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Introduction



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Unemployment Update



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Update from Albany



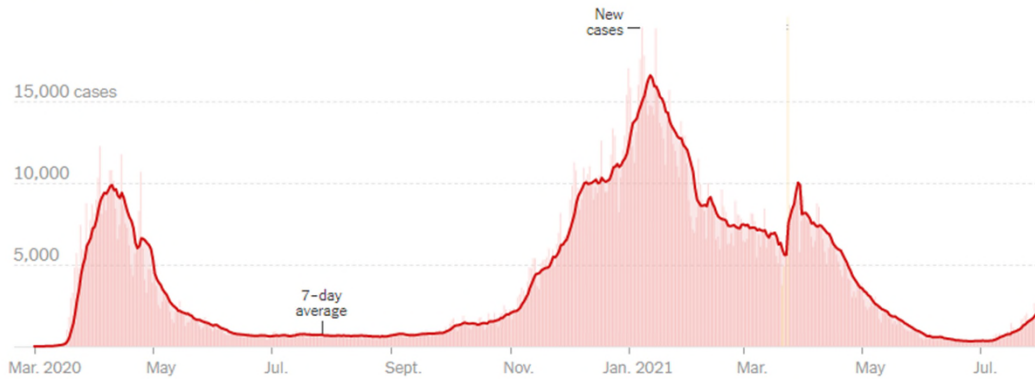
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New reported cases



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DAILY AVG. ON AUG. 2

14-DAY CHANGE

Cases	2,377	+158%
Tests	72,170	+19%
Hospitalized	1,052	+38%
Deaths	7	+10%

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All 50 states report rising vaccination rates as COVID infections surge, data shows

The New York Times

**U.S. Reaches Biden's 70%
Vaccination Goal**



**Florida and Texas had one-third of all US
Covid-19 cases in past week, official says**



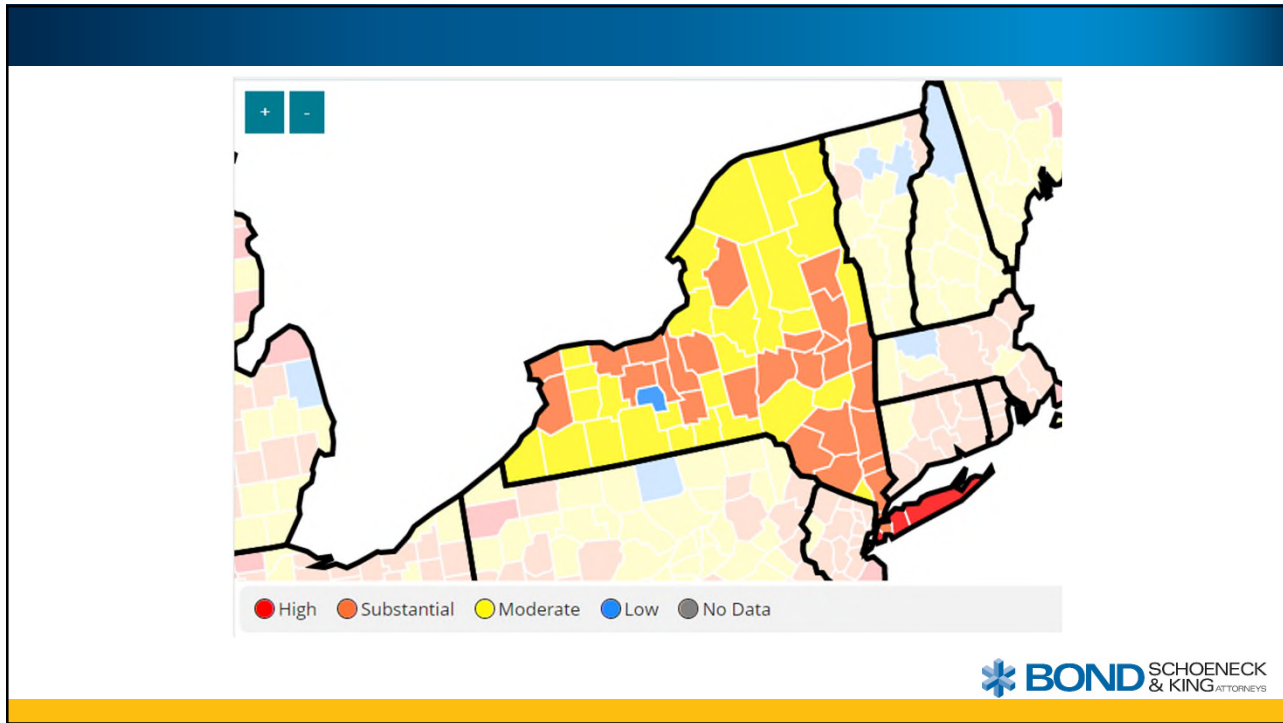
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Vaccination progress

- All New Yorkers:
 - 57% fully vaccinated
 - 63% one dose
- 18 and older:
 - 69% fully vaccinated
 - 76% one dose



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new york NOW
from wmht

New York Counties Transmission Rates - CDC

High	Substantial	Moderate	Low
Brooklyn	Albany	Allegany	Yates
Manhattan	Bronx	Broome	
Nassau	Cayuga	Cattaraugus	
Staten Island	Chenango	Chautauqua	
Suffolk	Columbia	Chemung	
	Dutchess	Clinton	
	Erie	Cortland	
	Lewis	Delaware	
	Monroe	Essex	
	Montgomery	Franklin	
	Niagara	Fulton	
	Onondaga	Genesee	
	Ontario	Greene	
	Orange	Hamilton	
	Otsego	Herkimer	
	Putnam	Jefferson	
	Queens	Livingston	
	Rensselaer	Madison	
	Saratoga	Oneida	
	Schenectady	Orleans	
	Schoharie	Oswego	
	Seneca	Rockland	
	Sullivan	Schuyler	
	Tompkins	St. Lawrence	
	Ulster	Steuben	
	Warren	Tioga	
	Wayne	Washington	
	Westchester	Wyoming	

BOND SCHOENECK & KING ATTORNEYS

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New Mask Mandate?

