

# CROSSSTATE CREDIT UNION ASSOCIATION

## THE VACCINE, FFCRA AND MORE FUN COVID TOPICS

Presented by:



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# WHY THE VACCINE?

Many good reasons for employers/business owners to talk and learn about the vaccine

- ▣ Can we fully reopen the economy without it?
- ▣ If not, what can we do to get enough people vaccinated?
- ▣ If not voluntarily, can you require your employees to be vaccinated as a condition of employment
- ▣ Can you require your members as a condition of in-person banking?

# THE VACCINE CHRONO

- ▣ February 4, 2020, HHS Secretary determined public health emergency with significant potential to affect national security
- ▣ March 27, 2020, HHS Secretary declared circumstances exist to justify EUA of drugs and biological products
- ▣ December 11, 2020, FDA issues EUA for Pfizer
- ▣ December 18, 2020, Moderna gets EUA

# WHAT THE HECK IS EUA?

Under an EUA, FDA allows:

*use of **unapproved** medical products, or **unapproved uses** of approved medical products in an emergency to diagnose, treat, or prevent serious or life-threatening diseases or conditions when certain statutory criteria have been met, including that there are **no adequate, approved, and available alternatives***

# VAXES READY TO ROLL

**Historic moment: first dose administered in U.S.**

**When?**

**December 14, 2020**



# WHO RECEIVED THE FIRST DOSE?

Sandra Lindsay nurse and ICU Director of Patient Services in the Long Island Jewish Medical Center

*I trust science. What I don't trust is getting Covid-19, because I don't know how it will affect me and the people around me.*

As of yesterday, **39.7** million Americans had received at least 1 dose and **15** million fully vaccinated [**331 million**]

**Only 316 million to go**

# MANY STILL SAY: *THANKS BUT NO VAX*

Most recent polling shows **only** between 60% to 70% of Americans willing to be vaxed



Why?

Because we don't like being told what to do!

Women less likely than men to get it

Only 50.6% say yes, down from 69.5% in April

Men on board fell from 79.1% in April to 62.3%

Probably many don't trust...waiting to see what happens to the rest of us

# GETTING TO HERD



Most immunology experts predict we need at least 80% to be vaxed to get to herd immunity  
FYI it took 95% of the country to get vaccinated to eradicate the measles

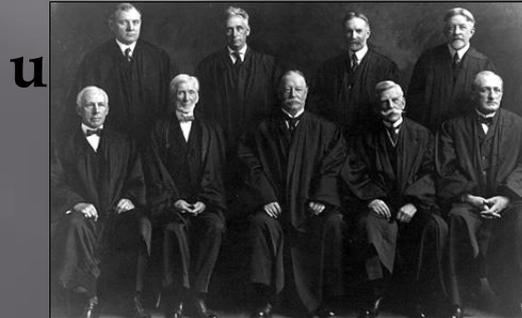
So with possibly 40% opting out and the supply seeming to trickle out....will the vax get us back to where we need to be for both our health and welfare and, almost as important, our economy

# CAN ANYONE MAKE US GET THE SHOT?

Let's start with the government

- ▣ At the turn of the Century (20<sup>th</sup>) Smallpox
- ▣ Massachusetts law allowing cities to require
- ▣ Cambridge outbreak and required the vax
- ▣ Pastor Henning Jacobson refused...fined \$5.00 and sued the state

- ▣ 1905 S  
this.....



- ▣ Real liberty can't exist if we can all do whatever we want without respect to harm we might cause others

# HOW NYC NAILED SMALLPOX

- ▣ **NYT (12/18/20) report NYC smallpox outbreak**
- ▣ **March 1, 1947 Patient Zero, Eugene LeBar, arrives by March 5 dead at Bellevue**
- ▣ **Virus spread even though many had been vaccinated immunity might have worn off**
- ▣ **NYC Health Commissioner mobilizes stock piles of vax from all over US and urges everyone in NYC to get re-vaxed ASAP**

**In 2 weeks 5 million and in less than 4 weeks 6.3 million New Yorkers had been vaccinated**

# CURRENT STATE OF THE LAW

- ▣ Right now, no federal or state law mandates citizens to be vaccinated for COVID
- ▣ NYS has a Bill pending in committee
- ▣ But state and federal power exists...Congress can use Commerce Clause...interstate commerce and interstate virus
- ▣ Vaxes mandatory in schools by state laws and scope will likely be extended eventually

But if we don't achieve herd immunity voluntarily could this become a reality?

