FAIRCLOTH MELTON SOBEL & BASH, LLC

ATTORNEYS

JIMMY R. FAIRCLOTH, JR.[1, 2]
BARBARA BELL MELTON
DAVID R. SOBEL[3]
LOTTIE L. BASH
FRANKLIN "DREW" HOFFMANN

105 YORKTOWN DRIVE
ALEXANDRIA, LA 71303
PHONE (318) 619-7755
FAX (318) 619-7744

www.fairclothlaw.com
jfaircloth@fairclothlaw.com

LAURA BETH MATTHEWS
MARY KATHERINE PRICE
CHRISTOPHER M. CHESNE
RICHARD "ERICK" NOREM, III

[1] L.L.M. IN LITIGATION
[2] ALSO ADMITTED IN GEORGIA
[3] ALSO ADMITTED IN TEXAS

September 1, 2021

Via Facsimile: (337) 289-8071 & U.S. Mail

Patrick W. Gandy, Chief Executive Officer
Dr. Amanda Logue, Chief Medical Officer
Ochsner Lafayette General
920 W. Pinhook Road
Lafayette, Louisiana 70503

Re: Ochsner Lafayette General COVID-19 Vaccine Mandate
Our file No. 0121012

Dear Mr. Gandy and Dr. Logue:

We represent a large group of Acadiana healthcare workers who object to the vaccine mandate for staff and employees at Our Lady of Ochsner Lafayette General.[1] This objection is based on the right of each individual to make an informed healthcare decision under Louisiana law—in particular, to decide whether to receive or refuse medical treatment. It is *not* a referendum on the risks of COVID-19, the efficacy of the vaccines, the availability of treatment options, or the intentions of anyone. Our clients fully understand the seriousness of the virus and have worked tirelessly to provide care and comfort for the inflicted and affected. But at same time, our clients respect the boundary between individual autonomy and the delivery of healthcare, and that the latter must ultimately yield to the former, as Louisiana law recognizes. They respectfully ask that Ochsner Lafayette General do the same.

Based on media reports, it appears the debate over private employer mandates has been wrongly framed around the laws of other states and the federal constitution, neither of which apply here. Remarkably, private employers are being urged by public officials to impose vaccine mandates as part of an initiative to increase rates without regard to limitations of authority or potential exposure. At a recent press conference, White House COVID-19 response coordinator Jeff Zients, flanked by the CDC director, implored private employers to require vaccines because "vaccination requirements work" by "driv[ing] up vaccination rates." Perhaps, but that is not the responsibility

[1] Our clients, numbering more than 100, represent a cross-section of the healthcare labor market, including many physicians and nurses. Their anonymity is maintained at this time to avoid reprisals.

of private employers, who would be well-advised to heed state law before naively pledging allegiance to such a heavy-handed crusade.

As explained below, Louisiana citizens have an affirmative constitutional right to refuse medical treatment, which cannot be abridged by anyone, including private employers. On the other side of the scale, Ochsner Lafayette General has no authority to impose the mandate as a condition of employment. Moreover, this issue does not involve the state's authority under a declaration of emergency or the vaccine rules applicable to public schools under La. R.S. 17:170 *et seq*.

If the mandate is not recalled before close of business on September 17, 2021, we will seek an injunction and, in due course, move to recover all damages caused by this misguided venture. We are hopeful that the following presentation of Louisiana law will produce a different result.

A. The Basic Rules of Employment

Terminating an employee for exercising his or her right to refuse medical care is facially unlawful, regardless of the nature of the employment. This even applies to "at will" employees, who are the least protected by law. *See Newsom v. Glob. Data Sys., Inc.*, 2012-412, p. 4 (La. App. 3 Cir. 12/12/12); 107 So. 3d 781, 785, *writ denied*, 2013-0429 (La. 4/5/13); 110 So. 3d 595 (An employer may terminate an "at-will" employee at any time and for any reason "provided the termination does not violate any statutory or constitutional provision.").

Contract employees may be terminated "for cause" in accordance with the terms of their contract. When not clearly defined in a contract, "cause" generally means lawful and necessary for discipline, efficiency, or safety. *See City of St. Martinville v. Norman*, 577 So. 2d 831, 832 (La. App. 3 Cir. 1991), *writ denied*, 581 So. 2d 692 (La. 1991) (civil service). Terminating employees for exercising a constitutionally protected right is unlawful.

