

Practical Issues for Transitioning to a Post-Pandemic Workplace

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On May 28, 2021, the U.S. Equal Employment Opportunity Commission (EEOC) published long-awaited updates to its guidance on EEO-related issues stemming from the COVID-19 pandemic.

Among other things, the EEOC's updated guidance confirms that employers generally may require their workers to get vaccinated as a condition of employment and may even offer financial and other incentives to encourage workers to get inoculated voluntarily.

As welcome as the EEOC's new guidance is, several other important legal and practical questions remain, especially for businesses that are moving rapidly to shore up their post-COVID return-to-office workplace plans and procedures.

In this rapid-fire session, panelists answer questions on many of the practical issues facing businesses as we begin to return to a post-pandemic workplace.

Transcript:

Naomi M. Berry: Good afternoon and good morning, and welcome to our webinar on Practical Issues for Transitioning to a Post Pandemic Workplace hosted by Core Triangle Consulting in conjunction with Carlton Fields. Today we will talk about the important legal and business issues that remain or are cropping up as we shore up our return to office workplace plans and procedures.

I am Naomi Berry and I'm a shareholder in Carlton Fields' Miami Office. Rae Vann is the vice president of Core Triangle Consulting and HR Risk Management Consultancy and shareholder in Carlton Fields' Hartford and Washington, DC offices. Meredith Moss is a shareholder in our Los Angeles office. Quincy Bird is an associate in our Tampa office and Micah Vitale is an associate in our Hartford office.

Before we begin, this webinar is been recorded for educational and training purposes. This recording may include questions and poll responses provided to you during the live event. This recording will be made available after the conclusion and live event and posted on the Core Triangle Consultancy and Carlton Fields websites. We welcome you to post questions in Zoom's Q&A feature located on the toolbar at the top or bottom of your screen. You're able to ask questions anonymously. We will try to answer as many questions as possible in the time available.

So, we have a lot of ground to cover. We're going to get started with the topic that I think a lot of people are interested in, which is whether an employer can mandate vaccinations. So Rae, can employers mandate vaccines and what have the federal authorities said about this?

Rae T. Vann: Thanks, Naomi, and I'm glad to be here with everyone. Welcome, everyone. The short answer to the question is, yes. Employers may lawfully require proof of vaccination before permitting employees to return to the workplace subject to a couple of major caveats. Subject to 1) consideration of individual employee disability or religious exemptions that maybe required under a state or federal workplace discrimination laws, including, of course, the Americans with Disability Act and Title VII of the Civil Rights Act of 1964; and 2) subject to any state law that may restrict or prohibit employers from mandating the vaccine. So, those are two important caveats to the general answer but, yes. Employers may require proof of vaccination even where an employee can't get vaccinated because of a disability or religious belief. I think it's important to point out that if there's no reasonable accommodation available to them that can't be implemented without imposing an

undue hardship, of course, the EEOC made clear in its recent updated COVID guidance that the employer would be permitted to exclude the employee from the workplace. It's really important to remember, though, again, some states have passed laws or considering legislation that would protect an individual's vaccination status so as to make it unlawful to discriminate against someone on that basis or would restrict or prevent employers from requiring proof of vaccination as a condition of employment. Montana just passed a law like that last month, and there are similar bills pending elsewhere including in Illinois and Ohio, and elsewhere. There's even then a federal bill introduced in Congress by Senator Ted Cruz of Texas that would prohibit discrimination based on vaccination status. But, of course, that measure I don't believe is expected to pass, and even if it were to pass it's not one that I would expect President Biden to sign into law. So, those are just reminders, general information for folks to take.

I would also note that a vaccination requirement is different from health screenings or tests to detect possible active COVID-19 infection of course, which the EEOC has indicated previously or justified under the ADA's direct threat principle. So in other words, an employer is permitted to bar from the workplace an individual who is infected with or has been exposed to COVID-19 under a direct threat analysis which we will probably talk about at some later time but that same rationale does not apply to vaccination requirements. Right? So excluding somebody from the workplace, someone who's unvaccinated from the workplace who is not been exposed to the virus or others with the virus or who have been exposed and who's not exhibiting any symptoms would not pass muster under the direct threat test, if that makes sense.

Naomi M. Berry: Yes, thank you, Rae. Micah, if you collect, as an employer, if you collect vaccination or health screening information, what can you do or not do with that information, or what should you do with that information?

Micah J. Vitale: Right. So I guess I will start with saying employers are permitted to ask their employees whether they've been vaccinated, and they can also ask for proof of vaccinations. And in the event that an employer does obtain information regarding vaccinations of their employees and in the event that that information is documented, that information must be kept confidential but also in a separate folder than the employee's personnel file.

