



## Episode 6: “What to Know If You’re Not Covered by the CMS and OSHA COVID-19 Vaccination Mandates, and How to Respond to Requests for Accommodations”

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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 to know if you’re not covered by the CMS and OSHA vaccination mandates and how to respond to requests for accommodations.” This is the next episode in our series of episodes where we tell you everything you need to know about navigating COVID-19 and issues in the workplace.

**[AK]:** This is a solo episode, which means this is the first episode that I am hosting all by myself, and if you’ve listened to any of our other episodes, you will know that I always ask our guests to share an interesting or fun fact about themselves. So being that today, it’s just me, I thought I was only fair that I share something fun or interesting about me, and I thought about this for a little bit last night and I was going back and forth on, you know, what I wanted to share. But basically what I landed on was the following: My fun or interesting fact is that I played four years of rugby when I was in high school. And for those who are listening, who are rugby players, former players, or just rugby enthusiasts, I played the position of tighthead prop. So that is my fun or interesting fact about me. And now that we kind of got that out of the way, let’s dive right in.

So if you have listened to our first few podcasts, you heard us talk about the mandatory vaccination laws that are currently in place, specifically the CMS mandate and the New York vaccine rule, which apply to certain health care providers throughout New York state and OSHA’s mandate as well, which, as our listeners probably know, applies to employers who have 100 or more employees.

So what we want to talk about in this episode, though, is if you’re an employer and you are not covered by the CMS mandate or the New York vaccine roll because you are not in the health care field or you’re a non-health-care employer, and if you have less than 100 employees, so you are not covered by the mandate. What your responsibilities, duties, obligations are, if any. If you’re an employer in those circumstances.

So basically today, if you’re an employer and you’re not in the health care field or you have less than 100 employees, I will tell you what you need to know about mandatory vaccination rules in New York. The first thing I want to talk with you about today is, you know, whether or not you are required—if you’re an employer under those circumstances—to have a mandatory vaccination policy for your employees. The answer to that question is no. If you are an employer who is neither covered by the CMS mandate nor the OSHA mandate, there is no law currently in place that says that you must, or have to have, a mandatory vaccination policy. But if you are an employer and you’re not covered by the CMS or OSHA mandates, you are able to enact a mandatory vaccination policy or voluntary vaccination policy if you so choose.

So, what I'd like to talk about first is if you choose to implement a mandatory vaccination policy, what that policy would look like. So, you know, essentially the mandatory vaccination policy would be a written policy. It would probably, you know, set forth the purpose of the policy, you know, the scope of the policy and then, of course, the contents of the policy or what the policy actually provides for. So in the course of a mandatory vaccination policy, you know, an employer would have a provision in the policy that says, you know, due to the ongoing concerns, you know, for example, as a result of the pandemic, we are requiring that our workforce be vaccinated against COVID-19.

Another important piece of the vaccination policy is a mechanism within the policy where, you know, employees can request certain accommodations. And this brings me to my next point, which is, if you listen to our episodes about the New York vaccine rule on the CMS mandate and the OSHA rule, you know that at this point, if you are a health care provider operating under the mandate or the New York vaccine rule that while you do have to provide a medical exemption, you do not have to provide a religious exemption within your mandatory vaccination policy.

Now in New York, if you're an employer who does not fit within the CMS or OSHA mandate rules, you are permitted to enact the policy, as we just discussed. But the policy must include exemptions or requests for accommodation on the basis of medical reason, or on the basis of a sincerely held religious belief. So this analysis is similar to the analysis we briefly touched on with Mike Sciotti when we talked about the OSHA mandate rule. So one of the important things about the decision, or choosing to implement a mandatory vaccination policy, is that there is a mechanism within that policy whereby employees know that they are able to request accommodations for those two reasons. And, you know, specific instructions for how an employee would do so.

And, you know, another important thing to keep in mind, if you're an employer who is thinking about or has chosen to implement a mandatory vaccination policy, is that you ensure that your staff, your H.R. professionals, your managers, your supervisors, are aware of the contents of the policy and are aware that there are certain requests for accommodations that employees can make and that those particular staff are also aware how employees are able to do so.

So, you know, that's kind of a general overview of the contents of a mandatory vaccination policy and what we're going to spend a majority of the rest of the episode talking about is those two exemptions that we mentioned. So, just so our listeners know, you know, the EEOC has issued guidance on these issues and what... what employer's obligations are to provide exemptions as it relates to medical ... for medical reasons or for a sincerely held religious belief. The EEOC guidance I'm referencing is called "What You Should Know About COVID 19 And The ADA Rehabilitation Act And Other EEO Laws."

