

# COVID-19 and Preparing for a Return to the Building Workplace: Key Legal and Practical Considerations of Mandatory Vaccinations

Steven Porzio  
Howard Rothschild  
Robert Schwartz

Friday, October 22, 2021

Proskauer»

**BOMA**  
New York

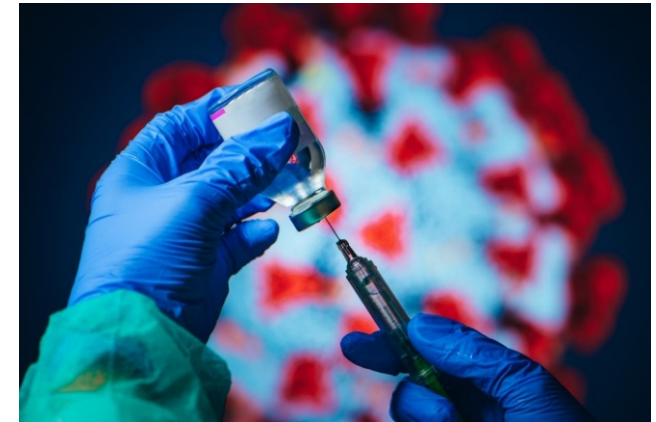
**REBNY**<sup>®</sup>

**RAB**  
REALTY ADVISORY BOARD  
ON LABOR RELATIONS

# Today's Agenda

---

1. COVID-19 Vaccination Policies in Employment: Background
2. COVID-19 Vaccination Mandates
3. Audience Questions
4. Implementing a COVID-19 Vaccination Policy under the RAB-32BJ MOA
5. Additional Information Regarding the MOA
6. Your Questions



# COVID-19 Vaccination Policies in Employment: Background





# Can Employers (Generally) Require That Employees Receive a COVID-19 Vaccine?

---

- Yes. According to EEOC guidance, employers **may require employees to be vaccinated**, subject to certain exceptions.
- Some claimed that the FDCA prohibited mandatory vaccines in employment while only authorized pursuant to an EUA.
  - In June, a federal district court in Texas rejected this argument. The DOJ later took the same position.
  - The Pfizer vaccine has now received full FDA approval.
- In a **unionized environment**, the NLRA may require bargaining over a mandatory vaccination policy.



# Can RAB Employers Require That Employees Receive a COVID-19 Vaccine?

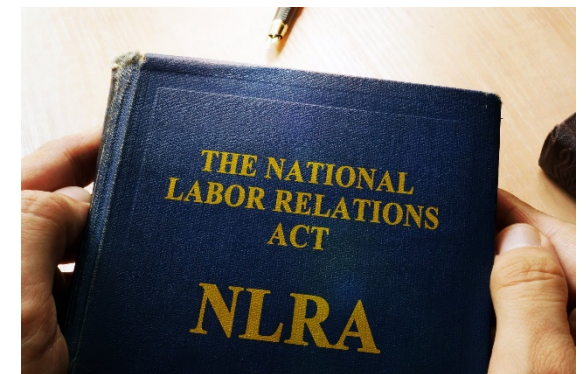
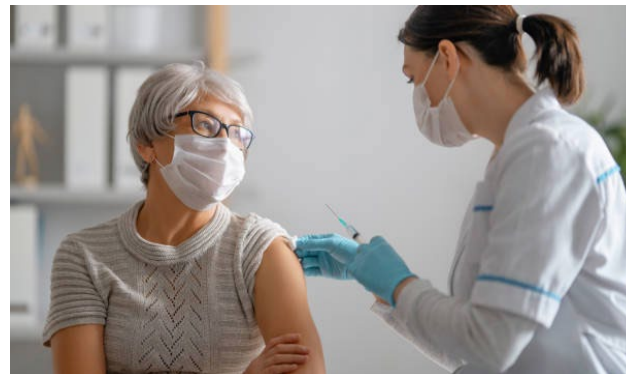
---

- On August 2, 2021, the Related Companies instituted a mandatory vaccination policy for 32BJ members.
  - The Union challenged the implementation of such a policy and demanded arbitration.
- The Arbitrator concluded that, based on the unique circumstances presented by COVID-19 “employers subject to the Agreements, including Related, have the right to promulgate and enforce a mandatory vaccination policy.”
- RAB and 32BJ used the decision to develop an MOA for the industry.
  - On September 30, **RAB and 32BJ agreed to a comprehensive MOA** allowing RAB members to implement mandatory COVID-19 vaccination requirements for employees working in most city buildings.

