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ACC Association of Corporate Counsel
BALTIMORE
FOCUS

President's Message

Dan Smith

As I sit down to write this, my first message as the President of the Chapter, we are in the midst of a pandemic that has shuttered many businesses, created new working environments, and made it difficult, if not impossible, for us to meet in person. Our country was further rocked by the recent events in Washington, D.C., just down the road from Baltimore, where a mob turned the US Capitol into a scene not witnessed since August 24, 1814, when the British burned that building.

Yet, despite the start to 2021, I am optimistic about the path forward. A vaccine with the promise to conquer the pandemic is being deployed, and, the traditions our democracy restored. And with that optimism, I am honored to assume the position of President of the Baltimore Chapter. I have been an in-house attorney in Baltimore since 2006, when my family and I moved here from Charlottesville, Virginia. Although not a Baltimore native, I have come admire Baltimore's offbeat charms, including its entrepreneurial spirit and winning sports teams (go Ravens!).

I would first like to take this opportunity to thank my predecessor, Larry Venturelli, for the wonderful job he did as President and for his help during my tenure as Treasurer. I want to thank, in advance, Kimberly Neal and Taren Butcher, for stepping up to serve as Chapter Treasurer and Chapter Secretary, respectively. Finally, we couldn't do all that do without the diligent effort and dedication of our Chapter Administrator, and former Chapter President, Lynne Durbin. Her tireless efforts and determination make this all possible. We are very lucky to have her as our Administrator.

Now, one of the reasons I continue to be optimistic is that, despite the challenges of COVID, the Board and our sponsors are putting together a great slate of Chapter activities to help keep you involved with ACC and the Chapter. Until we can meet in-person again, we are lining up exciting and relevant topics at our monthly Zoom "luncheons," we are brainstorming about virtual socials with our Premier sponsors, and we are seeking out charitable projects that are COVID appropriate. Finally, we are hoping that conditions will improve so that we can host our biggest event of the year, the annual golf/spa event in the Fall.

We kicked off the programming year with our annual Recruiter Update featuring Amy Hyman Baum of Robert Half Legal and Randi Lewis and Edina Beasley of MLA Global and moderated by our own Taren Butcher. They provided great info about the current state of the legal market, both locally and nationally, and how you can best position yourself for that next career move. This is always a very insightful presentation and a good reminder to make sure we own our careers. On February 9, we heard from Nelson Mullins about how to handle issues around vaccines and return to work and on February 25, we heard from Perkins Coie on tricky privilege issues for in-house counsel. In addition, at this and every virtual lunch until we meet again in person, the Chapter is making a donation to a local organization addressing food insecurity for each person that attends. Not only can you get smart on the topic, but your attendance will help the Baltimore community as well! So, please look for additional information in your email box on upcoming "luncheon" presentations and socials. While they certainly don't replace our in-person lunches, they are great way to keep connected to the in-house community. Sign up and join us!

Before I close, I would be remiss if I did not take a moment to thank our returning sponsors. We know that it is harder to make connections at virtual presentations and socials. Yet, these sponsors continue to support our Chapter. So, a huge shout out to our **Premier Sponsors – Womble Bond Dickinson, Jackson Lewis and Nelson Mullins; Gold Sponsors – DLA Piper, Shawe & Rosenthal, Saul Ewing, Gordon Feinblatt, and Perkins Coie; and our Silver Sponsor - Goodell, Devries**. These firms are rock stars. To the extent you can, please support them.

Finally, this is YOUR CHAPTER and we are here to serve YOU. If there is a topic that you would like to learn more about at one of our monthly meetings, please feel to reach out to me, any of our Board members, or our Chapter Administrator, Lynne Durbin. If the beginning of the year was any indicator, 2021 promises to be a memorable year. I am optimistic that it will be a great one as well.

My Take: Pursue Justice!

By Jo Anne Schwendinger

A message from the Chair of the ACC Global Board of Directors

Even as the world was grappling with COVID-19, other threats demanded our attention in 2020. Following the disturbing killing of George Floyd at the hands of police officers in the United States, people from many nations marched, protested, and demanded change. In the United States, this was followed by a period of political tension, culminating in an attack on the Capitol building in January of this year. On the world scene, refugee crises continue, with a growing number of people living in a country other than the one where they were born. Income gaps continue to widen. Food insecurity remains an intractable issue. Employers continue to make hiring and promotion decisions based on factors other than objective qualifications, thereby denying opportunities to disadvantaged groups. These events and realities are sobering reminders that we must be relentless in our pursuit of social justice.

The pursuit of social justice is not new. Gaps in social justice are not unique to a particular time, community, or place. In fact, the global dimension of social justice issues was recognized by the United Nations when, on November 26, 2007, the General Assembly declared that February 20, would be celebrated annually as the World Day of Social Justice.

The pursuit of social justice is not new. Gaps in social justice are not unique to a particular time, community, or place.

As lawyers, who are also a part of a world in need of repair, what can we do? How can we contribute to the fight? Certainly, we must uphold the laws of the lands in which we work and live. As in-house counsel, we advise and instruct our clients on all areas of the law. We can therefore be advocates for compliance with laws that call for things like greater diversity and inclusion, as well as protections for

the planet. And some of our in-house colleagues work for nonprofits and NGOs that promote social justice causes like fairness in housing, healthcare, and access to the legal system. There any many ways that in-house counsel can engage in the pursuit of social justice daily.