I should also note too, there's a common misconception that employees do not have to disclose this information to the employers because it's protected under HIPPA but that's actually not the case. That is not true. So, under HIPPA employers are not considered covered entities and so, therefore, employers are allowed to obtain this information so long as they keep it confidential.

Naomi M. Berry: So, aside from mandatory vaccines - oh, I skipped ahead. Rae, if an employer is considering a mandatory vaccination policy, is there anything else that they need to think about that you didn't touch on in your first answer in terms of how to shape that policy?

Rae T. Vann: Yeah, you know, again, I would just reiterate that there are some states that restrict or even prohibit outright mandating vaccines or mandating that employers are present proof of vaccination. So, the first thing that I would consider if I were an employer looking into whether or not to mandate vaccinations is you really need to think hard about whether a mandate is necessary or whether you can achieve the same results, your desired results through a voluntary vaccination campaign or policy. So, you know, would incentives help encourage employees to get vaccinated and things like that.

You know, mandates generally, as we all probably are well aware, carry big risks: risk of litigation, risk of, you know, employee relations issues in terms of disgruntled employees, and things like that. People generally don't like mandates either, even ones that are aimed to protect them. So, it could well be that employees respond much more favorably in a way that is intended by the idea of a mandate to an education and outreach campaign that encourages them to get vaccinated. And the reality is that many employers and a lot of surveys that have come out in recent months certainly have indicated that they don't plan to mandate vaccinations but really they're going to try to encourage their workers to get vaccinated by pointing to the benefits, relying on CDC and other guidance that supports the efficacy and safety of current vaccines and things like that. And again, many companies have offered token incentives and so forth. So, I think those are the sort of high-level considerations that an employer ought to think about in deciding whether or not to mandate vaccines for their employees.

Naomi M. Berry: Thank you. We've had a question from one of our attendees about whether Florida prohibits mandates for vaccination. Quincy, I think you'd be a good person to speak to that as one of our Florida lawyers.

R. Quincy Bird: Yeah. No, I appreciate that, and it's a good question, right, because in the press Florida has been towards the forefront of these states that are enacting bans on vaccine passports, right. I think there are 16 states now across the country that have taken on some type of full or partial ban. So, it seems initially a question of, well, consistency when you see this in the news but also here we are saying that you know, it's OK to mandate vaccines. And the key issue here, right, is that the prohibition, at least in Florida, typically applies at least, to the extent it applies to private businesses, it applies to patrons and customers, right, that the private right of contract between employer and employees typically undisturbed by that. And so, I think it's important to think when you're hearing discussion about vaccines passports, think about what a passport is. It's the type of thing that allows travel, right. It's the type of thing that allows you to visit a store but it doesn't generally apply to employees, right. It's meant for visitors and customers.

And so, in Florida, there are sort of three components, right. So, there's the first part that applies to private businesses. But then, it permits, of course, a business to continue to screen and do those basic protocols most people have gotten use to in the past year whether it's temperature taking or

having some type of PPE in place like wearing a mask. But that also applies to government entities, right. And so with government, it's a little bit broader. It's not just customers and patrons. The government in Florida can't require a person to provide documentation certifying vaccines status. So, maybe a similar question, I guess for a business owner on the webinar today is, hey, can I ask my customers about their vaccines status, or can my employees do it? And I would say that would probably fall under prohibited activity to the extent that you are certainly recording it, right, or allowing access based on their response. The prohibition in Florida applies to documentation certifying vaccination status.

And then finally, real quick before you move on, right, is that there's a couple of important caveats to the Florida law and that is healthcare organizations, right. Healthcare organizations are generally exempt from this prohibition. So, for probably obvious reasons the same prohibition on a vaccine passport that might apply in the mall doesn't apply if you walk into a doctor's office or a hospital.

Naomi M. Berry: Thank you. While we are talking about vaccination mandates, Quincy, under what circumstances could a vaccination mandate raise non-disability or religion-based EEO compliance concerns?

R. Quincy Bird: Yeah. I think, to Rae's earlier point, right that this mandate is typically going to be exempt, at least under federal law, to those employees that really raise kind of a question of a religious objection to receiving a vaccination or these particular vaccines. And I think the first kind of threshold question is that we're not necessarily talking about organized religion, right. It could be any type of sincerely held religious belief. It doesn't have to be mainstream or of a dogma of a particular one faith or another. But I think it's probably easier to talk about it in a likely situation that might arise with respect to these specific vaccines (Pfizer, Moderna, and Johnson & Johnson) that are apparently under EUA authorization in the US, right.

