

Hospice Insights: The Law and Beyond



Episode 28: COVID-19 Hospice How-To Series: The Latest on Testing and Vaccinating Employees

January 13, 2021

Speaker

Statement

Meg Pekarske

Hello, welcome to “Hospice Insights: The Law and Beyond,” where we connect you to what matters in the ever-changing world of hospice and palliative care. COVID-19 Hospice How-To Series, a special labor and employment edition, The Latest on Testing and Vaccinating Employees.

In this episode, I’m joined by colleagues Jenna Brofsky, Erica Ash and Wakaba Tessier, who will provide an update on the legal landscape related to COVID-19 testing and vaccinations. Our conversation explores the liability protections provided by the PREP Act and the legal considerations hospices need to account for when establishing a vaccination program. We break down the latest EEOC vaccination guidance, what it means for hospices and as employers.

Now for practical insights for navigating the challenges presented by mandating or otherwise encouraging employee vaccinations. Well, nothing is easy these days. I’m hopeful this discussion will leave you with some clarity that can ease the burden as you juggle the challenges of the day.

So awesome, thank you Jenna, Wakaba and Erica for joining me today for this really exciting conversation that is fast, lean and I know, Jenna, the last time you presented, it was like in the middle of that – the EEOC came out with their guidance, so you had a little bit more prep time and hopefully nothing new will happen in the moments of our recording. So thanks all for joining me. I wanted to start with you, Jenna, because I think what is on everyone’s mind these days is vaccines and I think as hospices, as employers, they may or may not have the vaccine yet depending on priority and whatnot, so some people may be into this already and administering the vaccine. Some may be preparing, but I think that the whole idea of can I mandate my employees, which was somewhat of an open question and then the EEOC came out with some guidance that provided some helpful



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clarity. So can you start us off and talk about this new guidance?

Jenna Brofsky

Yes, thank you so much, Meg, for having on here today. On December 16, that was when I was giving my last presentation on this topic, the EEOC updated one of their technical systems resources, so this is just some guidance they have on their website that they've been updating throughout the pandemic. But this is the first time that we've seen (*inaudible – 2:41*) directly on a vaccine since we now have multiple vaccines that are authorized by the FDA and I'm sure Erica and Wakaba will talk a little bit about authorization versus approval. But the EEOC guidance of note focuses on how the vaccine interacts with three employment discrimination laws, the ADA, Title VII of the Civil Rights Act, and the Genetic Information Nondiscrimination Act (GINA). And we'll go through those each in turn because there are a lot of acronyms in the employment world as there is in the hospice world.

So the ADA, the Anti-Discrimination Act, and GINA, both limit the questions that you can ask employees related to their health and medical information. And so employers wanted to know what can we ask employees, we're on the verge of vaccines, is this going to be considered a medical examination, and so this is what I can tell you from the EEOC guidance.

What's *not* a medical examination. Giving the vaccine to your employees is not a medical examination. And requiring proof that employees got the vaccine is not a medical examination. And why does that matter? Because the ADA sets forth a standard. If you're going to conduct a medical examination, it has to be job-related and consistent with business need. So again, this is kind of – the EEOC has really helped employers by saying, okay, getting the vaccine and requiring proof, that's *not* a medical exam. At the same time, there are a few spaces where we could get into the medical examination world, and those are the questions around screening for a vaccine. What are we asking about? Are we asking about genetic information? Well that might get into GINA protections. So that's the first area that the new guidance touched on.

Meg Pekarske

So I guess in terms of, you know, I think as employers – and Erica's going to talk a bit about the PREP Act and what liability protections you have, but I think everyone really wants to encourage – and I guess what I've been seeing is – and some of this was out before the EEOC guidance – is folks weren't mandating, but they were essentially strongly encouraging. And so I want to touch on what it means and what are some tips and thoughts you have on how you can strongly encourage. But let's start with mandating. What did the EEOC say about mandating vaccinations?

