

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

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

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 hope to inform our audience about current hot button issues and employment law.

Kelly Bunting ([00:33](#)):

This two-part episode focuses on Texas labor and employment laws. The new normal, with GT attorneys Jordan Cowman who leads the firm's Texas Labor and Employment Practice group. Shira Yoshor, a litigation shareholder in our GTS Houston and Philadelphia office and Alicia Sienne Voltmer, our of counsel in the labor and employment department within our GT Dallas office. Our guests will discuss topics ranging from COVID 19 related questions, such as return to the office policies and accommodation requests to Texas's new sexual harassment law.

Jordan ([01:16](#)):

Thank you so much. I know that everyone is so interested and perhaps confused about so many things regarding Texas labor and employment law these days. My topic has to do with vaccine mandates. With vaccine mandates, there's so much confusion right now in terms of what is permissible, what is prohibited and what is required. It's interesting because this has to do with Texas law.

Jordan ([01:47](#)):

This had to do with a Texas judge, which was, I think the first one to affirm a mandatory vaccination policy. This is a quote from the plaintiff's lawsuit. Now, I don't know if this is an actual quote from the CEO of Houston and Methodist, but this is what was at the top of their lawsuit. I'll just read it. It just basically says, "100% vaccination is more important than your individual freedom. Every one of you is replaceable. If you don't like what you're doing, you can leave and we will replace your spot."

Jordan ([02:20](#)):

I know that sounds extremely harsh, but simply put, certainly in Texas, we have employment at will. Right? Either party can leave at any time. You can terminate or quit at any time for any reason or no reason at all without penalty.

Jordan ([02:37](#)):

This court case came out in April and here this was April the first, and what happened was Houston Methodist required all of their workers as a condition of their continued employment that they get a coronavirus vaccine. You see, I just took a snip from the newspaper there. 178 staffers in Houston Methodist suspended for not complying with COVID 19 vaccine mandates. What happened there is, yeah a bunch of employees said, "Look, we're not going to follow this mandate."

Jordan ([03:14](#)):

Some of them got terminated, suspended, they filed a lawsuit and they sought a temporary restraining order. When the court looks at this, right, they look and see basically what that CEO said and see what the requirement is, which is, "Hey, get the vaccine or get out." The court looked at this at the EEOC's guidance on here. You'll see more on this in my colleague Shira Yoshor's presentation, but the EEOC says, "Look, employers can certainly require a vaccination as long as they accommodate requests. If they're religious requests or if there's a medical reason that someone's not willing to get a vaccine. The court looks at that and says, "Well, looking at the EEOC guidance, looking at employment at will, basically here's what they said. "You can basically A, accept what the employer wants, or you can refuse it. But if you refuse it, you're just going to have to find another job."

Jordan ([04:27](#)):

The court analogize it to basically any other type of requirement that an employer says an employee needs to do. Like, you need to change offices. You have to come in early, you have to be on time or whatever, all of those things, if the employee doesn't follow it, it's employment at will, and you can certainly fire them.

Jordan ([04:49](#)):

What the court is saying in that last bullet point, it's basically, the employer can require employee to choose to work there, continue working and get the vaccine or not get the vaccine. The EEOC says, "Hey, as long as you properly accommodate the employee with religious or medical exemptions, then you're in pretty good shape."

Jordan ([05:13](#)):

What we had that just came out in the U.S. Supreme court, I'm just going to read this article right here, just a very short blurb from it. This is out of Maine. It's a case out of Maine. It says, "The U.S. Supreme court declined Tuesday to block a vaccine requirement imposed on Maine healthcare workers, the latest defeat for opponents of vaccine mandates." The mandate required all healthcare workers, and hospitals, and nursing homes to get vaccinated or lose their job.

Jordan ([05:46](#)):

Some of the workers lost their job, because they refused and they had not requested an accommodation. The U.S. Supreme court said, "Hey, that's just fine." What you also see is a lot of union activity, not wanting their members to have to get the vaccine as a condition of their employment, but what we're seeing and certainly you see from the Supreme court case, I cited and the earlier case from Judge Hughes in Houston, the trend and probably the law says that if the employer requires vaccinations, those requirements will withstand legal scrutiny.