And I think the most likely one that at least I've explored is the connection between these vaccines and abortion. The Pfizer and Moderna vaccines were tested on a cell line and the Johnson & Johnson vaccine includes material derived from cell lines that originated with elective abortions back in the 1970s and 1980s. And obviously, that's not just a hot button politically in America but they're certain faiths, I think, probably most notably the Catholic church, who oppose abortion, right. And so, they put an obligation on their adherence to not participate in anything generally participant, you know, that are relating to abortion. But notably with the COVID vaccine in the Vatican and whatever the organizations within the Catholic church that have authority over these things have stated that it's OK under certain circumstances to receive these vaccines. It's sort of a window where it's permissible. Now, it applies to many people but not everybody. So I would say probably one of the more likely scenarios where we need to see a national or religious exemption by or at least be asserted by an employee who would be on those issues. Now, the important thing there is that when you're looking at the religious objection issue within the federal Title IX statute, the reasonable

accommodations are not quite the same as we see under, say, the ADA. Whereas under the ADA there's this interactive act of process and may be an option that's posed to employees to choose among different reasonable accommodations, the standard for an employer when you have a Title VII or religious objection is really just this kind of undue hardship, right, which is any burden on the employer that is more than de minimis. And so, but that being said, the employer does have the obligation to sort of take the assertion of a religious objection at face value. No need to be having mini-trials or inquisitions in your various HR offices, right. And certainly, we have not seen much litigation on this yet or guidance but something to keep in mind.

Rae, anything to add there?

Rae T. Vann: No, I think you hit it all really well, Quincy. I would just again remind folks, as you did, that the standards for undue hardship are different under Title VII and the ADA, with the ADA imposing a much more onerous burden on employers, just as you said.

Naomi M. Berry: Now Rae, we know that pregnant workers raise certain interesting employment issues in the workplace, and certainly here with vaccines, there are also a lot of things to consider. Now, must an employer accommodate a request to be exempt from a vaccination mandate from a non-disabled pregnant worker who's concerned about the potential effect of an as-yet unapproved vaccine on the unborn child?

Rae T. Vann: That's an interesting question, Naomi. I'm glad you asked. So, I will say this: the EEOC most recent guidance does speak to COVID-related pregnancy accommodations generally but not specifically to this particular question, right. And before I answer I just want to remind everyone that, unlike the ADA with respect to disability and Title VII with respect to religion, there's no affirmative obligation to accommodate non-disability pregnancy under federal law. Although there is a federal law pending that would do just that, the obligation that employers have under Title VII with respect to pregnant employees is to ensure that they are not treating pregnant workers as a whole, as a class, less favorably than others who were "similar in their ability or inability to work." That said, and really important clarification here, at least 31 states from the last time I counted, 31 states and localities have many pregnancy accommodation laws in place. So as a practical matter, many companies that operate in those jurisdictions may be subject to a state or local pregnancy accommodation requirement that would apply to the COVID context. So, it's important to check and make sure that you're complying as appropriate based on the jurisdiction in which you're operating. So, just to go back to the question, though, the concern here is not for the employee's own health but rather for the health of her unborn child. So here, again, just speaking in practical terms, I would encourage the employer to initiate the interactive process and ask for medical documentation supporting the employee's request for accommodation and sort of go from there. Some possible examples of accommodations that might be put into place in this circumstance provided that a healthcare professional has affirmed or confirmed the need for accommodations might include

flexible work schedules, staggered start or end times, flexible meeting and travel requirements, and things like that. So, at bottom, I would remind folks again that under federal law there may not be or there is no affirmative obligation to accommodate pregnancy. But, it is more likely than not, especially for companies that operate in multiple jurisdictions, that there is some state or local law that might impose that requirement. I will say - and Quincy, please correct my understanding - I will say that Florida does not, under state law, impose a pregnancy accommodation requirement on employers.

R. Quincy Bird: Yeah, Florida generally tracks federal law in most employment situations. My clients on this call, you can call me up afterwards.

Naomi M. Berry: Now, a similar issue is whether an employer can publicize worker vaccination status. For example, if you wanted to say that your employees are 100% vaccinated, you know, come back to our store. In what context is it permissible to publicize vaccination status, or is that something that employers should avoid? Micah, can you speak to that?

Micah J. Vitale: Sure. I have a comment on this point. Quincy, if you want to jump in as well too, or Rae or anybody. The only thing I would say is that if somebody did publicize this information, I think the safe way and the best practice would be to just provide an aggregate of the number versus identifying people individually. Like you talked about earlier, although it's not protected under the HIPPA, it is confidential information. So, that's what I would say about that point. If anyone has anything else to add, I'm happy to listen.

Naomi M. Berry: I would also add, it's probably a good idea to talk to your employees first, if you're thinking about saying something in the aggregate to make sure that everyone is comfortable with it, because if your number is 100% then it's going to be obvious that that person is vaccinated. And maybe for various reasons they, you know, maybe they have a difference of opinion amongst their family and didn't necessarily tell their family or something. It's always a good process to talk to your employees about that.

