

A graphic for a webinar series. The background is dark blue with a hand pointing upwards. The hand is positioned over the year '2021', which is the largest and brightest. Other years are visible: '2022' at the top, '2020' below it, '2019' below that, and '2018' at the bottom. The text 'BUSINESS IN 2021' is in large white letters, and 'WEEKLY WEBINAR SERIES' is in smaller orange letters below it. The logo for 'BOND SCHOENECK & KING ATTORNEYS' is in the bottom left corner.

2022

BUSINESS IN 2021

WEEKLY WEBINAR SERIES

BOND SCHOENECK & KING ATTORNEYS

2020

2019

2018

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A slide titled 'Vaccine Mandates Overview'. It features a portrait of Peter A. Jones on the left. To the right of the portrait is his name and contact information. The Bond, Schoeneck & King logo is in the bottom right corner.

Vaccine Mandates Overview



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Vaccine Mandates

- Vaccine mandate or testing mandate with a vax-out option
- Who is mandating? federal, state, local, employer
- Exemptions – medical, religious, other
- Effective date of the mandate
- Consequences of non-compliance – discipline, leave, work from home, discharge
- Impact of legal actions -- injunctions, grievances, ULP charges
- Pay for vaccination, side effects, and COVID sick leave

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Cataloguing the Mandates

- NYC – public accommodations mandate
- NYS – healthcare workers
 - Injunction vacated
- Federal
 - Federal contractors
 - OSHA
 - CMS

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Vaccination Mandate – Healthcare Providers

- Emergency Regulations Issued – August 26, 2021
- Preceded by Section 16 Commissioner’s Orders
- TRO Issued by the US District Court for the NDNY – limited to religious exemption
- FAQ’s issued by the NYS DOH September 20, 2021
- TRO Extended by the US District Court on September 20 through October 12
- NYS Opposition papers in the court proceeding due September 22
- Governor has indicated that she will not back off



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Emergency Regulations Basics

- Vaccine mandate
- No test out
- Medical exemption
- No religious exemption
- Implementation date – September 27 for general hospitals and nursing homes; October 7 for home health agencies and assisted living facilities
- Covered personnel – employee and non-employee members of the medical and nursing staff, contract staff, students and volunteers – who engage in activities such that they could expose other covered personnel, patients residents and staff to the disease



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Emergency Regulations Medical Exemptions

- Generally accepted medical standards
- Severe allergic reaction to previous dose or components
- Other limited precautions are listed
- Exempt individuals may continue normal job duties
- Testing not required by the ER



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Emergency Regulations Religious Exemptions

- Not included in the emergency regulations
- Subject to the TRO
- What to do now, pending the outcome of the court case?
- Sincerely held religious belief
- Undue hardship standard to grant/deny accommodation
- Other accommodations
- Documentation



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Key to NYC Executive Order

- Vaccine mandate for restaurants, indoor entertainment and sports venues and fitness centers
- No test out included
- Medical and religious accommodations are available
- Exceptions for certain de minimis activities
- Masking and social distancing for certain out of town performers and athletes
- Mayor-Elect has said he will keep the mandate



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OSHA's Vax or Test Emergency Temporary Standard



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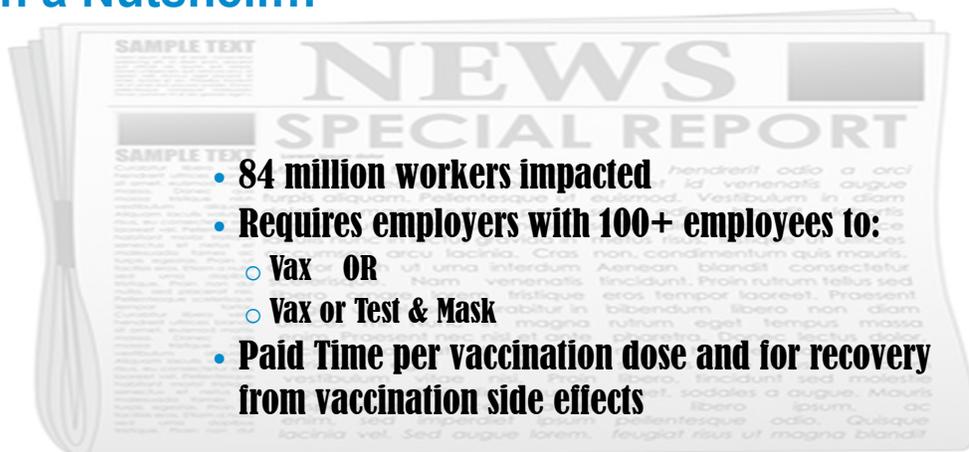
OSHA ETS TIMELINE

