

THE COVID-19 VACCINE – EMPLOYMENT IMPLICATIONS

NYCUA

March 23, 2021

John M. Bagyi, Esq., SPHR, SHRM-SCP

22 Corporate Woods Boulevard, Suite 501, Albany, NY 12211
Telephone: (518) 533-3229
jbagyi@bsk.com



John M. Bagyi

Recognized as one of the 500 Leading U.S. Corporate Employment Lawyers by Lawdragon, John counsels and represents employers on labor and employment issues helping them achieve and maintain legal compliance, while improving employee engagement and workplace productivity. With years of experience advising employers in a broad range of industries, John provides his clients practical, real world advice, mindful of the need to balance the legal “ideal” with a client’s operational reality.

John focuses on:

- **Preventative counseling** concerning compliance with federal and state employment laws, including wage and hour, EEO, leaves and other reasonable accommodation concerns, and corrective actions and terminations
- **Administrative proceedings** before the EEOC, Division of Human Rights, NLRB, and federal and state departments of labor
- **Training** for executives, board members, supervisors and employees on a wide variety of topics including sexual and other prohibited harassment, wage and hour compliance, performance management, progressive discipline and terminations, recruiting, hiring and retention, the reasonable accommodation obligation, drug and alcohol concerns and other ADA and FMLA issues, social media, technology and privacy
- **Personnel policies and procedures and employee handbooks**
- **Workplace investigations** relating to harassment and other EEO concerns, ethics violations and other workplace misconduct
- **Contracts/agreements** including employment agreements, retention agreements, executive contracts, confidentiality, nonsolicitation and noncompetition agreements, and severance plans and agreements
- **Business transitions**, such as mergers, acquisitions and reductions in force

Listed In

- *New York Super Lawyers*®, 2009 - present
- *The Best Lawyers in America*®, 2007 - present

Honors and Awards

- “500 Leading U.S. Corporate Employment Lawyers,” *Lawdragon*, 2020
- “Nation’s Most Powerful Employment Attorneys – Up-and-Comers,” *Human Resource Executive*® 2014, 2015, 2016, 2017, 2018, 2019
- “Lawyer of the Year” Albany Labor Law - Management, *The Best Lawyers in America*® 2014, 2017, 2020
- “Lawyer of the Year” Albany Litigation - Labor and Employment, *The Best Lawyers in America*® 2015
- “Lawyer of the Year” Albany Employment Law – Management, *The Best Lawyers in America*® 2014
- “Friend of the Year,” *Capital Region Human Resources Association*, 2012
- Excellence in Alumni Service Award, Albany Law School, 2005
- 40 Under Forty Honoree, *Capital District Business Review*, 2004
- Executive Editor, *Albany Law Review*

Community Involvement

- *Board of Directors*, Alzheimer’s Association-Northeastern NY Chapter, 2018-present
- *Founder & Facilitator*, CRHRA HR Leadership Program, 2006-present
- *General Counsel*, NYS Society for Human Resource Management, 2005-present
- *Founder & Facilitator*, CRHRA/BS&K HR Executive Briefing Series, 2004-present
- *Co-Chair*, Capital Leadership Steering Committee, Albany-Colonie Chamber of Commerce, 2003-2005
- *Board of Directors*, Capital Region Human Resources Association, 2002-2004



Contact

22 Corporate Woods
Albany NY 12211-2503
jbagyi@bsk.com
518.533.3229 Direct
518.533.3299 Fax

Education

Albany Law School of Union
University (J.D., *magna cum laude*, 1996)
University at Albany, State
University of New York
(B.A., 1993)

Bar Admissions

New York
Massachusetts
U.S. Supreme Court
Northern District of New York

Affiliations

Albany Co. Bar Association
American Bar Association
American Society for
Healthcare Human
Resources Administration
(ASHHRA)
College and University
Personnel Association
(CUPA-HR)
National Association of
College and University
Attorneys (NACUA)
New York State Bar
Association

LinkedIn

[linkedin.com/in/johnbagyi](https://www.linkedin.com/in/johnbagyi)

Twitter

@johnbagyi

Facebook

[facebook.com/john.bagyi](https://www.facebook.com/john.bagyi)

Development – NYS Vaccination Leave

- Effective: March 12, 2021 to December 31, 2022
 - Not retroactive
- Applies to all private employers
- Sufficient time - up to four (4) hours - of paid leave for each COVID vaccine injection, paid at employee's regular rate
- New, separate leave entitlement provided at the employer's expense
 - Cannot be charged against any other leave an employee is entitled to, including New York PSL
- No discrimination and no retaliation
- Statute does not address employer's right to require documentation