That said, is there a role for in-house counsel that goes beyond compliance with laws? If so, what should that role be, both within our organizations and within society?

Finding a role that is both meaningful and acceptable within work norms can be daunting. Nevertheless, there are tangible actions we can take to become allies for change within the profession and within our own legal departments. I encourage you to use the ACC Docket article, "The Time is Now: 10 Ways In-house Counsel Can Advocate for Change," as a jumping off point for ideas on how to leverage your position to promote diversity and inclusion, call out bias, and make colleagues feel welcome.

If taking up the social justice challenge feels like the right approach for your legal department, there are many avenues available to you. For one, you can hire legal service providers who promote social issues. For example, you can include in your outside counsel RFPs questions about a firm's diversity and inclusion initiatives — and even better — ask for their D&I metrics and scorecards. Ask about the causes they support, and perhaps even suggest partnering on pro bono activities that promote the social justices causes that are important to you and your client. Also, consider choosing law firms that demonstrate a commitment to work-life balance, with programs or policies that encourage lawyers to take time beyond the billable hour to care for family, community, and themselves.

If you choose your legal service providers based on their social commitments, I challenge you to keep track of how they are doing, and to take work away if they do not live up to their promises. These are hard conversations to have, especially with trusted counsel or firms your organization has worked with for years. But they are necessary to move the needle and go beyond platitudes. While no one action will end injustice, each thoughtful act moves us closer.

If you are looking to do more with social justice, reform, and corporate citizenship, don't forget that ACC is always there to help. For example, following the release of ACC's statement on George Floyd last summer, the ACC Foundation launched its IDEAL initiative and has since released many resources and produced programming on diversity. Recent programming, featuring notable diverse counsel, includes the two-part series, "What Every GC, Board, and Corporation Needs to Know About Diversity,

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Inclusion, and Equity." You can find both sessions and more On-Demand.

In addition to IDEAL, we continue to expand our Seat at the Table initiative. While it's critical that we champion the access and reporting structure of CLOs and those in leadership positions within the legal department, it is equally important that all levels of our teams have a clear pathway to earning their seats. I recently had a conversation with ACC's Ramsey Saleeby to discuss this topic in "Find Your Seat – Earning the Role of Strategic Business Partner." And as I encourage individual lawyers to seek and earn recognition, I also ask those in leadership positions to take a stand on equity within your departments. Being an ally to diverse communities truly matters in this area. I am optimistic when I read in the recently released 2021 Chief Legal Officers Survey that 72.7 percent of CLOs surveyed believe a focus on diversity and inclusion will continue to grow in importance in 2021 and beyond.

How we show up in our personal and professional lives matters. Standing up and saying something matters. Whether through a company statement or via a hiring decision, we have the power to make a difference, to be allies for change. As the keepers of the law, and those charged with managing risks and liability, we are uniquely positioned to champion these issues. I applaud you for the strides you are making and challenge you to do more; to go further. And as you grapple with finding a response to the question, what can we do, I encourage you to share your thoughts and insights with your fellow ACC members.

Jo Anne Schwendinger
II-VI Incorporated
Chief Legal & Compliance Officer & Secretary

ACC News

ACC In-house Counsel Certification Program

1–11 March & 19–29 April

The In-house Counsel Certification Program covers the core competencies identified as critical to an in-house career. This virtual training is a combination of self-paced online modules and live virtual workshops. The workshops will be conducted over a two-week period, four days a week for three hours each day.

ACC Xchange 2021

16-17 June

This two day experiential learning experience was specifically created for in-house counsel and legal operations professionals. Over the course of two days, attendees will be immersed in an advanced, practical, and interactive educational environment. Get the details and registration rates.

ACC Foundation Cybersecurity Summit

2–4 March

The ACC Foundation Cybersecurity Summit offers three days of education and networking, designed to engage and educate professionals. Sharpen your skills and knowledge while tackling today's most pressing cybersecurity concerns.

ACC Executive Leadership Institute

20-23 July

Invest in your high-performers and put your succession plan in place. Nominate your rising stars to gain the professional development they need to one day lead your department at the 2021 Executive Leadership Institute.

Introducing the ACC Data Steward Program

Your law firms are holding some of your company's most sensitive data but are you certain that it is secure? The Data Steward Program – Single Client Option – allows you to gain assurance that your law firms are secure, while the DSP Program does all the work.

ACC DATA STEWARD PROGRAM

School District Sanctioned for Failing to Preserve Evidence After Receiving EEOC Charge

By Judah L. Rosenblatt, Jackson Lewis PC

A Maryland federal district court's decision underscores the need to preserve evidence once notified of a potential lawsuit and the significant consequences for not doing so.

In *Eller v. Prince George's Cty. Pub. Sch.*, 2020 U.S. Dist. LEXIS 234367 (D. Md. Dec. 11, 2020), an employment discrimination case, the court found the school district's failure to keep disciplinary records on harassment of a transgender teacher after it was aware of the teacher's Equal Employment Opportunity Commission (EEOC) charge was sanctionable.