- On November 4, 2021, OSHA announces that the rule will be published in the Federal Register
- Published and effective November 5, 2021
- Most provisions effective December 5, 2021
 - Except for testing requirements – January 4, 2022
- OSHA cites a “grave danger” posed by the coronavirus
- The ETS is also a proposed rule and public comment is invited

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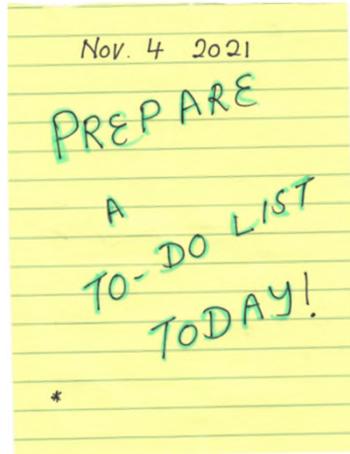
In a Nutshell...



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Read Labor and Employment Law Blog Post at This [Link](#)

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Does This Apply to Us?

- Employers with 100+ Employees
- Exception:
 - Employers covered by the federal contractor mandate
 - Employers covered by the OSHA Healthcare ETS

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☑ Count to 100

- Count at the corporate level – combine ALL employees at all locations
 - Single Corporate Entity – includes subsidiaries that are wholly owned by the parent company.
Review OSHA's single employer test
- Count part-time employees
- Count temporary or seasonal employees
 - Do not count temp employees by a staffing agency
- Do not count properly classified independent contractors
- Count employees working from home
- Multi-employer worksites count only its OWN employees, not total number of workers at the site
- Count employees who are minors
- When do I count?
 - Employee count as of Nov. 5, 2021. If you hit 100+ after Nov. 5, it applies at that point
 - Once you are at 100+ you are covered even if you drop below that number.

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☑ Does it apply to ALL employees?

- Employees who do not report to a workplace where other individuals such as coworkers or customers are present
- Employees while they are working from home
- Employees who work exclusively outdoors
 - Must work outdoors on all days
 - Must not routinely occupy vehicles with other employees as part of work duties. This is considered indoor time
 - De minimis use of indoor spaces where other individuals may be present is allowed.
 - Time spent indoors will be added up, cumulatively
- However, these employees are to be included in the total count of employees to meet the 100-employee threshold for coverage under the ETS.

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☑ To Vax or Test?

VAX	VAX, TEST AND MASK
<p>Employer must develop, implement and enforce a mandatory COVID-19 vaccination policy. Such a policy must require vaccination of all employees Except:</p> <ul style="list-style-type: none">- Those for whom a vaccine is medically contraindicated- Those for whom medical necessity requires a delay in vaccination- Those legally entitled to a reasonable accommodation under federal civil rights laws because they have a disability or sincerely held religious beliefs, practices or observances that conflict with the vaccination requirement. (New York employers must also review NY law on this topic)- The above employees must test weekly for COVID-19 and wear a face covering as per the ETS' requirements.	<p>Employers may choose to establish, implement and enforce a policy allowing employees to elect either to get vaccinated or to undergo weekly COVID-19 testing and wear a face covering at the workplace.</p> <p>Test - Each employee who is not fully vaccinated is tested at least weekly (if in the workplace once per week) or within seven days before returning to work (if away from the workplace for a week or longer).</p> <p>AND</p> <p>Mask - Employees not fully vaccinated must wear a face covering when indoors or when occupying a vehicle with another person for work purposes, except in certain limited circumstances.</p>