As for physicians, the Louisiana Supreme Court has held that hospital bylaws create obligations, the breach of which may give rise to damages. *See Granger v. Christus Health Cent. Louisiana*, 2012-1892 (La. 6/28/13); 144 So. 3d 736. Terminating privileges as punishment for exercising a constitutionally protected right is unlawful.

B. The *Affirmative* Right to Refuse Medical Treatment

1. Article 1, § 5 of the Louisiana Constitution

Article 1, § 5, of the Louisiana Constitution, titled "Right to Privacy," provides: "Every person shall be secure in his person, property, communications, houses, papers, and effects against unreasonable searches, seizures, or invasions of privacy." La. Const. art. I, § 5. It has been well-settled for over thirty years that this provision includes the affirmative right to decide whether to obtain or reject medical treatment, as expressly held by *Hondroulis v. Schuhmacher*, 553 So. 2d 398, 414 (La. 1989). Louisiana's right to privacy "***is one of the most conspicuous instances in which our citizens have chosen a higher standard of individual liberty than that afforded by the***

jurisprudence interpreting the federal constitution." *State v. Brennan*, 99-2291 (La. 5/16/00); 772 So. 2d 64 (quoting *State v. Hernandez,* 410 So. 2d 1381, 1385 (La.1982)) (emphasis added).

2. Statutory Authority

Section 1159.7 of the Louisiana Medical Consent Law, La. R.S. 40:1159.1 *et seq.*, codifies the right to individual autonomy over health care decisions by expressly protecting the right to refuse treatment:

> **Right of adult to refuse treatment as to his own person not abridged**
>
> Nothing contained herein shall be construed to abridge any right of a person eighteen years of age or over to refuse to consent to medical or surgical treatment as to his own person.

See Lemann v. Essen Lane Daiquiris, Inc., 05-1095 (La. 3/10/06); 923 So. 2d 627, 635-36 (recognizing that this provision creates a statutory right rooted in La. Const. art. I, § 5).

This right is reflected in other legislation, as well. For instance, the Louisiana Advance Directives statute authorizes use of a do-not-resuscitate declaration in which the patient expresses his or her "*legal right to refuse medical or surgical treatment* and accept[s] the consequences of such refusal." La. R.S. 40:1151.2 (emphasis added). The Louisiana Military Advance Medical Directive includes the same language. *See* La. R.S. 40:1153.2.

The nursing home Residents' Bill of Rights likewise recognizes the right to refuse treatment, among others, requiring that nursing homes adopt and publish a statement of affirmative rights "assure[d]" to all residents, including "[t]he right to be adequately informed of his medical condition and proposed treatment; to participate in the planning of all medical treatment, *including the right to refuse medication and treatment*; and to be informed of the consequences of such actions." La. R.S. 40:2010.8(6) (emphasis added).

3. Judicial Decisions

In 1989, the Louisiana Supreme Court first recognized the affirmative right of a competent adult to decide whether to obtain or refuse medical treatment under Article I, §5 of the Louisiana Constitution. *Hondroulis v. Schuhmacher*, 553 So. 2d 398, 414 (La. 1989) (involving informed consent to a medical procedure). The court began its analysis by observing that "[t]he informed consent doctrine is based on the principle that every human being of adult years and sound mind has a right to determine what shall be done to his or her own body." *Id*. at 411. After canvassing federal law and the laws of other states, the court concluded that "[t]he decision to obtain or reject medical treatment clearly should be recognized as falling within this cluster of constitutionally protected choices." *Id*. This decision, according to the court, is "an intrinsically personal decision. The patient alone must live with his disorder, encounter the risks of therapy or reap the consequences of treatment. By the same token, the choice will profoundly affect his or her development or life. It

may mean the difference between life and death, pain and pleasure, poverty and economic stability." *Id*. at 414-15. *Hondroulis* leaves no room for debate: the right to refuse medical treatment is guaranteed by the Louisiana Constitution.

Two years later, in *Roberson v. Provident House*, 576 So. 2d 992 (La. 1991), the Louisiana Supreme Court addressed the right to refuse treatment in a case involving a patient who was catharized without consent, stating:

> LSA–R.S. 40:1299.56 of the Louisiana Medical Consent Law provides that "Nothing contained herein shall be construed to abridge any right of a person 18 years of age or over to refuse to consent to medical or surgical treatment as to his own person." Recently, this court concluded that the right to privacy contained in Art. 1, § 5 of the 1974 Louisiana Constitution protects an individual's right to decide whether to obtain or reject medical treatment. *Hondroulis v. Schuhmacher, M.D.*, 553 So.2d 398, 410 (La.1988), *on reh'g* (La.1989). As recognized by this court in *Pizzalotto, M.D., LTD. v. Wilson*, 437 So.2d 859 (La.1983), a surgeon commits a battery on his patient when he undertakes a particular surgical procedure without the consent of the patient unless there is an emergency situation.
>
> Likewise, a nurse commits a battery upon a patient when she performs an invasive procedure like the insertion of an in-dwelling catheter over the objections of the patient.

