



2022

BUSINESS IN 2021

WEEKLY WEBINAR SERIES

 **BOND** SCHOENECK
& KING ATTORNEYS

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Introduction



Adam P. Mastroleo
Member
amastroleo@bsk.com
Syracuse, NY

 **BOND** SCHOENECK
& KING ATTORNEYS

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Update from Albany



Caitlin A. Anderson

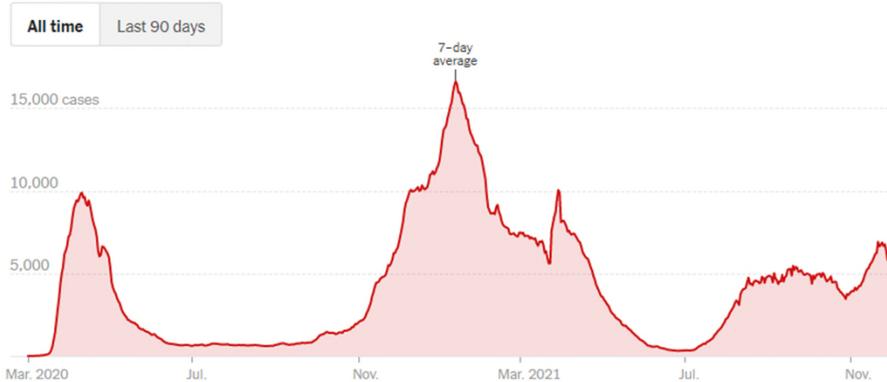
Associate
canderson@bsk.com
Albany, NY



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The New York Times

New reported cases



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	DAILY AVG. ON NOV. 29	14-DAY CHANGE
Cases	6,215	+13%
Tests	132,643	-2%
Hospitalized	2,715	+18%
Deaths	36	+11%

	DAILY AVG. ON DEC. 6	14-DAY CHANGE
Cases	9,363	+41%
Tests	154,000	+14%
Hospitalized	3,506	+30%
Deaths	48	+45%

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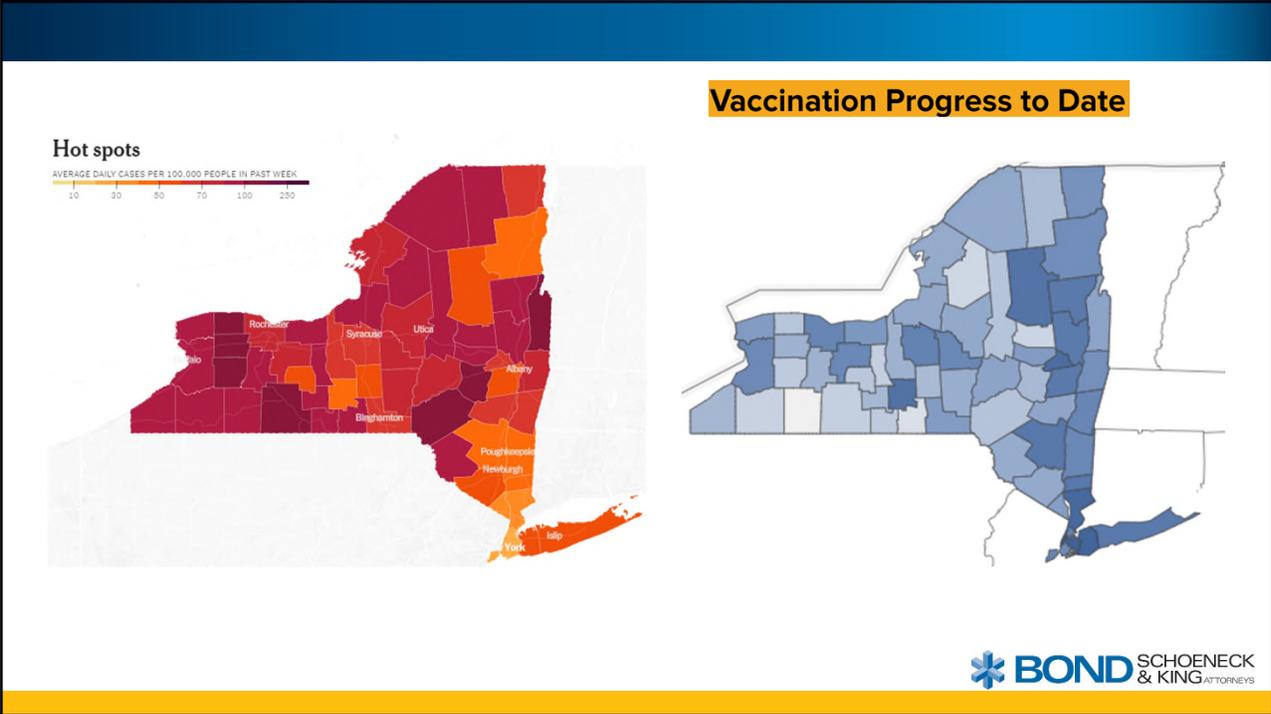
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Vaccination progress