Jordan ([06:32](#)):

That's kind of the bottom line on that. That said, you don't have to require vaccines or do you? Now last month, President Biden issued an executive order. This has to do with federal contractors and then subcontractors. It's requiring a new contract clause requiring vaccination requirements in all new contracts and contract extensions, that type of thing. Basically federal contractors will now be required to have a policy requiring vaccination. That's coming into effect very shortly and here there's going to be guidance that's going to be issued by OSHA, the Occupational Safety and Health Administration.

Jordan ([07:29](#)):

They call it, you'll see this abbreviation, ETS everywhere. It stands for Emergency Temporary Standards, and they're going to be coming out with guidance because there's not a whole lot of color around what the requirements are and so on and so forth. OSHA's going to be coming up with those here very shortly. They have a task force that's putting together those rules.

Jordan ([07:55](#)):

If you look to see the executive order, the covered contractors we know this so far, they're going to have to have documentation to prove the vaccination status of their employees. This is again covered government contractors. You can see in those bullet points below what type of proof or documentation is going to be required. The thing is, that if people are not vaccinated, we believe that the requirement says that they can get tested frequently, maybe once a week, or in some cases with healthcare twice a week, to make sure that they are coronavirus free.

Jordan ([08:41](#)):

Those are the types of administrative requirements that are going to be placed on federal contractors. Regarding penalties, right, I mean, that's what our clients want to know. Okay. These are the requirements, when's it going into effect? What does it require and what happens if we don't comply? Well, right now, we're waiting for those ETS guidance to tell us what exactly is going to happen with non-compliance. But certainly things could happen, like debarment or terminations for default on the contracts and that type of thing.

Jordan ([09:22](#)):

There can be some penalties that probably will be [inaudible 00:09:27] out. My opinion is that, I don't think that the Biden Administration wants to come down and start debarment people. They want people to get into compliance. I suspect that there will be some warnings and then some demands that they get into compliance rather than going for the ultimate penalties.

Jordan ([09:48](#)):

With regarding compliance, the proof of vaccination has to be in an acceptable form. We have to have a policy to accommodate covered workers for disability, religious reasons, or medical reasons. That's something that my colleague, Shira Yoshor will speak to in just a minute. Then there needs to be a coordinator designated to make sure that the work place is safe and coronavirus free, making sure that compliance happens with that particular executive order.

Jordan ([10:23](#)):

Another thing, providing employees reasonable time off to get vaccinated. The flow down requirements, meaning, that the federal contractors covered, but then the contractors also going to have to flow down to the subcontractors to require them to comply as well. Contractors and then federal subcontractors are going to be covered. That's something that we would have to look at each individual situation to make sure or to be able to properly advise you whether you're covered or not.

Jordan ([11:00](#)):

It may be time for you to visit whether you have contracts or subcontracts with the government. Here is where the big controversy is the big rub is, state versus federal law. That's a real controversy because especially in Texas, we have some problems. If you have a hundred or more employees, all right, whether or not you're a federal contractor, President Biden says that those with a hundred or more

employees have to mandate vaccination or require testing. We're waiting to see what kind of guidance we get on that. That's going to be coming up here shortly. The battle [inaudible 00:11:46] outcomes, federal versus state law. All right, Governor Abbott just, let's see, this was October 11, 10 days ago, issues this ban on coronavirus vaccine mandates in Texas.

