



Episode 4: “What’s up With COVID-19 Vaccination Mandates? Part 2: OSHA Vaccination Rules, With Michael Sciotti”

Speakers: Ari Kwiatkowski, Barclay Damon, and Michael Sciotti, Barclay Damon

[Ari Kwiatkowski]: Hi, everyone, this is a Barclay Damon live broadcast where we discuss all things L&E, labor and employment. I’m Ari. Let’s dig in.

[AK]: Hi, everyone, welcome to what’s up with COVID-19 vaccination mandates, part two. Today we are going to go through the nitty gritty of the Occupational Safety and Health Administration (or OSHA’s) ETS vaccination mandate. Joining us today, I am so happy to introduce one of my absolute favorites, Mike Sciotti. We work together a bunch and he’s awesome. Mike is a partner in our Syracuse office, and he has decades of experience representing employers in many facets, counseling employers on wage and hour issues, discrimination issues, the whole gamut. And he has tried several discrimination trials to verdict. So Mike, thanks for joining. How are you?

[Mike Sciotti]: Very good. Thanks for having me.

[AK]: Happy to have you. Mike, one of the things that we’ve been doing and I, you know, again, I don’t mean to put you on the spot, but you’re on the spot...is just asking our guests to give us a fun or interesting fact about their personal or professional life just to kind of break the ice, and from knowing you, I’m sure you have many interesting facts about yourself over your practice. But I’ll turn it over to you just to give us a little preview.

[MS]: Well, I’ll tell you one that’s personal and surprises a lot of people. I own over 50,000 comic books.

[AK]: WHAAATTT??? 50,000? You know, I did not know that about you, but we’re going to have to have an offline conversation, because I’m very into all the Disney+ Marvel shows that have come out. I don’t know if you’ve been tuning in.

[MS]: Absolutely, I don’t miss any of them.

[AK]: Great, we’re going to talk offline about that. We won’t subject our listeners to that, although maybe some of our audience would like to hear about that. But anyway, Mike, thanks again. I think we should dig right into it because we have a lot to get through and this is some complex stuff. So just briefly, on November 4, OSHA issued its emergency temporary standard or ETS vaccination mandate. It was scheduled to go into effect November 5. Mike, before we get into, you know, the the details. Can you just tell us generally what this OSHA rule is?

[MS]: The OSHA rule is currently stayed, meaning no employer has to move forward with the regulation giving an injunction that’s in place by the court. If the injunction is lifted—and the Department of Labor has made an effort recently to make that motion, to lift it—what will happen is the standard would go into effect. My guess is OSHA would set new deadlines for employers to comply, and employers that have over 100 or more employees would have to comply with the standard, which basically is your workforce is going to have to either be fully vaccinated or you come up with an alternative, which would be a weekly testing for employees coming into the workplace.

[AK]: Great, and we'll get into the details of that, for sure. But I just want to circle back to a point you made about the status of the mandate. So, you know, it's my understanding that right now the mandate is stayed as you mentioned, and that's the result of a Fifth Circuit decision staying it. And then, you know, OSHA has come out and said, as a result of that case, we are not going to enforce the standards at this time.

[MS]: That's that's 100% correct. And given the fact that there were lots of lawsuits filed all over the country against OSHA, it wound up in what's called multi-jurisdiction litigation. And the Sixth Circuit Court of Appeals will be making a ruling that will have nationwide impact after that ruling; I think regardless of which way it goes, it's going to wind up in the US Supreme Court.

[AK]: So Mike, you mentioned that the Sixth Circuit is hearing it, is hearing the case. You know, and I think that's a result of like a multi-jurisdictional lottery, which basically happens in federal court when, as you mentioned, you know, you have a bunch of states or a bunch of different lawsuits filed. And you know, I think what's interesting is that the Sixth Circuit, it's my understanding, you know, out of those 16 judges that are there, 11 of them are actually Republican appointees to the court. So I think, you know, I think it'll be interesting to see how this how this shakes out.

