



2022

# BUSINESS IN 2021

WEEKLY WEBINAR SERIES

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## Introduction



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## NY HERO Act – Recap and Update



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## NY HERO Act – “Part 2” Workplace Safety Committees

- Recall, NY HERO Act passed in May 2021
  - Two Parts:
    - NYLL 218-b – Occupational Airborne Infectious Disease Exposure Prevention
      - Effective: July 4, 2021
      - Designation extended though October 31, 2021
    - NYLL 27-D – Workplace Safety Committees
      - Effective: November 1, 2021
- \*Today’s Focus, Recap and Update\***



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## NYLL 218-b – Preventing Occupational Airborne Infectious Disease Exposure

- Airborne Infectious Exposure Prevention Plans
  - Adopted by August 5, 2021
  - September 6, 2021, NYS Commissioner of Health designated COVID-19 as “highly contagious communicable disease that presents a serious risk of harm to the public health”
  - Extended through October 31, 2021, subject to review at that time...
  - Wait and see if further extended...
    - If yes, continue to have Plan in place



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## NYLL 27-D – Workplace Safety Committees

- **Who is covered?** Private employers with at least 10 employees
- **Obligation?** “Employers shall permit employees to establish and administer a joint labor-management workplace safety committee”
  - Allows employees to establish and administer joint labor-management workplace safety committees
- **Effective?** November 1, 2021
- NYSDOL has promised to issue guidance “before” November 1, 2021...



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## Workplace Safety Committees

- **Composition:** Composed of employee and employer designees
  - At least 2/3 must be “non-supervisory” employees
  - “Co-chaired” by representative of employer and non-supervisory employee
- **Selection:** “employee” members
  - By and from among non-supervisory employees
  - Where there is a collective bargaining agreement → collective bargaining representative responsible for selection
- **How many committees?**
  - Geographically distinct work sites may have own committee, as necessary
  - If employer already has a workplace safety committee that is otherwise consistent with the requirements “exempted” from creating an additional safety committee under this section



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## Prohibition on Employer Interference

- Employers must not interfere with:
  - Selection of employees who serve on committee or who serve as workplace safety designee
  - Employees' performance of authorized duties



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## Authorized Duties of Safety Committee

- Workplace safety committee and workplace safety designee authorized to:
  - Raise health and safety concerns, hazards, complaints, violations
    - Employer must respond
  - Review any policy put in place in the workplace required by any provision of the Chapter relating to occupational safety and health and provide feedback
  - Review adoption of any policy in workplace in response to any health or safety law, ordinance, rule, regulation, executive order or related directive
  - Participate in any site visit by governmental health and safety agency (unless otherwise prohibited by law)
  - Review any report filed by the employer related to health and safety of workplace
  - Regularly schedule a meeting during work hours at least once per quarter that may no last longer than 2 hours



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## Training

- Employers must permit safety committee designees to attend training on:
  - Function of worker safety committees
  - Rights established under Section 27-D
  - Introduction to occupational safety and health
- Limited to max of 4 hours
  - Unclear if this is one time training per employee, or something else...
- Without loss of pay (read: paid)



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## Retaliation

- Retaliation provisions apply here too
  - Participation in activities or establishment of workplace safety committee
  - Incorporates remedies for retaliation under existing Article 7 of NYLL



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## Collective Bargaining Agreements

- Obligations under either section are waivable by CBA
  - NOTE: For waiver to be valid, it must explicitly reference the section
- Nothing in either section diminishes the rights, privileges, or remedies of an employee under CBA



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## Updated EEOC Guidance on Vaccine Requirements



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## EEOC Guidance on Religious Exemptions

- On October 25, 2021, the EEOC released guidance specifically addressing whether employers must grant religious accommodations when a vaccine mandate is imposed.
- Overall, the Guidance states that the failure to provide for religious accommodations is in violation of Title VII.



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## EEOC Guidance

- Employees must tell their employers when they have a religious objection to receiving the vaccine
  - Specific language not required
  - Same applies if there is an objection to a particular vaccine or dosage
- Inform employees about whom to contact, and how, to request a religious accommodation.



