 pandemic, employers should consider adopting a calibrated approach to ensure that no significantly adverse administrative actions are taken in cases where employees refuse to get themselves vaccinated. Alternative approach and steps to achieve the desired result of increased vaccination of individuals should be considered which may be able to better qualify the test of reasonableness, including identifying any specific medical concerns that would prevent vaccination or in terms of any incentives, such as organizing vaccination camps and facilities on site or through tie up with medical institutions, being offered to individuals who are inclined or willing to take actions as are necessary to build larger immunity amongst the work populace and reduce the scale of potential transmission of the virus at workplace.

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