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HEALTH LAW

COURT-ORDERED TREATMENT: THE IMPACT OF DIAGNOSTIC OVERSHADOWING FOR INDIVIDUALS WITH DEVELOPMENTAL AND INTELLECTUAL DISABILITIES

BY PAOLA ROSSETTI

Doctors frequently misdiagnose individuals with intellectual and developmental disabilities (commonly referred to as "DD/ID"). When these people exhibit "challenging behaviors," such as vocal distress and agitation, doctors may assume these behaviors are symptoms of the disability, when the person is actually acting differently due to an infection or other unrelated disease.

Researchers in Canada studied prescribing practices for 51,881 adults under 65 years old with DD/ID, divided further into cohorts with and without comorbid psychiatric diagnoses. They found that doctors prescribed antipsychotic medications to nearly one-third of DD/ID adults without a psychiatric diagnosis. One-third of these patients were getting medication to treat a disease they did not have.

Communication barriers between providers and patients, and providers' unconscious biases, lead to incorrect and unsupported medical assumptions — a phenomenon called diagnostic overshadowing. Diagnostic overshadowing occurs when health care providers treating individuals with disabilities misattribute signs and symptoms of a new condition to the underlying disability, instead of diagnosing the condition that fits the patient's clinical presentation. Such implicit bias can result in failure to treat the new condition and even in unnecessary and preventable deaths.

How can health care providers, courts and legal professionals address and prevent the harm of diagnostic overshadowing?

DIAGNOSTIC OVERSHADOWING AND EXTRAORDINARY TREATMENT ORDERS IN MASSACHUSETTS PROBATE AND FAMILY COURTS

In Massachusetts, when a person is prescribed "extraordinary medical treatment" and the person lacks the capacity to consent to such treatment, a judge of the Probate and Family Court engages in a process called substituted judgment. This process is supposed to occur only if the judge determines the person is incapacitated. If so, the judge decides what decision that person would make if they had the capacity to make decisions.

A common extraordinary treatment is antipsychotic medications. These medications can be intrusive with more adverse and long-term effects than other treatments. In these cases, the Probate and Family Court authorizes a so-called "Rogers guardian" to make extraordinary treatment decisions for the respondent. The Rogers guardian can be a family member, friend or court-appointed licensed professional, and is often vested with the dual role of Rogers monitor. A Rogers monitor is responsible for overseeing the respondent's treatment and reporting risks and benefits of such treatment to the court annually.

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A prerequisite to substituted judgment is the court's review of a medical-legal form, either a clinical team report or a medical certificate. Both forms must be signed under the penalty of perjury. Clinical evaluators completing and signing forms for extraordinary treatment should be diagnostically thorough and accurate — yet diagnostic overshadowing still gets in the way.

The clinical team report, almost always used for persons with DD/ID, contains a section called "Other Relevant Diagnoses," which instructs the clinician to "list other relevant physical or mental diagnoses that affect decision making ability."[1] This instruction may sound straightforward on paper. But too often, clinicians gloss through this question with a "not applicable" (N/A).

How does diagnostic overshadowing in extraordinary treatment cases occur in practice? One common scenario is when a respondent with autism and who is non-verbal exhibits a sudden increase in agitation. A doctor would interview most patients, order tests, and might discover underlying causes like overactive thyroid, medication toxicity or infection. But for an autistic patient, the doctor may assume the agitation is a symptom of autism. The treatment recommendation for agitation or irritability associated with autism is usually antipsychotic medication. These medications, if administered for a misconstrued indication, will subject the respondent to continued suffering from *both* the unresolved medical issue and potentially harmful effects of the medication itself.

WHY DO CLINICIANS MISS DIAGNOSES WHEN EVALUATING INDIVIDUALS WITH DEVELOPMENTAL AND INTELLECTUAL DISABILITIES?

Clinicians completing extraordinary treatment forms could feel pressured by the petitioner (e.g., school, family member or hospital) to complete the forms in a manner that gets treatment administered as soon as possible. Usually, the petitioner has noticed the patient is agitated or "acting out." The goal is to get them calmed down, and this usually means some kind of psychotropic medication. The clinician is not asked to explain or treat the cause of the behavior, and it is easier to write a prescription for a known condition than to investigate why the patient's behavior has suddenly changed. Another factor is the limited and brief answer spaces in such documents, which encourage little to no explanation by the clinician and implicitly discourage a well-developed medical narrative that one would use for an initial patient visit note.

Additionally, the providers completing such forms are not always the patient's usual doctors. Often, they are psychologists or social workers appointed by the court, who may not be trained to recognize clinical presentations among individuals with verbal communication difficulties, a common issue among people with DD/ID. These providers may be overwhelmed with a heavy caseload, feel bad for the family, or even feel pressured by their employer (school, hospital, nursing home) to get the form completed and signed immediately. The provider may also be unaware of the implications or impact of submitting this form, especially when the provider is new to the case or rarely sees the patient outside of the minimum yearly examination required as part of the report.

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Regardless, the trend of cursory answers and inaccurate or missing diagnoses indicates a need for a mandatory roadmap process, one that both supports clinicians in conducting these critical evaluations and supports the rights of individuals with disabilities to be worked up for underlying medical conditions.

