

Speaker 1 ([00:00](#)):

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Kelly Bunting ([00:19](#)):

Welcome to Asked & Answered, Greenberg Traurig's Labor & Employment podcast. I'm your host, Kelly Bunting, and I'm a shareholder in GT's Labor & Employment practice. We hope to inform our audience about current hot button issues in employment law. I'm here with Nicholas Corsano, he's an associate in Greenberg Traurig's New York City office, and Eric Sigda, who's a Labor & Employment shareholder in GT's New York City office. Now that companies are reopening with mandatory return to work orders, we're taking some time today to talk about issues that may arise with employees who are a little hesitant to return to the workplace and what a company's obligations are in certain circumstances. Eric?

Eric Sigda ([01:05](#)):

Thanks, Kelly. So Nick, now that employers are mandating that employees return to work, can employees decline to return to work because of a fear of contracting COVID?

Nicholas Corsano ([01:15](#)):

Well, Eric, the simple answer is no. Employers are not required to provide accommodations based on an employee's generalized fear of catching COVID. However, it's important for employees to remember that employers should still be taking safety precautions to ensure a safe work environment and compliance with federal and local laws. This may include health screenings or questionnaires, masks, and social distancing measures. So employees should feel safe and secure returning to the workplace.

Nicholas Corsano ([01:44](#)):

But Eric, what if employees are worried about exposing their family member who's at a higher risk of severe illness from COVID due to an underlying medical condition? Are they entitled to an accommodation of some sort?

Eric Sigda ([01:57](#)):

They are not. Although an employer is allowed to provide employees with flexibility, if it chooses to do so, it is not required to provide an accommodation to an employee who does not have a disability in order to protect a family member with a disability from potential COVID exposure. Notably, if an employer chooses to offer flexibility in this area, it should do so equally amongst all its employees.

Eric Sigda ([02:21](#)):

Nick, another issue that has arisen concerns employees that have been working from home since COVID began. If an employer has allowed employees to telework as part of its efforts to stop COVID, when the employer reopens its workplace, does the employer automatically have to grant telework as a reasonable accommodation to every employee with a disability that requests to continue the arrangement?

Nicholas Corsano ([02:43](#)):

Well, first it's important to remember that employees are generally not entitled to an accommodation unless they have a disability. So if an employee does not have a disability, the employee is not entitled under the ADA to telework as an accommodation.

Nicholas Corsano ([02:58](#)):

If the employee making the request does have a disability, however, this doesn't necessarily mean that a request to telework needs to be automatically granted by the employer. Employers are entitled to understand the employee's disability related limitations. Therefore, if there's no disability related limitation that requires teleworking, then the employer does not need to provide it. This means if the employer can accommodate the disability related limitation effectively onsite at the workplace, they can do so.

Nicholas Corsano ([03:29](#)):

Also, if the employer allowed employees to telework during workplace shutdowns and excused employees from performing one or more essential workplace functions during that time, the employer does not have to continue to allow employees to telework if it means continuing to excuse the employees from performing essential functions of their job after a workplace reopens. The ADA does not require an employer to eliminate essential job functions as an accommodation.

Nicholas Corsano ([03:58](#)):

So along these lines, what are some examples of accommodations outside of teleworking, an absent and undue hardship on the company, that an employer may grant to employees that will reduce their direct threat of contracting COVID in the workplace?

Eric Sigda ([04:12](#)):

Well, accommodations may include providing enhanced protective gear beyond what is generally provided, erecting a barrier that provides separation between the employer and coworkers and the public, modifying work schedules, and moving an employee's work location. But Nick, we have vaccines now. Can't employers just mandate that employees get vaccinated?

Nicholas Corsano ([04:33](#)):

In many instances, the answer is yes. Federal law does not prevent an employer from requiring all employees physically entering the workplace to be vaccinated. Many employers are mandating vaccines. However, some states are pushing back on vaccine mandates. For example, Montana's passed a law prohibiting private employers from mandating vaccines, and the governor of Texas issued an executive order stating the same thing. Other states are also considering similar measures.

