

Kelly Bunting ([00:00](#)):

Welcome to Asked and Answered, Greenberg Traurig's Labor and Employment podcast. I'm your host Kelly Bunting, and I'm a shareholder in GT's labor and employment practice. We are excited to launch Asked and Answered. It's a podcast where we'll discuss all topics related to labor and employment law as it affects the workplace and the workforce. We hope to inform our audience about current hot button issues in employment law.

Kelly Bunting ([00:27](#)):

In this episode, I am joined by Greenberg Traurig associates, Ellen Bandel, Jacob Dean, and Osazenoriuwa Ebose for a round table discussion of employers and the COVID-19 vaccination. A question for you three, that I am sure employers want to ask is, what the heck is going on? There seems to be new guidance issued every other day and some employers are mandating the vaccine for their workers. Others are making the vaccine voluntary, but if employees don't get it, then they're subject to a number of workplace restrictions. Now states are stepping in with legislation and of course there's lawsuits, right? I mean, what's a public health crisis without a lawsuit? [inaudible 00:01:13], you first vaccines in the workplace. What are the concerns for employers here?

Osazenoriuwa Ebose ([01:20](#)):

Well, Kelly, I think the first question is going to be to mandate or not to mandate. And this is a pretty polarizing topic for employees. I mean, what's welcome for some, might be pushed against by others. Employers need to be aware of possible concerns. Employees could resign, the business can slow down due to workforce loss and of course, negative publicity in the age of social media.

Osazenoriuwa Ebose ([01:47](#)):

So I'm sure you want to know what the trend is. An employer trends are currently split. The first trend is for employers who have mandated wholesale employee vaccinations. This trend is unsurprisingly led by higher education systems and healthcare providers. More than 580 campuses nationwide will require vaccinations this fall for incoming students and employees, including one of the largest statewide school systems. All of these efforts are generally supported by providing easy access on campus or in a central location for the vaccinations themselves. The largest healthcare system in Philadelphia, along with an equally large system in New Jersey and New York have also followed to in requiring employee vaccinations.

Kelly Bunting ([02:34](#)):

[inaudible 00:02:34], I heard you mention incentives. What do you mean by incentives?

Osazenoriuwa Ebose ([02:39](#)):

So Kelly, when we're talking about incentives, employers who are not mandating that their employees get vaccinations are basically trying to give a little push for the employees to do so. Large grocery chains across the nation have been providing incentives were proof of vaccination, such as a bonus, pay time off and flexible scheduling.

Osazenoriuwa Ebose ([03:05](#)):

One of my favorite stores in fact, where I spend too much money for no good reason is also providing up to four hours of paid leave for employees to get vaccinated. There's a software giant as well, who's also

allowing a specified number of fully vaccinated employees to volunteer to work together on designated floors. So as you see in this trend, some employers are pursuing incentives to get people to return back to the office, but also to get people to return back to the office in a safe manner. [crosstalk 00:03:38].

Kelly Bunting ([03:39](#)):

[inaudible 00:03:39] it's a slippery slope. I mean, isn't there some potential downside here?

Osazenoriuwa Ebose ([03:44](#)):

Well, that's a good point, Kelly. I think there is. When we're talking about incentives, incentives change or the effect of an incentive can change based on an employee's pay. So employees in a lower paid position may feel like they're enabled to pass up financial incentives.

Osazenoriuwa Ebose ([04:04](#)):

Lastly, the third trend is where employers require a new employees to be vaccinated. Two competing major airlines have required new hires to be vaccinated, but have exempted current ones. One of these companies is also giving three days of extra vacation to flight attendants who have received at least their first vaccine dose by a determined date.

Kelly Bunting ([04:25](#)):

Well, what about agency guidance though? There has to be some guidance from the EEOC, right?

Osazenoriuwa Ebose ([04:32](#)):

Definitely. In fact, there are three main guiding agencies to keep an eye on. Of course, we have the EEOC, the Equal Employment Opportunity Commission. OSHA, the Occupational Safety and Health Administration. And our evergreen friend, the CDC, the Centers for a Disease Control and Prevention. Now turning to the EEOC, as of May 28th, 2021, the updated EEOC guidance allows employers to offer incentives for voluntary vaccinations. However, these incentives can't be so substantial asked to be coercive.

Kelly Bunting ([05:08](#)):

So that's what you were talking about regarding the slippery slope concern then?