DIAGNOSTIC OVERSHADOWING IS A FORM OF HEALTH CARE DISCRIMINATION

The stark reality of the practice of overlooking diagnoses due to one's premature assumptions is actually silent discrimination manifested by disparate health care treatment for individuals with developmental and intellectual disabilities. Outside of the Massachusetts Probate and Family Court, providers should be aware of the potential consequences for their actions under federal laws, including the Americans with Disabilities Act (ADA) and Section 504 of the Rehabilitation Act.

Section 504 is implicated in federally funded programs; Title II of the ADA applies to health care services by local and state governments; and Title III of the ADA relates to public accommodations, which cover many private health care services. When a person with DD/ID presents to a health care provider, the provider should treat the person as a patient with reasonable accommodations in place as necessary, to fit the person's clinical presentation and medical history to the appropriate diagnosis and treatment plan.

POTENTIAL SOLUTION IN THE FUTURE — TREATMENT REVIEW PANELS

Silent discrimination in the provision of health care to individuals with developmental and intellectual disabilities leads to decisions to withhold appropriate treatment. These decisions equate to people's lives being valued less than the lives of those without DD/ID.

One significant problem is the Probate and Family Court's lack of data transparency on how many petitions for extraordinary treatment are filed each year and how many treatment plans get extended. This data gap leaves attorneys, clinicians, and even court personnel and judges unaware of the seriousness of the problem of inappropriate and harmful prescribing of antipsychotic medications to individuals with DD/ID in Massachusetts.

Attorneys and judges can learn from previous instances of health care discrimination and build safety nets in the form of treatment review panels composed of groups of clinicians that peer review each other's evaluations. According to a 2015 research letter by the U.S. Food and Drug Administration and university researchers, 15 states have implemented Medicaid-recipient clinical peer review committees. In these states, review teams adjudicate the appropriateness of decisions to prescribe antipsychotic medications to Medicaid-insured children and adolescents. A similar process could be enacted in Massachusetts for recipients of court-ordered antipsychotic medication once more data is collected on the prevalence of extraordinary treatment petitions in the Probate and Family Court.

While specialized public services require more work and funding at the outset, the long-term benefits of ensuring comprehensive evaluations of individuals with developmental and intellectual disabilities will guard against the costly and damaging medical and legal repercussions of diagnostic overshadowing. ■

1. *Commonwealth of Massachusetts: The Trial Court: Probate and Family Court, Clinical Team Report MPC 402* (5/30/11) at 2, available in pdf at www.mass.gov/doc/clinical-team-report-mpc-402/download.

TAKING A SHOT AT ANSWERING EMPLOYERS' COVID-19 VACCINATION QUESTIONS: BEST PRACTICES FOR MANAGING THE COVID-19 VACCINE IN THE WORKPLACE

BY STEPHEN W. ARONSON, BRITT-MARIE K. COLE-JOHNSON, NATALE DINATALE, ABBY M. WARREN, KAYLA N. WEST AND EMILY A. ZAKLUKIEWICZ

In December, the Food and Drug Administration (FDA) granted emergency use authorization (EUA) for Pfizer's and Moderna's COVID-19 vaccines. Since then, as of Feb. 2, 2021, 681,472 total cumulative doses of the COVID-19 vaccine have been administered, as reported by the Massachusetts Department of Public Health. Massachusetts is currently in the early stages of Phase 2 of its COVID-19 vaccination distribution plan, and Phase 3, which expands the availability of the COVID-19 vaccine to the general public, is currently expected to launch in April 2021. As the number of COVID-19 cases across the country continues to rise, with the total number of cases in Massachusetts recently surpassing 500,000, employers are grappling with how to manage COVID-19 in their workplaces. With widespread distribution and availability of the COVID-19 vaccine to the general public on the horizon in Massachusetts, employers across all industries may be considering whether to adopt a vaccination policy that requires vaccination as a condition of working or accessing the workplace. However, implementation of a COVID-19 vaccination policy in the workplace raises several legal and practical issues that employers may first wish to consider. This article answers some common questions employers may have about managing COVID-19 vaccination in the workplace.

WHAT IS THE SIGNIFICANCE OF THE FDA'S EMERGENCY USE AUTHORIZATION?

One notable risk associated with the COVID-19 vaccine is that its use is authorized by the FDA pursuant to an EUA. An EUA is different than complete FDA approval, and under 21 U.S.C. § 360bbb-3(e)(1)(A)(ii)(III), the secretary of Health and Human Services may require that individuals be told that they can refuse a product issued pursuant to an EUA. This difference might impact the extent to which employers can mandate COVID-19 vaccination. Because there is little precedent regarding an employer's ability to mandate vaccinations and to mandate a vaccine that has only had EUA approval, requiring COVID-19 vaccination with EUA approval in the workplace could lead to a considerable risk of litigation from employees or labor unions challenging the mandate.

WHAT IS THE EEOC'S POSITION ON MANDATING THE COVID-19 VACCINE?

The Equal Employment Opportunity Commission (EEOC) has taken the position that employers may mandate that employees receive the COVID-19 vaccine, subject to certain limitations. According to the EEOC, administration of the COVID-19 vaccine does not implicate the Americans with Dis-

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abilities Act (ADA) because administration of the vaccine is not a medical examination. Under the EEOC's guidance, employers, regardless of the industry, may require that their employees receive the COVID-19 vaccine without having to show that the mandate is job-related and consistent with business necessity.