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Development – American Rescue Plan Act

- Extension of tax credits for paid FFCRA leave (EPSL and EFMLA) employers elect to provide
- Effective April 1, 2021 to September 30, 2021
- Tax credits available for original EPSL/EFMLA reasons, plus:
 - Employee getting COVID vaccine
 - Employee recovering from complications due to vaccine
 - Employee seeking or awaiting the results of a COVID test or diagnosis IF the employee has been exposed or the employer has requested such test or diagnosis
- Resets 80 hours of EPSL



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Survey Says....

- Recent surveys found
 - 40% of employees are either unsure about getting the vaccine or do not plan to get it
 - 57% of employees think employers should offer vaccine incentives to employees
 - 67% of employees said they would get vaccinated for an incentive of between \$10 and \$1,000
 - 30% of employees said they would agree to get vaccinated for as little as \$100
 - 33% of employees said money would not influence their decision to get vaccinated
 - 52% of employees think employers should mandate vaccination

Sources: *BlackHawk Network Survey, February 2021; Eagle Hill Consulting Survey, March 2021*



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Vaccination – Options

- No Action
- Encourage/Incentivize Vaccination
- Mandate
 - Vaccination administered by employer (or employer contractor)
 - Employees provide proof of vaccination



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Preliminary Consideration

- Will vaccinations—whether incentivized or mandated—be
 - Provided by employer (or a contractor of employer)
 - Provided by third-party
- The chosen approach will impact legal obligations whether incentivizing or mandating



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Incentivizing Employee Vaccinations

- Employer (or contractor) administered vaccinations – incentives are likely subject to two limitations
 1. ADA/GINA Limit on Incentive
 - Currently uncertain
 - EEOC proposed regulations that provide that employers generally may offer no more than *de minimis* incentives (e.g., a water bottle, or gift card of modest value)
 - Biden administration withdrew proposed rules before they were finalized

(cont'd)



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Incentivizing Employee Vaccinations

- Employer (or contractor) administered vaccinations (cont'd)
 2. HIPAA Nondiscrimination Rules
 - Incentive cannot exceed 30% of the total cost of employee-only coverage under the group health plan
 - Employer must provide for a reasonable alternative standard for obtaining the incentive (or waiver of the standard) for employees who are unable to get vaccinated due to a medical condition (e.g., additional COVID safety training)
 - Other HIPAA obligations also apply (e.g., availability, reasonable design, etc.)

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Incentivizing Employee Vaccinations

- Vaccinations not provided by employer (or employer's contractor)
 1. ADA/GINA Limit on Incentives
 - Do not apply, provided the only documentation employer requires employees to submit is proof of vaccination (i.e., no other medical or genetic information is required as part of the program)
 2. HIPAA Non-Discrimination Rules
 - Applies regardless of who administers vaccinations



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Takeaway

- Ensure any incentives offered comply with the applicable limitations



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Mandating Vaccination

- Practical issues
 - Availability of vaccine
 - Potential employer liability (e.g., workers' compensation, tort liability)
- FDA Emergency Use Authorization concerns
- Reasonable accommodation concerns



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FDA Emergency Use Authorization (EUA)

- The FDA has taken the position that, pursuant to the Food, Drug and Cosmetics Act, 21 U.S.C. §564, among the conditions for the Agency's approval of a drug for emergency use is that individuals must have the right to refuse to take the drug
- The EEOC's guidance on mandatory vaccination does not address this and neither the FDA or the CDC has issued guidance addressing this
- As such, employers should be cautious about taking corrective or disciplinary action against employees who refuse the vaccine in contravention of the employer's mandatory vaccine policy
- Bottom line – consult with counsel



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Accommodation Concerns

- Whether an employer mandates
 - Vaccination administered by the employer (or a contractor) or
 - Employees provide proof of vaccination
- The employer will need to accommodate medical conditions and sincerely held religious beliefs that prevent an employee from getting vaccinated



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Reasonable Accommodation Obligation

- Federal and state law require employers to provide reasonable accommodation to any employee whose disability or sincerely held religious belief prevents them from being vaccinated, unless doing so is an “undue hardship”
- Once an accommodation is requested, employers must engage in a flexible, interactive process to identify workplace accommodations that do not require undue hardship (significant difficulty or expense)



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Sincerely Held Religious Beliefs

