

CORONAVIRUS

WEEKLY WEBINAR SERIES



May 11, 2021



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Introduction



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Update from Albany



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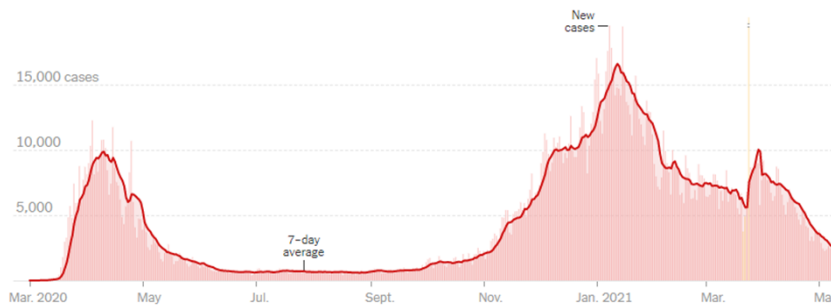
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The New York Times

New reported cases



40% fully vaccinated
50% one dose



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What is going on with reopening?

- May 19: Lots of restrictions being lifted, lots still remain.
- Business capacity limits **gone; must still maintain six feet between people.**
 - Appears to apply to everyone except large venues/stadiums.
 - Can seat people closer together so long as a barrier is in place.



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Reopening Updates

- Gathering limits:
 - May 10: Outdoor gathering limit increases to 500 people at events, arts and entertainment venues.
 - May 19: Outdoor residential gathering limit gone, indoor is 50.
 - May 19: Indoor gathering limit to 250 for events, arts and entertainment venues.
- **Important: gatherings may be unlimited in size so long as all individuals present proof of full vaccination status or a negative COVID-19 test result.**



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Reopening Updates

- Large-scale outdoor event venues – limited only by space available for parties to social distance. **Fully vaccinated attendees may be seated at full capacity in assigned sections designated solely for fully vaccinated individuals, beginning May 19.**
 - **Big change!**



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Reopening Updates

- Graduation/prom: guidance updated on April 27, but there are conflicts with the state-wide reopening plan.



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Reopening Updates

- Important caveats:
 - Face masks still required inside; required outside if there is a “crowd.”
 - Sunday: Dr. Fauci – as vaccinations increase, need to be more liberal for allowing vaccinated individuals to not wear masks indoors. Cases still too high nationally to do this, but likely soon.
 - Still need to do the health screening questionnaire.
 - Still need to gather contact information for tracing.
 - Still need to follow cleaning standards.



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Reopening Updates: Questions remaining

- Will businesses be able to ask for full vaccination status/recent negative COVID-19 test in order to get around the six feet limitation?
 - Perhaps soon.
- When will fully vaccinated individuals be allowed to go maskless indoors?
 - Unknown – seems more likely that outdoor restrictions will continue to be lifted first.



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Collective Bargaining and COVID – Vaccination, Workplace Safety and Paid Leave



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Collective Bargaining - Vaccination

- Initial question – mandate or encourage?
- If requirement:
 - Assess EUA impact
 - Provide for medical and religious accommodations
 - Anticipate the other issues
 - Morale
 - Staffing
 - Concerted activity
 - Protected concerted activity
- Alternatives to mandate
- Consequences for those who refuse mandate



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Collective Bargaining - Vaccination

- Duty to bargain over terms and conditions of employment
- Decision bargaining
- Effects bargaining
- Contract language – have you already bargained over the subject?
- Merger clauses – may you mid-term bargain over the subject?
- Bargaining – agreement, impasse, implementation or stalemate
- Challenges – arbitration or NLRB charge
- Protected concerted activity in a non-union setting



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Collective Bargaining – Workplace Safety

- What are the standards you “must” follow
 - OSH Act – General Duty Clause
 - OSH Act standards
 - State law requirements
- What does your CBA say (have you already bargained)?
- Existing safety committees – are they active?
- Labor/Management committees
- Bargaining or discussing – productive dialogue can help



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Collective Bargaining – Paid Leave

- Paid leave is a mandatory subject of bargaining
- Most CBA's have some forms of paid leave – vacation, sick, personal, holidays, PTO
- Lack of leave in some or all areas is a conscious choice of the parties
- State and federal leave requirements are an overlay: FMLA, NYS PSL, FFCRA, NYS COVID, NYS vaccination, etc.
- Tricky bargaining issues when minimum standards legislation is imposed by the state or federal government
- Challenges at the DOL, NLRB, arbitration, courts



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Legal Issues with Vaccination Incentive Programs



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Legal Framework

- Employer-incentivized COVID-19 vaccination programs will likely be considered “wellness programs”
- Wellness programs implicate a myriad of legal issues, including issues under:
 - The Americans with Disabilities Act (“ADA”);
 - The Genetic Information Nondiscrimination Act (“GINA”); and
 - The Health Insurance Portability and Accountability Act (“HIPAA”)

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ADA and GINA Incentive Limits

- Both the ADA and GINA limit the amount that can be provided to employees as an incentive to receive the COVID-19 vaccine
- The incentive limit is currently in flux
- Proposed regulations
 - “No more than a de minimis incentive”
 - Ex: a water bottle or gift card of modest value
- Exception to ADA and GINA incentive limits
 - Will not apply if the vaccine is administered by a third-party provider that is not contracted by the employer

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Other ADA Requirements

- In addition to the incentive limitations, in order to comply with the ADA employers must:
 - Make the COVID-19 vaccine incentive program available to all employees;
 - Provide reasonable accommodations to employees with disabilities;
 - Undertake a reasonable accommodation analysis to allow an individual to receive the incentive by some other means if they are unable to be vaccinated due to a disability or religious objection
 - Comply with ADA provisions prohibiting discrimination in the terms, conditions, and privileges of employment; and
 - Maintain the confidentiality of medical information provided by the employees

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HIPAA Nondiscrimination Requirements

- Incentive Limitation
 - Cannot exceed 30% of the total cost of employee-only coverage under the employer's health insurance plan
- The vaccine incentive program must provide for a reasonable alternative standard
 - Similar to the ADA's reasonable accommodation requirement
 - Requires that a reasonable alternative standard (or waiver of the standard) be provided to employees for whom it is unreasonably difficult due to a medical condition to satisfy the standard or for whom it is medically inadvisable to satisfy the standard

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HIPAA Nondiscrimination Requirements ctd.

- In addition to the incentive limitation and reasonable alternative standard, the HIPAA rules also impose the following requirements on vaccine incentive programs:
 - Frequency of reward;
 - Reasonable design;
 - Uniform availability; and
 - Notice of availability

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Takeaways

- Employer-incentivized COVID-19 vaccination programs can be carefully structured to avoid the ADA and GINA incentive limitations
 - Still subject to ADA Reasonable Accommodation requirements
 - Likely subject to HIPAA nondiscrimination requirements
 - HIPAA incentive limitations not as restrictive
- EEOC guidance forthcoming

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New York Legislative Update – Healthcare Staffing Laws



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Update from Albany

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Collective Bargaining and COVID

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Legal Issues with Vaccination Incentive Programs

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New York Legislative Update

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New York Employment Law: The Essential Guide

Bar Association Members can buy the book from the bar [here](#).

Non-Bar Association Members can purchase through Amazon [here](#).



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