Jordan ([12:01](#)):

It includes private businesses, not only federal contractors, just anybody requiring mandates for customers or employees. Of course, that's completely contrary to the federal executive order requiring all covered employees, or federal contractors rather, to have all employees vaccinated. The question here is which law will you violate? You may have seen in the press recently about American Airlines and Southwest Airlines saying that they're going to follow federal law. Well, obviously if you're federal contractor, that's probably going to be chief in your mind, but if you require vaccines, you're going to be fine under the federal law, but under state law, you'll be violating it. Bet on litigation. Right? Governor Abbott's order, "If you don't comply, there could be a result in a fine of \$1000." Then as you see there, some employers figure that the federal vaccine mandate is going to prevail, over the governor's executive order and down there I just paste the little snip from the newspaper that talks about that how Southwest and American are obeying federal rather than state law or the federal executive order, rather than Governor Abbott's executive order.

Jordan ([13:22](#)):

Most people predict, and we're seeing it, you see that little snip down there that says, "24 Republican State Attorneys General threatened to sue President Biden over vaccine mandate." Those are happening right now. It's a Battle Royal class actions, lots of litigation, State Attorney General's class action. You name it. There's going to be a ton of litigation around it.

Jordan ([13:48](#)):

Talking about mask mandates. All right.,I just took this snip, Governor Greg Abbott, local officials are fighting several legal battles over mask mandate. Back in May, Governor Abbott issued an executive order prohibiting government entities and officials for mandating face coverings or restricting activities in response to the coronavirus. Governor Abbott says you can't have mask mandates. In other words, government entities can't mandate it, your county judge and so on and so forth can not mandate it.

Jordan ([14:26](#)):

But what we're seeing is lots of school districts, for example, are defying the governor's executive order. You see a lot of activity around that area. What all this stuff happens to be, and some of you all I know a lot of you all on this call, but you feel like a chameleon on plaid because it's so confusing this array of federal. Do we follow federal, state, whatever? It's very difficult and you have to check what is most important to you, whether you have federal contracts, state contracts, and let's be very careful.

Jordan ([15:05](#)):

The EEOC guidelines are very clear here with regard to private employers. Right? An employer may require employees to wear a face mask. It goes back to that case for Houston Methodist that I mentioned at the very beginning. It's like, "Hey, if the employer requires you to wear a mask, then you got to wear a mask as a condition of your continued employment." With that, I will turn it over to my good friend and colleague Shira Yoshor. Shira, why don't you take it from here?

Shira Yoshor ([15:38](#)):

Thanks so much. Jordan, thanks for setting us up for the next discussion. I want to talk now about the vaccine exemption requests, because as you know, we're all going to be dealing, if you haven't already, we're all dealing with the variety of exemptions that may apply. You do have this conflict, as Jordan said, it's a real showdown. You've got the federal mandate on one side, Texas, you're dealing with the governor's mandate. I just want to read it to you so that y'all have it clear in your mind. It's that, "No entity in Texas can compel receipt of a COVID 19 vaccine by any individual, including an employee or consumer who objects to such vaccination for any reason of personal conscience, based on a religious belief or for medical reason, including prior recovery from COVID 19." the EOC guidance that Jordan mentioned before talks about religious and medical conditions that might be exceptions.

Shira Yoshor ([16:40](#)):

The governor has added in two very important, but not well defined exemptions that might be personal conscience and also if you've recovered from COVID 19. I want to through with y'all as quickly as I can, because we have so much interesting material to cover today. What you should do when you're dealing with a vaccine exemption request. Of course, this is just, I'd say you put it in the context, if time you have been requested to accommodate somebody. You want to number one, be fair. Treat them the way you would want to be treated. Two, be open-minded. If you have gone on record saying things like, "We're never going to give in, if somebody refuses to get the vaccine," that just looks bad from the start, because you're not taking in account these potential obligations to allow people to be exempted.

Shira Yoshor ([17:33](#)):

Now there's always going to be this wing, and we'll get into particular discussion in just a moment about religious exemption versus medical conditions exemptions, and how they are different, but you want to be open-minded. You don't want to be dismissive right out the box, when somebody comes forward with an exemption request. Be consistent, make sure that you're treating all of your employees fairly and equally, consistently, be flexible.

