

Mike Taylor:

Hello everyone. And welcome to the next episode of the Work Place Safety Review Podcast. I'm your host, Mike Taylor, Chair of the OSHA Practice Group at Greenberg Traurig based out of our Washington DC and Northern Virginia offices. I've been practicing OSHA law for roughly about 20 years now. And if you want to find out more about me or our OSHA Practice Group, you can go to [www.gtlaw.com](http://www.gtlaw.com).

Mike Taylor:

Today we have the privilege of interviewing Professor Mark Rothstein. Professor Rothstein holds the Herbert Boehl Chair of Law and Medicine and is the Founding Director of the Institute for Bioethics, Health Policy and Law at the University of Louisville School of Medicine. He received his BA from the University of Pittsburgh and his JD from Georgetown University. Professor Rothstein has concentrated his research on bioethics, genetics, health privacy, public health law, employment law, and occupational safety and health law.

Mike Taylor:

Before entering the academia, he served as an attorney advisor at the Occupational Safety and Health Review Commission. Ironic Mark, it's where I got my start many years ago with the review commission. He is the author and editor of 19 books and over 300 book chapters and articles in leading journals and of bioethics, law, medicine and public health.

Mike Taylor:

How I first got to know Mark, although not personally was through his treatise Occupational Safety and Health Law that I've used for the last 20 years. It's a great resource when I'm trying to look up very nuanced issues. So Mark welcome.

Professor Mark Rothstein:

Thank you, Mike. It's good to be with you.

Mike Taylor:

And Mark, I invited you to talk today about a really interesting topic that I know our listeners will find very interesting, and that is employer mandated vaccines dealing with COVID-19. And I know you've written some articles and other pieces on this topic. Do you know how many or what types of employers have, or are likely to have COVID-19 vaccine mandates?

Professor Mark Rothstein:

Well, the surveys have shown that it's a rather small number of employers, at least among large employers at the moment that are interested in having vaccine mandates. One can imagine that it is likely to be in the healthcare sector or in a retail or food distribution and so forth, the areas that are public facing and also where the exposure and risk is highest, I think it's safe to think they're going to be most interested in it, at least initially until they weigh the pros and cons.

Mike Taylor:

What are some of those pros and cons?

Professor Mark Rothstein:

Well, as a public health person, I would be very happy if everyone, employees certainly included would be vaccinated against this awful Corona virus. But the actual logistics and the way of doing it is going to be a problem if it's mandated, I think, and I'm recommending that employers facilitate the vaccination of their employees, but not mandated as such. And I think you have to realize that there is a significant number of people who are what's called vaccine hesitant, and they think the vaccine may have been rushed out because it was pushed by the Trump administration, and as well as now the Biden administration through this Operation Warp Speed. And they're concerned that it's a new kind of virus, an mRNA virus, a vaccination that hasn't been used before. They're concerned that there may be serious safety problems and so forth.

Professor Mark Rothstein:

And keeping that in mind, I'm afraid that if we bandaid it, then it might actually backfire and would have the effect of making people who were hesitant, sort of hardened in their views and refusing to participate and that I think would be worse because in order to get the herd immunity that you hear talked about so much, we're going to need at least 70%, maybe 80 or 85% of the population immunized. And if too many people declined to participate, then this pandemic is going to be slow to subside.

Mike Taylor:

That's interesting. And one of the questions that I have is how effective this vaccine is going to be anyway, we don't know what we don't know. And my understanding there are different strands of COVID-19 that are coming out. How would that affect the vaccine mandate?

Professor Mark Rothstein:

Well, you're quite right, that we are concerned with various new variants or strains that are coming out virtually every day. And for your listeners, they should understand that this is not unique at all, this is sort of commonplace when you get into virology. And there are so many millions of people who are infected and so many thousands of new infections each day in the United States, and then more around the world that you get these variants or mutations of this virus, which is very unstable and so that is to be expected. And I'm quite confident that the vaccines that we have authorized so far are extraordinarily efficacious, effective, and also safe.

Professor Mark Rothstein:

If you compare the safety profile and the effectiveness profile with other kinds of vaccines, it's extraordinarily good. But one of the problems is that people are vaccine resistant in the United States for all sorts of reasons. Some better than others, I would say. And there are certain classes of people that are suspicious of the government, they are some suspicious of science, they're suspicious of the motives of their employers, for example, if they're going to try to require this. And we need to keep this in mind and keep our eyes on the prize and the prize is getting this pandemic in our rear view mirror. And what I'm suggesting, I think is the best way to get that done.

Mike Taylor:

Are there any legal issues, I'm sure there are raised by an employer mandating a vaccination? And when I say that, the things that I've been reading is that, "You must be vaccinated or you can't work here." What are some of the legal risks associated with that?