Jenna Brofsky

Yes. So the EEOC guidance presumes that you can mandate a vaccine if



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you provide exceptions, and the exceptions are not new exceptions, they're the same exceptions we've seen in employment law for a while, but the guidance, the way that it's framed in a Q&A format, presumes that employers are going to provide – are going to mandate the vaccine. And if they do do so, they have to know what are the exceptions and those exceptions are, most notably, for disabilities and for religious beliefs. Those are the two kind of big categories that are protected by law. Religious discrimination is prohibited by Title VII of the Civil Rights Act and employers are required to provide what is known as a reasonable accommodation to employees who are objecting based on religious beliefs. That requirement is only to the extent that providing a reasonable accommodation doesn't cause an undue hardship on the employer. An undue hardship is a significant difficulty or expense, so we can talk about what that means, but just kind of stepping back, employers should be aware that to the extent that they are deciding to mandate, they will have to grapple with I have employees who are claiming that they can't get this because of a disability or a religious belief, and is providing them an accommodation an undue hardship on the business.

Meg Pekarske

So I guess practically speaking, are you seeing the employers you're working with stating I'm mandating this, or do you see people in the strongly encourage camp?

Jenna Brofsky

Yes, quite honestly we're seeing strongly encouraging. We're not seeing too many folks mandating the vaccine and I think part of that is where we're at in terms of distribution and administration, access to the vaccine. I think there's a question of this vaccine right now is approved for emergency use, it's not authorized, are there other things that we're not thinking of that could relate to that? There are questions, too, about how does this affect your employee population? Are they excited about getting the vaccine, are they hesitant? There's a lot of – you know your employees best and you know kind of how they're going to react. Some of this is geographic too, but I'm in the Kansas City area and we – we're not seeing the healthcare entities that I work with really mandating the vaccine at this time.

Meg Pekarske

Okay. And I think that this is just such a difficult area because, you know, for our hospice clients, many of them up to almost half of the population they serve is in facilities and access has really dropped, given the high risks of this population. And so I think vaccines will be incredibly important to help us be able to serve that patient population. And so it will be interesting to hear stories from clients as they start grappling with these issues of, you know, are our employees really not going to want to be getting the vaccine or not and how do you deal with that from a business perspective? Because, you know, we talked about this a bit when we were



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prepping for this, but in various parts of the country, and this is an area that I think varies quite a bit is, you know, there were local laws that essentially limited hospices from going into facilities or said you can't send a nurse that's been to any other facility and a lot of restrictions. And so as hospices really want to be able to care for the dying, they really need to find ways to safely get in and so a vaccine is incredibly important for that. But I know the long-term care industry is also struggling with some of these issues as well with employees, even if it is available, not wanting to take it. Those are hard issues.

Jenna Brofsky

Yeah, Meg, I want to talk about incentivizing, but I do want to note that the good news for employers who do decide that they want to mandate this is that the employment laws haven't changed, so generally, employers have to accommodate employees for disabilities and they probably have systems in place already to do that. They've had that interactive dialog that's required under the ADA. They know kind of where reasonable accommodations – we've seen employees in the healthcare industry who don't want to get the flu shot. And we have, again, systems in place. We have potential accommodations in the forms of PPE. So this isn't something that employers are thinking about for the first time, at least from an employment perspective.

Meg Pekarske

Absolutely. So let's talk about, if most folks are in the camp of strongly encouraging, what are the limits of that? Because strongly encourage might just be a softer, nicer way, but maybe ends with the same result. But what kind of incentives are you seeing and talk through sort of a risk management perspective for clients?

Jenna Brofsky

Yeah, absolutely. So I think the first thing to make sure of is that what you're doing is actually incentivizing versus making this a requirement or a condition of employment when you're deciding if you're going to go about requiring folks to use the vaccine or to get the vaccine. If you require employees to have the vaccine, then you can't exclude them from the workplace or you can't make it impossible for them to do their jobs, so that's a practical limitation to incentivizing.