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☑ Prepare a Written Policy - Dec. 5, 2021

- OSHA has provided templates
 - [template for a mandatory vaccination policy](#)
 - [template for a vaccination or testing and face covering policy](#)

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Determine and Track Vaccination Status - Dec. 5, 2021

- Employers must maintain a roster of employee vaccination status
- Acceptable documentation:
- The following list includes the acceptable documentation for proof of vaccination:
 - the record of immunization from a health care provider or pharmacy;
 - a copy of the U.S. COVID-19 Vaccination Record Card;
 - a copy of medical records documenting the vaccination;
 - a copy of immunization records from a public health, state, or tribal immunization information system; or
 - a copy of any other official documentation that contains the type of vaccine administered, date(s) of administration, and the name of the health care professional(s) or clinic site(s) administering the vaccine(s).
- To be acceptable as proof of vaccination, any documentation should generally include the employee's name, type of vaccine administered, date(s) of administration, and the name of the health care professional(s) or clinic site(s) administering the vaccine(s).

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- Employee may provide signed and dated attestation:
 - Attesting to their vaccination status (fully vaccinated or partially vaccinated);
 - Attesting that they have lost and are otherwise unable to produce proof required by this section; and
 - Including the following language: "I declare (or certify, verify, or state) that this statement about my vaccination status is true and accurate. I understand that knowingly providing false information regarding my vaccination status on this form may subject me to criminal penalties."
- From the preamble to the rule: "While employers may not invite or facilitate fraud, the ETS does not require employers to monitor or detect fraud."

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Provide Paid Time Off - Dec. 5, 2021

- FOR VACCINATION
 - 4 hours of paid time (includes travel time) to receive each primary vaccination dose
 - Separate from regular leave benefits
 - If the employer offers time during workday and employee does not accept, and gets vaccinated on own time, employer does not have to pay the vaccination time.
- FOR RECOVERY
 - Reasonable time and paid sick leave to recover from any side effects experienced following each primary vaccination dose.
 - What's reasonable? OSHA doesn't define this but says that if at least two days of paid sick leave per primary vaccination dose is provided, it will not enforce
 - If sick leave and vacation time are tracked separately and is available, may allow employees to use only sick leave benefits while recovering from vaccination side effects
 - Cannot require employees to accrue negative sick leave or borrow against paid sick leave to recover from vaccination side effects

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Test the Unvaccinated – Jan. 4, 2022

- Every seven days
 - Employers must ensure that each employee who is not fully vaccinated is tested at least weekly (if in the workplace once per week) or within seven days before returning to work (if away from the workplace for a week or longer).
- Does not have to be PCR – rapid OTC tests acceptable.
- Self-administered is okay, and self-read is okay, but
- BOTH self-administered and self-read is NOT okay.
- If employee is in the vaccination process, must test until fully vaccinated UNLESS employee gets last dose on or before January 4

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Require Prompt Notice of Positive Covid-19 Test - Dec. 5, 2021

Require employees to promptly provide notice of positive COVID-19 test or COVID-19 diagnosis and remove these employees from the workplace until they can return to work as per the ETS.

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Notice to Employees - Dec. 5, 2021

- Key Things to Know About COVID-19 Vaccines,” available at <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/keythingstoknow.html>
- That they can't be retaliated against. See [fact sheet](#) and
- The criminal penalties for false statements. See [fact sheet](#)

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Documentation

- By the end of the next business day after a request by an employee or an employee representative, the employer must make available to the requester the aggregate number of fully vaccinated employees at a workplace along with the total number of employees at that workplace.
- If OSHA asks for the written policy and the number of vaccinated employees and total employees during an inspection, that must be produced within four hours of the request.