[MS]: Yeah. And I wouldn't put too much credence in that "Republican or Democratic appointees"—once someone goes on the bench, they sort of get a mind of their own because it's appointed for life. The one thing I think this is, some people think, well, it's about whether the mandate is a good idea or not. And it's not. It's about that does OSHA have the authority to do what it did in that regard. So it's really an authority question at the end of the day. So we'll see how it pans out and then we'll just have to wait.

[AK]: Yep. So you anticipated my next question, Mike, which is, you know, basically the basis of the challenge to the mandate and it's really an authority issue, as you mentioned, whether OSHA has the authority under the Emergency Temporary Standards Regulations to make such a broad or sweeping mandate.

[MS]: Yeah. And one of the things the the court in Texas pointed out was that they took four months to develop an "emergency" standard and their response was basically, it couldn't have been that much of an emergency if you spent four months doing it. So that's going to be a problem for OSHA, because I think that's the reality of it. And then there were some comments made by President Biden which were being used against the administration in the litigation as well. So it's going to be interesting to see how this turns out.

[AK]: Agreed. And you know, to our listeners, stay tuned because, you know, hopefully we'll have an answer in the somewhat near future. But you know, as of right now, the mandate is stayed. But notwithstanding the stay, it is important for us to talk about the requirements of the mandate because, you know, as we mentioned, they are pretty expansive. So let's dig in Mike,

[AK]: If you guys listened to our first couple of episodes, we warned you how quickly things can change. Subsequent to the recording of this episode, the Sixth Circuit lifted the stay on the OSHA rule, basically holding that any associated risk with the continued spread of COVID-19 outweighed any harm caused by the mandate. Subsequent to the ruling, the United States Department of Labor has issued a statement saying that employers have until January 10, 2022, to come into compliance, but that there will be a grace period until February 9 for those employers who are using good faith and reasonable efforts to comply with the rule. Also subsequent to the ruling, an immediate appeal was filed with the United States Supreme Court, and the court is scheduled to hear oral argument on January 7. We'll be sure to keep you updated.

[AK]: ... (continued) you know, you mentioned generally what the mandate is. I wanted to talk with you a little bit about, you know, who the mandate applies to on the employer side. I know you mentioned its employers with 100 or more employees. Are there any other eligibility requirements or things like that for employers that the mandate would apply to?

[MS]: Yeah, a few. There's a few. I call it the Biden triangle. There were three initiatives launched by President Biden at once. One applied to federal employees and federal contractors. The other to health care workers. The other to private sector employers employing 100 or more employees on November 5 or thereafter. And I'll explain that in a second. So the requirement is that you don't fall into either the federal employee/contractor mandate, which is also stayed or the CMS health care worker mandate, which I believe is also stayed as well. In this regard, I think there's this injunction that another court has issued.

[AK]: Yep.

[MS]: So that's the triangle and who is impacted generally.

[AK]: So, Mike, just focusing on the mandate that applies to employers with 100 employees or more. If you're an employer, how do you count the number of employees that you have to satisfy that 100 employee requirement?

[MS]: Sure. Let's assume the first date that we use is November 5, 2021. How many employees did you have as of that day? A part-time employee counts as one, a full-time employee counts as one. In that regard, there's no difference between a part-timer and full-timer. And basically, I take a look at your payroll records and I figure out how many employees you had on that day. Now, let's say on November 5, you had 90 employees and then you hire 10 more in January 2022. You become covered on the day that you hit 100 employees. And, the last part of the test is what if I started out at 100 employees, but then I got rid of half my workforce because I lost a big contract. You're still covered. Once you're covered by the emergency temporary standard, you are covered until it is lifted by OSHA, and that assumes that at some point it goes into effect.

[AK]: Right, and I think that's a really important point to make, Mike, because there really is no account for fluctuations in workforce. So, you know, obviously a lot of employers are experiencing that as a result of the pandemic. But the fact remains that if you had at some point after November 5, 100 or more employees, regardless of, as you mentioned, whether you fired half of your workforce, you're still going to be covered by the ETS mandate, assuming that you know the mandate is upheld.

[MS]: Correct.

[AK]: So, Mike, you mentioned that, you know, the mandate requires that employees be vaccinated. I'm curious what qualifies as "vaccinated" under the ETS mandate?

