

IMPROVING NEW YORK CITY'S COVID-19 VACCINE MANDATE FOR PUBLIC SECTOR WORKERS: A COLLABORATIVE FRAMEWORK FOR LABOR-MANAGEMENT RELATIONS IN HIGH IMPACT CIRCUMSTANCES

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I. INTRODUCTION

Since being declared a global pandemic on March 11, 2020,¹ the novel coronavirus, SARS-CoV-2 (“COVID-19”) has had a substantial impact on people’s lives across the globe. With more than 6.9 million dead and more than 770 million reportedly infected,² the human toll has been devastating. In addition to the loss of life, the efforts to contain COVID-19 brought profound and unprecedented changes to just about every aspect of daily life including work, travel, and basic social interaction. But just as the COVID-19 virus was unprecedented, so too was the global response. Using groundbreaking mRNA technology, researchers rapidly developed multiple successful vaccines to immunize the public and slow the spread of the virus.³

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¹ Jamey Keaten, Maria Cheng, and John Leicester, *WHO Declares Coronavirus a Pandemic, Urges Aggressive Action*, ASSOCIATED PRESS (Mar. 12, 2020), <https://apnews.com/article/united-nations-michael-pence-religion-travel-virus-outbreak-52e12ca90c55b6e0c398d134a2cc286e> [<https://perma.cc/P8YF-6FV6>].

² *Coronavirus Dashboard*, WORLD HEALTH ORGANIZATION [WHO], <https://covid19.who.int/> [<https://perma.cc/2SNJ-FK7E>] (last visited Nov. 10, 2023).

³ Jennifer Abbasi, *COVID-19 and mRNA Vaccines—First Large Test for a New Approach*, [J] AMA MED. NEWS & PERS. (Sept. 3, 2020), <https://jamanetwork.com/journals/jama/fullarticle/2770485> [<https://perma.cc/9HLH-GHJS>].

In record time, vaccines were available for a large part of the global population.⁴

In the United States, government efforts to encourage and even compel vaccination have focused on those facets of life most heavily impacted by the COVID-19 virus. One common approach mandated proof of vaccination for indoor dining or event attendance.⁵ Another approach tethered compliance with COVID-19 vaccine mandates to one's employment.⁶ The power of state and local governments to enact protective public health measures is well-established,⁷ and it is similarly uncontroversial for non-unionized private employers to unilaterally impose new requirements on workers.⁸ Imposing employment-based vaccine mandates to unionized workplaces, however, raised important questions involving collective bargaining obligations.⁹

Broadly speaking, unions and employers are obligated to negotiate the setting of "wages, hours, and other terms and conditions

⁴ Amanda Glassman, Charles Kenny, and George Yang, *The COVID-19 Vaccine Rollout Was the Fastest in Global History, but Low-Income Countries Were Left Behind*, CTR. GLOB. DEV. (Feb. 9, 2022), <https://www.cgdev.org/blog/covid-19-vaccine-rollout-was-fastest-global-history-low-income-countries-were-left-behind> [<https://perma.cc/7SBS-JZNJ>] (discussing how, while COVID-19 vaccines were developed and distributed faster than any other such development in history, vaccines were not distributed equitably to low-income countries).

⁵ See Emma G. Fitzsimmons, Sharon Otterman, and Joseph Goldstein, *N.Y.C. Will Require Workers and Customers Show Proof of at Least One Dose for Indoor Dining and Other Activities*, N.Y. TIMES (Sept. 7, 2021), <https://www.nytimes.com/2021/08/03/nyregion/nyc-vaccine-mandate.html> [<https://perma.cc/S22K-77P7>]; see also Christine Bestor Townsend & Zachary A. Pestine, *Chicago Issues Proof of COVID-19 Vaccination Requirement for Restaurants, Gyms, and Indoor Concerts*, OGLETREE DEAKINS (Dec. 23, 2021), <https://ogletree.com/insights/chicago-issues-proof-of-covid-19-vaccination-requirement-for-restaurants-gyms-and-indoor-concerts/> [<https://perma.cc/D7DK-9ZD9>].

⁶ See generally Haley Messenger, *From McDonald's to Goldman Sachs, Here Are the Companies Mandating Vaccines for All or Some Employees*, NBC NEWS (Aug. 3, 2021, 12:40 P.M.), <https://www.nbcnews.com/business/business-news/here-are-companies-mandating-vaccines-all-or-some-employees-n1275808> [<https://perma.cc/6NVF-XLAX>]; see also Danielle Ivory et al., *Who's Requiring Workers to Be Vaccinated?*, N.Y. TIMES (Feb. 23, 2022), <https://www.nytimes.com/interactive/2022/02/23/business/office-vaccine-mandate.html> [<https://perma.cc/T7FG-GN8R>].

⁷ See *infra*, Section II.B.

⁸ See generally Roland E. Jolles, *A Survey of Employment Contract Law in Florida: An Analysis of the Applications of Employment Contracts to the Interests of Employers and Employees*, 21 FLA. ST. UNIV. L. REV. 167, 167 (1993) ("In the absence of a contract, however, an employee is subject to the common law doctrine of at-will employment. This latter doctrine gives the employer unfettered control over the terms and conditions of employment and termination.").

⁹ Jon Anderson & Rufino Gaytán III, *Vaccine Mandates May Require Collective Bargaining*, LAB. REL. L. INSIDER (Nov. 16, 2021), <https://www.laborrelationslawinsider.com/2021/11/vaccine-mandates-may-require-collective-bargaining/> [<https://perma.cc/P8RM-65W5>] ("[T]he ETS affects terms and conditions of employment—including the potential to affect the continued employment of employees who become subject to it—and to the extent the ETS gives covered employers some measure of discretion . . . bargaining obligations may arise.").

of employment” in good faith through collective bargaining.¹⁰ These rights and obligations apply to both the public and private sectors but derive from different authority. For public sector unions, federal, state, and local law determine what rights, if any, public sector unions have in that jurisdiction.¹¹ However, statutory mandates can sometimes affect the terms and conditions of employment of public or private sector workers. In the private sector, decisions of the National Labor Relations Board (“NLRB”) have long supported the principle that “an employer is relieved of its duty to bargain”¹² where a statute changes specific terms and conditions of employment; however, “the employer may not act unilaterally so long as it has some discretion in implementing those requirements.”¹³ Essentially, where the employer can make choices as to how the law will be implemented in the workplace, such changes may be subject to bargaining.¹⁴ Discretionary aspects of vaccine mandate implementation—for example, how workers would submit proof of vaccination or request a reasonable accommodation—prompted debate as to whether such terms would need to be bargained over.¹⁵ For private sector unions, the NLRB’s Office of the General Counsel took a clear stance that

¹⁰ 29 U.S.C. § 158(d).

¹¹ See *infra*, Section II.C. The rights and obligations of private sector employers and employees are enshrined in the National Labor Relations Act. See generally, 29 U.S.C. §§ 151-169.

¹² OFF. GEN. COUNS., NAT’L LAB. REL. BD., OM 22-03, RESPONDING TO INQUIRIES REGARDING BARGAINING OBLIGATIONS UNDER THE DEPARTMENT OF LABOR’S EMERGENCY TEMPORARY STANDARD TO PROTECT WORKERS FROM CORONAVIRUS, (Nov. 10, 2021), https://smart-union.org/wp-content/uploads/2021/11/2021.11.12_NLRB_Responding-to-Inquiries-Regarding-Bargaining-Obligations-COVID-19.pdf [<https://perma.cc/UFV3-YZFN>].

¹³ *Id.*; see also, Alex G. Desrosiers, *NLRB’s General Counsel Tells Unionized Employers They Must Bargain Over Mandate-or-Test Vaccine ETS Rule*, FISHER PHILLIPS (Nov. 16, 2021), <https://www.fisherphillips.com/news-insights/nlrbs-general-counsel-unionized-employers-bargain-vaccine-ets-rule.html> [<https://perma.cc/P2ZL-88SM>]; see also Anderson and Gaytán, *supra* note 9.

¹⁴ Such changes may not be subject to bargaining where a union has waived bargaining rights over the decision in question, or the decision falls under management rights provisions of the existing collective bargaining agreement. But even if waived by the union, an employer may still have to bargain over the effects of such statutory requirements. Anderson and Gaytán, *supra* note 9; see also Desrosiers, *supra* note 13 (describing the difference between decisional and effects bargaining in the context of vaccine mandates).

¹⁵ Steven M. Bernstein & Patrick W. Dennison, *The Realities of Mandating COVID-19 Vaccination for Unionized Employees*, FISHER PHILLIPS (Jan. 26, 2021), <https://www.fisherphillips.com/news-insights/the-realities-of-mandating-covid-19-vaccination-for-unionized-employees.html> [<https://perma.cc/LLY7-3CTZ>]; See also *Management and Union’s Rights and Obligations in Collective Bargaining*, A.B.A., https://www.americanbar.org/content/dam/aba/events/labor_law/basics_papers/nlra/obligations.pdf [<https://perma.cc/PN9S-ACCV>] (last visited Jan. 12, 2023) (explaining the difference between mandatory, permissive, and illegal bargaining terms).

workers have a right to bargain over how employers implement these and other discretionary aspects of such mandates.¹⁶

Public sector unions, meanwhile, may be more limited by state and local law.¹⁷ As outlined by relevant law,¹⁸ public sector unions and employers across the country engaged in bargaining, negotiation, or other forms of dispute resolution over COVID-19 vaccine mandate implementation.¹⁹ In New York City (“NYC”), for example, the city government imposed some of the “most aggressive steps in the nation to increase vaccination rates,”²⁰ primarily impacting the city’s public sector workforce.²¹ In implementing these mandates, the city and its unions utilized various forms of dispute resolution commonly deployed in labor relations, namely, negotiation and arbitration.²² Negotiation and arbitration served to settle disputes between the unions and city government over mandate implementation,²³ and arbitration played a significant role in the implementation of the mandate on rank-and-file workers through the accommodation request and appeal process.²⁴ Negotiation and arbitration, while non-adversarial in that they provide alternatives to litigation, can still be antagonistic. This is especially true in, but not unique to, the context of labor relations, where labor and management often come to the table with, at least a perception of, directly opposing goals. While critical to labor relations during normal circumstances, as seen

¹⁶ See OFF. GEN. COUNS., NAT’L LAB. REL. BD., *supra* note 12. Although this memo was issued in light of the Biden administration’s since-invalidated OSHA mandate (see *infra*, section II.B.1), it represents a broader policy statement regarding bargaining obligations relating to vaccine mandates, answering a question many in labor law had been asking since the COVID vaccine was in development; See Desrosiers, *supra* note 13.

¹⁷ *Infra*, Section II.C.

¹⁸ See, e.g., N.Y. CIV. SERV. L. §§ 200–215.

¹⁹ See, e.g., Seamus J. Ronan, Note, *Standardized (COVID) Testing? Vaccines Mandates and Teachers’ Unions Collective Bargaining Agreements in Urban School Districts*, 49 *FORDHAM URB. L.J.* 861, 895–908 (2022) (discussing negotiations and arbitration between the city school districts of Los Angeles and New York City with their respective teachers’ unions over, *inter alia*, vaccine mandates); see also *Breaking: State Workers Ratify Vaccine Agreement*, WASH. FED’N ST. EMPS. (Sept. 10, 2021), <https://www.wfse.org/news/breaking-state-workers-ratify-vaccine-agreement> [<https://perma.cc/GVA3-4TZ2>]; *State Reaches First Union Agreement on Vaccine Mandate in Illinois’ Congregate Facilities*, ST. ILL. (Sept. 20, 2021), <https://www.illinois.gov/news/press-release.23913.html> [<https://perma.cc/AMZ6-2NJT>].

²⁰ Emma G. Fitzsimmons & Sharon Otterman, *New York City Ends Vaccine Mandate for City Workers*, N.Y. TIMES (Feb. 6, 2023), <https://www.nytimes.com/2023/02/06/nyregion/vaccine-mandate-nyc-adams.html> [<https://perma.cc/92TJ-9HDB>].

²¹ *Id.*, see also *infra*, Section II.B.ii.2.

²² See *infra*, Section III.A.

²³ *Id.*

²⁴ *Id.*

with COVID-19, such processes are generally ill-suited to problem-solving in times of crisis.²⁵

In many ways, NYC's vaccine mandates highlighted longstanding issues particular to, and inherent in, public sector unions and bargaining.²⁶ In the context of a major societal upheaval like a pandemic, this question becomes more urgent: How can governments balance their powers and obligations to the public along with their obligations to unionized workers as an employer? Using NYC as a case study, this Note argues that in "high impact events" such as pandemics, financial crises, and natural disasters, the traditional methods of public sector labor-management dispute resolution are insufficient to properly balance these competing obligations. Instead, public sector employers and employees should engage in collaborative governance.

Collaboration is "a process through which parties who see different aspects of a problem constructively explore their differences and search for solutions that go beyond their own limited view of what is possible."²⁷ Collaborative governance describes the application of the process of collaboration to policy decision-making and public administration.²⁸ By bringing together multiple stakeholders, collaborative governance processes are intended to facilitate more thoughtful, responsive, and efficient responses to complex societal problems.²⁹ Pandemics, such as COVID-19 and other disruptors including financial crises and natural disasters, cause uniquely complex and interrelated issues for governments within the realm of labor relations involving public employees. Governments must balance the need to take swift, decisive action, uphold collective bargaining obligations as an employer, and ensure the continued provision of public services. With an updated and expanded role for collaboration—particularly using collaborative governance with government, management, union, and rank-and-file participation and input—public sector employers and employees could achieve better balance in times of crisis between protecting collective rights of employees and the public good while also ensuring respect for the individual rights of workers.

²⁵ *Infra*, Section III.C.

²⁶ *Infra*, Section II.C.

²⁷ Jill M. Purdy, *A Framework for Assessing Power in Collaborative Governance Processes*, 72 PUB. ADMIN. REV. 409, 409 (2012) (quoting Barbara Gray and Pat Lauderdale, *The Great Circle of Justice: North American Indigenous Justice and Contemporary Restoration Programs*, 10 CONTEMP. JUST. REV. 215 (2007)).

²⁸ See Kirk Emerson, Tina Nabatchi, and Stephen Balogh, *An Integrative Framework for Collaborative Governance*, 22 J. PUB. ADMIN. RSCH. & THEORY 1, 2–3 (2011).

²⁹ *Id.*; see also Purdy, *supra* note 27.