# Local 94 Agreement re: Mandatory Vaccinations?

---

- Discussions are underway with Local 94 regarding a similar deal to the one reached with 32BJ.
- In the interim, Local 94 has been cooperative in helping get its members vaccinated on voluntary basis in response to building/tenant vaccine requirements.
- Stay tuned as we hope to have an update soon.



# COVID-19 Vaccination Mandates



# Forthcoming OSHA Emergency Temporary Standard

---

- On September 9, President Biden announced that OSHA is developing an Emergency Temporary Standard (“ETS”) that will require employers to:
  1. Ensure that their workforce is fully vaccinated; or
  2. Require unvaccinated workers to provide a weekly negative test.
- Only applies to employers with 100+ employees.
  - OSHA officials have stated that the count will be based on a companywide headcount rather than the number of employees at a particular worksite.
  - Joint employer rules will likely be addressed in the ETS.





## Forthcoming OSHA Emergency Temporary Standard *(cont'd)*

---

- The ETS will likely address who will bear the cost of testing.
  - Reimbursement may be required under federal wage and hour law if the cost of the testing cuts into the minimum wage or overtime due to an employee.
- OSHA will also require employers with 100+ employees to provide paid time off to get vaccinated and recover from side effects.
- On October 12, 2021, a draft of the rule was sent from OSHA to the White House for final review.
- The ETS is likely to allow employers to require vaccinations (without a test-out option), provided that they consider reasonable accommodations.

# Federal Contractor Vaccine Mandate

---

- Employees of government contractors must be fully vaccinated against COVID-19 by December 8 **or** by the first day of work on a new contract.
  - Allows for exemptions for: (1) disabilities, (2) sincerely-held religious beliefs; or (3) an mission-critical need to have an employee begin work before becoming fully vaccinated.
  - There is no exception for prior COVID-19 infection.
- Applies to any covered contracts awarded on or after November 14, 2021.
  - Also applies to earlier contracts whenever an option is exercised or an extension is made.
- Applies at locations controlled by a contractor at which an employee working in connection with a covered contract is likely to be present.
  - Includes those who are not directly engaged in the specific work called for by the contract, such as HR, billing, and legal.

## Federal Contractor Vaccine Mandate *(cont'd)*

---

- Contractors must review documentation to confirm employees meet the requirement.
- Federal contractors also covered by the forthcoming OSHA mandate must require proof of vaccination – *i.e.*, they cannot have a testing option absent an accommodation request.
- The vaccine mandate also requires contractors to:
  1. Require that employees abide by certain face covering requirements;
  2. Require that non-fully vaccinated employees maintain six feet of distance to the extent practicable; **and**
  3. Designate a COVID-19 Workplace Safety Coordinator.

# New York City Executive Order 78

---

- As of September 13, City agencies must require contractors' employees to:
  1. Provide their employer with proof of full vaccination; **or**
  2. Provide their employer with proof of a negative PCR test on a weekly basis.
    - According to guidance accompanying the Order, “Ordinarily, results should be submitted within two to three days of specimen collection.”
    - At home and antigen tests do not qualify.
- Only covers contracts:
  1. To be performed within NYC; **and**
  2. Where employees may physically interact with City employees **or** members of the public in the course of performing work under the contract.
- Only covers employees performing work under the contract **and** whose salary is paid by funds from the contract.