Shira Yoshor ([18:00](#)):

It might be with all this changing information, you might say one week, "We can accommodate you by doing X," and then find out that there is scientific evidence that what you had proposed to do and had started to do isn't really the best thing. Being flexible and being willing to go back to the employee and talk about the accommodation request is really important.

Shira Yoshor ([18:21](#)):

Keeping it private is of course, always paramount when you're dealing with employee requests of this nature that are highly sensitive. You want to make sure that you are disclosing only to those who need to know and making sure that your documentation is well protected. If it has medical information, that it's in a separate file, that it complies with all the things that you need to do for maintaining that information under all the HIPAA rules and everything else and your policies very importantly.

Shira Yoshor ([18:49](#)):

Because this is so confusing, it's really helpful sometimes to have a sounding board. Outside council provides, we do this all the time. We're talking to people, we can provide you context for what other companies are doing. Highly recommended that when you get in these sticky situations, and you're not sure what to do, to reach out to your outside council, make sure you're getting good advice.

Shira Yoshor ([19:09](#)):

I want to talk now about the religious exemptions. For a religious exemption to apply, first of all, the employee has to have a sincerely held religious belief, practice or observance. The Supreme court has made clear that that's different from political, sociological, philosophical types of beliefs. Not so clear if what the Supreme court was trying to distinguish. I think what they were saying might be matters of personal conscious under what the Texas executive order states.

Shira Yoshor ([19:41](#)):

If we're just looking at religious exemptions though, and we want to first know whether it is a sincerely held religious belief, I think it's fair and it's best practice for most employers to assume that it is coming from a place that is sincere. When an employee comes to you and says, "I need a religious exemption," assume, give them the benefit of the doubt that it's sincere.

Shira Yoshor ([20:04](#)):

Now, what are some reasons that you might have to doubt it? If you never knew that they were a specific religion before and of a sudden the vaccine policy comes out and the next day they tell you they have just converted so that their new religion precludes them from being able to take the vaccine. That would be suspicious. It might be something related to the prior practice of how they've dealt with situations. It seems inconsistent perhaps with how they've dealt with other vaccines.

Shira Yoshor ([20:32](#)):

I think it's really important in the religious exemption context to understand that a reasonable accommodation is one that does not incur for the employer more than a Dominous cost. What does that mean? the Supreme court has looked at this and they're actually, there are some cases that are brewing that will hopefully give more definition to this. But over the years, the Supreme court has said, basically Dominous is an additional cost to the employer.

Shira Yoshor ([21:01](#)):

For example, if I say, "I am not going to take the vaccine and therefore I can't work these shifts, and you're going to have to hire somebody else who will get paid overtime for these shifts," that payment of overtime to another employee could be viewed as more than Dominous and could be a reason that you deny this religious exemption under past precedent. One way that this healthcare system has dealt with the issue and trying to make sure employees who are coming forward are really being consistent.

Shira Yoshor ([21:29](#)):

Because what we have seen increasingly and you probably on the line have seen this too. There have been many requests that have stated, "I do not want to take the vaccine because I believe in creating the vaccine stem cells were used and I object to fetal cells being used in any sort of medication." Well, what this system said was, "If you're going to take that approach with respect to the vaccine, the COVID 19 vaccine, then how are you dealing with all these other medications? We're testing use the same things."

Shira Yoshor ([22:02](#)):

Actually in the vaccine itself, we should all be clear that there aren't any fetal cells or stem cells used. It was in the testing that there may have been for some of the vaccines that are currently in use, but what

this employer did was say, and it's fair to do this, to have a written attestation, if you want to have a religious exemption, you have to tell me that you are not taking these other medications that under your theories, your religious theories, you would not be allowed to take.

Shira Yoshor ([22:32](#)):

If I want to make sure that you're being consistent, just like the employer should be consistent, this is one way to do it. Something definitely that you should consult with counsel before you put in place. I want to talk now about the medical conditions and when you might get these questions about whether, because of a medical condition, am I allowed to avoid a vaccine mandate that the employer is put in place? I'd say that the medical conditions and how you deal with these exceptions are similar to the way you do any reasonable accommodation. First step always is that you want to engage in the interactive process. It's critical. You want to make sure that that interactive process is well documented.