In 2011, the plaintiff, a teacher hired at Kenmoor Middle School in 2008, informed the principal she would be transitioning from male to female. The teacher alleged that once she began wearing traditionally feminine clothing, she became the target of harassment by staff and students. At the end of the school year, she transferred to another school in the district, Friendly High School, but the harassment continued and worsened. In August 2016, the teacher transferred to a third school in the district, James Madison Middle School, but the harassment continued there too, eventually causing her to resign.

During her employment, the teacher complained about the harassment in many ways, including by submitting complaints to the district on student discipline referral forms (PS-74 forms). In June 2015, she filed a charge of discrimination with the EEOC. The school district was given notice of the EEOC charge in July 2015.

In September 2017, the EEOC issued a determination, finding reasonable cause to believe the teacher had been subjected to harassment and retaliation. In November 2018, the teacher filed a lawsuit against the school district. One day before the close of discovery, the teacher filed notice of her intent to file a motion for sanctions against the school district for deficiencies in its discovery responses. She filed the motion nine days later, and the court deemed it to have been filed before the close of discovery per the court's Case Management Order. In her motion, the teacher claimed the school district had destroyed or lost the PS-74 forms and relevant surveillance camera footage and emails.

The court determined the school district's duty to preserve the potentially spoliated evidence arose in July 2015 when it first received notice of the teacher's EEOC charge. It concluded the PS-74 forms related to student disciplinary matters were "spoliated" and the school district had failed to take reasonable steps "to even attempt to ensure" the PS-74 forms were preserved after the school district's duty kicked in. Further, the court noted the school district's failure to preserve the PS-74 forms was "grossly negligence" because the school district had an official policy regarding the preservation of PS-74 forms.

Accordingly, the court ordered the school district not be allowed to offer any additional evidence of the contents of the missing PS-74 forms at trial, and the presiding judge, if appropriate, should inform the jury the PS-74 forms were lost or destroyed by the school district. However, the court declined to find that the school district handled the PS-74 forms in bad faith (which would have resulted in a harsher punishment), because there was no evidence the school district intended to destroy the missing PS-74s, either to prevent them from being used in litigation or for any other reason.

The court disagreed with the teacher's claims that the school district was wrong not to have saved surveillance camera footage or emails because the teacher never notified the school that camera footage might be relevant and there is no evidence that any emails were destroyed after the school district's preservation obligation started. The court also did not grant the teacher's request for attorney's fees (among her other requests) and advised her that she should not have waited so long to file the motion, as she knew about the missing forms in July 2019, but waited until August 2020 to file the motion.

Employers can face case-dispositive sanctions for failing to preserve evidence. Therefore, employers must take reasonable steps to preserve relevant evidence once they are on notice of a potential claim, including after receiving an EEOC charge. This may involve preserving of a broad range of potentially relevant documents, including, but not limited to, employee disciplinary records. Please contact a Jackson Lewis attorney with any questions.

Author:

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Judah L. Rosenblatt

ERISA Investment Committees Face New ESG Investment Rules in 2021

By Devin Karas, Gordon Feinblatt LLC

In the closing months and weeks of 2020, the U.S. Department of Labor (DOL), aware of the rising trend in socially responsible investing (*e.g.*, mutual funds, exchange traded funds and other vehicles focused on environmental, social and corporate governance (ESG) considerations of a non-pecuniary interest), issued two final rules governing ERISA investment fiduciary duties.

The first, issued in late October underscores that despite whatever cause an ESG may support, such cause must always be secondary to an ERISA plan's primary purpose: to provide retirement income and financial security to plan participants. To facilitate compliance with this overall goal the DOL in its final rule:

1. Requires an ERISA investment fiduciary (*i.e.*, any person, committee or other entity responsible for the investment of ERISA plan assets, such as an investment committee, manager or advisor) to assess plan investments and investment strategies exclusively on pecuniary factors. For this purpose, a pecuniary factor is a financial consideration with a material effect on an investment's risk or rate of return over taking into consideration the investment's investment horizon and the plan's investment objectives and funding.
2. Prohibits an ERISA plan fiduciary from prioritizing unrelated public policy objectives over the interests of participants or weighing ESG, or other non-pecuniary goals, over plan investment returns.
3. Requires an ERISA investment fiduciary, if presented with an ESG investment, to consider reasonable alternatives in a manner intended to satisfy ERISA's requirements that fiduciaries act prudently and in the exclusive interests of plan participants and beneficiaries.
4. Requires an ERISA investment fiduciary to document its analysis and rationale when choosing a non-pecuniary investment in those cases where a fiduciary claims the pecuniary factors among investment options are indistinguishable. This recordkeeping requirement is intended to prevent a fiduciary from finding investment equivalence in bad faith or choosing an ESG investment imprudently without careful consideration.
5. Underscores that ERISA's prudence and exclusive purpose requirements apply to the selection of designated investment alternatives offered to plan participants and beneficiaries in a participant-directed individual account plan.

Under the final rule, a fiduciary may include an ESG investment as part of participant-directed individual account plan (like a 401(k) plan) *so long* as the investment is included exclusively because of its pecuniary factors. However, an investment fund, product or model portfolio may not be included as a qualified default investment alternative (QDIA), or QDIA component in a participant-directed individual account plan, if the investment's objectives, goals, or principal investment strategies indicate the use of one or more non-pecuniary factors.