# Implementing a COVID-19 Vaccination Policy: Audience Questions



# Ask the Audience!

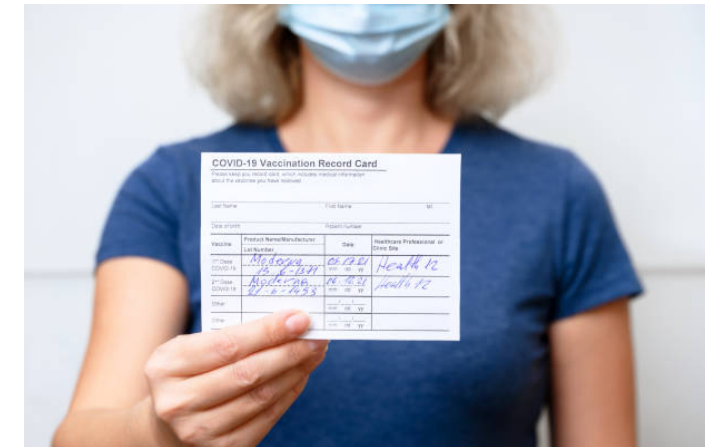
---

**Do you intend to implement a mandatory vaccination policy?**



# Ask the Audience!

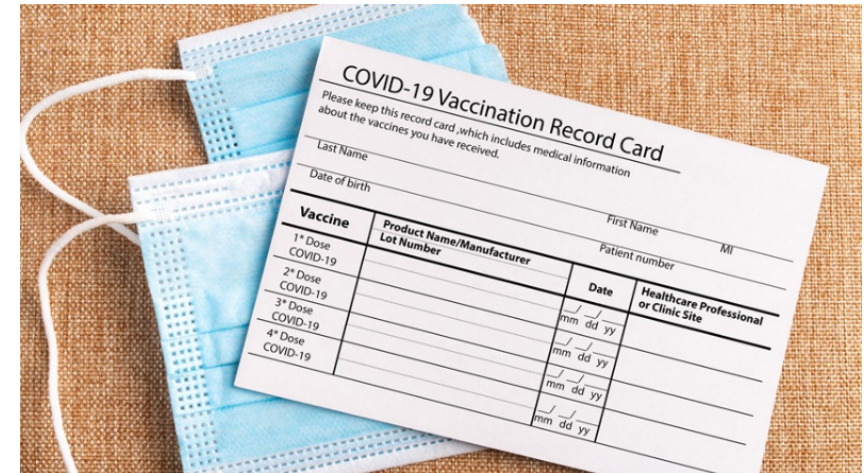
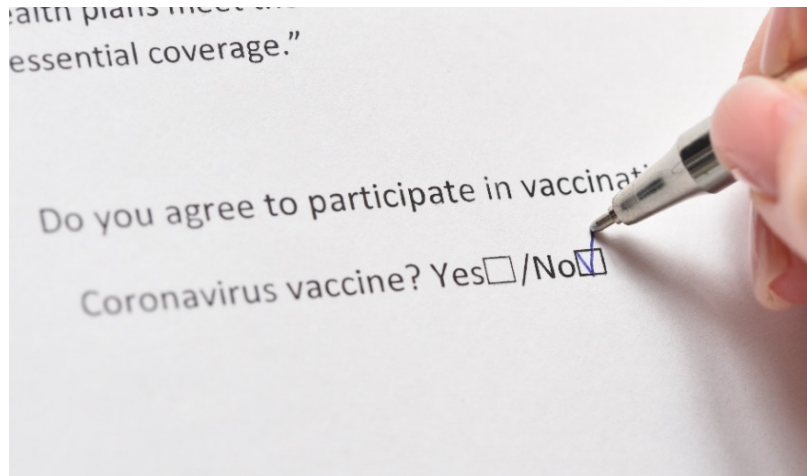
Have some of your clients already implemented their own 3<sup>rd</sup> party vaccination mandate?





# Ask the Audience!

Do you know what percentage of your workforce is currently unvaccinated?





# Implementing a COVID-19 Vaccination Policy under the RAB-32BJ MOA



# Step 1: Communicate with Employees

---

- Prior to implementing a mandatory vaccination policy, the employer must:
  1. Inform employees *in writing* that it is considering a vaccination mandate; and
  2. Request that employees provide the following information within *one week*:
    - Whether the employee has been vaccinated, and if so, to provide proof of vaccination.
    - If the employee has a vaccine appointment, to provide the appointment notification.
    - If the employee is seeking a vaccination appointment, to provide documentation of that request.
    - If the employee is unwilling to be vaccinated, to provide the reason for refusing vaccination.
- A sample notice is available from the RAB and will be attached to the deck.
- Employers must keep proof of vaccination separate from other records.
- Employers must advise employees of the process for seeking an accommodation, when necessary.

## Step 1: Communicate with Employees *(cont'd)*

---

### Sample Vaccination Information Collection Questions:

- Are you vaccinated against COVID-19?
  - If so, please provide vaccination card or other vaccination documentation to [location or person].
  - If not, do you intend to become vaccinated against COVID-19?
- If you are not vaccinated and do not intend to become vaccinated, is your objection based upon a medical reason, a sincerely held religious belief, or another reason?
  - If it is a medical reason, please state the reason, and provide documentation from your healthcare provider in support of your objection to [location or person].
  - If it is a religious reason, please state the basis of your belief.
  - If it is for another reason, please specify why you do not intend to become vaccinated.