Shira Yoshor ([23:14](#)):

If you have a team or committee that deals with these kinds of requests, oftentimes it's better to do these kinds of things by committee. It's perceived as more fair, more objective. You have more people weighing in, hopefully a diversity of views and it will enable you to be better protected as an employer who might be rejecting some of these requests. You again want to be consistent, communication with the employee is really key. Make sure that you're dealing, if you're dealing with the employee by email or text exchange that you're keeping those documents safe that you have evidence of what you did to extend accommodations. Understand that the one that is requested by the employee is not necessarily the reasonable accommodation. It is fair for an employer to come up with something else.

Shira Yoshor ([24:05](#)):

For example, if somebody says, "I don't want to take the vaccine because I had COVID," then maybe the employer comes back and says, "Well, we think that previous COVID doesn't give us enough certainty whether you have immunity and whether you'll be transmitting the disease to other people. We want you to have a test on a frequent basis." That might be a way to get around it. As you see, that's testing has become, I think more and more one of the accommodations that's being considered seriously at every level of the government.

Shira Yoshor ([24:39](#)):

Now with a medical condition, if you're considering what is it that I need to accommodate, it's different. The reasonable accommodation is going to be basically if you're an employer, you have a very high burden to show an undue hardship, with respect to a medical accommodation, as opposed to the Dominous way that it's looked at in the religious context.

Shira Yoshor ([25:03](#)):

Again, as I said earlier, you want to be open to re-evaluation. Nothing should be set in stone. There's so much uncertainty as Jordan pointed out. For those of you who are Assure members probably saw the leading article where there's so much frustration and there was a picture I thought that summed it up so perfectly with a woman just going like this. Her hands over her head, she's an HR professional. I'm getting all these conflicting dictates. Every single day. Things are changing. I can't even put a policy in place because it's going to have to change so quickly. How do I deal with this? We're here to help. That's what, hopefully, if nothing else, that you're one of your key takeaways is today that we're here to help and try to guide you through this very murky process.

Shira Yoshor ([25:44](#)):

I think I already covered this mostly the main issue that I just wanted to point out, Jordan really also captured well, the executive order that we're dealing with in Texas. I know that the governor wanted this to be taken up in the third emergency session for more clarity. I don't believe that the legislature dealt with it. I think some of the question about, for example, personal conscience, I think still undefined.

Shira Yoshor ([26:09](#)):

One of the things that you're probably dealing with as well as issues of employee stress, not just the vaccine, but you have people who are trying to figure out what to do, how to live their lives in this COVID world. With so much conflicting information, there is a lot of stress and how to respond to people's requests for accommodation. Really, you want to use the same rules that I laid out before with respect to COVID 19. You want to be fair and open-minded, consistent, flexible. All of those things are really important, but when you're dealing with a situation, an employee says, "I'm stressed out." There's no magic words that somebody has to use for the request of an accommodation.

Shira Yoshor ([26:50](#)):

It might be that that reaches a level. The standard now for determining what's a disability that requires you under the ADA to reasonably accommodate an employee, it's pretty low. You want to be careful that you're not just dismissing an employee who says I'm really stressed out. Everybody's stressed out, we're all dealing with COVID. We're all trying to figure out how to make sure that our kids are safe, our family are safe, our parents are safe. Don't be dismissive. Take it seriously and try to work through with the employee, how to accommodate them.

Shira Yoshor ([27:23](#)):

Now, certain things that you probably have dealt with in the past, but if you haven't, if somebody comes in and says, "I can't have this particular supervisor, they are causing me stress," that historically there are several cases, including cases out of the Southern district of Houston, for those of you who are in the Southern district. I know that there are cases with similar holdings from the first circuit, the seventh circuit. We're talking about the Midwest, the Northeast, where if you say, if you go in and say, "My accommodation for stress has to be that you move me to a different supervisor." You can't dictate who is the organization of the employee. That generally is not considered a reasonable accommodation.