We also – we talk about OSHA and OSHA's duty for each employer to create a safe and healthful work space, free from recognized hazards that are likely to cause death or serious injury. And OSHA's obviously been in place before COVID-19 and we think about are employers creating a safe place for their employees with the spread of COVID-19? So those are some of the things that I'm thinking of as an employer lawyer as we move toward incentivizing, but there are so many really incredible ways and interesting ways to incentivize big and small. But for employers that already have wellness programs in place, that's something that's worth taking a look at. The EEOC actually just proposed within the last weeks



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new guidance that will have to go through notice and comment and it doesn't mention vaccines expressly, but it does talk about wellness programs as a really good vehicle when they're reasonably designed to promote health or prevent disease. And I know that a lot of employers have wellness programs where you, as an employee, can get points if you get the flu vaccine, so something similar to that. That type of framework is perhaps an easy way to encourage people to get the vaccine.

One thing that I like to tout is the standards that the CDC has on its website. You can print out and have folks wear on their shirt to proudly say, I got my vaccine, or go vaccine! It's really – a lot of this is an education campaign. How do we get folks to feel excited about getting the vaccine? Incentives that we've seen – also, you know, social scientists have been weighing in on this too. You've probably read about it in the newspaper. I read one study that stated that if you give people a time to go get their vaccine, you just assign them a time to get their vaccine, they're likely to just go and to do it without putting out much of an effort. So if you make it really easy for them to do it, I think employees are more inclined to do it. For the hospice industry, advocating on behalf of your employees at the facilities where care is being provided could be an interesting way to do it. You know, working with the nursing home that they're already getting vaccines there, making sure that your employees have access to that, that the timing is really helpful, paying for the time spent to get the vaccine, anything that makes this, again, really easy for your workforce will go a long way.

Meg Pekarske

And I think, too, and this was – I think this has been true throughout the pandemic – is like who's communicating this information? Because I think that folks have some concerns as I think employees did when this first came out about, you know, this was when everyone was starting to learn about the scope and severity of the virus was, you know, being – and obviously hospices have medical directors and so that the physicians within the hospice were talking about, you know, PPE and sort of a what's true and what's not true kind of thing. And so I also think what you said is really important, about this is an education campaign and so learning from some of the experiences that worked earlier on in the pandemic of, you know, based on the climate of your workforce, is it helpful to have your physician staff or other people be available to answer questions or, I don't know, but I just know that a lot of hospices found that to be useful, especially, again, an example in the nursing home relationship when facilities were very nervous about letting us in and we would explain all the different precautions we were taking and how we were staffing and who is it helpful to hear that from, that people feel a level of trust? And I think all of us can – can't even count how many pictures we've seen on LinkedIn and the media about CEOs and others taking the vaccine and all



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of that stuff. But before we move into liability protections and issues about administration and consent, other thoughts on incentivizing, Jenna?

Jenna Brofsky

Yeah, I think – well, let's go back to communication, regularly communicating with your employees is also really important just throughout the pandemic. Some of the state websites, Missouri, for example, have really great myth buster sections about, you know, this vaccine is not a hoax. This is what's going to happen. So I direct employees to those kind of third-party sites too that they might have a little bit more faith in. And then just to think about, as a business, right, what advantage can we provide over other businesses at this time? You can have a safe workforce, right? Your workforce is going to go in and you're going to keep your patients safe if your employees have the vaccine. I mean, we've seen this in the context of ride share entities – which of those is going to require their workforce to have the vaccine because more people are probably going to get into cars where drivers are vaccinated than where they're not. Same for – we've seen it with service providers who come to your home. Do people want service providers coming into their home if they haven't been vaccinated? And I think it's especially important in hospice where our clients and our patients are high-risk folks. So we need to be able to ensure that we're not the ones that are putting their lives in harm.

Meg Pekarske

I think that's an incredibly important point and I think throughout this time, I've heard a lot of fear and anxiety with families about us coming into their homes, because the vast majority of care is provided in someone's personal residence and so I think that family members, being very concerned about letting the nurse in or the social worker in and the chaplain, and so I think that this is hopefully another way that we can ease that burden of families and fear and concern. I think that is really helpful and interesting to hear what you're seeing in the field, beyond just healthcare, about how employers are approaching this.