Those of us ... or our listeners watching on YouTube will see that I had to just read that title off and I did not memorize it. But you know, this is guidance that the EEOC has issued, had issued actually years ago and throughout the course of the pandemic, has been updating it fairly frequently. You know, the most recent update that the EEOC issued was actually on December 14, so the EEOC is looking at this and issuing updated guidance. But basically, what that guidance provides or tells employers a little bit more about is the process for requesting a medical or religious exemption or what we call "reasonable accommodation" under the ADA or Americans with Disabilities Act and Title VII of the Civil Rights Act. So let's jump right in and basically talk generally and then more specifically about what these exemptions entail. Basically, what the EEOC guidance says is that an employee who requests an accommodation on the basis of a medical condition or a sincerely held religious belief may be entitled to that accommodation, provided it does not pose an undue hardship on the employer's business. And we'll talk a little bit more about what "undue hardship" means in the context of the ADA and Title VII and a little bit more about what reasonable accommodations employers can provide for employees requesting exemptions or accommodations on these two bases. But you know, really what it comes down to, the EEOC has identified some reasonable accommodations that would be acceptable, such as

socially distancing, you know, having the employee who's requesting the accommodation work, a modified shift or, if possible, work from home. And one other reasonable accommodation that the EEOC has also identified is the wearing of a face mask. For our listeners in New York as I'm sure you're aware recently that the governor had announced a new face mask mandate throughout the state and that applies throughout the state. And stay tuned because we will be really digging into that mandate next week. But you know, the wearing of a face mask is an example of a reasonable accommodation that the EEOC has identified can be provided for employees who are requesting an accommodation due to a religious belief, sincerely held religious belief or medical exemption.

So let's dig into what the EEOC has said about a request for a medical exemption from an employer's mandatory vaccination policy. Basically, the ADA says that if an employee cannot get vaccinated due to a medical condition or disability, the employer cannot require the employee to be vaccinated unless that employee not being vaccinated would cause a "direct threat" to the health or safety of others in the workplace. And you may be if you're listening, you may be wondering what will what does that mean? What is a "direct threat" or what has the ... what ... what do the regulations say about what a direct threat is? Or what has the EEOC said about what a direct threat is? And the definition of direct threat—and I'm reading this definition—is "a significant risk of substantial harm that cannot be eliminated or reduced by reasonable accommodation."

Now, in its updated guidance, the EEOC has made clear that whether an employee's request for an exemption from a mandatory vaccination policy would pose a direct threat requires really an individualized assessment. You know, there is not one bright, round bright line rule for our listeners who have been accommodating or receiving requests for reasonable accommodations under the ADA for years; it's a very similar analysis. Again, no bright line, excuse me, no bright line rule, but really an individualized assessment.

And in the context of this mandatory vaccination policy issue, the EEOC has identified several factors that employers must weigh when determining whether an employee having an exemption or not being vaccinated would pose a direct threat. And those factors again for our viewers who are watching this on our YouTube platform, you'll see I'm reading this off. But according to the EEOC, employers must weigh the following "the duration of the risk; the nature and severity of the potential harm; the likelihood that potential harm would occur; and the imminence of potential harm." So basically, when making this individualized assessment and considering whether an employee's exemption from a vaccination policy or not being vaccinated would pose a direct threat, the EEOC has said that the employer should also consider the most current medical knowledge about COVID-19. And basically, the EEOC has also said that that would include, you know, statements or data issued by the CDC. Current medical knowledge would also include, you know, more localized data as it relates to community spread and factors on community spread. The EEOC has said that employers should also consider, you know, the type of work environment that the employee is in, and that kind of goes back to the reasonable accommodations we mentioned earlier in the episode.

But basically, the EEOC has said that if the, you know, the employer should consider whether the employee works alone, whether the employee is in a mostly remote environment, whether the employee interacts very closely with others in the workplace or the general public as it relates to the employer's business. You know, those are also factors that the employer should consider when deciding to ... whether or not to accommodate a request for a reasonable accommodation based on a medical condition or disability under the ADA.

