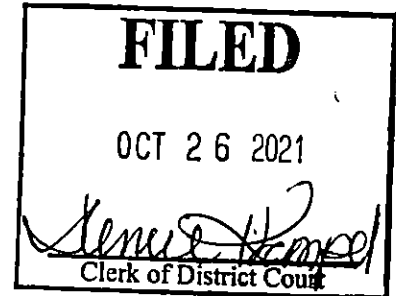


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Attorneys for Plaintiffs

**MONTANA SEVENTH JUDICIAL DISTRICT COURT, RICHLAND COUNTY**

<p>NETZER LAW OFFICE, P.C. and DONALD L. NETZER,</p> <p>Plaintiffs,</p> <p>vs.</p> <p>STATE OF MONTANA, by and through AUSTIN KNUDSEN, in his official capacity as Attorney General and LAURIE ESAU, Montana Commissioner of Labor and Industry,</p> <p>Defendants.</p>	<p>Cause No. DV-21-89</p> <p><b>FIRST AMENDED COMPLAINT</b></p> <p>Hon. Katherine M. Bidegaray</p>
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The Plaintiffs, Netzer Law Office, P.C. and Donald L. Netzer (collectively, "Netzer Law") for its First Amended Complaint against the Defendants, the State of Montana by and through Austin Knudsen in his official capacity as Attorney General and Laurie Esau in her official capacity as Montana Commissioner of Labor and Industry (collectively, "State Defendants"), state as follows:

### **Parties**

1. Plaintiff, Netzer Law Office, P.C., is a Montana professional corporation headquartered in Sidney, Montana, with offices in Sidney and Billings.’
2. Plaintiff, Donald L. Netzer, is a resident of Sidney, Montana, and a Montana attorney, who is the majority shareholder and owner of Netzer Law Office, P.C. and an employee.
3. The State of Montana is a governmental entity subject to suit for injuries to persons or property. Montana Constitution, art. II, § 18. The State of Montana adopted Montana HB 702.
4. Austin Knudsen is the Montana Attorney General and generally charged with the enforcement of the laws of the State of Montana, as they affect the public interest.
5. Laurie Esau is the Montana Commissioner of Labor and Industry and is charged with the enforcement of Montana HB 702 through the Montana Human Rights Commission.

### **Jurisdiction and Venue**

6. This Court has original jurisdiction over this civil matter. Mont. Code Ann. § 3-5-302.
7. Venue in this matter is proper in Richland County because this county is where the claim arose and the county of the Plaintiffs residence. Mont. Code Ann. § 25-2-126.
8. This case is also founded on Mont. Code Ann. § 27-8-201, which authorizes the Court to grant declaratory relief, and on Mont. Code Ann. § 27-19-201, which authorizes the Court to grant injunctive relief.

### **Summary of the Claims**

9. This lawsuit asserts that Montana House Bill 702, 67th Legislature, Regular Session (Mont. 2021) (“HB 702”)—codified in the Montana Human Rights Act at Mont. Code

Ann. §§ 49-2-312, 49-2-313—is unconstitutional on its face and as applied to businesses and employers like Netzer Law, and individuals like Netzer Law’s owners.

10. HB 702, among other things, generally prohibits all persons, businesses, governmental entities, and employers from discriminating, in any way, against persons based on their vaccination status or possession of an immunity passport. Mont. Code Ann. § 49-2-312(1). Through this prohibition, HB 702 also generally bans vaccine mandates of any kind. *Id.* Additionally, HB 702 adopts a blanket ban of vaccine mandates for certain available and impending (*e.g.*, for kids) COVID-19 vaccines by providing that “[a]n individual may not be required to receive any vaccine whose use is allowed under an emergency use authorization or any vaccine undergoing safety trials.” Mont. Code Ann. § 49-2-312(4).
11. HB 702’s prohibitions prevent businesses and employers like Netzer Law from adopting, implementing, and enforcing various measures designed to, among other things, (1) reduce the risk and spread of COVID-19 and its existing and future variants within their offices and among their owners, employees, clients, and others; and (2) fulfill their constitutional and moral obligations to ensure a clean, safe, and healthy office environment.
12. HB 702 must be invalidated because it violates the following rights and provisions of the Montana Constitution:
  - A. Under article II, section 3, the inalienable rights to (1) a clean and healthful environment; (2) pursue life’s basic necessities; (3) enjoy and defend one’s life and liberty; (4) acquire, possess, and protect property; and (5) seek safety, health, and happiness.