Osazenoriuwa Ebose ([05:14](#)):

Exactly. And it's important to note that the EEOC only allows employees to receive incentives, not family members. But family members can still receive vaccinations, if the employer is offering it. Now turning to OSHA, the guidelines are far simpler. Employers cannot distinguish between workers who are vaccinated and those who are not. Simple and easy. But lastly, we have a CDC, which has issued a number of guidances, specifically affecting the conduct of vaccinated persons in a workplace. On May 13th of this year, the CDC said fully vaccinated individuals could resume life as normal, except where workplace and other guidance required, otherwise. However, just recently on July 27th, 2021, the CDC updated its recommendations to encourage mask wearing indoors, even for fully vaccinated people when an areas with substantial and high transmission of COVID-19. That's pretty much two thirds of all US counties.

Osazenoriuwa Ebose ([06:18](#)):

And the concern here is the spread of the new Delta variant. All of this goes to say, even the foremost leading minds on this pandemic are still unsure when it will end. So it's especially key that employers keep abreast of these federal agency guidances.

Kelly Bunting ([06:33](#)):

Well, I guess so. However, the efforts of employers to institute measures, keeping employees and their customers safe, that's not only controlled by the federal government, right? I mean, state legislatures are jumping into the fray. There's a bunch of laws affecting the abilities of companies to act. And so that's where Jacob Dean comes in. Jacob, what can you tell us about this?

Jacob Dean ([07:01](#)):

That's right, Kelly. Employers are not unaware that each state may have separate laws affecting its ability to regulate or to provide employees with certain guidance. It's part of their practice. And so employers are used to navigating a number of jurisdictional specific requirements, as it relates to employees. Vaccine mandates and vaccine passport prohibitions are no different. We've seen a number of state legislatures move on this front and act varying laws, affecting the ways in which an employer can mandate or require employees to receive vaccines. As more and more companies and local governments take efforts to keep their employees and customers safe, states are increasingly legislating on this front. The result, a patchwork of state laws, employers must be cognizant of when devising their policies. This patchwork has made it almost impossible for national and global companies to mandate across the board policies without certain carve-outs based on jurisdictional laws.

Jacob Dean ([08:07](#)):

I think the best way for us to consider and talk about this legislation is two buckets. The first bucket is whether an employer can even ask employees whether they are vaccinated. So for instance, the employer wants to know what segment of its workforce is inoculated or wants to provide certain data to either its customers, if it's a healthcare industry, for instance, or for it to provide to its HR team. The second bucket is whether employers can outright mandate employees receive the vaccine. Starting with the first bucket, we have the vaccine passport bands. So a number of states have taken steps to either prohibit requirements that an employer will mandate that employee show vaccines, among those states that have moved on this front of Georgia, Alabama, Arkansas, Montana, Alaska, and Idaho. So if you're considering requiring employees to share their vaccine passport or their vaccine status, then you should consider whether the state has taken efforts to legislate on this front.

Ellen Bandel ([09:18](#)):

Just to jump in for a second on that, Jacob. On the other end of the spectrum, since I am here representing the great state of California, I will share that we are starting to see, although it hasn't spread as much as some of the other trends, we are seeing at the local level, for example, Santa Clara county has mandated that employers solicit this information. So we've got the other end of the spectrum and states like Georgia, where we can't solicit this information, Santa Clara county, California, you're required to solicit the information. So we've got every end of this spectrum here.

Jacob Dean ([10:01](#)):

That's a really good point. And I think it's a great note to just know that if you're touching on this subject, you're bound to have certain areas of the country that are going to react differently. And that when you're cultivating a policy, it's important to remain aware, not only of the state requirements, but

as Ellen mentioned, be aware of your county or a city policy on this front. We earlier talked about certain incentivizations to employees to get the vaccine, but on the other end, sort of the care and the stick approaches, how can employers who have offered certain advantages to receive the vaccine? How can they now mandate or put the stick with the vaccine? So an employer who wants to be more aggressive should be aware of certain states that have taken an approach to prohibiting mandates.

Jacob Dean ([10:55](#)):

For instance, one way you might do this is you either take the vaccine by X day or your employment will be terminated. There's at least one state Montana, for instance, which became the first in the nation to pass a law, prohibiting discrimination based on a person's vaccination status or possession of an immunity passport. In Montana, employers are prohibited against discriminating against employees or refusing to employ someone based on whether that person has been vaccinated. And [inaudible 00:11:28] bars employers from requiring employees to receive vaccines such as occurring COVID-19 vaccine, who's uses allowed under emergency use authorization. So before it's passed under the FDA.