But I wanted to move to Erica. You and Wakaba and Jenna feel free to pipe in here, but talking about consent. And since we're on the line of vaccines here, let's stay on consent with vaccines. I understand there's some type of consent that comes with the vaccine and maybe you can walk us through that and then this concept of having an additional consent, or your own consent, related to this. Can you sort of break that down for us, Wakaba, and talk a little bit about the issues of consent and what the issues are from a practical perspective?

Wakaba Tessier

Yeah. First of all, thanks again for having me on your podcast, Meg. I always ...

Meg Pekarske

This is your second one!



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Wakaba Tessier	I know! I'm becoming a regular. I love it.
Meg Pekarske	Exactly.
Wakaba Tessier	<p>So first of all, I think it's important – and this goes to the PREP Act analysis that Erica's going to talk about a little bit more closely, but when you get the vaccine, it comes with a lot of paperwork, right? It's going to be information sheets for healthcare providers, information sheets for patients. There's going to be a lot of documentation that comes with it, and part of that will say in order to provide the vaccine, here are the things that you're going to need to tell your patients. So that's sort of in the paperwork that you're going to get along with the vaccine. That said, we have advised our providers that they need to either incorporate that, you know, this is what you need to give your patients concept, along with the consent that you develop on your own. As healthcare providers, if you're giving the vaccine, there's an independent responsibility to let patients understand the risks and to consent to treatment. And so we've advised them that they should have a separate consent that says yes, I understand that I'm getting this, not approved, but authorized vaccine, from the FDA. I understand the risks, I'm willingly getting the vaccine, I've had an opportunity to ask questions – that sort of typical consent that you see.</p> <p>The other thing, I think something to consider, and we've certainly seen this in the testing sphere, is that you want to be able to – or it may be prudent to get consent related to privacy issues. So if we're talking like say in the testing sphere, we've always included in the consent language related to I consent to allow my employer to see my results. And I think it's similar in this context where you say I authorize the employer to see when I took the vaccine or when my second dose is due. And that really comes from a lot of questions that I have received in the privacy space related to in what capacity am I giving these vaccines. And I don't want to go into a huge privacy discussion on it, but we've had questions related to, again, in a capacity – am I giving these vaccines and where do we store the vaccine records? And if we store them in our EHR system, does it become part of our medical record? And so if you are giving it in the role as a healthcare provider to your employees, it may be that you need to get proper authorization to look at whether or not this particular employee has had the vaccine and when and when is the second dose due? So these are some of the considerations I think that providers should think about as they're thinking about vaccinating their employees.</p>
Meg Pekarske	So I want to make sure I understand because I think it's really important what you said. So if I'm the hospice, I am going to administer, I've got the vaccines, I'm going to administer this to my employees and I'm now – am I wearing the healthcare provider hat from a HIPAA perspective and



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therefore, what?

Wakaba Tessier

You know, I think it depends. So a lot of the questions that we've received have been a sort of facts – and I'm talking like a lawyer because obviously we're a bunch of lawyers. I apologize! But the questions we've received have really been okay, where are you giving the vaccine, right? So in this particular instance, this client was giving the vaccine within their healthcare space, within their pharmacy, so then that record of having given the vaccine to the employee then became a medical record as we would think of as providers. And in those instances, we said okay, HIPAA governs. Then if you wanted to provide those vaccination records to your employer, which really is the same thing, but we should really separate the employee record and the medical record. So I think it sort of depends on how the vaccine is given. How as in not like a shot, but in what context and in what circumstance? And I think with respect to this particular audience, it is certainly conceivable that the hospice provider, as a healthcare provider, is going to give these vaccines to the employees. So really it is something to think about. Is this an employee record or is this a medical record?

Meg Pekarske

And so Jenna, do you have any thoughts on that, in terms of – because I think making sure our hospice listeners here understand the difference when I'm wearing my provider hat versus my employer hat and the particularities around that and the legal distinctions we need to make and what's in the employee file versus what's in – and so, I guess, what's your perspective on that, Jenna?