- The EEOC has defined religion broadly to protect beliefs, practices, and observances, e.g.:
 - The presence of a deity or deities is not required
 - Religious beliefs can include beliefs held by a few or even one individual
 - Individuals who do not practice any religion are also protected
- However, personal preferences are not religious beliefs
- Because of the broad definition of religion adopted by the EEOC, employers should ordinarily assume that an employee's request for religious accommodation is based on a sincerely held religious belief



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Documenting an Employee's Sincerely Held Religious Belief or Disability

- If an employer has an objective basis for questioning either the religious nature or the sincerity of a particular belief, practice, or observance, the employer may request additional supporting information
- When an employee's disability and/or the need for accommodation is not obvious, the employer may ask the individual for reasonable documentation
 - Reasonable documentation means only the documentation needed to establish that a person has protected disability and that the disability necessitates a reasonable accommodation



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Takeaways

- Before implementing a mandatory vaccination policy, an employer should establish a mechanism for reviewing requests for accommodation
- Those involved in implementing a mandatory vaccination policy should be
 - Trained to recognize a request for accommodation and know to whom the request should be referred
 - Reminded that it is unlawful to disclose an employee's reasonable accommodation or retaliate against the employee for a request for accommodations



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What If An Employee's Medical Condition Or Religious Belief Prevents Them From Getting Vaccinated?

- **Step 1** – Before excluding the employee from the workplace or taking any other action, the employer must be prepared to show the unvaccinated employee would pose a “direct threat”
 - This requires an individualized assessment of four factors
 - (a) Duration of the risk
 - (b) Nature and severity of the potential harm
 - (c) Likelihood that the harm will occur
 - (d) The imminence of the harm

(cont'd)



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What If An Employee's Medical Condition Or Religious Belief Prevents Them From Getting Vaccinated?

- **Step 2** – If an employer determines that an individual who cannot be vaccinated due to disability or sincerely held belief poses a direct threat at the worksite, the employer should next consider whether there is a reasonable accommodation that would eliminate or reduce this risk so the unvaccinated employee does not pose a direct threat
- **Step 3** – If there is a direct threat that cannot be reduced to an acceptable level, the employer can exclude the employee from the workplace
 - Note – this does not mean the employer can automatically terminate the employee. The employer would first need to consider accommodations (e.g., remote work, leave)



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Takeaways

- If an employee is unable to get vaccinated as a result of a medical condition and/or a sincerely held religious belief – consult with counsel before excluding the employee from the workplace or taking any other action



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Additional Considerations When Vaccination Administered by Employer (or Contractor)

- ADA Limitation on Disability Related Inquiries
 - Vaccine pre-screening questions are considered a disability-related inquiry
 - Employees can only be required to respond to vaccine pre-screening questions if job-related and consistent with business necessity
 - To satisfy this standard, employer would need to have a reasonable belief, based on objective evidence, that an employee who does not answer the questions and, therefore, does not receive a vaccination, will pose a direct threat to the health or safety of themselves or others
 - Note – If both getting vaccinated and answering the pre-screening questions is voluntary, the pre-screening questions are not subject to this standard



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Takeaways

- Before mandating employees receive a vaccine administered by the employer (or its contractor) or produce proof of vaccination by a third party – consult with counsel



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Asking for Proof of Vaccination

- Employers may ask employees to provide proof of vaccination
- However, asking why an individual did not receive a vaccination may elicit information about a disability or genetic history
- *Takeaway*
 - If employees are asked to provide proof of vaccination
 - Make clear that employees should not provide any medical information other than proof of vaccination
 - Ensure those involved in securing this information know not to inquire why someone did not get vaccinated



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Closing Thoughts

- Consider whether mandatory policy is truly necessary, given other alternatives (e.g., remote work, physical distancing, face coverings)
- If you decide to implement a mandatory vaccine policy
 - Consider limiting to high-risk locations, departments and/or worksites
 - Consult with labor and employment counsel
- Establish and communicate a procedure to review and address requests for accommodations
 - Review exemption requests on a case-by-case basis, engage in the interactive process, and consult with counsel before denying request
- If employee refuses to get vaccinated or provide proof of vaccination, proceed with caution before imposing corrective action



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jbagyi@bsk.com

LinkedIn  [linkedin.com/in/johnbagyi](https://www.linkedin.com/in/johnbagyi)

twitter @johnbagyi

facebook [facebook.com/john.bagyi](https://www.facebook.com/john.bagyi)



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