The Background section of this Note will briefly discuss the impacts of the COVID-19 pandemic on the workplace and provide an overview of the legal landscape relating to vaccine mandates at the federal, state, and local level. The Background section will also discuss important ways public sector labor unions differ from private sector unions, in particular, the unique relationship between union and management when management is also the government. The Discussion section will evaluate the way NYC's COVID-19 vaccine mandate for city employees was imposed largely unilaterally by city government. Additionally, this section will look at the outcomes of agreements reached through bargaining and arbitration and analyze whether, and to what extent, they achieved objectives such as protecting worker and public health, respecting workers' needs for accommodation, and maintaining trust in institutions.

Finally, this Note will propose that unique and extreme circumstances such as the COVID-19 pandemic necessitate a more collaborative framework that seeks to balance the needs and input of government, management, labor, and union rank-and-file to ensure the highest possible buy-in at every level. Decisions of the government as an employer carry the implication of policy.³⁰ Decisions concerning public sector employment, often determined through collective bargaining, can indirectly impact workers beyond those employed in the public sector. This makes it even more imperative for the government to enact thoughtful, responsive policy for public sector workers in times of crisis. And the best way to ensure this is the case is through collaborative governance.³¹

II. BACKGROUND

A. *COVID-19 and the Workplace*

After COVID-19 was declared a pandemic, many states and localities issued stay-at-home orders to slow the spread of the virus. Entire sectors of the economy essentially shut down, disrupting employment for millions.³² Unemployment in April 2020 measured at 14.8%, the highest levels ever recorded in the United States.³³ Both the public and private sector felt these losses. While public sector job

³⁰ See *infra*, Section II.C.iii.

³¹ See *infra*, Section IV.

³² Gene Falk, Isaac A. Nicchitta, Paul D. Romero, and Emma C. Nyhof, CONG. RSCH. SERV., R46554, UNEMPLOYMENT RATES DURING THE COVID-19 PANDEMIC (2021).

³³ Data on national unemployment rates did not start being collected until 1948. *Id.*

losses due to the pandemic were not as drastic and immediate as private sector losses, by September 2020, state and local governments lost more than 1.2 million jobs.³⁴

The immediate and drastic impact of the COVID-19 virus on work and the economy led to predictions of fundamental changes to work and workplace.³⁵ But rather than expanding accessibility and addressing racial³⁶ and gender³⁷ inequities³⁸ laid bare by the pandemic, many policymakers focused recovery narratives on the economy broadly and a “return to normalcy.”³⁹ Pandemic-era job loss and unemployment disproportionately affected workers in fields less amenable to remote work;⁴⁰ Hispanic workers, Black workers, and those with lower levels of education—particularly those with a high school diploma or less—were also disproportionately impacted.⁴¹ Notably, for many employers, including public sector employers

³⁴ The 1.2 million lost state and local government jobs equates to a loss of 6.1% of all state and local government jobs nationwide. Total private sector losses by September 2020 reached 9.8 million jobs, or a 7.6% decrease. Federal government numbers are here excluded due to increases stemming from census-related hiring. Sara Hinkley, *Public Sector Impacts of the Great Recession and COVID-19*, U.C. BERKELEY LAB. CTR. (Oct. 21, 2020), <https://laborcenter.berkeley.edu/public-sector-impacts-great-recession-and-covid-19/> [<https://perma.cc/EBK9-9NT6>].

³⁵ Some of these predictions included: sustained increases in remote work and reliance on telecommunication technologies; increased use of automation and artificial intelligence; and lowered demand for low-wage customer service and retail workers due to said automation. *E.g.*, Susan Lund, Anu Madgavkar, James Manyika, Sven Smit, Kweilin Ellingrud and Olivia Robinson, *The Future of Work After COVID-19*, MCKINSEY GLOB. INST. (Feb. 18, 2021), <https://www.mckinsey.com/featured-insights/future-of-work/the-future-of-work-after-covid-19> [<https://perma.cc/4Y6J-BGEH>].

³⁶ *E.g.*, Jamillah Bowman Williams, *COVID-19 Widens Disparities for Workers of Color*, 35 A.B.A. J. LAB. & EMP. L. 1, 33, 33–35 (2020), https://www.americanbar.org/content/dam/aba/publications/aba_journal_of_labor_employment_law/v35/number-1/covid-19-widens.pdf [<https://perma.cc/CN3W-6M9N>].

³⁷ Richard Fry, *Some Gender Disparities Widened in the U.S. Workforce During the Pandemic*, PEW RSCH. CTR. (Jan. 14, 2022), <https://www.pewresearch.org/fact-tank/2022/01/14/some-gender-disparities-widened-in-the-u-s-workforce-during-the-pandemic/> [<https://perma.cc/WSF7-TRNH>].

³⁸ Gender and racial disparities have further impact on those at the intersection of multiple social identities, such as black women, who saw “disproportionately negative social effects” as a result of COVID-19. Jacquelyn V. Coats et al., *Employment Loss and Food Insecurity—Race and Sex Disparities in the Context of COVID-19*, CTRS. DISEASE CONTROL & PREVENTION (Aug. 18, 2022), https://www.cdc.gov/pcd/issues/2022/22_0024.htm [<https://perma.cc/K2BL-MEKF>].

³⁹ *E.g.*, Michelle L. Price, *Big Cities Drop More COVID-19 Measures in Push for Normalcy*, AP NEWS (Mar. 4, 2022), <https://apnews.com/article/kathy-hochul-brooklyn-nets-nba-coronavirus-pandemic-sports-5377490ad6db096d52c355d3d7c15757> [<https://perma.cc/7LAY-2MYF>] (“New York City and Los Angeles are lifting some of their strictest COVID-19 prevention measures as officials in big cities around the U.S. push for a return to normalcy after two grueling years of the pandemic.”).

⁴⁰ See Falk, Nicchitta, Romero, and Nyhof, *supra* note 32, at 5, 20 (stating that sectors offering “in-person services” saw the highest job losses, with the leisure and hospitality industry suffered significantly higher job loss than any other employment sector).

⁴¹ *Id.* at 12–13.

such as the NYC government, “return to normalcy” policies often aligned with the issuance of COVID-19 vaccine mandates.⁴²

B. *Legal Authority for Vaccine Mandates*

Vaccine mandates have been considered a legitimate exercise of state police power almost as long as vaccines have existed. In 1905, the Supreme Court upheld a smallpox vaccine mandate for all Cambridge residents in the foundational case *Jacobson v. Massachusetts*.⁴³ Since the development of COVID-19 vaccines, mandates have been issued at the federal, state, and local levels, often by executive authority.⁴⁴ Throughout the pandemic, the courts largely upheld state and local mandates for COVID vaccines⁴⁵ as public health protections are generally considered a power reserved to the states through the Tenth Amendment to the United States Constitution.⁴⁶ Meanwhile, federal mandates were largely subject to judicial interpretation of administrative and constitutional law due to their enactment by federal agencies or the executive branch⁴⁷ rather than Congress.⁴⁸

i. Federal COVID-19 Vaccine Mandates

As will be discussed below, federal COVID-19 vaccine mandates encountered mixed results in the courts. Two executive federal agencies issued mandates in 2021 that went before the Supreme Court: The Occupational Safety and Health Administration

⁴² Annie McDonough, *City Employees Are Eyeing the Exits as Adams Insists on In-Person Work*, CITY & ST. N.Y. (Mar. 17, 2022), <https://www.cityandstateny.com/policy/2022/03/city-employees-are-eyeing-exits-adams-insists-person-work/363317/> [<https://perma.cc/ZTQ8-6FZQ>] (noting that city office workers were ordered to return to offices full-time in September, 2021; roughly coinciding with the issuance of the City’s vaccine-only mandate for all city employees that same month, *see infra* Section II.B.ii.2).

⁴³ *Jacobson v. Massachusetts*, 197 U.S. 11 (1905). This is not to say, however, that every state and local vaccine mandate is legal: courts have invalidated vaccine requirements found to be discriminatory or otherwise arbitrary. *See Wong Wai v. Williamson*, 103 F.1 (C.C.N.D. Cal. 1900) (finding a vaccine requirement exclusively targeting San Francisco’s Chinese and Chinese-American residents discriminatory and thus invalid).

⁴⁴ Wen W. Shen, CONG. RSCH. SERV., R46745, STATE AND FEDERAL AUTHORITY TO MANDATE COVID-19 VACCINATION, (2022)

⁴⁵ *Id.* at 8-12; *see also infra*, Section II.B.ii.

⁴⁶ Stephanie Cooper Blum, *Federalism: Fault or Feature—An Analysis of Whether the United States Should Implement a Federal Pandemic Statute*, 60 WASHBURN L. J. 1, 3 (2020).

⁴⁷ *Infra*, Section II.B.i.

⁴⁸ While Congress has some concurrent powers in the public health sphere, limitations under the Tenth Amendment restrict Congressional action to the provision of “guidance, research, expertise, and financial assistance.” Blum, *supra* note 46, at 44.

(“OSHA”)⁴⁹ and the Centers for Medicare and Medicaid Services (“CMS”).⁵⁰ In both cases, the Court focused on interpreting the issuing agency’s statutory authority.⁵¹ The Court’s decisions on these mandates established that executive agencies are capable, if limited, in issuing vaccine mandates by the powers enumerated in their authorizing statutes. Presidential authority to issue vaccine mandates for the federal workforce, however, was largely not upheld.⁵²

In November 2021, OSHA issued a broad vaccine-or-test mandate⁵³ that applied to all private employers with one hundred employees or more.⁵⁴ OSHA issued this mandate as an Emergency Temporary Standard (“ETS”) under the Occupational Safety and Health Act, 29 U.S.C.S. § 655(c)(1).⁵⁵ Experts estimated this

⁴⁹ OSHA is an executive agency housed within the Department of Labor. OSHA, 86 C.F.R. § 61402 (2021).

⁵⁰ CMS is an executive agency housed with the Department of Health. Dept. of Health, Ctrs. For Medicare and Medicare Servs., 86 C.F.R. § 61555 (2021).

⁵¹ See Nat’l Fed’n Indep. Bus. v. Dep’t of Lab., Occupational Safety & Health Admin., 142 S. Ct. 661, 665 (2022) (invalidating the OSHA mandate as exceeding the scope of the agency’s authority); see also Biden v. Missouri, 142 S. Ct. 647, 651 (2022) (upholding the validity of the CMS mandate for healthcare workers in facilities receiving Medicaid funds).

⁵² President Biden issued two vaccine mandates in 2021 aimed at the Federal workforce through Executive Order: Executive Order No. 14043 applying to federal employees (“employee mandate”) and Executive Order No. 14042 extending the federal employee mandate to federal contractors (“contractor mandate”). Exec. Order No. 14043, 86 Fed. Reg. 50989 (Sept. 9, 2021); Exec. Order No. 14042, 86 Fed. Reg. 50985 (Sept. 9, 2021). Both mandates were enjoined by the federal courts and those injunctions were upheld on appeal. *Louisiana v. Biden*, 55 F.4th 1017 (5th Cir. 2022) (upholding injunction against the contractor mandate); *Kentucky v. Biden*, 57 F.4th 545 (6th Cir. 2023) (upholding injunction against the contractor mandate); *Feds for Medical Freedom v. Biden*, 63 F.4th 366 (5th Cir. 2023) (upholding injunction against the employee mandate). The Biden Administration announced on May 1, 2023, that the enjoined federal employee and contractor mandates would end. *The Biden-Harris Administration Will End COVID-19 Vaccination Requirements for Federal Employees, Contractors, International Travelers, Head Start Educators, and CMS-Certified Facilities*, WHITE HOUSE (May 1, 2023), <https://www.whitehouse.gov/briefing-room/statements-releases/2023/05/01/the-biden-administration-will-end-covid-19-vaccination-requirements-for-federal-employees-contractors-international-travelers-head-start-educators-and-cms-certified-facilities/> [https://perma.cc/GML4-2K5Y].

⁵³ “Vaccine-or-test” means that workers who chose not to, or could not, receive the COVID-19 vaccine could instead choose to get tested for COVID-19 weekly and produce their negative test to their employer. See ARCHIVES & RECS. ADMIN., OFF. FED. REG., DCPD202100725 (2021).

⁵⁴ OSHA, *supra* note 49.

⁵⁵ 29 U.S.C. § 655(c)(1)(1970) outlines the criteria for issuance of an ETS as “(A) that employees are exposed to grave danger from exposure to substances or agents determined to be toxic or harmful or from new hazards, and (B) that such emergency standard is necessary to protect employees from such danger.” As an ETS, the rule would be put into place for six months during which OSHA would accept comments as required by the Administrative Procedures Act to determine whether the rule should be made permanent. 29 U.S.C. § 655(b) (1970); see also James Sullivan, *Lawsuits Fighting OSHA COVID-19 Vaccine Standard May Not Matter*, BLOOMBERG L. (Sept. 24, 2021), <https://news.bloomberglaw.com/daily-labor-report/lawsuits-fighting-osha-covid-19-vaccine-standard-may-not-matter> [https://perma.cc/FL3A-26PD] (the COVID-19 vaccine mandate marked the first time OSHA had issued an ETS in nearly forty years).

private employer mandate could have affected up to 100 million Americans, with up to 50% of whom otherwise were not previously vaccinated.⁵⁶ Those challenging the ETS argued that the COVID-19 vaccine mandate exceeded the authority designated to OSHA by the Occupational Safety and Health Act.⁵⁷ The Supreme Court agreed, holding that COVID-19 did not constitute a workplace hazard qualifying for the implementation of an ETS, according to § 655(c)(1).⁵⁸

The CMS mandate, meanwhile, was a vaccination-only mandate applicable to healthcare workers at facilities accepting Medicare and/or Medicaid funding.⁵⁹ CMS issued the mandate without going through formal notice-and-comment requirements, arguing there was “good cause” to do so due to the danger to patient health from delayed implementation.⁶⁰ Facilities that failed to adhere to the mandate could suffer monetary penalties or even termination from participation in Medicare or Medicaid programs.⁶¹ The Supreme Court found this to be within the scope of the agency’s authority to “impose conditions on the receipt of Medicaid and Medicare funds”⁶² to further the “health and safety”⁶³ of Medicare and Medicaid patients, including conditions relating to the “qualifications and duties” of healthcare workers.⁶⁴

ii. State and Local COVID-19 Vaccine Mandates

State and local governments are primarily responsible for regulations pertaining to public health as a police power reserved to

⁵⁶ Farhan I. Mohiuddin & Hina I. Mohiuddin, Comment, *To Force or Not to Force: Analyzing the Implications of the Executive Employer Vaccine Mandate*, 12 Hous. L. REV. 25, 31 (2021) (citing Julia Ries, *How Many People Will Be Impacted by Biden’s Vaccine Rules?*, HEALTHLINE (Sept. 17, 2021), <https://www.healthline.com/health-news/how-many-people-will-be-impacted-by-bidens-vaccine-rules> [<https://perma.cc/9CNA-MNH5>]).

