

**ALERTS**

## Updated Vaccination Guidance and New York Law Developments

**June 11, 2021**

On May 28, 2021, the U.S. Equal Employment Opportunity Commission (“EEOC”) updated its previously published guidance entitled “What You Should Know About Covid-19 and the ADA, the Rehabilitation Act, and Other EEO Laws,” discussed in previous *SRZ Alerts* [here](#) and [here](#). The updated guidance addresses issues relating to mandatory vaccination programs, exceptions and accommodations under such programs, and the legality of vaccine incentive programs.

### Mandatory Vaccinations

According to the updated EEOC guidance, under the Americans with Disabilities Act of 1990 (“ADA”), Title VII of the Civil Rights Act of 1964 (“Title VII”) and other federal nondiscrimination laws, employers may mandate that employees who are physically entering the workplace be vaccinated against COVID-19 (Section K.1). Employers that have a vaccine requirement must still provide reasonable accommodations for employees who, due to disability or sincerely held religious beliefs, will not be vaccinated.<sup>[1]</sup> These accommodations must be provided unless they pose an undue hardship on the operation of the employer’s business. Further, employees who do not receive a COVID-19 vaccine due to pregnancy may be entitled under Title VII to job adjustments to keep working, including seeking an exemption from the mandatory vaccination requirement. For example, as a reasonable accommodation, “an unvaccinated employee entering the workplace might wear a face mask, work at a social distance from coworkers or non-employees, work a modified shift, get periodic tests for COVID-19, be given the opportunity to

telework, or finally, accept a reassignment” (Sections K.2, K.5, K.6, and K.12).

If a mandatory vaccine program is to be implemented, employers should provide notice of the program’s introduction to all employees. The guidance notes that a best practice is to notify employees that the employer will consider requests for accommodation (Sections K.5 and K.12). The EEOC advised that employers with a mandatory vaccine requirement might need to respond to allegations that the requirement has a disparate impact or disproportionately excludes employees based on race, religion or other protected classifications. Further, application of mandatory vaccine requirements in the workplace cannot treat employees differently based on disability, race, color, religion, sex (including pregnancy, sexual orientation, and gender identity), national origin, age, or genetic information, unless there is a legitimate non-discriminatory reason (Section K.1).

## **Vaccine Incentives**

The EEOC reiterated that employers may encourage employees to get the COVID-19 vaccine. To do so, employers may educate employees about the benefits of vaccination and may respond to concerns or questions. Further, employers may offer incentives for voluntary COVID-19 vaccinations, which includes both rewards and penalties.

The EEOC cautioned employers that offer incentives to employees to receive a COVID-19 vaccination administered by the employer (or its agent) against providing an incentive that is so substantial as to be “coercive” (Section K.17). A “very large incentive” may be considered coercive because it could make employees feel pressured to disclose protected medical information in obtaining the vaccination (Section K.17). This incentive limitation, however, does not apply to employers that offer an incentive to employees that voluntarily provide documentation or other confirmation that they received a COVID-19 vaccination on their own from a third-party provider that is not their employer or an agent of their employer (Section K.17).

Documentation or other confirmation of vaccination, like all medical information, must be kept confidential and stored separately from the employee’s personnel files (Section K.4). Under the ADA, it is also unlawful to disclose that an employee is receiving a reasonable accommodation.

# Emergency Use Authorization of Vaccines

The new EEOC update gives no further clarification as to the legal implications of the Emergency Use Authorization (“EUA”) granted by the FDA to the COVID-19 vaccines (Section K). The update notes that “it is beyond the EEOC’s jurisdiction to discuss the legal implications of the EUA or the FDA approach.” As a result, employers still assume legal risk in mandating vaccines in the workplace. In fact, there are currently vaccine mandate lawsuits pending against employers in several states, including Texas, California, North Carolina, and New Mexico, based in part on the argument that employees cannot be required to take an EUA vaccine.

## New York’s Paid Sick Leave Law Update

On May 28, 2021, Governor Andrew M. Cuomo announced that New York’s Paid Sick Leave Law now covers “any necessary recovery period from the COVID-19 vaccine.” As noted in a previous *SRZ Alert*, New York legislation granted employees paid leave time to receive the COVID-19 vaccine. Now, under New York’s Paid Sick Leave Law, time off to recover from the side effects from the COVID-19 vaccine will be considered a paid sick leave day. The Department of Labor noted that “employers are obligated to honor an employee’s desire to use accrued sick leave for recovery.”