- Gov – no statewide mask mandate, localities must decide.
- NYC – no new mask mandate.
- Erie County – masks required inside all county buildings, may implement more soon.
- Monroe County – masks required to be worn by county employees in public and common areas at all county-operated facilities.



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Governor – Vaccine Mandates?

- Suggested that private businesses institute vaccine mandates.
- Remember – no more emergency powers.



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Employer Vaccine Mandates



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Are Employer Vaccine Mandates “Legal”?

- Historical Context
 - Generally permitted in medical settings
- EEOC Guidance
- Court Cases/DOJ Opinion
- Emergency Use Authorization / OSHA Issues
- Collective Bargaining Issues



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Historical Context

- Mandatory Flu Vaccination Policies in the Healthcare Context
 - Generally permissible, but accommodations must be provided, absent undue hardship, for disabilities (including pregnancy) and sincerely held religious beliefs
 - Unique to the healthcare industry
- Very little outside of the healthcare context
 - California decision involving flu vaccine mandate in the University of California system



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EEOC Guidance – ADA/Title VII/GINA

- Americans with Disabilities Act (ADA)
 - Restricts employer ability to require medical examinations and make disability related inquiries
- Title VII of the Civil Rights Act of 1964 (“Title VII”)
 - Prohibits discrimination on the basis of protected characteristics, including religion
- Genetic Information Nondiscrimination Act (“GINA”)
 - Prohibits discrimination on the basis of genetic information



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EEOC Guidance – ADA/Title VII/GINA

- Federal EEO laws “do not prevent an employer from requiring all employees physically entering the workplace to be vaccinated for COVID-19, subject to the reasonable accommodation provisions of Title VII and the ADA and other EEO considerations . . .”



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EEOC Guidance – Accommodation Issues

- ADA Accommodation Issues
 - Reasonable Accommodation
 - No exclusion from workplace unless there is “no way” to provide a reasonable accommodation absent “undue hardship”
 - Employer must engage in the interactive process
 - Termination vs. Exclusion from Workplace



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EEOC Guidance – Accommodation Issues

- Title VII Religious Accommodation Issues
 - What is a sincerely held religious belief?
 - Reasonable Accommodation?
 - Undue Hardship?
 - More than a *de minimus* cost or burden to the employer



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EEOC Guidance – Examples of Accommodations

- Wearing masks at all times;
- Working at a social distance from coworkers or non-employees;
- Working a modified shift;
- Getting periodic tests for COVID-19;
- Be given the opportunity to telework; or
- Accept a reassignment



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Emergency Use Authorization Issues

- Emergency Use Authorization (“EUA”)
 - [Emergency Use Authorization for Vaccines Explained](#)
 - Mechanism to allow use of vaccine that is not fully approved by FDA
 - FDA must ensure that recipients of the vaccine under an EUA are informed that they have the option to accept or refuse the vaccine



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Is EUA still an issue?

- Court Cases:
 - Houston Methodist Hospital
 - Indiana University
- Department of Justice Opinion Letter
 - EUA does not prohibit public or private employers from mandating the vaccine



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OSHA Issues

- Occupational Safety and Health Act
 - Encourage vaccination
 - Whistleblower Protection (Section 11(c))
 - Employee with a medical condition who refuses vaccination because of a “reasonable belief” that the shot could lead to serious illness or death may be protected
 - Reasonable belief of danger based on EUA approval process

Collective Bargaining Issues

- Mandatory subject of bargaining?
 - NLRA has been interpreted to require bargaining over mandatory vaccinations, absent contract language addressing the issue
 - Specific authorization in the CBA
 - Management rights / health and safety clauses
 - Employer has right to make reasonable rules and provisions for the safety and health of its employees
 - History of imposing safety rules, flu vaccines or medical requirements

Practical Issues

- Additional Legal challenges
 - *Legaretta v. Fernando Macias*, NM District Court
- Potential employer liability
 - Adverse reaction claims
 - Workers' Compensation or tort liability
 - Disparate treatment claims



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Practical Considerations

- What does your workforce do?
- What percentage of your workforce is vaccinated?
- How will the policy be implemented?
- Who will be responsible for monitoring?
- Are you really going to take action against a top performer?



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Vaccination - Options

- No Action
- Encourage/Incentivize Vaccination (Voluntary)
 - Administer on-site
- Mandate Proof of Vaccine
- Mandate Vaccination Administered by Employer or Employer's Contractor

Mandatory Vaccination - Suggestions

- Written Policy
 - What proof is acceptable/how submitted/when/to whom
 - Paid leave
 - Accommodations available
 - Subject to change
- Accommodation Requests
 - Forms
 - Clear process

FAQ - Proof of Receipt

- Can an employer require an employee to show proof of their receipt of the COVID-19 vaccination?
 - Generally, yes. This is not likely to elicit information about a disability and is therefore not a disability-related inquiry.
 - 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 the proof of vaccination they provide.



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FAQ – Vaccine Incentives

- What incentives are permissible?
 - Vaccination incentives are generally considered wellness programs
 - ADA Incentives and GINA
 - Other ADA Requirements
 - HIPAA Nondiscrimination
 - Availability
 - Frequency
 - Reasonable Design
 - Notice of Availability



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FAQ – Employees Who 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 because a reasonable accommodation may exist.
 - Example: 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.



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Unemployment Update

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Update from Albany

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Employer Vaccination Mandates

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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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