Jenna Brofsky

Yeah, absolutely. So it's really important when you're acting as the employer to keep separate the medical records that you have from other employee information, like an HR file. And a lot of that is practical, you know, who's looking in the HR file, why do they need to know what's in your medical records? So keep it separate is kind of the general advice I give. And then additionally, there are record-keeping requirements under OSHA, 29 CFR 1910.1020. You can check out – you can't talk with me later if you want the specific citation, but for the first time, a lot of folks are going to be subject to OSHA's recording-keeping rule, record retention rule, which requires keeping medical records for 30 years. And so this is new, again, for those entities, hospice entities in particular who haven't been collecting medical information prior to the pandemic. So something else to keep in mind once you have that information, don't destroy it.

Meg Pekarske

Interesting. That's a whole massive tangent in terms of – I won't go down that rabbit hole, but I think really important considerations because of this line blurring that can happen between I'm a healthcare provider and I am an employer and my employee is now my patient for purposes of this



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administration – I mean, it just gets mucky. And I think it's really important to have clarity, because everyone is wearing multiple hats. Like, you know, your nurse manager is giving these vaccines and anyway, I think blurred lines that I think, you know, HR professionals and others really need to be mindful of. And so I guess before we get into liability protections, are there other thoughts you wanted to share on consent?

Wakaba Tessier

Yeah. I think the important – just the important part about consent, the other question we've gotten is, can we put in a release and waiver? Or like an indemnification. Like we're not responsible for anything that goes on with any adverse reactions to the vaccine. And again, Erica is going to talk a little bit more about the PREP Act, but generally speaking, you can put in whatever you want in a vaccine consent, right? Like you do it, but whether or not it is enforceable is a whole other question. I think when we go back to the basic tenets of a consent and, you know, why do we want to give consent, is you want people to feel comfortable about getting whatever treatment you're going to get, whether it's a vaccine or surgery or anything. We have generally found that these releases and indemnifications are not enforceable and so to encourage people to feel more comfortable about signing the consent, for people to feel more comfortable about asking questions, we have encouraged our providers not to include that language in there. And part of it is that whole overlay with the PREP Act immunity that again, Erica's going to talk about, but if it's unenforceable and it's going to discourage people from getting the vaccine, why include that?

Meg Pekarske

That's a really interesting thought about, yeah, if this is something you want people to do and this is not really, at the end of the day, going to be enforceable, you're probably kicking yourself in the shins by demanding or feeling that that's critical. But now, it's the all buildup to you Erica, about the PREP Act, and everyone wants to know about how I'm going to protect myself from liability. So I wanted to talk about the PREP Act and then I want to talk about, you know, there's case law that's going on here that's like, you know, everything seems to be cutting edge these days and nothing stays the same. So tell us, because I think most of our listeners will not know what the PREP Act is and if it applies to them, so can you just give us a primer on that?

Erica Ash

Definitely. So the PREP Act stands for the Public Readiness and Emergency Preparedness Act. And so this was essentially enacted so that during a public health emergency like what we're in right now, the Secretary of the United States Department of Health and Human Services, or HHS, can essentially say nobody will get in trouble if you are a covered counter person, doing covered countermeasure, and you will not have any liability under federal or state law so long as you weren't participating in



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any willful misconduct, so you're not purposely doing something like, you know, stealing vaccines or something that might be criminal or wouldn't be just over ordinary negligence. And so this immunity, like we said, is extremely broad when you qualify under the PREP Act, so it's all tort immunity under state law. And tort actions are what we think of when people get sued for a civil – a civil for monetary so like that would include wrongful death, negligence, battery in some cases. So like if you don't get a consent, sometimes a patient will sue for battery. And so it's kind of all of those umbrella things. And so as you mentioned, the case law is pretty interesting because we really haven't seen this used on a wide scale before because obviously, this public health emergency is pretty new. So there was a line of cases related to flu vaccines and so that's kind of what everyone has been using so far, because that's really all we have. And there's one case, it's called *Casabianca v. Mount Sinai Medical Center*, and so in that case, there was an older patient and he passed away at Mount Sinai Medical Center because he wasn't given a flu vaccine, or at least that was according to his daughter. And so she sued the medical center for wrongful death and what the court held in that case is that the medical center actually wasn't entitled to PREP Act immunity because they did not give a covered countermeasure, or at least that was the claim. So a really important facet of the PREP Act immunity as Jenna kind of alluded to is that you actually do have to give the covered countermeasure, which in this case would be the vaccine or the test or, you know, you have to be doing something. So if you were negligent because, let's say, you just let everyone come to work and then you have a huge COVID outbreak, that's not necessarily going to be covered because the claim would be that you were negligent in not doing something. That makes sense.

