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REGULATORY UPDATE

Lunch with a Lawyer
June 16 2021


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NEW YORK UPDATE

“New York State’s health guidance and industry specific guidelines are now **optional** across commercial and social settings.”-- DOH Website

<https://coronavirus.health.ny.gov/home>

WHAT ARE THE BASICS?

- State's COVID-19 Restrictions and New York Forward Industry Guidance Lifted Across Commercial Settings, including Retail, Food Services, Offices, Gyms and Fitness Centers, Amusement and Family Entertainment, Hair Salons, Barber Shops, Personal Care Services, Among Others
- Unvaccinated Individuals Responsible for Continuing to Wear a Mask, Per Federal CDC Guidance
- Large-Scale Indoor Events Venues, Pre-K to 12 Schools, Public Transit, Homeless Shelters, Correctional Facilities, Nursing Homes and Health Care Settings Must Still Adhere to Existing COVID-19 Health Protocols Per CDC Guidelines

Specifically—What Goes Away?

- social gathering limits
- capacity restrictions
- social distancing
- cleaning and disinfection
- health screening
- contact information for tracing

WHAT ABOUT MASKS??

https://www.governor.ny.gov/sites/default/files/2021-05/NYS_CDCGuidance_Summary.pdf

- NY is defaulting to the CDC and OSHA guidance:
 - Masks still required for unvaccinated individuals in workplaces and everywhere else indoors



PA CONSTITUTIONAL AMENDMENT

- Legislature may end governor's disaster emergency declaration with simple majority
- Governor's disaster emergency automatically end after 21 days unless extended by legislature

WHAT DOES THIS MEAN FOR EMPLOYERS?

- Mask mandate (even for unvaccinated) end sooner than CDC recommendation?
- Employers may have local laws or declarations
- Employers may need their own policies



OSHA UPDATED GUIDANCE

[Osha.gov/coronavirus/faqs](https://www.osha.gov/coronavirus/faqs)

ADVERSE REACTIONS AND RECORD KEEPING

- DOL and OSHA, as well as other federal agencies, are working diligently to encourage COVID-19 vaccinations. OSHA does not wish to have any appearance of discouraging workers from receiving COVID-19 vaccination, and also does not wish to disincentivize employers' vaccination efforts. As a result, OSHA will not enforce 29 CFR 1904's recording requirements to require any employers to record worker side effects from COVID-19 vaccination through May 2022. We will reevaluate the agency's position at that time to determine the best course of action moving forward.

HAZARDOUS COMMUNICATIONS PROGRAM

- If you are using new or different cleaners in the workplace, you may need to have a program
- September 21, OSHA Holding Program on Proposed New Rules

EMERGENCY TEMPORARY ORDER FOR HEALTHCARE

<https://www.osha.gov/sites/default/files/ovid-19-healthcare-ets-reg-text.pdf>

- Cover protective measures in the healthcare setting
- Covers Respirator Program (i.e. N-95 Masks)

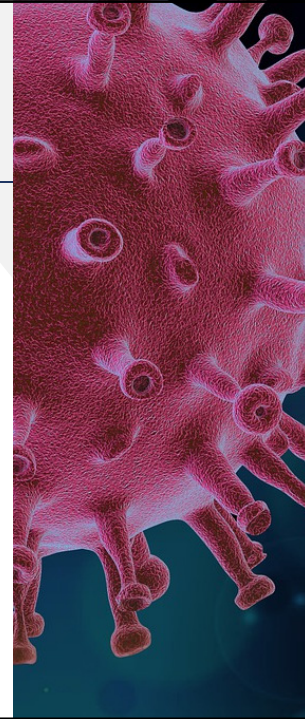


KNOW YOUR MASKS



UPDATED GUIDANCE FOR NON-HEALTHCARE

- Focus of protection is on unvaccinated workers and “at-risk” workers
- Employers should “encourage” vaccination
- <https://www.osha.gov/coronavirus/safework>



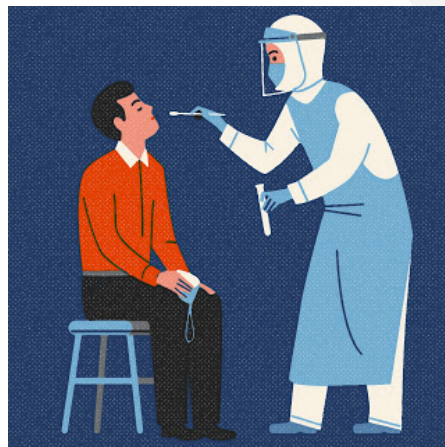
OSHA GUIDANCE

- Paid Time off for Vaccination
- Continue contact tracing quarantines
- Physical distancing for unvaccinated
- Provide face coverings or surgical masks
- Train workers on your policies
- Have unvaccinated customers, visitors or guests wear face coverings

OSHA GUIDANCE cont.

