



Episode 5: “What’s up With COVID-19 Vaccination Mandates? Part 3: OSHA’s Test-Out Rule, With Michael Sciotti”

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[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 three. In this episode we are continuing our discussion of OSHA’s ETS mandate, which as our listeners know, if you listened to last week’s episode basically is a mandate which requires employers with 100 or more employees to adopt a mandatory vaccination policy or a test-out requirement. As we mentioned last week, the mandate is currently stayed. But it is important that if you are an employer and you have over 100 employees, you know what’s going on with this because it’s really hard to predict how this will all shake out. I am thrilled again to announce we have Mike Sciotti joining us this week. Mike and I talked you know about a lot of the requirements in the mandate last week, and we’re just going to pick back up right where we left off. Hey Mike!

[Mike Sciotti]: Hello again.

[AK]: Thanks for joining us...[Laughs]

[MS]: No problem.

[AK]: So, Mike, you know, when we ended last week’s episode we got into, you know, the contents of the mandatory vaccination policy and also, you know, the kind of the recordkeeping requirements for employers. What I wanted to start with today was to ask you, you know, must an employer who, you know, has implemented a mandatory vaccination policy verify that its employees are in fact vaccinated?

[MS]: The answer is yes...you’re going to have to basically come up with a manner in which to determine the vaccination status of your workforce. You know, typically what we’re seeing are employers asking a series of questions to their employees and requiring them to upload their vaccination card. So it would be like, question one: Let’s say it was the Pfizer, question one: What vaccine? Pfizer, Moderna or Johnson & Johnson? You picked Pfizer. Date of first shot? Date of second shot? And now we’re starting to see the booster question: When did you get the booster? And you upload a copy of your card. That would be an acceptable proof of vaccination in that regard—just remember what I said, I think last week: The ETS does not cover the booster. It’s something that you as an employer want to know. Especially if to determine accommodations I think it’s prudent to know what part of your workforce is vaccinated and what part is not, at the end of the day. We’re also seeing some geniuses out there who have lost their card...really?? You know, there is an attestation form available. There is another way—through your health care provider giving the information. But the best proof, the easiest proof seems to be uploading and producing a copy of the card itself. So just make sure, if you remember from last week, I said, if you have a policy, within your policy, you have to give an employee a warning: If you give us a fake card, it’s a felony act and it’s real serious. We’re seeing people prosecuted. I did do a search last week on Google about purchasing a fake vaccine card. I actually came across some sites that were able to do it. So these sites are out there and your employees are going to try scam you And just funny story Ari, I don’t know if you

saw this... An employee got busted the other day, he had a fake arm, he went to get the vaccine, and he had a fake arm! So he was trying to get the vaccine, pretend to get the vaccine, but using a fake arm, he got busted. I mean, it's just amazing what we're starting to see.

[AK]: I did not see that, Mike.

[MS]: Yeah, that is pretty funny. And the other the other thing here in New York is... the Excelsior Pass, where they download a copy of an app and then they ask a series of questions and it's tied into the state's records, and you get this pass that shows you're good! And I think that would qualify as well.

[AK]: Yeah, I think that's a good point too. And I was going to ask you about the Excelsior Pass. You know, I know myself, you know, our listeners know I'm in the Buffalo office. I actually was in New York City last weekend and, you know, I had to show proof of vaccination. I used the Excelsior Pass, you know, pretty much anywhere I went. And last night I actually went to see Hamilton at Shea's in Buffalo and also had to show proof of vaccination through the Excelsior Pass. It's definitely an easy way that you can show proof of vaccination.

[MS]: Yeah, and I think what's happened between last week and this week is also that New York state implemented you either have to check the vaccination status of everyone coming into your workplace and they have to be fully vaccinated, or, you basically have to mask up everyone even if they're fully vaccinated for indoor parts of your facility with a few exceptions. You know I went to a bank yesterday, and the bank had a security guard there, "show me your proof of vaccination coming in, or you're not coming in. And so, it's reality.

