



## **Good news for Norwegian Cruise Lines – Passengers can be required to show documentation of COVID-19 vaccination**

Norwegian Cruise Lines succeeded in the US District Court in enjoining the application of a Florida statute prohibiting Florida businesses from requiring patrons to document they have been vaccinated as a condition of service.

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Planning to resume passenger cruises from Florida on 15 August 2021, Norwegian Cruise Line Holdings Ltd. (NCLH) adopted a policy requiring all passengers on its vessels to be fully vaccinated against COVID-19 and to provide documentation confirming their vaccination status.

NCLH's policy, however, was at odds with a recently enacted Florida statute, Fla. Stat. § 381.00316 (Statute), prohibiting businesses in the state from requiring patrons or customers to provide any documentation certifying COVID-19 vaccination or post-infection recovery to gain access to, entry upon, or services.

Arguing that the Statute violates the First Amendment of the U.S. Constitution and the Dormant Commerce Clause Doctrine, NCLH asked the U.S. District Court for the Southern District of Florida to issue a preliminary injunction against the enforcement of the Statute.

On 8 August 2021, finding that NCLH was likely to prevail on both constitutional grounds on the merits, that the cruise line would likely be irreparably harmed if required to comply with the Statute, and that the equities and public interest weighed in favor of the injunction, the Court granted NCLH's request. *Norwegian Cruise Lines Holdings v. Rivkees*, No. 21-22492, 2021 U.S. Dist. LEXIS 148279 (S.D. Fla. Aug. 8, 2021).

### **Background - the CDC No Sail Order and Conditional Sailing Order**

Considering the unique risks of COVID-19 outbreaks on board cruise ships, the U.S. Centers for Disease Control and Prevention (CDC) issued a No Sail Order on 14 March 2020, prohibiting cruise ship operators from continuing operations in U.S. waters. The No Sail Order was extended three times before expiring on 31 October 2020. Thereafter, on 4 November 2020, the CDC issued a Conditional Sail Order (CSO), establishing a four-step framework for a phased resumption of cruise ship passenger operations. The steps include:

1. establishing laboratory testing of crew onboard cruise ships in U.S. waters;
2. performing simulated voyages designed to test a cruise ship operators' ability to mitigate COVID-19 on cruise ships;
3. completing a certification process; and
4. resuming restricted passenger voyages in a manner that mitigates the spread of COVID-19.

Following the introduction of COVID-19 vaccines, the CDC modified the CSO through a series of Letter Instructions, including, on 28 April 2021, a letter acknowledging that instead of simulated voyages, cruise lines could satisfy step two of the framework through an alternative method:

1. attesting that 98 per cent of crew members are fully vaccinated [later reduced to 95 per cent]; and
2. submitting to the CDC "a clear and specific vaccination plan and timeline to limit cruise ship sailings to 95 percent of passengers who have been verified by the cruise ship operator as fully vaccinated prior to sailing."

Although the CSO and its subsequent instructions now appear to be non-binding guidelines because of separate, recent legal challenges, all cruise lines have nevertheless agreed to continue to follow the CDC Order and instructions on a voluntary basis.

### **The Norwegian Gem**

NCLH plans to resume sailing from Florida for the first time since the pandemic aboard the *Norwegian Gem*.

On 9 July 2021, the CDC approved the *Norwegian Gem*'s application for a Conditional Sailing Certificate, with the vessel fulfilling the second step of the CSO framework through the attestation method instead of performing simulated voyages.

Starting 15 August 2021, the *Norwegian Gem* will offer several cruises from Florida to the Bahamas, Honduras, Belize, Mexico, the Dominican Republic, the U.S. Virgin Islands, and the British Virgin Islands.

To prevent a COVID-19 outbreak on board, build brand trust and goodwill with customers, and ensure compliance with the attestation it submitted to the CDC, NCLH will require that all crew and passengers be fully vaccinated, and that passengers provide proof of their vaccination status, prior to boarding the ship.

### **Section 381.00136**

NCHL's policy, however, is prohibited by Florida law. Effective from 1 July 2021, Florida business entities "may not require patrons or customers to provide any documentation certifying COVID-19 vaccination or post-infection recovery to gain access to, entry upon, or services from the business operations in [the] state," subject to a fine of up to USD 5,000 per violation.