[MS]: The good news is the booster is not part of the mandate, so you can sort of set booster shots aside, but basically you have to have one of the FDA-authorized shots completed. So one Johnson & Johnson or two of the Pfizer or two of the Moderna is what's going to qualify. There's also a very limited exception. There are some individuals out there receiving clinical trials for experimental COVID-19 vaccine shots. They would also qualify in that regard. They don't know a lot about what the experimental shots are, but there is an exception that is carved out for them.

[AK]: So Mike, to be vaccinated under the mandate you have to have, if there's a vaccine that calls for two doses, both doses and that is there a waiting period then after the second?

[MS]: Yes. Yes, there is. I think it's a seven-day lookback if memory serves correctly, so you have to be fully vaccinated and then basically serve out the waiting period and then you qualify, you meet the definition of fully vaccinated.

[AK]: Understood. So Mike, I know you mentioned the mandate as a vaccination or test-out mandate, so ... that meaning you have to require that employees be vaccinated or you can have a test-out option, which we'll talk about more later. But under the ETS mandate, what qualifies as a COVID test?

[MS]: Yeah. So the COVID test ... it's an employer choice: Are we going to require everyone to be fully vaccinated or just part of our workforce and allow a test-out procedure? So it starts with what does the employer want? The question of what qualifies as a test. You know, we have these over-the-counter tests that are out there. That test can be used, but the employee cannot both self-administer and self-read the tests. So the regulations point to, you know, the employee can do the test in front of the employer, or a telehealth provider that's authorized by the employer. And that's one way to do the test. Or you go to an urgent care, you go to a hospital and you get a test there, and within 24 hours you'll get back a little piece of paper saying, COVID/NO COVID. And that is what you would ultimately give to your employer if you went to some third party. So that's in a nutshell, that's it.

[AK]: That makes sense. But basically, I guess it's important for us to know for our listeners that, you know, an at-home COVID test just self-administered by an employee is really not going to cut it without that extra step.

[MS]: You need that, it can't be both, self-administered and self-read, and you need someone to handle one part of it, if you would. And I think my view, the best way is if the employer's going to allow it, have the employee administer it and then have the employer read it or have the telehealth do it. But I also you know... we all know what the COVID test is. Was it far enough up the nose, did it touch the brain, you know, stuff that I want to know nothing about if I'm an employer and whether you do it or not, you just say go to some third party is really an employer choice...

[AK]: Yes, that makes that makes sense. So, Mike, you know, let's focus on the first piece of the mandate. So let's assume that an employer decides that they are going to implement a mandatory vaccination policy. I wanted to talk with you a little bit about what exceptions there are provided in the mandate if an employer decides to go that route. So there is an exception for employees who are not able to get the vaccine under those circumstances. If the employee, excuse me, if the vaccine is medically, I think the the word is contraindicated as per the regulations. Is that right?

[MS]: Yeah. And what that typically is, is you could be on some type of medication that is not a good idea to get the shot while you're on, so until you're off it, the physician may take the position you can't get the shot because you're on some medication and it's going to hurt you, it's going to counteract something. So that's one of the big exceptions that we see, and I've heard contradicting things. But one of ... the one of the drugs, I believe it is prednisone. If you're on prednisone, I don't think you're supposed to get the shot, but I've heard contrary things in that regard. But it's really a medical determination relative to what the employee's individual medical status is.

[AK]: Right. So in addition to, you know, whether there is a medical contraindication for the vaccine or, you know, I think there's also an exception, which I think you mentioned, which is, you know, if there's some medical reason for the vaccine to be delayed because you're on a particular medication or you have some, you know, some medical condition that you know, a physician determines, and that's probably an important point to make, Mike: this has to be something that a physician determines is medically contraindicated, right?