## Step 2: Prepare to Announce the Policy

---

- Draft a *written policy*.
  - A sample policy is available from the RAB and will be attached to the deck.
  - According to EEOC guidance, as “a best practice, an employer introducing a COVID-19 vaccination policy ... should notify all employees that the employer will consider requests for reasonable accommodation.”
- Prepare to evaluate requests for medical and religious exemptions as *reasonable accommodations*.
  - Work with counsel to develop forms for medical and religious accommodation requests.
  - Determine who will evaluate such requests.
    - Typically, this will be the same person who would evaluate any other accommodation request.
    - Should not be handled by individual managers, but through a centralized decision-maker.



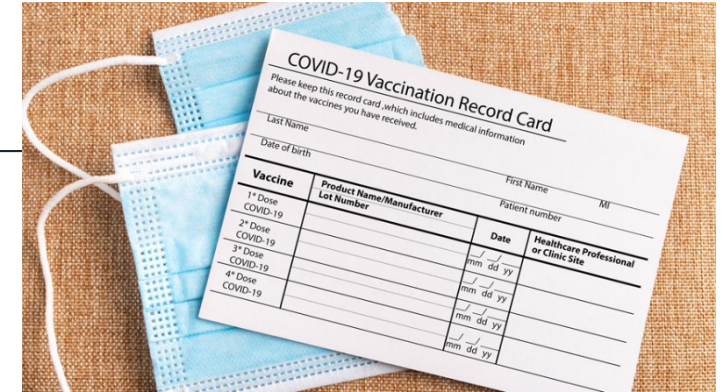
## Step 3: Announce the Vaccination Policy

---

- If the employer intends to implement a vaccination requirement, the employer shall provide **written notice** to 32BJ and all employees.
  - This may be no sooner than 2 weeks after the employer has requested that employees provide their vaccination status.
- The deadline to obtain a single dose vaccine or the first dose of a two-dose vaccine may be no sooner than 4 weeks from the date of notice to the Union and employees.
- The deadline to obtain the second dose of a two-dose vaccine may be no sooner than 8 weeks from the written notice.
- The parties must meet and confer before mandating booster shots.

## Step 4: Collect Proof of Vaccination

- According to the MOA, proof of vaccination includes:
  - A copy of the individual's CDC vaccine card;
  - An employee's Excelsior Pass Plus; or
  - A letter from the employee's doctor that the employee has been vaccinated.
- The employer must keep these records **confidential** and **separate** from other personnel records.
  - The employer shall not disclose to any third party whether any individual is vaccinated, but may disclose aggregate information (e.g., 95% of employees are vaccinated).
  - **NOTE:** The MOA requires employers to provide information regarding employees' vaccination status to the Union upon request.
- If the employer requires that proof be uploaded electronically, the employer must provide assistance to employees.



## Step 5: Evaluate Accommodation Requests



- Employers must provide reasonable accommodations:
  - For known **disabilities** of employees; and
  - For an employee's sincerely held **religious beliefs**.
- Employers may be obligated to provide a **disability-related** accommodation if the employee has:
  - An impairment that is a contra-indicator to the COVID-19 vaccine.
  - A mental disability that would be exacerbated by a mandatory vaccination.
  - An allergy or sensitivity to the vaccine.
- **Religion** is construed broadly under Title VII.
  - But, social, political or economic philosophies (and personal preferences) are not protected.

## Step 5: Evaluate Accommodation Requests *(cont'd)*

---

- Employers can only bar an unvaccinated employee (entitled to an accommodation) from the workplace if no effective accommodation exists.
- **Examples** of accommodations:
  - Requiring the use of a mask or other types of PPE;
  - Requiring the employee to work at a social distance from others;
  - Requiring the employee to work a modified shift;
  - Submitting to **periodic testing** and/or maintaining a temperature log; and/or
  - Reassigning the employee to a vacant position that does not require vaccination.
- There is no obligation to provide the accommodation of the employee's choice, so long as a reasonable accommodation is offered.

## Step 5: Evaluate Accommodation Requests *(cont'd)*

---

- Employers do not have a duty to provide reasonable accommodations that would impose an “**undue hardship**” on the employer.
  - **ADA standard:** Significant difficulty or expense incurred by the employer.
  - **Title VII standard:** More than a *de minimis* cost or burden.
- Employers may deny **disability-related** accommodations where there is no available alternative that alleviates the “**direct threat**” posed by an unvaccinated employee.
  - **Direct threat:** A significant risk of substantial harm that cannot be eliminated or reduced by reasonable accommodation.
  - In assessing this risk, the EEOC notes that employers should consider the number of other employees in the workplace who have received the vaccine.