So, this brings us to, you know, what happens if you have a mandatory vaccine policy and you have an employee who decides that they don't want to get vaccinated and they don't have a religious or an ADA objection. Is the logical outcome that that employee will be separated and without severance? What happens then?

Rae T. Vann: I'm happy to weigh in here. So, I think the first part of your question addresses a scenario that a lot of employers, you know, rightly so, are beginning to prepare for and that is, you know, the employee who is not prevented, as you said, by disability or religious belief from getting vaccinated but simply refuses to do so for whatever reason, right. The answer to that question is that the employee may be treated as any other employee who refuses to comply with an employer

mandate, right, which could include progressive discipline or termination from employment. Whether that person is eligible for or should be considered for severance is obviously going to depend on company policy and the particular circumstances, but severance in the absence of some dispute, right, between the employee and the employer typically is reserved for separations unrelated to employee misconduct.

But, again, employer practices are going to vary, as will the particular circumstances. You know, there may be a circumstance in which an employee is questioning the wisdom of coming back to the office based on the need to get the team back together or team-building purposes, the importance of, you know, being face-to-face, and things like that. Those are legitimate reasons, right. Depending on the nature of the job, of course, and the work being performed, there are many jobs and types of work that are team-oriented which suffer and have suffered as a result of the mass shutdowns and, you know, work-from-home orders and things like that. Just because the work was able to be accomplished under those extraordinary circumstances doesn't mean that, in the employer's view, it was the most effective or efficient way to get the job done.

On the other hand, of course, there are other jobs that may not have that orientation and in those instances, a boss's desire simply to sort of get the team back together to yuck it up with colleagues in the office may not go over as well with employees. But at the end of the day, unless an employee is requesting work-from-home as a workplace reasonable accommodation and the employer is refusing on the ground that the essential functions of that employee's job can only be performed effectively from the office, the employer essentially doesn't have to justify its return to office decision to employees.

You know, speaking of workplace accommodations, while - and this is another question that's come up a lot, I know - while it may be more difficult for an employer to argue categorically that remote work is unreasonable or unworkable as a disability accommodation, given everything that we've had to do under shut down orders and things like that, I just want to point out that the EEOC does speak to this in its COVID guidance that actually it issued last year in which it made clear that just because many employers found a way basically to make work-from-home work for many roles doesn't mean that they lost their ability to deny that type of request once the emergency subsides. So, in particular, where an employee may have been forced to excuse the performance and this - the EEOC speaks specifically to this - the performance of particular essential functions due to COVID-19 and the shift to work-from-home more. Once that - again, the crisis abates and workers return to the office, the EEOC has said that continued work-from-home as a reasonable accommodation does not have to be approved if it would require the employer to continue to excuse the performance of essential job functions. That's something that you're never required to do as a reasonable accommodation. But, of course, in making those types of decisions, employers are always should engage in the interactive process, just as they would with any reasonable accommodation request.

Naomi M. Berry: Thank you, Rae. Quincy, we have a follow-up for you on when you were talking before about, you know, Florida's policy and how that impacts employers and employees. What about third-party consultants and vendors?

R. Quincy Bird: Yeah, that's a good question, right. So, looking at - and I don't want to make this too Florida-centric but happy to answer this. The Vaccine Passport Ban Statute, to the extent it applies to businesses, you know, the text specifically said, "patrons and customers," right. It's worth kind of going through the actual language because it says, "This subsection does not otherwise restrict businesses from instituting screen protocol consistent with authoritative or controlling and government-issued guidance to protect public health." So what this says to me is, 1) it's a brand new statute, so to the extent that a contractor qualifies as a patron or customer, is to be determined but I would say, likely not, kind of based on the plain language of the term or the plain reading of the term. So what I would recommend then that business would be to consider implementing otherwise, like, different screening protocols, like, you know, your basic, you know, thermometer testing or wear a mask when you come onsite or these types of things in lieu of a vaccination. That way you are not requiring documentation of certification about vaccination status and you are taking other steps that can be reasonably be seen to protect your workplace from COVID-19. But on its face, with the important caveat that it's still a very new statute and untested, I would say that, again, that private right of contract, which is important to legislators here in the state of Florida, remains kind of unfringed by the ban much like your relationship between the employee and employer.

Naomi M. Berry: Thanks, Quincy. And before we move on to our next topic, I just wanted to check in with Meredith and see if there is anything we need to know specifics of California in terms of mandatory vaccine policies.

Meredith M. Moss: No, thank you, Naomi. Actually, that is the one question we do have some certainty around with regard to California and we will touch on some of the other things in a little bit. But yes, our Department of Fair Employment and Housing which is, you know, our State Anti-Discrimination Enforcement Agency has said yes like the EEOC has said you can require mandatory vaccines. And you can require proof of vaccination. And we can touch a little bit later on what that might mean. But with the caveats of, you know, accommodations for disabilities and religion that are, you know, similar to with, you know, at issue under federal law. Yes, in California, you can have a mandatory vaccination requirement for your employees.