Meg Pekarske

So who's covered under this? Because when I think of countermeasure, I think of like, you know, I don't know, (*inaudible*) or something and so I get distracted by that word. So you talked about being a covered person or something, so who is a covered person?

Erica Ash

So the definitions are a little bit circular in that respect, so it's anyone issuing what they call a covered countermeasure and those are the things that the Secretary of HHS specifically enumerates, so vaccines would be one. So if you're a vaccine provider, as Wakaba mentioned, we've seen a lot of pharmacies wanting to get into – well, a lot of pharmacies do give vaccines, but a lot of pharmacies are wanting to give COVID vaccines, the hospital employers that we've seen giving vaccines, so they, in that case, would be a covered person because they're giving the vaccine which is a covered countermeasure under the PREP Act. Testing is another one, so if you're doing employee testing, you would be covered in that circumstance as well.



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Meg Pekarske	So as it relates to, I guess in this context, because we're talking about hospices as employers here, it would be their activities, their doing related to testing and vaccinating, if they're administering that as an employer, that's where the PREP Act would come into play?
Erica Ash	Exactly. And if they're doing it as a provider, well, I don't know if they need to do that with their patients at all, but also to the extent they would be (<i>inaudible</i> – 33:32) their patients then as well.
Meg Pekarske	Got it. And so to your point, Wakaba, about waivers and indemnifications and all this, I mean, there is PREP Act immunity and many states have also had different and separate immunity provisions that they passed and whatnot is probably better on balance to perhaps rely or think it's going to be helpful, because the PREP Act is going to apply to whatever you're doing and then essentially, you know, trying to put waiver or release language in your consent; to thread that needle that you talked about.
Erica Ash	Right.
Meg Pekarske	Okay.
Erica Ash	I would also add, too, that with respect to the PREP Act, so HHS, they do strongly encourage all covered persons to develop and document the reasonable precautions taken to safely use the covered countermeasures, so to the extent that we're talking about consent, notwithstanding my comment about the waivers and indemnifications and all that stuff, the added consent, right, that you would develop on your own I think would be a good example of additional documentation to safely use those covered countermeasures, because it then demonstrates, right, that you provided your employees an opportunity to ask questions and for them to really understand what they're getting.
Meg Pekarske	Got it. So in terms of, before we leave this topic, I guess, you mentioned case law is not very voluminous on this and are we seeing case law about COVID in particular? Wrongful death suits related to that that we're able to glean anything? I hear everyone doesn't know the behind the scenes of the podcast, but we record them via video and we don't release the video, but everyone's shaking their heads. So Jenna, you're shaking your head. What are you seeing?
Jenna Brofsky	We are seeing claims related to COVID, though not, quite frankly, not as many as we thought we'd see. And it's a little early to see the vaccine claims, but we're seeing claims related to the leave, the federal leave the Congress mandated, that FFCRA. We're seeing claims of retaliation, alleged retaliation, a failure to accommodate, the kind of typical employment claims, but they really aren't at the same level that we