[MS]: Yeah. So what I would put that in is that I would classify that as a reasonable accommodation because of a disability that's based on a medical condition. It's not something for the employee to wake up one morning and say, "I don't want that. I don't want to do this. I'm afraid of needles. I don't know what's in the vaccine, they're tracking me ..." or whatever else employees are going to say. It's a health care provider determination that you have some medical condition that is contrary to and could cause you harm if you get the vaccination. One of the things, actually the only thing I've seen so far are some individuals who have certain types of allergies, the immunization is not recommended for in that regard. And if you get a medical notation and a medical record of some type saying this is the deal why...the employer has the right to question it or accept it. And if they accept it, we have to come up with the alternative. But I think the approach is, OSHA has sort of laid out the alternative for us: it's the testing. You know, if you're coming in the office for a shift, we're going to test you every seven days and the only way you get in here is if you hand me a piece of paper saying you had a test and you're good for seven days.

[AK]: Right. So Mike and I, I think you anticipated my question and you know, we talked about this last week in the context of the CMS mandate and in the context of the New York health care vaccination law. Is, in the ETS mandate, is there an explicit exception for individuals who have sincerely held religious beliefs or, as you mentioned, you know, have a medical condition or disability which prevents the individual from receiving the vaccine?

[MS]: Yes. Yes to both. So the first one we would look at is under the Americans with Disabilities Act and the corresponding state law, the Human Rights Law and does it ... and the undue hardship rule also comes into play there. You run it like a normal disability accommodation like we have been since 1990. There's nothing special other than it's brand new and we have to deal with it under Title VII and the state human rights law, individuals who have a sincerely held religious belief may be entitled to a religious accommodation so they don't have to get the vaccine. That's going to be problematic for many individuals because pretty much the major religions have come out and said the vaccine does not violate their tenets. It's ok to get it. And you also have the religious aspect, the analysis of undue hardship and whether allowing the religious accommodation causes the employer that undue hardship. So they're all at play. But again, I think they're easily solved by the other part of the OSHA mandate. Like, okay...You don't want to take the test. We're going to give you the test-out option, and that seems to be the key. You know, one of the things we're seeing Ari, and I sort of chuckle, is some employees are taking the position. I refuse to get tested because of clearly held religious beliefs, which so far has not held water in any analysis that I have done or others done in the office. I think that's a crock. To be frank in that regard. They just don't want to get tested. But I think the key on the religious aspect is that the major religions, what I call the mainstream religions, Christianity, Judaism, Islam, Hinduism and Buddhism sort of come out and said, this is OK, and what we're dealing with are individuals who don't want to get the shot in the vaccine, and they're suddenly citing scripture. They're suddenly saying they're Christian and they're putting this forth, employers who are pushing back and pushed back with the right questions ... You know, they're denying their religious exemptions because ... some of them are just making it up. Some of them, it's not sincerely held and others are newly formed churches we had recently the Church of the Anti-vaxxers, which was recently formed, and it's a direct response to the COVID vaccine. So there's so much at play here, it's amazing.

[AK]: And I think at least for me Mike, and I'm sure for you, you know this, the religious, the sincerely held religious belief aspect of the exception is something we're getting a lot of questions about, as you mentioned, because, you know, it's really been a real hot-button issue. So to our listeners, stay tuned because next week we're going to go into a little bit more detail about what to do if you're an employer and an employee is refusing to get vaccinated on that basis. But, you know, I think that's great, Mike. And you know, we did talk about, of course, employer eligibility and what employers are covered under the mandate. But what I wanted to talk with you about next is whether the ETS mandate applies to all employees within that workforce.

[MS]: Yeah, the answer is “no.” It generally applies to employees coming into the office. So don’t confuse here the coverage test, whether you’re covered by the standard with whether it applies to a specific employee, the standard itself, the substance you must be vaccinated or test out applies to those employees coming into the office. So, if you have a workforce of 150 employees, 50 of which work at home exclusively, it’s key, exclusively, they don’t have to comply with this standard. But let’s say you have one of those 50 employees who needs to come in for a meeting, they’re going to have to either be fully vaxed or test seven days before coming into the office. There’s also an exception for working exclusively outdoors. Usually, it’s a construction industry, we’re seeing, again, exclusively outdoors, if they work five days a week, they’re in the field five days a week. It also covers your company vehicle, and the OSHA standard, surprisingly, goes into excruciating detail on what is a “completed building,” in that regard. So if the air is not free-flowing from the outside, that’s into our work in that regard. Highly fact -pecific, but we did get into a lot of detail.