However, according to the EEOC, while vaccination is not a medical examination for purposes of the ADA, pre-vaccination medical screening questions likely are disability-related inquiries that must be job-related and consistent with business necessity. Therefore, the EEOC's guidance advises that if an employer or a third-party vendor engaged by an employer administers the COVID-19 vaccine and asks pre-vaccination screening questions, the employer must show that these pre-screening questions are job-related and consistent with business necessity. Specifically, an employer needs to demonstrate that an employee who does not answer the questions, and thus does not receive a vaccine, will pose a direct threat to the health or safety of the employees or others. To avoid these risks, an employer may choose to require that its employees obtain the vaccine from a third party not associated with the employer. Alternatively, if an employer chooses to offer the vaccine to employees on a voluntary basis, and an employee's decision to answer the associated pre-screening questions is also voluntary, an employer might not need to demonstrate that such pre-screening questions are job-related and consistent with a business necessity.

Although Massachusetts has not taken a position on whether mandatory COVID-19 vaccination is permissible, Massachusetts has taken steps to implement mandatory flu vaccinations, specifically in light of the COVID-19 pandemic. Thus, for the 2020-2021 influenza season, the Massachusetts Department of Public Health required that certain health care employers (e.g., Massachusetts nursing homes and rest homes) ensure that all personnel were vaccinated against the influenza virus, subject to narrow exceptions. The Massachusetts Department of Public Health also required the influenza vaccine for all students enrolled in child care, preschool, K-12 schools and post-secondary institutions, with limited exceptions. That mandate resulted in litigation, and the Massachusetts Department of Public Health has since announced removal of the influenza vaccine requirement for students enrolled in child care and preschool, as well as primary, secondary and post-secondary education.

HOW DO EMPLOYERS MANAGE EMPLOYEES WHO REFUSE THE COVID-19 VACCINE?

Recent headlines illustrate many of the challenges associated with employee refusal of the COVID-19 vaccine, especially in certain high-risk industries. For example, many nursing homes and long-term care facilities are facing challenges as high percentages of frontline nursing home staff refuse to receive the COVID-19 vaccine.

The EEOC and the courts have advised that employees may lawfully refuse the COVID-19 vaccine for a number of reasons. Accordingly, employers with mandatory vaccination policies might be required to accommodate employees who refuse the vaccine due to a disability or a sincerely held religious belief. For example, if an employee is unable to receive the COVID-19 vaccine due to a sincerely held religious belief, employers may be required to provide the employee with a reasonable accommodation regarding the vaccination requirement unless it would pose an undue hardship, meaning more than a *de minimis* cost or burden on the employer. Similarly, if the employee refuses the COVID-19 vaccine due to a disability, employers might be required to provide the employee with a reasonable accommodation with respect to the vaccination requirement unless it would pose a direct threat to the workplace. Notably, even if the "direct threat" standard has been met, employers likely cannot automatically terminate an employee for refusing to get vaccinated, although the employer might be able to exclude the employee from the workplace if there is no way to provide a reasonable accommodation. Although the issue has not yet been addressed, employers likely have similar reasonable accommodation obligations under the Massachusetts Fair Employment Practices Act, M.G.L. c. 151B et seq. Employers would be well-advised to train their personnel on how to manage reasonable accommodation requests in this context. Employers may also wish to consider which potential reasonable accommodations could be offered to employees requesting exceptions from receiving the vaccine (e.g., remote work, personal protective equipment, social distancing, isolated work areas, etc.).

If an employee has refused the COVID-19 vaccine for some reason other than a disability or a sincerely held religious belief, employers may wish to evaluate the relevant risks associated with such a refusal. Specifically, if certain employees refuse the vaccine, employers would be well-advised to ensure that other measures are in place to maintain a safe workplace. Additionally, from an employee relations perspective, if an employer seeks to mandate COVID-19 vaccination or terminate employees for refusing to receive the COVID-19 vaccine, there might be negative implications for employee morale and retention. Moreover, employers might not want to take the risk of losing valuable employees who refuse to receive the COVID-19 vaccine if such employees can telework or their job duties can otherwise be modified.

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ARE THERE PRIVACY AND CONFIDENTIALITY CONCERNS?

The EEOC has taken the position that, under the ADA, an employer may generally require that an employee show proof of receipt of the COVID-19 vaccine because such a request is not a disability-related inquiry. However, employers would be well-advised to avoid asking for any additional information beyond the proof itself. For example, it would be prudent for employers to avoid asking questions regarding why an individual did or did not receive the vaccine and to advise employees not to provide any medical information when submitting proof of the vaccination. Any such follow-up questions could potentially implicate the ADA and would therefore need to be job-related and consistent with business necessity. To comply with the ADA, employers also would be well-advised to store any employee medical information obtained in the course of a vaccination program separately from the employee's personnel file (e.g., in the employee's medical file) and to keep such information confidential. Lastly, employers may also want to take note that, under the Health Insurance Portability and Accountability Act (HIPAA), there are restrictions on an employer's ability to confirm an employee's vaccination records through a health plan.

ARE THERE ANY OPERATIONAL OR WORKPLACE SAFETY CONSIDERATIONS?

Employers may wish to consider whether the availability of a COVID-19 vaccine will impact their plans to return to the physical workplace, or whether it would be appropriate, in accordance with applicable federal, state and local law, to change their policies regarding face coverings, social distancing, in-person meetings, etc. In doing so, employers should remain mindful of their obligations to provide a safe workplace under the Massachusetts Department of Public Health's Mandatory Safety Standards for Workplaces and sector-specific safety protocols. Additionally, for employers that do not mandate or encourage COVID-19 vaccination in their workplaces, employees may invoke the general duty clause under section 5(a)(1) of the Occupational Safety and Health Act to support a claim that the employer failed to provide a safe and healthy work environment. Similarly, if employers mandate COVID-19 vaccination, it is possible that an injury or illness could occur related to the vaccination, and employees may be entitled to seek relief via workers' compensation.