Kelly Bunting ([11:41](#)):

So Jacob, it seems to me then Montana's actually made whether you're vaccinated or not, your vaccination status, a protected category?

Jacob Dean ([11:52](#)):

Yes. It's now protected category, just like race.

Kelly Bunting ([11:56](#)):

Wow. Okay. So, well, what you and Ellen were saying really demonstrates how difficult it is for a multi-state employer to keep up with the guidance. I mean, I'm sure other states have taken various approaches, maybe some less restrictive. What can you tell us about some of these other states and the legislation they're proposing?

Jacob Dean ([12:18](#)):

That's right. So Montana is perhaps the most restrictive in terms of outright banning employers from taking any adverse action against an employee based on his or her vaccination status. But sort of that, you've had a number of governors across the nation issue executive orders, which are inherently less applicable to private employers. But nevertheless, can affect an employer's ability to mandate policies. The first I want to touch on today, is the Texas governor Greg Abbott. He issued an executive order, prohibiting state agencies and political subdivisions from adopting or enforcing any order that requires an individual to provide documentation regarding the individual's COVID-19 vaccine status. The order also prohibits any public or private entity that receives public funds from requiring consumers to provide as a condition of receiving service or entering the space, documentation requiring such a vaccine status.

Jacob Dean ([13:23](#)):

And then you also have my home, state of Georgia. In Georgia, governor Kemp has issued an executive order that prohibits private employers from accessing or using data from Georgia's registry of immunization transactions and services. While they ordered prohibits private employers from accessing or using the vaccination data half of the state, the order does not explicitly prohibit private employers from requesting proof of vaccination from their employees. So you have a number of states that have

passed various restrictions on employers. This is just a snippet of what the governors have done in this sphere.

Kelly Bunting ([14:04](#)):

And what about businesses employers that have actually sued the state over say, a state's refusal to allow that business to check the vaccination status of their employees? And I'm thinking about the lawsuit that was just filed by a major international cruise line against the state of Florida because of Florida's law. Exactly what you're saying, forbidding companies or employers from getting any sort of vaccination status information or making decisions based on that vaccination status?

Jacob Dean ([14:40](#)):

That's a great point, Kelly. Companies have an interest in keeping their employees safe, especially employees that interface a lot with the general public. And so you've seen a movement and none of this [inaudible 00:14:51] to take measures to the court to allow certain private industries to require its public access to have vaccine status be shown.

Kelly Bunting ([15:03](#)):

So I guess really what we can say here is stay tuned because there's going to be more on this topic and some of it I'm sure contradictory. And of course, lawsuits, we've talked about lawsuits briefly. Ellen, we know at least there's been a handful of employees who have filed a lawsuit against their employer. What's happening on the lawsuit front when it comes to COVID-19 vaccinations?

Ellen Bandel ([15:33](#)):

Yep. You're exactly right. So far we have seen at least a handful of lawsuits filed. Some of which are still pending brought against employers regarding mandatory vaccination policies. So just to touch on a couple of those, it's usually in my nature to speak chronologically when I talk about case developments, but I'm going to actually talk first about one of the cases that has probably gotten the most media attention because of the fact that a judge has already made a ruling on the case. And just to give a little bit of a spoiler, the case has been dismissed, but the story doesn't end there. The case that I'm talking about was brought by a group of hospital employees in Houston, the facts are pretty straight forward. And to give a little bit of helpful context, the hospital that was sued in this case has been mandating vaccines, including the flu vaccine for over 10 years without issue.

Ellen Bandel ([16:35](#)):

So in April of 2021, this hospital announced that they would be requiring all employees to be vaccinated by June. And at the end of May, an employee by the name of Jennifer Bridges, along with approximately a hundred other employees who represented maybe about 1% of the workforce at that hospital, given the fact that about 99% had been vaccinated by that time. Filed a petition in state court to attempt to block that mandatory vaccination policy and what would be the terminations of any employees who were not willing to get vaccinated. The case ended up getting transferred to federal court. And as I mentioned earlier, it was dismissed in mid June, but has an appeal pending in the Fifth Circuit court of appeals. The decision that was rendered by that district court judge does provide some really helpful information and insights I think onto how other courts may evaluate these types of cases.

Ellen Bandel ([17:43](#)):

How employees and their respective attorneys may bring or not bring future cases. So I did want to talk about that briefly. So the main argument that was advanced is something that all of us in the labor and employment world have been hearing a lot about and others as well is the facts that each of these three vaccines that are available in the United States have only received emergency use authorization. And so, the claim is that they are only experimental and are dangerous. The complaint went so far as to say that the employees at this hospital were being treated as human guinea pigs and subjected to a medical trial as a condition of their continued employment. And the court did quickly dismiss this claim and clarified that they have not only misconstrued the law, but also misrepresented the facts because they weren't in fact, being required to be part of a clinical trial.