[AK]: So, Mike. I think that’s a really important point about exclusively working from home because I know, you know, a lot of employers and a lot of our clients have a hybrid workforce right now. Some people come into the office, some people are required to, you know, it’s industry-specific. Some people do work exclusively from home. But you know, I have a question as it relates to, let’s say you have 100 employees, 50 are exclusively work-from-home and 50 come into the office. All of those 100 are, excuse me, all of those employees count toward the 100-employee requirement, right? But with the caveat that only the 50 who do not work exclusively from home or come into the office are required to be vaccinated, is that right?

[MS]: That’s 100% correct.

[AK]: Right. So I think that’s, you know, that’s kind of an interesting point to make because there’s a piece of it where these employees count toward the total number. It’s very broad as it relates to counting how many employees fit, you know, satisfy the 100-employee requirement. But then when you’re actually looking at each individual employee, it’s not always the case that every single employee will need to be vaccinated.

[MS]: Correct. And also just remember the ... we’re seeing some employers impose more rigid standards than OSHA was even doing. That is allowed.

[AK]: Yes, that’s a really good point, right. So basically, if you know, if you’re an employer and you want to implement, you know, I’ll call them safer, more restrictive, you know, policies as it relates to this mandate, you’re permitted to do that.

[MS]: Yeah, and there’s one interesting caveat which we haven’t talked about the ETS standard indicate it preempts contrary state and local laws, not ones that are in harmony with it and not ones where they sort of exceed it. And when I first read it, I was a little perplexed. But then it hit me what they were referring to. Not so much here in New York and in the Northeast. But as you start to go down into Texas, Louisiana, and Mississippi, George and Florida, there’s a bunch of laws down there that have been active at the state and local levels that say, “Dear Employer, you cannot force your employees to be vaccinated.”

[AK]: Yes.

[MS]: That would be something that is contrary to the OSHA standard and the OSHA standard if it is ultimately deemed legal, would overrule that in that regard. But it wouldn’t overrule, for instance, if you have a fully vaccinated workforce like your entire workforce is fully vaccinated and the employer says we still want you to wear a mask at all times ... So that would be something that would be not contrary at the end of the day under the standard.

[AK]: Great point, Mike. So just circling back to what employees are covered? What about part-time employees?

[MS]: If they are coming into the office, they would be covered by the standard. If they're not working exclusively outdoors, they're covered by the standard, and they would count towards the overall coverage determination as well.

[AK]: Understood. And then I did want to ask you, Mike, because I think, you know, a lot of employers have this type of employment relationship and I know our clients do. What about independent contractors?

[MS]: Independent contractors are not employees and therefore do not count towards the the underlying, "are you covered by the standard" or the underlying parts of the standard. So they simply are deemed not relevant. However, we all know those of us that practice labor and employment law... The government can challenge the status of an independent contractor claiming you're really an employee, and so can the independent contractor.

[AK]: Yes. So, Mike, you know, before we get into just kind of what a mandatory vaccination policy under the ETS mandate should include, I did want to ask you briefly, you know, what about our listeners who have unionized workforces? Does this mandate apply to unionized workforces and is it the same 100 employee threshold?

[MS]: Yes, yes to both. It applies to unionized workforces, and it's the same threshold. The interesting thing that the ETS, adds is the union and employer are free to agree on additional safeguards as long as they meet or exceed the OSHA standards. So a unionized workforce and the employer, I think, have a little more flexibility than the non-unionized workforces under the standard. But they still have to, at the minimum, meet the standard in that regard. So a little more wiggle room, but I don't think it's as much as people think.

[AK]: Yeah, and I think that's consistent with, you know, the the basis of collective bargaining. So essentially, what you're saying, Mike, is if you have a unionized workforce, you can provide for what they call greater protections in the collective bargaining agreement than what the ETS mandate calls for. But you cannot bargain or agree to lesser protections.

[MS]: Correct.

