Podcast Transcript

Considerations around Vaccine Administration for Employers

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Rubenking: Many employers are starting to ask themselves, how they are going to handle the COVID-19 vaccine in their workplaces. Will it be required or voluntary for their employees? Will it invite workers compensation claims? What about OSHA? As we open the doors to 2021 and COVID-19 vaccinations, what should employers be thinking about from a legal, safety, and cultural perspective. I'm Randall Rubenking and you're listening to BakerHosts.

On today's episode we discuss considerations around employer vaccine policies, from the perspective of employment law, employee safety and health, and labor management relations with BakerHostetler's Labor and Employment group chair, Amy J. Traub.

Welcome Amy.

Traub: Thank you Randall, happy to be here.

Rubenking: Amy, are employers required to mandate that their employees receive the COVID-19 vaccine in order to return to work or to continue to work in-person?

Traub: As of right now, there is no mandate at the federal, or any state level for employees to become vaccinated. It is certainly possible that at some point vaccination will be required in order for individuals to participate in certain activities, like travel or attend concerts or attend work in person. But, like the vaccination requirements that we see for children to attend school, that kind of a mandate is more likely to be at the state or the city level, not from the federal government. The federal government is actually constrained by the Constitution, whereas the states and the cities have a bit more leeway, so long as, their mandate is reasonable, proportional, and non-discriminatory. So, maybe we'll

see the vaccine mandated in certain zip codes, for example, that are considered hotspots for COVID. The New York state assembly has already proposed a bill to require COVID-19 vaccine for all residents of that state who are able to safely receive it and it is possible that other states will consider a similar measure. We're almost sure to see it being mandated for certain types of workers, such as healthcare workers, much like we see with the influenza vaccine for example. The thinking behind mandating the vaccine is to achieve herd immunity, if too many people opt-out of the vaccine herd immunity would be delayed and maybe even completely compromised, so, there's a lot to think about. The legal precedent for vaccination mandates at the state level is laid out by a Supreme Court case from 1905, *Jacobson vs. Massachusetts*, which confirmed a state's right to enact reasonable regulations to protect the public health and safety, and in that case the threat to public health and safety at the time was smallpox. There were challenges that were made to that mandate and those challenges were brought under the 14th Amendment, which is the right to liberty, but the case held that there was no violation of the 14th Amendment, but rather that liberty could not exist, if individuals could act in a way that is injurious to others, for example, by carrying a disease that could otherwise be vaccinated against. The bottom line is that, as with everything related to COVID-19 flexibility is key, employers are going to need to be ready to take in new information and pivot. But the answer to your question today, is that employers are not required to mandate that their employees receive the vaccine.

Rubenking: I see. Well then, what if an employer wants to mandate that its employees receive the vaccine in order to return to or continue to work. Can they do that?

Traub: Well, that's a timely question and one we get asked every single day. Employers in all industries are eager to get their people back to work, and to create workplaces their employees view as healthy and safe and one way some employers are thinking to get there is to mandate the COVID-19 vaccine. Employers are generally permitted to require vaccines and many already do. For example, healthcare employers often require that their employees get the flu vaccine, but there are labor and employment laws to be cognoscente of. The first question is whether the mandate is intended to avoid a direct threat to the health or safety of individuals in the workplace. Right now, COVID-19 remains a threat to public health, so this is an easy threshold to meet, where employees are currently working or will be expected to work in-person, and one could certainly make the argument in the case of a healthcare employer or a meatpacking plant, for example, but perhaps even an office environment could meet the standards given the state of the pandemic right now. The next question is whether the workforce is unionized and, if so, the employer needs to be cognoscente of any collective bargaining agreements that might come in to play. Once those hurdles are overcome, employers should be aware of the EEOC's position on mandatory vaccines, particularly, under the American's with Disabilities Act and Title VII. Generally speaking, exemptions to the mandatory vaccine policy would need to be made to those who have disabilities that prohibit receipt of the vaccine or medical contraindication to the vaccine or its components, unless an undue hardship can be shown.

Employers would also need to provide accommodations for sincerely held religious beliefs that prohibit receipt of the vaccine. So, what would those accommodations look like? Maybe providing the employee with a secluded office, requiring extra masking, relocating the employee to another area of the workplace where they're not in contact with as many people, or maybe it's working a different schedule. If there's no way to accommodate the person to continue safely working in-person, maybe it's remote working, or maybe it's a leave of absence. In addition to legal concerns, I think there's other things to consider as well, employee culture and moral. The fact of the matter is that for every person excited to receive the vaccine as quickly as possible, there's another person who's not excited, and who will not get it. According to a Gallup survey two months ago, almost half of Americans said that they would not get the vaccine, if it were ready, even if it were free. Some people are worried about the safety of it, especially one that was so quickly approved, and they want to delay getting it to see how others react to it first. Others think it would be pointless to take it, considering that masks and social distancing will still be required for those who receive it. Another consideration is whether mandating the vaccine could open the door to workers' compensation claims. So, I would say overall, even in those instances where mandating the vaccine might be lawful, employers have a lot more to think about, as to whether to mandate it.

