CITY OF MINNEAPOLIS

Managing Unionized Workforces After 2020

IMLA Conference – October 1, 2021

Minneapolis, MN

Presented by: Trina Chernos

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Minneapolis
City of Lakes



Welcome to our city!

Welcome to our city!
While you are here:

- Sightsee during your visit
- IMLA's Land Use Tour on Oct. 2 from 2-5pm Preregistration required ($30)
- Rent a bicycle or scooter; visit the Farmers Market, view public art; visit US Bank Stadium (host of past Super Bowl)
- For local events, download the Minneapolis app or visit: https://www.minneapolismn.gov/

Click on "Things to Do" and "Getting Around"

Topics Covered:

1. COVID, ADA and FMLA – focus on labor union issues
2. Budget Crisis – interest arbitration
3. Heightened scrutiny of public employees
4. Social media activity
5. Employee Resource Groups

Presentation Format and Goals

- Identify issues in unionized workforces
- Provide examples of developing law and public policies
- Spark discussion and thought
- Audience participation is encouraged and appreciated

Theme: 2017 law review article

"The future of healthcare in America is uncertain. Many questions about who will have access to healthcare and how it will be paid for are likely to remain unsettled for months or years to come. But it *is* clear that Americans are facing new and resurgent health challenges in the form of outbreaks of vaccine-preventable illnesses. In addition to determining who will pay to treat infected patients, various segments of society--including employers whose business interests may be adversely affected by disease outbreaks--must consider how to prevent and control the spread of these diseases."

Worth reading, even though published pre- COVID-19 pandemic

Teri Dobbins Baxter, Employer-Mandated Vaccination Policies: Different Employers, New Vaccines, and Hidden Risks, 2017 Utah L. Rev. 885, 886 (2017).

- Law review article above analyzes and cites:
- constitutional issues;
- labor union challenges to mandating vaccines;
- public v. private sector employment;
- government authority and more

COVID 19 – vaccine “mandates” - Factors in decision

- Federal government’s mandates
- Incentive or mandate or hybrid
- Government authority for employer to take certain action(s) – developing area of the law
- Limits on government authority – developing area of the law
- State and federal law; federal agency’s guidance
- FDA approval
- Labor unions

COVID 19 – vaccine “mandates” - Issues

- Does an employer policy truly “mandate” a vaccine?
- Read the fine print: any exemptions?
- Any consequences stated for noncompliance?
- Any procedural or substantive requirements prior to taking adverse employment action for noncompliance?
- Are employees represented by labor unions?

COVID 19 – vaccine “mandates” - Considerations in a union workforce:

- What, if any, aspects of a vaccination policy must be negotiated with the labor union?
- Where to look for the “answer”?
- Consequence for unilateral implementation if the policy contains a mandatory subject of bargaining?

COVID 19 – vaccine "mandates"- Examples from around the country:

Denver:

- Mayor announced on August 2, 2021 that all city employees and private sector workers in certain "high-risk" settings must be fully vaccinated by September 30, 2021.
- After Sept. 30, unvaccinated individuals will not be permitted to work onsite or in the field.

COVID 19 – vaccine "mandates" Examples from around the country:

New York City:

- Mayor announced on August 3, 2021 that employees and patrons of indoor dining, fitness and entertainment facilities wanting access will have to show that they have received at least one dose of the vaccine.
- Face coverings mandated for employees who do not provide documentation that they are fully vaccinated (with certain exceptions)
- https://www1.nyc.gov/assets/dcas/downloads/pdf/agencies/directive_2020_1.pdf

COVID 19 – vaccine "mandates"- Examples from around the country:

Delta Airlines: on August 25, 2021, announced surcharge on health insurance premium of unvaccinated employees.

