

John Wright: Welcome to Business Better, a podcast designed to help businesses navigate the new normal. I'm your host, John Wright. For nearly 15 years, I was senior vice president and general counsel at Triumph Group Incorporated, a global aerospace component supplier. I'm now a member of the securities at M&A groups at Ballard Spahr, a national law firm with clients across industries and across the country. On today's episode, we'll be discussing a key issue presented by the coming COVID-19 vaccines, whether employers can or should mandate vaccination, what limitations might exist on an employer's ability to do so, and other considerations that an employer might take into account when thinking about a vaccine mandate. Leading this discussion is Brian Pedro, a partner in Ballard Spahr's Philadelphia office, and practice leader of the firm's labor unemployment group.

He represents employers and the full scope of matters related to employment, labor, and employee benefit disputes. Joining Brian is Shannon Farmer and Jessica Federico. Shannon is a partner in the firm's Philadelphia office. In her practice, she represents employers in all types of employment and civil rights claims, and provides advice and training related to employment policies and other HR needs. Jessica is an associate in our Denver, Colorado office. Jessica counsels employers on defensive discrimination, claims employee termination and other employment law issues. Let's turn it over to Brian, Shannon and Jess.

Brian Pedrow: Hello and welcome to Ballard's business Better podcast series. On November 16th, we learned that Moderna had promising preliminary results from its coronavirus vaccine trial, that the vaccine is 94.5% effective. We also learned that the vaccine under development by Pfizer and BioEnTech also is 95% effective, and they have already applied to the FDA for emergency use authorization on November 18th. Pfizer announced that if the FDA authorizes the two dose vaccine, Pfizer could have up to 50 million doses available by the end of the year, and up to 1.3 billion by the end of next year. With widespread distribution if most people get the vaccine, the pandemic could drastically shrink. All of this leads to the question, can or should employers mandate the vaccine for their workforces. I'm Brian Pedrow, the practice group leader of Ballard Spahr's labor and employment group. The topic for our Ballard Business Better podcast is, Vaccines in the Workplace: To Mandate or Not To Mandate. I'm joined today by Shannon Farmer and Jessica Federico. Shannon and Jess, please introduce yourselves.

Shannon Farmer: Hi, everybody. This is Shannon. I'm excited to be here.

Jessica Federico: Hi, this is Jessica Federico. I'm in the Denver office for Ballard.

Brian Pedrow: All right. Our first question of the day, should employers require employee vaccinations? What are your thoughts?

Shannon Farmer: The question is can they or should they, so let's maybe first start with this question of can they? The answer generally is going to be, let's say yes with an

asterisk. First area that we're going to look at is under the Americans with Disabilities Act. This is a federal law that applies to all employers with 15 or more employees. The general rule is that any medical inquiry must be job-related and consistent with business necessity. Now, you may say, "Wait a second. How is a vaccine a medical inquiry?" Really, it is because you can't require a vaccine without determining if somebody's already been vaccinated, or if there are reasons why somebody shouldn't be vaccinated, whether they have certain kinds of medical conditions, perhaps they already have antibodies that they're aware of because of some testing. It falls under the category of a medical inquiry. Medical tests fall under the same.

Now, we've already got a body of case law, particularly coming out of the healthcare industry and certain others, where there have been vaccination requirements for years. For example, a lot of healthcare employers are going to require certain types of vaccinations. In some industries, they're required by various state laws. We're not starting out on this question of whether we can require a COVID vaccine without an entire body of prior case law that deals with things like flu vaccines or other types of vaccines.

Brian Pedrow: Shannon, what about the ADA standard of job-related and consistent with business necessity in the non-healthcare setting?

Shannon Farmer: We do have some broader guidance that exists. A lot of this came out of either the flu vaccines or prior types of pandemics. OSHA, the occupational safety and health administration, which is generally responsible for workplace safety at a federal level, in a 2009 letter said, "Although OSHA does not specifically require employees to take the vaccines, an employer may do so." We know we don't have an OSHA issue. In addition, the EEOC, the Equal Employment Opportunity Commission, who is responsible for administering the ADA, in recent guidance, acknowledged that the pandemic is a direct threat under the ADA. That means that it can pose a threat of harm to people in the workplace where employers may have more latitude to control employee behavior. We've already seen that implemented, for example, with employers being able to require COVID testing or temperature tax or symptom screening in the workplace.

I think that in the circumstances of COVID, we don't have much of a concern that requiring a vaccine is not going to be considered consistent with business necessity, even in a non-healthcare setting where people are working in the office. Now, if you have everybody working remotely and there isn't a plan to return to in office settings, that may be a different question. Also, you never want to forget to think about your state law. for example, many States have mandated vaccines for school students and healthcare workers. Not all states have recognized a public health emergency as a cause to implement mandatory vaccination requirements. You want to make sure, but many industries already have them, healthcare, education would be another one, childcare settings, for example. Many States already require certain types of vaccines already. There aren't very many States that prohibit vaccines.