ARE THERE LABOR OR UNION CONSIDERATIONS?

The National Labor Relations Board has held that a vaccination policy is a mandatory subject of bargaining. Therefore, before implementing a vaccination policy, employers with unionized employees must either provide the union with notice and an opportunity to bargain about the policy or establish that the collective bargaining agreement permits the employer to do so unilaterally. Employers with unionized employees also likely will be required to bargain with the union about the impact that such a policy will have on employees' terms and conditions of employment. Moreover, both union and non-union employers should consider the right of employees to engage in concerted activity to advance their interests as employees with respect to the vaccine (e.g., to protest a vaccination policy or lack thereof), as it is unlawful for an employer to interfere with, restrain or coerce employees who engage in such activity for mutual aid or protection. Lastly, as many labor organizations have become increasingly vocal with respect to vaccine policies, employers that fail to communicate effectively could see their non-union employees turn to a labor union to find a voice on the issue.

SHOULD EMPLOYERS REVIEW OR REVISE THEIR LEAVE POLICIES?

Some employees may experience side effects after receiving the COVID-19 vaccine. Therefore, employers may wish to revise their leave and/or short-term disability policies to accommodate employees who must remain out of work while they are experiencing post-vaccination symptoms. Employers also should check any paid leave laws, including under the federal Family and Medical Leave Act or Massachusetts Paid Family and Medical Leave law, as to whether such leave would qualify for paid or unpaid leave.

HOW CAN EMPLOYERS ENCOURAGE COVID-19 VACCINATION IN THE WORKPLACE?

Due to the risks associated with mandating the COVID-19 vaccine, employers may instead wish to consider ways they can encourage employees to receive the vaccine or provide access to the vaccine on a voluntary basis, such as by offering participatory rewards or incentive programs, providing access to or covering the cost of the COVID-19 vaccine (e.g., offering vaccination clinics), or by educating employees on vaccination.

As Massachusetts' COVID-19 vaccine administration efforts continue, employers may wish to prepare for the impact the COVID-19 vaccine will have in their workplaces. In doing so, employers should remain mindful of the various legal and practical implications associated with mandating or encouraging their employees to receive the COVID-19 vaccine. Employers may wish to consult with competent legal counsel about these issues. We note that we are not providing any medical advice or suggestions on these issues, but are raising these issues for discussion only as they relate to employment law. ■






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EMPLOYER COVID-19 VACCINE MANDATES

BY MICHELLE DE OLIVEIRA AND VALERIE C. SAMUELS

INTRODUCTION

The COVID-19 pandemic has raised novel questions for employers. Now, as COVID-19 vaccines become more widely available to the general public, employers must grapple with new questions. Here, we explore whether employers can mandate that employees get COVID-19 vaccines and, if employers do so, how to address the legal issues that arise from a vaccine mandate.

EEOC GUIDANCE

On Dec. 16, 2020, the Equal Employment Opportunity Commission (EEOC) updated its COVID-19 Technical Assistance Questions and Answers ("EEOC Guidance") and included guidance and information relating to COVID-19 vaccinations.

Key takeaways from the EEOC Guidance include:

- **Employers may mandate that their employees get vaccinated under federal law.** The EEOC Guidance provides that employers can require that employees get vaccinated before being permitted in the workplace; however, the reality is much less straightforward, as discussed below.
- **Administration of an FDA-approved vaccine is not a medical examination.** The EEOC defines a medical examination as "a procedure or test usually given by a health care professional or in a medical setting that seeks information about an individual's physical or mental impairments or health." Although administering the vaccine itself is not a medical examination, pre-screening questions prior to the vaccine may implicate the Americans with Disabilities Act's (ADA's) prohibition on disability-related inquiries.

  If the employer is involved in the administration of the vaccine, it must show that any pre-screening questions are "job-related and consistent with business necessity." To comply with this standard, the employer must have a reasonable belief, based on objective evidence, that an employee who does not answer the pre-screening questions and is not vaccinated will pose a "direct threat" to the health or safety of himself or others. A direct threat is "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."
- **Asking employees for proof of vaccination is not a disability-related inquiry.** But, if the employer asks follow-up questions, such as why the employee was not vaccinated, it may be a disability-related inquiry, as the question may elicit information about a disability. Any such questions must be "job-related and consistent with business necessity." Employers should also instruct employees not to provide any medical information contained in proof of vaccination documentation.

REASONABLE ACCOMMODATIONS FOR A DISABILITY AND/OR SINCERELY HELD RELIGIOUS BELIEF

Despite the EEOC having cleared the way for employers to implement a mandatory COVID-19 vaccine policy in the workplace, at least two critical issues are on the horizon for employers to wrestle with. First: will there be permissible (or, better yet, required) exceptions to a policy that requires all employees to get vaccinated? Second: when an employer receives a request for an accommodation — or an exception to the policy — because the employee is unable to be vaccinated, how are employers to maneuver the applicable legal landscape to avoid a litigation landmine?

Each issue is explored further below.