[AK]: I think that makes sense. So, Mike, you know, I just wanted to talk with you as well about, you know, the content of these of the mandatory vaccination policy. And I would point out as well for our listeners that, you know, I think OSHA actually does provide some sample policies, if you if you go to the website, is that right?

[MS]: That's correct. There's two versions of the policies that are out there. One is for the employer that has a mandatory vaccination policy only, and the other one is the hybrid that allows for mandatory vaccine for part and the test out for them. I am recommending to employers if the ETS standard is affirmed eventually to simply adopt one of those, depending on which one you're going to do. It is, I describe it as a "fill in the blank," but it's pretty involved. It's going to take you hours to fill in the blanks, if you would, relative to your workforce. Very detailed. I think one of them is eight pages long and the other one is 10 pages long.

[AK]: Yeah, I saw that.

[MS]: Yeah. And so there's a lot in those suckers.

[AK]: Right! So, Mike, just generally, you know what does the vaccination policy and I don't want to get into, you know, complete nitty gritty type details, but what are just the basic things that need to be included if you decide to go the route of the mandatory vaccination policy?

[MS]: Sure. You know, a lot of it is an explanation of the ETFs and the standard itself and what have you to sort of put the employees at ease as to why this is going on.

[AK]: Yes.

[MS]: there is going to be a component for religious accommodations. There will be a component for the disability accommodations. OSHA has identified a series of items that you must reference or somehow direct the employee to, including CDC standards, reminding an employee if they provide a fake vaccine card that that is a felony under federal law and sort of warning employees, hey, if you do this you're committing a federal felony, which is not a good idea.

[AK]: Not great.

[MS]: A lot of it is your general HR stuff. You know, who do we go to, how do we prove we're vaccinated? What is it? How do we upload that proof? Things like that that you would typically expect to see. But when you look at their policies, Ari, it's basically everything that we've talked about thus far in there in one form or another. And, everything we're going to talk about moving forward is going to be in there in one form or another, very comprehensive.

[AK]: Yes, agreed Mike. And there is a requirement as well that the policy is distributed to every employee. Correct?

[MS]: Correct. I would recommend that you get an employee sign off either real signature or an electronic signature—doesn't appear to be required. I think that's just HR 101. I would post the policy with your other employment posters and keep it there as well. There is no requirement that you give it to OSHA initially. There are some rules that are in there about if OSHA asks for it, you do have to give it to them, but that's it. Don't overlook the general HR stuff. Get the sign up. I don't want an employee saying I never got the policy. Make them sign off.

[AK]: Right. That's important to Mike because, you know, it's a policy, you know, a larger policy that OSHA has mandated, but all the common sense stuff or the practical stuff that we talk about as it relates to, you know, distributing the policy that stuff is is all still in play.

[MS]: Great.

[AK]: So I just wanted to talk just briefly, Mike, about a couple of housekeeping type things like we mentioned in the ETS. Is there any requirement that you have to file your mandatory vaccination policy with OSHA if you're an employer?

[MS]: There is not. There is initially there is not. However, if OSHA asks for it, you are required to produce it to OSHA within four business hours. Most employers probably would be surprised by that. But if this standard goes into effect and if OSHA calls you, faxes you, emails you, we want it...you have four business hours to do it and make sure you understand what that means if they ask for it at 9:00 in the morning, you have until 1:00 to produce it in the afternoon. But if they asked for it at 5:00 and the close of the business day, it's four hours the next morning that you'd be required to produce it. So you have to you have to give it up.

[AK]: Yeah, that's good to point out because that is a very quick turnaround time.

[MS]: I've never seen anything like it in 30 years of practicing law, but it is the quickest turnaround time I have ever seen.

[AK]: Wow. Well, Mike, thank you so much again for joining us today. I think this is a good place for us to stop. We still have a lot of material we want to go through with our listeners as it relates to the requirements of the ETS mandate. But the good news is next week we will pick up right where we left off and we will talk about proof of vaccination under the ETS mandate. Mike, anything to add before we sign off?

[MS]: Nope, look forward to the rest of our chat.

[AK]: Absolutely. Well, thanks for listening, everybody. See you next week!

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