# DOES EUA MAKE A DIFFERENCE?

This is all new...no law...no court cases guiding

- ▣ But EUA status likely prevents government mandate for now
- ▣ Because FDA regs allowing EUA require instructions to recipient of **right to refuse** but also potential health risks of passing
- ▣ FDA disclaimer essentially that feds aren't forcing the vax....assumption of the risk
- ▣ Eventually EUA status will be dropped and then what?

# COVID PASSPORT



Discussion underway for those fully vaxed to carry documentation paper or digital App to demonstrate immunity

- ▣ Might need to fly, go to ball game or concerts, or to get into other countries – like Neg tests
- ▣ Denmark has already started the COVID Passport system planning
- ▣ Some might not be able to get it for legit reasons and will create a two class system of literally **haves & have nots (Immunity Caste)**

# WHAT ABOUT EMPLOYERS?

If the government doesn't mandate will private employers...can you require employees and CU members to be vaccinated?

Short answer: Yes

But we're lawyers.....there are no short answers

Health care for years...Flu mandatory

OSHA obligation to protect employees from *known hazards* so if a way to prevent...

COVID *known hazard* spreadable at workplace

# EEOC TOLD US *GO FOR IT*

Mid-December 2020, EEOC issues 6 page guidance for employers on mandating vaccines

- ▣ Employers can require all employees to get (with 2 exceptions) if employer decides that:

The Un-vaxed pose a *direct threat* to co-workers and/or public

**What's a direct threat?**

# EEOC'S DIRECT THREAT ASSESSMENT

**Direct threat** assessment requires consideration of:

- ▣ Duration of the risk
- ▣ Nature and severity of potential harm
- ▣ Likelihood that potential harm will occur
- ▣ Imminence of potential harm

All boxes likely checked for COVID



# WHICH BRINGS US TO

**The two exceptions:**

**Employees can refuse vax if:**

- (1) Valid medical excuse or**
- (2) Religious objection**

**What is a valid medical excuse?**

- ▣ So far not much evidence of contraindications**
- ▣ Prior severe allergic reaction to vaxes with PEG, other mRNA vax component, or polysorbate**

**EMPLOYERS CAN GET PROOF FROM DOCS**

# NOT MUCH ELSE

Even pregnant or nursing mothers are only told by CDC and FDA to check with their Docs

What about **fear**?

Employees say their afraid...after all only 60% to 70% say they'll get the vax

EEOC has previously said generalized fear is not a disability or valid reason not to return to work---so not likely valid excuse to decline vax if employer requires

# EXCUSE NO. 2

## RELIGIOUS OBJECTIONS

- ▣ Fed and state law protect “sincerely held religious beliefs”
- ▣ If employee objects based on religious beliefs bar is low--EEOC and courts have broad definition of religion---
- ▣ Can be *idiosyncratic beliefs*
- ▣ But employers can ask for explanation
- ▣ Can't require note from clergy but entitled to evidence of commitment to belief system

# ON RELIGION

- ❑ So if this guy says it's against his religion to get a needle in his arm.....
- ❑ Can reject his request
- ❑ What about anti-vax movement?
- ❑ Is that *idiosyncratic beliefs*?
- ❑ Not likely because objections by anti-vaxers typically dispute the science
- ❑ So employee objecting on that basis likely not legally protected



# REASONABLE ACCOMMODATION

Employee has valid medical or religious excuse —  
now what? Should you fire?



Must explore reasonable accommodation options

- ▣ Maintain mask and 6ft....forever?
- ▣ Healthcare and flu vaccine
- ▣ Private office...Zoom into meetings
- ▣ Remote work if possible

**Undue Hardship to Employer**

# SO NOW YOU KNOW YOU CAN BUT SHOULD YOU REQUIRE?

- ▣ Recent survey show 61% of US employers intend to **encourage** but not **mandate**
- ▣ **Not even health care industry has required**
- ▣ Roughly 1/3rd of HC workers passing
- ▣ CEOs in diverse industries launching “myth buster” campaigns to educate and encourage
- ▣ Some are producing videos or bringing in experts to answer questions about safety

# STARS COME OUT



# SOME ARE MORE ASSERTATIVE

Late January, United Airlines CEO told employees that he's considering mandating it

Just recently learned of 1<sup>st</sup> employer in country to mandate vaccine....sort of --And wouldn't you know it's a law firm

End of Jan., 500 lawyer Seattle firm told employees they must get the vax or

# HERE ARE THE RULES

- ▣ **Not allowed back in office for any reason until vaccinated**
- ▣ **But can continue to work remotely**
- ▣ **Firm will pay for vax if not covered**
- ▣ **Will provide extra PTO for side effects**
- ▣ **Proof of vax is required**
- ▣ **Can you?**
- ▣ **EEOC guidance said employers can require proof of vaccination**

# SO WHAT ABOUT LIABILITY?

What if you require it and an employee has severe allergic reaction or even some yet unknown long-term health problem –

Can you get sued for that?