It's also important to note that if an employer concludes that an employee being vaccinated would pose a direct threat to the safety of others or safety in the workplace, then the employer must then determine whether, in a reasonable accommodation would eliminate that threat. So just to reiterate, of course, with the pandemic, this is a very evolving issue. But also, you know, this is a very individualized assessment that an employer must make, and there really is no bright line test or rule. But you know,

these are the factors that the EEOC has said must be weighed by an employer when considering a request for a reasonable accommodation on the basis of disability. It is important for employers to review this guidance and just, you know, as we've said in every episode, just keep an eye on it because the situation is rapidly evolving.

So next, let's dig into an employee's request for an exemption from a mandatory vaccination policy on the basis of a sincerely held religious belief. And the applicable law in this situation is really Title VII of the Civil Rights Act. And what the EEOC's updated guidance says about this issue is that, you know, an employer must "provide an accommodation for on the basis of a sincerely held religious belief, absent undue hardship." What the EEOC has said about the undue hardship standard in the context of Title VII is that it's actually a bit more relaxed or a bit easier standard to satisfy than, that under the ADA.

So you know, what's important and what we should definitely talk about is the ... the definition of "religion" under Title VII or the definition of what the regulations and the EEOC has said about a sincerely held religious belief. And it's really important to note that a sincerely held religious belief, or, you know, the definition ... definition of religion under Title VII is very broad, and it includes religions that aren't necessarily popularly recognized. So basically, the EEOC has said that, you know, employers should generally assume in the context of a sincerely held religious belief that "the belief is sincere or that the employee does subscribe to that religious belief." However, it's also important for us to know that under ... the under Title VII and the EEOC guidance, a religious belief does not mean a philosophical belief, it does not mean a political view or a political belief—the belief preventing the employee from being vaccinated really has to be founded in a religious belief.

So, you know, as I mentioned, a political or a philosophical or even just a personal opinion is really not enough. An employee must have a sincerely held religious belief in order to qualify for an exemption from such a policy. And you know, basically what this analysis really centers on from an employer side and the EEOC has said that, you know, the analysis really focuses on an employee's credibility in the context of requesting a religious, excuse me, a religious accommodation.

However, if an employer is aware of other objective factors that provide a basis for questioning the employee's sincerely held religious belief or credibility as it relates to that belief, the employer can ask for more information. And in fact, the EEOC has said if an employee refuses to provide such information, that the employee may later be barred from bringing a subsequent claim that they were entitled to an accommodation and an employer wrongfully denied that accommodation. So, you know, the EEOC, in its guidance, has identified certain factors that an employer may consider when determining whether a request for an accommodation based on a sincerely held religious belief—and that belief is in fact credible—and again, I'm just reading off the guidance at this point, those factors are "whether the employee has acted in a manner inconsistent with the professed belief, although employees do not have to be scrupulous in their observe ... observance," according to the EEOC, "whether the accommodations sought is a particularly desirable benefit that is likely to be sought for non-religious reasons, whether the timing of the request renders it suspect and whether the employer otherwise has reason to believe that the accommodation is not sought for religious reasons."

Now, as it relates to the weighing of these factors, you know, certain employers have tried to ask for additional information or have asked for additional information to get to the bottom of whether the employee has acted inconsistent with that belief in the past. And you know, some of the examples that we have been seeing is, you know, there are religious objections to receiving the vaccine on the basis of, you know, fetal stem cells being used to develop the vaccine or, you know, certain lines also being used to develop medications. And one ... of one thing that we're seeing employers ask to try to get to the issue of whether the belief is sincere and whether it is consistent with the employee's past behavior, is asking an employee if they have previously been vaccinated for the flu or have taken other medications that have used similar development procedures.

But you know, as ... as we mentioned in our episode where we discuss the OSHA rule, you know, most major religions at this point have come out and said that the vaccine is not a problem. Just one example, is I know the for the ... for the Catholic Church, the pope has come out and said that the, you know, receiving the vaccine is not problematic. So you know, there are there are certainly some things that employers can ask. But, you know, I think the EEOC guidance makes it clear that there are certain things that you can ask, but you really again need to make an individualized assessment regarding whether an employee is entitled to a ... an accommodation based on a sincerely held religious belief. And one thing that's interesting about Title VII is, you know, the EEOC has said that undue hardship under Title VII, or whether, you know, an employee receiving an accommodation under Title VII for a sincerely held religious belief is an undue hardship. Under Title VII, undue hardship in this context is not limited just to monetary hardship. Undue hardship includes situations where the accommodation would impair workplace safety, and you know that that was something courts have interpreted and had said prior to the pandemic. And obviously, employers in this context do have a good case for, you know—depending on the type of business, the type of employee, the employee's role, how they're interacting with other employees, how they're interacting with, you know, the public generally in the context of the employer's business—you know, obviously there are additional considerations here. But again, this is a case by case assessment. And the EEOC has said that again, similar to a request to for an exemption based on the basis of disability that you know, an employer who receives a request for an accommodation under ... for a sincerely held religious belief really must consider, you know, whether that employee works indoors or outdoors, remotely, and whether certain accommodations or the accommodations that we mentioned before would really, you know, eliminate the employer's undue hardship.