The above-mentioned final rule is effective with respect to investments made after January 12, 2021. Non-compliant QDIAs are required to be modified no later than April 30, 2022.

The second rule, issued this past December, provides that, with regard to the exercise of shareholder rights and proxy voting, and consistent with ERISA's prudence and exclusive purpose requirements:

1. The duty of a fiduciary to recognize shareholder rights does not require that the fiduciary vote every proxy or exercise every shareholder right.
2. The fiduciary must (a) act exclusively in the *economic interests* of the plan and plan participants; (b) weigh the costs involved prior to exercising a proxy vote; (c) prioritize participants' financial security in retirement over any non-pecuniary social or public-policy objectives; (d) assess the material facts motivating a specific proxy vote or exercise of a shareholder right; and (e) retain proxy voting records or records relating to the exercise of a shareholder right, and act prudently when selecting or monitoring a shareholder rights advisor or other similar service provider.
3. A plan fiduciary may adopt the following ERISA-compliant safe harbor proxy voting policies: (a) proxy votes will be limited to proposals that have been prudently determined by the fiduciary to be substantially related to the subject corporation's business or expected to have a material effect on the plan's investment value; and (b) proxies will not be voted if the fiduciary determines that the size of the plan's stock holdings are small enough such that the outcome of the vote will not have a material impact on the plan's investments.

The above-mentioned final rule is effective for proxy votes and shareholder decisions made after January 15, 2021. Fiduciaries have until January 31, 2022 to ensure whether its investment manager, proxy advisory firm or similar service provider proxy voting policies are prudent and compliant with the final rule.

Author:

Devin M. Karas

Devin M. Karas is Counsel in Gordon Feinblatt's Benefits/ERISA Practice Group in which he focuses on employee benefits and executive compensation. His background includes tax-qualified and nonqualified plans; health and welfare plans; fiduciary, transactional and executive compensation; employee stock ownership plans; as well as corrections through Employee Plans Compliance Resolution System and Section 409A.

Vaccines in the Workplace: A Practical Guide for Employers

By Fiona Ong, Parker Thoeni, Lindsey A. White and Chad M. Horton, Shawe Rosenthal, LLP

With the COVID-19 vaccine finally becoming a reality, employers are addressing questions of whether and how to implement vaccination programs. Below, we have addressed many common, and some not so common, questions about vaccines in the workplace.

Q: May Employers Require Employees to Be Vaccinated?

A: Yes, in the context of the current pandemic, subject to exemptions as reasonable accommodations for disability or religious needs. (See Q&As below for further discussion of reasonable accommodations). However, guidance from federal agencies suggests that vaccines be encouraged rather than mandated by employers.

The Centers for Disease Control and Prevention (CDC) states in its Vaccine FAQs that the federal government does not mandate vaccinations, but notes that employers of healthcare or essential workers may impose such a requirement.

The Equal Employment Opportunity Commission (EEOC) updated its What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws resource to address the impact of federal non-discrimination laws on an employer's vaccine requirements. Notably, the guidance assumes that employers may mandate vaccines under certain circumstances, but employees may be entitled to an exemption under the Americans with Disabilities Act due to a medical condition or under Title VII due to a religious belief. Additionally, in its 2009 Guidance, *Pandemic Preparedness in the Workplace and the Americans with Disabilities Act*, the EEOC recognized that an employer can impose a vaccine mandate in the context of a pandemic, subject to religious or disability accommodations. The EEOC further states that employers should "encourage" rather than "require" employees to be vaccinated.

The Occupational Safety and Health Administration (OSHA) issued a letter of interpretation in 2009, providing that employers may impose a vaccine mandate, with exceptions for disability or religious reasons. In a 2014 Guidance, *Protecting Workers during a Pandemic*, OSHA noted that employers "may" offer vaccines to employees to reduce the risk of infection in the workplace.

At this time, it appears that many employers are taking the "recommended" approach to a COVID-19 vaccine. Many states have laws that require healthcare employers specifically to make vaccines available to their employees.

Q: Should Contractors and Temporary Employees Be Vaccinated?

A: Yes. According to the CDC, companies should encourage everyone at a work site to be vaccinated – including contractors and temporary employees, including staffing agency employees. If the company is offering an on-site vaccination program, it can open the program up to these other individuals. If there is no on-site program, it can provide information about vaccination options in the community.

Q: Does Emergency Use Authorization Mean the Vaccine Is Not Safe?

A: No, according to the Food and Drug Administration, which is responsible for issuing the EUA, as well as for the normal drug approval process. EUA drugs must meet rigorous safety standards. And there will be continued safety monitoring, just as there is for drugs that are approved through the normal process.

Note, however, that under the statutory authority for the EUA, FDA must ensure that recipients of the vaccine are informed that that they have the option to accept or refuse the vaccine, along with other information, including that FDA has authorized the emergency use of the vaccine, of the known and potential benefits and risks, the extent to which such benefits and risks are unknown, and of any available alternatives to the product. This information is contained in an FDA fact sheet on the vaccine.

Q: Can Employers Specify Which Vaccine Employees Should Take?

A: Technically yes, although realistically, given the limited supply of vaccines, there may not be a choice.

Q: Who Pays for the Vaccine?