[AK]: Yep, and actually, to our listeners tune in because next week we are going to talk about the new mandate that went into effect in New York state as it relates to the indoor mask mandate. So stay tuned. So, Mike, just getting back to, you know, I think we we talked about proof of vaccination and what qualifies as proof. And you know, I think you mentioned, you know, if you lost your vaccination card or if you can't provide proof, there is an attestation form, I think you mentioned, correct?

[MS]: Correct.

[AK]: Does that attestation form have to have any type of physician or medical provider signature on it?

[MS]: No. It includes the following: the employee signing an attestation, that they're fully vaccinated. Which dose did you take, when did you take them, who administered them, that you've lost your card and you can't find it. And then there's a criminal warning; that, basically the employees saying, I swear to this under penalties of perjury, and I realize I can get arrested if I'm lying. That is the sum and substance of it. It's enough to verify, if you needed to, the underlying truth of it. Especially if OSHA did an audit, OSHA could go back to the health care provider, arguably, and see if this is true or not. And probably cross-reference with the state—but the health care provider does not have to sign it. There is a separate one with the production of medical records from the health care provider. That would be sufficient as well.

[AK]: Understood. And that leads me to my next point, Mike, which is, you know, if you're an employer and you have this policy, you have to, you know, have proof of the employee's vaccination status. And I think you have to have a roster of each employee and their vaccination status. And like any other medical record, you would keep that proof of vaccine ... vaccination separate from the employee's personnel file. Is that right?

[MS]: That's correct. All this would be subject to what I call the "medical record confidentiality requirements" for the ADA, GINA [Note: The Genetic Information Nondiscrimination Act of 2008], the Human Rights Law, which basically says the medical stuff is not placed in the personnel file, but is kept separate and apart in the medical file.

[AK]: So just the last point on the mandatory vaccination piece, then I want to transition in talking about the test out, you know, piece of the ETS mandate. But I think that the regulations have some specific ways that employers must support, you know what the regulations deem “support” that COVID vaccination, COVID-19 vaccination for employees, is that right?

[MS]: That’s correct. two main things you got to go let them get the vaccine during work hours, if that’s when they get it and you’re going to have to pay them up for four hours in that regard. Sort of consistent with the New York state vaccine leave law in that regard. And then you’ve got to give them time to recover if they have a reaction in that regard. And you know, like here in New York, there was already a directive from the Department of Labor: Paid sick leave should be used in the first instance, for the recovery of it. The OSHA standard adds one interesting thing though: You cannot force someone to go into the negative under paid sick leave in that regard. So I interpreted that it would be leave without pay, and you can’t let their account go into the negative.

[AK]: Yes.

[MS]: So that those are the two general, very general things that it requires. Again, I don’t think either one is a shocker to people or a big deal. Some of it ... and the other thing I’d add ,Ari is, if the employee schedules the vaccine during non-working hours you do not have to pay that, up to the four hours because they did it on their own time. But you do have to allow them time off to recover if they have an adverse reaction. Now everyone is different. You know, for me, shot one did nothing. Shot two I slept a lot. And the booster, I slept like 14 hours. But everyone is different and other people, there’s nothing and some people will be back to work immediately. I’ve known people for five days, they were affected by Pfizer 2 or Moderna 2. I think it just depends on the person and how they react.

[AK]: And it’s so interesting, I think, you know, with everything with the pandemic, that’s obviously been such a theme that it seems like everybody reacts differently to, you know, pretty much everything surrounding the virus, so presents some additional challenges, I would say.

[MS]: Yeah. And one of the biggest challenges I see for employers is keeping up with all this stuff! I mean....I have yet to meet someone who fully gets every aspect of this. Because it seems like every day there’s something... we’re getting hit with. Whether it’s like a couple of weeks ago with the New York City mandates, then we have the face-covering mandate. It’s constant!! So, to the employers, don’t feel bad if you can’t keep up, none of us can.

