

# CORONAVIRUS

WEEKLY WEBINAR SERIES



May 18, 2021



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## Introduction



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## Update from Albany



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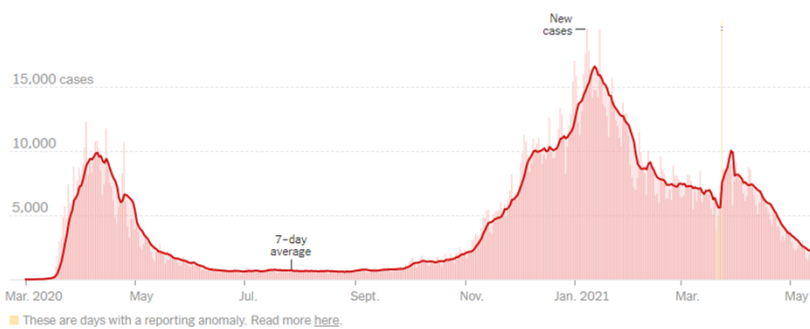
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## The New York Times

### New reported cases



43% fully vaccinated  
52% one dose



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## Last Thursday

- CDC announces change in guidance: Fully vaccinated individuals no longer need to wear masks or social distance, except in certain circumstances.
- Announcement was a surprise.



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## Yesterday

- Governor announces NY will adopt CDC guidance beginning on May 19.
  - Corresponds with the other changes in rules occurring on May 19.
  - Masks and social distancing still required in healthcare settings, schools (Pre-K – 12) public transit, homeless shelters, and correctional facilities.
- **Businesses may choose to continue requiring masks.**



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## So.... What Does This Mean?

- Many unknowns still.
  - Only guidance available to us from NY is a press release.
- **Capacity rules:**
  - Removing capacity limits to requiring six feet of social distancing on May 19. **May remove the six feet of social distancing if all present show proof of full vaccination status.**
  - Proof of full vaccination: paper card, “digital application,” or the Excelsior Pass.
  - **If vaccination status unknown, six feet of social distancing still applies.**
- Some places opening *only* for vaccinated individuals.



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## Events

- Fully vaccinated attendees may attend at 100% capacity, masks are optional.
- Unvaccinated individuals must be socially distanced.
- Children who have not been able to be vaccinated yet may be seated with vaccinated adults in a fully vaccinated section.



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# Employers and Masking Rules in New York



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## New York "HERO" Act

- Private employers must adopt an industry-specific "infectious disease exposure prevention plan"
  - Covers all workers (not just employees) and work sites
  - Will include mandates for health screenings, face coverings, PPE, hygiene stations, regular cleaning/disinfecting, social distancing, engineering controls, etc.
  - Employers have option to adopt NYDOL model prevention plan or develop, adopt, and implement their own
    - If employer opts to develop their own, it must meet/exceed minimum standards and requires "meaningful participation" of employees in course of development
  - Training & posting (and distribution) of plan required
  - Anti-discrimination/retaliation protections...including where employees refuse to work based on "reasonable" and "good faith" belief working conditions are unsafe
  - Penalties, fines, and private right of action
  - Original effective date: June 4, 2021
    - Technical changes

## and FAQs



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## New York “HERO” Act

- Private employers (with at least 10 employees) are required to permit “joint labor-management workplace safety committees” at each worksite
  - Committees must be allowed to meet at least once per quarter
  - Two-thirds must be non-supervisory employees selected by rank-in-file workers without interference from management
  - Committee will have enumerated powers, including raising health and safety concerns, reviewing workplace policies, and participating in governmental site visits
  - Employees protected against retaliation for their participation
  - Effective November 1, 2021
  - NLRB/OSHA pre-emption?



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## Mandatory Vaccination Policies and Legal Developments



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## Covid-19 Vaccine: To Mandate or Not To Mandate?

Recent Washington Post Poll<sup>1</sup>:

**42%** Of Healthcare workers **oppose** mandating the COVID-19 vaccine for those who work with patients.

**30%** 30% of those healthcare workers either intend to decline the vaccine or were undecided.

- Almost **75%** of that group indicated that they would sacrifice their jobs rather than being vaccinated.

**30%** 30% of non-healthcare workers **oppose** mandatory Covid-19 vaccine policies.

<sup>1</sup> KFF/Washington Post Frontline Healthcare Workers Survey, March 2021, [https://www.washingtonpost.com/context/washington-post-kff-frontline-health-care-workers-survey-feb-11-march-7-2021/ba15a233-9495-47a9-9cdd-e7fa1578b1ca/?hpid=hp\\_in-line\\_manual\\_11](https://www.washingtonpost.com/context/washington-post-kff-frontline-health-care-workers-survey-feb-11-march-7-2021/ba15a233-9495-47a9-9cdd-e7fa1578b1ca/?hpid=hp_in-line_manual_11)



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## Key Implementation Considerations



### Reasonable Accommodations

- Disability-Related Requests for Accommodation
- Religious Accommodation



### Logistical Considerations of Vaccine Administration



### Consequences for Refusing to be Vaccinated



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## Reasonable Accommodations: Medical-based and Religious Objections

### Medical-based Objections:

- The ADA requires employers to provide reasonable accommodation to any employee whose disability prevents them from being vaccinated, unless doing so is an “undue hardship,” defined as “significant difficulty or expense.”

