

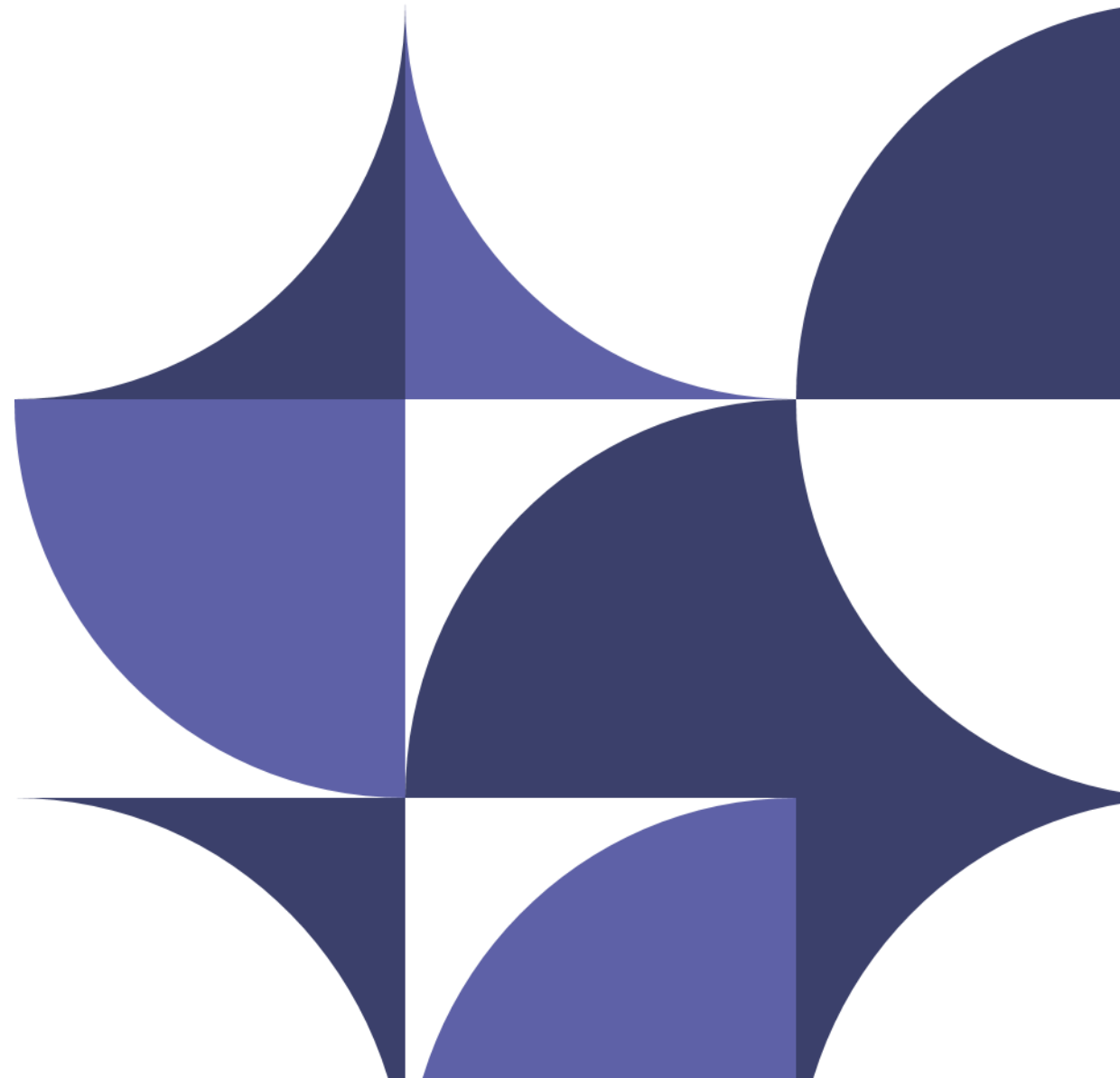


Vaccine Mandates, Proof of Vaccination, and Other Return to Work Updates in New York