- Unionized pilots, flight attendants, mechanics
- Pay cut?
- Deduction from wages?
- Could a governmental entity do this?
- Considerations

COVID 19 – vaccine "mandates"- Examples from around the country:

United States Armed Forces "mandate"

- 17 mandated vaccines depending on location of service member's deployment
- Added COVID vaccine by announcement on August 26, 2021
- Enforcement? the same as any other direct order

Exemptions:

- Serious medical reactions to the vaccine
- Immune deficiencies such as HIV infection
- "Evidence of existing immunity" by a serologic antibody test
- Documentation of previous infection or natural infection presumed

COVID 19 – involuntary testing Fourth Amendment issues

- Knox County Educ. Ass'n v. Knox County Bd. Of Educ., 158 F.3d 361 (6th Cir 1998). Union sued following drug and alcohol policy requiring testing of teachers. Held: (1) "suspicionless" drug testing was constitutional; (2) suspicion-based drug testing policy was constitutional; but (3) it could not be determined from the record whether suspicion-based alcohol testing policy was constitutional.

- Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646 (1995). Public school district's student athlete drug testing policy did not violate student's federal or state constitutional right to be free from unreasonable searches.

COVID 19 – vaccine or other "mandates" - Legislative pushback:

- Montana: effective May 7, 2021 prohibits employers from mandating the current COVID-19 vaccines and recognizes an individual's vaccination status as a protected category under the Montana Human Rights Act.

- Oklahoma: effective July 2021, law bans schools from mandating masks

COVID 19 – vaccine "mandates"- Union pushback:

California:

- Governor required all state workers to show proof of vaccination or undergo regular testing
- CA's largest public sector union, SEIU, represents 96,000 employees
- SEIU's president objected in a letter, stating: "The new policy constitutes a unilateral change in violation of the obligations to give notice and the opportunity to meet and confer prior to implementation."

COVID 19 – vaccine “mandates”- Employee pushback:

- Unvaccinated George Mason University Law Professor sued school administrators in Virginia federal court, arguing that policy threatening discipline against the unvaccinated violates his constitutional rights
- Professor withdrew lawsuit after university offered professor religious/faith-based exemption

COVID 19 – vaccine "mandates"- Employee pushback

RON HENCEY, et al., Plaintiffs, v. UNITED AIRLINES, INC., et al., Defendants. Additional Party Names: Fed. Aviation Admin., Martin J. Walsh, Pete Buttigieg, Steve Dickson, United States Dep't of Lab., United States Dep't of Transportation, 2021 WL 3634630, (S.D. Fla. Aug. 17, 2021):

Court denied motion by 18 pilots for temporary restraining order enjoining airline(s) from implementing policy mandating vaccines by a certain deadline. Pilots who remained unvaccinated would be discharged from employment. Court denied the motion for the TRO, stating:

COVID 19 – vaccine "mandates"- Employee pushback

"Even if Plaintiffs had filed a complaint setting forth specific claims for relief, it is unlikely that Plaintiffs would be able to establish a substantial likelihood of success on the merits. The Northern District of Indiana recently denied a motion for preliminary injunction seeking to enjoin Indiana University from enforcing a Covid-19 vaccine mandate for students. *Klassen v. Trustees of Indiana Univ.*, No. 1:21-CV-238 DRL, 2021 WL 3073926 (N.D. Ind. July 18, 2021). The Seventh Circuit affirmed, *Klassen v. Trustees of Indiana*, No. 21-2326, 2021 WL 3281209 (7th Cir. Aug. 2, 2021), and on August 12, 2021, Supreme Court Justice Amy Coney Barrett denied the plaintiffs' Emergency Application for Writ of Injunction related to Indiana University's vaccine mandate. *See In re Ryan Klaassen, et al.*, Case No. 21A15 (Aug. 2, 2021). It is also unlikely that Plaintiffs would be able to meet their burden of establishing irreparable harm. If Plaintiffs are terminated for failing to get vaccinated and United's actions are later deemed to have violated Plaintiffs' rights, then Plaintiffs can be made whole with monetary damages—just like in any other employment dispute. This, however, is a discussion for another day."

Hencey, 2021 WL 3634630, at *2.