Naomi M. Berry: Thank you, Meredith. And we will move on to our second category which is, can you treat vaccinated and unvaccinated employees differently? The first question is, may employers establish different vaccination, distancing, or other rules depending on where employees are located, their specific job responsibilities, or other factors? Micah, I think you were going to speak to that.

Micah J. Vitale: Correct. I'll step in on this one. So, I think the best practice is to follow the CDC guidance. The CDC does hold that, you know, people outside are at less risk of transmission to people who may be inside. So for example, there may be circumstances where two people work for the same company but somebody works outdoors and somebody works in the office indoors. So based on job necessity and job duties and based on CDC guidance, there may be different requirements for both individuals. Rae, I don't know if you want to pick up where I left off?

Rae T. Vann: Yeah, no, I think that right, Micah. The only thing that I would add is that obviously if you were imposing, say, a mask requirement on certain office workers, you want to make sure that you're applying that requirement consistently and uniformly with respect to similarly situated employees. You never want to get into a position of someone claiming that you're unevenly applying the policy or applying it in a discriminatory or unfair manner. But, you know, as Micah said, if you have different classes or categories of employees, say office workers versus landscapers who work exclusively outdoors, you may determine that you're going to relax a mask requirement for the outdoor workers whereas maintain it for the office workers. But again, as Micah said, CDC guidance is really your go-to source for help and tips and strategies for these types of questions. And I would also say and we'll probably talk about it a few times throughout the course of this program, that guidance is being updated regularly. In fact, you know, the CDC updated many of the guidances that are relevant to our discussion today as recently as last Thursday and Friday, so it's really important to continue to monitor for updates from the CDC as well as state and local health authorities.

R. Quincy Bird: Rae, that's maybe worth making just a practical consideration that I suspect many on this call is dealing with, which is the change or at least the constant updating. You know, I think you have to be living under a rock in America not to know about CPC at this point in time. To be sensitive to, you know, that the change, be it the change in guidance or the updated, you know, data that is released affects not only the employer but the employees as well, right. So, much like Micah commenting earlier about how people thinks HIPAA covers a lot of these types of issues, there are a lot of common misconceptions out there either much more risk-tolerant or much more risk-averse than maybe, you know, one of our attendees might be that should go with the kind of practical consideration, right, to avoid some legal issues down the road.

Naomi M. Berry: That's a great point. Rae, speaking of treating vaccinated and unvaccinated employees differently, I've heard of a company that said they were only going to allow vaccinated employees to travel for business or people who had an ADA or religious-based exemption. Is that permissible to treat employees differently for business travel opportunities, and what should a company consider if they are developing such a policy?

Rae T. Vann: Well, I think thinking about, devising, putting into place a travel policy is probably good practice. And with that again, as we've said, I would strongly recommend that companies lean on the current CDC guidance that's out there which provides a lot of helpful strategies, even with respect to

travel. So, this is an area in which an employer's policy may wish to differentiate between vaccinated and unvaccinated employees. Again, assuming that they are permitted to ask the question, right, regardless of vaccination status. And again, teeing off of currently CDC guidance, you know, you may wish to consider restricting non-essential travel altogether. So the CDC advises against unvaccinated people from traveling. They say that unvaccinated people should delay travel. So you might, in your policy, restrict travel to essential business only or, you know, maybe based on some other criteria, like, the vaccination or infection rate in the destination state or whether the travel contemplated is domestic versus international, or maybe, you place restrictions only for some period of time, pending again updated guidance from the CDC. As I mentioned, the CDC updated portions of its guidance just last week. And in some of those updates, the CDC again continues to recommend that anyone who is not fully vaccinated should delay travel. But even for vaccinated travelers, the CDC, you know, points out that mask-wearing, obviously, is required on all forms of transportation, including planes. So that reminder might also be incorporated into a corporate travel policy that's COVID-specific.

R. Quincy Bird: And Naomi, I would only add, since this dovetails with the vaccine passport issue a lot, right, like, we have sixteen states. The destination matters. Obviously, if someone is traveling to India or, you know, anywhere in Europe, it might be a different question than if you're traveling to Florida. But within the United States, you know, domestically, I think only Hawaii and New York have any type of state-sanctioned vaccine passport program going right now. So certainly, you know, efficiently, it's more of a business decision, you know. If someone is traveling to New York, it might be reasonable to restrict traveling to New York or Hawaii -- I mean, I volunteer, I suppose, but -- you know, to vaccinated persons. But just take destination into consideration.

