



Episode 19: “What’s Up With COVID-19 Vaccination Mandates: Where Are We Now?”

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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.

[Ari]: Hey, guys. Welcome to “What’s Up with COVID-19 Vaccination Mandates: Where are we now?” If you listen to the podcast for the last couple of months, you would know that we actually did a few episodes, I think it was it was definitely back in December—I think it was our second and third and fourth or third, fourth and fifth episodes where we talked about certain COVID-19 vaccination mandates. So we definitely wanted to give you an update, there’s been some activity over the last few months and just last month, the EEOC updated its guidance with respect to vaccination laws and programs and Title VII and religious accommodations. So given all that’s happened and it’s been a few months, we just wanted to tell you what’s up.

[Ari]: I wanted to start this episode like we start every episode. I’m going to give you a fun fact. This is another solo episode. So the fun fact is about me only. Over the next few months, you guys are definitely going to get to know me a lot better. But my fun fact for today is that I am my family’s essentially resident baker. I’m not a professional baker, but it’s a hobby of mine. Last night I was up pretty late making my mom’s birthday cake. Today is my mom’s birthday, so, happy birthday, Mom. Shout-out if you’re listening. And she requested an almond cake with raspberry filling and chocolate cream cheese frosting. So I try to make everything from scratch. I am one of those pandemic bakers for sure. And baking has definitely become a hobby of mine. I am not one of the bread-making bakers that have become super-experienced in the pandemic. And I just wanted to make that clear because I feel like that takes a whole other level of skill. So that is my fun fact about me for today. I would definitely put baking as one of my hobbies.

[Ari]: So guys, let’s dig in. I think this is an important topic. As I mentioned just a few moments ago, you know, we’ve had some episodes on these issues, so you know, I don’t want to dig in too too far. I just want to tell you guys what’s new. But before I do, I think we have to just talk a little bit about how we got here, where we were, where we are, where we’re going. So back in December, we were talking about certain mandates that had been enacted. And there’s really three that come to mind or that you should be aware of when we’re talking about these things. The first is the New York vaccine rule. The second is the CMS mandate. And the third is the OSHA ETS rule. Now, let’s just talk about OSHA really quickly and we can move on.

[Ari]: The OSHA ETS, if you’re listening, you probably know was part of the Biden administration’s push for mandatory vaccination in the workplace for facilities of 100 or more employees. That mandate went through the courts. It was struck down by the Supreme Court. Basically, the court said that OSHA did not have the authority to implement such a wide-reaching mandate. So let’s put that aside. I did want to put a pin in that, though, because we definitely talked about that and spent a lot of time talking about that a few months ago. So for purposes of this episode, we are going to be focusing on the New York vaccine mandate and the CMS mandate. So—and specifically, we’re going to talk a little bit in a few minutes about how those mandates interact with Title VII and what issues you should be aware of. So just a brief background on the New York vaccine mandate. It was back in August of 2021 when New York issued

the vaccine mandate, which we'll call the New York vaccine rule. A couple of weeks after it, it issued some guidance, the New York State Department of Health, issued guidance, basically identifying what was covered by the mandate, who were covered personnel. You know, the New York vaccine rule covers hospitals, certain health care facilities, home health care agencies, pace programs, things like that. What is important to know about the New York vaccine rule if you're in health care, you probably already know this, is that, that vaccine rule, while it contained an exemption for medical reasons, did not contain a religious exemption or an exemption for individuals who do not want to be vaccinated due to a sincerely held religious belief. So more on that in a moment.

[Ari]: As we talked about a couple of months ago, there was a challenge to the New York vaccine rule brought in the Federal District Court for the Northern District. That's *We the Patriots v. Hochul*. The Northern District basically said, listen, this law as written is not enforceable. And the Northern District actually issued an injunction which said you could not that the state could not enforce that piece of the rule, which did not provide for a religious exemption. And that continued to go through the courts. The New York vaccine rule went up to the Second Circuit and basically the Second Circuit overturned, and for listeners or non-legal listeners, the Second Circuit is the next highest court in federal court after the Northern District Court. So, you know, the state appealed to the Second Circuit and the Second Circuit basically said, we think that this law is okay, it's enforceable. But it was important. It's important to note what exactly the Second Circuit said. The Second Circuit said it may be possible under the New York vaccine rule for an employer to accommodate, not exempt employees, with religious objections, by "employing them in a manner that removes them from the mandates definition of personnel. Such an accommodation would have the effect under the mandate of permitting employees to remain unvaccinated while employed." So this is a really important point, and I'll explain in a few minutes why. But basically the Second Circuit said, you know, there is not an exemption in the New York vaccine rule, and that's okay. But it is possible under the New York vaccine rule for employers to potentially offer an accommodation on the basis of religious belief. So kind of opened the door for a discussion as it relates to religious accommodations, and we'll get there in a minute and why that's important.