- All New Yorkers:
 - 69% fully vaccinated
 - 79% one dose
- 12 and older:
 - 80% fully vaccinated
 - 90% one dose

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Elective Surgeries Cancelled at 32 Hospitals

<ol style="list-style-type: none"> 1. A.O. Fox Memorial Hospital (Otsego) 2. Albany Medical Center 3. Brooks-TLC (Chautauqua) 4. UPMC Chautauqua 5. Canton-Potsdam 6. Claxton-Hepburn (St. Lawrence) 7. Crouse Hospital (Onondaga) 8. University Hospital SUNY (Onondaga) 9. Upstate University (Onondaga) 10. Erie County Medical Center 11. Mercy Hospital of Buffalo 12. Sisters of Charity Hospital (Erie) 13. F.F. Thompson Hospital (Ontario) 14. Geneva General Hospital (Ontario) 15. Faxton-St. Lukes (Oneida) 16. St. Elizabeth Medical Center (Oneida) 	<ol style="list-style-type: none"> 17. Oneida Health Hospital 18. Glens Falls Hospital 19. Saratoga Hospital 20. Guthrie Cortland Medical Center 21. Highland Hospital (Monroe) 22. Rochester General 23. Strong Memorial (Monroe) 24. Unity Hospital of Rochester 25. Wyoming County Community Hospital 26. Alice Hyde Medical Center (Franklin) 27. Champlain Valley (Clinton) 28. Elizabethtown Community Hospital 29. Little Falls Hospital (Herkimer) 30. Mount St. Marys (Niagara) 31. St. Mary's Healthcare (Montgomery) 32. Oswego Hospital
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Omicron Updates

- 12 confirmed cases in NY; some linked to the Anime NYC convention held from Nov. 19 to Nov. 21.
- What do we know?
 - How much we don't know.
- What do early reports say?
 - South Africa: Moves quickly, but potentially less severe
 - ~25% of COVID tests in South Africa are positive; two weeks ago, had ~2% positive rate

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New International Travel Requirements

- Beginning on December 6, all air passengers, regardless of vaccination status, must show a negative COVID-19 test taken **no more than one day before** to travel into the U.S.

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NYC Vaccine Mandate

- December 27: All employees at private businesses must have received at least one dose.
 - Additional info coming on December 15.
- Key to NYC:
 - Children, December 14: Children 5-1 must show proof of vaccination
 - Adults, December 27: Full vaccination is required.
- Remember: NYC has a new mayor Jan. 1.

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OFCCP Contractor Portal



Hannah K. Redmond

Associate
hredmond@bsk.com
Syracuse, NY



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Background: The OFCCP

- The Office of Federal Contract Compliance Programs (OFCCP) is responsible for ensuring that federal contractors comply with laws and regulations that prohibit discrimination
- Federal contractors that meet certain criteria must develop and maintain Affirmative Action Programs (AAP)

Background: Affirmative Action Program(s)

- AAPs ensure equal opportunities for recruitment, job placement, and advancement without regard to protected characteristics (sex, race, religion, disability or veteran status, etc.)
- AAPs address non-discrimination and outline employers' policies and practices for recruiting and hiring women, minorities, people with disabilities, veterans, etc.
- Annual AAP certifications

Who Must Submit an AAP?

- Supply and service contractors with at least 50 employees

AND

that meet certain monetary contract thresholds:

- Single federal contract of \$50,000+
- OR
- Single federal contract of \$150,000+

- **NOTE:** thresholds are for written AAP requirements only



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The OFCCP Portal

- Last week, the OFCCP revealed its new online platform through which federal contractors must certify that they are meeting the requirement to develop/maintain an AAP
- The portal is formally called the “Affirmative Action Program Verification Interface (AAP-VI)”
- Replaces submission via mail or email
- Creates more efficient system for all



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OFCCP Portal Rollout Timeline

- February 1, 2022 - Registration opens
 - Federal contractors will be able to access the Portal, register their company, verify their company information is accurate
 - The OFCCP will begin outreach to invite registration
- March 31, 2022 - Certification period begins
 - Contractors will be able to certify that they maintain an AAP
- Certification period ends on June 30, 2022
 - Deadline for certifying the status of AAPs

Contractor Portal FAQs

- Along with announcing the new portal, the OFCCP released several FAQs
- Certifying compliance using the portal does not exempt contractors from compliance audits