⁵⁷ Nat’l Fed’n Indep. Bus. v. Dep’t of Lab., Occupational Safety & Health Admin., 142 S. Ct. 661, 665 (2022).

⁵⁸ *Id.* (stating “[a]lthough COVID-19 is a risk that occurs in many workplaces, it is not an occupational hazard in most . . . Permitting OSHA to regulate the hazards of daily life . . . would significantly expand OSHA’s regulatory authority without clear congressional authorization”); *cf.* OSHA, *supra* note 49, at 61407 (arguing “there is nothing in the [OSH] Act to suggest that its protections do not extend to hazards which might occur outside of the workplace as well as within,” citing as an example existing OSHA regulation relating to HIV/AIDS and Hepatitis B exposure).

⁵⁹ The CMS mandate, issued as an interim final rule with comment period (IFC), allowed exemptions for remote workers and those requiring medical or religious accommodations. *Biden v. Missouri*, 142 S. Ct. 647, 651 (2022).

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.* at 652.

⁶³ *Id.*

⁶⁴ *Id.* at 653.

them through the Tenth Amendment.⁶⁵ Accordingly, both New York State (“NYS”) and NYC issued vaccine mandates for COVID-19. NYS focused on vaccine mandates for healthcare workers.⁶⁶ NYC, meanwhile, initiated multiple mandates initially aimed at employees of different government agencies, eventually culminating in a sweeping mandate applicable to all private employers with work-sites in the city.⁶⁷ While the power of the state and city to enact such mandates remains largely intact as discussed below, some challenges succeeded with as-applied claims of arbitrariness, separation of powers violations, and violation of collective bargaining rights.⁶⁸

1. NYS Mandate for Healthcare Workers

Challenges to the NYS mandate primarily focused on the mandate’s lack of a religious exemption.⁶⁹ However, federal courts have long held that “a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice.”⁷⁰ As such, the Second Circuit Court of Appeals held that NYS had a “legitimate government interest”⁷¹ in preventing both the spread of COVID-19 in medical facilities and staffing shortages that could negatively impact patient care.⁷² The Second Circuit also cited the lack of religious accommodation in longstanding vaccine requirements for New York healthcare workers, such as those for measles and rubella.⁷³

⁶⁵ Blum, *supra* note 46; *see also* Shen, *supra* note 44.

⁶⁶ 10 N.Y.C.R.R. § 2.61.

⁶⁷ *Infra*, Section II.B.ii.2.

⁶⁸ *See id.*

⁶⁹ Mary Beth Morrissey, Thomas G. Merrill, and Christopher C. Palermo, *Challenges to State and Local Vaccine Mandates in New York*, NYSBA (Dec. 10, 2021), <https://nysba.org/challenges-to-state-and-local-vaccine-mandates-in-new-york/> [<https://perma.cc/F7MD-DK6M>].

⁷⁰ *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993).

⁷¹ *We the Patriots U.S., Inc. v. Hochul*, 17 F.4th 266 (2d Cir. 2021). The U.S. Supreme Court declined to hear this case on appeal; Andrew Chung, *U.S. Supreme Court Nixes Religious Challenge to New York Vaccine Mandate*, REUTERS (June 30, 2022, 11:47AM), <https://www.reuters.com/legal/government/us-supreme-court-nixes-religious-challenge-new-york-vaccine-mandate-2022-06-30/> [<https://perma.cc/W6VE-8Y8J>].

⁷² *Id.*

⁷³ Chung, *supra* note 71.

A later challenge to the mandate in state court held that the mandate violated state law⁷⁴ and was arbitrary and capricious.⁷⁵ However, the Appellate Division of the Supreme Court of New York, Fourth Judicial Department, issued a stay on this order until the case could be heard on appeal.⁷⁶ NYS lifted the mandate in May 2023 before the appeal could be heard.⁷⁷

2. NYC Mandates: Expansion and Exemption

NYC's COVID-19 vaccine mandate consisted of multiple orders issued under Mayor Bill de Blasio's administration, starting in July 2021 and continuing into 2022 under Mayor Eric Adams, as will be detailed below. A chronological view of these orders shows the de Blasio administration's attempt to expand the mandate to as many people as possible. The Adams administration took a less unified approach, navigating political pressures and pushing for a "return to normalcy."⁷⁸

The first vaccine orders issued by Mayor de Blasio in the summer of 2021 implemented vaccination-or-test mandates for

⁷⁴ *Med. Pro. for Informed Consent v. Bassett*, 185 N.Y.S.3d 578, 585 (N.Y. Sup. Ct. 2023) (citing that NYS Public Health Law prohibits the State Health Commissioner from implementing mandatory immunization programs for children or adults unless added to the Public Health Law legislatively).

⁷⁵ J. Neri declared the mandate "absurd" and "Orwellian" based on evidence that COVID-19 vaccines do not fully prevent transmission of the disease. It is unclear, however, why a 100% transmission prevention rate is the only measure of vaccine efficacy considered. *Id.* at 586. *See also* Petition, Ex. F at 25, *Med. Pro. for Informed Consent v. Bassett*, 185 N.Y.S.3d 578, 586 (Sup. Ct. 2023).

⁷⁶ S. Alexander Berlucchi, et al., *Healthcare Law Alert: New York State Supreme Court Judge Invalidates COVID-19 Vaccine Mandate*, HANCOCK ESTABROOK (Mar. 1, 2023), <https://www.hancocklaw.com/publications/healthcare-law-alert-new-york-state-supreme-court-judge-invalidates-covid-19-vaccine-mandate/> [<https://perma.cc/TE9B-6LUK>].

⁷⁷ The appeal was to be added to the court's term beginning May 15, 2023. *Id.*; The NYS Department of Health announced the repeal of the mandate on May 24, 2023. *New York State Department of Health Statement on Repealing the COVID-19 Healthcare Worker Vaccine Requirement*, N.Y. DEP'T. HEALTH (May 24, 2023), [https://www.health.ny.gov/press/releases/2023/2023-05-24_statement.htm#:~:text=\(May%2024%2C%202023\)%20%2D,at%20regulated%20health%20care%20facilities](https://www.health.ny.gov/press/releases/2023/2023-05-24_statement.htm#:~:text=(May%2024%2C%202023)%20%2D,at%20regulated%20health%20care%20facilities) [<https://perma.cc/BYD8-YFJF>].

⁷⁸ *See* Michael Gartland, *Political Tone in NYC Takes a Marked Turn Two Years Into the COVID-19 Pandemic*, N.Y. DAILY NEWS (Mar. 13, 2022, 12:00 PM), <https://www.nydailynews.com/news/ny-covid-pandemic-eric-adams-de-blasio-masks-vaccines-hochul-cuomo-20220313-3fs3gdhcu5chdijg2wcyergu6ae-story.html> [<https://perma.cc/Q2N3-GNJZ>] (pointing out that de Blasio, when enacting NYC's aggressive vaccination mandates, was term-limited and thus less constrained by political considerations).

city employees,⁷⁹ starting with those employed in higher-risk environments such as hospitals, and phasing in all city agencies over time.⁸⁰ The de Blasio administration also implemented the “Key to NYC” program in summer 2021.⁸¹ Key to NYC required both workers and visitors at indoor establishments such as restaurants, gyms, and theaters, to show proof that they had received at least one dose of the vaccine to enter.⁸² Notably, the program required vaccines for some private sector workers.⁸³

By August 2021, the de Blasio administration switched to a vaccination-only approach for city workers beginning with the Department of Education (“DOE”),⁸⁴ no longer allowing weekly testing as a vaccination alternative.⁸⁵ In October 2021, the de Blasio administration issued a vaccination-only mandate for all city employees (“the public sector mandate”).⁸⁶ In its most ambitious effort, the de Blasio administration then issued a mandate for all employers with worksites in NYC in December 2021 (“the private

⁷⁹ Mirna Alsharif et al., *New York City to Require its Health Workers to get Vaccinated or Submit to Weekly Tests*, CNN (July 21, 2021, 1:38 PM), <https://www.cnn.com/2021/07/21/us/new-york-city-vaccine-healthcare-requirement/index.html> [<https://perma.cc/9H2X-3NS7>]; see, e.g., CITY OF N.Y., COMM’R HEALTH & MENTAL HYGIENE, ORDER OF THE COMMISSIONER OF HEALTH AND MENTAL HYGIENE TO REQUIRE COVID-19 VACCINATION OR TESTING FOR STAFF IN PUBLIC HEALTHCARE SETTINGS (Aug. 24, 2021), <https://www.nyc.gov/assets/doh/downloads/pdf/covid/covid-19-vaccination-or-testing-staff-public-settings-072121.pdf> [<https://perma.cc/ZA9J-DKHV>]; CITY OF N.Y., COMM’R HEALTH & MENTAL HYGIENE, ORDER OF THE COMMISSIONER OF HEALTH AND MENTAL HYGIENE TO REQUIRE COVID-19 VACCINATION OR TESTING FOR STAFF IN RESIDENTIAL AND CONGREGATE SETTINGS, (Aug. 10, 2021) <https://www.nyc.gov/assets/doh/downloads/pdf/covid/covid-19-vaccination-or-testing-staff-residential-congregational-081021.pdf> [<https://perma.cc/ZGK9-G4AM>].

⁸⁰ See Alsharif et al., *supra* note 79.

⁸¹ Fitzsimmons et al., *supra* note 5. CITY OF N.Y., OFF. MAYOR, EMERGENCY EXEC. ORD. No. 225 (2021), <https://www1.nyc.gov/assets/home/downloads/pdf/executive-orders/2021/eo-225.pdf> [<https://perma.cc/S7C7-4JBV>].

⁸² CITY OF N.Y., OFF. MAYOR, EMERGENCY EXEC. ORD., *supra* note 81.

⁸³ See *id.*

⁸⁴ CITY OF N.Y., COMM’R HEALTH & HUMAN HYGIENE, ORDER OF THE COMMISSIONER OF HEALTH AND MENTAL HYGIENE TO REQUIRE COVID-19 VACCINATION FOR DEPARTMENT OF EDUCATION EMPLOYEES, CONTRACTORS, VISITORS, AND OTHERS (Sept. 15, 2021), <https://www.nyc.gov/assets/doh/downloads/pdf/covid/covid-19-vaccination-requirement-doe-2.pdf> [<https://perma.cc/PQ3L-2Y6X>] (covering in-person teachers, staff, contractors, and even visitors to NYC public schools, charter schools, and DOE buildings).

⁸⁵ Morrissey et al., *supra* note 69.

⁸⁶ CITY OF N.Y., COMM’R HEALTH & HUMAN HYGIENE, ORDER OF THE COMMISSIONER OF HEALTH AND MENTAL HYGIENE TO REQUIRE COVID-19 VACCINATION FOR CITY EMPLOYEES AND CERTAIN CITY CONTRACTORS (Oct. 20, 2021), <https://www1.nyc.gov/assets/doh/downloads/pdf/covid/covid-19-vaccination-requirement-city-employees.pdf> [<https://perma.cc/A5AZ-YR3R>].

employer mandate”).⁸⁷ The private employer mandate required employers to receive proof of vaccination from any employee who worked in-person with either members of the public or other employees.⁸⁸ The private employer mandate prompted questions regarding the scope of local public health powers.⁸⁹

When Mayor Adams took office the following month in January 2022, his administration declined to enforce the private employer mandate.⁹⁰ Then, in March 2022, Mayor Adams made crucial changes to the existing web of vaccine mandates through the issuance of two executive orders. First, citing high rates of vaccination and lower rates of COVID-19 infection, he ended the Key to NYC Program through Executive Order 50 issued March 4, 2022.⁹¹ Establishments no longer needed proof of vaccination from customers.⁹² Executive Order 50, however, still required businesses to collect proof of vaccination from workers pursuant to the private employer mandate, despite that mandate not being enforced.⁹³

Then, on March 24, 2022, Mayor Adams modified Executive Order 50 and, by extension, the private employer mandate.⁹⁴ Specifically, he changed the definition of “covered worker,” exempting certain categories of employees from the obligation to

⁸⁷ This mandate created complementary obligations for both private employers and their employees: employees were obligated to provide proof of vaccination to their employer, who had to collect this information and keep records of employee vaccination status. CITY OF N.Y., COMM’R HEALTH & HUMAN HYGIENE, ORDER OF THE COMMISSIONER OF HEALTH AND MENTAL HYGIENE TO REQUIRE COVID-19 VACCINATION IN THE WORKPLACE (Dec. 13, 2021), <https://www.nyc.gov/assets/doh/downloads/pdf/covid/covid-19-vaccination-workplace-requirement.pdf> [<https://perma.cc/PE34-UWAH>].

⁸⁸ This requirement extended to non-employees as well, such as contractors, interns, and volunteers. *Id.*

⁸⁹ *E.g.*, Susan Gross Sholinsky, et. al., *Is New York City’s Vaccine Mandate for Private Employers Legal?*, BLOOMBERG L. (Dec. 9, 2021, 9:00 AM), <https://news.bloomberglaw.com/daily-labor-report/is-new-york-citys-vaccine-mandate-for-private-employers-legal> [<https://perma.cc/P5RF-UVVL>]; *see also* Morrissey et al., *supra* note 69.

⁹⁰ Adams claims his administration focused on promoting vaccination through education instead, distributing informational pamphlets on COVID-19 vaccines. Lola Fadulu, *Eric Adams Stopped Enforcing Vaccine Mandate for New York City Businesses*, N.Y. TIMES (June 23, 2022), <https://www.nytimes.com/2022/06/23/nyregion/nyc-vaccine-mandate-adams.html> [<https://perma.cc/9SZR-3FW7>]; *see also* David Lazar, *Adams Administration Is Not Inspecting Companies for Vaccine Mandate Compliance*, NY1 (June 22, 2022, 10:00 PM), <https://www.ny1.com/nyc/all-boroughs/coronavirus/2022/06/23/mayor-eric-adams-not-inspecting-private-companies-for-city-s-covid-19-mandate> [<https://perma.cc/YB4M-8FT5>].

⁹¹ CITY OF N.Y., OFF. MAYOR, EMERGENCY EXEC. ORD. NO. 50 (2022), <https://www.nyc.gov/office-of-the-mayor/news/050-003/emergency-executive-order-50> [<https://perma.cc/2RWC-XJXU>].

⁹² *Id.*

⁹³ *Id.*; *see also* Fadulu, *supra* note 90.