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	expected to see, quite frankly.
Meg Pekarske	Interesting. Erica, Wakaba, you – and obviously none of us do wrongful death claim litigation or anything, but in terms of the research and whatnot, because you guys have been speaking on these topics, I mean, any other interesting case law you see developing with COVID and testing, whether – obviously, the vaccine is super new, but ...
Wakaba Tessier	So I haven't seen additional case law, although Erica has been doing more case law research on this than I am, admittedly. I will say that while we're on the topic PREP Act immunity, certainly with respect to agreements that we've seen, especially with governmental entities and our providers, and obviously we serve a whole range of providers, we have seen language going back and forth about how PREP Act immunity might apply to each of these covered persons. And so, the litigation or I guess, fallout, from these agreements that we have drafted and then the implications of the PREP Act I think have yet to be seen.
Meg Pekarske	Yeah.
Erica Ash	Meg, I want to put in a little plug for some works that our L&E folks have been doing. We have a tracker of COVID litigation across all 50 states.
Meg Pekarske	Oh!
Erica Ash	Yeah, by type of case. I'm obviously focused on the labor and employment cases, but you should stay tuned. Maybe we can post a link to that or something later so folks can see what's been going on.
Meg Pekarske	Yeah, we will definitely include that. So that's available for folks to have access to?
Erica Ash	Yes.
Meg Pekarske	We'll definitely include. We're going to also include in the liner notes, or I guess that's an old school phrase for the podcast notes or whatever, but we're going to include a copy of the EEOC guidance that you were talking about, Jenna. So I don't want to leave this discussion today without just touching on testing. I know that the vaccine issues have sort of overcome folks right now. But anything that you guys have been seeing that's interesting on the testing front? I mean, people have been dealing with that for quite some time, so I expect they've largely figured that out. But is there anything that we want to add there?
Wakaba Tessier	Yeah, just the other day I was looking – and I don't do this for fun, I promise – but I was looking ...



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Meg Pekarske	With a glass of wine, you're like, oh, let me ...
Wakaba Tessier	<p>Right. It's my before bedtime activity, but I was looking at the FDA website to see that testing that has been authorized recently, because you know, at the beginning of the pandemic, besides that Abbott rapid test, we were really seeing this PCR tests where you have to take the sample, send it into the lab, and it took some time for the results to come back. Now I'm seeing – I saw – I think I saw, I want to say, several point of care tests, which are – if you think of it, it's kind of like a UTI test where you walk into the Walgreens minute clinic and you can tell within minutes whether you have a UTI or not. So those types of tests have gotten authorization so I do think we're moving in the right direction with respect to timeliness of getting the tests. I think, relevant to the conversation we had with respect to the PREP Act, I think it's going to be important to read through the authorization documents, the emergency use authorization documents, because that's really going to outline how to administer those tests. So for example, in the hospice community, if you get a batch of, I don't know, rapid COVID tests, I think it's going to be important for the hospice providers to read through the emergency use authorization documents because that can affect PREP Act immunity, right? So one of the tests that I am most familiar with is the Yale SalivaDirect test and you would think that collecting saliva is easy and I could just spit into a test tube and send it in, but it's a little bit more than that. There's a requirement in there specifically that says the collection of saliva has to be observed by a healthcare provider. And I've heard that's necessarily intuitive, but it's those little things that are really going to help people through the argument when it comes to PREP Act immunity. So I just want to point out that there are a lot more easier tests that are coming up, but do pay attention to those authorization documents that come along with it.</p>
Meg Pekarske	<p>Yeah, I think that's a great point because hospices have been getting, and it's been tiered, but getting some tests from the federal government, and I think it's come in drips and drabs and I think it was prioritized based on maybe where there were outbreaks and whatnot. I don't know what those tests were, but I think your point is well taken, is understanding that authorization and if you are administering those, because obviously everyone would like to have immunity and liability protection if at all possible. So I think folks who have additional questions on this PREP Act, it's probably worth the time to try to understand how you might be able to fit within that.</p> <p>Well, this has been such a wonderful conversation. I wanted to wrap it up with thoughts on sort of practical things, if we are in the shoes of our hospice clients here, about small things. I think sometimes, because I think, at least me personally, when you think of things, small things you can do,</p>



Speaker**Statement**

it makes like doing easier instead of thinking about this massive thing I have to do, right? And so is there – what's on your shortlist that you think people can be mindful of on sort of an everyday basis to avoid some of the pitfalls, whether that be litigation or employee relation things? Any sort of closing thoughts, Jenna?

