

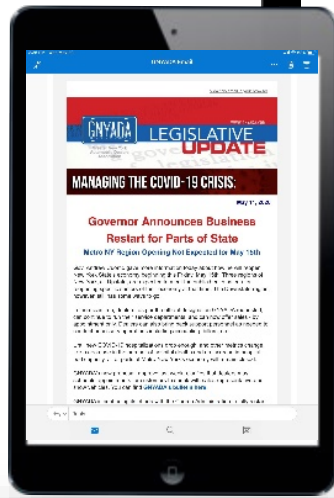
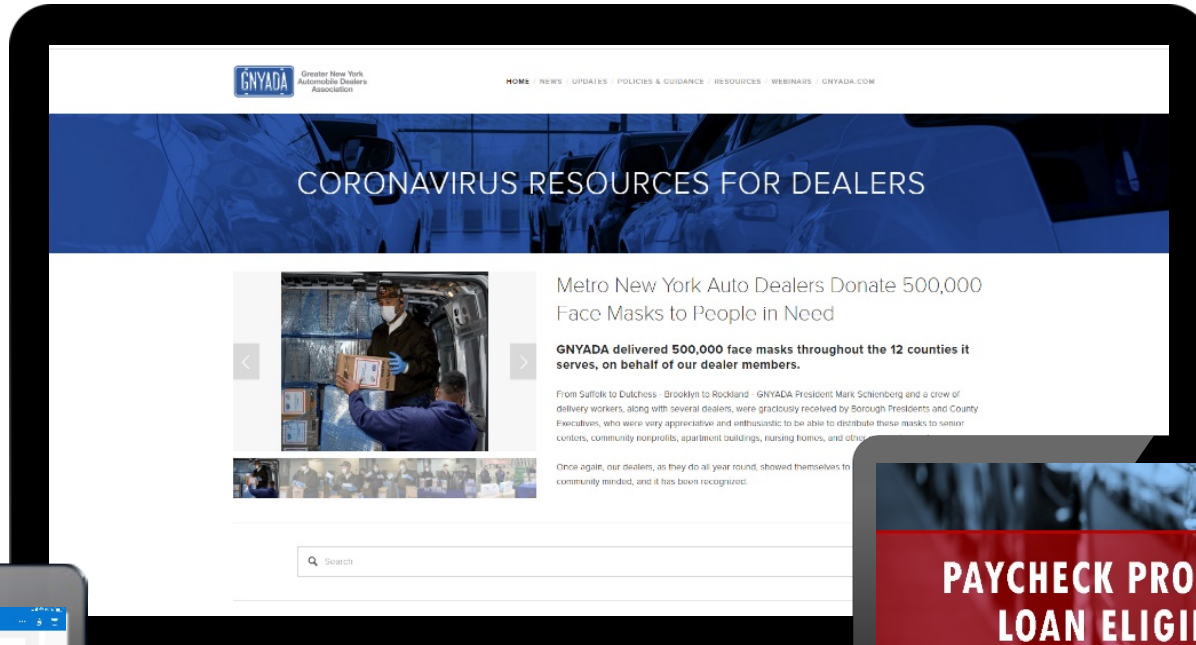


**Greater New York  
Automobile Dealers  
Association**



*Bagels with  
Bielber*









# Mandating COVID Vaccines Will You? Should You?

February 4, 2021

With us today...