Ellen Bandel ([18:43](#)):

A clinical trial is a very separate issue from a mandatory vaccination policy and the court did in fact, make that distinction clear. The plaintiffs also claimed that the hospital policy amounted to a wrongful termination. And again, the court sided with the hospital there noting that under Texas' common law regarding wrongful terminations that would only be available if the termination was for refusal to commit an act that could result in criminal penalties. This of course is not a scenario where that would be at issue that's because vaccination is not an illegal act, nor would getting vaccinated carry any criminal penalties, just the opposite. And additionally, Texas does not recognize a public policy exception to at will employment. And therefore, this requirement is actually according to the court and the judge actually consistent with public policy of ensuring the health and safety of the citizens of Texas.

Ellen Bandel ([19:48](#)):

So we'll see how the Fifth Circuit decides to treat this appeal and certainly more to come there. And just to quickly touch on two additional cases with similar claims that are both pending in federal district court, one was filed back in February by a corrections officer in New Mexico. And another was raised by a group of workers who call themselves the California educators for medical freedom, they're a group of workers that are associated with the Los Angeles Unified School District. And they're a voluntary unincorporated association of LA USD employees who are advocating for medical choice and medical freedom and bodily autonomy. So both of those cases have actually very recently finished their briefing on motions to dismiss, and we will see how the judges dispose of, or keep those cases alive in particular based on what we expect to be some reliance or disregard for depending on the court, the Texas case. So, very interesting stuff.

Kelly Bunting ([21:16](#)):

Yeah. I'm sure that there's going to be more of these kinds of cases filed, right?

Kelly Bunting ([22:44](#)):

And I'm sure that employers are watching the outcome of some of these lawsuits to see just how far they can go. And we definitely been seeing an uptick in these sorts of public announcements regarding the mandatory vaccination policies. I mean, you see this in the news almost every day.

Ellen Bandel ([23:04](#)):

Yep, exactly. And they're all over the news. And as I think Jacob mentioned, they're still never the less controversial and will continue to be controversial. Controversy means litigation. Controversy is litigation.

Kelly Bunting ([23:22](#)):

Well, is there anything that employers or businesses might want to do any way, I guess that they could try to protect themselves a little more from these kinds of lawsuits as it, apparently it's going to become more common?

Ellen Bandel ([23:37](#)):

Yeah. There's always the possibility of a lawsuit regardless of the action that you take. So, with that in mind, and as we're a group of four attorneys here, it's certainly very important to talk to your attorney about all of the nuances associated with implementing or not implementing a vaccination mandate. As Jacob mentioned, this is a very, very intricate patchwork quilt that we've got going on here, especially for those businesses that have employees in multiple jurisdictions, it is a mess to put it gently. And just one of those nuances that is important to consider is the need to potentially make exceptions for employees who have religious beliefs that for example, may conflict with a vaccination mandate or employees with a disability who maybe shouldn't get the vaccine because their doctor has advised them of that.

Ellen Bandel ([24:38](#)):

I know anecdotally what I've heard from some businesses is that an employee for example, went through and receive the first dose of the vaccine, but had a severe allergic reaction and was advised by their doctor that they maybe shouldn't get the second. So you're always going to have situations like that that need to be handled on a case by case basis. So, in terms of what other steps an employer can take, some are going to be more litigation averse and cautious and take a wait and see approach. As I mentioned earlier, waiting to see how those judges rule on the other pending vaccine mandate lawsuits, and also see when the FDA approval comes through.

Kelly Bunting ([25:20](#)):

What about these shield laws that we've been hearing about? Going back to what Jacob was saying, these legislatures, state legislatures that are taking things into their own hands, trying to help businesses, trying to help employers, is that a trend? Is that something that we're going to be seeing in more and more states? The passage of the shield laws?

Ellen Bandel ([25:44](#)):

Yeah. So the shield laws have been passed and actually many of them went and have been in effect for well over a year at this point. I think we're at about 30 states and counting right now, not surprisingly the states that have passed these laws tend to be towards the center of the country. If you look at a map, you would note that the Northeast and the West coast states have not adopted these kinds of shield laws. So that gives you kind of a sense of the political pressures associated with that trend and where they've gone into effect. So certainly, there may be additional shield laws that go into effect in the future.