576 So.2d at 994. *See also, State v. Stowe*, 635 So. 2d 168, 175 (La. 1994) (The right to privacy also protects "our bodies or autonomy," and "our freedom to demand that a life sustaining machine be withheld or withdrawn" [cites omitted]).

In *State v. Perry*, 610 So. 2d 746 (La. 1996), the Louisiana Supreme Court held that the state was prohibited from medicating a death row inmate in order to carry out his execution based, in part, on the rights guaranteed by Article I, § 5, as interpreted by the court in *Hondroulis v. Schuhmacher*. The court again recognized that each individual has a "right to decide whether to obtain or reject medical treatment and what shall or shall not be done with his body," and that this "intrinsically personal decision" belongs to the individual. *Id*. at 755-56.[2]

More recently, in 2006, the Louisiana Supreme Court recognized the right to refuse medical treatment in *Lemann v. Essen Lane Daiquiris, Inc.*, 05-1095 (La. 3/10/06); 923 So. 2d 627, 635-36, which involved paramedics who declined to transport a patient refusing consent. The trial court denied summary judgment for the paramedics. The Supreme Court, however, reversed on the basis that the patient's right to refuse treatment trumped the paramedics' duty to provide care:

[2] In another 1996 opinion, the Louisiana Supreme Court recognized the right of persons to "refuse medical or surgical treatment" under the Medical Consent statute. *See Manuel v. State*, 95-2189, p. 17 (La. 3/8/96); 692 So. 2d 320, 331, n.10 (rejecting equal protection challenge to 21-year-old restriction on alcohol sales).

> Significantly, Louisiana recognizes the right of an adult to refuse to consent to medical or surgical treatment of his own person. *See* LSA–R.S. 40:1299.56 ("Nothing contained [in the Louisiana Medical Consent Law] shall be construed to abridge any right of a person eighteen years of age or over to refuse to consent to medical or surgical treatment as to his own person.") (cites to *Roberson v. Provident House* and *Hondroulis* omitted). The EMS personnel must balance fulfilling a person's emergency medical needs with respecting a person's wish not to be treated or transported to the hospital. *See Kyser v. Metro Ambulance, Inc*., 33,600, p.13 (La. App. 2 Cir. 6/21/00), 764 So.2d 215, 223. Parker had a statutory right to refuse transportation which the EMS personnel were obligated to respect so long as he was capable of exercising that right.

923 So. 2d at 636.

Importantly, as explained in *State v. Brennan*, 99-2291 (La. 5/16/20); 772 So. 2d 64, the right to decide whether to obtain or refuse medical treatment is an affirmative right—as opposed to merely a limitation on the authority of government, as under the federal constitution:

> Soon after the enactment of the 1974 Constitution, this Court recognized the greater protections afforded by Art. I, § 5, and has continued to endorse this heightened right to privacy. *See State v. Perry*, 608 So.2d 594 (La.1992); *Hondroulis v. Schuhmacher,* 553 So.2d 398 (La.1989). This Court has stated that "[o]ur state constitution's declaration of the right to privacy contains an affirmative establishment of a *right of privacy* ..." and that this "is one of the most conspicuous instances in which our citizens have chosen a higher standard of individual liberty than that afforded by the jurisprudence interpreting the federal constitution." *State v. Hernandez,* 410 So.2d 1381, 1385 (La.1982) (emphasis in original)."

772 So.2d at 71.

Multiple intermediate appellate courts have confirmed the right to refuse medical treatment. In *Boyd v. Louisiana Med. Mut. Ins. Co.*, 593 So. 2d 427 (La. App. 1 Cir. 1991), *writ denied*, 594 So. 2d 877 (La. 1992), the parents of an infant who contracted polio after being vaccinated with the Sabin oral vaccine sued a physician for failing to inform them of the risks and alternatives, including the Salk vaccine. The jury returned a verdict for the parents. The court of appeals found sufficient evidence to support the jury's finding that the physician breached his duty to inform of the risk and alternatives, but a lack of evidence on causation (that a reasonable person so informed would have chosen an alternative). In doing so, the court recognized "[t]he patient's right to decide whether to obtain or to refuse medical treatment is a fundamental right protected by Article I, Section 5 of the 1974 Louisiana Constitution." *Id*. at 429 (citing *Hondroulis v. Schuhmacher*, 553 So. 2d 398, 411 (La. 1988)).