Although the Florida Department of Health is authorized to enforce the Statute and adopt implementing rules, the Department had not done so as of the date of the injunction.

Notably, the Statute does not prohibit businesses from requiring their employees to provide COVID-19 vaccination documentation.

### **The legal standard**

A party seeking a preliminary injunction must establish the following four elements: (1) a substantial likelihood of success on the merits; (2) a substantial threat of irreparable injury; (3) that its own injury outweighs the injury to the nonmovant; and (4) that the injunction would not disserve the public interest.

#### **The First Amendment**

The First Amendment, applicable to the states through the Fourteenth Amendment, prohibits the enactment of laws unnecessarily abridging the freedom of speech. Under this clause, a state has limited power to restrict expression because of its message, its ideas, or its content.

The Court noted that Section 381.00316 is a content-based restriction because, on its face, it draws distinctions based on content. The Statute specifically and only prohibits businesses from requiring their patrons to present "documentation certifying COVID-19 vaccination or post-infection recovery" for access to services; it does not prohibit businesses from demanding proof of a negative COVID-19 test, other types of vaccine documentation, or any other type of medical information. The only documentation businesses cannot demand is proof of vaccination against COVID-19. Accordingly, the Court found the Statute to be a content-based restriction because it singles out documentation regarding a particular subject matter but leaves businesses free to demand other categories of documents as a condition for services.

Further, applying an intermediate level of constitutional review applicable to commercial speech, the Court determined that the state failed to establish that its content-based restriction on speech was valid. In other words, the state failed to show that the Statute was justified by substantial government interests, that it directly advanced those interests, and that it was appropriately tailored to those interests.

Consequently, the Court held that NCLH was likely to prevail on the merits of its First Amendment Claim.

### **The Dormant Commerce Clause**

The Court also found that the Statute likely runs afoul of the Dormant Commerce Clause, which prohibits two forms of conduct.

First, states are prohibited from enacting laws that directly regulate or discriminate against interstate commerce or have the effect of favoring in-state economic interests. Second, states have limited authority to enact laws that indirectly burden interstate commerce. If the burden on interstate commerce is clearly excessive in relation to the putative local benefits, the law will be invalidated.

Finding the first tier of analysis inapplicable, the Court focused on the second tier where it again found that the state had failed to articulate any local purpose that justified the Statute's alleged burdens on interstate commerce.

Presuming that the state desired to safeguard its residents' rights to medical privacy and prevent discrimination against unvaccinated residents, the Court nevertheless found that there was no evidence to suggest that these interests were in fact at risk or that the Statute advanced these objectives.

To the contrary, the Court noted that the Statute's failure to regulate regarding employees, COVID-19 test results, and other medical documentation conflicts with the purported desire to protect medical privacy. Adding that the Statute does not protect against the discrimination of unvaccinated individuals, where cruise lines have adopted measures and practices that differentiate between vaccinated and unvaccinated passengers.

Conversely, the Court found that NCLH would likely succeed in proving substantial impact on interstate commerce, recognizing that:

### **Substantial threat of irreparable injury**

Lastly, finding that NCLH was likely to succeed on the merits of its First Amendment claim, the Court also found that pursuant to Supreme Court precedent in *Elrod v. Burns*, 427 U.S. 347 (1976), the continued enforcement of Section 381.00316 against NCLH constitutes an irreparable injury. As explained by the Supreme Court in *Elrod*, "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Id.* at 373. This finding was then bolstered by the claimed loss of reputation, trust, goodwill, and significant monetary loss in the form of cancellations estimated at USD 4,000,000 in revenue per seven-day cruise.

As to the remaining elements required under the legal standard, the Court had little difficulty finding that the inequities and public interest weigh in favor of an injunction.

Thus, NCLH's motion for preliminary injunction was granted, and the state of Florida is enjoined from enforcing Section 381.00316 against NCHL pending resolution of the merits of this case.

On 10 August 2021, the state of Florida filed a Notice of Appeal. In the meantime, the ruling means that passengers will be required to show documentary proof of COVID-19 vaccination to join the sailing of the *Norwegian Gem*.