- Cleaning and disinfection
- Ventilation systems
- Record and report infections and deaths
- Prevent retaliation for complaints
- Follow other OSHA standards

EEOC UPDATED GUIDANCE



Can an Employer Require Employees “physically Entering the workplace” to be vaccinated for covid-19?

- Yes. If job related and consistent with business necessity
- This means the employee poses a “direct threat” to the health and safety of others
- Must Perform “Reasonable Accommodation” analysis

How to Determine Direct Threat?

- Level of Community Spread
- Statements from CDC
- Information from Employee Healthcare Provider
- Work Environment (indoors v outdoors, ventilation, etc.)
- Contact with others
- Other Safety measures

WHAT ACCOMMODATIONS MUST EMPLOYER CONSIDER?

- Unvaccinated worker wearing a mask and distancing
- Modified shift
- Periodic COVID-19 Testing
- Telework
- Reassignment

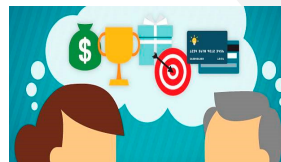
HOW CAN AN EMPLOYER “ENCOURAGE” VACCINATION?

- Education
- Incentives
- Workplace Vaccination Programs
- Appointment Assistance



WHAT’S THE DEAL WITH INCENTIVES?

- Employer may offer incentives for those providing information about their vaccination status
- May offer incentives for those who get vaccinated through an on-site program (but be careful is the on-site program is limited)
- May offer incentives for proof of family member vaccination from 3rd party, BUT not employer program
- Incentive for Employer Program Must Be Small- Not Coercive



WHAT ABOUT CONFIDENTIALITY OF VACCINATION STATUS?



- Employer questions regarding vaccination status are not covered by HIPAA
- It is legal to ask employees to provide proof of vaccination status (not a medical inquiry)
- It is Confidential Medical Information under the ADA once you have their vaccination status.

WHAT ELSE TO CONSIDER?

Disparate impact based on barrier to receiving COVID-19 Vaccination

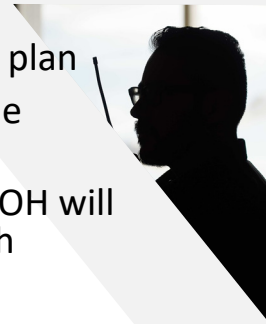


HEROES ACT



NY HEROES ACT

- Requires Employers to develop safety plan
 - Airborne infectious diseases in the workplace
 - Commissioner of Labor and NY DOH will develop model standards for each industry
- Requires Employers to develop safety committee which includes employees
- Non-retaliation provisions



LABOR LAW 218-B REQUIREMENTS

- Step 1
 - Assess the Current risk
- Step 2
 - Create a Plan
 - Health Screenings
 - Face Coverings
 - PPE
 - Handwashing and breaks
 - Cleaning
 - Social distancing

LABOR LAW 218-B CONT.

- Need to address mandatory or precautionary orders of isolation or quarantine
- Engineering controls (air flow)
- Compliance and designation of enforcement
- “Verbal” Training


COMMISSIONER'S MODEL PLAN V. PLAN DEVELOPED BY THE EMPLOYER

- Must Include Employee Input
- Use an Interim Plan?



WHAT ELSE?

- Anti-Retaliation Provisions
- Provide a Copy to Employees and New Hires
- Post it and add to the Employee Handbook



ENFORCEMENT?