A: The Government says it will be free for the individual. According to the CDC, vaccination providers may be able to charge an administration fee that will be reimbursed by insurance or, for the uninsured, by the Health Resources and Services Administration's Provider Relief Fund.

Q: Are Employers Required to Pay Employees for Time Being Vaccinated?

A: It depends on whether the vaccine is being required or recommended. If the employer is requiring the vaccine, it should pay for the time required to get vaccinated, if not done during regular working time. If the vaccine is recommended, but not mandated, then the employer need not compensate the employee for off-duty time spent being vaccinated.

Q: May Employers Ask Pre-Screening Vaccine Questions?

A: Yes, if administering the vaccine. The CDC states that health care providers should ask screening questions to ensure that there is no medical reason that would prevent the individual from receiving the vaccination. The EEOC states that an employer or employer's agent who is administering the vaccine may ask those pre-screening vaccination questions. Because such questions may elicit information about a disability, however, they may be subject to the ADA's standard for disability-related inquiries – meaning that the employer must be able to show that such inquiries are job-related and consistent with business necessity. The EEOC notes that, in order to meet this standard, "an employer would need to have a reasonable belief, based on objective evidence, that an employee who does

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not answer the questions and, therefore, does not receive a vaccination, will pose a direct threat to the health or safety of her or himself or others." Any medical information obtained in the course of the vaccination process must be kept confidential under the ADA.

The EEOC notes two exceptions to the "job-related and consistent with business necessity" standard. First, if the vaccine is offered on a voluntary basis, then employees can choose not to answer the pre-screening questions, and the employer can then decline to administer the vaccine but may not retaliate against the employee for that choice. Second, and importantly, if the employee receives the vaccine from an unrelated third-party provider (like a pharmacy or other health care provider or clinic), then the ADA does not apply to that provider's questions.

Q: Can Employers Require Proof of Vaccination?

A: Yes. As the EEOC notes, requiring proof of vaccination is not a medical inquiry under the ADA. However, asking why an employee did not get a vaccination might be covered by the ADA as it may elicit information about a disability. The EEOC recommends, and the CDC reiterates, that employers warn employees not to provide any medical information as part of the proof.

Q: Can Employers Dictate When the Vaccine Is Taken?

A: Yes. There are reportedly some side effects to the vaccine, which may result in an employee being out of work for a day or two. Employers may schedule vaccinations to ensure that the entire workforce is not impacted at the same time. In addition, employers may require employees to get the vaccination before a weekend or other days scheduled off, so that the employee does not miss work time if they experience side effects.

Q: Should Employees Who Had COVID-19 Still Get the Vaccine?

A: Yes. It is still unknown for how long antibodies will protect an individual after recovering from COVID-19, and whether such antibodies will protect against variants.

Q: Must Employers Provide Exemptions from a Vaccine Mandate as a Reasonable Accommodation?

A: Yes, as long as the accommodation does not pose an undue hardship. Under the Americans with Disabilities Act (for disability) and Title VII (for religion), employees are entitled to a reasonable accommodation, unless it would pose an "undue hardship" on the employer. "Undue hardship" means "significant difficulty or expense" under the ADA (a high standard), and "more than a de minimis cost" under Title VII (a lower standard).

Q: What Are the Requirements for a Vaccine Exemption Based on a Disability?

A: The employee must have a disability and that disability must prevent them from taking the vaccine. The standard ADA analysis applies – the employee must be substantially limited in a major life activity. Generalized fears about the safety of the vaccine are not protected by the ADA.

Q: What Documentation May Employers Require to Support a Disability Request?

A: Employers may request medical documentation about the employee's disability and functional limitations, as with any disability. Employers may need to be flexible with regard to the timing of the documentation, given the current burdens on the healthcare system in light of the rising COVID-19 numbers.

Q: What About Vaccine Exemptions for Pregnancy?

A: Pregnant employees may be entitled to an exemption as an accommodations as well. As the EEOC notes in its COVID-19 guidance, What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws, pregnancy-related conditions may be ADA disabilities. In addition, the Pregnancy Discrimination Act specifically requires that women affected by pregnancy, childbirth, and related medical conditions be treated the same as others who are similar in their ability or inability to work. Thus, the ADA reasonable accommodations analysis above applies to pregnant employees seeking an exemption as well.

Q: What Are the Requirements for a Vaccine Exemption Based on a Religious Need?

A: The employee's belief must be religious and it must be sincerely held. Note that, under Title VII, "religion" encompasses more than traditional or standard religions, but also moral or ethical beliefs that are held with the strength of traditional religious views. Such beliefs must address fundamental and ultimate questions having to do with deep and imponderable matters. Note that beliefs about the safety or necessity of a vaccine, even though strongly held, would be considered medical rather than religious beliefs.

In its Religious Discrimination guidance, the EEOC has identified four (non-dispositive) factors to be used in determining whether a belief is sincerely held:

(a) Whether the employee has behaved in a manner markedly inconsistent with the professed belief;

(b) Whether the accommodation sought is a particularly desirable benefit that is likely to be sought for secular reasons;

(c) Whether the timing of the request renders it suspect (e.g., it follows an earlier request by the employee for the same benefit for secular reasons);

(d) (Whether the employer otherwise has reason to believe the accommodation is not sought for religious reasons.