Rubenking: It sounds to me like there are many factors involved in this decision. What if an employer does mandate receipt of the vaccine, and then an employee experiences side effects from it?

Traub: Well, the data currently being released and provided from the CDC suggests that the vaccine is generally safe and has limited side effects. That said, employers should consider staggering receipt of the vaccine, if possible, to avoid a scenario where a large part of their workforce is out at the same time, due to any minor reactions that the employees may have for instance chills and fever and pain at the injection site, much like you see with the influenza vaccine, have all been reported for the COVID vaccine. If there are side effects that are more severe than this or some injury or illness or even death, absolutely employees are likely to assert workers' compensation claims, if they've been mandated to receive the vaccine. The good news is that in most states, a workers' compensation is typically a bar to any other kind of personal injury or tort claims that arise in the workplace. So, filing a lawsuit instead of or on top of a worker's comp claim would likely be barred in those states. Instead, a worker's comp claim would be the only mechanism employees could use to claim potential liability against an employer for any injury they incur as a result of a COVID vaccine.

Rubenking: Very good. You talked about some of the considerations employers should factor in when it comes to mandating the vaccine. In your opinion, should employers institute a mandatory COVID-19 vaccine policy?

Traub: I think it really depends and it's a bit premature to make the determination at this early juncture. I mean, first, there aren't even enough vaccines to make it mandatory at this point; second, it really depends on the workforce, if you have a workforce that is super high-risk in terms of contracting or passing COVID-19,

especially passing it to a high-risk group of individuals, like in a healthcare setting, then it might make sense, once the vaccine is readily available to make it mandatory. If on the other hand the majority of the employees work remotely, or they work in individual offices it might make less sense. And I think industry matters too, as I said healthcare, certain manufacturing plants, long-term residential care facilities, meat packing plants, those immediately come to mind for me as a setting in which it might be prudent to mandate the vaccine. The question is whether the requirement is to avoid a direct threat to the health or safety of individuals in that workplace. The more likely it is that non-vaccinated employees put customers, or fellow employees, or the general public at risk, the more compelling the case will be for a vaccination mandate.

Now, some employers, we know, are anxious to rid themselves of all of these COVID protocols, like cleaning and mask wearing, and want to mandate the vaccine for that reason, but the CDC has already indicated that even where individuals have been vaccinated, mask wearing and social distancing still need to be maintained, until further directed. Another thing to consider is the difficulty that exemptions for medical reasons might pose. Because of the infancy of this particular vaccine, I think it might be difficult to determine whether someone has a true medical contraindication to the vaccine. I anticipate some big challenges for companies in working through medical exemption requests, at least at the outset. There's also limited data available with respect to the safety of the vaccine in all populations for instance, pregnant individuals, and then there's no data at all with respect to the vaccines long-term effects.

So, all in all, I would say that there is no one-size-fits-all approach to that question, I think employers need to carefully consider all of the issues and confer with their labor and employment counsel to make the decision that's best for their particular workforce.

Rubenking: Okay. Now, Amy given all of these considerations, could there be liability for not mandating the vaccine?

Traub: Many employers are concerned about OSHA on that particular question. OSHA requires employers to maintain safe and healthy workplace environments. Could an employee bring an OSHA claim against an employer for failing to meet the requirement, if the employer fails to mandate the vaccine? I think that depends on the state of the pandemic at the time frankly. If federal or state public health guidance indicates that employers should not allow unvaccinated employees into their workplaces or into certain workplaces, like retail establishments, manufacturing plants, healthcare settings, or schools, and an employer does so anyway subjecting its employees to potential COVID contraction in the workplace, then, maybe. It's too early to call, I think, at this point. But I would say that to err on the side of caution, where an employer does not plan to mandate the vaccine, it should undertake, at least, a strong education campaign to its employees about the vaccine. Encouraging them to get it on their own. In that way, I think the employer could be said to be doing what it needs to do, at least under OSHA.

Rubenking: Thank you Amy. This has all been very informative.

Traub: Thank you Randall.

Rubenking: If you have any questions for Amy, her contact information is in the show notes. As always, thanks for listening to BakerHosts.

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