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Seyfarth Shaw LLP

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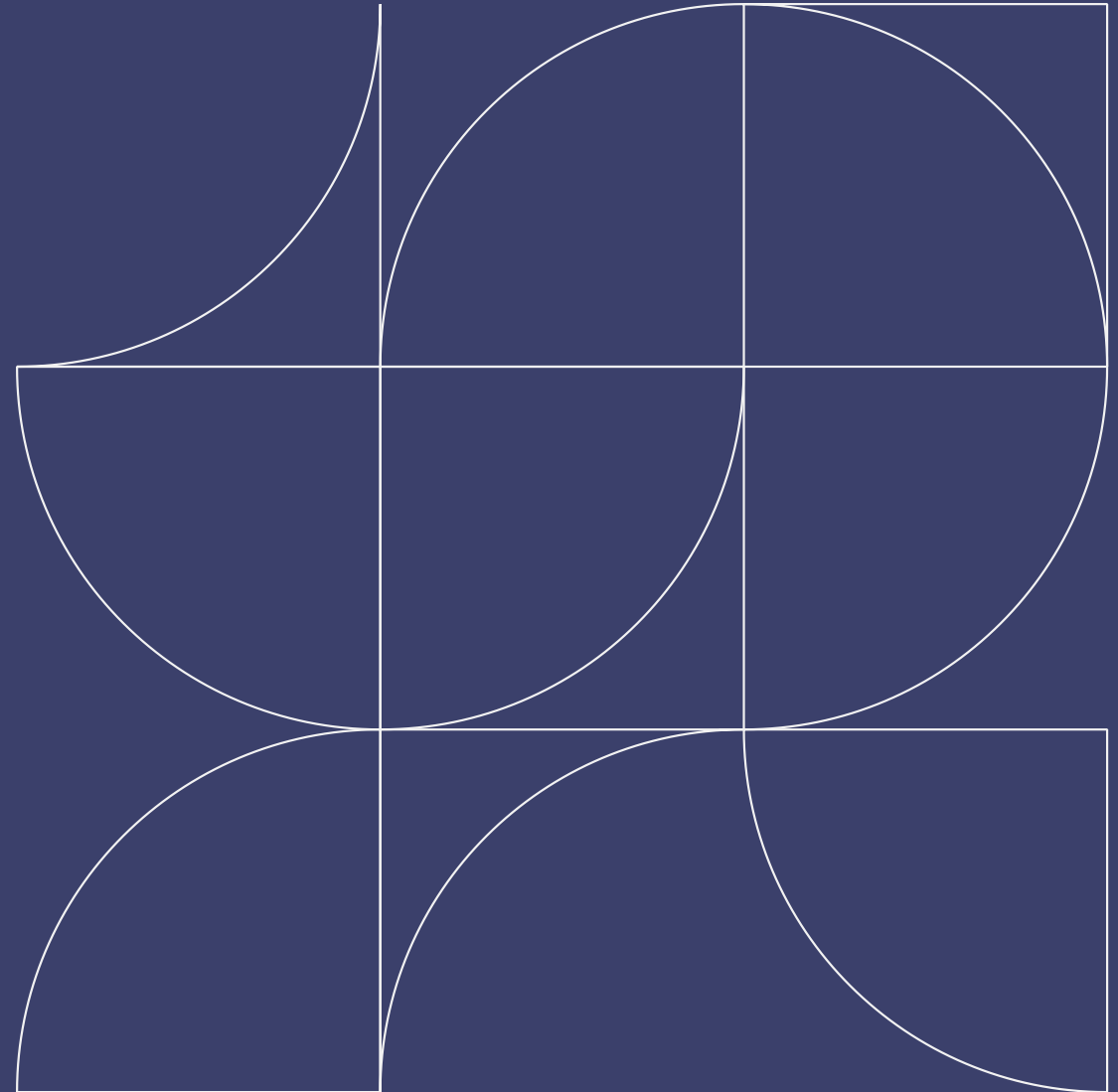
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Agenda

- 01** Overview of COVID Vaccines and the Workplace
- 02** Mandating Proof of Vaccination and Current NY COVID Guidance
- 03** Sick Leave Updates
- 04** NY 'Hero Act'

Overview of COVID Vaccines and the Workplace



Mandating Vaccinations

MAY EMPLOYERS MANDATE THAT EMPLOYEES GET VACCINATED?

“TO BE OR NOT TO BE, THAT IS THE QUESTION” (VACCINATED THAT IS)! Shakespeare’s Hamlet.

EEOC: MANDATORY VACCINATIONS ARE PERMISSIBLE, IF:

- EMPLOYEES RECEIVE THE VACCINATION FROM AN INDEPENDENT THIRD PARTY..
- IF NOT PROVIDED BY INDEPENDENT THIRD PARTY, THE EMPLOYER MUST ESTABLISH **BUSINESS NECESSITY, BECAUSE:**
 - pre-screening questions if asked by the employer are considered a disability related medical exam under the ADA and the employer must show the screening is “job related and consistent with business necessity”, that is, employees not vaccinated pose a direct threat.
 - this will be a difficult burden for most employers to meet.