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## EEOC Guidance

- Generally, under Title VII, an employer should assume that a request for religious accommodation is based on sincerely held religious beliefs.
- However, if an employer has an objective basis for questioning either the religious nature or the sincerity of a particular belief, the employer would be justified in making a limited factual inquiry and seeking additional supporting information.
- An employee who fails to cooperate with an employer's reasonable request for verification of the sincerity or religious nature of a professed belief risks losing any subsequent claim that the employer improperly denied an accommodation



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## EEOC Guidance

- The definition of “religion” under Title VII protects nontraditional religious beliefs that may be unfamiliar to employers.
- Employees may be asked to explain the religious nature of their belief and should not assume that the employer already knows or understands it.
- The employer may ask for an explanation of how the employee’s religious belief conflicts with the employer’s COVID-19 vaccination requirement.



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## EEOC Guidance

- The employee’s sincerity in holding a religious belief is “largely a matter of individual credibility.”
- Factors which may undermine credibility:
  - Actions inconsistent with professed beliefs;
  - Whether accommodation sought is desirable for non-religious reasons;
  - Timing of the request renders it suspect (follows a non-religious request for the same);
  - Other reasons to believe the accommodation is not sought for religious reasons



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## EEOC Guidance

- Title VII does not protect social, political, or economic views, or personal preferences.
- Objections to COVID-19 vaccination that are based on social, political, or personal preferences, or on nonreligious concerns about the possible effects of the vaccine, do not qualify as “religious beliefs” under Title VII.



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## EEOC Guidance

- An employer should thoroughly consider all possible reasonable accommodations, including telework and reassignment.
- If an employer demonstrates that it is unable to reasonably accommodate an employee’s religious belief without an “undue hardship” on its operations, then Title VII does not require the employer to provide the accommodation.
- The determination of whether a particular proposed accommodation imposes an undue hardship on the conduct of the employer’s business depends on its specific factual context.



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## EEOC Guidance

- The Supreme Court has held that requiring an employer to bear more than a “de minimis,” or a minimal, cost to accommodate an employee’s religious belief is an undue hardship. Costs to be considered include not only direct monetary costs but also the burden on the conduct of the employer’s business – including, in this instance, the risk of the spread of COVID-19 to other employees or to the public.
  - Ex. The religious accommodation would impair workplace safety, diminish efficiency in other jobs, or cause coworkers to carry the accommodated employee’s share of potentially hazardous or burdensome work.



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## EEOC Guidance

- If there is more than one reasonable accommodation that would resolve the conflict between the vaccination requirement and the sincerely held religious belief without causing an undue hardship under Title VII, the employer may choose which accommodation to offer.
- The obligation to provide religious accommodations absent undue hardship is a continuing obligation that takes into account changing circumstances.



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## NYS Retirement Security For All Act - Update



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## New York State Secure Choice Savings Plan (S.5395-A/A.3213-A)

- On October 21, 2021, Gov. Hochul signed off on new legislation requiring private employers who do not sponsor a retirement plan for their employees to automatically enroll their employees into the State's new retirement program
  - Amending a prior law which made this program optional for small employers
- The new program essentially is an automatic IRA program funded with employee payroll deferrals.
  - Accords with best practices for retirement savings vehicles;
  - Maximizes participation, savings, and sound investment practices
  - Maximizes simplicity, including ease of administration for participating employers and enrollees;
  - Provides an efficient product to enrollees by pooling investment funds;
  - Ensures the portability of benefits; and
  - Provides for the deaccumulation of enrollee assets in a manner that provides a financial benefit in retirement.
- A nine-member board ("New York State Secure Choice Savings Board") will oversee the program.
- This act shall take effect immediately.
  - "Each participating employer shall have a payroll deposit retirement savings arrangement to allow each employee to participate in the program **at most nine months after the board opens the program for enrollment.**"



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## New York State Secure Choice Savings Plan