Brian Pedrow: We think requiring vaccines is permitted. Are there any limits to the right of employers to mandate a COVID-19 vaccine?

Jessica Federic...: Well, the first place we should look is to the EEOCs, Pandemic Preparedness Guidance. This was originally prepared in 2009 at the height of the H1N1 flu, and was updated just in March of this year to address COVID-19. That guidance point blank asks, "May an employer covered by the ADA and title seven of the Civil Rights Act of 1964, compel all of its employees to take the influenza vaccine regardless of their medical conditions or their religious beliefs during a pandemic?" The answer is no, but it goes on to explain that there are exemptions under the ADA and title seven for disabilities and certain religious beliefs. What's interesting about that is that the EEOC didn't simply say, "No, an employer may not mandate vaccines." It's a qualified no, which is important here. In addition to looking at that EEOC guidance, then we have to turn back to the ADA.

The ADA requires reasonable accommodations for an employee who has a disability that prevents them from receiving the vaccine. As Shannon mentioned earlier, you have to remember the direct threat analysis. If you're allowing a non-vaccinated person into the workplace, does that create a direct threat to other employees or even that person? For example, if you have an employee who can't wear a mask and there's no other accommodation that's available that will reduce that significant risk that's posed, you could refuse to allow that individual to come to work. Otherwise, assuming the direct effect standard doesn't apply, you must provide a reasonable accommodation to an employee with a disability. It's important to note that the ADA's confidentiality requirements are going to apply to employee vaccination information, as well as to information that's provided about a disability that may trigger the exemption from the vaccination requirement.

This raises the question of course, of who may be exempt under the ADA from a required COVID vaccine. The CDC has provided some examples applicable to the flu vaccine, which would likely apply to any COVID-19 vaccine. For example, as to the flu pregnant employees poses. A very good question. Doctors have said that some forms, but not all forms, of the flu vaccine are unsafe. As to the COVID 19 vaccine, we still don't know exactly what form it's going to take. Of course, there might be some heightened sensitivity to the safety of the vaccine, because it will be so new. If you do have a pregnant employee who's seeking an exemption, we would recommend accommodating that request because this is a temporary condition that can be addressed on that basis.

Brian Pedrow: Jess, I heard you mentioned title seven and religious objections as another potential exception. What are the parameters of title seven and how does it apply to a mandatory COVID vaccine?

Shannon Farmer: Sure. Just like with the ADA under title seven, you have an obligation to engage in this interactive process to determine if there is a reasonable accommodation

for an employee whose sincerely held religious belief practice or observance, prevents an employee from taking the vaccine. As with an ADA analysis, you may be required to do that unless it poses an undue hardship. One of the questions is going to be, what are some examples of the kinds of things? For example, you could have an employee who is Catholic, who objects to a specific vaccine because they are being made with cell lines that are derived from aborted fetuses. There are types of vaccines that are. That may not be across the board that the employee objects, but they may object to certain vaccines. There may be, for example, an accommodation discussion about, is there another type of vaccine, especially if we get in the COVID situation, multiple vaccine lines that are being manufactured in different ways. Maybe they don't get one, but they can get another.

There's also religions, Church of Christ, scientists, for example, which believe in only natural healing and some adherence may refuse vaccines generally. One of the questions that employers sometimes have is, should we look into this question of whether this is a sincerely held belief or look at whether this is something that's really required by the religion? Generally, our advice is going to be no. Generally, you're going to accept the employee statement that it's in sincerely held religious belief and only seek supporting information if you have an objective basis to question the sincerity of the belief or practice. You generally don't want to be in the business of doubting whether somebody really has a certain religious belief.

Brian Pedrow:

Shannon, I heard you mentioned alternative vaccines as a possible accommodation. We could have multiple types of vaccines and some might be produced in a way that alleviates the religious objection or a medical issue that somebody might have. Other accommodations I presume would be if somebody cannot take the vaccine, then continuing the protocols, the health and safety protocols, for that individual like mask wearing or face covering, social distancing, plexiglass barriers that might've been erected, that may be a way to continue to reduce the risk of spreading of the infection, even absent a vaccine. You might also have an employee who you could change their job duties. If they have marginal duties that involve, for example, interaction with the public that could be removed temporarily from that job or continued remote working could also be an accommodation, assuming the essential functions of the job can be done that way. Shannon, at the outset, you distinguished between the, can we require a vaccine question and this should we require a vaccine question. Let's turn to the, should employers require a vaccine? What are some of the pros and cons there?