### New York HERO Act Update

On May 5, 2021, Governor Cuomo signed into law the New York Health and Essential Rights Act (“HERO Act”) with the promise that technical amendments to the law would be forthcoming. (The HERO Act and its impact on employers was described in a previous *SRZ Alert*.) These promised amendments (“Amendments”) were introduced as a bill in the New York State Legislature and passed both houses. We expect the Amendments to be signed into law in the coming days.

The Amendments delay until July 5, 2021 the effective date of the first section of the HERO Act (addressing the prevention of occupational exposure to an airborne infectious disease). The Amendments clarify that the requirement that each covered employer adopt an exposure prevention plan will not take effect until after the New York State Department of Labor (“NYS DOL”) publishes its model prevention standards. Following the publication of these model standards, employers will have thirty days to adopt a prevention plan, which can be

accomplished by adopting the NYSDOL's model standards. In addition, employers must provide their prevention plans to all of their employees within sixty days after the NYSDOL publishes its model standards.

The HERO Act's airborne infectious disease prevention section will also be amended to provide additional protections to employers. Employees bringing civil actions against their employers for alleged violations of the airborne infectious disease prevention section of the HERO Act will no longer be entitled to liquidated damages and such actions must be brought within six months of the employee's knowledge of the alleged violation. Employees must also give their employer notice of the alleged violation and generally provide the employer with thirty days to cure the violation. Employers sued under the HERO Act may recover their costs and reasonable attorneys' fees from the employee (and/or the employee's attorney) if the court finds that the action is "frivolous."

The Amendments exempt from the HERO Act's workplace safety committee requirement employers that already have "a workplace safety committee that is otherwise consistent with the requirements of this section." The workplace safety committees' powers authorized under the HERO Act are also amended, including by limiting the committees' right to review only those policies that concern "occupational safety and health."

## **New York's Guidance for Office-Based Work**

On June 8, 2021, the New York State Department of Health updated its Interim Guidance for Office-Based Work ("Office Guidance"). As explained in a previous *SRZ Alert*, this guidance applies to all "office-based work." The Office Guidance, while preserving much of its previous guidelines, for the first time reiterates New York's adoption of the Centers for Disease Control and Prevention's guidance for fully vaccinated individuals, which lifts certain COVID-19 precautionary protocols for fully vaccinated individuals. More specifically, office-based employers are now permitted, though not required, to rescind COVID-19 safety requirements (i.e., requiring employees to wear a mask and/or adhere to social distancing) for fully vaccinated employees, provided they follow applicable guidelines for masks, distancing and capacity, as outlined in New York State's guidelines on Implementing CDC Guidance."

The Office Guidance eliminates general capacity limits for offices. Instead, employers need only ensure that capacity is limited by the space

available for individuals to maintain the required social distancing, based on vaccination status. For fully vaccinated individuals, employers may allow full capacity without six feet distancing within either the entire office or a separate, designated part of the office. Note that in-person gatherings continue to be discouraged.

The Office Guidance simplifies employers' screening requirements by allowing such screening to be completed by, among other methods, "signage," which appears to allow employers to pose the screening questions to all entrants through signs containing the questions, instead of through individual questionnaires. In addition, the required screening questions are modified to focus on whether employees have 1) experienced COVID-19 symptoms, 2) had close contact with someone with COVID-19 and 3) tested positive for COVID-19.

## **OSHA COVID-19 Safety Regulation for Healthcare Employers**

On June 10, 2021, the Occupational Safety and Health Administration ("OSHA") issued its long-awaited emergency temporary standard pertaining to COVID-19. This regulation — OSHA's first nationwide COVID-19 workplace safety rule — applies only to healthcare employers to protect health care workers against exposure to COVID-19 in the workplace. More specifically, this rule "applies to all settings where any employee provides healthcare services or healthcare support services," except for settings specifically exempted by the rule.

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If you have any questions concerning this *Alert*, please contact your attorney at Schulte Roth & Zabel or one of the authors.

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[1] Note that EEOC guidance explains that the definition of religion is broad, and employers should ordinarily assume that an employee's request for religious accommodation is based on a sincerely held religious belief, practice or observance.

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*This is a fast-moving topic and the information contained in this Alert is current as of the date it was published.*

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