Naomi M. Berry: Sure. And what about returning from travel? You know, if you have an unvaccinated employee who is traveling for business, can you require them to work from home upon their return, and can you treat unvaccinated and vaccinated differently? For example, if they go to a conference together, can the vaccinated employee come right back to the office while the unvaccinated person has to quarantine from the office because of the travel?

Rae T. Vann: So, I'll take the lead on this and everybody certainly feel free to jump in. So as I said, the CDC recommends that unvaccinated employees should delay travel. But if they do travel, the CDC does recommend a few things. First of all, they should be getting a COVID test one to three days prior to travel and also three to five days after travel. And the CDC does recommend that they self-quarantine for seven to ten days. It's seven days if they've gotten retested and it's longer if they elect not to get retested upon return. They should also, according to the CDC, avoid interacting with individuals who are at higher risk for serious illness for a period of 14 days, whether they get tested or not. So, for workplaces that have were both vaccinated and unvaccinated employees are present, this may mean building into a policy - the policy, for instance, that we were talking about before - the requirement that the unvaccinated employees returning from travel must work from home for 14

days. If that's not possible given the nature of the employee's position, then the policy might want to address that as well. So, in other words, a policy might say, "Non-essential travel by unvaccinated employees will only be permitted for certain positions and requires manager approval." Again, should be customized and adopted for the particular employer and workplace in place but, you know, that's again drawing upon CDC guidance. If you've got unvaccinated workers traveling for work, it's best to ensure, for their own safety and the safety of others, that they clear that period of time within which they are more susceptible to becoming sick and also making others sick.

Naomi M. Berry: Thanks, Rae. And before we move on to our last category of managing the return to work, we've had a follow-up question about religious accommodation that I think Quincy can handle. And the question is, how should employers go about questioning sincerely held beliefs? For example, when exploring returning to work an employee said, she would never get the vaccine. And now that vaccines are mandatory in that workplace, the employee is claiming a "religious exemption". Can you speak to that, Quincy?

R. Quincy Bird: Yeah. So, oh, I hate to give the typical "it depends" lawyer response, but it does sort of depend on what she is saying and who that employee is, right. And this is where, you know, as your HR team having knowledge of your workforce sort of matters. 1) Is this person credible? I don't expect the HR team to know the religion of all their employees, but what is the basis of her assertion? If she's, like, simply, you know, simply saying, I'm never going to do it because I'm some, you know, I don't think there is a church of anti-vax out there. Though I can see an instance where someone's aversion to vaccination broadly could be sincerely held, I don't think from my understanding of the case law that it would independently hold up. When questioning, the best practice is that there is a presumption of validity, right? And I would also counsel that in the current environment, you know, it's sort of going against the grain to resist vaccination that, you know, whether this person is looking for an out is possible but you have sort of proceed with caution. Maybe it's a question that deserves enough detail that we deal with offline, and I would certainly welcome our anonymous questioner to give me a call and we could talk further about it. And this is just under federal law, right. This is not necessarily, and I don't know what state our questioner's in.

One thing I think to follow up with what Rae was saying earlier about the CDC recommendations that are a pivot back for a second, too. It's important to understand the liability shields in place for employers, right. There is definitely a best practice in the EEOC recommendation of adhering to CDC guidelines. But there are only three states, right now, Delaware, Maine, and Washington that don't have a liability shield in place or in the works for employers to fit in defense of a suit alleging, right, that I contracted COVID due to work. There might be a worker's comp issue, but I think we all agree that it's pretty difficult, and Rae, you could probably speak to this more directly. I'm not sure there has really been a proven case, with the exception of maybe some meatpacking plants or similar, you know, employers that you see in the news. It would be very difficult for them to trace that back to their employment.

Now, there is a different breadth and a different application of each state's sort of liability shield when it comes to COVID-related lawsuits. And some of them would also potentially apply to liability for a mandated vaccine, right. Some type of adverse effect to the vaccine might be covered under some of these as well. So, it's worth looking into what applies in the state. But I would just say too, if you tend to be a little bit more risk-tolerant and have a sales force, for example, that needs to get back on the road and you're willing to, despite vaccination status, authorize that, you know, it's something worth talking about and how to manage that risk. But I would say, you know, we can start - maybe this is just the Florida in me - we can start back opening up again responsibly, right. And I would invite someone that could talk further and more specifically about that with me if they are interested.

Rae T. Vann: Naomi, I'd like to just go back very quickly to what Quincy was talking about in responding to the religious accommodation question and just add that the EEOC has guidance to this point that may be helpful in dealing with an employee whose own actions seem in conflict with or contradict this now-claimed sincerely held religious belief. So I would look to EEOC guidance for some help in how to navigate that situation as well. And of course, we all here serve as resources as well.