I REALLY  
DON'T  
KNOW

Pfizer/Moderna and the feds up first

Speculation is could be WC claim

**Federal National Vaccine Injury Compensation Program (around since 1980s)**

But requiring vax for continued employment still allows employee to decide – doesn't force them

# INCENTIVES

- ▣ Some employers offering incentives instead
- ▣ Hospital system in TX offering \$500 “hope bonus” to its 26,000 employees
- ▣ Dollar General – 4 hours pay to 140,000 EEs
- ▣ Illinois grocery chain-2 hours pay per dose
- ▣ The TX hosp vaccinated 75% so far (vs. 60%)

But are incentives a good idea?

**There is a legal catch....of course**

# EEOC RULES ON WELLNESS PROGRAMS

**Some employers offer incentives to join a gym, quit smoking or lose weight**

**Why? Healthy employees absent less and health insurance premiums be lower**

**But wellness programs require personal health info**

**If employer's incentive is "too high" EE may feel coerced---says EEOC – and employer can't force**

**New proposed regs "de minimis" incentives only**

**February 1, 2021 letter-- 40 business associations to EEOC seeking clarity on incentives ASAP!**

# HIGHEST FORM OF INCENTIVE

*DC Marijuana Justice* org outside COVID vax clinics giving free bag of pot to everyone get vax

## JOINTS FOR JABS

In Michigan similar *joint* effort between *Greenhouse of Walled Lake* and *Ubaked Cannabis Company*

## POT FOR SHOTS

# WHAT'S UP SIDE?

- ▣ If businesses require vax more likely to get to herd immunity faster – better for economy
- ▣ If you require your employees might make members more comfortable coming in
- ▣ If you require members to be vaxed might make employees more comfortable
- ▣ And of course might prevent an outbreak at your credit union

# COOL NEW QUARANTINE RULE

## CDC February 10, 2021

Vaccinated persons exposed to suspected or confirmed COVID-19 case are not required to quarantine if meet all the following criteria:

- ▣ Are fully vaccinated ( $\geq 2$  weeks after 2nd dose or  $\geq 2$  weeks after 1 dose of a single-dose vax)
- ▣ Are within **3 months** following receipt of the last dose in the series
- ▣ Have remained asymptomatic since exposure
- ▣ Those who don't meet **all 3** criteria should quarantine after exposure

# Families First Coronavirus Response Act

**FFCRA-1st Congressional response effective April 1, 2020**

**Emergency Paid Sick Leave Act (ESPLA) & Emergency Family and Medical Leave Expansion Act (EFMLEA)**

**Fewer than 500 employees 80 hours paid sick leave and up to 12 weeks job protected paid leave if kids' schools or daycares closed or remote learning**

**Not available if employee can work remotely**

# MORE FFCRA

Full pay up to \$511 a day for EPSLA and 2/3rds up to \$200 a day for EFMLEA

All fully covered by feds through reimbursement of payroll withholding dumped back into payroll account (FICA & taxes)

Sunset on December 31, 2020

But not dead yet....

Consolidated Appropriations Act of 2021(CAA) revived FFCRA---

Sort of

# FFCRA ACT II, Scene 1

CAA extends **payroll tax credits** for employers if voluntarily choose to allow employees to take leaves previously available under FFCRA

So employees don't have **right** to FFCRA leave but employer can...if follow all rules...allow and the feds **will pay the bill**

Not available for anyone who used all benefits  
Available until March 31, 2021....but then.....

# ACT III, SCENE I

White House seeks to reinstate FFCRA  
*American Rescue Plan* includes FFCRA 3.0

- ▣ No exception for employers with 500+
- ▣ 14 weeks of leave up from 12
- ▣ Businesses with fewer than 500 employees still get 100% reimbursement
- ▣ Those with 500+ employees would have to pay 100% of benefits

This version to sunset on September 30, 2021

**Or will it?**

# Q&A TIME WITH MARK AND BILL



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