Nicholas Corsano ([05:00](#)):

It remains to be seen how these state measures will interact with federal law. For instance, under the Biden Action Plan, OSHA issued a new rule requiring all employers with 100 or more employees to ensure their workforce is fully vaccinated, or require any workers who remain unvaccinated to produce a negative test result on at least a weekly basis before are coming to work. OSHA issued an emergency temporary standard to implement this requirement. However, several states have challenged this rule, and its implementation has been stayed by the courts pending further litigation. Also, OSHA said that it will not be enforcing the emergency temporary standard while the matter in litigation. The president

has also issued an executive order that all federal contractor employees will be required to be vaccinated against COVID-19. This requirement, however, has also been stayed by the courts. Similarly, a directive was issued mandating that healthcare workers that work in institutions that receive federal funding for Medicare and Medicaid must be vaccinated and do not have an option for weekly testing. Like the other mandates, this directive has also been stayed.

Eric Sigda ([06:08](#)):

So Nick, where does this leave employers?

Nicholas Corsano ([06:12](#)):

Well, at the moment, employers do not have to comply with the terms of the federal mandate. However, employers should continue to monitor the status of the mandates. Ultimately, the mandates and any conflicts between federal law and state law will almost certainly be decided by the courts. But even if an employer has a mandatory vaccine policy in a state with no prohibitions, they may still have to provide a reasonable accommodation to employees with disabilities or sincerely held religious beliefs, unless providing such an accommodation would pose an undue hardship on the operation of the employer's business. In this circumstance, disability can also include pregnancy related conditions.

Nicholas Corsano ([06:49](#)):

So what about asking about vaccine status? Is that a disability related inquiry?

Eric Sigda ([06:54](#)):

No, it is not. Employers can ask employees whether they obtained a COVID vaccine. Also, requesting employees to provide documentation confirming vaccination is not a disability related inquiry under the ADA. However, the documentation or other confirmation of vaccination is medical information and must be kept confidential.

Nicholas Corsano ([07:14](#)):

Eric, what if the employee says they're not vaccinated? Should the employer ask why?

Eric Sigda ([07:19](#)):

No. In this instance, the employer should refrain from inquiring why an employee has not been vaccinated, because it might elicit disability related information. Also, employers should be careful about asking about vaccination status in a job application. Asking about this information may violate ADA requirements on pre-employment medical inquiries and examinations, because asking the question may elicit why the applicant has not been vaccinated. This may cause disability related information to be disclosed, which is prohibited under the ADA. Thus, it is best practice not to ask if an applicant has been vaccinated.

Eric Sigda ([07:55](#)):

So Nick, what if an employee has not been vaccinated and needs a reasonable accommodation? What should an employer do?

Nicholas Corsano ([08:02](#)):

Well, like any accommodation request, the employer should engage in the interactive process with the employee to determine if a reasonable accommodation can be provided that doesn't impose an undue hardship on the employer. This process may include obtaining supporting medical documentation about the employee's disability. The employer should examine undue hardships on a case by case basis to see if the requested accommodation will impose a significant difficulty or expense on the employer.

Nicholas Corsano ([08:29](#)):

So Eric, what are some reasonable accommodations an employer can provide to an employee requesting an accommodation due to disability preventing them from being vaccinated?

Eric Sigda ([08:39](#)):

Well, some accommodations may include requiring the employee to wear a face mask, working at a social distance from coworkers or non-employees, working a modified shift, getting periodic tests for COVID, offering the opportunity to telework, or accepting a reassignment.

Eric Sigda ([08:55](#)):

And Nick, what about an employee who has been fully vaccinated or requests an accommodation because that employee has an underlying disability and a continued fear of contracting a severe illness, despite being vaccinated?

Nicholas Corsano ([09:08](#)):

Well, it's an interesting scenario. But employers who receive an accommodation request should process it like any other accommodation request. The employer should engage in the interactive process to determine if there is a disability related need for the reasonable accommodation requested. This might include seeking information from the employee's healthcare provider. For example, certain employees that may be immunocompromised might still need accommodations because their condition may mean the vaccine does not offer the same level of protection as other vaccinated individuals. The employer should explore possible accommodations that might be afforded to that individual, absent undue hardship on its business.

Eric Sigda ([09:47](#)):

So that's that. Nick, this has been great.

Nicholas Corsano ([09:50](#)):

Yeah. This has been fun and very informative. Thanks very much.

Speaker 3 ([09:54](#)):

Thank you for listening. Tune in to the next episode of Asked & Answered, Greenberg Traurig's Labor & Employment podcast.