⁹⁴ CITY OF N.Y., OFF. MAYOR, EMERGENCY EXEC. ORD. NO. 62 (2022), <https://www.nyc.gov/assets/home/downloads/pdf/executive-orders/2022/eo-62.pdf> [<https://perma.cc/UWD6-FDNR>].

provide proof of vaccination to their employer.⁹⁵ These exemptions applied to remote workers, professional athletes, performing artists, and individuals “accompanying” either a performing artist, athlete, or the athlete’s sports team.⁹⁶ These exemptions became known as the “Kyrie Carveout,” referring to the vocally unvaccinated member of the Brooklyn Nets professional basketball team, Kyrie Irving, who had been benched by the Nets due to the city’s vaccination policies.⁹⁷

Mayor Adams contended the Kyrie Carveout was necessary for NYC’s economic recovery, as the city’s economy relies heavily on tourism and entertainment.⁹⁸ But the exemptions for artists and athletes immediately angered public sector labor leaders.⁹⁹ While never enforced, the Adams administration formally ended the private employer mandate on November 1, 2022.¹⁰⁰ The public sector mandate not only remained in effect at that time, further angering public sector labor leaders,¹⁰¹ but had long been enforced by the city. In February 2022 alone, NYC terminated more than 1,400 city workers for non-compliance with the vaccine

⁹⁵ *Id.*; see also CITY OF N.Y., COMM’R HEALTH & HUMAN HYGIENE, *supra* note 87.

⁹⁶ CITY OF N.Y., OFF. MAYOR, EMERGENCY EXEC. ORD. No. 62, *supra* note 94 at § 3(d)(3).

⁹⁷ Initially in compliance with the Key to NYC program and then the (unenforced) private employer mandate, the Brooklyn Nets benched the unvaccinated Irving for home games at Barclay’s Center in Brooklyn. Unvaccinated visiting players were not so restricted. Ohm Youngmisuk, *Kyrie Irving Says Decision to Remain Unvaccinated is ‘About Being True to What Feels Good for Me’*, ESPN (Oct. 14, 2021, 1:10 AM), https://www.espn.com/nba/story/_/id/32397602/kyrie-irving-says-decision-remain-unvaccinated-being-true-feels-good-me [<https://perma.cc/87F5-B872>]; see also Emma G. Fitzsimmons & Sopan Deb, *‘Kyrie Carve Out’ in Vaccine Mandate Frees Irving to Play in New York*, N.Y. TIMES (Mar. 23, 2022), <https://www.nytimes.com/2022/03/23/sports/kyrie-irving-nyc-vaccine-mandate.html> [<https://perma.cc/F8P8-WQFM>].

⁹⁸ Mayor Eric Adams, *Transcript: Mayor Eric Adams Makes an Economic and Health-Related Announcement*, NYC GOV’T (Mar. 24, 2022), <https://www.nyc.gov/office-of-the-mayor/news/153-22/transcript-mayor-eric-adams-makes-economic-health-related-announcement> [<https://perma.cc/2JUP-HTJR>] (“A multibillion-dollar industry is tied to tourism . . . [W]e’re going to keep our nightlife industry thriving, a \$35.1 billion industry.”).

⁹⁹ Katie Honan, *Eric Adams’ ‘Kyrie Carve Out’ Has Unions and Workers Fuming*, THE CITY (Mar. 24, 2022, 8:00 PM), <https://www.thecity.nyc/2022/3/24/22995486/adams-kyrie-irving-carve-out-nyc-unions-workers-angry> [<https://perma.cc/8Z8P-8SM2>].

¹⁰⁰ Daniel I. Small & Robert S. Whitman, *COVID-19 Update: New York City Announces November 1 End for Vaccine Mandate*, SEYFARTH (Sept. 20, 2022), <https://www.seyfarth.com/news-insights/covid-19-update-new-york-city-announces-november-1-end-for-vaccine-mandate.html> [<https://perma.cc/RED6-98NW>].

¹⁰¹ Joe Anuta, *Supreme Court to Consider Taking up Challenge to New York’s Vaccine Mandate*, POLITICO (Sept. 20, 2022, 9:01 PM), <https://www.politico.com/news/2022/09/20/supreme-court-new-york-vaccine-mandate-00057894> [<https://perma.cc/54ED-J37C>].

mandate.¹⁰² The public sector mandate remained in effect until February 2023.¹⁰³

Various lawsuits, largely from public employees, challenged the different iterations of NYC’s COVID-19 vaccine mandate in both state and federal court. While the United States Supreme Court declined to hear a challenge to the public sector mandate,¹⁰⁴ the New York State Supreme Court for Richmond County found the public and private sector mandates arbitrary and capricious due to the Kyrie Carveout.¹⁰⁵ Judge Ralph Porzio held in *Garvey v. City of New York* that “there is no rational reason for vaccination mandates to distinguish City workers, athletes, performers, and other private sector employees Either there is a mandate for all, or a mandate for none.”¹⁰⁶ Crucially, Judge Porzio focused on the implementation of the mandates, not their scope, writing that “[i]t is clear that the Health Commissioner has the authority to issue public health mandates,”¹⁰⁷ however, “the Board of Health does not have the authority to unilaterally and indefinitely change the terms of employment for any agency.”¹⁰⁸ This sentiment, that the conditioning of continued employment on vaccination creates a new term of employment, was echoed in a holding from the New York Supreme Court of New York County; a judge held that, while “it is undisputed that the DOH has the authority to issue vaccine

¹⁰² As of February 2022, another 9,000 workers were awaiting decisions on exemption requests. Emma G. Fitzsimmons, *N.Y.C. Fires 1,430 Workers, Less Than 1 Percent of City Employees, Over a Vaccine Mandate*, N.Y. TIMES (Feb. 14, 2022), <https://www.nytimes.com/2022/02/14/nyregion/nyc-vaccine-mandate.html> [<https://perma.cc/FVN7-LLHW>]. By September 2022, the number of terminated city workers rose to around 1,700. Sahalie Donaldson, *What’s the Latest on New York City’s COVID-19 Vaccine Mandate for City Workers?*, CITY & ST. (Sept. 28, 2022), <https://www.cityandstateny.com/policy/2022/09/whats-latest-new-york-citys-covid-19-vaccine-mandate-city-workers/377671/> [<https://perma.cc/CBN9-Z8J2>].

¹⁰³ Fitzsimmons & Otterman, *supra* note 20 (noting the change affected current and future employees; the lifting of the mandate did not restore jobs for those who had been terminated under the mandate, though they could reapply for employment).

¹⁰⁴ This particular challenge to the public employer mandate predated Executive Orders 50 and 62. Andrew Chung, *U.S. Supreme Court’s Sotomayor Keeps New York City’s COVID Vaccine Mandate*, REUTERS (Aug. 29, 2022, 6:56 PM), <https://www.reuters.com/world/us/us-supreme-courts-sotomayor-keeps-new-york-city-covid-vaccine-mandate-2022-08-29/> [<https://perma.cc/P5YK-AULF>].

¹⁰⁵ *Garvey v. City of New York*, 77 Misc. 3d 585 (N.Y. Sup. Ct. 2022).

¹⁰⁶ *Id.* at 599.

¹⁰⁷ *Id.*

¹⁰⁸ Unlike with the state vaccine mandate for healthcare workers, Judge Porzio noted that there have never been any citywide vaccine requirements for public sector employees. *Id.* at 595.

mandates,” NYC had an obligation to engage in bargaining with the unions over implementation.¹⁰⁹

C. Public Sector Union Bargaining

i. Codification of Public Sector Collective Bargaining Rights

Public sector unions, as the name suggests, represent public sector workers employed by government entities, rather than workers engaged by private employers. As will be explored below, public employment differs from private employment, both generally and regarding collective bargaining rights, in some fundamental ways. Further, the American federal system of government means that public sector unions can be broken down according to the respective level of government—federal, state, and local—each with their own parameters and permissions when it comes to collective bargaining.¹¹⁰ As the vaccine mandates impacting federal employees never went into effect,¹¹¹ this Note will not discuss federal collective bargaining practices.

Public sector bargaining rights for state and local workers are determined by state and local statute rather than the National Labor Relations Act, which governs private sector bargaining. As a result, public sector employee bargaining rights exist “on a continuum,”¹¹² varying both between and within states. At least thirty-one states allow public sector collective bargaining to some extent, but some states have banned the practice outright.¹¹³ While some states and localities grant collective bargaining rights to certain categories of employees, most states instead legislate what terms of employment can or cannot be bargained for.¹¹⁴ For example, some states allow bargaining over wages and hours but not retirement benefits.¹¹⁵

Public sector union statutes go beyond prescribing who can bargain and what they can bargain over. These laws also touch on various other factors affecting the scope of public sector

¹⁰⁹ *Police Benevolent Ass’n. v. City of N.Y.*, 2022 N.Y. Misc. LEXIS 5420 (Sept. 23, 2022) (“The issues before this Court are narrow and are whether the DOH can impose adverse employment actions to enforce those mandates and even taking it a step further, whether it is lawful for the DOH to implement conditions of employment to members of the PBA.”).

¹¹⁰ Jon O. Shimabukuro, CONG. RSCH. SERV., R41732, COLLECTIVE BARGAINING AND EMPLOYEES IN THE PUBLIC SECTOR (2011).

¹¹¹ *See supra* Section II.B.i.

¹¹² Shimabukuro, *supra* note 110, at 3.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

union bargaining power such as whether terms are permissive or mandatory, what dispute resolution procedures will be used to resolve grievances, and what rights, if any, workers have to strike.¹¹⁶ As mentioned previously,¹¹⁷ changes to conditions of employment imposed by statute are generally not subject to negotiation except sometimes where the employer has discretion in determining how the statutory change will be implemented.¹¹⁸ For public sector unions, this also depends on whether they have a statutory right to collectively bargain over the condition of employment in question.¹¹⁹

As in the private sector, public sector unions must often rely on various forms of bargaining, negotiation, and dispute resolution to resolve grievances or address issues that arise outside of contract negotiations. For example, Memoranda of Understanding (“MOUs”) or Memoranda of Agreement (“MOAs”) are collectively bargained-for agreements that can serve to resolve disputes or address needs that arise under an existing collective bargaining agreement (“CBA”).¹²⁰ In some limited emergency circumstances, employers may take unilateral action that is otherwise not expressly permitted under a CBA.¹²¹ Even before the prospect of mandated vaccination, the COVID-19 pandemic prompted many questions, in both the public and private sectors, over whether employers could unilaterally impose health and safety measures on unionized workers or whether such measures were subject to collective bargaining.¹²² For the public sector, these questions centered on the intersection of the government’s public health powers and the obligation to bargain with public employee unions.

ii. NYS and NYC Public Sector Union Rights

New York State public sector unions’ bargaining rights are governed by the Taylor Law.¹²³ The Taylor Law includes basic rights and permissions for public sector unionization at the state and local levels,¹²⁴ including granting public employees the right to organize

¹¹⁶ Monique Morrissey, *Unions Can Reduce the Public-Sector Pay Gap*, EPI (July 9, 2021), <https://www.epi.org/publication/unions-public-sector-pay-gap/> [<https://perma.cc/86PD-CZQU>].

¹¹⁷ See *supra* Section I.

¹¹⁸ Desrosiers, *supra* note 13.

¹¹⁹ Shimabukuro, *supra* note 110.

¹²⁰ Ronan, *supra* note 19, at 870.

¹²¹ Brian R. Garrison, *COVID-19 Issues for Unionized Employers*, FAEGRE DRINKER (Apr. 1, 2020), <https://www.faegredrinker.com/en/insights/publications/2020/4/covid-19-issues-for-unionized-employers> [<https://perma.cc/QN8B-E6JQ>].

¹²² *Id.*

¹²³ Taylor Law (Public Employees’ Fair Employment Act), N.Y. CIV. SERV. LAW § 200-215 (McKinney 1969).

¹²⁴ N.Y. CIV. SERV. LAW § 201(6) (McKinney 1969).

and choose their union; requiring governments and “other political subdivisions”¹²⁵ to negotiate and enter into CBAs with employee unions; establishing procedures where bargaining does not result in agreement; and creating the Public Employment Relations Board (“PERB”), a neutral, state-level administrative agency that enforces the Taylor Law.¹²⁶ The Taylor Law defines the terms and conditions of employment as “salaries, wages, hours and other terms and conditions” and excludes all retirement benefits and payments from public retirement systems.¹²⁷ The Taylor Law also defines which public employees are excepted from bargaining rights¹²⁸ and prohibits public employees from conducting strikes or other work stoppages.¹²⁹

iii. Concerns and Controversy Over Public Sector Bargaining Rights

With the government as an employer, terms of employment are also policy decisions.¹³⁰ For example, public sector unions bargaining for higher wages impacts budget levels and resource allocation, typically policy decisions made by the elected legislature.¹³¹ As a result, many questions regarding political participation, where the terms and conditions of public sector employment intersect with public policy, have persisted since the first attempts to gain recognition for public sector unions.¹³² Specifically, what terms and conditions are to be negotiated privately by union representatives and what issues are of such public interest that they must be openly

¹²⁵ *Id.*

¹²⁶ *See id.*; The PERB serves a similar function for New York’s public sector unions similarly that the NLRB serves for private sector unions. *See* N.Y. CIV. SERV. LAW § 205 (McKinney 1969); *see also* N.Y. DEPT. LAB., OFF. EMP. REL., *New York State Public Employees’ Fair Employment Act – the Taylor Law*, N.Y. ST., <https://oer.ny.gov/new-york-state-public-employees-fair-employment-act-taylor-law> [<https://perma.cc/CBT7-VGVV>] (last visited Oct. 15, 2023).

¹²⁷ N.Y. CIV. SERV. LAW § 201(4) (McKinney 1969).

¹²⁸ N.Y. CIV. SERV. LAW § 201(7) (McKinney 1969) (excepting “judges and justices of the unified court system,” managerial and confidential employees and political appointees from collective bargaining rights).

¹²⁹ N.Y. CIV. SERV. LAW § 210 (1) (McKinney 1969).

¹³⁰ *See* Clyde Summers, *Public Sector Bargaining: A Different Animal*, 5 U. PA. J. BUS. L. 441, 441 (2003); *see also* Jeffrey H. Keefe, *Laws Enabling Public-Sector Collective Bargaining Have Not Led to Excessive Public-Sector Pay*, ECON. POL’Y INST. (Oct. 16, 2015), <https://www.epi.org/publication/laws-enabling-public-sector-collective-bargaining-have-not-led-to-excessive-public-sector-pay/> [<https://perma.cc/7B6L-VZZ4>].

¹³¹ Summers, *supra* note 130, at 446.