Reasonable Accommodations: Exceptions to a COVID-19 Vaccine Mandate

The EEOC Guidance, allowing employers to require employees to be vaccinated, cannot be read in a vacuum. Indeed, employers must continue adhering to federal and state laws relating to reasonable accommodations in the workplace. An employee may have a legitimate reason to be exempt from a mandatory workplace vaccine policy.

For this reason, the short answer to the question of whether there will be permissible (or required) exceptions to a mandatory vaccine policy is: it depends. Ultimately, it will depend on whether the employee is exempt from the mandatory COVID-19 vaccine policy because of either a disability or a sincerely held religious belief (i.e., a reasonable accommodation), and whether the reasonable accommodation creates an undue hardship for the employer.

Responding to Reasonable Accommodation Requests

An employer who receives a request for a reasonable accommodation must engage in an interactive process to identify accommodations that do not create an undue hardship for the employer. This process involves assessing, among other things, the nature of the employee's position within the workplace. Employers may request documentation from the employee in support of the accommodation request. The EEOC has indicated that the number of employees who received the vaccine, and their degree of contact with others whose vaccination status is unknown, may impact the undue hardship analysis.

According to the EEOC, employers can rely on recommendations from the Centers for Disease Control and Prevention (CDC)

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when deciding the availability of effective accommodations that would not pose an undue hardship.

Moreover, the ADA permits employers to have a qualification standard that includes "a requirement that an individual shall not pose a direct threat to the health or safety of individuals in the workplace." If a safety-based qualification standard (e.g., vaccination requirement) screens out a disabled employee, the employer has the burden to demonstrate that an employee who did not receive the vaccine will pose 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 a fact-specific assessment of four factors: (1) the duration of the risk; (2) the nature and severity of the potential harm; (3) the likelihood that the potential harm will occur; and (4) the imminence of the potential harm.

Before an employer concludes that an individual would pose a direct threat, it must determine if an unvaccinated employee will expose others to COVID-19 at work. If the employer determines that an individual who cannot be vaccinated poses a direct threat at the worksite, the employer cannot exclude the employee from the workplace, or take any other action, *unless* there is no way to provide a reasonable accommodation (absent undue hardship) to eliminate or reduce the risk posed by an unvaccinated employee. For example, the employee may be able to telework or be on leave.

Similarly, if an employee claims that a sincerely held religious belief, practice or observance prevents the employee from getting a COVID-19 vaccine, "the employer must provide a reasonable accommodation for the religious belief, practice, or observance unless it would pose an undue hardship under Title VII…."

Employers bear the burden to demonstrate that the requested accommodation creates an undue hardship, (e.g., "more than a *de minimis* cost or burden on the employer."). Employers must also "ordinarily assume" that an employee's request for religious accommodation is based on a sincerely held religious belief. If there is an objective basis to question the religious nature or sincerity of a religious belief, practice or observance, the employer may request additional information.

Employers may exclude employees from the workplace if there is no reasonable accommodation available — but cannot automatically terminate the employee. Rather, employers must review applicable EEO laws or other authorities for guidance.

Pregnant or breastfeeding employees may also pose challenges for employers who wish to mandate COVID-19 vaccines in the workplace. According to the CDC, there is limited data regarding the safety of COVID-19 vaccines for pregnant women at this time. Employers likely will receive accommodation requests from workers in these categories. If these employees have been successfully working remotely during the pandemic, continued remote work is likely to be a reasonable accommodation.

BARGAINING OBLIGATIONS FOR MANDATORY COVID-19 VACCINATION

Mandatory vaccination policies are a required bargaining subject; therefore, an employer must bargain with its employees' collective bargaining representative over the implementation of such a policy unless an exemption excuses the employer from its bargaining obligation.

At the start of the pandemic, the National Labor Relations Board's (NLRB's) then-general counsel, Peter Robb, released GC Memorandum 20-04 on March 27, 2020 (the "GC Memo"), which summarizes the leading NLRB cases addressing the duty to bargain in emergency situations like the coronavirus pandemic. In large part, the cases in the GC Memo highlight that an employer may be excused from taking unilateral action without first bargaining with its employees' collective bargaining representative where "economic exigencies" "compel" the employer to take swift and immediate unilateral action.

Now that employers find themselves beyond the initial shock of the pandemic, and are well-settled into their pandemic operations, they should not rely on the defense of "economic exigencies" described in the GC Memo to implement a mandatory vaccine policy unilaterally. Rather, once an employer decides that it wants to require its unionized workforce to take the vaccine as a condition of employment, it should follow traditional bargaining principles, and first determine whether it is exempt from its bargaining obligation over the implementation and/or effects of a mandatory vaccine policy because the plain language of the parties' collective bargaining agreement grants it the right to act unilaterally under the NLRB's new "contract coverage" waiver doctrine.

As an initial step, it may be best to start one's review by reading the management rights clause, and/or health and safety clauses in the agreement. If the plain contractual language shows the employer's mandatory vaccine policy falls within the scope of management's right to act unilaterally, and the employees' representative waived its right to bargain over the issue under the recently established "contract coverage" test, an employer should work with counsel to draft a policy that is reasonable in both purpose and application so that the policy may withstand any challenge from the representative on the basis that the policy is an unreasonable exercise of the employer's contractual rights.

Once the policy is drafted, an employer should provide the employees' representative with notice of its intent to implement the policy and, if required to do so, prepare to bargain with the representative over any effects that may arise as a result of the implementation of the policy, including issues regarding how employees will receive the vaccine, who may bear the cost of the vaccine, how much time an employee has to obtain the vaccine, and whether/what discipline will be imposed on an employee for failure to comply.