NYC Updates



Sarah A. Luke

Senior Counsel
sluke@bsk.com
New York, NY



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New York City Update

- “Preemptive Strike” Against Omicron Variant
 - **Employer Mandate**
 - One dose of an approved vaccine by **December 27, 2021**
 - **No** testing alternative
 - Religious and medical exemptions
 - Expect guidance on **December 15, 2021**
 - **Update to “Key to NYC”**
 - Vaccination requirement for dining and indoor entertainment expand to apply to children ages 5 – 11 (one dose of vaccine will be required as of **December 14**)
 - For adults, **full** vaccination will be required as of **December 27, 2021**



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Vaccine Mandate Update and FAQs



Adam P. Mastroleo

Member
amastroleo@bsk.com
Syracuse, NY



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Federal Contractor Mandate

- Who is covered?
 - Do you have a contract with the federal government, or a government contractor, that includes a clause that states that your company will comply with all guidance for contractor or subcontractor workplace locations published by the Safer Federal Workforce Task Force?
 - That's really it.
 - This clause is required in all contracts awarded after Nov. 14.
 - For contracts awarded before Nov 14, if they are extended or any option is exercised, the clause will be inserted at that time.

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Federal Contractor Mandate

- “Covered contractors must ensure that all covered contractor employees are fully vaccinated for COVID-19, unless the employee is legally entitled to an accommodation.”***
- “Covered contractors” – as previously discussed.
- Allows for religious and medical accommodations
- “Covered contractor employees”
 - “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.”

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Covered Contractor Employees/Workplaces

- “Covered Contractor Workplace” – “location controlled by a covered contractor at which any employee of a covered contractor working on or in connection with a covered contract is likely to be present during the period of performance”
- What does this mean practically?
 - Any location at which any employee performing work on or in connection with a covered contract is likely to be present converts the entire workplace into a covered workplace, which means all employees at that workplace—regardless of whether they are working on a covered contract—are subject to the mandate.
 - Employees working entirely from home are the sole exception.

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Federal Contractor Mandate - Deadlines

- “Covered contractor employees must be fully vaccinated no later than January 18, 2022.”
- “Fully vaccinated” is two weeks after last dose of two-dose vaccine, or two weeks after single-dose vaccine.

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Federal Contractor Mandate - Status

- Stay of Mandate in Kentucky Federal Court
 - Applies to Kentucky, Ohio and Tennessee
- No stay in any other States

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OSHA Emergency Temporary Standard (ETS)

- Who is covered?
 - Employers with 100+ employees
 - Exceptions:
 - Employers covered by the Federal Contractor Mandate
 - Employers covered by the OSHA Healthcare ETS

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OSHA Emergency Temporary Standard (ETS)

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</p> <p>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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OSHA ETS - Status

- Stay of Mandate Nationwide by 5th Circuit Court of Appeals
- OSHA says that it is not enforcing pending outcome of litigation
- 6th Circuit Court of Appeals has been chosen to decide

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CMS Rule for Healthcare Workers

- Centers for Medicare and Medicaid Services (CMS)
- Who is Covered?
 - Healthcare services, support or suppliers that are regulated by CMS, including:
 - Hospitals
 - Ambulatory surgery centers
 - Dialysis facilities
 - Home health agencies
 - Clinics, rehabilitation agencies and public agencies as providers of outpatient physical therapy and speech-language pathology services
 - Psychiatric residential treatment facilities
 - Long-term care facilities, including nursing homes

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CMS Rule for Healthcare Workers

- Who is Covered? (cont'd)
 - Healthcare services, support or suppliers that are regulated by CMS, including:
 - Programs of all-inclusive care for the elderly
 - Home infusion therapy suppliers
 - Rural health clinics
 - End-stage renal disease facilities

**Only Medicare and Medicaid certified providers. Does not apply to other healthcare entities not regulated by CMS, such as physician offices

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CMS Rule for Healthcare Workers

- Who must be vaccinated?
 - All current and future employees, whether clinical or non-clinical, including:
 - Doctors, nurses, medical staff
 - Students
 - Trainees
 - Volunteers
 - Those who are not involved in direct patient, resident or client care
 - Anyone who provides treatment or services under a contract or other arrangements

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CMS Rule for Healthcare Workers - Status

- Eastern District of Missouri and Western District of Louisiana issued preliminary injunctions
- CMS officially suspended mandate following the two court orders:
 - “The Centers for Medicare & Medicaid Services (CMS) will not enforce the new rule regarding vaccination of health care workers . . . While there are court-ordered injunctions in place prohibiting enforcement of this provision.”

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Update from Albany

Caiti Anderson, canderson@bsk.com

OFCCP Contractor Portal

Hannah Redmond, hredmond@bsk.com

NYC Updates

Sarah Luke, sluke@bsk.com

Vaccine Mandate Update and FAQs

Adam Mastroleo, amastroleo@bsk.com



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