- B. Under article IX, section 1, the obligations that “[t]he [S]tate and each person,” including Netzer Law, “shall maintain and improve a clean and healthful environment in Montana for present and future generations.”
- C. Under article II, section 4, that “[n]o person shall be denied the equal protection of the laws.”
- D. Under article V, section 11, clause 3, that bills like HB 702 “shall contain only one subject, clearly expressed in its title,” and that “any subject [] embraced in any act and [] not expressed in the title” shall be “void.”
- E. Under article II, section 34, which acknowledges the existence of other protected fundamental rights not expressly enumerated in the Montana Constitution.

**Statute Under Review**

13. HB 702, Section 1 (Mont. Code Ann. § 49-2-312) provides:

(1) Except as provided in subsection (2), it is an unlawful discriminatory practice for:

(a) a person or a governmental entity to refuse, withhold from, or deny to a person any local or state services, goods, facilities, advantages, privileges, licensing, educational opportunities, health care access, or employment opportunities based on the person's vaccination status or whether the person has an immunity passport;

(b) an employer to refuse employment to a person, to bar a person from employment, or to discriminate against a person in compensation or in a term, condition, or privilege of employment based on the person's vaccination status or whether the person has an immunity passport; or

(c) a public accommodation to exclude, limit, segregate, refuse to serve, or otherwise discriminate against a person based on the person's vaccination status or whether the person has an immunity passport.

(2) This section does not apply to vaccination requirements set forth for schools pursuant to Title 20, chapter 5, part 4, or day-care facilities pursuant to Title 52, chapter 2, part 7.

(3)(a) A person, governmental entity, or an employer does not unlawfully discriminate under this section if they recommend that an employee receive a vaccine.

(b) A health care facility, as defined in 50-5-101, does not unlawfully discriminate under this section if it complies with both of the following:

(i) asks an employee to volunteer the employee's vaccination or immunization status for the purpose of determining whether the health care facility should implement reasonable accommodation measures to protect the safety and health of employees, patients, visitors, and other persons from communicable diseases. A health care facility may consider an employee to be nonvaccinated or nonimmune if the employee declines to provide the employee's vaccination or immunization status to the health care facility for purposes of determining whether reasonable accommodation measures should be implemented.

(ii) implements reasonable accommodation measures for employees, patients, visitors, and other persons who are not vaccinated or not immune to protect the safety and health of employees, patients, visitors, and other persons from communicable diseases.

(4) An individual may not be required to receive any vaccine whose use is allowed under an emergency use authorization or any vaccine undergoing safety trials.

(5) As used in this section, the following definitions apply:

(a) "Immunity passport" means a document, digital record, or software application indicating that a person is immune to a disease, either through vaccination or infection and recovery.

(b) "Vaccination status" means an indication of whether a person has received one or more doses of a vaccine.

14. HB 702, Section 2 (Mont. Code Ann. § 49-2-313) provides:

A licensed nursing home, long-term care facility, or assisted living facility is exempt from compliance with [section 1] during any period of time that compliance with [section 1] would result in a violation of regulations or guidance issued by the centers for medicare and medicaid services or the centers for disease control and prevention.

15. HB 702's broad prohibition against discrimination based on vaccine status and immunity passports is not limited to COVID-19 and its variants. Instead, this prohibition applies to vaccine status and immunity passports related to all diseases and viruses that have existed (but largely have been eradicated due to past vaccine mandates and vaccine-status discrimination), presently exist, and will exist in the future, regardless of the magnitude

of the threat those diseases and viruses pose to the public health of Montanans, Americans, and societies around the world.