Vaccinations Cont.

Caveat: “ Sit Vaccinator Cave” --- Let the vaccinator beware--

- the Food, Drug and Cosmetic Act effectively states that ‘ individuals can refuse the vaccine’ because it has been approved for “ emergency use only” (“EUA”).
- the EUA has given rise to several lawsuits that are currently pending in California, New Mexico, and Pennsylvania. According to the plaintiff in the case in New Mexico, “ the applicable statute states that individuals to whom such vaccines are administered must be informed of the known and potential benefits and risks of its use “and ***of the option to accept or refuse administration of the [vaccine]...***”
- arguably, therefore, there is a question in the minds of some lawyers regarding whether vaccines can be mandated. This could be the reason why less than 5 % of employers are mandating vaccinations for their employees, and only 5 % more said they will mandate should the FDA give full approval.

Note: full FDA approval should take away the risk of litigation. On May 10, 2021 Pfizer and BioNTech applied for such approval for its vaccine.

According to a study by researchers at Yale University and Duke University, the full FDA approval process in the past has taken an average of 12 months.

Vaccinations Cont.

- In considering whether to mandate vaccinations, employers must also consider the plethora of legislation introduced around the country. Many of these bills, if passed, would either prohibit employers from requiring vaccinations; prohibit adverse action against applicants and employees for refusing to be vaccinated; prohibit adverse action based on vaccination status.
- Illustrative list of states with pending legislation, most of which was introduced in 2021:
 - Arizona, California, Colorado, Connecticut, Florida, Illinois, Michigan, Minnesota, New York, Pennsylvania, Texas, Washington.
 - Executive Orders – Arizona, Florida, Idaho, Montana, South Carolina, Texas, and South Dakota – "have issued executive orders prohibiting vaccine passports/requirements. Most prohibit state/local governments from requiring citizens to provide Covid-19 vaccination status to receive services or enter certain areas.

Vaccinations Cont.

KEY QUESTION FOR EMPLOYERS REGARDING WHETHER TO MANDATE VACCINATIONS:

- Is it worth waiting for one or more of the vaccines to be fully approved by the FDA (as opposed to authorized under EUA status) before deciding about a mandate?

IF AN EMPLOYER'S DECISION IS TO MANDATE VACCINATIONS :

- Have employees receive the vaccination from an independent third party;
- Ensure compliance with the ADA's and Title VII's accommodation requirements -- for disabilities and religion, respectively.

If employee cannot get vaccinated because of a qualifying disability, he/she may be entitled to an accommodation under the ADA:

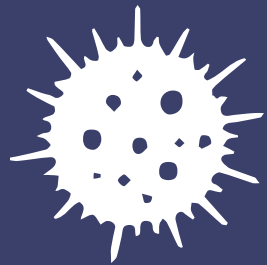
Direct threat assessment: employer must determine that the unvaccinated person exposes others to the virus at the worksite: cannot exclude even if direct threat, unless no reasonable accommodation is available that would eliminate or reduce the risk of unvaccinated employee no longer posing a direct threat.

Vaccinations Cont.



- Examples of Conditions for which accommodations may be required:
 - Anxiety
 - Allergy
 - Autoimmune Disorder
 - Other conditions (Note: fear of being vaccinated is **not** a covered disability, but anxiety may be)
- Employer is required to follow standard ADA Process:
 - Interactive Assessment/Individualized Assessment (in NY, “cooperative dialogue”)
 - supporting medical documentation
 - cannot automatically terminate

Vaccinations Cont.



- Possible Reasonable Accommodations: masks/face coverings, other PPE; testing; social distancing; remote work; alternative work hours (less exposure); leave of absence; combination of the above.

Vaccinations Cont.



REASONABLE ACCOMMODATIONS/RELIGIOUS ISSUES:

- Employee must request accommodation; must have a “sincerely held religious belief” that precludes vaccination; EEOC says employers generally should not question religious beliefs-
Note: being an “anti-vaxxer” is not a religious belief.
- Working remotely is an obvious though not necessarily feasible accommodation.
- Employers still have an undue hardship defense-- employer must prove, however, that hardship can’t be averted through reasonable accommodations (social distancing, masks, etc.)

Vaccinations Cont.