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Report - Dec. 5, 2021

Employers must also report work-related COVID-19 fatalities to OSHA within eight hours of learning about them and report work-related COVID-19 in-patient hospitalizations within 24 hours of the employer learning about the hospitalization.

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Other Considerations

- Face coverings for unvaccinated
 - Exceptions:
 - When an employee is alone in a room with floor to ceiling walls and a closed door.
 - For a limited time while the employee is eating or drinking at the workplace or for identification purposes in compliance with safety and security requirements.
 - When an employee is wearing a respirator or facemask.
 - Where the employer can show that the use of face coverings is infeasible or creates a greater hazard
 - Employers not enforcing OSHA's newest ETS could be cited by the agency and face a fine of up to \$13,653 for each serious violation. A willful violation, essentially an employer deliberately disregarding the mandate, could lead to a fine as high as \$136,532.

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What's Next?

- Lawsuits galore...
 - Fifth Circuit Temporarily Stays the ETS pending further action by the court
 - “grave statutory and constitutional issues with the Mandate”
 - Department of Justice Says... “ Take a seat, we need a lottery to pick the circuit that decides the fate of this ETS...this is premature”
- Wait to see if OSHA rule is preliminarily enjoined – and if so, is it nationwide
 - But timelines of court decisions may change so plan accordingly to meet the deadlines

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Federal Vaccine Mandates



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Federal Contractors – Executive Order 14042

- September 9, 2021 → President Biden signed Executive Order 14042 “Ensuring Adequate COVID Safety Protocols for Federal Contractors”
- September 24, 2021 → Safer Federal Workforce Task Force issues guidance



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Federal Contractor Guidance Requirements

1. COVID-19 vaccination of covered contractor employees, except in limited circumstances where an employee is legally entitled to an accommodation;
2. Compliance by individuals, including covered contractor employees and visitors, with the guidance related to masking and physical distancing while in covered contractor workplaces; and
3. Designation by covered contractors of a person or persons to coordinate COVID-19 workplace safety efforts at covered contractor workplaces.



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“Phase-In”

- The Executive Order directs federal agencies to incorporate the new clause as follows:
 - in new contracts awarded on or after Nov. 14, 2021;
 - in new solicitations issued between Oct. 15, 2021 and Nov. 14, 2021;
 - in extensions or renewals of existing contracts and orders awarded on or after Oct. 15, 2021; and/or
 - in options on existing contracts and orders exercised on or after Oct. 15, 2021.



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Coverage

- Applies to any new contract; new contract-like instrument; new solicitation for a contract or contract-like instrument; extension or renewal of an existing contract or contract-like instrument; and exercise of an option on an existing contract or contract-like instrument, if:
 1. it is a procurement contract or contract-like instrument for services, construction, or a leasehold interest in real property;
 2. It is a contract or contract-like instrument for services covered by the Service Contract Act, 41 U.S.C. 6701 *et seq.*;
 3. it is a contract or contract-like instrument for concessions; or
 4. it is a contract or contract-like instrument entered into with the Federal Government in connection with Federal property or lands and related to offering services for Federal employees, their dependents, or the general public.



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“Contract or Contract-Like Instrument”

- Broad definition, follows USDOL’s proposed rule “Increasing the Minimum Wage for Federal Contractors”
- “[A]n agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law...includes, but is not limited to, a mutually binding legal relationship obligating one party to furnish services and another party to pay for them...”
 - Includes all contracts and any subcontracts of any tier thereunder (except those solely for provision of products)
 - Procurement actions, lease agreements, cooperative agreements, provider agreements, intergovernmental service agreements, service agreements, licenses, permits, or any other type of agreement...purchase orders, notices of awards, awards, job orders...



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Broad and Sweeping

- Caution: Executive Order and Guidance provide federal agencies and contractors with discretion to incorporate new clause into contracts and contract-like instruments that are not directly covered by the Order



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Coverage

- Executive Order clearly states that it **does not apply** to:
 1. grants;
 2. contracts, contract-like instruments, or agreements with Indian Tribes under the Indian Self-Determination and Education Assistance Act;
 3. contracts or subcontracts whose value is equal to or less than the simplified acquisition threshold (which is currently \$250,000);
 4. employees who perform work outside the United States or its outlying areas; or
 5. subcontracts solely for the provision of products.
- Note: Agencies encouraged to exercise their discretion to incorporate clause even before they are required to do so.