R. Quincy Bird: That's a great point, Rae.

Naomi M. Berry: Thank you. And we had a question that was submitted in advance as we start the managing return to work segment. Please address the handling of employees by indicating they may be uncomfortable returning to work because others may be unvaccinated. Rae, do you want to take this one?

Rae T. Vann: Sure. There may be any number of reasons why an employee may be uncomfortable returning to work. And, obviously, fear of being exposed to infection from unvaccinated co-workers certainly is one of them. Also though, is the fear that their employer hasn't devoted sufficient time or energy or resources to protecting them, protecting workers from contracting COVID-19 at work. So, communication is critically important in combatting employees' reticence to returning to the office. I have said over the course of these last several months that you really, as an employer, can't over-communicate to employees about health and safety issues in the COVID context. And that communication can be just as important sort of emotionally to employees as all the actual measures that you are putting in place to protect them. So, let employees know what you've done to enhance cleaning and sanitation procedures and things like that. But also that you have a plan and process in place for responding to suspected cases or confirmed cases and things like that.

And maybe some other folks are concern about their privacy in connection with all of these new safety protocols and things like that. Talk about the steps you've taken to protect COVID-related confidential health information, just as Micah and others have talked about earlier today, which will

help to further ease invariably an employee's unease and reluctance, not only to return to the office but also to submit to testing or self-reporting possible COVID exposure.

Again, you know, I point to CDC guidance. The CDC guidance is a great source of information for employees especially with respect to the benefits of getting vaccinated, right. So, even if an employer doesn't plan on or may be restricted by state law or restricted by state law from mandating vaccinations, for employees who are scared about getting sick, helping them to understand the efficacy again and the benefits of available COVID vaccines may help considerably.

I would also just say in wrapping up that many employers who may be on this call, in fact, have Employee Assistance Programs. EAP is our other, sort of, emotional or mental health resources and benefits that are available to employees that may be especially helpful during this time. And so again, communicating and reminding employees of the support that is available to them through those types of programs, I believe can help again to ease some of their concern even as they continue to sort of deal with the fallout from COVID-19 and all that they've had on their shoulders to this point.

Also, by pointing to COVID guidance that the CDC and other health authorities have published, you're signaling that this is not stuff that you are just pulling out of thin air or making up, right. And again, I'll remind you, and as Quincy said and others have said, CDC guidance is constantly being updated to address, you know, the situation on the ground, right, including, with respect to, as we talked about before, domestic travel, using public transportation and what vaccinated and unvaccinated folks should be doing to protect themselves and others.

Naomi M. Berry: And once an employer has, you know, their safety policies in place, you know, what obligations do they have to enforce those policies, or would an employee any recourse if they find, you know, for example, if an employer says unvaccinated employees don't have to wear a mask but then they are not enforcing mask wearing for the unvaccinated employees, you know. Quincy, can you speak to, you know, the employer's obligations to enforce and what might happen if they don't? You're on mute, Quincy.

R. Quincy Bird: You would think 15 months into this, I'd understand how Zoom actually works. At least I haven't turned into a cat, so that's good. Yeah, from a liability perspective, the standard in most states - and this includes Florida - is either the liability protections extend to general matters of negligence. So the exceptions include intentionally wrongful conduct, gross negligence, etc. So, you know, but again because it's an area of the law that's still in development, there are some, you know, hornbook laws. We could talk about what constitutes gross negligence or willful conduct, but the kind of more meaningful analysis will have to sort of wait to bear out.

Rae T. Vann: I would also just mention - and I am not an OSHA expert by any stretch of the imagination - but you all may be aware that OSHA issued its emergency temporary standard last

week that applies in the healthcare context. But I mention OSHA only because that guidance and other guidance, more general guidance that was released in conjunction with the ETS reiterates that retaliation is obviously prohibited under the OSH ACT. So if an employee were to complain or raised an issue about what he or she perceives to be an unsafe or unhealthy condition at work, you run the risk of being accused of retaliation, among other things, if you take adverse action against that person, simply by virtue of having brought that health and safety concern forward.

Naomi M. Berry: Thank you. Meredith, we know that California often does its own thing. Can you give us an update on what California is doing with regard to return to work issues?

Meredith M. Moss: Absolutely. And, you know, we are sort of the opposite of Florida. So we've got some bookends going here. And when we picked the day of this webinar or were discussing the day of the webinar, we were aware that California is reopening today. And so we thought everything would be settled and clear, and of course, it's not.

We here have our own Cal OSHA organization. And for those of you who have employees here, you'll know that back in November, Cal OSHA issued Emergency Temporary Standards that are very thorough about many aspects of COVID in the workplace. They've since been trying to come up with a new version of the rules to deal with the updated CDC guidance and what the California Department of Public Health is doing. And that even cumulated in a meeting last week where they adopted rules, reversed it. Now they are having another meeting this Thursday.