¹³² The history of public sector unions, while fascinating, is outside the scope of this note. *See* Joshua B. Freeman & Steve Fraser, *IN THE REARVIEW MIRROR: A Brief History of Opposition to Public Sector Unionism*, CUNY SCH. LAB. & URB. STUD.: NEW LAB. F. (Oct. 2011), <https://newlaborforum.cuny.edu/2011/10/12/in-the-rearview-mirror-a-brief-history-of-opposition-to-public-sector-unionism/> [<https://perma.cc/X48E-T7VN>].

debated according to fundamental democratic principles?¹³³ The collective rights of workers to fair negotiation are, in some ways, seen as opposed to the individual rights of citizens to political participation.¹³⁴ But workers themselves are also members of the public with a right to civic participation in addition to their collective rights as a unit.¹³⁵ This means that, on one hand, union negotiations conducted through elected union representatives can be interpreted as preventing workers from participating in the political process as individual citizens.¹³⁶ On the other hand, however, this can also render civic participation by public unions and their members as a form of collective action to impact working conditions, as expressed by Victor Gotbaum, former head of the American Federation of State, County, and Municipal Employees, District Council 37 who stated that “[w]e have the power, in a sense, to elect our own boss.”¹³⁷

Government employers do not solely represent their interests as employers in negotiations with public sector unions. President Franklin D. Roosevelt wrote, on the question of public sector unionization, that “[t]he employer is the whole people, who speak by means of laws enacted by their representatives.”¹³⁸ Essentially, government employers are entrusted to represent the will of the public. Early concerns with public sector unions focused on whether, in negotiating with the representatives of the citizenry, public sector unions would serve as an “organized minority”¹³⁹ negotiating against the majority will of the public.¹⁴⁰ To some, this could be seen as a challenge to state sovereignty itself.¹⁴¹ Limitations on public sector bargaining, including restrictions on strikes, are thus at least partly in response to concerns of “politically advantaged”¹⁴² public employee unions having outsized influence on both politics and government.¹⁴³

¹³³ Summers, *supra* note 130, at 448–50.

¹³⁴ Keefe, *supra* note 130 (“The greatest concern about extending the private-sector model was whether public-sector collective bargaining would result in distortions of democracy . . .”).

¹³⁵ See Summers, *supra* note 130, at 447–48.

¹³⁶ *Id.* at 448 (using decisions regarding student discipline as an example: “. . . when disciplinary rules are bargained for, the teachers may have different and conflicting views, yet the union as exclusive bargaining representative purports to speak with a single voice for all teachers. With [collective bargaining] behind closed doors, the teachers who disagree will have no opportunity to be heard.”).

¹³⁷ Emmet Teran, *Private vs. Public Unions*, UNIT (Feb. 5, 2021), <https://guide.unitworkers.com/private-vs-public-unions/> [<https://perma.cc/33N3-AUQT>].

¹³⁸ Freeman & Fraser, *supra* note 132.

¹³⁹ Keefe, *supra* note 130.

¹⁴⁰ Freeman & Fraser, *supra* note 132.

¹⁴¹ *Id.*

¹⁴² Keefe, *supra* note 130.

¹⁴³ *Id.*; see also Summers, *supra* note 130.

Many states and localities either do not permit any public sector unions the right to strike or strictly limit the practice.¹⁴⁴ Such limitations are most common for public safety professions such as police and corrections officers.¹⁴⁵ Strike bans also relate to concerns over the political ramifications of public sector bargaining, in particular public sector unionization as a political act because “[u]nlike a strike in the private sector, a strike in the public sector is not an economic instrument operating through the market . . . [i]t is primarily a political instrument working through the political process.”¹⁴⁶ A labor strike is a sort of ultimatum, and a government employer deciding whether to comply with an ultimatum is unable to make a democratic choice, especially when that choice carries any of the aforementioned policy ramifications such as budget and resource allocation.

III. DISCUSSION

A. NYC Public Sector Union Implementation of the COVID-19 Vaccine Mandate

By their nature, government-imposed vaccine mandates tied to workplace and employment are necessarily going to be implemented by employers,¹⁴⁷ which for unionized workers, both public and private-sector, implicates impact bargaining.¹⁴⁸ New and evolving circumstances such as the COVID-19 pandemic are poor subjects for CBAs, which are intended for long term implementation and often do not change substantially when renegotiated.¹⁴⁹ As is typical

¹⁴⁴ Summers, *supra* note 130, at 450; *see also* Kirsten Bass, *Overview: How Different States Respond to Public Sector Labor Unrest*, ONLABOR (Mar. 11, 2014), <https://onlabor.org/overview-how-different-states-respond-to-public-sector-labor-unrest/> [<https://perma.cc/7LKK-XLZ3>] (detailing policies for those states that do permit public sector labor strikes in some form).

¹⁴⁵ Summers, *supra* note 130, at 450; Bass, *supra* note 144.

¹⁴⁶ Summers, *supra* note 130, at 452.

¹⁴⁷ *See, e.g.*, CITY OF N.Y., COMM’R HEALTH & HUMAN HYGIENE, *supra* note 86 (public sector mandate); *see* CITY OF N.Y., COMM’R HEALTH & HUMAN HYGIENE, *supra* note 87 (private employer mandate issuing the vaccine requirement for workers with a deadline for compliance but not specifying anything about the logistics of how employers would collect employer vaccine status or what the disciplinary process for workers found non-compliant would be, requiring the employers individually to determine these aspects of implementation).

¹⁴⁸ *See*, Anderson & Gaytán, *supra* note 9 (discussing impact bargaining in private sector labor law); *see also* West Irondequoit Teachers Ass’n v. Helsby, 35 N.Y.2d 46 (N.Y. 1974) (upholding public sector impact bargaining in NY: “PERB has held only that determination of class size is not negotiable. It has not been held that the *impact* of class size on the teachers is not negotiable . . . ‘Nevertheless, impact is a matter for negotiations.’”) (emphasis added).

¹⁴⁹ Ronan, *supra* note 19, at 879 (“Significant research shows that CBAs are resistant to change without a large precipitating event causing a reason to reconfigure the terms of the contract. CBAs are rarely substantively modified, and the contract language remains constant.”).

in such situations, NYC's public sector unions turned to bargaining tools such as MOAs instead.¹⁵⁰

When such negotiations reach an impasse, public employers and unions turn to dispute tools such as mediation, fact-finding, or interest arbitration, with specific dispute resolution tools and timelines defined by statute.¹⁵¹ When bargaining with the city over the vaccination-only mandate for DOE employees reached an impasse,¹⁵² the United Federation of Teachers (“UFT”) and the city entered into arbitration.¹⁵³ *Board of Ed. of the City School District of the City of N.Y. and United Fed. Of Teachers* (“UFT Arbitration”) served as a framework for many subsequent agreements between NYC and other public unions,¹⁵⁴ as is typical where an employer must deal with multiple bargaining units.¹⁵⁵

In addition to use as an impasse procedure in bargaining, the appeals process for individual workers' accommodation requests utilized a different arbitration process.¹⁵⁶ The arbitration processes for individual workers differed minimally between the MOAs reached with various bargaining units.¹⁵⁷ Standards for accommodation requests largely derived from the UFT Arbitration¹⁵⁸ and

¹⁵⁰ *Id.*; e.g., Summary of Agreement between District Council 37, AFSCME and The City of New York (Nov. 4, 2021), https://www.dc37.net/wp-content/uploads/news/headlines/pdfs/Summary_of_Agreement_DC37_NYC_11_04_2021_COVID_vaccine.pdf [https://perma.cc/38HK-PG33] [hereinafter DC 37 Agreement]; Memorandum of Agreement Local 300, Service Employees International Union (SEIU), City of New York, and the Board of Education of the City School District for the City of New York (Oct. 4, 2021), <https://www.seiulocal300.org/assets/files/L300-DOEVaccinemandateMOA10-4-21executed10-4-21.pdf> [https://perma.cc/VPH6-UCRK] [hereinafter SEIU Local 300 MOA]; Memorandum of Agreement Between Local 237, International Brotherhood of Teamsters and the City of New York (Nov. 3, 2021), <https://www.local237.org/docman/latest-from-local-237/1103-ibt-237-citywide-vaccine-mandate-moa/file> [https://perma.cc/X6GX-PC5L] [hereinafter Teamsters Local 237 MOA].

¹⁵¹ *See, e.g.*, N.Y. CIV. SERV. LAW § 209 (McKinney) (specifying dispute resolution procedures to be used at impasse).

¹⁵² According to the UFT at least, bargaining reached an impasse due to the City's refusal to budge on offering any medical or religious accommodations. *See Arbitrator Rules City Must Offer Non-Classroom Work to Teachers with Covid Vaccination Medical/Religious Exemptions*, UFT (Sept. 10, 2021), <https://www.uft.org/news/press-releases/arbitrator-rules-city-must-offer-non-classroom-work-teachers-covid-vaccination-medicalreligious> [https://perma.cc/AD8U-38AT].

¹⁵³ *Id.*; *United Fed'n of Tchrs., Loc. 2 v. City of New York* (Sept. 10, 2021) (Scheinman, Arb.).

¹⁵⁴ *See* DC 37 Agreement, *supra* note 150; *SEIU Local 300 MOA*, *supra* note 150; *Teamsters Local 237 MOA*, *supra* note 150; *see also* Sharon Otterman, *N.Y.C. Reaches an Agreement with Nine Labor Unions on COVID Vaccine Mandates*, N.Y. TIMES (Nov. 8, 2021), <https://www.nytimes.com/2021/11/04/nyregion/nyc-vaccine-mandate-union.html> [https://perma.cc/SAU3-CU2M]. The concessions outlined in the UFT Arbitration will be described below. *See infra* Section III.C.i.

¹⁵⁵ *See* Summers, *supra* note 130, at 444.

¹⁵⁶ *See* Otterman, *supra* note 154; DC 37 Agreement, *supra* note 150; SEIU Local 300 MOA, *supra* note 150; Teamsters Local 237 MOA, *supra* note 150.

¹⁵⁷ *See* DC 37 Agreement, *supra* note 150; SEIU Local 300 MOA, *supra* note 150; Teamsters Local 237 MOA, *supra* note 150.

¹⁵⁸ *United Fed'n of Tchrs.* (Scheinman, Arb.).

followed established anti-discrimination standards.¹⁵⁹ For medical accommodations, workers could request permanent or temporary exemptions.¹⁶⁰ Both required documentation from a doctor showing that the individual could not receive any COVID-19 vaccine, either due to a condition or prior allergic reaction to any vaccine, or to certain medical conditions allowing for a temporary accommodation.¹⁶¹ For religious accommodation, workers had to provide a letter from a clergy member.¹⁶² A religious accommodation could still be denied, however, where the head of the religion in question had spoken in favor of vaccination.¹⁶³

Workers who applied for but were denied an exemption could usually choose to appeal one of two ways:¹⁶⁴ submission to a city panel¹⁶⁵ or an appeal through an independent arbitrator from Scheinman Arbitration & Mediation Services (“SAMS”),¹⁶⁶ a frequent neutral for NYC public sector union disputes.¹⁶⁷ The city panel option did not afford the opportunities for live hearings and decisions were based on submitted materials alone.¹⁶⁸ The SAMS process as described in these same MOAs allowed for expedited virtual hearings only at the arbitrator’s discretion.¹⁶⁹

¹⁵⁹ See, e.g., *What You Should Know about COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*, EEOC (July 12, 2022), <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws#K> [<https://perma.cc/R6PH-VX8V>] (discussing ADA and medical accommodations in Section K, and religious accommodation under Title VII in Section L).

¹⁶⁰ *Applying for a Reasonable Accommodation from the COVID-19 Vaccine Mandate*, DEP’T. OF CITYWIDE ADMIN. SERVS. (Oct. 28, 2021), <https://www.nyc.gov/assets/dcas/downloads/pdf/guidelines/vaccine-reasonable-accommodation-process.pdf> [<https://perma.cc/54PH-4J95>] [hereinafter *Applying for a Reasonable Accommodation*].

¹⁶¹ See *United Fed’n of Tchrs.* (Scheinman, Arb.) (specifying conditions such as myocarditis as eligible for temporary medical accommodation).

¹⁶² *Id.*

¹⁶³ This question arose in several cases with NYC employees claiming exemption based on their Catholic faith, while Pope Francis had spoken publicly in favor of the COVID-19 vaccines. *E.g.*, State. N.Y. Unemployment Ins. Appeal Bd., Appeal Board No. 625404 (N.Y. 2022) (referencing the Pope’s statements in favor of vaccination in upholding the denial of unemployment benefits for a teacher fired under the DOE mandate citing his Catholic faith as the basis for religious objection to vaccination).

¹⁶⁴ Not all workers had access to both processes. See *Applying for a Reasonable Accommodation*, *supra* note 160.

¹⁶⁵ *Id.*

¹⁶⁶ *United Fed’n of Tchrs.* (Scheinman, Arb.).

¹⁶⁷ *Resume of Neutral: Martin Scheinman*; N.Y.C. OFF. COLLECTIVE BARGAINING, <https://www.ocb-nyc.org/view-resume.php?uid=555ca62fb30a5> [<https://perma.cc/V6YC-39BJ>] (last visited Feb. 6, 2023).

¹⁶⁸ DC 37 Agreement, *supra* note 150; SEIU Local 300 MOA, *supra* note 150; Teamsters Local 237 MOA, *supra* note 150.

¹⁶⁹ DC 37 Agreement, *supra* note 150; SEIU Local 300 MOA, *supra* note 150; Teamsters Local 237 MOA, *supra* note 150.

Even after going through arbitration and negotiating MOAs with the city government, NYC's public sector unions remained unhappy with the termination of city workers who failed to comply with the mandate.¹⁷⁰ NYC issued termination notices to unvaccinated and unexempted workers in January 2022.¹⁷¹ In response, a collective organization of NYC public sector bargaining units called the Municipal Labor Committee¹⁷² brought suit for violations of procedural due process, claiming that the government failed to follow disciplinary procedures from CBAs and city and state law.¹⁷³ The New York State Supreme Court for New York County held that the cited statutes and relevant CBAs did not apply to the COVID-19 vaccine mandate, as the created condition of employment did not implicate job performance and the specific cited statutes delineate disciplinary procedures relating to issues with job performance, competency, and misconduct.¹⁷⁴ Despite some successful as-applied challenges to NYC's vaccine mandate in lower courts,¹⁷⁵ these accommodation procedures remained in place until the mandate ended in 2023.¹⁷⁶

B. *Public Sector Union Stances on Vaccine Mandates*

Many public sector unions raised concerns with COVID-19 vaccine mandates while supporting vaccines for their members. This was not limited to NYC unions, with national public sector labor organizations similarly encouraging voluntary vaccination among members while withholding official support for mandates.¹⁷⁷ This was often not out of opposition to vaccination itself, but based on a desire to preserve the ability to negotiate concessions for members

¹⁷⁰ See *N.Y.C. Mun. Lab. Comm. v. City of New York*, 75 Misc.3d 411 (N.Y. Sup. Ct. 2022).