Christopher Valentino, Esq.  
Jackson Lewis

JacksonLewis



# Can You Mandate The COVID Vaccine? (And maybe the better question – should you?)

02.04.2021

## David Greenhaus, Esq.

Jackson Lewis P.C. Long Island

[David.Greenhaus@jacksonlewis.com](mailto:David.Greenhaus@jacksonlewis.com) (631) 247-4658

## Chris Valentino, Esq.

Jackson Lewis P.C. Long Island

[Christopher.valentino@jacksonlewis.com](mailto:Christopher.valentino@jacksonlewis.com) (631) 247-4653

**Can You Mandate The COVID  
Vaccine?**

**Short Answer: Generally, yes**

# The Analysis

- Federal law and guidance
  - ADA
  - GINA
  - FMLA
  - EEOC
- State law and guidance
  - NYS Human Rights Law / NYC Human Rights Law
  - NY Forward
  - Governor's EOs / DOH guidance
- Employer policies
  - NY – employer-friendly on policy writing



# December 2020 EEOC Guidance – Vaccinations

- Consistent Theme – health and safety are paramount.
  - Direct threat analysis applied.
  - EEOC guidance throughout pandemic – more flexible and practical.
- December 16, 2020 EEOC Guidance Issued
  - COVID-19 vaccination is not a “medical examination” which are restricted under the ADA.
  - But employers must avoid pre-screening disability-related inquiries which may elicit information about a disability.

# Federal Law / Statutes In Play

- ADA
- FFCRA
  - Expired 12/31/20
- FMLA
  - Always a consideration
- GINA
  - No, as administering and/or requiring proof of vaccination alone does not involve: the use of genetic information to make employment decisions, or the acquisition or disclosure of “genetic information” as defined by the statute.

# State & Local Law

- No prohibition under NYSHRL or NYCHRL
  - Will follow federal guidance to large extent
  - State's communications – heavily focused on safety and health.
- 
- Note: Being classified as an “essential business” does not excuse an employer's obligations to comply with applicable federal and state employment laws.

# Can An Employer Actually Administer the Vaccine?

- **Yes.**
- **Best Practice – Probably no, unless . . .**
- If an employer requires employees receive vaccination from employer or third-party, possible ADA obligations are triggered.
  - The CDC recommends health care providers ask certain questions before administering a vaccine to ensure no medical reasons would prevent the person from receiving.
  - Pre-vaccination medical screening questions are likely to elicit information about a disability.
  - Disability-related screening inquiries must be “job related and consistent with business necessity” to be compliant with the ADA.

# Can An Employer Administer the Vaccine?

- Employers are **not** required to satisfy the “job-related and consistent with business necessity” requirement under two circumstances:
  - The employer is offering the vaccine on a voluntary basis; or
  - There is no contract between the third-party vaccination provider and the employer.
- Under the ADA, employers are required to keep any employee medical information obtained in the course of a vaccination program confidential.
  - Who is and is not vaccinated
  - Reasons for exceptions
  - Recordkeeping

# The NLRA and COVID Vaccines

- Generally, employers have a duty to bargain with the union over mandatory subjects including changes to working conditions.
- Mandating vaccine is a term and condition of employment.
- Must BARGAIN before mandating.
- Do not foreclose helpful language in CBA though.
- Unlikely to overcome unilateral action claim relying on Governor's EOs, CDC, OSHA guidance, etc.
- Don't forget Section 7 (protected concerted activity) issues!



# Exceptions To The “Rule”

# Exceptions To “Mandate”

- Employers cannot mandate under following circumstances:
  - Employee with disability that prevents him/her from taking vaccine, or
  - Employee with sincerely held religious belief that prevents him/her from taking vaccine.
  - Potential: pregnancy or breastfeeding needs.
- Under these circumstances, the employer may **not** automatically exclude the employee from the workplace or terminate the employment.

# Disability Analysis

- ADA permits employer to maintain “a requirement that an individual shall not pose a direct threat to the health or safety of individuals in the workplace.”
- Employer must show that unvaccinated employee would pose a direct threat due to a “*significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation.*”
  - Appears easy to establish based on state and federal guidance.
- Employers should conduct an individualized assessment of
  - the duration of the risk;
  - the nature and severity of the potential harm;
  - the likelihood that the potential harm will occur; and,
  - the imminence of the potential harm.