Ellen Bandel ([26:27](#)):

But as far as whether the shield laws will come into play, with respect to the vaccination mandate lawsuits that we're starting to see, each law is a little bit different, but they do give businesses who act in good faith immunity from a potential civil liability for claims relating to exposure to, or contracting of COVID-19. So for example, a business that's not acting in good faith in some respect with respect to their COVID-19 safety and prevention activities, they may not have access to that immunity. And additionally,

there are some exemptions or exceptions for example, in the case of negligence or gross misconduct or failure to comply with COVID related safety rules that are in effect under federal law, state law or local laws, public health orders in those situations as well. I mean, [inaudible 00:27:27] might not be available.

Kelly Bunting ([27:28](#)):

It's not blanket immunity either, right? I mean, some of the laws only protect certain industries, certain professions like healthcare settings and other laws are sort of a blanket. But that's not across the board, right?

Ellen Bandel ([27:45](#)):

Right. And as far as employment goes, a number of these laws also have a carve-out for workers' compensation claims. And the reason for that is that many of the state workers' compensation systems consider workers' comp to be the exclusive remedy for workplace related injuries and illnesses. And so they wanted to make sure not to interfere with that workers' compensation structure that's already in place in these states.

Kelly Bunting ([28:12](#)):

And California hasn't passed a shield law, right?

Kelly Bunting ([28:31](#)):

Do you think any of these laws then will be cited by businesses or by employers who get sued over mandatory vaccination policy?

Ellen Bandel ([28:39](#)):

That's a really good question. The laws were passed largely to protect businesses who actually are taking steps to keep their employees and customers safe and prevent the spread of COVID-19. But who, nevertheless recognizing how easy it is for COVID-19 to spread. They still have employees or customers who get exposed or infected. The mandatory vaccination policy is obviously a little bit different because there are employees are claiming that they are or would be wronged or injured by having to get vaccinated as opposed to being injured, because they actually got COVID-19. With that said though, any employer who is facing a legal challenge would almost certainly explore every possible defense that might be available to them, including potentially under any of these shield laws, if they're available in the particular states where that business operates.

Kelly Bunting ([29:34](#)):

So I'm going to say it again, stay tuned. We all just have to wait and see. Ellen, Jacob, and [inaudible 00:29:42]. Thank you so much for this informative discussion. For more, please be sure to tune in to the next episode of Asked and Answered, Greenburg Traurig's Labor and Employment podcast. So just after we finished taping the podcast, there were a number of new initiatives that were announced. Over the past few weeks, a multitude of employers have announced mandatory COVID vaccine policies for onsite work subject to of course, certain exceptions for disability and religious accommodations. These companies include major retail chains, national newspapers, poultry, and meat plants, and a host of tech companies. The incredible uptick in companies mandating vaccinations really provide substantial evidence that private employers are stepping up to mandate vaccines where local state and federal governments have not.

Jacob Dean ([30:33](#)):

That's right, Kelly. And the announcement by a plethora of private employers comes on the heels of the department of veterans affairs announcement that it too, will require a certain segment of its workforce to become vaccinated. Other employers, including the city of New York will mandate employees receive the COVID-19 vaccine or submit to weekly coronavirus testing. This clear trend has prompted other employers to re-evaluate its policy with respect to the COVID-19 vaccine. As we discussed in the podcast, courts appear increasingly willing to let employers take this action. In addition to the cases we discussed today on the podcast, in *Clawson versus the trustees of Indiana university*, the court stated the Indiana University students are not being forced to submit to vaccination without their informed consent.

Jacob Dean ([31:20](#)):

Rather, they must choose whether to undergo vaccination or to defer attending school on campus, or to submit to requirements not imposed on backside to students, such as wearing a mask, social distancing, and frequent testing. The court upheld all these mandates. And just recently the Seventh Circuit denied plaintiff's request for an injunction pending appealed. Writing for majority, judge Easterbrook of the Seventh Circuit wrote that vaccination is instead a condition of attending Indiana University. People who don't want to be vaccinated may go else where.

Kelly Bunting ([31:53](#)):

That's really interesting. The vaccine mandates by employers. Well, they're not the only ones on the rise. Just recently, the city of New York has announced that it will require proof of vaccination for a variety of the activities. And it's for employers, it's for visitors, it's for customers, clients, and that includes indoor dining, gyms, movie theaters going to see a Broadway play. So I guess I just can't say it enough, stay tuned. Things are moving quickly and the law and these mandates keep changing.