Q: What Documentation May Employers Require to Support a Religious Exemption Request?

A: A limited amount of documentation may be required. The EEOC states that "if the employer has an objective basis for questioning either the religious nature or the sincerity of a particular belief or practice, the employer would be justified in seeking additional supporting information." Thus, as the EEOC noted in its Religious Discrimination guidance, employers may request oral statements, affidavits, or other documents from the employee's religious leader(s), as well as from fellow adherents (if applicable), family, friends, neighbors,

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managers, or co-workers who may have observed the employee's past adherence or lack thereof, or discussed it with them.

However, because religion encompasses more than traditional views, employees may not be required only to submit such letters from religious leaders to support their beliefs. The EEOC recognizes that a statement from the employee describing their beliefs and practices, including information regarding when the employee embraced the belief or practice, as well as when, where, and how the employee has adhered to the belief or practice, may be sufficient support.

Q: Does a Vaccine Exemption Pose a Direct Threat or Constitute an Undue Hardship?

A: It depends on the circumstances. In some circumstances, given that the CDC is asserting that masks both prevent the spread of COVID-19 and can offer some protection to the wearer (depending on fit, material, etc.), the use of masks and other preventative measures may be deemed an effective substitute for the vaccine, and thus a reasonable accommodation for an employee's request for a mask exemption. This is not necessarily the case in all circumstances, however.

The EEOC states that an employer may exclude from the workplace an unvaccinated employee who poses a direct threat due to a "significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation." This requires an individualized assessment that considers four factors: the duration of the risk; the nature and severity of the potential harm; the likelihood that the potential harm will occur; and the imminence of the potential harm. Based on this assessment, the employer must determine that an unvaccinated individual will expose others to the virus at the worksite and, further, that there is no reasonable accommodation that would reduce or eliminate the risk.

The EEOC notes that, although an employer can bar the unvaccinated employee from the workplace where it determines a direct threat exists, it may need to consider whether other accommodations are possible or rights are available – such as remote work or leave under the Families First Coronavirus Response Act (which is currently set to expire on December 31,2020), the Family and Medical Leave Act, or employer policy. The employer may rely on CDC recommendations or OSHA guidance in determining whether these accommodations pose an undue hardship.

Q: Can Employers Impose Other Requirements in Lieu of a Vaccine?

A: Yes. Depending on the circumstances, employers could require employees who cannot or will not be vaccinated to wear masks/face coverings, comply with social distancing protocols (maintain 6 feet distance), utilize additional protective clothing or equipment, telework, take leave, or engage in some other appropriate action.

Q: Must Employers Require Employees to Be Vaccinated in Order to Provide a Safe Workplace?

A: Likely not. Under OSHA's General Duty clause, employers have the obligation to provide a safe work environment. As long as the employer is complying with OSHA and CDC workplace guidance on preventative and remedial measures for COVID-19 in the workplace (which currently does not require vaccinations), an employer would likely be found to have met its obligations under the General Duty clause.

Employers should be careful in how they manage employees who raise vaccine-related safety concerns. Under OSHA, those employees are protected from retaliation for raising such concerns.

Q: Are Employers Liable If an Employee Experiences Adverse Effects from a Vaccine?

A: Likely not. Any related illnesses or injuries would likely be covered by state workers' compensation programs.

Note, however, that any illness resulting from the vaccination would likely be a work-related illness, which would need to be recorded on OSHA Form 300 (Log of Work-Related Injuries and Illnesses) and Form 301 (Illness and Injury Incident Report). In addition, there are reporting requirements under OSHA – employers have 24 hours to report if the employee is hospitalized within 24 hours of the vaccination, and 8 hours to report if the employee dies within 30 days of the vaccination.

Q: What Should Employers Do If Employees Experience Adverse Effects from the Vaccine?

A: In post-vaccination guidance for healthcare personnel, the CDC has suggested approaches for evaluating and managing post-vaccination symptoms. In addition, employees should be encouraged to report adverse effects to the federal Vaccine Adverse Event Reporting System. Employees may also be encouraged to enroll in a new smartphone-based tool called "v-safe," which CDC uses to check in on people's health after they receive a COVID-19 vaccine. The CDC recommends that employees experiencing a fever should stay home pending further evaluation, which could include COVID-19 testing. If the employee's soreness from a shot extends past 24 hours or other symptoms do not abate within a few days, the employee should be directed to stay home and contact their health care provider.

Q: Are Employees Entitled to FFCRA or Other Leave Due To Adverse Effects from a Vaccine?

A: FFCRA leave does not apply, but other leave may apply. Note that the FFCRA paid leave mandates expired at the end of 2020, but covered employers may choose to let employees use any unused FFCRA paid sick leave (and take the tax credit) until March 31, 2021. However, an employee experiencing adverse effects from the vaccine does not meet any of the specified reasons for FFCRA leave – in particular, they are not experiencing symptoms of COVID or have been recommended to quarantine. Statutory sick leave or PTO will apply. And if the employer provides other paid leave, such as vacation or non-statutory sick/PTO, employees who meet the criteria for the leave may use such leave.

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Q: Are Employees Entitled to FFCRA or Other Leave If They Refuse a Vaccine and Get COVID-19?