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Vaccine Mandate

- **What is required?** Covered contractors must ensure that all covered contractor employees are fully vaccinated for COVID-19
- **Who must be vaccinated?** “All covered contractor employees”
 - Guidance defines “covered contractor employee” as “any full-time or part-time employee of a covered contractor working on or in connection with a covered contract or working at a covered contractor workplace. This includes employees of covered contractors who are not themselves working on or in connection with a covered contract.”

Vaccine Mandate

- **By when?**
 - ~~December 8, 2021~~ **January 4, 2022**
 - After that date, all covered contractor employees must be fully vaccinated by the first day of the period of performance on a newly awarded covered contract, and by the first day of the period of performance on an exercised option or extended or renewed contract when the clause has been incorporated into the covered contract.
 - Note: Other safety protocols in the guidance must also be adhered to (masking, social distancing, etc.)

Vaccine Mandate

- No testing opt out
- Reasonable accommodations must be evaluated for disability/medical contraindication and sincerely held religious beliefs
 - Note: Periodic testing can be one type of reasonable accommodation
- Contractors must flow down clause in subcontracts
- Contractors must comply with applicable safety protocols if performing work at a federal workplace (may include providing proof of vaccination)
- Recent guidance and White House statements seem to indicate some flexibility for contractors trying to comply with the mandate in good faith -- "This is not a cliff"



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Centers for Medicare and Medicaid Services – Interim Final Rule

- September 9, 2021 → Biden-Harris Administration announced it would require COVID-19 vaccination of all staff within Medicare and Medicaid certified facilities
- November 5, 2021 → Interim Final Rule published



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Interim Final Rule – Which facilities are covered?

Medicare and Medicaid-certified provider and supplier types:

- Ambulatory Surgery Centers
- Community Mental Health Centers
- Comprehensive Outpatient Rehabilitation Facilities
- Critical Access Hospitals
- End-Stage Renal 2 Disease Facilities
- Home Health Agencies
- Home Infusion Therapy Suppliers
- Hospices
- Hospitals
- Intermediate Care Facilities for Individuals with Intellectual Disabilities
- Clinics, Rehabilitation Agencies, and Public Health Agencies as Providers of Outpatient Physical Therapy and Speech-Language Pathology Services,
- Psychiatric Residential Treatment Facilities (PRTFs) Programs for All-Inclusive Care for the Elderly Organizations (PACE),
- Rural Health Clinics/Federally Qualified Health Centers, and
- Long Term Care facilities.



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Interim Final Rule – Vaccination Requirement

- **What staff are covered?** Staff working at a facility that participates in the Medicare and Medicaid programs, regardless of clinical responsibility or patient contact.
 - Facility employees
 - Licensed practitioners
 - Students, trainees
 - Volunteers
 - Other individuals who provide care, treatment or other services for the facility and/or to its patients under contract or other arrangement
- “All staff who interact with staff, patients, residents, clients, or PACE program participants in any location beyond formal clinical setting must be vaccinated”



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Interim Final Rule – Vaccination Requirement

- Does not apply to:
 - Staff who exclusively provide telehealth or telemedicine services outside of facility and who do not have any direct contact with patients and other staff
 - Staff who provide support services that are performed exclusively outside of the facility and who do not have any direct contact with patients and other staff
- Religious Nonmedical Health Care Institutions, Organ Procurement Organizations, and Portable X-Ray Suppliers are not directly covered.
 - May be covered by relationship with other covered facilities, however.
- Does not directly apply to physician's offices or other health care entities that are not regulated by CMS
 - **But**, physicians with admitting privileges are covered



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Interim Final Rule – What is required?