So, you know, that's ... that's basically, you know, a good summary of what the EEOC guidance says as it relates to these two issues. You know, as I mentioned in the beginning of our episode, the guidance was updated fairly recently, on December 14 of 2021. And basically, that the updates really centered around whether COVID is or is not a disability or can qualify as a disability under the ADA.

But there are a couple other issues that I wanted to point out to our listeners as it relates to that guidance and mandatory vaccination policies. So, for example, I think it's important for our listeners to know that, you know, the ADA does not prohibit an employer from inquiring about an employee's vaccination status. Now, if you're an employer and you want to know whether your workforce is vaccinated and ... and what employees within your workforce are vaccinated, that is fine. You can certainly ask your employees about their vaccination status, but you cannot ask additional questions regarding why that person may or may not be vaccinated.

You know, another thing I wanted to point out for our listeners—because we do get a lot of questions from employers who are our large manufacturing facilities or are larger employers, you know, and even some of our our clients who have less than 100 employees—you know, there's a lot of questions about whether, you know, if you're if you are administering the vaccine on site or you have an agent, you know, administering the vaccine on your behalf on site, whether that qualifies as a medical examination under the ADA. And the short answer to that question is no, you know, a vaccine is not a medical examination under the ADA. But if you are an employer and you are having the vaccine administered on site, you know, are you directly are ...do you have someone on staff who's administering the vaccine, you know, pursuant to your mandatory vaccination policy or voluntary vaccination policy? Certain prescreening questions as it relates to health history and things like that can be subject to challenge by an employee.

So what that means is if you are administer ... and again, this applies if you're an employer who's administering the vaccine on site, either by someone on your staff or through an agent or directly through you, as opposed to, you know, an employee going to get vaccinated on or off company time at a separate facility, their health care provider, a state-run vaccination clinic, et cetera. You know, those prescreening questions, you know, may be in the realm of a medical exemption under the ADA. And if an

employee challenges the nature of those questions, you know, under the ADA's analysis, the employer would then have to show that the questions are job-related and consistent with a business necessity under the ADA.

One last thing I did want to mention to our listeners as it relates to the EEOC's guidance on mandatory vaccination policies is whether an employer may offer certain incentives to incentivize their employees from getting vaccinated. And, you know, obviously this ... this mostly comes up in the context of a voluntary vaccination policy, but basically, some of the questions that we've been receiving here at Barclay Damon involve whether an employer can provide some sort of incentives or incentivization to get employees to receive the COVID-19 vaccine. And the short answer to that is yes, there is a qualification if the employer is not administering the vaccine—so employees are going to get vaccinated off site during business hours or after business hours. You know, the ADA or the EEOC has said that the ADA really does not limit the ... the amount of an incentive that an employer may provide. But if an employee in the alternative, like we just talked about a few moments ago, is having employees vaccinated on site is vaccinating the employee through a member of the staff or through an agent, then you know, the EEOC has said that any vaccine incentive offered cannot be coercive. So in that situation, you know, you have to be a little bit more careful because you cannot ... it cannot be perceived that the incentive that you're offering is basically coercive or leaves the employee no choice but to get vaccinated.

Well guys, I think, that's everything I wanted to tell you about the EEOC updated guidance. If you listen to a few first few episodes, as we mentioned, we really dove in on the CMS mandate, the New York vaccine rule, and the OSHA mandate. So we really wanted to fill in the gaps for any of our listeners who work for employers who have less than 100 employees, or if you're an employer who has less than 100 employees and you're not in the health care field, you know what you can do if you want to implement a mandatory vaccination policy.

We also wanted to provide you with the most recent information about what the EEOC has said about responding to requests for exemptions or reasonable accommodations from mandatory vaccination policies on the basis of disability or medical condition, or sincerely held religious belief. Next week, we're going to tell you what you need to know about New York's new mask mandate. We're going to dive in deep. Thank you so much for listening. See you next week!

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