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COVID-19 VACCINATIONS AND EMPLOYEE RIGHTS

I. Presenters

- A. Robert Ramsey, Esquire, Garden State CLE Senior Instructor
- B. Rick Grimaldi, Esquire, of Fisher Phillips
 - 1. Partner, Fisher Phillips.
 - 2. Has practiced labor and employment lawyer for over 30 years.
 - 2. Licensed to practice in NJ, PA, and DC.
 - 3. Published author.
 - 4. Latest Book – Flex: A Leader’s Guide to Staying Nimble and Mastering Transformative Change in the American Workplace

II. What happens to virtual events when the pandemic ends?

- A. With the exception of criminal trials, virtual court events are likely to continue.
- B. Virtual depositions are also likely to continue.

III. Will proof of vaccination be required in certain situations?

- A. Privacy rights are always a concern.
- B. Proof will likely be required for international travel.
- C. Proof of vaccination should enable people to avoid quarantining after out-of-state travel.
- D. The government may provide proof of vaccination in the form of a card or other document.
- E. Generally speaking, employers are allowed to require that employees be vaccinated. By extension, colleges and universities may also decide to require vaccinations.

IV. Will the government, at either the state or federal level, require vaccinations?

- A. Anti-vaxxers.
- B. Constitutional impediments will include, but will not be limited to, infringement upon privacy rights and freedom of religion. In response, the government will argue that the requirement is necessary to maintain safe workplaces, schools, places of worship, etc.
- C. In all likelihood, vaccinations will be mandated for inmates and members of the military.
- D. Mandating vaccines will likely be left to the states.
- E. There will be civil liberty challenges to any attempt to mandate vaccinations.

F. With respect to the social impact of mandated vaccinations, there is a risk that people who refuse to be vaccinated on religious or secular grounds will be shunned or ostracized.

G. Currently people cannot enter most public places without wearing a mask. The next logical step is that people will be denied entry absent proof of vaccination. Keep in mind that tickets to events come with limitations. People can't bring food into a movie theater, alcohol to a sporting event, or behave in an unruly manner at any venue. Therefore, it is not a far stretch to add the limitation that attendees must be vaccinated.

V. Hypotheticals

A. Adult Plaintiff in Private Industry – The client, a clerical worker at a newspaper, practices a religion that forbids all types of vaccinations. The employer tells the client that he will be fired if he does not get vaccinated. What should the plaintiff's attorney focus on?

1. Is there a collective bargaining agreement?
2. Is it a sincerely held religious belief?
3. Religious beliefs v. the threat of infection that plaintiff will pose in the workplace.
4. Employer should be motivating employees to get vaccinated, not threatening them.
5. Are there other reasonable, alternative accommodations that could be made without causing the employer undue hardship?
6. Religious Freedom Restoration Act of 1993 v. Law Against Discrimination – lower burden with religious accommodations than with disability accommodations.
7. Find out if other employees do not want to be around the client because they think he is a danger/threat.

B. Private Sector Employer – What are the questions and legal advice that the attorney should provide to his client, the newspaper publisher?

1. Have you spoken with the union representatives?
2. Have you engaged in the interactive process the plaintiff-employee? That is, have you sat down with him and tested the sincerity of his religious beliefs? Did he explain the precise issue relative to the inoculation?
3. Has the rest of your workforce been vaccinated?
4. The employer must explain certain aspects of the plaintiff's job. Who does the employee interact with daily and for how long? Given the extent of his

interactions with others, is there a reasonable, alternative accommodation that you can provide that will allow him to perform his job functions without causing you a hardship? (A financial liability must be significant for the court to consider it a hardship.)

5. If the client does not want to make accommodations, the employee can file a complaint with the EEOC or make an LAD claim.

6. Employer's strongest argument is that the employee poses a direct threat to people in the workplace.

7. Explain to the client what his exposure is in terms of damages.

8. Does the employer carry Excess Loss Premium (ELP) insurance, and if so, what is the deductible?

9. Explain the potential for Attorney General involvement.

10. The attorney must discourage the client from thinking that he can work the case out with this particular employee, then make a conscious effort to never hire another person with the same or similar religious beliefs. (Remind the employer that he cannot ask job candidates about their religious affiliations.)

VI. Unions – Attorneys who represent unions should be advising them to face this issue now. All future collective bargaining agreements should address COVID vaccinations.

VII. Should attorneys wait until an issue arises before conferring with their employer-clients? No, attorneys should be meeting with the employers now to come up with a plan.

VIII. Would an employee have a cause of action if he claims that he contracted COVID-19 on the job, and that but for the lack of mandated vaccinations, he wouldn't have gotten sick? Probably not, because it would be nearly impossible to prove that he contracted the virus as a result of exposure to an unvaccinated coworker. If he could prove it, his argument would be that his employer failed in his duty to keep him safe at work.

IX. General Advice for Private Employers

A. See me before you have a problem, or at the very least, see me at the first hint of a problem.

B. Have an organized, documented vaccination program and ask each employee for his/her consent.

C. Be sensitive to disabilities and sincerely held religious beliefs for those seeking exemption and, if possible, make reasonable accommodations.

D. Make sure other employees don't retaliate against, shun, or create a hostile work environment for those seeking exemption from vaccination and provide training in this regard.

E. Tell HR people not to give any hint that prospective employees will be discriminated against if they object to being vaccinated. Instead, they should say that the company, which adheres to EEOC rules, requires vaccinations. Would a vaccination prevent you from working here or fulfilling your essential functions? If the answer is yes, think about accommodations.

X. Resource – www.fisherphillips.com has a page dedicated to COVID-19 vaccination issues.

XI. With respect to vaccinations, there are palpable differences when a case involves a government, rather than private sector, employer.

A. Government employers have greater limitations than private sector at will employers.

B. Advice to governmental employers would be different because there is greater constitutional scrutiny, it is more than likely that there will be some sort of collective bargaining aspect to each case, and there are always civil service issues to consider.

C. Right now it is clear that vaccinations may be a condition of employment in the private sector. It is less clear in the public sector.

XII. Whether children may be required to be vaccinated to attend school has yet to be determined.

XIII. Prediction – Government will mandate vaccinations when voluntary vaccinations are insufficient to create herd immunity.

XIV. Advice for Practitioners – Sit down with your clients now and formulate a plan to mitigate their risk.

XV. Anyone with questions for Mr. Grimaldi may reach him at (610) 230-2136.