If the employees' representative has not waived its rights to bargain over the effects of the mandatory vaccine policy, an employer will need to carve out sufficient time to bargain with the representative prior to actual implementation, as discussed below. Also, given the novelty of the "contract coverage" waiver doctrine, and that it will likely revert to the prior pro-union "clear and unmistakable" waiver test with the new administration's NLRB appointments later in 2021, an employer may wish to err on the side of bargaining, even where it may believe there was a contract waiver, to avoid protracted litigation.

An employer that does not have the authority to unilaterally impose a mandatory vaccine policy as a matter of contractual right, and nonetheless seeks to move forward with a mandatory vaccination policy, should notify its employees' collective bargaining representative of its desire to implement such a policy and provide the representative with an opportunity to bargain over the policy and its effects on mandatory subjects of bargaining (e.g., wages and other terms and conditions of employment). Following the union's demand to bargain, prior to implementation,

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CONSIDERATION UNDER MASSACHUSETTS' NONCOMPETITION AGREEMENT ACT

BY RUSSELL BECK AND HANNAH T. JOSEPH

It has been over two years since the Massachusetts Noncompetition Agreement Act (MNAA) took effect, and we still have little clarity about some key elements of the statute. In particular, both the Legislature and courts have been largely silent on what consideration is required to support a noncompete under the MNAA. But, a close reading of the statute, an understanding of its legislative history, and dicta from one federal case holding may provide some much-needed guidance on the topic.

We begin with the statute. With respect to noncompetes that are entered into at the outset of employment, a noncompete must (among other things) "be supported by a garden leave clause *or* other mutually-agreed upon consideration between the employer and employee, provided that such consideration is specified in the noncompetition agreement." G.L. c. 149, § 24L(b)(vii) (emphasis added). Noncompetes entered into after the commencement of employment (sometimes pejoratively called "afterthought agreements") must be supported by consideration that is *also* "fair and reasonable." But what is "mutually-agreed upon consideration" if not garden leave? And what constitutes "fair and reasonable" consideration, and does it require something more than "mutually-agreed upon consideration"? The law is silent on these issues.

At first glance, the issue of consideration required for new employees appears to be guided by the provision's reference to garden leave, which the statute defines as "at least 50 percent of the employee's highest annualized base salary paid by the employer within the two years preceding the employee's termination . . . ." G.L. c. 149, § 24L(b)(vii). Further complicating the issue is the fact that the MNAA expressly excludes garden leave clauses from its definition of "noncompetition agreement" and, thereby, the statute's purview altogether. G.L. c. 149, § 24L(a). Reading these provisions together, some practitioners have criticized the statute as embracing circular logic. Think of a scenario in which an employer and employee enter into an agreement with a garden leave clause. If the agreement is, as the definitions section suggests, wholly exempt from the MNAA's purview, it would not need to comport with the other requirements and limitations set forth in the statute (including, for example, the MNAA's notice requirements and one-year cap on noncompetes). If the agreement is not exempt from the MNAA's purview, as some would argue, it must nevertheless satisfy the MNAA's other requirements, which renders the definitional language expressly excluding garden leave agreements from the statute's purview entirely meaningless.

Nevertheless, some practitioners variously have pointed to subsection (b)(vii) as either requiring garden leave or raising the floor concerning what types of consideration will be deemed sufficient to support a noncompete for new hires. After all, why include a reference to garden leave in the context of consideration if it has no bearing on the kind of consideration that will be deemed acceptable?

Well, one answer may be simply that the MNAA is a product of political compromise. Indeed, during the legislative process, which spanned nearly a decade, the House pushed a bill (H.4434) that provided the following language:

> The noncompetition agreement shall be supported by a garden leave clause or other mutually-agreed upon consideration between the employer and the employee, provided that such consideration is specified in the noncompetition agreement.

Meanwhile, the competing Senate bill (S.2418) provided:

> The noncompetition agreement shall be supported by a garden leave clause or other mutually-agreed upon consideration between the employer and the employee *which shall be equal to or greater than the value of the garden leave clause* and is negotiated during the 30-day period immediately following the termination of employment.

(Emphasis added.) It took until mid-2018 for the Legislature to reach an agreement on this issue. Specifically, lawmakers agreed on the language from the House bill (which was, itself, a compromise), expressing no parameters for "other mutually-agreed upon consideration" other than that it be specified in the noncompete.

Accordingly, the MNAA, both on its face and when read in the context of its legislative history, appears not to require garden leave (or anything like it) to support a noncompete for a new hire.

So, what is required?

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HANNAH T. JOSEPH is senior counsel at Beck Reed Riden LLP, where she litigates and counsels clients in the growing areas of trade secrets and restrictive covenants law, employee mobility and unfair competition. Joseph regularly publishes and speaks on the topics of trade secrets and restrictive covenants law, including through the American Intellectual Property Law Association, Boston Bar Association and Practising Law Institute.

To quote the Talking Heads, it may be the "same as it ever was."

In *Nuvasive, Inc. v. Day*, the U.S. District Court for the District of Massachusetts concluded that the following statement of consideration would be sufficient under the MNAA:

> In consideration of my engagement by the Company, the compensation I . . . receive from the Company (including for example monetary compensation, Company goodwill, confidential information, restricted stock units and/or specialized training) . . . .