# Disability Analysis

- If an employer determines an individual who cannot be vaccinated due to disability poses a direct threat at the worksite, the employer cannot exclude the employee from the workplace—or take any other action—unless there is no way to provide a **reasonable accommodation** (absent undue hardship) that would eliminate or reduce this risk so the unvaccinated employee does not pose a direct threat.
- Reasonable accommodations process:
  - Flexible and interactive
  - Consider: Remote work, leave of absence, remote work area

# Undue Hardship

- In determining whether an accommodation imposes an undue hardship, the employer should consider:
  - The prevalence in the workplace of employees who already have received a COVID-19 vaccination.
  - The amount of contact (close contact) that occurs in the workplace.
  - The amount of contact with others, whose vaccination status could be unknown (in particular customers, vendors, etc.).
  - The amount of contact with others in vulnerable populations.
  - The effectiveness of other controls in the workplace, which may be evidenced by the incidence of outbreaks in the facility.
  - The current rate of infection/incidence of the virus in the surrounding community.

# Sincerely Held Religious Belief Analysis

- Once on notice, the employer must provide a reasonable accommodation for the religious belief, practice, or observance unless it would pose an undue hardship
- “Undue hardship” (federal) – having more than a *de minimis* cost or burden on the employer.
- Employer should ordinarily assume employee’s request for religious accommodation is based on a sincerely held religious belief.
- If employer has an objective basis for questioning either the religious nature or the sincerity of a particular belief, practice, or observance, the employer would be justified in requesting additional supporting information.



**DOCUMENT!!!**

**But, Should You Mandate?**

# Issues To Consider

- Genuine concern regarding the safety of the vaccine.
  - Emergency Use Authorization (EUA) status
- Adverse reactions to vaccines in general.
- Employee morale.
  - Personal or philosophical objections.
  - Mandate for all employees or some?
- What to do when employee refuses?
- Risk of development or expansion of union.
- “I’m already immune.”

# Encouragement May Be Better Course.

- Educate employees regarding the risks and benefits of vaccination in order to encourage employees to make informed decisions.
- Communicate clearly and frequently with employees to emphasize how vaccinations lead to a safer workplace.
- Lead by example in having management take the vaccines first.
- Make obtaining the vaccine as easy and convenient as possible for employees.
- Cover costs associated with getting vaccinated.
- Provide nominal incentives to employees who get vaccinated.
  - Note: HIPAA / ADA rules concerning wellness plans may be implicated.
- **OVER COMMUNICATE!**

# How Do You Handle Non-Compliance?

- Mandate work from home?
- Require additional COVID-precautions?
  - Be careful of creating a Scarlet Letter.
- Force employees out on administrative leave?
- Discipline?
- Termination?
  - Are you prepared to terminate your best employees?
  - Are you prepared to handle consistently?

# Other Issues You Should Be Thinking About?

- Disparate impact claims
  - Exclusively recruiting for hire individuals who have been vaccinated.
  - Watch the postings and advertisements.
- Wage / hour implications
  - Mandating = compensable time.
- Effectiveness of waivers.
- Continuation of COVID protocols post-vaccination.



**Can You Ask For Proof?**

# Can Employer Demand Proof of Vaccination?

- **Yes.** Although federal and state health officials insist that vaccination cards are intended solely for personal use, it is likely that employers could require proof of vaccination if there is no discriminatory issue, such as disability or religious belief, at play.
- Employers may request that employees provide documentation of immunization showing the dates the vaccines were administered.
- EEOC guidance provides that asking or requiring employees to provide proof of receiving a COVID-19 vaccination is not a disability-related inquiry under the ADA.
- Avoid further questioning / gratuitous info being offered.

# COVID-19 Vaccination Record Card

- Every individual will receive a COVID-19 Vaccination Record Card after receiving their first dose of the COVID-19 vaccine.
- Vaccination cards will include:
  - A person's first and last name;
  - Birthdate;
  - The vaccine's name and maker; and
  - Dates of when the first and second dose were received
- The main purpose of vaccination cards is to make sure people follow up with the second dose of the vaccine.