## Step 5: Evaluate Accommodation Requests *(cont'd)*

---

- Once an employer is **on notice** that an employee requires an accommodation, the employer must engage in an **interactive process** to determine whether an accommodation is warranted and can be provided.
- There are limitations on an employer's ability to request information or documentation to support an accommodation request.
- In New York City, employers are required by law to provide a **final written determination** at the end of the cooperative process.
- Information about an employee's accommodation must be kept confidential.
  - Supervisors and managers may be informed about necessary accommodations.

## Step 6: Address Employees Who Refuse To Be Vaccinated

---

- Unvaccinated employees (not eligible for an accommodation) may elect:
  1. An **unpaid leave of absence** for up to 4 months. The employee may return upon becoming fully vaccinated.
  2. To be **placed on a recall list** for 6 months or until March 1, 2022 for recall if: (1) positions become available; and (2) the employee has been fully vaccinated or the vaccination requirement has been lifted.
    - The employee must notify the employer if they have been vaccinated to be eligible for recall.
  3. Employees who do not elect option 1 or 2 will receive a **non-disciplinary termination**.
- If a resident manager or superintendent seeks a leave of absence or furlough and this is not feasible to provide, the Union and employer must promptly meet to resolve the dispute.
  - If unable to do so, the dispute will be submitted to arbitration on an expedited basis.

# Additional Information Regarding the MOA



## Additional Information Regarding the MOA



- “Vaccination” is defined as receiving both shots of a two-dose vaccination, or one shot of a one-dose vaccination (and any recommended boosters).
- Employees are entitled to PTO in connection with receiving the vaccine in accordance with the April 29, 2021 MOA.
  - Employees receive an additional day of PTO to recover from side effects, if needed.
- The employer, Union, and the Health Fund will provide employees with information about where they can be vaccinated near the worksite.
  - The Union and employer will provide employees information regarding how to contact the Health Fund for assistance with becoming vaccinated.

## Additional Information Regarding the MOA *(cont'd)*

---

- The parties will cooperate to have vaccination sites in and around work sites.
- The employer will provide employees with access to a computer to register upon request.
- Prior to (or in lieu of) a vaccination mandate, the employer may require all **unvaccinated employees** to undergo **PCR testing** on non-work time up to 2 times per week and submit results to the employer.
  - The employer must provide 1 week written notice to the Union and impacted employees.
- **Beyond the testing provided for above**, employers may implement COVID-19 testing requirements, at no cost to the employee and on work time.



## Additional Information Regarding the MOA *(cont'd)*

- Employers **may** implement other applicable safety requirements (e.g., masking, social distancing).
  - No employee shall be prohibited from wearing a mask or other appropriate PPE.
- To the extent that there is a **state of emergency** related to COVID-19:
  - **Masking:** The employer **shall provide** disposable surgical masks or masks with a nose wire to employees each day.
  - **Hand Sanitation:** The employer **shall provide** employees with hand sanitizer and ensure that employees have the opportunity to wash their hands.
  - **Employee Facilities:** The employer **shall provide** employees with a private area for changing and for taking breaks that allows employees to socially distance.



# Questions?

---

Proskauer >>



The information provided in this slide presentation is not intended to be, and shall not be construed to be, either the provision of legal advice or an offer to provide legal services, nor does it necessarily reflect the opinions of the firm, our lawyers or our clients. No client-lawyer relationship between you and the firm is or may be created by your access to or use of this presentation or any information contained on them. Rather, the content is intended as a general overview of the subject matter covered. Proskauer Rose LLP (Proskauer) is not obligated to provide updates on the information presented herein. Those viewing this presentation are encouraged to seek direct counsel on legal questions. © Proskauer Rose LLP. All Rights Reserved.

# COVID-19 and Preparing for a Return to the Building Workplace: Key Legal and Practical Considerations of Mandatory Vaccinations

Steven Porzio  
Howard Rothschild  
Robert Schwartz

Friday, October 22, 2021

Proskauer»

**BOMA**  
New York

**REBNY**<sup>®</sup>

**RAB**  
REALTY ADVISORY BOARD  
ON LABOR RELATIONS