- OPTIONS FOR EMPLOYERS:

- Mandate vaccinations, while considering accommodations for the disabled/religion. (Require proof of vaccination from all employees– e.g., vaccination card reviewed by HR.)

With this option: require masks to be worn by **all employees** in open areas and areas where social distancing is not possible; **or only** for employees not vaccinated.

- Voluntary program: inform employees they will have to produce either a vaccine card to enter the workplace, or proof of a negative test result. (Note: employers following this option usually require a weekly or more frequent negative test result to be produced).

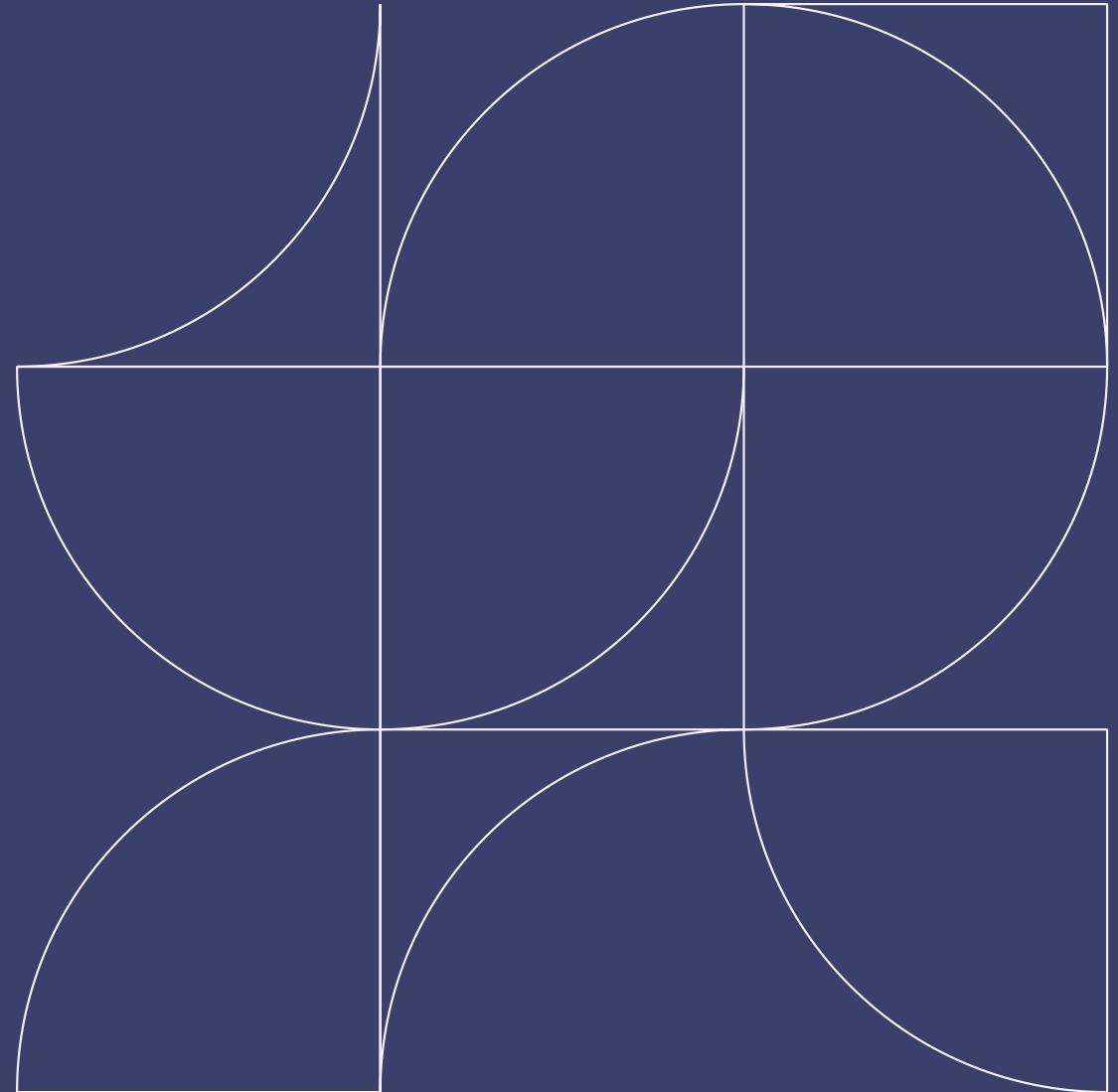
Same issue arises with respect to masks and distinguishing those vaccinated from those who aren't.