[AK]: So I think it’s, you know, it’s a lot to keep track of. I think it definitely keeps our jobs pretty interesting, very interesting. But I was saying to my husband last night, you know, I kind of miss the days where you didn’t have like a new law you had to keep track of basically every week, you know, depending on where you are too. And then kind of you throw the New York City stuff in there and it’s, you know, just in New York, it’s a whole different ballgame. But Mike, that’s great. You know, I think we went through everything I wanted to talk about as it related to the vaccination policy piece of it before we talk testing or the test-out piece. Anything else you want to add on the the vaccination piece?

[MS]: No, I would just say you need to monitor this and see where it goes with OSHA. And ultimately, the US Supreme Court issuing a ruling. And that’s the difficult part. I think that if the standard is upheld, the dates will be reset by OSHA.

[AK]: Yes.

[MS]: Otherwise, I think what we’ve discussed is the thrust of it knowing, yeah, there are more details in it. But, you know, I think you’re sort of getting the thrust of it by this podcast.

[AK]: There are more details and also stay tuned because, you know, kind of up in the air. So Mike, let's talk testing. So, you know, I know we talked last week briefly about the test-out piece of the ETS mandate, but can you just tell our listeners, you know, what does that piece of the mandate say?

[MS]: If you're going to allow a test-out, who administers the test. I mean, it can either be...most people are going to a third party to go to a hospital and get tested. They'll go to their physician and get tested, they'll go to an urgent care like, WellNOW and get tested, and then they'll come back with the result a day or so later. All those are acceptable. We also see this ... these home-administered tests if you can find them. You know, they're all like \$25 a shot. If the employee wants to use one of those, they can, but they cannot both self-administer and self-read the test. You either have to get the employer involved or a telehealth provider to assist with it. For that reason, I'm telling employers to shy away from that. Basically tell them hey go ... I don't want to get involved in reading your test result or administering the test. Go to a WellNOW or something like that, go over there and do it.

[AK]: Right. So, Mike, for the testing out piece of it, I wanted to ask, you know, does this apply again to all employees or these are, you know, if you're if you exclusively, if you work remotely, exclusively, are you subject to some testing requirement?

[MS]: Yeah. So... the workers who are exclusively remotely, they don't come in the office at all. None of the testing requirements and the vaccination requirements do not apply to them. Where it comes up, Ari, let's say you've got 50 employees working remotely. One of them is asked to come into a meeting in the office, and they want the person in there. They don't want to do it by Zoom or Teams or something else. The employee must provide a test result if they are not fully vaccinated and you need that seven-day lead-in, in order to do it. So you're going to have to plan it out a little bit to make sure that the employee has sufficient time to test and come on in. There would be no testing issue if the employee was fully vaccinated. They could come on in immediately if they were fully vaxed. It depends on the employee, and that's why I think—even for the ones working exclusively at home—I think you must track the vaccination status of those individuals, have them upload the proof, so you have it. It's going to be very important. And some employers are complaining they expect me to keep track of all of this. My response is...Yes! End of discussion. You have to do it!

[AK]: So the testing requirement applies to non-vaccinated workers who report to work at least once every seven days. That's right?

[MS]: Correct.

[AK]: OK, now that was important, and smart of you to point out, Mike, that, you know, if you do have an unvaccinated worker who predominantly works remotely, it's not a situation under this mandate where you can say, OK, unvaccinated employee, we need you in the office in three hours for a meeting...

[MS]: Can't happen!

[AK]: You need to have the proof a negative test before that individual can come into the office...

[MS]: Correct. And some of this will create a burden to an employer if it's an emergency situation But, you know, I think... Don't overthink it employers. I mean, some of it is as simple as hopefully you can plan things out. Hopefully, you really don't need the employee in... you can do a Zoom. But if you really do need the employee, there's not really an exception unless they're fully vaxed to come in right away. So just be aware in that regard.

[AK]: Yes. So let's talk a little bit, Mike, about, you know, the proof of a negative test, what qualifies as proof of a negative test under the ETS mandate?