¹⁷¹ The court's opinion states that approximately 4,000 workers received termination notices, but more than 1,300 were ultimately terminated. *Id.* at 413. It is unclear whether or how many of those 4,000 workers either received their requested exemption or voluntarily separated from employment rather than be terminated. *Id.*

¹⁷² N.Y.C. Admin. Code § 12-313.

¹⁷³ N.Y.C. Mun. Lab. Comm., 75 Misc.3d at 415.

¹⁷⁴ *Id.* at 415–16.

¹⁷⁵ As referenced prior, appeals in these cases were not heard before the end of the mandate. See *infra* Section II.B.ii.2.

¹⁷⁶ N.Y. DEPT. HEALTH, *supra* note 77.

¹⁷⁷ Nathaniel Weixel & Alex Gangitano, *Vaccine Mandates Test Biden Ties with Labor*, HILL (Sept. 11, 2021, 5:00 PM), <https://thehill.com/homenews/administration/571773-vaccine-mandates-test-biden-ties-with-labor/> [<https://perma.cc/T892-XRHA>].

and ensure adequate representation for workers.¹⁷⁸ For example, in the UFT Arbitration, the arbitrator wrote that “[t]he UFT made clear it supports vaccination efforts and has encouraged its members to be vaccinated. Nonetheless, as a Union, it owes a duty to its members to ensure their rights are protected.”¹⁷⁹

Not all public sector unions, however, shared these views on mandates and vaccines, with some unions not even supporting vaccination as an individual choice. For example, some police unions across the country actively encouraged members to not get vaccinated.¹⁸⁰ The majority of NYC bargaining units and their members, meanwhile, complied with the mandate: by February 2022, only three city agencies had vaccination rates below 90%.¹⁸¹ One of those three agencies was the New York Police Department (“NYPD”).¹⁸² Yet despite the prevalence of anti-vaccine messaging aimed at law enforcement, at least 89% of the NYPD had been vaccinated at that time.¹⁸³ By the time Mayor Adams lifted the mandate in February 2023, more than 95% of all NYC employees received at least one dose of the vaccine.¹⁸⁴

¹⁷⁸ Jeffrey Hirsch, *Why So Many Unions Oppose Vaccine Mandates – Even When They Actually Support Them*, CONVERSATION (Nov. 9, 2021, 8:41 AM), <https://theconversation.com/why-so-many-unions-oppose-vaccine-mandates-even-when-they-actually-support-them-170067> [<https://perma.cc/ZWM5-BEPU>].

¹⁷⁹ *United Fed’n of Tchrs.* (Scheinman, Arb.).

¹⁸⁰ Sharon Otterman & Joseph Goldstein, *New York City’s Biggest Police Union Sues Over the City’s Vaccine Mandate*, N.Y. TIMES (Nov. 4, 2021), <https://www.nytimes.com/2021/10/25/nyregion/nypd-police-covid-vaccine-mandate-deblasio.html> [<https://perma.cc/686L-U8K5>] (“Police unions across the country, from Chicago to Washington State, are urging members to resist COVID vaccine requirements — despite COVID being by far the most common cause of officer duty-related deaths this year and last, according to the Officer Down Memorial Page.”).

¹⁸¹ David Lazar, *95% of City Workers Have at Least One Dose Ahead of Vax Deadline, Mayor’s Office Says*, N.Y. 1 (Feb. 9, 2022, 6:03 PM), <https://www.ny1.com/nyc/all-boroughs/coronavirus/2022/02/09/city-municipal-worker-vaccination-rates-feb--9> [<https://perma.cc/93PK-JVH5>].

¹⁸² *Id.*

¹⁸³ *Id.* NYC’s police unions and leaders, while leading multiple court challenges to the vaccine mandates, were not publicly opposed to vaccination and argued for police officers to have access as soon as possible. Instead, NYC’s police unions and leadership primarily advocated vaccination as a personal choice or argued the vaccine mandate exceeded the city government’s authority. Patrick J. Lynch, *PBA On Covid-19 Vaccinations*, NYCPBA (July 22, 2021), <https://www.nycpba.org/press-releases/2021/pba-on-covid-19-vaccinations/> [<https://perma.cc/AS66-TFWP>] (advocating vaccination as personal choice); Janelle Griffith, *‘Hell No’: Some Police Officers and Their Unions Oppose Vaccination Mandates*, NBC NEWS (Aug. 27, 2021, 4:30 AM), <https://www.nbcnews.com/news/us-news/hell-no-some-police-officers-their-unions-oppose-vaccination-mandates-n1277608> [<https://perma.cc/JUT7-AADY>] (quoting then-NYPD Commissioner Dermot Shea as supporting vaccine mandates “100 percent” but believing the mandate should have come from the state or federal government).

¹⁸⁴ Fitzsimmons & Otterman, *supra* note 20.

C. *Outcomes and Effects from COVID-19 Vaccine Mandate Implementation*

NYC's public sector unions undoubtedly won some valuable concessions from the city, whose hardline vaccine-only stance was one of the most aggressive vaccination measures in the country.¹⁸⁵ But in many ways, the mandates as implemented were still insufficient to properly protect workers against COVID-19 nor to adequately address those who had legitimate need of accommodation.¹⁸⁶ Additionally, by focusing solely on vaccination, the city missed a vital opportunity to institute a more comprehensive public health strategy to better address COVID-19, such as supporting vaccination efforts with masking, regular testing, and improved ventilation.¹⁸⁷ By relying on the oppositional approach to bargaining, as often seen in labor relations, and taking a hard, vaccine-only stance, the city missed an opportunity to build trust and buy-in from both union leadership and the rank-and-file during a time when conspiracy theories and lack of trust in institutions were rampant.¹⁸⁸

i. *Positive Outcomes from Vaccine Mandate Implementation*

First and foremost, the high rate of vaccination among NYC employees was an undoubtedly positive result of the COVID-19 vaccine mandate. The COVID-19 vaccine is estimated to have prevented 8,508 deaths, 48,076 hospitalizations, and 290,467 cases in NYC between December 2020 and July 2021 alone.¹⁸⁹ The vast majority of the city workforce ultimately complied with the mandate;¹⁹⁰ surely many workers who otherwise would not have been vaccinated did so because their continued employment depended on it. Through bargaining and arbitration, the unions also won significant concessions from the city government despite the city's commitment to a vaccination-only mandate.¹⁹¹ Some of the concessions included: providing non-public facing roles for work-granted medical accommodation, rather than these workers "being removed from payroll,"¹⁹² and expanding the options for those out

¹⁸⁵ *Id.*

¹⁸⁶ *See infra* Section III.C.iii.

¹⁸⁷ *See infra* Section III.C.ii.

¹⁸⁸ *See infra* Section III.C.iv.

¹⁸⁹ Affan Shoukat, et al., *Lives Saved and Hospitalizations Averted by COVID-19 Vaccination in New York City: A Modeling Study*, 5 *LANCET REG'L. HEALTH – AMERICAS* 100085 (2021), <https://www.sciencedirect.com/science/article/pii/S2667193X21000818> [<https://perma.cc/9RFQ-G8YP>].

¹⁹⁰ *See* Fitzsimmons & Otterman, *supra* note 20.

¹⁹¹ Ronan, *supra* note 19, at 900–02.

¹⁹² UFT, *supra* note 152.

of compliance by the mandated deadline, including offering unpaid leave while maintaining health insurance coverage or the ability to separate from employment with severance pay and no disciplinary record.¹⁹³

ii. Inadequate Long Term Public Health Measures and Workers' Rights Protections

Vaccines, while extremely effective and crucial in stopping the spread of deadly viruses like COVID-19,¹⁹⁴ are even more effective when used in conjunction with other public health measures.¹⁹⁵ By focusing solely on vaccination, the city failed to take advantage of additional public health benefits associated with regular testing,¹⁹⁶ masking,¹⁹⁷ improved ventilation,¹⁹⁸ and continued allowances for remote work for relevant staff.¹⁹⁹ Failure to embrace and promote these additional public health precautions likely contributed in some degree to continued spread of the virus, for example by not providing additional protections against “breakthrough” cases of

¹⁹³ *Id.*; see also *United Fed'n of Tchrs.* (Scheinman, Arb.) As is often the case, later MOAs between N.Y.C. and its unions were modeled on the UFT Arbitration, which first outlined these concessions to workers; see also *e.g.*, DC 37 Agreement, *supra* note 150.

¹⁹⁴ Tom Randall et al., *More Than 12.7 Billion Shots Given: COVID-19 Tracker*, BLOOMBERG (Oct. 6, 2022, 1:16 PM), <https://www.bloomberg.com/graphics/covid-vaccine-tracker-global-distribution/> [https://perma.cc/DU9X-JPLF].

¹⁹⁵ Liz Szabo, *Better Ventilation Can Prevent Covid Spread. But Are Companies Paying Attention?*, KAISER HEALTH NEWS (Apr. 19, 2022), <https://kffhealthnews.org/news/article/ventilation-covid-prevention-indoor-air-quality-businesses-invest/> [https://perma.cc/2JSS-7JYS] (“Scientists stress that ventilation should be viewed as one strategy in a three-pronged assault on covid, along with vaccination . . . and high-quality, well-fitted masks.”).

¹⁹⁶ See Tim R. Mercer & Marc Salit, *Testing at Scale During the COVID-19 Pandemic*, 22 NATURE REVS. GENETICS 415, 415 (2021), <https://www.nature.com/articles/s41576-021-00360-w#> [https://perma.cc/8PZG-55BS] (discussing that some studies have shown largescale testing can lower infection rates).

¹⁹⁷ See Sam Moore, PhD et al., *Vaccination and Non-Pharmaceutical Interventions for COVID-19: A Mathematical Modelling Study*, 21 LANCET 793 (2021), [https://www.thelancet.com/journals/laninf/article/PIIS1473-3099\(21\)00143-2/fulltext](https://www.thelancet.com/journals/laninf/article/PIIS1473-3099(21)00143-2/fulltext) [https://perma.cc/F68X-KDCL]; see also Mehul D. Patel, PhD et al., *Association of Simulated COVID-19 Vaccination and Nonpharmaceutical Interventions with Infections, Hospitalizations, and Mortality*, JAMA Network (June 1, 2021), <https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2780539> [https://perma.cc/DM9S-CWQ5].

¹⁹⁸ Gail M. Thornton et al., *The Impact of Heating, Ventilation, and Air Conditioning Design Features on the Transmission of Viruses, Including the 2019 Novel Coronavirus: A Systemic Review of Ventilation and Coronavirus*, PLOS GLOB. PUB. HEALTH (July 5, 2022), <https://journals.plos.org/globalpublichealth/article?id=10.1371/journal.pgph.0000552> [https://perma.cc/RHD6-ZV8F]; see also Szabo, *supra* note 195.

¹⁹⁹ Jean-Victor Alipour, Harald Fadinger, & Jan Schymik, *My Home Is My Castle—The Benefits of Working from Home During a Pandemic Crisis*, 196 J. PUB. ECON. 329 (2021), <https://www.sciencedirect.com/science/article/pii/S0047272721000098> [https://perma.cc/E53S-CHMQ].

COVID-19.²⁰⁰ NYC employs more than 325,000 individuals,²⁰¹ and it is reasonable to think the benefits to workers from additional, non-vaccine precautions would ripple outward from workers to their households, families, and communities. By adopting a more holistic public health approach, the city also could have inspired private employers to enact similar changes.²⁰²

The vaccine-only mandate also imposed inherently higher barriers for those seeking medical or religious accommodation than a vaccine-or-test mandate would.²⁰³ With a testing option, employees additionally benefit from not having to share potentially sensitive and personal information about their health or religious beliefs with their employer. While a small minority of workers requested accommodation and an even smaller percentage had legitimate claims for exemptions,²⁰⁴ this renders these issues no less important under American law. And, as detailed below, with opaque standards both for initial accommodation requests and appeals, protections of the rights of workers.

²⁰⁰ “Breakthrough cases” are instances of COVID-19 infection in vaccinated individuals. As of February 2023, more than 18.5% of fully vaccinated New Yorkers, accounting for 2,725,213 people statewide, had laboratory-confirmed breakthrough cases of COVID-19. Additional unconfirmed breakthrough infections likely occurred through this period. Hospitalization rates, however, remained extremely low for breakthrough cases, amounting to less than 1% by February 2023. *COVID-19 Breakthrough Data*, N.Y. DEPT. HEALTH, <https://coronavirus.health.ny.gov/covid-19-breakthrough-data> [<https://perma.cc/4V7G-MRJC>] (last visited Nov. 20, 2022).

²⁰¹ Ana Champany & Patrick Ronk, *NYC Employee Headcount*, CITIZENS BUDGET COMM’N (Oct. 18, 2021), <https://bcny.org/research/nyc-employee-headcount> [<https://perma.cc/55FV-K63H>].

²⁰² See, e.g., Fitzsimmons & Otterman, *supra* note 20 (quoting a health adviser under the de Blasio administration on the effect public sector vaccine mandates have on the private sector: “Dr. Jay Varma . . . was particularly concerned, he said, that the city dropping its mandate would lead private employers to follow suit, just as the city’s institution of the mandate encouraged private employers to do the same. ‘It’s a cascading effect.’”).

²⁰³ The NYC Commission on Human Rights issued guidance on the “Equitable Implementation of COVID-19 Requirements” that suggested regular COVID testing as a possible reasonable accommodation for employees requesting disability or religious-based reasonable accommodations to vaccine mandates. *Guidance for Employers on Equitable Implementation of COVID-19 Vaccine Requirements*, N.Y.C. COMM’N HUM. RTS. (Dec. 15, 2021), <https://www.nyc.gov/assets/cchr/downloads/pdf/publications/Vax-Employment-Guidance.pdf> [<https://perma.cc/KTX4-BVJK>].