In *Ciko v. City of New Orleans*, 427 So. 2d 80 (La. App. 4 Cir. 1983), the plaintiff sued the defendant for police brutality and failing to provide medical assistance. As to the medical assistance

claim, the court found the police had no duty to provide care over the plaintiff's refusal. "The police do not have the authority to force anyone, even those who are visibly injured, to receive medical treatment. Louisiana law gives all persons over the age of 18 the right to refuse medical treatment as to their own person." *Id.* at 82. "An individual may choose to decline medical treatment for a variety of reasons. While the appellant in this case may have seemed disoriented this should not give the police the right or the duty to substitute their judgment for that of the injured person. To do so would violate the individual's right to refuse treatment which is protected by law." *Id*.

In *State v. Fisher*, 93-0175 (La. App. 1 Cir. 11/24/93); 628 So. 2d 1136, *writ denied*, 637 So. 2d 474 (La. 1994), the court denied a motion in a criminal case to suppress evidence of cocaine discovered when the defendant's stomach was pumped before his arrest. The court allowed the evidence, because the "defendant's stomach was pumped as a result of the actions of the doctor and other hospital personnel, private persons who acted independently of law enforcement authorities." *Id*. at 1140–4. The court recognized that "a patient's right to decide whether to obtain or refuse medical treatment is a fundamental right protected by the Louisiana Constitution." However, in this instance, the defendant's grievance was with the healthcare providers who pumped his stomach, not law enforcement. Thus, the evidence was properly admitted. *Id*.

There is simply no serious question that the right to refuse medical treatment is firmly established in the Louisiana jurisprudence, both as a matter of statutory and constitutional law.

C. Employee Protection from Reprisal

Louisiana law prohibits an employer from taking reprisal against an employee who "[o]bjects to or refuses to participate in an employment act or practice that is in violation of law." La. R.S. 23:967(A)(3). The plaintiff in a claim under this provision "may recover from the employer damages, reasonable attorney fees, and court costs." R.S. 23:967(B).

Ochsner Lafayette General has announced its intention to enforce the unlawful vaccine mandate. This letter provides notice of our clients' objections and refusal to participate.[3]

D. Conclusion

The issue can be framed as follows: The fundamental right of employees to refuse healthcare versus Ochsner Lafayette General' noble commitment to a public health initiative. Our clients have a clearly protected right; while Ochsner Lafayette General has no authority. Protecting employees from themselves is not lawful cause—in fact, it contradicts the individual right itself—nor is protecting the public at large, because Ochsner Lafayette General is a private entity. Further, medical science now overwhelmingly demonstrates that vaccines do not prevent the spread of virus, as originally hoped when the President assured the public, "If you get vaccinated, you don't have to wear the mask." As has been widely reported, the primary benefit of the vaccines is to reduce the risk of severe symptoms. Although perhaps true, that purpose will provide no defense to these

[3] The identity of our clients will be revealed if the filing of a petition becomes necessary.

claims. We urge Ochsner Lafayette General to step back from the intensity of the public debate over COVID-19 and recognize the legal implications of its actions.

On behalf of our clients, we respectfully request that Ochsner Lafayette General withdraw the mandate by close of business September 17, 2021. If not, we will seek injunctive relief and recovery of the damages that are sure to follow. We are hopeful that Ochsner Lafayette General reverses course.

With best regards,

Sincerely,

FAIRCLOTH MELTON SOBEL & BASH, LLC

By: */s/ JIMMY R. FAIRCLOTH, JR.*
Jimmy R. Faircloth, Jr.

LAW OFFICE OF G. SHELLY MATURIN, II, L.L.C.

By: */s/ G. SHELLY MATURIN, III*
G. Shelly Maturin, II

BRYSON LAW FIRM, L.L.C.

By: */s/ ANGELA S. BRYSON*
Angela S. Bryson
Cary B. Bryson

JRF/kap

cc: Gordon E. Rountree, Jr. – *Via email:* grountree@lgh.org
Lafayette General Health System
920 W. Pinhook Road
Lafayette, Louisiana 70503