[MS]: Sure. So, you know, like I indicated, you went to the hospital, you went to a WellNOW and they give you a little piece of paper ...I've gotten like 10 COVID tests, negative cards, COVID-19/SARS not present. That is something that will clearly qualify in that regard. Also, remember what I said about, you know, self-administered tests. If the test was done properly in accordance with the manufacturer's directions and the employer reads it and it shows negative that's going to be acceptable as well. What you can't have is an employee, self-administering and self-reading their own test result. That would not be acceptable at the end of the day.

[AK]: Right. So Mike this test-out portion of the mandate... Basically, it says unvaccinated workers must, you know, be tested regularly, once every seven days. And in addition, if an unvaccinated employee is in the workplace, the unvaccinated employee must wear a face covering correct?

[MS]: That is correct and they go into ad nauseum detail as to what is an acceptable mask covering.

[AK]: Yes. So, basically, this is really twofold. It's testing and mask-wearing for unvaccinated employees.

[MS]: That that is correct. And the employer, you know, you have an obligation to make sure that they're wearing a proper mask, that the mask is fitted properly, you're not wearing it down here, which you know, you go through the Dunkin Donut line and all the workers have their mask down here...

[AK]: Yes.

[MS]: If it's wet or soiled they can tell them to replace it. Some other rules they put in place, was, you know.. if the employee wants to wear a respirator to work, you know, the full thing... you can't stop them... They're entitled to, you don't have to provide it. But if they want to go overboard and wear basically a gas mask, you know, they're entitled to at the end of the day. I don't know how it's going to work with workplace communication. But you know, you can't prevent it. The employee can also wear a face shield over the covering, and you as the employer can't stop it, in that regard. You know, the only thing I would say is you can't stop it; I use it very generally. If there is some safety issue created by the mask ...

[AK]: Yes.

[MS]: I think you're always allowed to intervene in that regard. But it's so business-specific and I haven't come across a specific scenario yet where that was an issue. Sometimes you look at it this way, it's like if the mask creates a hazard. So like, if I'm wearing jewelry and a long necklace and I'm working around machines that go like this [gestures] I'm well within my rights as an employer to ask them to take that jewelry off because you could hurt yourself or you can kill yourself or others in that regard.

[AK]: So, Mike, but the ETS mandate does provide for certain exceptions to this to the face covering requirement. For example, if an employee is alone in a room with floor to ceiling walls and a closed door, then the employee, while in that space does not have to wear the mask.

[MS]: Yeah, and it's sort of what we're dealing with right now here in New York. There is a common area rule, like the elevator, the reception area, the hallways, you know, you mask up. But if you're in your own office with the door closed, and not a cubicle—

[AK]: An important distinction...

[MS]: ...it's a confined four-sided space, you're allowed to take it off. In that regard, there's exception for eating lunch as well. So yes, they exist, but they're very limited in scope.

[AK]: So, Mike, a question that's kind of twofold under the the mandate, does an employer have to pay for one, testing and two, face coverings?

[MS]: No and no is the general rule. But what we are seeing more often than not is if the employer is mandating the test, sometimes they're holding testing clinics right at their facility, and they'll pay for it. We're seeing employees more and more ... the employee forgets their face mask. They have one available to them in that regard, but generally speaking, the directive and ETS standard says "no." Then there's the practical reality of what's going on in the workplace, and many employers are doing this. Many aren't, but many are.

[AK]: I think that makes sense. You know, I guess depending on the size and the, you know, your workforce and whether your workforce does report to work predominantly or, you know, I guess it's it's a very particular individualized decision.

[MS]: Yup. And then the other thing I would simply say is you need to analyze if the OSHA standard goes into effect, you always have to remember the state law and the local law. If it provides a greater duty on you as an employer, if it's not inconsistent with the OSHA standard, you're going to have to follow that as well.

[AK]: Exactly. So Mike, I know we talked about this in the context of the mandatory vaccination policy, but I did want to touch briefly on, you know, an OSHA-related inquiry, you know, about these testing requirements. So I think the regulations basically have certain requirements. You know, if an employee makes a request as it relates to the testing, you know, how an employer must respond and what the timeframe is, if you could talk about that.