A: Likely Yes. Although the obligation to mandatory FFCRA leave ended on December 31, 2020, pursuant to the most recent stimulus law, a FFCRA-covered employer may choose to allow employees to use any unused FFCRA paid sick leave (and take the tax credit) through March 31, 2021. If employees have statutory sick leave or PTO available, they may use that.

One nuance – if an employee chooses not to be vaccinated and willfully engages in high risk activity that results in their becoming sick, employers may be able to assert that non-statutory employer-provided paid leave is not available for use.

Q: Should Vaccinated Employees Wear Masks/Face Coverings?

A: Yes. CDC, in its Frequently Asked Questions About COVID-19 Vaccination, currently states that, even after being vaccinated, people "should continue using **all the tools** available to us" to stop the pandemic, which includes wearing masks, washing hands frequently, and staying 6 feet away from others.

Q: What Can/Should Employers Do About Employees' Vaccine-Related Concerns?

A: Listen, do not dismiss. This is an uncertain time and people understandably are fearful. Employers should take the time to hear the concerns and try to address them with facts and explanations. Document the discussions. Ultimately, if the employee's concerns are unreasonable or unwarranted, the employer can still move forward with vaccine requirements. And if an employee refuses to be vaccinated as part of a mandatory vaccination program, and no reasonable workplace accommodation is required or available, the employer may place the employee out of work unless and until they comply with the mandate or the mandate is no longer necessary.

Some employers may question whether they may terminate an employee who refuses to be vaccinated. We note that, under the EUA statute, an individual has the right to refuse the vaccine. Given this statutory right, employers may wish to refrain from terminating the employee, in order to avoid a possible wrongful discharge claim. Rather, the employer might consider other options, such as telework or leave. However, this is complicated, and employers should consult with counsel.

Additionally, employers should be careful with any employee expressing workplace safety concerns, as OSHA protects employees who raise such concerns from retaliation. In other words, employees cannot be disciplined for raising such concerns. This is different than not allowing an employee who refuses to be vaccinated to work, as the latter is a safety consideration, not a disciplinary one.

If there is a group of employees expressing concerns about a vaccine mandate – or concerns that an employer is not mandating the vaccine for all employees – this would likely be considered protected concerted activity under the National Labor Relations Act. This does not mean that the employer must yield to their objections, just that those employees may not be disciplined or terminated for merely voicing the concerns.

To the extent that employees are expressing concerns about a vaccine mandate as a political matter, some states have laws that protect legal off-duty political activity. But off-duty laws do not protect workplace activity.

Q: Must Unionized Employers Bargain Over Vaccine Policies?

A: Yes, vaccination policies are mandatory subjects of bargaining, absent contractual authority granting unilateral employer implementation or extra-contractual evidence of a union waiver of its right to bargain over the policy.

A unionized employer should first look to its CBA to determine whether it may unilaterally implement a mandatory vaccination program without first notifying and bargaining with the union. If no contractual authority exists, the employer should review any past practice of implementing or altering vaccination programs. Even if the employer is privileged to act unilaterally, either via an expansive management rights clause or a previous waiver-by-inaction on the union's part, the employer must remain mindful of its obligation to bargain over the effects of its decision to implement a mandatory vaccination program, if requested to do so by the union. Employers should provide sufficient notice to the union before implementing vaccination policies to provide the union with time to bargain over the decision or effects of the mandatory vaccination program.

Q: May Employers Offer an Incentive to Employees to Encourage Vaccination?

A: Generally, yes, a modest incentive would be acceptable. These can include things such as gift cards, paid time off, and cash payments. Note that cash payments may have tax consequences, and employers should consult with accountants or tax counsel.

An employer administering its own vaccine program, however, should be aware of possible wellness program implications. Under the ADA and the Genetic Information Nondiscrimination Act, employee participation in a program to promote health, through which they are required to provide medical information to the employer, must be voluntary. As the EEOC notes, pre-vaccination screening questions may seek medical information. And it has issued a proposed rule on wellness programs, in which it states that too-high incentives may render participation involuntary; thus only modest incentives – such as a gift card or water bottle – are permissible. Incentivizing employees to obtain vaccinations from their own third-party vaccine providers, however, will not trigger this limitation as the third party, and not the employer, would be asking the screening questions.

In addition, employers should be mindful that offering an incentive to employees who become vaccinated can have a disparate impact on employees who cannot get the vaccine due to a disability. Typically, to avoid a disparate impact, employers would want to accommodate employees who cannot earn the incentive due to a disability by permitting them to earn the incentive in another way (e.g., in the context of a wellness program that promotes exercise, disabled employee who cannot

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run a mile can instead meditate for 15 minutes). With a vaccine, it seems impossible to articulate a meaningful alternative for disabled employees who cannot take the vaccine, especially because the CDC is indicating that other protective measures (PPE and distancing) should remain in place even after vaccination, so masking is not a suitable alternative as it is in the context of the flu vaccine. While an incentive could lead to a disparate impact, it is not clear precisely what liability would result from a such a policy. Employers should consult with counsel before implementing such incentives.

Q: How Else May Employers Encourage Employees to Become Vaccinated?