- Fines
- Private Right of Action- Violation that “creates a substantial probability that death or serious physical harm could result” (damages plus attorneys’ fees and liquidated damages)
- Frivolous Counterclaim provision

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27-D WORKPLACE SAFETY COMMITTEE

- At least 2/3 non-supervisory employees
- Selected by non-supervisory employees
- Co-chaired by employer and non-supervisor designees
- May need separate committees at separate sites

27-D POWERS OF THE WORKPLACE SAFETY COMMITTEE

- Raise concerns
- Review any policy required by this law OR Worker's Comp. law
- Participate in site visits by government official (OSHA)
- Review any report by the employer
- Regularly schedule meeting during work hours at least once a quarter

27-D SAFETY COMMITTEE-WHAT ELSE?

- Permit safety committee designees to attend training without loss of pay regarding safety committees
- Non-retaliation




SOME THOUGHTS


- Look at Your Re-Opening Plan
- Your Policy May Need Versions, Revisions, or Special Provisions
- Plan for the Committee Early
- Consider Making It an “Interim” Policy (pending release of the Commissioner’s Guidance)



THERE ARE SO MANY QUESTIONS!



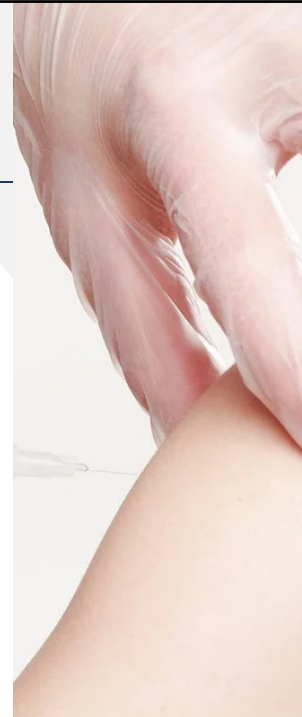
VACCINES



PAID LEAVE FOR VACCINES

NY VACCINE LEAVE

- Labor Law 196-c
- Up to 4 hrs. per shot
- Paid at Regular Rate
- Cannot Replace Other Leave
 - <https://www.nysenate.gov/legislation/bills/2021/S2588>



FAMILIES FIRST ACT EXTENSION

- Extended through September 30, 2021
- Voluntary for Employers under 500 employees, but can still receive tax credit
- New bank of 10 days of emergency paid sick leave for employees starts April 1
- Must provide to all employees (including part-time) if you are claiming the tax credit

FAMILIES FIRST ACT EXTENSION

- self-isolation because of a COVID-19 diagnosis;
- to obtain a medical diagnosis or care when experiencing COVID-19 symptoms;
- because a health official or health care provider has recommended quarantine;
- to care for a family member with COVID-19 or who is seeking diagnosis/care;
- to care for a family member in quarantine;
- when a child's school or childcare provider is unavailable because of COVID-19;
- **to get a COVID-19 vaccine; and**
- **to recover from adverse reactions to the vaccine.**

FFCRA-EFMLA

- Expands tax credits for emergency FMLA leave arising from any of the reasons
- The Rescue Plan also removes the two week waiting period on emergency FMLA leave
- Raises the aggregate cap on emergency FMLA leave from \$10,000 to \$12,000.

OTHER LEAVES?

- NY Paid Sick Leave
- NY Paid Family Leave
- FMLA
- ADA Accommodation
- NY COVID Leave ?????*



WAGE AND HOUR CHANGES IN PA

- Increases in Minimum Weekly Salary for Exempt Employees- Oct. 2021
- Philadelphia- Restrictions on Credit History, Ban the Box





COBRA SUBSIDIES

COBRA SUBSIDY BASICS

- Individuals eligible for COBRA coverage due to either a reduction in hours or an involuntary termination of employment
- April 1, 2021, to Sept. 30, 2021
- Even for individuals who discontinued or never elected COBRA
- Does not apply to individuals terminated for “gross misconduct”—this is not ordinary negligence or poor performance

COBRA SUBSIDY—TAX CREDIT

<https://www.irs.gov/pub/irs-drop/n-21-31.pdf>

- Need to get certification from employee
- payroll tax credit equal to the premium payee for the COBRA coverage provided to AEIs. The tax credit is a refundable credit applied against the employer's portion of Medicare taxes.

US DOL WITHDRAWAL OF GUIDANCE

- Independent Contractor Guidance
- Truckers Sleeping in Berths
- Tip Regulation



AND . . .

- EEOC Announced the opening of data collection for the EEO-1
- April 26-July 19
- <https://www.eeoc.gov/employers/eeo-1-data-collection>



YOUR QUESTIONS