2019 WL2287709, at *4 (D. Mass. May 29, 2019) (Casper, J.). Thus, a new job and associated compensation and rights may be — as they have always been — sufficient consideration under the MNAA.

But what is required for continuing employees? What will the courts consider to be "fair and reasonable" consideration? Although there is zero guidance on the issue, we can assume based on statutory interpretation and policy considerations (concerning, in particular, the relative imbalance of bargaining power between an employer and an existing employee) that the MNAA requires more than continued employment and will likely involve a fact-intense analysis on a case-by-case basis.

Stay tuned for developing case law. ■

MASSACHUSETTS APPEALS COURT ADDRESSES EMPLOYEE VS. EMPLOYEE DEFAMATION CLAIMS

BY CATHERINE SCOTT

In *Lawless v. Estrella*, 99 Mass. App. Ct. 16 (2020), the Massachusetts Appeals Court affirmed summary judgment in favor of a subordinate employee, Cheryl Estrella, in a defamation claim brought by her former supervisor, Diane Lawless. The plaintiff/supervisor had sued the defendant/employee claiming the defendant had made defamatory statements against her in the course of an internal investigation regarding the plaintiff's employment. The Appeals Court affirmed summary judgment in favor of the defendant/employee on the grounds that her statements were non-actionable opinions of fact and were privileged because such statements were made in the context of an internal employment-related investigation.

FACTUAL BACKGROUND

The parties worked together as supervisor and subordinate between 2013 and 2014 in the treasurer's office of the town of Freetown, Massachusetts (the "employer"). The defendant later transferred to a different department working for the town. In 2015, after the parties had stopped working together, the plaintiff/supervisor was involved in an altercation with another employee (the defendant's replacement), and the employee complained about the plaintiff's treatment of her.

The employer began an investigation into the plaintiff/supervisor's behavior and requested that all current employees provide written statements regarding their experiences working with the plaintiff. In response to this request, the defendant drafted a six-page email and shared observations about working with the plaintiff, including that the plaintiff spent significant time "socializing" on her phone and frequently disparaged the town and the employer. The defendant stated that she believed the plaintiff created "an uncomfortable, abusive, and hostile work environment." The defendant described the plaintiff as "belligerent, threatening, overbearing and [engaging in] psychological harassment." The plaintiff/supervisor disagreed with the defendant's characterizations.

The employer ultimately terminated the plaintiff's employment after a three-day hearing and found that the plaintiff had engaged in misconduct, including, but not limited to, being impolite to employees and vendors, misleading the employer, downloading employee and taxpayer information after being placed on administrative leave pending the investigation, and failing to provide pension information to the employer's insurance agency.

LEGAL ANALYSIS

The plaintiff/supervisor brought an action with one count of libel per se against the defendant/employee for her email and involvement in the investigation into the plaintiff's employment. The Superior Court granted summary judgment in favor of the defendant.

The Appeals Court agreed with the Superior Court's analysis and first found that the statements in the defendant's email were "statements of opinion" and, therefore, non-defamatory under Massachusetts law.[1] The Appeals Court affirmed that whether a statement is one of fact or one of opinion for purposes of a defamation claim can be a question of law where the statement's intent is unambiguous.

The Appeals Court also found that even if the defendant's statements had been defamatory, they were conditionally privileged because they were made in the context of an internal investigation related to the plaintiff's employment. The Appeals Court highlighted in particular the importance of ensuring that employees be able to make honest and open disclosures in the context of a workplace investigation without fear of being held liable for a claim of defamation. Finding that the defendant had only published the statements in the context of the investigation, and nowhere else, the Appeals Court upheld the defendant's privilege to make such statements to the employer.

Notably, the Appeals Court stated that the content of the statements was essentially irrelevant to determine whether the statements were privileged in this context. The Appeals Court further found that there could be no question of fact as to whether the defendant made these statements maliciously. The fact that these statements were made in response to an employer's inquiry regarding the plaintiff's employment negated any finding of malice where it was the plaintiff's burden to demonstrate that the defendant published the statements solely out of ill will or spite. ■

1. The Appeals Court even found that the defendant's statement that she believed the plaintiff's behavior to indicate a "severe bipolar disorder or some other form of mental handicap" was placed sufficiently within speculative context to make it a statement of opinion.

COVID-19 VACCINE MANDATES

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the employer must bargain with the union in good faith until resolution or impasse.

Mandatory vaccination policies in the workplace remain a controversial topic given society's differing views on their efficacy. Coupled with the general reluctance some employees may have given the novelty of the coronavirus vaccine and limited data on its side effects, an employer should anticipate a contentious negotiation with its employees' representative over this issue, and keep this in mind as it creates a timeline around when it wants to implement the policy.

As an alternative, an employer should consider whether, based on its unique operations, it is appropriate to implement a voluntary vaccination policy that incentivizes, rather than requires, an employee get the vaccine.

CONCLUSION

The COVID-19 pandemic has created a litany of workplace issues. As the vaccine becomes widely available, it will inevitably generate additional questions for employers and their counsel. The impact of COVID-19 in the workplace and the legal landscape have continued to change. There is no magic formula for maneuvering the implications of mandatory COVID-19 vaccine workplace policies, and the expectation is that such policies will generate additional questions for employers nationwide. ■

The authors wish to thank Lauren Schaefer, Esq. and Genaira Tyce, Esq., both associates at Arent Fox LLP, for their valuable contributions to this article.