Vaccinations Cont.

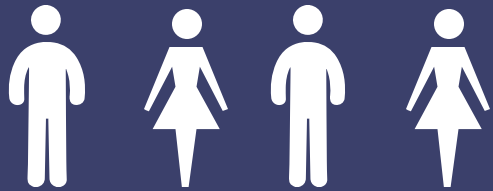
OTHER VACCINATION AND DISABILITY RELATED ISSUES:

- Pregnancy: Note: CDC states that trying to become pregnant, currently pregnant, wanting to get pregnant in the future: **no evidence that Covid-19 vaccinations cause any problems with pregnancy including development of the placenta; further, no evidence that it causes fertility problems.**
- **CDC: no evidence that vaccinations alter or interact with DNA in any way.**
- May not ask the reason for not getting vaccinated -- if an employer does, inquiry must meet the “job related and consistent with business necessity standard”.

Mandating Proof of Vaccination and Current NY COVID Guidance



Can multi-jurisdictional employers mandate proof of vaccination across the country?



National Framework

- ***Federal Level***

- Biden Administration indicated it does not intend to implement a COVID passport or create a vaccination database.

- ***Prohibiting proof of vaccination***

- ***Reasons cited:*** concerns proof violates medical privacy rights, prejudice those unable to receive the vaccine, slow economic recovery, and cause division

- ***Trends***

- ***Mandating proof of vaccination***

Can employers mandate proof of vaccination in New York?

New York

- Can ask for proof of vaccination (voluntary or mandatory)
 - EEOC made clear proof of vaccination is not a disability-related inquiry
 - Type of proof = CDC vaccination card, medical appointment, Excelsior pass or other digital pass, or self-reporting of vaccination status (e.g. honor system)
 - Remind employees when submitting proof do not provide medical information
 - Can apply to employees, independent contractors, visitors, customers
 - ADA / NYSHRL / NYCHRL compliant
- Benefits:
 - Mask Mandates
 - Quarantine Guidelines
 - Safety assurances to employees and patrons

Recent NY Updates



NY Implements CDC Mask Guidance

- Effective Date = May 19th
- Rule:
 - fully vaccinated individuals do not need to wear masks or be socially distanced, but unvaccinated individuals must continue to wear masks and be socially distanced in most settings*

** applies in most commercial settings (retail, food services, offices, gyms, amusement/entertainment, hair salons/barber shops/personal care settings).*

*** does not apply to pre-k – 12th grade schools, public transit, homeless shelters, correctional facilities, nursing homes, and healthcare settings*

- can still require masks and six feet of social distancing for employees and/or patrons
 - The Department of Health strongly recommends masks and six feet of social distancing in indoor settings where vaccination status of individuals is unknown.

NY's Mask Mandate Cont.