- Fiduciary Duties – Similar to ERISA
  - for the exclusive purposes of providing benefits to enrollees and beneficiaries and defraying reasonable expenses of administering the program;
  - by investing with the care, skill, prudence, and diligence under the prevailing circumstances that a prudent person acting in a like capacity and familiar with those matters would use in the conduct of an enterprise of a like character and with like aims; and
  - by using any contributions paid by employees and employers remitting employees' own contributions into the fund exclusively for the purpose of paying benefits to the enrollees of the program, for the cost of administration of the program, and for investments made for the benefit of the program.
- Program Highlights:
  - Investment Options - offer returns on contributions and conversion of individual retirement savings account balances to secure retirement income without incurring debt or liabilities to the state.
    - Default investment option, based upon cost, risk, benefit level, and ease of enrollment
    - a conservative principal protection fund; a growth fund; a secure return fund; an annuity fund; a growth and income fund; or a life cycle fund with a target date based upon factors determined by the board.
  - Contract with necessary service providers, including investment managers, financial organizations, other financial and service providers, consultants, actuaries, counsel, auditors, third-party administrators, and other professionals as necessary.
  - Conduct a periodic review of the performance of any financial organizations, including, but not limited to, a review of returns, fees, and customer service. A copy of reviews shall be posted to the program's Internet website.
  - Cause moneys in the program to be held and invested as pooled investments or otherwise, with a view to achieving cost savings through efficiencies and economies of scale.
  - Evaluate and establish enrollment process including employees opting in, setting contribution rate, selecting investment option, and terminate participation in the program.
  - Board will design and disseminate informational materials and employee informational materials, which shall include background information on the program, and necessary disclosures as required by law for employees.
  - Evaluate, or cause to be evaluated, the need for, and procure as needed, insurance against any and all loss in connection with the property, assets, or activities of the program, and indemnify as needed each member of the board from personal loss or liability resulting from a member's action or inaction as a member of the board.
  - Allocate administrative fees to individual retirement accounts in the program on a pro rata basis.
  - Facilitate education and outreach to employers and employees.
  - Determine or authorize withdrawal provisions, such as economic hardships, portability and leakage.
  - Determine employee rights and enforcement of penalties.



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## New York State Secure Choice Savings Plan

- **Employees:**
- Employees may make elective deferrals up to the maximum limits under Code Section 219
- Employees may change their deferral rate at any time (subject to rules set by the board).
- Employees who fail to enroll will default at a three percent contribution, up to the maximum under Code Section 219
  - (shall not begin until the 30<sup>th</sup> day after such employee has been enrollment)
- Employees who opt out may re-enroll again during an open enrollment period (at least once per year)
- Program fees will initially come from state funds, but ultimately be paid out of future employee contributions (including potentially .
- **Employers:**
- "Employer" shall mean person/entities engaged in a business, industry, profession, trade, or other enterprise in New York state, whether for profit or not for profit, that:
  - at all times during the previous calendar year employed at least 10 employees in New York state,
  - has been in business at least 2 years, and
  - has not offered a qualified retirement plan in the preceding 2 years.
- Employers can not terminate their plan in order to join the NYS program.



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## New York State Secure Choice Savings Plan

- Required Disclosures:
  - Employers must provide employees with informational materials, including a disclosure form explaining many facets of the program, including:
    - the benefits and risks associated with making contributions to the program;
    - the process for making contributions to the program;
    - how to opt out of the program at any time;
    - the process by which an employee can participate in the program with a level of employee contributions other than three percent;
    - that they are not required to participate or contribute more than three percent;
    - the process for withdrawal of retirement savings;
    - the process for selecting beneficiaries of their retirement savings;
    - how to obtain additional information about the program;
    - employees should contact financial advisors for financial advice, employers not liable for investment decisions;
    - information on how to access any available financial literacy programs; and
    - that the program fund is not guaranteed by the state.
  - Employers must also provide a form where employees may either opt-out or select a deferral rate other than three percent.