16. HB 702, Section 1 (Mont. Code Ann. § 49-2-312) applies to all Montana businesses and employers, except for licensed nursing homes, long-term care facilities, and assisted living facilities, which are exempted in limited circumstances under Section 2 (Mont. Code Ann. §§ 49-2-313).
17. HB 702, Section 1 (Mont. Code Ann. § 49-2-312) does not apply to vaccination requirements set forth for schools and day-care facilities under certain Montana laws.
18. HB 702, Section 1 (Mont. Code Ann. § 49-2-312(1), (4)) prohibits persons, businesses, governmental entities, and employers from adopting, implementing, or enforcing vaccine mandates.

#### **General Allegations**

19. The COVID-19 pandemic began in the United States in early 2020 and now, as 2022 approaches, the pandemic has still not subsided, with over 700,000 Americans having died from COVID-19 complications.
20. In response to the COVID-19 pandemic, a variety of vaccines were developed to reduce the spread of COVID-19 and reduce the severity of symptoms for a vaccinated person who contracts COVID-19. These vaccines initially received Emergency Use Authorization and on August 23<sup>rd</sup>, 2021, the Food and Drug Administrative has since fully approved the Pfizer-BioNTech COVID-19 Vaccine.
21. The COVID-19 vaccines are safe and effective and over 408 million doses of COVID-19 vaccine have been administered in the United States from December 14, 2020, to October 18, 2021.

22. Montana is continuing to see low vaccination rates despite the Montana Department of Health and Human Services reporting that unvaccinated individuals are five times more likely to be hospitalized and three times more likely to die from COVID-19 than vaccinated individuals.
23. In October of 2021, Montana hit an all-time statewide high for hospitalizations from COVID-19 of 510 people and also led the United States in having the highest number of COVID-19 cases per 100,000 people.
24. Netzer Law is a non-exempted Montana business that employs lawyers and legal assistants in its Sidney and Billings offices and, therefore, is fully subject to the requirements of HB 702 as described above and below.
25. Under HB 702, Netzer Law is prohibited from refusing to employ a person, barring a person from employment, or discriminating against a person in compensation or in a term, condition, or privilege of employment based on the person's vaccination status or whether the person has an immunity passport.
26. HB 702 thus limits Netzer Law's ability to exercise its professional judgment in determining employment conditions when necessary to, among other things, ensure a clean, safe, and healthy office environment for Netzer Law's owners, employees, potential employees, clients, potential clients, and other third parties that may interact within or around Netzer Law's various offices.
27. HB 702 prevents Netzer Law from providing a clean, safe, and healthy office environment for its owners, employees, potential employees, clients, and prospective clients in the following ways:

- A. Unvaccinated employees are more likely to spread and transmit infectious diseases, viruses and pathogens, including, but not limited to, the COVID-19 virus, than vaccinated employees;
  - B. Netzer Law has a duty to provide a clean and healthy environment to its owners, employees, potential employees, clients, potential clients, and other third-parties that may enter its offices.
28. Netzer Law has owners, employees, and clients who represent a broad cross section of Montanans and include elderly and immunocompromised individuals.
29. Netzer Law is injured by HB 702 because, among other reasons, it is legally prohibited from adopting and implementing common-sense measures it otherwise would adopt to protect the interests and lives of its owners, employees, clients, and others from coming into contact with unvaccinated persons. Specifically, HB 702's legal prohibitions prevent Netzer Law from adopting and implementing measures to protect (1) the safety, health, happiness, and lives of its owners, employees, clients, and others; and (2) Netzer Law's business, business interests, economic viability, and property.
30. For example, Netzer Law is unable to require its employees to be vaccinated against the COVID-19 virus, or any other known or unknown viruses or communicable diseases and as such is prohibited from providing a safe and healthful environment to all Netzer Law employees.
31. Netzer Law is also prohibited from treating unvaccinated persons differently from unvaccinated persons within its office.