Shannon Farmer:

Let me just first say that I think this is not a one size fits all analysis for employers. You have to think about what makes sense within your industry, within your workforce and with everything that we're dealing with COVID right now, what happens if you get pushback from employees? If you were to take a hard line on something and employees refuse, are you prepared to terminate people? Are you prepared to deal with people who aren't able to come to work?

Can you replace people? Are you prepared to deal with the potential litigation over all of those things? I would keep all of that in the back of your mind when you're weighing these issues. Some of the advantages of requiring a vaccine is, a lot of employers are looking for ways to get people back to work. Maybe there's a lack of efficiency.

There's a lack of customer service going on. Maybe there are people who just can't perform the functions at all, depending on the industry. Having it be a rule, can help diminish conflict between employees. If it's voluntary, some people may do it. Some people may not. That may lead to tension within the workforce. Also, you're going to have, if you are in a public facing job, whether that is your vendors or clients or customers. There's going to be additional confidence. You may be a way to sort of get back to normal in a greater sense than under our current circumstances. Some people are looking at it and saying, "Hey, we can start having in-person meetings again, if there's a vaccine. We can start going out to customers and really getting back to normal."

It may also provide additional confidence and safety for higher risk employees. One of the things that many employers are struggling with is there are employees who either at a physical high-risk or living with people who are high risk, who don't feel comfortable coming into the workplace. In some cases, these people are just having to be on leave because they can't work remotely. This is a way for people to be able to get back to work in many cases and to feel confident doing so.

Brian Pedrow: Shannon, I'm envisioning retail shops with signs on the front door that say all of our clerks have been vaccinated.

Shannon Farmer: Absolutely. I think that that's right. It is going to be something that people are advertising if you're trying to get customers back in the door. I can picture a lot of businesses also for their Salesforce, are looking at ways to get salespeople vaccinated and back in front of people. Absolutely. That is, I think the major plus, and for the people who have been marginalized in the workforce, because they can't really fully participate, because they don't feel safe. I think the other piece of it is not only the people who, where there is the physical risk, many people are really struggling with fear and anxiety during the pandemic. In some cases that has turned into a mental health condition, but it is something that a lot of people are doing. It may also diminish those aspects. Employers who are dealing with a lot of FMLA requests or a lack of productivity because of employees, because they are suffering from so much anxiety over pandemic situations.

It may help to diminish that which can make people more productive, but it's not all a slam dunk question. What are the cons? On the other hand, there are people who are going to be really nervous about taking a vaccine. If you look at the surveys, there are a large number of people who are saying, "Hey, I don't want to be the guinea pig." There were people who are concerned about how

quickly that has happened. "Is it dangerous? Has there been a rush? Is it cutting corners? Can it make me sick?" We don't have a hundred percent or, even close to it, participation with flu shots now. Are people going to be willing to take this vaccine and is the anxiety that the vaccine is going to create? There's also an administrative burden that you have to think about.

If you're requiring this of the workforce, somebody has to be in charge of making sure that it happens. Are you doing an onsite clinic, for example, are you doing it on site? Or are you telling people you have to do it and bring me proof. How are you going to handle all of these accommodation requests? How long are you going to give people? What are you going to do if people refuse and deadlines. It's going to be a full-time job of somebody to try to manage this process. We could also have workplace conflict over it, including potentially protected concerted activity. Employees saying, "No, we refuse. It's not safe." As we've seen, for example, some employees refusing to come to work or protesting publicly their working conditions now, we could see the same, if there are employees who don't feel like they should be forced to get a vaccine.

Then finally, there's the potential for litigation that could be, for example, claims of injuries related to the vaccine. There's a whole body of case law out there. For example, if people who are claiming that they have gotten ill or had allergic reactions or other kinds of claims from flu or other vaccines. You've got those possibilities. Sometimes it's considered to be a workers' comp injury. Maybe it is maybe it's not in most states. It probably is if it's a mandatory vaccine, but you could be caught up in those. In addition, if people are refusing and saying, "I want this accommodation under the ADA or under title seven," then you're going to get the risk of retaliation claims. People saying, "I've refused the vaccine based on some protected basis. Now adverse actions have been taken against me," even if they aren't terminated, or certainly in cases, if people are terminated because you determine there it's not a reasonable accommodation. There are pros and cons for employers. Everybody, I think, has to go through that process of saying, "What makes sense for our workforce?"

Brian Pedrow: Should we require it? Should we encourage it? Should we perhaps initially encourage it and then move to require it. Those are all different approaches employers could take. What about the anti-vaxxers? political belief, ideological belief, religious belief, where do they fall on the spectrum?