Shira Yoshor ([28:07](#)):

Now it might be that somebody says, "This person has been dismissive of my COVID fears." Maybe there's a way to do it. If there's a way to do it and you can do it, then consider it. I wouldn't rule things out just because in the past we've said, "You can't tell me who the supervisor's going to be." This might be different under the current environment, you want to be sensitive and careful and know that you're handling things based on all these rules that are in front of you.

Shira Yoshor ([28:34](#)):

I know a question that we're hearing oftentimes is, "Well, what about remote work? You've been able to accommodate me for the last year and a half. Now you're telling me I have to come back to the office? What's up with that? Why are you telling me that I must come and I'm stressed out if I have to take public transportation to get there. I don't know who's vaccinated. I don't know who's masked." Consider these questions when you're trying to come up with a return to work policy. Think about really carefully,

"Does this employee need to be physically present in the workplace? Is it a manufacturing facility where you need people on the ground, healthcare workers where you definitely need this interaction? Or is it just okay for this person to be working from their home office? Or maybe is there a back office so they're not exposed to as many people that might be another alternative?"

Shira Yoshor ([29:20](#)):

Are the performance issues that wouldn't exist if the person was physically present? I've had clients who've told me, "We've looked very carefully to see how these employees are performing and their productivity went way, way down when they were working from home. We tried to accommodate them as long as we can, but we can't do it anymore."

Shira Yoshor ([29:37](#)):

That might be a valid reason for telling people to come back to the office. Have all the other employees returned to the workplace? That's something that you should consider. If you're you're picking and choosing that always is I think, cause for concern and you should really think hard before you say, "I'm not going to accommodate you."

Shira Yoshor ([29:55](#)):

If you have already gotten an employee, who's proven that they have stress. Part of that also is, having the right documentation. If there's a question about whether that stress is real or not, this day an age, it's pretty easy for somebody to get a doctor's note to do so, but you still have the alternative. If you think somebody is really not seeking medical treatment for the stress that they're claiming for it to be in medical condition, then you could ask for an independent medical exam, but do it with the advice of counsel, please. Don't just go out and start asking for people to go to your doctor that you prefer, please.

Shira Yoshor ([30:31](#)):

Then lastly, the question I think that you all have to consider is, "Has a CEO return to the workplace? Are the people in the C suite coming in? If they're not, why is it okay for them not to be there?" There might be legitimate reasons. Like I said, if it's a manufacturing facility or some sort of job that requires people to be there in person to do their job, then obviously it's easier to explain.

Shira Yoshor ([30:54](#)):

It's a lot harder to explain when everybody's basically working from a computer. Why do the people in the management positions get special treatment, aren't being required to come in, but I am as an employee. Make sure that you have a well reasoned approach. We do understand that these policies are ever changing and it's becoming complicated, not really clearer by the day, but more complicated by the day.

Shira Yoshor ([31:19](#)):

I think with that, I just want to mention in that there are other states, if you're doing business in other states. Other states have taken very different approaches. I think that it's really important for you to be counseling, if you do have offices outside of Texas, be counseling with your employment lawyers, to make sure that you understand where are the places where a vaccine might be mandated.

Shira Yoshor ([31:45](#)):

For example, like in New York, there's no religious exception. It's being challenged right now. In Maine, there's no religious exemption. The first circuit, as Jordan mentioned earlier, just decided that that was okay, but it's going to be teed up at the Supreme court. We know what's coming.

Shira Yoshor ([32:01](#)):

We will continue to keep abreast of all of these changes. Try to help guide you through these murky waters. I know that there's more material that we want to cover. With that, I'm going to turn it over to Alicia. Who's going to give you a good sense of the new sexual harassment law in Texas.

Kelly Bunting ([32:20](#)):

This concludes part one of our podcast discussion. Thank you for listening and tune in to the next episode to listen to part two.