Professor Mark Rothstein:

Of course, we've never tried any of these cases yet, but theoretically several statutes are implicated, if you have a mandatory vaccination. The first one that comes mind would be the Americans with Disabilities Act and the state law analogues that prohibit discrimination on the basis of disability. So if someone had a disability that prevented them from getting vaccinated, then the employer would have a responsibility under the ADA to provide reasonable accommodations. And the reasonable accommodation might be working at home for example, or increased personal protective equipment or other measures.

Professor Mark Rothstein:

The problem with that argument is that there are very few people who would be covered under it. In other words, there are very few conditions that would qualify as disabilities under the ADA that would be relevant to this kind of vaccination requirement. There might be some, and the employer could insist on some medical confirmation of the problem that vaccinating this individual would have.

Professor Mark Rothstein:

The EEOC has said that in these situations where an applicant or an employee is unable to be vaccinated, the employer would be within its lawful right to "exclude the individual." And what I take that to mean is if the employee is already on the job, that it would mean basically an unpaid leave of absence until conditions were such that you could bring back and unvaccinated employee without risks to the employee or to other employees and the public. But it's complicated and there is a cost to all the parties, even in just sorting out this kind of issue. So that's the first one.

Professor Mark Rothstein:

A second statute that might be implicated is Title VII of the Civil Rights Act of 1964, which everyone on listening to this podcast probably knows prohibits discrimination on the basis of race, color, religion, sex, or national origin. And here it would be a religious discrimination claim where an employee says that my religious beliefs prohibit me from being vaccinated. Now the employer, again, it would be analogous to the situation with the ADA, you could exclude these people because of the risk to themselves or others. But I think it would be unlawful terminate their employment. And there is sort of a transaction costs to all the parties in trying to decide how to deal with someone who makes one of these claims.

Professor Mark Rothstein:

In addition for unionized workplaces, under Section 7 of the National Labor Relations Act, employers would have an obligation and Section 85 to bargain with the authorized representative of the employees over wages, hours, and other terms and conditions of employment. And most people think that this would include a vaccine mandate. I would add parenthetically that I think for both unionized and non-unionized workplaces, it's a very good idea for employers to consult with employees, not to spring it on them. Not only because this is such an important issue, but because it's such an emotional issue and getting a sense of what the concerns are, the employees and how to best alleviate them without disrupting the workplace situation, I think would be very advisable.

Mike Taylor:

You covered some areas of law where it may be problematic to mandate, could an employer rely on the OSHA Act to say, "I must do this, otherwise I may be in violation of the General Duty Clause of the OSHA Act, which is prohibits employers from having hazards in the workplace." How do you see that in conflict with those other areas that you just mentioned, if at all?

Professor Mark Rothstein:

Well, the Occupational Safety and Health Act could in fact apply to situations where there is a very serious hazard in the workplace, such as the Corona virus. My expectation is that within the next weeks or months for sure, OSHA will come up with an emergency temporary standard under section 6(d) of the Act. And one of the requirements could be that employees with certain exposures must be vaccinated.

Professor Mark Rothstein:

There is some precedent for thinking about this because under OSHA's bloodborne pathogen standard, which is directed at hepatitis B exposure in healthcare settings, there is a vaccination provision that requires employers to offer employees this vaccination at no cost. But they can decline it, and there's not even any statement about the reasons for it, they can just decline it. And that may be the route that OSHA take in mandating or trying to require employers to provide a vaccine.

Professor Mark Rothstein:

I think it would be very difficult for an employer to apply the General Duty Clause in this situation, even though they might be cited under it, to use the General Duty Clause as a basis for not hiring or permitting employees to work, after all there are many personal protective equipment standards under OSHA, under the general industry standards that might apply. And I expect that an emergency temporary standard under section 6(c) would require certain personal protective equipment such as masks and gloves and gowns and whatever OSHA deems appropriate. So we're going to have to take a look at that, see what it requires, see how employers can comply with that. And it's a very interesting time to be studying the Occupational Safety and Health Act because OSHA has not promulgated an emergency temporary standards since the 1980s. And this would be quite a break in the recent history of the Act

Mike Taylor:

Indeed, indeed, an inquiry as to whether they will promulgate a temporary emergency standard or go forward with an infectious disease standard. But as you know, that can take some time before it really becomes the force of law. So I think what you're saying is kind of like what the Bloodborne Pathogens Standard requires is that employers should offer or help employees who do want to get vaccinated, get vaccinated. Is that right?