### Religious-based Objections:

- The employer must provide a reasonable accommodation for the religious belief, practice, or observance unless it would pose an undue hardship under Title VII of the Civil Rights Act.
- Managers and supervisor responsible for communicating with employees about compliance with the vaccination requirement should be:
  - Trained to recognize a request for accommodation and know to whom the request should be referred to
  - Reminded that it is unlawful to disclose an employee’s reasonable accommodation or retaliate against the employee for a request for accommodations.
- Employers must engage in a flexible, interactive process to identify workplace accommodations that do not require undue hardship (significant difficulty or expense).



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## If an Employee Cannot Get Vaccinated

- If an employee cannot get vaccinated for COVID-19 because of their disability or sincerely held religious belief, it may be lawful for the employer to exclude the employee from the workplace.



- This does **not** mean an employer may automatically terminate an employee as a reasonable accommodation may exist.
  - e.g.: The employee could be accommodated by being permitted to work remotely or placed on leave.
  - Employers must be sensitive to the need for accommodations and evaluate potential solutions



- Implementation Tip: Consider developing a Covid-19 Vaccine Exception Request Form



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## Select Logistical Considerations



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## Is the vaccination considered a “medical examination” for the purposes of the ADA?

- No. The vaccination itself is not a medical examination
  - A medical examination is “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.” E.g.: vision tests, blood pressure screenings
-  • Pre-screening vaccination questions may implicate the ADA provision on disability-related inquiries, when a vaccine is administered by an employer or a contractor on behalf of the employer
- Questions such as asking why an individual did not receive a vaccination, may elicit information about a disability or genetic history
  - Inform employees not to provide any medical information as part of their proof of vaccination.



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- **Exceptions to the Standard:**

- 1. When the vaccination is offered on a voluntary basis**

- The employees choose to be vaccinated
- Thus, the employee’s decision to answer pre-screening disability-related questions also must be voluntary
- If the employee refuses to answer the pre-screening questions, the employer may decline to administer the vaccine
- The employer may not retaliate against, intimidate or threaten the employee for such refusal

- 2. When an employee receives an employer-required vaccine from a third party that DOES NOT have a contract with the employer.**

E.g.: Employee receives the vaccine from a pharmacy or other healthcare provider that the employer has not contracted with.



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## OSHA Guidance on Covid-19 Vaccines

- Provide a COVID-19 vaccine (when available) at no cost to all eligible employees.
- Provide information and training on the benefits and safety of vaccinations.
- Not distinguish between workers who are vaccinated and those who are not.
- Workers who are vaccinated must continue to follow protective measures such as wearing a face masks and remaining physically distant.

The Centers for Disease Control and Prevention ([CDC](#)) has issued new guidance relating to recommended precautions for people who are fully vaccinated, which is applicable to activities outside of healthcare and a few other environments. OSHA is reviewing the recent CDC guidance and will update the above information and their materials accordingly.



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## Can An Employee Be Terminated For Refusing To Take A Covid-19 Vaccine?

- **Emergency Use Authorizations**
  - Covid-19 vaccines were approved by the FDA under an emergency use authorization (“EUA”).
  - Federal law requires that drug must be accompanied by information on the right of individuals to refuse the drugs and the consequences of such refusal.
  - Currently, no law specifies that an employer is required to provide a reasonable accommodation when employee refuses the vaccine based on EUA.
- **Legaretta v. Macias et. al. (2021)** – Recently filed federal case
  - New Mexico Corrections Officer was written up and threatened with termination if he failed to comply with a memo mandating that employees get vaccinated.
  - Memo said, in part, “*being vaccinated is a requirement and a condition of ongoing employment with the County due to the significant health and safety risks posed by contracting or spreading Covid-19.*”



In the absence of any guidance, employers should be cautious about taking corrective or disciplinary action against employees who refuse the vaccine in contravention of the employer’s mandatory vaccine policy.



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## Return-to-Work, Stay Remote, Hybrid Work Arrangements and Post-COVID Employment Trends



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### Update from Albany

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### HERO Act Brief Review and FAQs

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### Return-to-Work, Stay Remote, Hybrid Work Arrangements and Post-COVID Employment Trends

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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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