[Ari]: So that basically was what happened as the New York vaccine rule was going through the courts. You know, it eventually was appealed by the plaintiffs in that case to the Supreme Court of the United States. And the Supreme Court said, you know, we're not touching that. The Second Circuit decision was permitted to stay. So right now, the New York vaccine rule is in effect and remains in effect for the foreseeable future. So let's talk a little bit about the CMS mandate. That's the mandate that was issued by the Centers for Medicare and Medicaid Services. And if you're in health care and you're a Medicare or Medicaid recipient, I'm sure you know all about this... if you employ personnel in the health care field. But basically, you know, right around the same time in November, CMS issued its mandate, which required staff of Medicare and Medicaid certified providers to be vaccinated against COVID-19. There was a challenge, of course, to that mandate as well. But before we get into that, I did want to mention a really important point about the CMS mandate, which is that it does include exemptions for religious and medical reasons. So unlike the New York vaccine rule, which does not include a religious exemption the CMS mandate includes both a medical and religious exemption. So we talked about this briefly in a prior episode, but the CMS mandate was stayed following two federal district court decisions. It went up to the US Supreme Court, and the Supreme Court basically said that the mandate was constitutional as written. So that's kind of where we were.

[Ari]: So where are we now, guys? Right now, the New York vaccine rule and the CMS mandate are in effect. And if you're in health care, you know this and you're kind of struggling with these issues as they come up. I did want to mention that following these court decisions, the United States Equal Employment Opportunity Commission has updated its guidance several times. But specifically last month, the EEOC updated its guidance as it relates to religious objections to COVID-19 vaccine requirements. So whether you have a mandatory policy, even if you're not covered by these two mandates or whether you are an employer who has personnel who is covered by both the New York vaccine rule and the CMS mandate, I

think it's really important we go over what the EEOC has said.

[Ari]: All right, guys. So let's dig into this updated EEOC guidance and just so our listeners know, so you can check it out when you have a minute, The guidance is "What You Should Know About COVID-19 and the ADA, the Rehabilitation Act and Other EEO Laws." So what we're going to talk about specifically is the Title VII religious accommodation piece of the updated guidance. And you may be wondering, Ari, why is this important? And I'm going to tell you why this is important. So the dust is kind of settled with these respective vaccination mandates. And the unfortunate reality is that as a result of the New York vaccine rule and the CMS mandate, employers are coming across issues with employees who are requesting religious accommodations. So if you're in health care, you probably already know this. The dust has settled. You're dealing with the aftermath of either granting religious accommodations or not. What we're seeing here at our firm is there have been a number of charges that have been filed with the EEOC, specifically for employers who excuse me, for employees who have been terminated from employment as a result of not receiving a vaccination on the basis of a sincerely held religious belief. And in New York, it's a little bit confusing, particularly in the health care sense.

[Ari]: So this piece of the conversation is going to focus on employers who are in the health care industry. But if you're not in the health care industry, don't worry and you have a mandatory vaccination policy, we'll definitely go through what the guidance says for you. But in any event, you know, this has become an issue because it's a little bit confusing for health care employers to navigate. You have the New York vaccine rule which does not include a religious exemption and the Second Circuit and the Supreme Court through not touching that decision has basically endorsed the fact that that's okay. And then you have the CMS mandate, which specifically provides for a medical and a religious exemption. So it is a little bit confusing. And that's why I was stressing the importance of the Second Circuit's decision where they said, although the New York vaccine rule has an exemption it may be possible for employers to grant an employee a religious accommodation as a result, allow them to remain employed, although unvaccinated.

[Ari]: So let's talk about if you're an employer and you get one of these charges, what we think about and what you should be thinking about. So and let's assume for purposes of this conversation that you are an employer who's in health care and covered by both the New York vaccine rule and the CMS mandate. So you're an employer in health care, and unfortunately, you've had to terminate an employee because they cannot perform their job without interfacing directly with patients So you're kind of at the you're at the point where you had to terminate an employee because they requested a religious exemption and there was no accommodation that could be afforded to them. Meaning, you know, you have a surgical nurse who really cannot perform their job remotely or you have somebody who maybe even be in administration, but they're patient-facing or they meet with patients to deal with issues. Or under the New York vaccine rule, they meet with other members of staff who are patient-facing and there's a risk that that employee could have passed COVID on to either a coworker or a patient. So you're in the position where you've been you know, served with a charge of discrimination, whether it's through the EEOC or a complaint, the New York State Division of Human Rights. And you're wondering, what should I do? We're going to have a whole segment later on in the podcast about how you should investigate and how you should respond to charges. But today, let's just focus on the Title VII piece of this.