32. If even a single Netzer Law employee contracts COVID, it would disrupt Netzer Law's small but busy office. If there is an office outbreak at Netzer Law's office, that would significantly impair Netzer Law's health, business, and other interests.
33. Montana is seeing a resurgence of COVID-19 cases throughout the state, with the current number of active COVID-19 cases standing at 10,739, as of October 25<sup>th</sup>, 2021, per the State of Montana COVID-19 data dashboard.
34. Yellowstone County has 2,092 active COVID-19 cases and Richland County has 42 active COVID-19 cases, as of October 25<sup>th</sup>, 2021, per the State of Montana COVID-19 data dashboard.
35. The COVID-19 virus poses a serious risk of causing bodily injury or death to individuals who contract the virus and as of October 25<sup>th</sup>, 2021, approximately 2,259 deaths have been attributed to the virus since the outbreak of the pandemic in March of 2020, per the State of Montana COVID-19 data dashboard.
36. Yellowstone County hospitals are at or near capacity due to the surge in COVID-19 cases and on September 21<sup>st</sup>, 2021, Montana Governor Greg Gianforte announced he was sending 10 additional National Guard members to assist Billings Clinic, in addition to the 10 prior National Guard members he sent to Billings Clinic on September 15<sup>th</sup>, 2021. Governor Gianforte also announced on September 21<sup>st</sup>, 2021, that 10 National Guard members would assist St. Vincent Healthcare in Billings.
37. On September 28<sup>th</sup>, 2021, Montana Governor Greg Gianforte announced he was sending four National Guard members to assist Sidney Health Center, in Richland County.

38. Data from the Montana Department of Health and Human Services, released on September 20, 2021, reports that on or about August 28<sup>th</sup>, 2021, 86.9 percent of hospitalizations in Montana were of people not fully vaccinated.
39. According to the State of Montana COVID-19 data dashboard, as of October 25<sup>th</sup>, 2021, only 41% of the eligible population of Richland County residents have been fully vaccinated against the COVID-19 virus. Only 54% of the eligible population of Yellowstone County have been fully vaccinated against the COVID-19 virus.

**First Claim - Violation of Netzer Law's Inalienable Rights  
Under Montana Constitution Article II, Section 3**

40. The allegations of Paragraphs 1-39 are incorporated in this claim as though set forth fully herein.
41. The Montana Constitution, in its Declaration of Rights, provides: "All persons are born free and have certain inalienable rights. They include the right to a clean and healthful environment and the rights of pursuing life's basic necessities, enjoying and defending their lives and liberties, acquiring, possessing and protecting property, and seeking their safety, health and happiness in all lawful ways. In enjoying these rights, all persons recognize corresponding responsibilities." Mont. Const. art. II, § 3.
42. The "environment" referred to in article II, section 3 and article IX, section 1 encompasses indoor office environments, including the air, water, surfaces, and other elements which are found both in indoor and outdoor environments.
43. HB 702 infringes on Netzer Law's inalienable right to a clean a healthful environment in, among other ways, by (1) preventing Netzer Law from adopting and implementing reasonable and common-sense measures necessary to reduce safety and health risks within its offices; and (2) thereby preventing owners, employees, clients, and others from

enjoying their right to a clean, safe, and healthy environment within Netzer Law's offices.

44. HB 702 therefore substantially burdens Netzer Law's, its owners', its employees', its clients', and others' fundamental rights to a safe and healthy environment.
45. For similar reasons, HB 702 also violates Netzer Law's, its owners', and its employees' rights to pursue life's basic necessities.
46. This right contemplates Netzer Law's and its owners' rights to preserve and protect their office and business as the source of their lives' basic necessities. It also contemplates Netzer Law's employees' right to pursue life's basic necessities through their opportunity for employment in a safe and healthy environment.
47. HB 702 therefore substantially burdens the right to pursue life's basic necessities.
48. HB 702 also violates Netzer Law's, its owners', and its employees' right to defend their lives because, among other things, it creates an unsupported and increased risk of exposure to COVID-19, a deadly virus. Part and parcel to that risk, is the risk to the continued life and operation of Netzer Law as a business.
49. HB 702 therefore substantially burdens the right to defend one's life.
50. HB 702 also violates Netzer Law's and its owners' right to fully possess, control, and protect its business and office space (property) by, among other things, denying them of the right to adopt and implement needed safety and health measures.
51. HB 702 therefore substantially burdens the right to possess and protect property.
52. HB 702 also violates Netzer Law's, its owners', and its' employees' rights to seek safety, health, and happiness for the same reasons identified above.
53. HB 702 therefore substantially burdens the right to seek safety, health, and happiness.