²⁰⁴ While unclear what these exact numbers may be, some sources have reported that approximately 13,000 city workers submitted exemption requests. Compared to a workforce of around 325,000, this would be less than 4% of the city workforce. This makes sense considering the more than 95% compliance with the mandate. See Reuven Blau, *With Vaccine Exemptions Under Review, Thousands of City Workers Could Still Lose Jobs*, THE CITY (Feb. 21, 2022, 7:04 PM), <https://www.thecity.nyc/2022/2/21/22944908/with-vaccine-exemptions-under-review-thousands-of-city-workers-could-still-lose-jobs> [<https://perma.cc/9NNR-CQA4>]; see also CITIZENS BUDGET COMM’N, *supra* note 201; Fitzsimmons & Otterman, *supra* note 20.

iii. Opaque Accommodation Request and Appeal Procedures

While required by federal non-discrimination law to provide reasonable accommodation for workers with sincere religious belief or disability,²⁰⁵ NYC's vaccine mandate implementation provided insufficient procedures for adequate handling of accommodation requests and appeals.²⁰⁶ There is of course a need to identify and reject false claims or the suspicious adoption of sudden religious devotion at the exact time vaccine mandates were implemented,²⁰⁷ and many individuals applied for accommodation who clearly did not meet the standards.²⁰⁸ But the opaque procedures for accommodation request appeals in particular raised concerns that some individuals with sincere religious beliefs or legitimate need for medical exemption were similarly rejected with little to no explanation.

The UFT Arbitration and MOAs between NYC and unions established processes for requesting accommodation, including an appeal process for those denied accommodations. Many workers had a choice between the city's appeal panel and SAMS process.²⁰⁹ Workers, however, often received little to no explanation for why an accommodation request was rejected or found insufficient, either as an initial determination or through either appeal process.²¹⁰ For example, in *Matter of Deletto*, a New York Supreme Court judge for New York County determined that the denial of an NYPD officer's religious exemption request due to his Catholic faith was unlawful.²¹¹ The officer's religious accommodation request was denied for "not meet[ing] criteria," with no elaboration as to what those criteria are, rendering the denial of accommodation arbitrary and capricious.²¹² The judge in *Garvey* similarly expressed concerns about the "generalized and vague denials" petitioners received in response to

²⁰⁵ See generally EEOC Technical Assistance, *supra* note 159.

²⁰⁶ See *DC 37 Agreement*, *supra* note 150; *SEIU Local 300 MOA*, *supra* note 150; *Teamsters Local 237 MOA*, *supra* note 150.

²⁰⁷ Mark E. Wojcik, *Sincerely Held or Suddenly Held Religious Exemptions to Vaccination?*, 47 A.B.A. HUM. RTS. MAG. (2022), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/intersection-of-lgbtq-rights-and-religious-freedom/sincerely-held-or-suddenly-held/ [<https://perma.cc/P8ZZ-36ZH>] (detailing some of the difficulties employers have in determining genuine religious belief and the factors through which to evaluate such claims).

²⁰⁸ According to The City, N.Y.C. granted approximately 2,118 exemption requests from October 2021 to February 2022. Of 13,044 total exemptions requested, about 4,800 still awaited an initial determination of as February 2022, meaning at least half had been rejected. Blau, *supra* note 204.

²⁰⁹ *Supra* Section III.A.

²¹⁰ See *Matter of Deletto v. Adams*, 2022 N.Y. Slip Op. 33129 (N.Y.S. 2022); see also *Garvey v. City of New York*, 77 Misc.3d 585 (N.Y. Sup. Ct. 2022).

²¹¹ *Matter of Deletto*, Slip Op. at 13.

²¹² *Id.* at 5.

their requests for exemptions.²¹³ The vast majority of petitioners in the *Garvey* case either received no reason for the denial of their exemption appeals, or received the same determination as *Deletto*: “Does not meet criteria.”²¹⁴

iv. Dissipation of Trust in Leadership and Institutions

Many public sector unions and workers took issue with Mayor Adams’s decision in March 2022 to create exemptions from the vaccine mandate for athletes and performers while city workers were losing their jobs due to non-compliance with the mandate.²¹⁵ This unilateral decision from the mayor’s office was perceived as benefitting multimillionaire athletes and the even-wealthier owners of NYC’s sports teams,²¹⁶ creating a perception of hostility towards the city’s workforce. However, that was neither the first nor last decision the city government made during the pandemic that angered workers and unions. Compounding the distrust and dissatisfaction caused by the Kyrie Carveout, Mayor Adams later reinforced this seeming hostility to his own workforce by refusing to extend the availability of remote work opportunities;²¹⁷ eliminating nearly 5,000 vacant city jobs in order to reduce the size of the workforce;²¹⁸ and keeping pay as low as possible for new hires and transfers.²¹⁹ Many have cited these policies as causing an “exodus” of city workers.²²⁰ Such policies raised questions about NYC’s ability

²¹³ *Garvey*, 77 Misc.3d at 592; *Matter of Deletto*, Slip Op. at 13.

²¹⁴ The denial notices for two petitioners, however, cite that those individuals were denied for “failure to engage in cooperative dialogue.” *Garvey*, 77 Misc.3d. at 41 (Petitioners Affidavits and corresponding exhibits).

²¹⁵ Honan, *supra* note 99.

²¹⁶ *Id.* (highlighting that the owner of the Mets had donated \$1.5 million to Adams’ mayoral campaign and former City Council speaker Corey Johnson directly lobbied Mayor Adams on behalf of the Nets).

²¹⁷ Joe Torres, *Mayor Adams Sends Stern Letter to NYC Employees: “You Are Required to Report to Work in Person”*, WABC (June 1, 2022), <https://abc7ny.com/work-from-home-nyc-municipal-employees-return-to-office/11915890/> [<https://perma.cc/AFK8-LA8B>]. City Hall indicated a reversal of course in February 2023, however, during contract negotiations with city unions. Elizabeth Kim, *In a Shift, City Hall Will Consider Hybrid Work, Union Says*, *GOTHAMIST* (Feb. 2, 2023), <https://gothamist.com/news/in-a-shift-city-hall-will-consider-hybrid-work-union-says> [<https://perma.cc/KUU4-RYX2>].

²¹⁸ Annie McDonough, *New York City Will Cut Some of its 21,000 Vacant Government Positions*, *CITY & ST.* (Nov. 22, 2022), <https://www.cityandstateny.com/policy/2022/11/new-york-city-will-cut-some-of-its-21000-vacant-government-positions/380107/> [<https://perma.cc/E3AG-K8GW>].

²¹⁹ Ross Barkan, *Working for the City When Everyone Else Is Leaving*, *CURBED* (Jan. 23, 2023), <https://www.curbed.com/2023/01/vacancy-crisis-new-york-city-agencies-eric-adams.html> [<https://perma.cc/N56H-SB2E>].

²²⁰ Dana Rubinstein & Emma G. Fitzsimmons, *Why City Workers in New York Are Quitting in Droves*, *N.Y. TIMES* (July 13, 2022), <https://www.nytimes.com/2022/07/13/nyregion/labor-shortage-nyc-jobs.html> [<https://perma.cc/PK4R-4B65>].

to deliver necessary services in the short term.²²¹ But they further risked fostering deeper distrust in government at a time when distrust in public institutions was already negatively impacting COVID-19 mitigation measures across the globe.²²² Such distrust will have implications not only for future pandemics, but also for good governance in the long term; “lack of trust in government can be a circular, self-reinforcing phenomenon: poor performance leads to deeper distrust, in turn leaving government in the hands of those with the least respect for it.”²²³

IV. PROPOSAL

This section will lay out the necessity of supplementing traditional labor bargaining practices with a more collaborative model of governance in times of crisis. First, it will discuss potential benefits to collaboration in times of crisis. Then, it will detail theoretical components and elements of collaborative governance. Lastly, this section will outline what a collaborative framework could look like and detail some of the expected challenges.

A. *The Case for Collaboration in Public Sector Labor Relations*

There is no question that the adversarial relationship between labor and employer is vital to many aspects of labor and the fight for workers’ rights. However, the COVID-19 pandemic has shown that traditionally oppositional bargaining and related dispute resolution processes, such as negotiation and arbitration, are inadequate under such complex and ever-evolving circumstances to sufficiently meet the needs of public sector employers, unions, workers, and the

²²¹ Barkan, *supra* note 219 (“The city comptroller’s office released a report . . . that found the overall vacancy rate at municipal agencies is 8 percent, quadruple the 2 percent rate before COVID. Certain pivotal agencies are struggling much more.”).

²²² Olga Khazan, *What’s Really Behind Global Vaccine Hesitancy*, ATL. (Dec. 6, 2021), <https://www.theatlantic.com/politics/archive/2021/12/which-countries-have-most-anti-vaxxers/620901/> [<https://perma.cc/D9XA-AX39>] (“Something as complex as vaccine hesitancy is bound to have many causes, but research suggests that one fundamental instinct drives it: A lack of trust . . . The crisis of vaccine hesitancy and the crisis of cratering trust in institutions are one and the same.”).

²²³ Dr. Orkun Saka, *The Political Scar of Epidemics: Why COVID-19 is Eroding Young People’s Trust in Their Leaders*, LONDON SCH. ECON. (Sept. 7, 2021), <https://www.lse.ac.uk/research/research-for-the-world/politics/the-political-scar-of-epidemics-why-covid-19-is-eroding-young-peoples-trust-in-their-leaders-and-political-institutions> [<https://perma.cc/6HFB-DRFC>] (quoting Mark Schmitt).

public.²²⁴ Rather, in such exceptional circumstances, supplementing the collective bargaining relationship with a collaborative, multi-party framework for governance would allow for increased reactivity, flexibility, and cooperation. Collaborative governance in such situations could produce policies that lead to better health outcomes, create clearer enforcement procedures, and increase trust in leadership between both employers and unions, and unions and their membership. This framework intends in no way to serve as a replacement for collective bargaining for those issues that impact workers' day-to-day conditions. Admittedly, however, this can be a difficult line to draw with challenges such as COVID-19 that, at its height, altered the most basic facets of daily life and work. Instead, this framework aims to address the ways events like the COVID-19 pandemic require thoughtful, wide-ranging adaptation and collective action to address the daily realities of working people, and in particular those working to deliver government services in a time of crisis.

Models for labor-management collaboration do already exist. Labor-management committees ("LMC"s), for example, are a form of cooperative body between management and labor²²⁵ "intended to provide a non-adversarial forum for discussion of problems that might develop into disputes."²²⁶ LMCs take on many forms: some focus on particular areas of concern, such as workplace safety²²⁷ while others address more general matters. Some exist between one bargaining unit and their employer,²²⁸ while others are a sort of regional body addressing community-wide issues.²²⁹ In the private sector, LMCs have also served to increase collaboration between

²²⁴ See *supra* Section III.C.

²²⁵ LMCs can raise issues under § 8(a)(2) (prohibition on employee-dominated labor organizations) and § 8(a)(5) (duty to bargain in good faith) of the NLRA and public sector bargaining statutes modeled thereon. A full detailing is beyond the scope of this Note, but caution must be taken primarily in assigning the role and authority of management, as well as the extent to which employee proposals made by the body can be approved or denied unilaterally by management. *E.I. DuPont de Nemours & Co.*, 311 NLRB No. 88 (1993).

²²⁶ *Labor-Management Committees*, PUB. EMP. REL. BD., <https://perb.ny.gov/labor-management-committees/> [<https://perma.cc/AV5X-7VBQ>] (last visited Jan. 16, 2023).

²²⁷ George R. Gray, Donald W. Myers, & Phyllis S. Myers, *Joint Local Labor-Management Safety and Health Committee Provisions in Private Sector Collective Bargaining Agreements*, COMP. & WORKING CONDITIONS (2000), <https://www.bls.gov/opub/mlr/cwc/joint-local-labor-management-safety-and-health-committee-provisions-in-private-sector-collective-bargaining-agreements.pdf> [<https://perma.cc/EU39-5RT3>].

²²⁸ See, e.g., *NYS/UUP Joint Labor-Management Committees*, NYS OFF. EMP. REL., <https://oer.ny.gov/nysuupjlmc> [<https://perma.cc/S6KG-EJGL>] (last visited Nov. 5, 2023).

²²⁹ Richard D. Leone & Michael F. Eleey, *The Origins and Operations of Area Labor-Management Committees*, U.S. BUREAU LAB. STATS.: MONTHLY LAB. REV. (May 1, 1983), <https://www.bls.gov/opub/mlr/1983/05/rpt3full.pdf> [<https://perma.cc/XAY8-SX3E>].

labor and management in times of crisis such as during wartime.²³⁰ The use of LMCs to increase collaborative, joint decision making in times of crisis in the private sector help underscore the need and potential for a collaborative framework or sort of modified LMC to serve a similar purpose in the public sector.²³¹

i. Why Collaboration: Incentives and Modern Motivations

With rising concern over society's increasing vulnerability to zoonotic infectious diseases,²³² many experts predict COVID-19 will not be the last global pandemic in our lifetimes.²³³ The twenty-first century has seen the emergence of three separate deadly coronavirus infections: COVID-19 being the third and most devastating, following the emergence of SARS and MERS in 2002 and 2012, respectively.²³⁴ This same time period has seen zoonotic forms of influenza cause numerous global outbreaks.²³⁵ Ebola,²³⁶ West Nile Virus,²³⁷ and Zika²³⁸ are further examples of zoonotic diseases that have caused significant outbreaks in recent years. As a global economic and cultural center

²³⁰ *Id.*

²³¹ *Id.*

²³² *Zoonotic Disease: Emerging Public Health Threats in the Region*, WHO <https://www.emro.who.int/about-who/rc61/zoonotic-diseases.html#:~:text=The%20emerging%20zoonoses%20are%20a,other%20WHO%20region%20%5B2%5D>. [<https://perma.cc/R88N-X8SL>] (last visited Jan. 16, 2023) (“It is estimated that, globally, about one billion cases of illness and millions of death[s] occur every year from zoonoses. Some 60% of emerging infectious diseases that are reported globally are zoonoses.”).

²³³ See, e.g., Karen Weintraub, *As COVID Turns 3, Experts Worry Where the Next Pandemic Will Come From—And If We'll Be Ready*, USA TODAY (Jan. 4, 2023, 12:28 PM), <https://www.usatoday.com/story/news/health/2023/01/01/covid-anniversary-next-pandemic-expert-concern/10847848002/> [<https://perma.cc/T8DF-6BNQ>].

²³⁴ Manas Pustake et al., *SARS, MERS, and COVID-19: An Overview and Comparison of Clinical, Laboratory, and Radiological Features*, 11 J. FAM. MED. & PRIMARY CARE 10, 10 (2022).

²³⁵ E.g., 2009 H1N1 Pandemic, CTRS. DISEASE CONTROL, <https://archive.cdc.gov/#/details?url=https://www.cdc.gov/flu/pandemic-resources/2009-h1n1-pandemic.html> [<https://perma.cc/D724-R5ZS>] (last visited Feb. 12, 2023) (discussing swine flu); Kai Kupferschmidt, ‘Incredibly Concerning’: Bird Flu Outbreak at Spanish Mink Farm Triggers Pandemic Fears, SCI. (Jan. 24, 2023, 5:00 PM), <https://www.science.org/content/article/incredibly-concerning-bird-flu-outbreak-spanish-mink-farm-triggers-pandemic-fears> [<https://perma.cc/73S3-8JR6>] (discussing fears in early 2023 over avian flu potentially jumping to humans).