So, what that means for Californian employers is that even though the state is opening up today and certain things are changing, other things in the workplace haven't changed just yet but we hope they will soon and expect them to soon. And so I will talk just for a quick moment about some of those highlights. One of the things that is changing today is capacity restrictions for anything other than a mega event which is 5,000 people indoors or 10,000 people outdoors capacity, restrictions are going away. Physical distancing is generally going away, although again, you know, we are waiting on the Cal OSHA standards.

Probably the most interesting area, though, is face coverings, masks. And that is where there has been some tension and they are trying to work out coordinated rules. So, the Department of Public Health in California is in line with the CDC and basically eliminates masks for vaccinated people. That's fully vaccinated people, and that's important for some other things to understand. So it's two weeks past that last shot. So, there will, of course, be circumstances where everyone has to be masked on public transit, in healthcare settings, long-term care, correctional facilities, shelter facilities, and also, for the moment, schools. That can still change, but those are the everyone must mask situations here. But otherwise, once those Cal OSHA guidelines get updated, vaccinated people will not have to be masked, indoors or outdoors.

One of the areas of tension had been that Cal OSHA wanted to say that if there was one unvaccinated person, all of the vaccinated people still had to continue to wear masks. And that provoked a lot of backlash for many reasons as you can imagine. So that looks like that will go away and so vaccinated people will not have to be masked. But unvaccinated people will need to continue to be masked in the workplace unless they are the only one in a room or there are eating or drinking at the moment.

Now again, there are exceptions. If you have a medical condition, or mental condition, or other disability that prevents you from wearing a mask, you can be exempted from that. If you are hard of hearing or communicating with someone who is hearing impaired so that they need to be able to lip-read, that can also be a situation where you would not have to be masked even if you aren't vaccinated. And then also if work that you're doing cannot be performed while wearing a mask, that is additionally a situation where you could possibly be unmasked.

One of the other questions is that the Cal OSHA guidelines likely will require employers to make available N95 masks, in the right size, to employees who are unvaccinated. And so the open question about that will be are we going to have to stockpile those in advance, or can you wait for the employee request because it is at the employee's request? So we will be looking for some updated guidance on that as well.

And then proof of vaccination is another area where there may be some questions. Again, it's fully vaccinated people, so that does require the need to know a little bit of information, like when the person had their last shot. The open question is, will you have to actually get a copy of the vaccine card, can you just look at it, verify it, or can the employee self-attest? Those are things we will be seeing some guidance around.

Now with regard to customers, it is important to know the California Department of Public Health said that employers have the option. Businesses, when people are coming in, they can verify that same status, they can let people self-attest so if there is a sign, "By entering this facility unmasked, you represent that you are fully vaccinated," or require everyone to continue to mask. So, if you are in California, you will still see businesses still likely, you know, no shirt, no shoes, no mask, no service. And that is OK. What is not OK is to prevent anyone from obtaining a service of their business if they are masked. So, you cannot tell people you must unmask in order to enter our business.

A quick other note I just wanted to make clear that our California employers remember is that in California, there is no such thing as de minimis time, meaning that you have to pay employees for all the time they are spent engaged in doing anything related to their jobs. So if you have for example, temperature screening or any other kind of screening before they enter the workplace that is compensable time. If you send them offsite to get a COVID test, travel time compensable, and also

mileage reimbursement is something to think about there because California is very strict on all of those compensation requirements.

And the last thing I would just mention is that our California Supplemental COVID Sick Leave statute is still in effect till the end of September and so employees who are taking time off to get vaccinated or for symptoms related to a vaccine or they actually have COVID or are seeking medical treatment for COVID or have a family member in that circumstance, all those things are still subject to paid sick leave under that statute.

One final thing I would mention is that the California state of emergency - even though we are lifting all of these other restrictions - the California state of emergency has not gone away. So there are some localities that have their own COVID sick leave laws that the expiration date is tied to the end of the state of emergency, and that is not happening yet. And we don't know when that will happen. So that was the breathless run-through of where we are in California, where we think we're going. But the good news is, we hopefully will know by the end of this week because the governor has said he wants quick action on these Cal OSHA standards.

Naomi M. Berry: Great. We'll be on the lookout for those. Thank you, Meredith. And we are right at 2:00. I know there's so much ground to cover here. I know I had more questions and we probably have some people in the audience who had more questions. We tried to answer all of them, whether live or by typing the answers. But please feel free to reach out to any of us if you have questions after the program. We're all happy to help you or direct you to the right Carlton Fields or Core Triangle person who can help you. And we thank you all so much for attending today. Thank you to our wonderful panelists. And everyone have a great rest of your day.

Rae T. Vann: Thank you.

R. Quincy Bird: Thank you, everyone.

Micah J. Vitale: Thank you.

Presented By



Naomi M. Berry



Meredith M. Moss

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