54. HB 702's provisions do not advance the State's purported interest in privacy as to medical records. HB 702's purported interest is a pretext. HB 702's actual interests are not legitimate, let alone compelling or important, because, among other things, they undermine public safety, health, and welfare.
55. HB 702 is not narrowly tailored (or even reasonably tailored) to advance the purported state interest in privacy as to medical records because, among other things, it adopts broad prohibitions that only minimally contribute to the bill's purported interests.
56. HB 702 is not the least onerous path that can be taken to achieve the State's purported objective of protecting privacy as to medical records. The State cannot meet its burden to prove that less onerous means are available to accomplish its purported interest.
57. HB 702 therefore is unconstitutional; violates Montana Constitution article II, section 3; and must be invalidated.

**Second Claim – Violation of Duty to Maintain a Clean and Healthy Environment Under Montana Constitution Article IX, Section 1**

58. The allegations of Paragraphs 1-57 are incorporated in this claim as though set forth fully herein.
59. The Montana Constitution, article IX, section 1 provides:
  - (1) The state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations.
  - (2) The legislature shall provide for the administration and enforcement of this duty.
  - (3) The legislature shall provide adequate remedies for the protection of the environmental life support system from degradation and provide adequate remedies to prevent unreasonable depletion and degradation of natural resources.

60. HB 702 violates the obligation to maintain and improve a clean and healthy environment for the reasons stated under the First Claim and by facilitating and even mandating the employment in Montana businesses like Netzer Law of persons who are more likely to spread disease.

61. HB 702 also impedes Netzer Law's ability to fulfill its constitutional obligation to provide a clean and healthy office environment by preventing it from adopting measures to increase safety and health in its offices.

62. HB 702 therefore substantially burdens Netzer Law's, its owners', and its employees' constitutional rights under this provision.

63. Because HB 702 does not satisfy the requirements of strict, middle-tier, or rational-basis scrutiny as alleged above, it violates article IX, section 1 of the Montana Constitution.

**Third Claim – Violation of Equal Protection Clause  
Under Montana Constitution Article II, Section 4**

64. The allegations of Paragraphs 1-63 are incorporated in this claim as though set forth fully herein.

65. The Montana Constitution requires that “[n]o person shall be denied the equal protection of the laws.” Mont. Const. art. II, § 4.

66. HB 702 treats similarly situated employers differently by creating a class of non-exempt and exempt employers, where exempt employers (*e.g.*, nursing homes, long-term care facilities, assisted living facilities, schools, day-care providers and health care facilities) are not subject to the same prohibitions.

67. Netzer Law is similarly situated to exempt employers. Despite this, under HB 702, Netzer Law is prohibited from requiring individuals seeking their services to be vaccinated, unlike schools and day-care providers.

68. Due to the prohibitions in HB 702, Netzer Law is unable to provide to its owners, employees, clients, and others entering its offices the same healthy workplace environment that Montana nursing homes, long-term care facilities, and assisted living facilities can provide because of their exemption.
69. Due to the prohibitions in HB 702, Netzer Law is unable to provide to its owners, employees, clients, and others entering its offices the same healthy workplace environment that Montana schools and day-care facilities are able to provide because of their exemption.
70. As alleged above, HB 702 imposes prohibitions on non-exempt employers that substantially burden the fundamental rights of those employers and others.
71. Because fundamental rights are implicated, strict scrutiny applies.
72. As alleged above, HB 702 fails the strict scrutiny analysis and therefore violates article II, section 4 of the Montana Constitution and must be invalidated.
73. If it applied, HB 702 also would fail the middle-tier scrutiny test because, among other reasons, the purported privacy interests driving HB 702 do not justify treating exempt and non-exempt employers differently.
74. If it applied, HB 702 also would fail the rational-basis test because, among other reasons, its actual purposes are entirely disconnected from the bill's provisions, it was adopted purely to alleviate political pressures, and it is otherwise arbitrary or based on an impermissible ground.
75. For these reasons, even if a lower level of scrutiny applied in the equal protection analysis, HB 702 violates article II, section 4 of the Montana Constitution and must be invalidated.