Jessica Federic...: That's a great question. A belief can be religious, even if it's not associated with a well-known religion, but the key really is the employee's motivation, not the nature of the situation at issue. It's a case by case inquiry. In general, we think the anti-vaxxer beliefs are not sincerely held religious beliefs, but this remains a murky area of the law. One which could be clarified in the coming months, once the COVID 19 vaccination is available. Instead, in the absence of guidance currently, we have to look to prior cases that are coming out of the health care setting. Under title seven, the third circuit, which covers Pennsylvania, has rejected accommodations for political, sociological or philosophical beliefs, as

distinguished from religious beliefs. For example, in one case, the third circuit held that any concern that the flu vaccine made you more harm than good was a medical belief and not a religious one. It wasn't protected under title seven. Cases like that emphasize how much we need to be aware of prior precedent and also state law to ascertain whether political activity is protected.

Brian Pedrow:

There are other issues implicated by vaccines. Shannon, you mentioned the possibility that a vaccine could cause an injury to an employee, which then raises the specter of workers' compensation claims. I think we also need to consider whether there's a duty to bargain with a unionized workforce. On the workers' comp front, many commentators and some courts who have considered the issue in the context of the flu vaccine, have in fact determined that injuries caused by the vaccine itself can be a compensable injury. That's not necessarily a bad result because it means for employers, that they're going to be covered by the exclusivity bar of workers' comp laws, which generally is going to prevent any other claim, like a claim for tort injuries, for example. In Pennsylvania, we definitely have decisions that have held that an employee getting a flu vaccine made available by the employer, whether it's on the premises, off the premises or through a voluntary program, even that the employee is indeed acting within the scope of their employment, which satisfies the work-related requirement for workers' compensation benefits.

Generally, the courts have viewed it as a program that's for the benefit of the employer by having healthy workers. One employee for example, had a flu vaccine and ultimately contracted Guillain Barre syndrome, which the court said was indeed compensable under workers' comp. What about this duty to bargain?

Shannon Farmer:

Yeah. Actually, before I say that, it's one interesting twist on these workers' comp cases that Brian was mentioning is, sometimes in these cases, there's litigation that's going on, not so much the employer and the employee being opposite each other, but really the employer taking opposite positions from its workers' comp insurer, where the carriers are saying, "No, that's not work-related." The employers and the employee are saying that it is because the employer does want that workers' comp bar. It can make some strange bedfellows. In terms of the duty to bargain, it's going to depend a little bit on your contract. You may have, under the MV transportation case, you may have permission to do this under a contract coverage standard within your management rights clause.

If you have a broad management rights clause, for example, that gives you the ability to set reasonable work roles, it may fall under that. Otherwise, you may have a duty to bargain, particularly if those rules are normally bargain, but we have seen some success with arbitration decisions, at least in the healthcare industry where employers have mandated flu vaccines and not allowed people to work or put restrictions on them if they do not vaccinate.

Brian Pedrow: One of the issues, undoubtedly, if you're bargaining over this issue with the union is, who's going to pay for the vaccine. Is the employer going to pay or can you force the employee to pay? Which is even outside the duty to bargain. That's just yet practical consideration. Who's going to cover the cost. What do you think, Jess?

Jessica Federic...: Well, currently many employers and insurers subsidize employee flu shots and provide them onsite to minimize the burden on the employees. However, it remains to be seen how expensive a COVID vaccine will be. Relatedly, if employers require vaccinations or provide them onsite, the time spent waiting for or receiving the vaccine is arguably compensable under the Fair Labor Standards Act. It's a big gray area still about who is going to cover all the costs. I should mention that the federal government has indicated that it will cover the costs of the COVID-19 vaccine. One of their FAQ's indicated that the vaccine dose is purchased with US taxpayer dollars, will be given to the American people at no cost. It still remains to be seen how this will play out in the workplace.

Brian Pedrow: I'll add too, that the Biden platform, campaign platform, included the fact that the federal government would pay for COVID-19 vaccines when available. The final thing I want to mention, I want to thank you. If you've listened to the whole podcast, I hope you found it interesting. Thank you, Jess. Thank you, Shannon, for participating. If you want to learn more about these issues, Ballard Spahr will be presenting a webinar on the topic on January 13th, 2021, where we'll take a deeper dive into these issues. My partners, David Fryman, JS Wike, and Denise Kaiser will be presenting that from noon to 1:00 PM. You can register for that webinar by going to the Ballard COVID resource center. Thank you for listening today.

John Wright: Thanks again to Brian Pedrow, Shannon Farmer and Jessica Federico. Make sure to visit our website www.Ballardspahr.com, where you can find the latest news and guidance from our attorneys. Subscribe to the show in Apple podcasts, Google play Spotify, or your favorite podcast platform. If you have any questions or suggestions for the show, please email podcasts at Ballardspahr.com. Stay tuned for a new episode coming soon. Thank you for listening.