[Ari]: So if you received a charge from the EEOC, it's from an employee who was terminated because they requested a religious exemption or a religious accommodation and it just wasn't feasible. You couldn't grant them any type of accommodation as a result of their sincerely held religious belief. Under Title VII... And we talked about this in a prior episode, an employer has to show that providing an accommodation on the basis of a religious belief would be an undue hardship to an employer's business. And this is what's important about the guidance that the EEOC issued last month. Basically, the EEOC has come out and said that if you are doing an undue hardship analysis, will allowing the employee to remain unvaccinated in my facility cause an undue hardship? There are certain...the EEOC will look at whether or not the employer had done a cost analysis. And basically, the Supreme Court, just to back up,

has held that requiring an employer to bear more than a minimal cost to accommodate an employee's religious belief is an undue hardship. So under Title VII, this is a little bit of a lower standard than that under the ADA. But basically an employer has to show there's more than a minimal cost to the employer to keep the employee employed in this case or to not grant an accommodation based on a sincerely held religious belief. And basically, last month, the EEOC said specifically as it relates to Title VII and vaccine programs, that costs to be considered include not only direct monetary costs, but also the burden on the conduct of the employer's business, including in this instance, the risk of the spread of COVID-19 to other employees or to the public. So this is important, guys, because this is the EEOC basically saying, listen, if you're doing an undue hardship cost analysis as an employer, when you're making certain decisions under Title VII and mandatory vaccination laws or programs one of the costs that should be considered is the risk of the spread of COVID-19. Now, in the situation we were talking about a few moments ago, obviously it's a little bit easier to show why risk would be involved with that. So the EEOC has also outlined some other factors that employers can consider when considering costs as it relates to showing an undue hardship. And this is specifically, again, in the context of Title VII. The EEOC has said certain common and relevant considerations during the pandemic and to establish undue hardship include whether the employee requesting a religious accommodation to a COVID-19 vaccination requirement "works outdoors and indoors, works in a solitary or group setting, has close contact with other employees or members of the public (especially medical medically vulnerable individuals). Another relevant consideration is the number of employees who are seeking a similar accommodation or the cumulative cost or burden on the employer." So let's talk about why that's important. So if you're an employer who's been, you know, who's received a charge of discrimination on the basis that an employee was terminated due to a sincerely held religious belief, and you could not grant that employee an accommodation because they were patient-facing this EEOC guidance is basically saying it is an undue burden or there are costs associated with allowing somebody in the workplace who's unvaccinated, who's patient-facing and that there is a risk of spreading COVID-19 to other employees and to those patients, especially medically vulnerable individuals. So basically, through this guidance, the EEOC has established kind of a framework for what an employer should consider with respect to mandatory vaccination requirements.

[Ari]: So guys, like most episodes, we try to tell you why do you want to know this? Well, the reason why you want to know this is that we are seeing a vast number of charges being filed with the EEOC in particular on this issue. And it's important, you know, as a health care employer for you to know what to do when you receive a charge. Again, you know, definitely contact somebody. You need you need a lawyer to definitely navigate this with you. But, you know, if you can basically establish that there was no reasonable accommodation for an employee on the basis of their religious beliefs, for example, as I mentioned earlier, as, know, a surgical nurse, you know, somebody who is patient-facing, they can't work remotely, there's really no other position, you know, for the employee to be assigned to. You know, you can show that there is an undue hardship. And again, guys, one of the one of the things the EEOC has said is that, you know, an employer should consider all types of accommodations, you know, whether the employee can be reassigned, whether there's a different position for the employee. But, I mean, I think the fact remains that if you have an employee who is patient-facing, there's a risk of spread. They can't work remotely. They work indoors. They interact with patients or members of staff who also interact with patients. I think this guidance makes it a little bit easier to establish that there was an undue hardship, and that was the reason why the employee could not be granted a religious accommodation. And why ultimately, as the employer, you had to make the unfortunate choice to terminate the employee.

[Ari]: So, guys, I think I've told you what you know is new with this EEOC guidance. You should definitely check it out. You know, this is where we're at with these vaccine mandates. I don't think they're going anywhere anytime soon. And I did want to mention that if you're an employer and you're not covered by these vaccination mandates, the EEOC's guidance applies to you as well. So if you're an employer, who has chosen to implement a mandatory vaccination policy, you definitely want to check out the updated guidance. It certainly applies to you as well.

[Ari]: Thanks so much for listening guys, I appreciate you. Tune in next week where we'll talk with Dr. Andrew Tisser. And we're kind of going to flip the switch a little and he's going to interview me about some issues that physicians, particularly new career physicians are facing in the workplace and some legal issues that those physicians want to know about. So thanks so much for tuning in. We'll see you next week.

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