Jenna Brofsky

Yeah Meg, so best practice as an employee, regardless of the topic, is to set out some policies for all the employees kind of upfront to set expectations. And in the land of COVID, there are ways to create COVID policies that kind of explain, this is the process that we're going to follow if X arises or Y arises, and that's helpful for your own internal staff and kind of problem-solving in that moment, and that lets employees know, okay, this is what happens. This is how long I'm going to have to be out. It is certainly challenging right now when we have CDC guidance that's changing all the time, but having a policy and explaining what the protocols are for your work space and for your workforce, it's really helpful upfront. And then, of course, should you find yourself in litigation, it could be really helpful as a defense.

And then the other thing I'm going to say is just, you know, we're focused so much on the vaccine and that's great, but we should also keep doing all the things that employers have been doing for months now – making sure employees are wearing PPE and social distancing as much as possible. And I think we can see the light at the end of the tunnel, but I don't want employers to focus solely on the vaccine at this moment in time. I think that would be a little shortsighted.

Meg Pekarske

That's really helpful. Wakaba, what's on your short list?

Wakaba Tessier

So I guess when this whole pandemic first started, I think COVID is certainly novel, COVID-19 is novel, and the whole testing landscape was a little bit novel too. But with respect to vaccine, vaccine distribution, vaccine administration, I think we can take comfort in the fact that we have done this before, right? We are operating within a background where we have done this. We've had the flu vaccine, right? There's all sorts of other vaccines. And so I think sometimes with respect to our providers, I think they think that somehow with the COVID-19 vaccine that it might be different. But really, if you step back and think about, it isn't. So I think it might be a good idea just to, you know, if you're ever sort of in a conundrum about it, I think it's good to be able to think about it within the mind frame of okay, we've done this before, you know? It's not so novel anymore, right? So I think that's really been helpful for our providers.

Meg Pekarske

I think those are really wise words. I mean, it's like life advice at that same time, right? Like this is, when you experience something hard, this is not the first time. I mean, yeah, the circumstances are different, but it's the



Speaker**Statement**

same tools, right? You bring the same tools. So I think that's a lot of good wisdom there. I think in some of these issues, I think people have the tendency to be like a deer in the headlines and it's like, okay, I feel – and I use the word empower a lot, but what motivates me to do what I do is I really want to not only learn things myself, but help people. And I think empowering people with knowledge is helpful, right? So how do you respond when you feel like the deer in the headlights? Oh, I've been through this before. Different situation but same thing. And so I think that makes a lot of sense.

Erica, anything to add from your perspective on the PREP Act?

Erica Ash

Yeah, just to add to what Wakaba said, they have some really great patient information sheets and provider information sheets online related to the vaccines, and they're written in plain English and they're very easy to understand. And obviously, you have to provide that to anyone you're giving the vaccine to anyway, but just giving that to your employees and, you know, so people can understand that the studies that were done, are empowered to make their own decisions. I to read them personally to draft some consents, but they were really helpful and well written.

Meg Pekarske

That's great. This was an awesome conversation and I think we covered a lot of ground. And despite being lawyers, I think we give the seal of approval that we're trying to be very practical in a sort of ever-changing landscape here. But I really appreciate all of your time and being game and sort of mucking in this web of – I think it's hard for us as lawyers. I mean, we're used to dealing with gray, but I think we go back to Wakaba's words which are, you know, this is just a different variant of something we've all dealt with before. What do you go back to? Oh, policies and procedures. I need to be clear about what I'm going to do. And so I think that's a great way to wrap up this conversation, because I think it's going to remain a challenging time for quite some time and it's really helpful. So thank you for sharing your knowledge and expertise today.

Well, that is it for today's episode of Hospice Insights, the Law and Beyond. Thank you for joining the conversation. To subscribe to our podcast, visit our website at huschblackwell.com or sign up wherever you get your podcasts.

Until next time, may the wind be at your back.