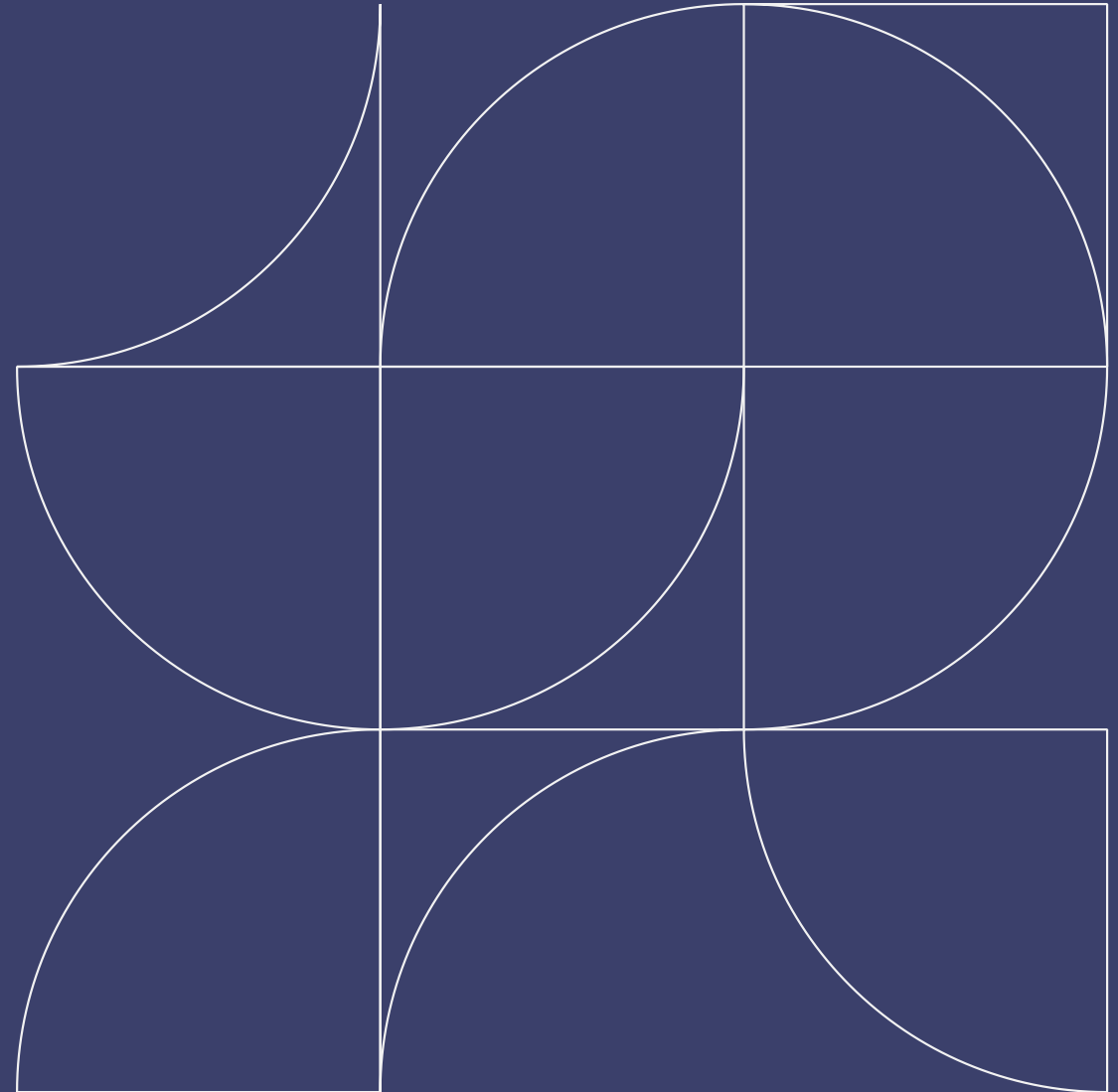
Businesses operating below the State's Social gathering Limit of 250 indoors or 500 outdoors

- CDC guidance → fully vaccinated do not need to wear masks or be social distanced but unvaccinated must wear masks and be socially distanced
 - Proof of vaccination = paper form, digital application, Excelsior Pass, or self-reporting (e.g., honor system)
 - Whole establishment or separate, designated part
- Not following CDC guidance masks and social distancing of 6 ft.

Operating above the social gathering limit (e.g., event venues, sports, performing arts and entertainment, catering, conventions, etc.)

- Capacity = enforceable
- Unvaccinated / unknown status = 6 ft. apart, assigned section, masks required (exceptions)
- Fully vaccinated = no social distancing and no masks in assigned section
- Children

Sick Leave Updates



NY COVID-19 Sick Leave



- **Amount and Types of Leave:**
 - **10 or less employees and net income of \$1 million or less as of 1/1/2020:** Employees are entitled to unpaid sick leave for the entire period of quarantine or isolation, and **employees will be eligible for paid family leave and disability benefits.**
 - **11-99 employees OR 10 or less employees and net income greater than \$1 million as of 1/1/2020:** Employees are entitled to 5 (calendar) days of paid sick leave, and unpaid leave for remainder of the quarantine or isolation. **After exhausting the 5 days of paid sick leave, employees are eligible for paid family leave and disability benefits.**
 - **100 or more employees as of 1/1/2020:** 14 (calendar) days of paid sick leave. **Appears that no paid family benefits are available, with potential exception for care of child subject to covered order.**

New York State COVID-19 PSL



Updated January 2021 Guidance

- New guidance confirms NYDOL's interpretation of a multiple order cap of **three** instances of NYS COVID PSL under certain circumstances
- A positive test is sufficient “proof” of need for leave
- If employer sends employee home due to exposure, NYDOL guidance mandates paid leave