- **Establish process to fulfill the staff vaccination requirement (Two Phases)– December 5, 2021**
 - Phase 1: All covered individuals must have received at least their first vaccine by December 5, 2021
 - Staff must receive at least first vaccine before providing any patient care, treatment, or other services for facility
 - Phase 2: Fully vaccinated by January 4, 2022
 - Guidance: If staff has completed primary series by this date, deemed to have met requirement even if 14-day period has not yet completely lapsed
- **Establish process for tracking and securely documenting COVID-19 vaccination status of all covered staff, including any booster doses as recommended by the CDC**
- **Establish process for collecting and evaluating requests for reasonable accommodation to the vaccination requirement in alignment with federal law (medical or sincerely held religious belief)**
 - Must include process for tracking and securing information provided by those requesting exemption
 - For medical contraindications, requires very detailed and specific list of what must be included in request/documentation
- **Establish a process for ensuring the implementation of additional precautions intended to mitigate the transmission and spread of COVID-19 for staff who are not fully vaccinated for COVID-19 (exemption granted) consistent**
- **Contingency plans for those who are not fully vaccinated for COVID-19**



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CMS Interim Final Rule

- Meant to preempt any state law to the contrary (those state laws that prohibit vaccine mandates)
- Meant to be complementary to OSHA Healthcare ETS, OSHA ETS, or Federal Contractor Guidance



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Update from Albany



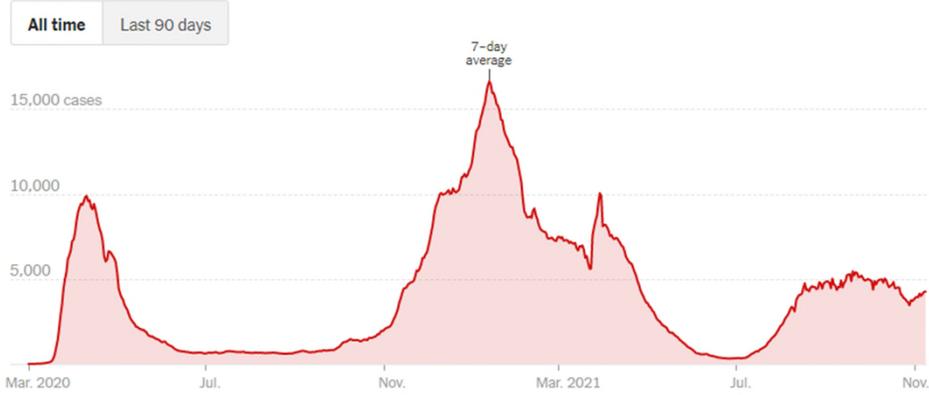
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New reported cases

