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# Requiring Employees to Get Vaccinated: How Far Can Employers Go?

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Troutman Pepper Partner Tracey Diamond spoke with *Balance of Power's* David Westin during a September 21 Bloomberg radio segment on vaccine mandates. Read the Q&A transcript below:

***Westin:* President Biden wants OSHA to require companies employing more than 100 people to impose a vaccine mandate or face weekly testing, raising a range of questions under federal and state law. To take us through those questions, welcome Tracey Diamond, a partner at Troutman Pepper where she is part of the Labor and Employment Practice Group.**

**Some states have bans on vaccine mandates, is it clear that if OSHA did in fact enact the legislation it would preempt state law?**

*Diamond:* I believe that is correct, David. So far there are two states that have banned vaccine mandates for private employers – Montana and North Dakota. I do believe that pursuant to the supremacy clause, those state statutes would be preempted by the federal law.

***Westin:* Now I said provided OSHA does adopt the legislation. That doesn't just take a click of the pen, there is a little more involved, right?**

*Diamond:* The Biden Administration directed OSHA to draft an emergency temporary standard, and we expect that to come out over the next few weeks to a month or so.

***Westin:* Does that have to go through notice of common rulemaking?**

*Diamond:* My understanding is because of the emergency nature of the temporary standard that it will bypass the normal notice and commentary period of time. Otherwise it would take some time.

***Westin:* Exactly. And I'm not going to hold you to this, if in fact they have the emergency basis, do you think it could be in effect in the next 60-90 days?**

*Diamond:* I think by the end of this year, we should be seeing some kind of OSHA standard in effect.

***Westin:* One of the questions I assume is going to be exceptions, right? There is talk about health exceptions, religious exceptions.**

*Diamond:* The Biden Administration directive is to mandate the vaccine or require weekly testing. A lot of focus has been on the vaccine, but there is still that option for weekly testing. That's where these two exemptions for disability reasons or religious reasons would come into effect. And the onus will really be on employers to determine who would be eligible for an exemption from the vaccine mandate. Either because they have a disability under the ADA or because of a religious reason under Title VII.

***Westin:* We have a great advantage because you are actually practicing this law –you have clients who are asking questions. What are the questions you're getting from employers?**

*Diamond:* Lots of questions really centering around the details. Which employers will this mandate apply to? The administration said 100 or more employees, well is that employees across the country? What about joint employments? Is it across different facilities or is it 100 employees within a facility?

How do we actually apply exemptions? Whether those exemptions will still be in effect, which I do believe is the case, and if so, how do you apply them? How do you determine whether someone has a sincerely held religious belief practice or observance that would prevent them from getting the vaccine, and what to do about those folks in terms of, is weekly testing enough to provide a safe workplace?

Other questions I hear are related to confidentiality requirements and what should employers do with the information that they are going to be collecting.

***Westin:* Exactly, I wanted to ask about that. But before that, who's going to pay for all this?**

*Diamond:* That's another good question.

***Westin:* We've got thousands of employees and we have both vaccination cards that we submit but also we get tested on top of that every week, but Bloomberg has a lot of resources, there are a lot of employers that only have 100 employees, 150 employees, that should be pretty expensive I think.**

*Diamond:* Yes. The type of test that will be considered an authorized test – will it be an at home test or do employees have to submit a particular type of test – that's an open question, as well as who's going to pay for those tests.

***Westin:* Wow. Talk about the exemptions that would be enforced, and particularly with respect to the privacy of the data. How do employers collect this data? What assurances do they give about how it's going to be used?**

*Diamond:* We're recommending that clients designate either one person or a small group of people to collect that information or requests for the exemptions. And we're helping employers draft forms for employees to use to make the requests, and then discussing with employers how best to maintain confidentiality of those requests and also about the employer's decision on the request. The same goes for the vaccine records themselves, they should be kept separate from employee personnel files as a confidential document.

***Westin:* It sounds like a lot of employers are just assuming this is going to happen and they are getting**

ready for it.

*Diamond:* Yes. For some employers who really wanted to move toward vaccine mandates, this is providing them the support they need to get employees over the hump. And for employers that are opposed to vaccine mandates, they are taking more of a wait and see approach, waiting to see what OSHA comes up with.

***Westin:* When it comes to proof of vaccination, do you think it's going to work to have substitutes for that? I'll give you an example. In New York state we have the Excelsior Pass (a secure, digital proof of vaccination status). Do you think that that will be sufficient for employers to require that sort of confirmation?**

*Diamond:* It's going to get a little sticky because 14 states now prohibit that sort of vaccine passport, while only three states so far require it in certain instances outside the employment world. Employers in those 14 states where a vaccine passport is prohibited will have to carefully look at the statutes to see whether there is an exemption for employment purposes as opposed to going into businesses, restaurants, theatres, etc.

***Westin:* We're anticipating the FDA coming down with a ruling on booster shots here, and we heard from Dr. Fauci over the weekend that that ruling will probably evolve as they get more data, more people will be able to get booster shots. Do you anticipate that whatever OSHA requires could be extended to booster shots as well as basic vaccination?**

*Diamond:* That's a really good question and something I'm not really hearing about yet. The FDA just the other day said "no" to booster shots for most people unless you're immunocompromised or over age 65. I'm anxiously personally waiting to see what happens in the future with that decision, but I'm not hearing any talk yet about whether this vaccine mandate is going to extend to boosters. I would imagine it would, but I think we need to get people vaccinated in the initial instance first.

***Westin:* Does OSHA have jurisdiction over public schools?**

*Diamond:* It's a federal standard. I think it will preempt state school issues. I think the mandatory testing option may save this law, because it does give alternatives.

**For the latest guidance around vaccine mandates and how your company can best plan and respond, we're here to help. Contact our [Labor and Employment Practice Group](#).**

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