Professor Mark Rothstein:

Yeah, that's right, Mike. If I got a call from an employer and the employer wanted to know what would recommend, I would recommend to the extent possible facilitating the vaccination of employees who are interested in becoming vaccinated. And I would do that by providing accurate, valid, understandable information about the risks and benefits of vaccination. I would try to make available public health experts from the area or medical experts who are not employed by the employer. So in other words, they're seen as sort of neutral parties. And I would make it easy on the employees to become vaccinated, such as scheduling onsite vaccinations, if possible, providing free transportation to vaccination sites or giving time off for getting vaccinated. And I think these are the kinds of things that would help.

Professor Mark Rothstein:

My hope is that over time, as more people realize that the vaccines are safe and effective, that their friends and family members who've been vaccinated did not have all these terrible adverse events that many people fear that their position, if they're sort of wavering would be in favor of becoming vaccinated and that they would do that. I think given the circumstances surrounding the Corona virus and frankly, the politicization of public health in many respects that this is probably the best way to go.

Mike Taylor:

Do you see a problem with rural areas? Like you're a professor at Louisville, I grew up in Kentucky in a small town, just Northeast of Lexington with a population of about 3000, and the county, I think is about 10,000. You take a county like that in Kentucky, would it be difficult for certain employers to offer a vaccination program to its employees? And number two, should they, if they're not in tight quarters, if you will?

Professor Mark Rothstein:

Yeah. I think that's a really good point to mention. Sometimes we think of the large urban environments where employers do business, but there're many in remote areas and those employers need to be more creative in ensuring that the employees who want to be vaccinated have an ability to do so. And I would add that the same kind of thinking ought to apply to public health officials with regards to just the residents of towns like where you grew up, Mike, and [crosstalk 00:21:13] we need to be more creative and make sure that we're going to have mobile vaccination programs that go into the rural areas. And some of the frontier areas out West and so forth, if we don't do that, then there are going to be a large number of people who are not going to be able to get vaccinated.

Mike Taylor:

One of the questions I have is do you see a value of an employer having an incentive program for employees to get vaccinated? And if so, what would it look like?

Professor Mark Rothstein:

So I know that a number of employers have offered cash benefits to employees, such as if you become vaccinated, you will get a \$100 and so on. I'm of mixed views about that. I think, as I said earlier, that employers could well provide payment for certain hours. There's some companies that have said, "Okay, we will pay you two hours for each dose of the vaccine. And this would be for the two shot vaccines for a maximum of four hours pay while you get the vaccines." I think that's fine. Paying the employees now raises the question of, "Okay, why did they have to pay us if it's such a great thing, as everybody says it is." And then people might become even more suspicious.

Professor Mark Rothstein:

And then there's also the question of how do you deal with the payments? So in other words, if I get vaccinated on my own today and next week, the employer puts in a policy of, "I'll pay you with a \$100 if you get vaccinated," does that apply retroactively to people who already got vaccinated? And there may be some sort of practical and logistical issues of surrounding that. And there can even be legal issues in terms of offering coercive inducements to employees, it's an area that is currently in flux because of some court rulings involving employer wellness programs and the incentives that were offered. So I would like to see that payment as a secondary bonus, not as the primary attempt that employers are going to make to get people vaccinated.

Mike Taylor:

Yeah. Because the theme I'm getting from you about the vaccines in the workplace, whether it's mandatory or not, is that we need to make sure that there's plenty of sunshine on this issue, meaning a full education to these workers about what the vaccinations are, the health risks, what they can do, that kind of thing. Because without that, you're not going to really get a buy-in from the workers.

Professor Mark Rothstein:

I think that's absolutely right. And I have done some call in kind of podcasts and the like, and you get some very interesting questions that workers and people in general need to get an answer to. Is it safe for people who have certain medical conditions? Is it safe for people who are pregnant? Is it safe for people who are obese? Is it safe for this, that, or the other condition? And what about this? And what about that? And when you talk to them and explain to them, for example, the question would be, how are we able to get a vaccine developed, in fact, multiple vaccines in less than a year when it's their understanding correctly, that it usually takes five or 10 years to get vaccines in place. And I explained to them exactly why that was the case in the Corona virus vaccines. And then they say, "Oh, I didn't know that. Well, that makes some sense." And so I think we should regard people who are vaccine hesitant with respect and with a need for more objective, neutral, persuasive information and let them make up their own minds. Hopefully, as I said, I hope the result is going to be that more people are convinced that, "Okay, I'll do that." And for those who doubt, I think there's a limited amount that you can do.

Mike Taylor:

Right. I agree. Another question I have is, okay, we're talking about full sunshine and information, so people can make an informed decision about what they want to do. And if an employer is going to either mandate or offer it to their workers, where do they get this sunshine information and how do you go about presenting it to your workers?