NY Paid Family Leave COVID-19 Updates



- **Qualifying Reasons for Use:**

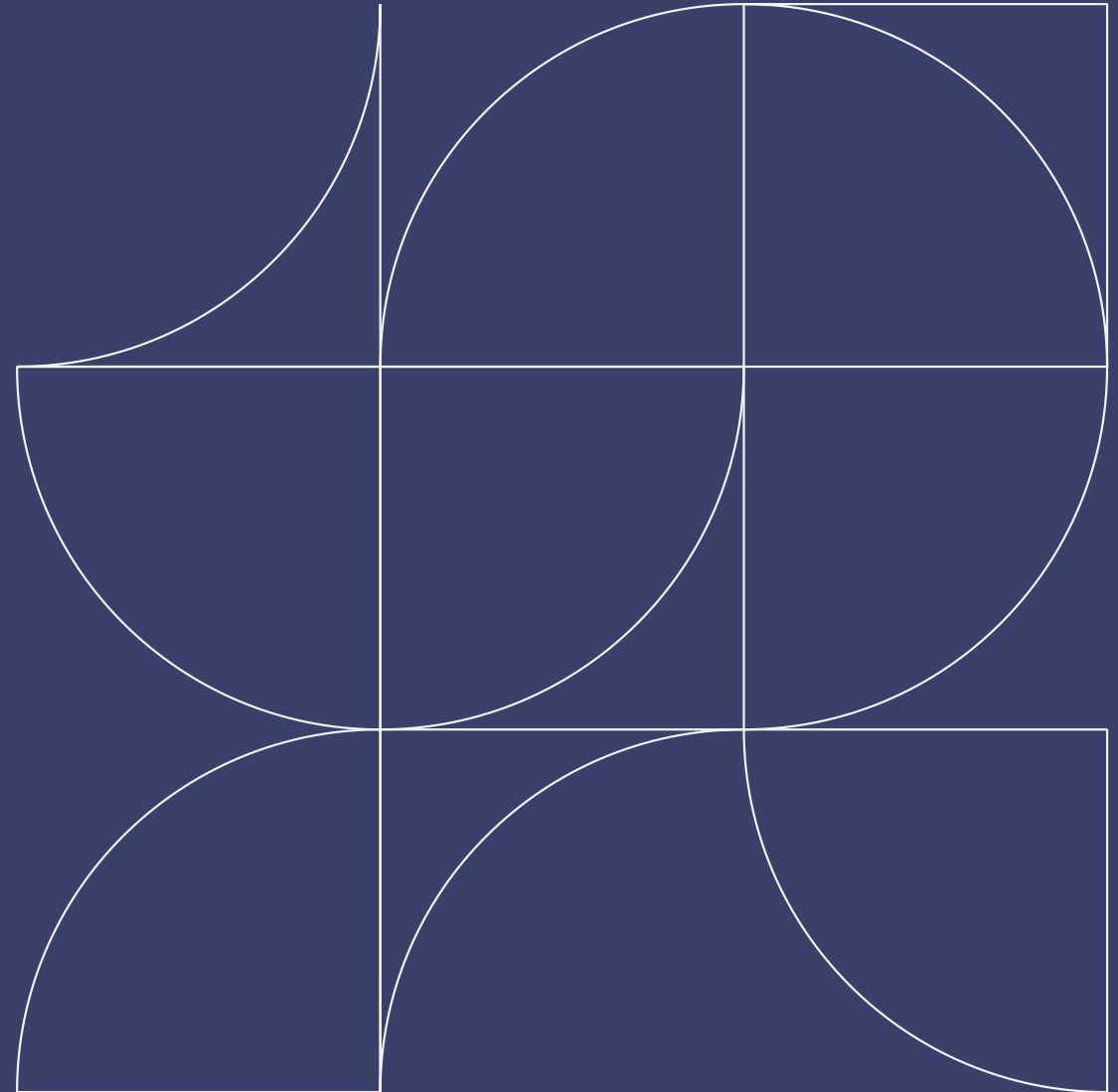
- Employee must be subject to a mandatory or precautionary order of quarantine or isolation issued by the state of New York, the department of health, local board of health, or any governmental entity duly authorized to issue such order due to COVID-19.
- **Expansion of paid family leave:** Employee can use **paid family leave to provide care for a minor dependent child of the employee** who is subject to a mandatory or precautionary order of quarantine or isolation issued by the state, the department of health, a local board of health, or any government entity duly authorized to issue such order due to COVID-19.

New York COVID-19 Vaccine Paid Leave Law



- Effective March 12, 2021 (not effective retroactively); sunsets on December 31, 2022
- Paid leave of absence for a sufficient period of time, not to exceed four hours, per vaccine injection to be vaccinated for COVID-19.
- Employees must be paid their regular rate of pay.
- COVID-19 vaccine paid leave is required in addition to any other paid leave to which the employee is entitled.
- Prohibits discrimination or retaliation.
- While notice and documentation requirements are permissible, the law provides no guidance as to what “sufficient” notice or documentation may be.