A: The CDC suggests that employers host a vaccination clinic in the workplace, during work hours and at no cost to employees, and refers employers to local health departments for further guidance, along with its Guidance for Planning Vaccination Clinics Held at Satellite, Temporary, or Off-Site Locations and Resources for Hosting a Vaccination Clinic. If a workplace vaccination clinic is not possible, the CDC also recommends: allowing employees to take paid leave to get a vaccination elsewhere; supporting transportation to off-site clinics; displaying posters/flyers in breakrooms, lunchrooms and high-traffic areas with information about vaccine clinic locations in the community; use company communications (e.g. emails, newsletters, intranet, portals) to inform employees about the importance of vaccinations and where to obtain them.

Q: What Resources Have the CDC and OSHA Provided to Employers?

A: The CDC has created toolkits for employers of essential workers, medical centers/clinics/clinicians, and long-term care facilities, although the resources are certainly applicable to employers generally. The toolkits contain FAQs for employers and employees, sample communications, posters, social media content, and more.

This is obviously a fast-moving and ever-changing situation, and we will continue to send out E-Lerts on any significant developments. These Q&As will be added to our extensive COVID-19 FAQs resource on our website, which is continually updated.

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States Gear Up to Limit Use of Biometrics and Biological Data

By Theodore Claypoole, Womble Bond Dickinson

This may be the year when limitation of biometric capture goes national. Right now, company's using biometrics are driven by one state law, but others could soon join.

As limits on biometrics cascade forth from Illinois in private cases based on the state's Biometric Information Protection Act (BIPA), other state legislatures have decided to place limits on capture and use of biometric information. The private right of action and statutory damages offered by BIPA have made Illinois the experimental lab where U.S. companies learn what counts as a biometric program and what their limits on that program may be. Illinois may soon have company.

New York's legislature is considering restrictions of consumer biometrics this term, and the proposed act looks like Illinois' BIPA, requiring written notice of taking a biometric identifier, notice of how the identifier will be used and disposed of, and written permission from the subject to do so. It also contains a broadly worded "thou shalt not profit from anyone's biometric identifier" that could eviscerate the entire biometric technology industry if it is interpreted in an expansive fashion. The disclosure prohibitions are also surprisingly broad and could lead to liability for simply using a biometric tech processor. The legislation also contains a private right of action and statutory damages that seem lifted straight from BIPA.

New York has also proposed a less comprehensive bill that would restrict companies from using biometric information in marketing. I don't understand the driver for this particular bill, if the legislature is more concerned about a company only marketing to people grouped by biometric data, so selling to people with brown eyes or with single whorls in their thumbprints, or whether it is concerned with the manipulation of serving ads using your own voice or earlobes to sell material. However, there must be a concern because someone wrote an Act to consider.

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Legislation proposed in Maryland regulates biometric identifiers and requires companies capturing such information to publish a written retention policy that will establish "guidelines for permanently destroying biometric identifiers and biometric information on the earlier of" three years or when the initial purpose for obtaining the biometric identifiers was satisfied. The Maryland act, like New York and Illinois, includes the same private right of action and statutory damages clauses.

Virginia has proposed a bill directed primarily at employers who chose to use biometric tools with their employees. The bill requires written informed consent from an employee before the capturing and storing of the biometric data. The bill would also restrict employers from profiting from the biometric data of their workers.

South Carolina's entry into this race is a consumer protection act with very broad definitions of personal information and biometric information. This bill is almost a "CCPA for biometrics" which addresses consumer rights to prevent sale of biometric data, protections for children, and prohibition on discrimination against consumers for protecting their biometric data. This act seems to anticipate a future world where companies are using biometric data in more expansive ways than much of what I have seen, which is primarily biometric use for identification, authentication or other security purposes. There is some voice stress analysis in use, but it seems the target of this bill is anticipatory, rather than reactionary.

California's legislature passed one of the most thoughtful and constructive biometric laws last year, but it was vetoed by Governor Gavin Newsom. A similar law was introduced into this year's legislative session. The Genetic Information Privacy Act (GIPA) placed limits on what companies could do with DNA information gathered from California residents, addressing a major privacy loophole that affects the DNA entertainment industry.

In the U.S., HIPAA protects biological information that person would give to a doctor, hospital or pharmacist to assist in medical treatment, so DNA provided for this purpose would be covered under federal privacy protections. However, millions of people have decided to swab themselves and hand this DNA data – the core information describing a person's physical being – to unregulated private companies who reserve the rights to use your DNA information for all kinds of purposes. Some of these recreational DNA mills provide your data to law enforcement and some to the pharma industry, and at least one has been recently bought by big private equity firms looking to expand the range of what can be done with volunteered DNA. So this is a significant privacy problem, in part because most people who swab themselves for the benefit of these private companies are unaware of the risks and likely exposure of their biological information.

The newly introduced California law, like GIPA, would require direct-to-consumer genetic testing companies to honor a consumer's revocation of consent to use the DNA sample and to destroy the biological sample within 30 days of revoking consent. It would also provide consumers access to their genetic data. The law would not provide a provide right of action, but could be enforced by state or local officials. It may be written to overcome Gov. Newsom's objects, which he claimed were related to restricting COVID-fighting efforts.

These legislative actions may or may not be passed into law. In any case it is clear that use of biometrics by businesses for consumers, marketing and employees have sparked the imagination of state legislatures, and we are only likely to see more action in biometrics for years to come.

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