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PAID FAMILY MEDICAL LEAVE (PFML) AND THE DUTY TO BARGAIN

BY SUMMAR C. SPARKS

Beginning Jan. 1, 2021, eligible workers gained access to some of the benefits available to them under the Massachusetts Paid Family and Medical Leave (PFML) law. As workers begin to use this new statutory benefit, both private employers and workers are bound to have questions regarding the administration of this program. In unionized workplaces, employers and workers have an additional resource for resolving issues arising from the implementation of PFML: the union.

Bargaining with the union over these issues is both a resource and an obligation. Employers have a duty to bargain collectively over wages, hours, and terms and conditions of employment. In the context of PFML, this means that employers have a duty to bargain over PFML's impact on existing benefits as well as program administration. Absent language in a collective bargaining agreement recognizing an employer's right to act, an employer may not make unilateral changes to workers' existing benefits without first providing the union with reasonable notice and an opportunity to bargain. Further, an employer may not unilaterally impose aspects of the program that the law merely allows but does not require; for instance, an employer may not unilaterally impose the fitness for duty examinations permitted under PFML. This means that employers must negotiate with the union regarding some of the issues arising from the implementation of PFML. While the employer has a duty to bargain with the union over some of these issues, collective bargaining provides a valuable opportunity to collaboratively evaluate how to best administer this new benefit in the context of a specific workplace.

AN OVERVIEW OF THE BENEFIT

The PFML provides eligible workers with the following types of paid leave: (1) 12 weeks of family leave to either care for a family member with a serious health condition or bond with a child following the child's birth, adoption or foster care placement; (2) 20 weeks of medical leave to address the employee's own serious health condition; (3) 26 weeks of family leave to care for a family member who is a covered servicemember; and (4) 12 weeks of family leave when a family member is on active military duty or notified of an impending call to duty. The total amount of leave is capped at 26 weeks per benefit year, which is the 52 consecutive week period beginning the Sunday before the first day PFML is used by the employee. Leave entitlements are prorated for part-time employees, and leave may also be taken intermittently.

A worker's weekly benefit amount depends on the worker's average weekly earnings, but is currently capped at $850 per week. More specifically, the portion of a worker's average weekly wage that is equal to or less than 50% of the state's average weekly wage is replaced at 80%, and the portion of a worker's average weekly wage that is more than 50% of the state's average weekly wage is replaced at 50%.

SOME EXAMPLES OF ISSUES TO ADDRESS DURING BARGAINING

As the name implies, PFML involves two benefits: pay and leave. Under PFML, a worker cannot aggregate compensation payments from most sources. In other words, a worker's weekly PFML payment will be reduced by wages, wage replacements, workers' compensation, unemployment benefits or other such compensation. Because the law mandates that PFML payments be offset by existing wage replacements, it is unlikely that employers and unions will have much room for bargaining over this aspect of the new program. However, the manner in which PFML leave intersects with existing leave benefits as well as many aspects of PFML program administration is likely to raise issues involving mandatory subjects of bargaining.

While the PFML law generally permits this leave to be taken simultaneously with leave available under other programs, such as the Family and Medical Leave Act (FMLA), Massachusetts Parental Leave Act, and the Massachusetts Earned Sick Time Law, the administration of the PFML and those other programs must typically be aligned for this to occur. For example, the PFML statute does not permit employers to require workers to exhaust discretionary leave, such as sick, vacation or personal time, before accessing this new benefit, which means that an employer who requires discretionary leave to be exhausted before a worker accesses FMLA could not attribute an employee's leave to both PFML and FMLA without altering the administration of FMLA. Such an alteration to an existing benefit program would be a mandatory subject of bargaining and would require the employer to bargain with the union.

Similarly, FMLA provides three options for calculating a benefit year, yet PFML only provides one definition of a benefit year. Depending on the definition of a benefit year an employer adopted for FMLA, it is possible for workers to have exhausted FMLA leave without yet using any PFML. This means that some employers will be incentivized to alter their FMLA benefit year calculation, and unions will want to carefully evaluate how different benefit year definitions impact the availability of benefits in various situations. Again, such a change to an existing benefit program would be a mandatory subject of bargaining.

In addition to bargaining over changes to existing benefits prompted by the implementation of PFML, employers and unions will want to address how this new program will be administered. For instance, if a worker uses PFML to address the worker's own serious health condition, the employer can require the worker to prove that they are fit to return to work. If a fitness for duty evaluation process has not already been bargained between the parties for employees returning from medical leaves, the union and employer must engage in that bargaining before such a process is implemented; fitness for duty evaluations are a mandatory subject of bargaining.

PFML is likely to prompt employers to pursue changes to the status quo involving mandatory subjects of bargaining. More specifically, in the case of the PFML, unions and employers should bargain over how this new benefit impacts workers' access to existing employer-provided benefits as well as the administration of the program. Since the PFML program is new, unions and employers should keep the lines of communication open to ensure that the benefit serves the needs of employees and employers alike. ■

SUMMAR C. SPARKS, an associate at McDonald Lamond Canzoneri, focuses her practice on the representation of labor unions in all aspects of union functions. She is a recent graduate of Boston University Law School, where she served as a note editor for the *Public Interest Law Journal*.

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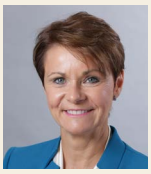

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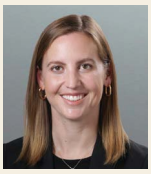

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