Vaccine mandate - Union pushback to flu shot (2021):

- AFSCME, University Professional & Technical Employees and Teamsters alleged violation of state law by the University of California's unilateral implementation of policy mandating the flu vaccine for certain employees. By decision dated July 26, 2021, California's Public Employment Relations Board stated:

CA's PERB decision:

"The university's decision to adopt the influenza vaccination policy was outside the scope of representation because under the unprecedented circumstances of a potential confluence of the COVID-19 and influenza viruses, the need to protect public health was not amenable to collective bargaining or, alternatively, outweighed the benefits of bargaining over the policy as to University employees. We also find, however, that the University was not privileged to implement the vaccination policy before completing negotiations over its effects because the University did not meet and confer in good faith prior to implementation. … The University's implementation of the vaccination policy constituted an unlawful unilateral change in violation of CA's Higher Education Employer-Employee Relations Act (HEERA)."

Vaccine mandate - Union pushback to flu shot (2007):

Virginia Mason Hospital v. Washington State Nurses Association, 511 F.3d 908 (9th Cir. 2007):

- Hospital mandated flu vaccines after incentives resulted in only 55% of employees vaccinated.
- Nurses union grieved the mandate. Arbitrator sustained grievance and ordered hospital to rescind policy.
- Hospital filed motion to vacate arbitrator's award
- Federal district court granted summary judgment to the union
- Ninth Circuit Court of Appeals affirmed
- Impact of decision? Per 2017 Utah Law Review article: absent explicit, well-defined and dominant public policy [or even in presence of same, as author opined existed in this case], unions are allowed to challenge and delay measures deemed necessary by medical professionals
- Would the result be the same in your city? Where might you look?

Americans With Disabilities Act

- EEOC guidance: mandating vaccines; questions employer may ask
- EEOC guidance: “Long haulers”
- Reasonable accommodation - considerations in a union workforce
- Resource:

https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws

Religious accommodation – Litigation re: TDP vaccine mandate

Horvath v. City of Leander, 946 F.3d 787 (5th Cir. 2020)

Facts: firefighter (FF) opposed mandatory vaccination for tetanus, diphtheria and pertussis (TDP) on religious grounds. FF turned down accommodation of transfer to code enforcement position with no vaccination requirement or continued assignment in line position provided FF wore a respirator at all times.

Religious accommodation – Litigation re: TDP vaccine mandate

Horvath v. City of Leander, 946 F.3d 787 (5th Cir. 2020)

Held:

1) city offered FF a reasonable accommodation for his religious-based objection to vaccination requirement;
2) city's legitimate, non-discriminatory reason for FF's termination was not pretext for retaliation; and
3) requirement that FF wear a respirator mask in lieu of taking required vaccination did not violate his right to freely practice his religious beliefs.

Family Medical Leave Act

- 29 CFR §825.312 Fitness for duty certification.

……

- (g) “If State or local law or the terms of a collective bargaining agreement govern an employee's return to work, those provisions shall be applied.”

Budget Crisis

- Pandemic
- Police misconduct
- Unrest
- Labor negotiations during a budget crisis
- Interest arbitration for essential workers
- Notice of intent to strike
- American Rescue Plan Act (ARPA)

Heightened scrutiny of public employees

- Racial justice demonstrations
- It’s January 6, 2021. Do you know where your employees are?
- Labor union involvement in employee misconduct investigations
- Increased requests for government data

Employee Resource Groups

"No one expects that you are going to be an expert on experiences outside of your own. It is only by observing and listening to others that you will be able to learn and better understand their experiences."

–Jeffery S. Brockmann, U.S. Bank, in chapter *Keys to Successful Allyship in the Workplace* in Minnesota CLE's 2021 publication of *Workplace Diversity, Equity, and Inclusion Handbook*

Employee Resource Groups, con't.

- Also referred to as Affinity Groups or Allyship in the workplace
- Sample definition: organizationally-supported groups of employees who voluntarily convene and mobilize around a shared characteristic, interest or set of experiences.
- Usurping the role of labor unions?

Social Media – Employee activity and discipline

- Nexus to work?
- First Amendment considerations
- Sample case – what if union members submit the complaint against another union member?
- A different case – letter signed jointly by department head and union president

Related presentation:

- Employment Law: "Navigating the New Hybrid Workforce"

- Monday, Oct. 5
- Interactive presentation moderated by Deidra Sullivan

Questions or Comments?

- Moderator: Robin Cross (thank you!)
- Instructions for submitting questions or comments

Thank you for attending!

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