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## NYS Secure Choice vs. NYC Retirement For All

### NYS Secure Choice

- at all times during the previous calendar year employing at least 10 employees in NYS, been in business at least 2 years
- Employees include those eighteen years of age or older, employed by NY employer, earning wages in New York state
- automatically enroll eligible employees at 3%
- No penalties listed

### NYC Retirement For All

- Private sector employers with at least 5 employees in NYC
- Covered Employees include those working 20+ hours per week, age 21+, regular work duties in NYC
- automatically enroll eligible employees at 5%
- Penalties for noncompliance
- Board has up to 2 years from August 9, 2021 (Effective Date) to provide details on this program



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## Wrap Up

- Neither the state program nor the city program is yet running.
- However, the legislation enacting the city program provides that the city will discontinue its program if the state establishes a retirement savings program that requires “a substantial portion of employers who would otherwise be covered” by the city program to offer to their employees a savings program through payroll deduction or other method of contribution.
- Now that the state program is mandatory and will likely cover many of the same employers as the city program, the city may halt efforts to implement its program.



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## Update from Albany



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New reported cases



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	DAILY AVG. ON OCT. 18	14-DAY CHANGE
Cases	4,456	-8%
Tests	152,110	+3%
Hospitalized	2,511	-7%
Deaths	36	-7%

	DAILY AVG. ON OCT. 25	14-DAY CHANGE
Cases	3,825	-24%
Tests	148,331	+4%
Hospitalized	2,415	-9%
Deaths	36	+1%

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## Vaccination progress

- All New Yorkers:
  - 66% fully vaccinated
  - 74% one dose
- 12 and older:
  - 77% fully vaccinated
  - 85% one dose

## Vaccination Progress – the Mandatory Vaccination Effect?



Location	At least 1 dose	Fully vaccinated	Population
Vermont	79.2%	70.9%	624,313
Rhode Island	77.5%	70.5%	1,057,231
Connecticut	78.4%	70.4%	3,575,074
Maine	75.9%	70.1%	1,335,492
Massachusetts	79.5%	69.4%	6,850,553
New York	73.6%	66.2%	19,572,319
New Jersey	74.5%	66%	8,878,503
Maryland	72.5%	65.8%	6,018,848
New Mexico	75.7%	65.7%	2,092,454

## Booster Shot News

- CDC and FDA have approved booster shots of Moderna and Johnson & Johnson
  - Johnson & Johnson booster: recommended for those 18 and older who were vaccinated 2 or more months ago
  - Moderna and Pfizer boosters: following individuals eligible 6 or more months after initial series:
    - 65+
    - 18+ living in long term care facilities
    - 18+ with underlying medical conditions
    - 18+ working or living in high risk settings



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## Booster Shot News

- Trick-or-treat, mix-and-match COVID boosters: FDA and CDC have approved practice.
  - Study: J&J recipients receiving a Moderna booster saw antibody levels rise 76-fold in 15 days, compared with a 4-fold increase after an extra J&J dose.
- What does this mean?
  - If a person is eligible to receive a booster shot, they can get any booster shot available.