**What Should A Policy  
Include?**

# DRAFT COVID-19 Policy / Encouragement (NY / Non-Union)

## **COVID-19 Vaccination Policy Encouraging Vaccination**

In light of the ongoing COVID-19 pandemic, and as part of our continued efforts to maintain a safe workplace for employees and customers, EMPLOYER is encouraging all employees to receive an FDA authorized and/or approved COVID-19 vaccination. This is an evolving public health emergency. EMPLOYER fully intends this policy to comply with all applicable federal, state and local law or guidance. EMPLOYER is monitoring guidance from all applicable public health authorities and we reserve the right to modify this policy as deemed necessary or appropriate. It is recommended that employees consult with their healthcare provider regarding whether to obtain a COVID-19 vaccination. The decision whether to be vaccinated, and which vaccine to receive, is a choice that employees should make in consultation with their medical provider after reviewing all of the available information.

# DRAFT COVID-19 Policy / Encouragement (NY / Non-Union)

## Time Frame for Receiving Vaccination

EMPLOYER encourages employees to consider obtaining COVID-19 vaccinations as soon as they are eligible to receive it under state plans for tiering vaccinations and vaccinations are available to the employee. As most vaccinations will require two dosages, we realize it will take time for all covered employees to be fully vaccinated. Employees may contact [insert company contact name] at \_\_\_\_\_ to receive additional information about the availability of the vaccinations for individuals in their positions and community.



# DRAFT COVID-19 Policy / Encouragement (NY / Non-Union)

## **Notice of Scheduled Vaccination**

According to the CDC, individuals may experience mild to moderate reactions to vaccinations that may cause individuals to feel ill for 1-2 days after the vaccination. Therefore, we are attempting to plan for potential absences following vaccinations. Employees may be eligible to take paid or unpaid time off for absences related to reactions where they feel ill after the vaccination. As soon as covered employees schedule a vaccination, please report the date of your vaccination to [insert company contact name] at [contact information]. To avoid unanticipated staffing shortfalls, we may explore the possibility of scheduling you to take time off on the day(s) immediately following your vaccination(s).

# DRAFT COVID-19 Policy / Encouragement (NY / Non-Union)

## **Costs of Vaccinations** [OPTIONAL]

Whenever possible, EMPLOYER will work with covered employees to see that the costs of vaccinations will be covered by the EMPLOYER'S medical plan. If employees are not covered under EMPLOYER'S medical plan, before receiving vaccinations, please contact [insert company contact name] at [redacted] to discuss the process for seeking reimbursement for, or funding of, vaccination costs.

## **Safety Protocols Following Vaccinations**

Unless notified otherwise in writing by EMPLOYER, employees must continue to comply with all applicable COVID-19 safety protocols after they are vaccinated, regardless of information that may be available from the CDC or other federal/state/local health authorities. EMPLOYER will determine, based on guidance from the CDC and applicable state/local public health authorities, whether and when such protocols will be modified or eliminated for fully vaccinated employees.

# DRAFT COVID-19 Policy / Mandate (NY / Non-Union)

- Modify the policy language provided; add “require” language.
- Address availability
- Address compensable time issues
- Address cost of vaccine
- Address time frames to receive vaccine
- Address confirmation requirements
- Address notice of accommodation process
- Address failure to comply procedures

# COVID Sick Leave Update

# January 2021 NYS DOL Guidance

- January 21, 2021 NYS DOL COVID Sick Leave Guidance issued
  - No obligation to test if returning to work from a mandatory quarantine or isolation period.
  - Up to 3 QLL periods; 2 and 3 must be pursuant to a positive test.
  - Employers who mandate employees, not otherwise subject to a quarantine order, to remain out of the work due to exposure to COVID must continue to pay the employee's regular rate of pay until either:
    - The employer permits the employee to return to work; or
    - The employee becomes subject to a mandatory or precautionary order of quarantine.

**Questions?**

JacksonLewis

Thank **you.**