**Fourth Claim – Violation of Unenumerated Rights  
Under Montana Constitution Article 2, Section 34**

76. The allegations of Paragraphs 1-75 are incorporated in this claim as though set forth fully herein.
77. Montana Constitution article II, section 34, entitled “Unenumerated Rights,” provides: “The enumeration in this constitution of certain rights shall not be construed to deny, impair, or disparage others retained by the people.”
78. The adoption of this provision accomplished two things: (1) “it recognized that the rights enumerated in Montana's Constitution were not exclusive—i.e., that there are unenumerated rights or ‘rights beyond those specifically listed’ which are retained by the people”; and (2) it provided “a crucial part of any effort to revitalize the state government's approach to civil liberties questions” that could “be the source of innovative judicial activity in the civil liberties field.” *Snetsinger v. Montana Univ. Sys.*, 2004 MT 390, ¶¶ 92-93, 325 Mont. 148, 175, 104 P.3d 445, 463 (Concurring, J. Nelson) (citations omitted).
79. Article II, section 34 provides courts with constitutional authority to expand upon the fundamental and other rights included in article II of the Montana Constitution. Should the Court conclude that Netzer Law's assertions above do not fall within, or are not incidental to, the aforementioned fundamental rights, article II, section 34 applies to protect the interests asserted by Netzer Law.
80. HB 702 substantially burdens the rights expressly and implicitly asserted by Netzer Law throughout this complaint that fall under the protection of article II, section 34. Therefore, the strict scrutiny test would apply.

81. As alleged above, HB 702 fails the strict scrutiny, middle-tier, and rational-basis test. As a result, HB 702 violates Montana Constitution article 2, section 34 and must therefore be invalidated.

**Fifth Claim – Violation of Clear Expression of Bill’s Subject  
Under Montana Constitution Article V, Section 11, Clause 3**

82. The allegations of Paragraphs 1-81 are incorporated in this claim as though set forth fully herein.

83. The Montana Constitution provides: “Each bill, except general appropriation bills and bills for the codification and general revision of the laws, shall contain only one subject, clearly expressed in its title. If any subject is embraced in any act and is not expressed in the title, only so much of the act not so expressed is void.”

84. Montana Courts strictly construe this constitutional requirement.

85. HB 702’s full title in the enrolled version of the bill is “AN ACT PROHIBITING DISCRIMINATION BASED ON A PERSON’S VACCINATION STATUS OR POSSESSION OF AN IMMUNITY PASSPORT; PROVIDING AN EXCEPTION AND AN EXEMPTION; PROVIDING AN APPROPRIATION; AND PROVIDING EFFECTIVE DATES.”

86. HB 702, Section 1’s (Mont. Code Ann. § 49-2-312(1), (4)) general prohibition against discrimination impliedly effectuates a general ban on all types of vaccine mandates, and it expressly bans without exception vaccine mandates related to “vaccine[s] whose use is allowed under an emergency use authorization or [that is] undergoing safety trials.”

87. HB 702’s title identifies every major substantive aspect of the bill, except for its most controversial subject—its general ban on vaccine mandates and its absolute ban on certain COVID-19 vaccine mandates.



88. HB 702's failure to clearly identify in its title its bans on vaccine mandates constitutes a clear violation of Montana Constitution article V, section 11, clause 3.
89. Pursuant to Montana Courts' strict construction of that constitutional provision and HB 702's violation of that provision, the portion of HB 702 is void.

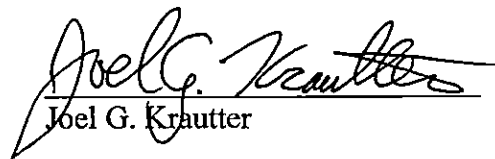
**Relief Requested**

The Plaintiffs pray for the following relief:

- A. A declaration that HB 702 is facially unconstitutional;
- B. A declaration that HB 702 is unconstitutional, and therefore invalid and unenforceable, as applied to Netzer Law and similarly situated businesses and employers;
- C. A preliminary injunction prohibiting State Defendants from enforcing HB 702 in its entirety;
- D. A permanent injunction prohibiting the State Defendants from enforcing HB 702 in its entirety;
- E. Attorney's fees, including litigation expenses, and costs; and
- F. Such other relief as may be just and proper.

Dated this 26 day of October, 2021.

NETZER LAW OFFICE, P.C.

  
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