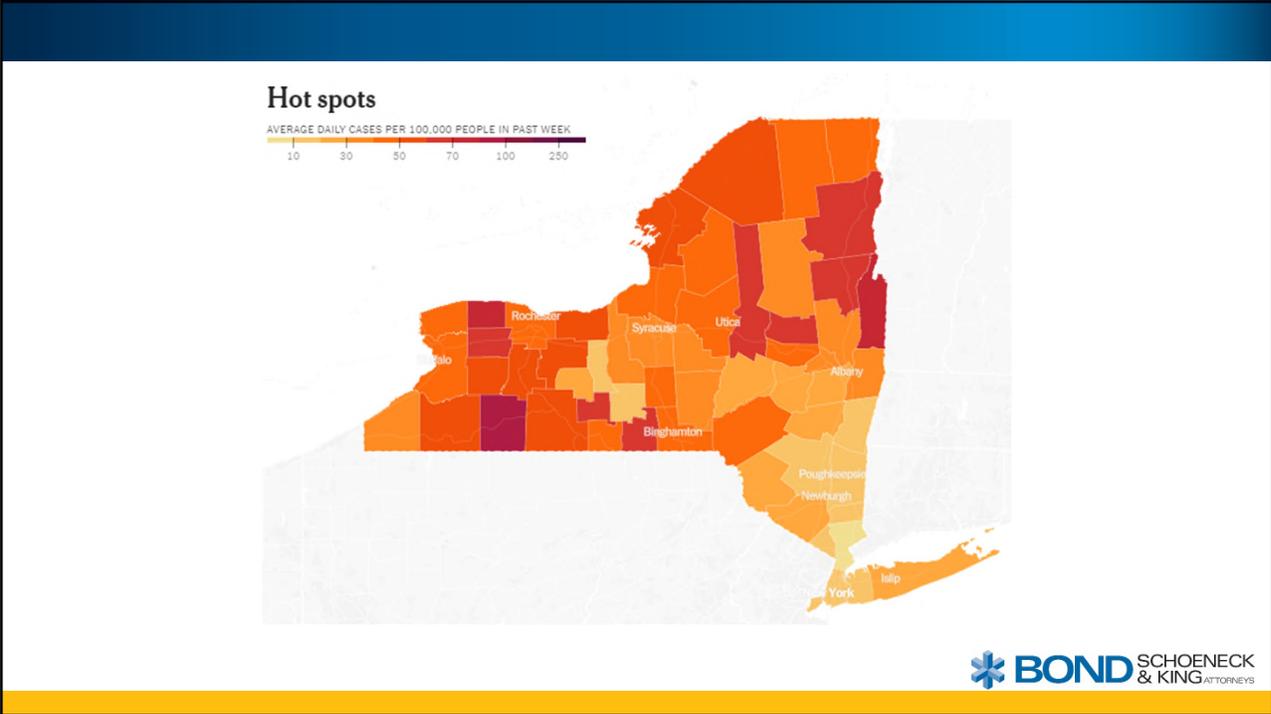


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	DAILY AVG. ON NOV. 1	14-DAY CHANGE
Cases	3,884	-13%
Tests	150,653	+10%
Hospitalized	2,313	-10%
Deaths	34	-6%

	DAILY AVG. ON NOV. 8	14-DAY CHANGE
Cases	4,248	+11%
Tests	138,498	+1%
Hospitalized	2,177	-12%
Deaths	34	-5%

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Vaccination progress

- All New Yorkers:
 - 67% fully vaccinated
 - 75% one dose
- 12 and older:
 - 78% fully vaccinated
 - 87% one dose

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	CASES DAILY AVG.	PER 100,000	14-DAY CHANGE	HOSPITALIZED AVG. PER 100,000	14-DAY CHANGE	DEATHS DAILY AVG.	PER 100,000	FULLY VACCINATED
New York	4,248	22	+11%	11	-12%	33.7	0.17	67%
Allegany ›	39	85	+78%	39	+24%	0.4	0.93	39%
Orleans ›	30	75	+70%	19	+37%	0.4	1.06	50%
Washington ›	45	73	+86%	13	+3%	0.3	0.47	60%
Fulton ›	36	67	+14%	35	-19%	0.1	0.27	49%
Tioga ›	32	66	+31%	33	-11%	0.1	0.30	55%
Schuyler ›	12	65	+102%	20	-17%	0.3	1.60	58%
Herkimer ›	39	64	+39%	24	-13%	0.3	0.47	54%
Genesee ›	36	63	+35%	22	+15%	0.6	1.00	55%
Warren ›	39	61	+32%	17	-1%	0.1	0.22	71%
Essex ›	23	61	+41%	16	-20%	0.1	0.39	65%

Federal Infrastructure Investment and Jobs Act

- \$1.2 trillion infrastructure bill passed over the weekend
- What's in it?
 - \$1.44 billion annually to community projects for pedestrians, cycling, and scooters (another \$200 million to creating rail trails)
 - \$89.9 billion for public transit
 - \$65 billion to broadband: \$42.45 billion state grants, \$14.2 billion for \$30 monthly voucher for low-income Americans
 - \$154 billion to climate programs
 - \$7.5 for EV charging infrastructure
 - \$65 billion to fix/improve electric grid
 - \$5 billion for EV school buses

Vaccine Mandates Overview

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