[MS]: Sure. OSHA has always allowed employees to make requests of their employer regarding certain medical issues. So, for example, an employee can always ask for a copy of their medical file and the employer has to give them a copy of it or let them look at it and make copies, whatever the case may be. Consistent with that standard, what OSHA has done here basically said, you know, if an employee asks, I want a copy of my vaccine card, I lost it...well, give it to them, give them a copy of it. The other thing the employee has the right to ask for is what is the vaccination status of the workforce. Meaning...not by name, you know, you don't give out the name... Johnny Jones is vaccinated. Tina Smith is not.

[AK]: Right.

[MS]: What you do is what are the numbers... You know, it's basically a numbers game. How many are fully vaccinated? How many have the first dose? If you want to throw in the information about the booster, but it's really a number, my recollection is you have one business day to respond to that request. The same request can be made by OSHA. And you have four business hours to respond, consistent with the request for your policy. It's a very quick turnaround time. So we analyze the request. Sometimes employees ask more than they're entitled to. But we have to give them the minimum of the information they're entitled to. But that's also a great point because you have to track this. A note your violation. And the other reason, even if the OSHA standard doesn't go into effect. let's say the Supreme Court ultimately says, OSHA you're crazy. you didn't have the authority to do this—whether they do or don't, I don't know. Let's say that's the ultimate ruling here. Should I still keep track of the vaccination status of my employees? Absolutely!! The EEOC has indicated the number of employees who are fully vaccinated, or partially vaxed... have one of the two shots in the series is a factor to consider relative to reasonable accommodations and undue hardships in the workplace. So I have taken the position consistently since the vaccine rolled out: You need to track how many people are fully vaccinated, partially vaxed, or refuse to get it at all. And now I throw in the booster. Because I think you need to for purposes of accommodation requests.

[AK]: Yes, I think that's great, sage advice, Mike, as it relates to tracking, you know, what's happening with your workforce, regardless of the status of the ETS mandate. So I think the last thing, Mike, I want to chat about and don't hold me to that. I think the ETS, the regs or the regulations basically say that employers, you know, make a good faith effort to implement these types of policies. What can you tell us what the regs say about this good faith effort?

[MS]: You know, it comes down to enforcement. OSHA has a hammer. They can fine you as an employer. And what they basically said is, "Look, in the first instance, we know this is new, we're going to take a look at your good faith efforts. Do you have a policy in place? Did you distribute your policy? Do you follow your policy? Do you track the number, who is vaccinated and who is not vaccinated?" They're going to give some leeway. Some workforces are very fluid. There's a lot of turn-over that occurs within workforces. And so the vaccination status sometimes gets lost in the mix. And if you have, I think their number was 95% or 90% compliance, they're going to sort of cut you a break on the other few percent that you're off on. But even if the ETS standard goes into effect, that's only going to be initially, at some point they'll go from education to taking out the hammer and coming down hard on you. What the amount of this grace period is going to be, I don't know. But you know, the good news is... Ultimately we'll have some new deadlines if the standard is approved by the court. And if it's not approved by the courts, we won't care. That will be the end of it unless they want to try again, in that regard. But the other thing I think, Ari, you're going to see... forget OSHA for a minute. What the New York City did... and what the mayor did down there to private sector employers, I think you're going to see states and more importantly, localities. Issuing these local laws on mandates and...Wow. That's going to be a whole other level of for us take a look through. But it's going to happen. It's happening now in New York City.

[AK]: Very true! Well, Mike, thank you so much for joining us again this week. I think, you know, that's that's everything I wanted to run through as it relates to the the whole universe of the requirements for employers under the ETS mandate. I really appreciate your time. Anything to add as we wrap up today?

[MS]: No. Thank you for having me. I would simply say, don't feel bad if you can't keep up because it's a day-to-day grind in this issue, in this area and it's difficult for every single employer. Period!

[AK]: Absolutely, Mike. And to our listeners, stay tuned... Next week, we're going to talk about what your obligations are or your rights as an employer are if you do not fall under the CMS mandate or the OSHA mandate. So thanks so much for tuning in. See you next week.

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