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## Booster Shot Updates

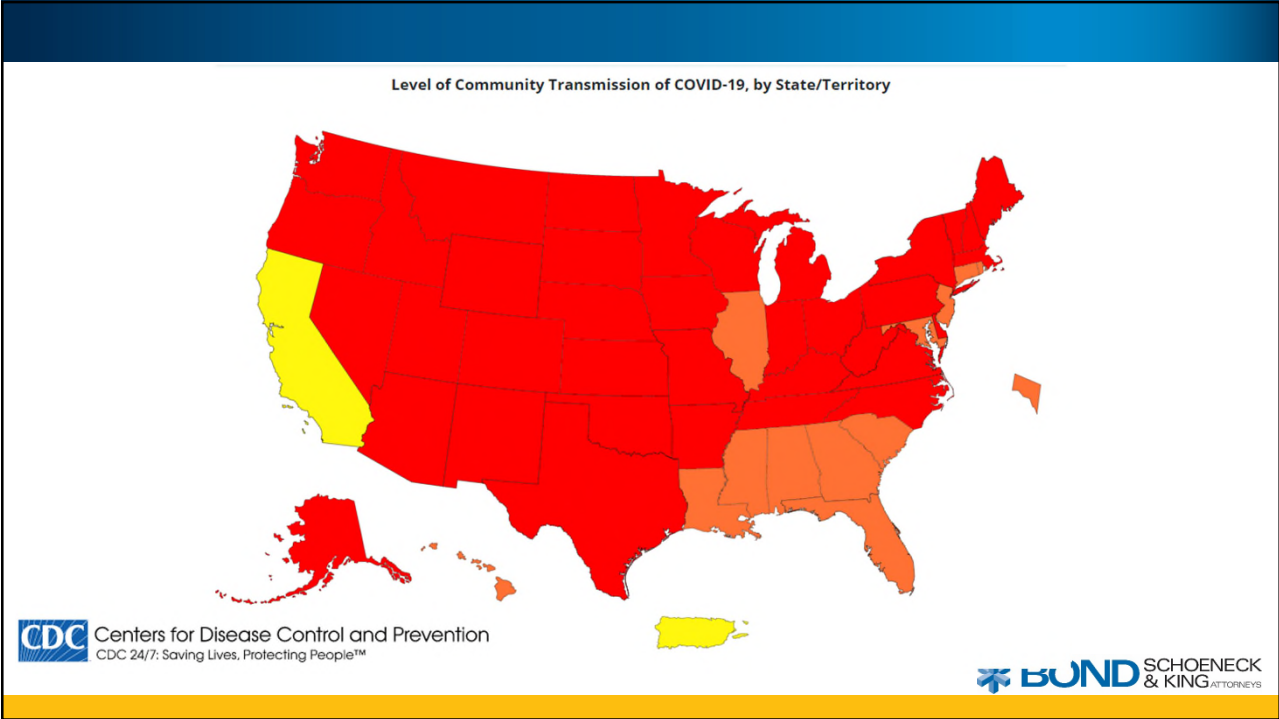
- FDA: Advisory panel backed use of Moderna and J&J boosters last week; final approval expected this week.
- May authorize mix-and-match booster shots.
  - Preference may be to use the same vaccine/booster, but nothing is final.
- Also expected: broadening categories of those eligible for boosters.
- Note: In US, 15+ million received J&J, 69.5 million Moderna, 104.5 million Pfizer.

## Hero Act Designation for November?

**Commissioner's Designation Pursuant to Labor Law § 218-b for COVID-19**

**September 30, 2021**

On September 6, 2021, pursuant to Labor Law § 218-b and the associated regulation at 12 NYCRR 840.1, I designated COVID-19 as a highly contagious communicable disease that presents a serious risk of harm to the public health in New York State, in which the Centers for Disease Control and Prevention (CDC) has identified the level of transmission of such disease as "substantial" or "high." I hereby continue this designation until October 31, 2021, at which point I will review the level of transmission of COVID-19 in New York State and determine whether to continue this designation.



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Indicator - If the two indicators suggest different transmission levels, the higher level is selected	Low Transmission Blue	Moderate Transmission Yellow	Substantial Transmission Orange	High Transmission Red
Total new cases per 100,000 persons in the past 7 days	0-9.99	10-49.99	50-99.99	≥100
Percentage of NAATs <sup>1</sup> that are positive during the past 7 days	0-4.99%	5-7.99%	8-9.99%	≥10.0%

**New York (Level of Community Transmission)\***  
**Level of Community Transmission:** high  
**Cases in Last 7 Days/100K:** 138.6  
**7-day % Positivity:** < 3%

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**New York City**  
**Level of Community Transmission:** N/A  
**Cases in Last 7 Days/100K:** 91.9  
**7-day % Positivity:** N/A

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## NYS Retirement Security For All Act – Update

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## Update from Albany

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