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Senate Human Services Committee

Sen. Judy Lee, Chairman
Sen. Sean Cleary, Vice Chairman

Testimony of Nathan Svihovec

Commissioner of Labor
N.D. Department of Labor and Human Rights

NEUTRAL

February 13, 2023

I. Introductory Summary

Chairman Lee, Vice Chairman Cleary, and members of the Senate Human Services Committee, my name is Nathan Svihovec and I was appointed as the North Dakota Department of Labor and Human Rights Commissioner beginning December 2022. I am a licensed attorney in the State and prior to my appointment, primarily practiced in labor and employment law as well as other civil litigation areas. I have been fortunate to formerly represent the Department as an Assistant Attorney General and to represent private businesses and individuals before the Department while I was in private practice.

Chapter (Ch.) 34-05 of the North Dakota Century Code (N.D.C.C.) created the North Dakota Department of Labor and Human Rights and prescribes the powers and duties of the Commissioner of Labor (Labor Commissioner). The Department's statutory duties can be most concisely summarized as ensuring citizens can live, work, and prosper in North Dakota. It is my deeply held belief that the mission of the Department is an essential service to the public.

II. Disability Discrimination

The North Dakota Human Rights laws protect individuals with disabilities. A disability is defined as a physical or mental impairment that substantially limits one or more major life activities, a record of this impairment, or being regarded as having this impairment. It is a discriminatory practice for an employer to fail or refuse to make reasonable accommodations for a qualified employee with a physical or mental disability unless the employer can show the accommodation would pose an undue hardship. Notice to an employer of a need for an accommodation triggers a duty to engage in an interactive process through which the employer and employee can discuss possible reasonable accommodations.

The North Dakota Human Rights Act further protects people with disabilities from discrimination in public accommodations – such as full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation. A place of public accommodation includes a facility open to the public.

The Department also investigates claims of federally equivalent protections pursuant to its work-sharing agreement with the EEOC, the federal equivalent to the Department. In return, the Department receives federal funding for a portion of its investigations.

III. Recent Case Law

Well-settled legal precedent holds that state law that conflicts with a constitutional federal law is deemed unconstitutional and void. A recent federal court decision determined, in part, a similar state statute was preempted by the Americans with Disabilities Act (ADA) and violated the Equal Protection Clause of the Constitution.

In Montana Medical Ass'n. v. Knudsen, the court determined that it could not meaningfully be shown how employers could accommodate a person with a disability or employee and still comply with the statute. The court further reasoned that, for a facility to accommodate any immunocompromised individuals' safety and health, it needed to know the vaccination status of employees. The court noted that, even if an entity was unable to limit a patient's exposure to non-immune staff, the setting still needs to know immunity or vaccination status of employees to offer protection and reduce the risk of exposure through other possible methods such as using specialized personal protective equipment or requiring physical distancing.

IV. Legal Precedent

Long before the ADA (or state equivalent) protections were in place, the U.S. Supreme Court issued an opinion on vaccines in 1905. In Jacobson v. Commonwealth of Massachusetts, the Cambridge, Massachusetts board of health adopted the following regulation:

“Whereas, smallpox has been prevalent to some extent in the city of Cambridge, and still continues to increase; and whereas, it is necessary for the speedy extermination of the disease that all persons not protected by vaccination should be vaccinated; and whereas, in the opinion of the board, the public health and safety require the vaccination or revaccination of all the inhabitants of Cambridge; be it ordered that all the inhabitants of the city who have not been successfully vaccinated since March 1st, 1897, be vaccinated or revaccinated.”

The defendant argued that “vaccination ‘quite often’ caused serious and permanent injury to the health of the person vaccinated; that the operation ‘occasionally’ resulted in death; that it was ‘impossible’ to tell ‘in any particular case’ what the results of vaccination would be, or whether it would injure the health or result in death.” The Supreme Court, however, held the law was not unconstitutional.

V. Neutral Assessment

This bill will create situations where individuals with immunocompromising disabilities seek to limit their exposure to unvaccinated individuals and employers will be unable to legally request employees’ vaccination statuses. In addition, employees who are immunocompromised will be required to isolate and thus not afforded full and equal access to the goods, services, facilities, privileges, advantages, or accommodations of those who are not immunocompromised. In other words, based on the recent court decision, the Department will encounter legally contradicting positions regarding treatment of individuals with disabilities. Accordingly, the Department requests language is included in an amendment that

expressly creates an exception for employers of individuals with disabilities pursuant to the ADA and N.D.C.C. ch. 14-02.4.

VI. Fiscal Impact

I anticipate a significant increase in claims filed with the Department pursuant to this bill. The increase in claims will likely require additional FTEs to investigate and process the claims. With our current case backlog, this would delay our existing cases from being timely investigated. It is prudent that the Department receive authorization and funding for at least 2 additional Compliance Investigator FTEs if this bill passes.

VII. Conclusion

Thank you for your time and service to North Dakota. I would happily address any questions you may have.