Professor Mark Rothstein:

Yes. I think that's a very important sort of practical question and what I would suggest first to employers, certainly the larger ones where it would be beneficial. I would approach the local public health authorities and say, "Look I've got a 1000 workers here and some of them are kind of concerned about taking this vaccine. Can you send someone out to our plant and talk for an hour and answer some questions? Or can we give some sort of link to your website and maybe in a sort of a synchronous or asynchronous manner, have somebody answer their concerns or some call-in number." And if they don't have the personnel, maybe from a school of public health.

Professor Mark Rothstein:

And keep in mind that it wouldn't necessarily have to be from the area, if you're going to do an in-person, of course it would. But if there's an employer in Montana and the expert is in Washington or San Francisco, that's fine too, because the issues are going to be roughly the same. So I think lining up these kinds of experts who will tell you and explain to the employees, "Okay, this is exactly how it works. And what's the difference between an mRNA vaccine and an adenovirus-based vaccine. And why is this? And how has that? And if you address their concerns in a thoughtful way, you can make some progress.

Professor Mark Rothstein:

One of the things that also concerns me a great deal is the excessive reluctance of black and Hispanic employees to become vaccinated, keeping in mind the fact that they have and continue to bear a disproportionate burden of this pandemic. And it gets a bit more complicated because you have to get into the history of abuses in the past, both in clinical settings and in research settings. And if you understand where people are coming from, it helps you connect with them and they can hopefully put some stock in what you're suggesting.

Mike Taylor:

I totally agree. Just by way of analogy, if I've got a case and I'm litigating it, and it deals with a safety hazard and I'm meeting with OSHA to negotiate withdrawal of a citation item, for example, I often tell clients, it's one thing for OSHA to hear it from a lawyer that there's no hazard, but if I have someone who's an expert in that topic to explain why that's going to go a lot farther than me, the lawyer, telling them you got no case, this is not a hazard. The same is true, it seems to me from the employer's perspective is that the workers will have more confidence in hearing from local or state or national experts in this area about the vaccine's, the pros, the cons. So they can make an informed decision because without that, it's going to be, I think, really hard for employers to offer a vaccination series without some kind of real communication going on.

Professor Mark Rothstein:

Yeah. I think that's exactly right. And as you know quite well, workplaces vary tremendously in the relationship between labor and management, in some places they're very collegial and trusting and understanding and so forth. And some places is just the opposite. And the dynamics in each workplace is going to affect whether the employees are going to be trusting and willing to rely on, let's say some corporate medical director's view or whether they want to hear it from some presumably neutral public health or university affiliated public health official.

Mike Taylor:

Mark, why got you on your one last question I have, have you seen anything or heard anything about a worker claiming that he or she got the virus in the workplace and then brought it home and gave it to a relative and therefore a lawsuit has been filed on the theory that the employer caused the relative, for example, to get COVID?

Professor Mark Rothstein:

Well, there have been one or two of these lawsuits brought so far, and these are theoretically possible, but they're very difficult conceptually for the plaintiff to succeed, because what the problem is, is it depends on the employee becoming infected in the workplace, coming home and infecting some family member. There are two infections and both of them have to be shown to be not related to the ordinary exposures that people have in their daily lives. So it may be that the employee became infected off the job. And even if the employee was infected on the job, the family member might've been infected off the job on public transportation or at a publicly frequented store or a restaurant or something.

Professor Mark Rothstein:

There can be certain presumptions or inferences drawn by the courts. And this is of course a matter of state tort law. And so it varies widely, but you can imagine certain situations in which the family member of exposed workers could show that there've been so many workers infected on the job, let's say at a meat packing plant, and the family member say a spouse hardly left the house during the

pandemic. And then the finder of fact could easily, I think, conclude that that was the source of the infection. The individual workers is now going to be barred by workers' comp from bringing a personal injury action. But the family members obviously not covered by workers' comp and could bring a negligence case. It's an interesting theory, basically, the take home liability theory from a [inaudible 00:35:41] and other kinds of cases, but it's more difficult when you've got an exposure that sadly is so common in the community.

Mike Taylor:

Yeah, those will be very, very difficult to sustain, I can imagine. I think we can both agree, there are lots of challenges ahead dealing with vaccinations in the workplace and what to do and what not to do and how to go about doing it the right way. Professor, we really appreciate you being on our podcast today. This was very, very informative. I'm sure we'll make a lot of my listeners really think about some of the issues that you talked about, and we really appreciate having you on the show.

Professor Mark Rothstein:

My pleasure, Mike, anytime.

Mike Taylor:

Perfect. Stay tuned for the next episode of the Greenberg Traurig Work Place Safety Review Podcast. All Right.