



# New York Lawmaker Wants To Require COVID-19 Vaccine: What Employers Need To Know

Insights

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The news this week that a Manhattan-based state lawmaker wants to require most New York residents to receive the COVID-19 vaccine brought renewed interest to an issue that has crept into the consciousness of just about every employer across the country: whether employers can – and should – mandate that their employees receive the vaccine. It is a thorny issue that requires an examination of company culture, industry-specific guidelines, geographic location, and a variety of other factors, not to mention a consideration of disability-related and possible religious accommodations. What do New York employers need to know about this current development and the bigger question about mandatory vaccines?

## Legislative Proposal Would Mandate Vaccines In Many Situations

Assemblymember Linda Rosenthal (D-67th District), a state lawmaker representing residents of Manhattan’s West Side, recently introduced a bill ([A11179](#)) that would require the state to administer the COVID-19 vaccine – and would mandate the vaccinations in certain situations. While the bill faces a significant uphill battle to ever be enacted, it is worth examining the contours of the proposal as it may mirror some of the same concerns that employers may soon need to address.

According to the text of Rosenthal’s bill, she believes the proposal would protect public health “by permitting the Department of Health to require COVID-19 vaccines for all individuals who are clinically determined to be safe to receive such vaccine if the state COVID-19 Vaccination Administration Program fails to achieve sufficient immunity.” She notes that epidemiologists and public health experts have concluded that a vaccine will be necessary to develop herd immunity and ultimately stop the spread of the disease. While New York’s vaccination plan is designed to ensure an orderly distribution of the vaccination, her proposal notes that New York should go further.

To promote vaccination and ensure that a high enough percentage of the population is vaccinated against COVID-19 to develop sufficient immunity, the proposal seeks to empower state public health officials to make a determination that “sufficient immunity” has not been achieved after a certain period of time. Once that determination has been made – which is not defined by Rosenthal’s bill – the legislative proposal would allow the Department of Health to require vaccination for New York residents able to safely receive the vaccine. Rosenthal told media sources that the mandate should take effect if under 70% of the population voluntarily gets vaccinated.

A11179 would permit individuals to avoid the mandate if they get a letter from a licensed medical professional indicating they are medically exempt. The bill makes no mention of any other potential exemptions from the mandate, such as for religious reasons or personal convictions or beliefs.

As of now, the bill seems to face a difficult future. Although the New York State Bar Association passed a resolution last month urging state lawmakers to consider a vaccine mandate and have subsequently expressed support for Rosenthal's bill, no co-sponsors signed on to the legislative proposal at the time it was introduced and there have not been many other legislators – if any – who have publicly come out in favor of the bill. Further, according to media reports, a spokesman for Governor Andrew Cuomo pointed to recent comments he made indicating that “you can't mandate that somebody takes a vaccine.” That seems to indicate that the governor does not support the proposal and would not sign the bill if it landed on his desk.

### **What Should New York Employers Do?**

Regardless of the fate of this proposal, employers in New York have a daunting decision to soon reach – can you mandate that your workforce receive the COVID-19 vaccine? While we await specific guidance from the EEOC, its commentary concerning mandatory flu shots – including the need to consider employees' reasonable accommodation requests – provides a good roadmap for evaluating the question of whether you will be able to require your employees to obtain a COVID-19 vaccination. Although the EEOC has advised employers to *encourage* flu shots rather than *requiring* them, it has not prohibited employers from requiring the shots, especially when the flu is severe.

Considering the scope and severity of the COVID-19 pandemic, the EEOC's guidance regarding workplace screening for COVID-19, and the Commission's position regarding mandatory flu shots, you will probably have the right to require workers to be inoculated once the approved COVID-19 vaccine becomes readily available to the general public – *subject to some significant caveats*.

- First, you must be able to demonstrate that a vaccine mandate is job-related. Your inoculation requirements should be based upon reliable, objective criteria that supports the business need for the policy, not subjective perceptions or irrational fears. This will be an easier standard to achieve in some settings than others. Healthcare and education, for example, are places where mandatory vaccines are common, while other settings such as retail and hospitality may lend themselves to easier justifications than other industries.
- Your policies must adequately inform employees of whatever requirement you impose in clear and certain terms.
- You need to coordinate any mandatory vaccine requirement with any union obligations contained in your collective bargaining agreement.
- Critically, you must allow workers to seek an exception (or accommodation) on the basis of a disability or a sincerely held religious belief. The failure to engage in an interactive process where workers have the right to demonstrate the need for a possible exemption could lead to liability concerns.

- Given that New York has a law protecting an employee's right to engage freely in outside political activities, you also need to consider whether someone's generalized "anti-vax" stance would support a potential legal claim against your organization if you took adverse action for failure to get inoculated.
- And of course, you must ensure the privacy of each employee's medical information under both the ADA and HIPAA.

The next question you need to ask yourself is, even if you *can* mandate required COVID-19 vaccines for your workers, *should* you do so? Some employers are instead mounting an information campaign encouraging vaccination, and even providing incentives (through an HSA plan, perhaps) to those workers who voluntarily choose to get inoculated. The decision in this area will vary from employer to employer, and should be taken in coordination with your legal counsel.

## Conclusion

As the availability of COVID-19 vaccines to the general public approaches, you must be prepared to deal with prioritization, logistics, and responding to employees' concerns. We will continue to monitor developments related to the new vaccines and related workplace questions that arise. Make sure you are subscribed to [Fisher Phillips' Alert System](#) to get the most up-to-date information.

If you have questions about how to ensure that your vaccine policies comply with workplace and other applicable laws, visit our [Vaccine Resource Center for Employers](#) or contact any attorney in our [New York City office](#) or on our [FP Vaccine Subcommittee](#).

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*This Legal Alert provides an overview of developing workplace issues. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.*

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