NY Hero Act



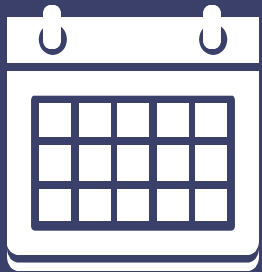


NY Hero Act

What is the NY Hero Act?

- 3 Main Components
 - (1) Disease Prevention Safety Protocols
 - (2) Workplace Safety Committees
 - (3) Liability Risks
- Legislative Process
- Proposed Amendments

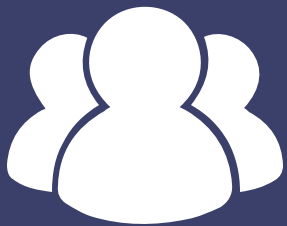
NY Hero Act (Current)



Disease Prevention Safety Protocols

- NY DOL must create safety protocols within 30 days (*i.e.*, by June 4)
- Industry-specific
- Must address several topics, including (1) health screenings, (2) masks, (3) PPE, (4) social distancing, and (5) cleaning and disinfecting protocols
- Either adopt the DOL-issued standard that is relevant to their industry and workforce, **OR** establish disease prevention plan that meets or exceeds the requirements of the DOL-issued standard
- Posting/Distribution Requirements

NY Hero Act (Current)



Workplace Safety Committees

- The law **requires** employers **to permit** employees to form a joint labor-management workplace safety committee with employee and employer designees
- Committee jurisdiction
 - raise workplace health and safety concerns,
 - review employer workplace safety policies,
 - participate in government site visits relating to workplace health and safety standards
 - attend during working hours committee meetings and trainings related to workplace health and safety standards

NY Hero Act (Current)



Liability Risks

- **Non-Retaliation.** Barred from retaliating for (i) reporting violations of employer's standard, (ii) reporting concerns of exposure to such diseases, and (iii) refusing to work where employee reasonably believes in good faith that workplace exposes them to an unreasonable risk of exposure
- **Penalties.** Authorizes DOL to assess penalties to a non-compliant employer of at least \$50 per day for failing to adopt a relevant standard or disease prevention plan, and a fine of \$1,000-\$10,000 for failing to comply with the plan.
- **Private Right of Action.** Grants employees the right to bring a lawsuit seeking injunctive relief against an employer for failing to comply with the above provisions of the law.
- **Fees and Liquidated Damages.** Courts may enjoin employer's conduct and award plaintiff attorneys' fees and costs and liquidated damages up to \$20,000 unless the employer demonstrates good faith attempts to comply with the standard.



NY Hero Act (Current)

Legislative Process

- Cuomo Signed Legislation on 5/5/2021
 - DOL must issue model protocols by **6/4/2021**
 - Workplace safety committees are effective **11/1/2021**
 - Liability provisions are effective **6/4/2021**
- **BUT**...Cuomo announced agreement with legislature that there needs to be amendments to:
 - 1) include more specific instructions and timelines for the DOL and employers to enact these safety standards
 - 2) provide an opportunity for employers to immediately cure violations
 - 3) limit litigation to situations where employers are “acting in bad faith and failing to cure deficiencies”

NY Hero Act (Proposed Changes)

Proposed Amendments

- **Extend Deadline for DOL from 30 Days to 60 Days.** The current law requires the DOL to create industry-specific model safety protocols by June 4, 2021. The amendments would give the DOL 30 extra days, to July 5.
- **Employers Can Wait Until DOL Enacts Standards.** Employers will have 30 days after the DOL creates its model industry-specific protocols to create a disease prevention plan. Additionally, employers would have 60 days following the DOL publication to provide such safety protocols to their employees.
- **Jurisdiction of Workplace Safety Committee Narrowed to Safety and Health Issues.** Clarify that committees can only “[r]eview any policy put in place in the workplace required by any provision of this chapter relating to occupational safety and health and provide feedback to such policy in a manner consistent with any provision of law.”
- **Big Changes to Available Damages.**
 - No liquidated damages
 - Court may award employer with reasonable attorneys’ fees if employee’s lawsuit was “frivolous”
- **Opportunity to Cure and Limits on Suit.**
 - 30 days’ notice to cure
 - 6 months Statue of Limitations

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Q&A

thank you

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