²³⁶ 2014–2016 Ebola Outbreak in West Africa, CTRS. DISEASE CONTROL (VHFs), <https://www.cdc.gov/vhf/ebola/history/2014-2016-outbreak/index.html> [<https://perma.cc/P7GX-5DDC>] (last visited Feb. 12, 2023).

²³⁷ 8 Zoonotic Diseases Shared Between Animals and People of Most Concern in the U.S., CTRS. FOR DISEASE CONTROL (May 6, 2019), <https://www.cdc.gov/media/releases/2019/s0506-zoonotic-diseases-shared.html> [<https://perma.cc/YM7N-WB24>].

²³⁸ Zika Virus, WHO (Dec. 8, 2022), <https://www.who.int/news-room/fact-sheets/detail/zika-virus> [<https://perma.cc/S33B-A8WP>].

and tourist destination, NYC has been directly impacted by many of these outbreaks.²³⁹

Other critical circumstances, such as following natural disasters²⁴⁰ or global economic crises similar to the Great Recession in 2009²⁴¹ provide impetus to apply this framework. Such a framework for collaborative governance in crisis is necessitated by the nature of public sector work itself: crises increase the need for public services while putting further strain on already-limited government resources.²⁴² By fostering a collaborative relationship in times of societal crisis, management and labor—and the government and workers they represent—can work together to ameliorate, contain, and, where possible, minimize the difficult fallout and aftermath.

B. *Collaboration Theory*

It is important to place collaboration in the context of labor relations and, particularly, collective bargaining. As stated previously, collaboration is not a substitute for collective bargaining, but a supplement to it; an alternative when collective bargaining alone is insufficient.²⁴³ Barry Rubin and Richard Rubin broadly outlined the context under which collaboration can better meet the needs of labor and management, explaining that collective bargaining best serves the basic, foundational needs of workers, such as wages, hours, and conditions, while collaboration can better address “higher-order” needs such a personal autonomy in the workplace, job satisfaction, and feelings of competence.²⁴⁴ Furthermore, they argue “the success of collaborative management will be dependent

²³⁹ E.g., Justin Lessler et al., *Outbreak of 2009 Pandemic Influenza A (H1N1) at a New York City School*, 361 *NEW ENG. J. MED.* 2628 (2009) (detailing the discovery of one of the first U.S. outbreaks of swine flu during the 2009 pandemic at a high school in Queens).

²⁴⁰ E.g., *Impact of Hurricane Sandy*, N.Y.C. COMM. BLOCK GRANT, <https://www.nyc.gov/site/cdbgdr/about/About%20Hurricane%20Sandy.page#>, [<https://perma.cc/Q9JD-SYXU>] (last visited Feb. 12, 2023).

²⁴¹ Hinkley, *supra* note 34.

²⁴² E.g., *id.* (identifying trends from post-Great Recession data showing that government budget cuts following recession cause public sector employment to recover more slowly than private sector employment).

²⁴³ Leone & Eleey, *supra* note 229.

²⁴⁴ Many researchers break down issues according to “low” or “high” needs, but the terms “low” and “high” do not reflect the relative importance of these needs compared to each other. Rather, high and low reference their station in a hierarchy of needs: “low” needs such as wages provide for basic life necessities, while “high” needs are needs that arise once the “low” needs are satisfactorily met. Barry Rubin & Richard Rubin, *Labor-Management Relations: Conditions for Collaboration*, 35 *PUB. PERS. MGMT.* 283, 284–85 (2006).

on the effectiveness of the collective bargaining relationship.”²⁴⁵ Collaborative relationships are necessarily determined by the context in which they operate, the “multilayered context of political, legal, socioeconomic, environmental and other influences.”²⁴⁶ Existing collective bargaining relationships are thus crucial to understand to establish the “system context”²⁴⁷ in which collaboration is to happen.

i. Initiating the Collaborative Relationship

Barry Rubin and Richard Rubin also describe the conditions under which collaboration is appropriate and even necessary. The first pre-collaboration stage, that they call “impetus,” is described as the point at which collective bargaining has proved inadequate to address the “increasing internal and external pressures on both parties.”²⁴⁸ Notably, they write, those internal and external pressures serve to differentiate the otherwise largely-shared goals of the parties, fulfilling another necessary element for the use of collaboration; there must simultaneously be both goal congruence, or shared objectives, and goal differentiation, ensuring the parties each adequately represent their own respective constituencies.²⁴⁹ Kirk Emerson, Tina Nabatchi, and Stephen Balogh meanwhile identify a number of “drivers” necessary to initiate the collaborative relationship.²⁵⁰ The four identified drivers are leadership; “consequential incentives,” or what it is the collaborative relationship must address; the inability to address the issue independently; and uncertainty.²⁵¹ Crucial for collaboration, the parties must “recognize their mutual problems and be willing to make the necessary commitment to resolve them.”²⁵² This element was unfortunately missing in NYC’s handling of the COVID-19 vaccine mandates, with the city government instead unilaterally issuing mandates.

Much collaboration scholarship emphasizes the importance in collaboration of “the iterative process”²⁵³ or the institutionalization of collaboration.²⁵⁴ Emerson, Nabatchi, and Balogh define four “process elements” through which the iterative process takes shape in the form of “principled engagement”: discovery, definition, deliberation,

²⁴⁵ *Id.* at 285.

²⁴⁶ Emerson, Nabatchi, & Balogh, *supra* note 28, at 8.

²⁴⁷ *See generally id.*

²⁴⁸ Rubin & Rubin, *supra* note 244, at 285.

²⁴⁹ *Id.* at 286.

²⁵⁰ Emerson, Nabatchi, & Balogh, *supra* note 28.

²⁵¹ *Id.* at 5.

²⁵² *Planning for Progress: Labor Management Committees*, FMCS, https://www.fmcs.gov/wp-content/uploads/2016/10/FMCS_LMC_Planning_for_Progress.pdf [<https://perma.cc/H2MF-RZB5>] (last visited Oct. 15, 2023).

²⁵³ Emerson, Nabatchi, & Balogh, *supra* note 28, at 11.

²⁵⁴ Rubin & Rubin, *supra* note 244, at 287.

and determination.²⁵⁵ Principled engagement then combines with the shared motivation of the parties and their capacity for joint action to initiate external actions; and these actions force the adaptation of the collaborative dynamic as the process continues.²⁵⁶ Thus, the iteration of the process is crucial element of the framework's ability to adapt, act, and ultimately create any impact.²⁵⁷

Synthesizing these pieces of scholarship, then, the requirements for use of the collaborative framework outlined in this Note are (1) an existing collective bargaining relationship, (2) issues and/or circumstances that impact employer, management, the union, and workers in ways not liable to solution neither through collective bargaining nor traditional impasse solutions, such as mediation or arbitration, (3) an alignment of overall objectives while maintaining differentiated interests, and (4) a mutual commitment both to collaborating in order to resolve said issues and to the iterative process of collaboration itself.²⁵⁸ Unlike traditional LMCs, the collaborative framework as outlined in this Note considers it necessary to differentiate roles for the government separate from, but in addition to, management; and for the rank-and-file as separate, but in addition to, union leadership. These features are particular to the context of public sector bargaining.

ii. The Organizing Body Generally

Due to the complexity of contexts, the framework presented in this Note is only presented in the broadest sense. Details such as how many actual members are on the organizing body or meeting structures are omitted, as these and other questions of implementation would be heavily dependent on available resources and many other factors. What follows are merely general suggestions for organization and participation could look like and why.

The body will consist of representatives of four interested categories: government, employers, unions, and the rank-and-file. "Government" here largely refers to the political government: elected officials or those representing officials such as the mayor, who are empowered to legally issue policy. Employers will also technically be government but are representative of those government agencies that act as employer to unionized public sector employees. With a large, bureaucratic government like NYC's, not every department will be able to be represented due to sheer volume. Instead, employer agencies shall be rotated in four staggered terms in order to represent

²⁵⁵ Emerson, *supra* note 28, at 11.

²⁵⁶ *Id.* at 6.

²⁵⁷ *See id.*

²⁵⁸ *Id.*; Rubin & Rubin, *supra* note 244, at 285.

the varied interests and needs of different agencies. Similarly, not all eighty-five of NYC's public sector bargaining units will be able to be represented at once. Union and rank-and-file representatives should also follow a staggered, rotating appointment schedule.

Selection of rank-and-file representatives is arguably the most challenging and most crucial, as it is important to have a range of workers and views represented. Involvement cannot be compulsory. But those most likely to volunteer for such a position would likely be those already deeply involved with the union, potentially preventing more skeptical workers from becoming involved. This will likely require creative solutions in the form of incentives as well as creating interest through various opportunities for involvement, such as townhall-style meetings and surveys to increase participation among the rank-and-file broadly.²⁵⁹

Such a framework also requires the involvement of neutral agents to ensure that discussion is conducive and does not become dominated by certain personalities or mired in minutiae. For NYC, the Office of Conciliation of the PERB may be well-suited to serve in this capacity, considering that the Office of Conciliation houses a state-level LMC program.²⁶⁰ The Office of Collective Bargaining (“OCB”), a similar body chartered at the city-level, could also potentially serve in this role, as most bargaining units in NYC fall under the purview of the OCB rather than PERB.²⁶¹ The neutral party could be charged with ensuring proper rotation and selection of new representatives from each of the representative categories. A neutral facilitator would be especially helpful at guiding the body through its own creation.²⁶² Additionally, while the hope is that working collaboratively will result in productive dialogue, there may be times where the parties simply cannot move forward on a topic. In such instances, a neutral facilitator could step in to mediate and help the parties arrive back to a mutual understanding in order to proceed.

iii. The Four Parties

1. Government, Employer, and Union

The inclusion of government as public administrator, government as employer, union, and rank-and-file input seeks to

²⁵⁹ *Infra* Section IV.B.iii.2.

²⁶⁰ PUB. EMP. REL. BD., *supra* note 226.

²⁶¹ *Public Employers Under OCB's Jurisdiction*, OFF. COLLECTIVE BARGAINING, <https://www.ocb-nyc.org/introduction/public-employers-under-ocbs-jurisdiction/> [https://perma.cc/D8NR-H8GC] (last visited Aug. 15, 2023).

²⁶² *See, e.g.*, FMCS, *supra* note 252.

ensure the broadest range of views and ideas be represented. Each comes with challenges, as discussed below,²⁶³ but each also contribute to potential solutions in times of crisis in important ways.

While the government is technically the employer in terms of public sector unions, the direct management of public sector unions is most often handled at the department or agency level (Department of Education, Department of Corrections, etc.).²⁶⁴ In the context of a macro-societal issue such as COVID-19, some department heads may be responsible in conjunction with executive and legislative policymakers for key policy decisions.²⁶⁵ But largely, such policies will be coming from elected officials. In the context of NYC and the scale of city government, it would be appropriate to have representation from both the Mayor's Office²⁶⁶ as well as a member of the City Council. As necessary, this can also include agency heads who would otherwise not be seated on the body at that time, where certain expertise would be beneficial: the Department of Health and Mental Hygiene in times of pandemic, or finance and budget leaders in a recession, for example.

As stated earlier, unions should be rotated in on staggered intervals. By seating multiple public sector unions on the collaborative body, unions would be further required to also collaborate with each other. While certain issues, such as COVID-19 vaccine mandates, may be viewed very differently by different unions,²⁶⁷ the underlying goals—protecting workers and the public they serve—certainly are shared. Requiring the public sector unions to work as a collective will likely bring about better outcomes for all public sector workers regardless of workplace, with the benefits of those improved outcomes emanating out to the general citizenry.

2. The Importance of the Rank-and-File

It is also crucial to involve rank-and-file members of unions rather than reserve participation in discussions for labor leadership.

²⁶³ See *infra* Section IV.B.iii.2.

²⁶⁴ See generally *DC 37 Agreement*, *supra* note 150; *SEIU Local 300 MOA*, *supra* note 150; *Teamsters Local 237 MOA*, *supra* note 150.

²⁶⁵ For example, both the head of the Department of Health and Mental Hygiene as well as the mayor issued orders establishing NYC's COVID-19 vaccine mandates. See *supra*, Section II.B.ii.2.

²⁶⁶ It may be most appropriate to have the representative of the Mayor's Office be a member of the Office of Labor Relations, which already handles collective bargaining with public unions. *About OLR, OFF. LAB. REL.*, <https://www.nyc.gov/site/olr/about/about-olr.page> [<https://perma.cc/5EJE-PQHZ>] (last visited Aug. 15, 2023).

²⁶⁷ See, e.g., Weixel & Gangitano, *supra* note 177 (pointing out that law enforcement unions and, in New York, the state teacher's union NYSUT both openly opposed vaccine mandates, while other public sector unions such as the International Association of Fire Chiefs came out in support of mandates).

Pragmatically, unions are politically active, and union leadership may have preexisting relationships with elected or government officials. These relationships are carefully maintained, and union leaders may be hesitant to take stronger stances in discussions that could alienate political allies. Including rank-and-file members in the collaborative framework not only ensures a more diverse range of voices and opinions are discussed, but that union leadership can represent the interests of the union itself. While the unions' interests are based on benefitting members, the interests of the union may differ from the interests of the rank-and-file due to the political aspect of unions, especially in the public sector.²⁶⁸ Public sector unions may also benefit internally from a more collaborative relationship with their own rank-and-file, building trust and fostering greater buy-in to leadership decisions.²⁶⁹

Finally, the participation of public sector rank-and-file provides not only the viewpoints of workers but is also in a sense direct citizen participation in setting policy. This does create some difficult questions around representation, however, with the inherent tensions of public sector collective bargaining as discussed in Section II.C. However, issues also arise due to the fact that not all NYC workers actually live in the city.²⁷⁰ Allowing non-citizens a voice in determining possible policy outcomes is, in a sense, anti-democratic; however, preventing rank-and-file members from participating in discussions involving their own union would render the unions anti-democratic. There are a few possible workarounds for this: positions within the collaborative body could require a portion of, but not all, rank-and-file representatives be residents of the city. Additionally, a collaborative body would ideally be creating opportunities for rank-and-file participation through tools such as listening sessions, open meetings, and surveys; allowing both resident and non-resident members to participate in the collaborative process and decision making. This also raises potential problems due to the variety of viewpoints the rank-and-file would represent. As seen in numerous lawsuits, many city workers are staunchly opposed to vaccine mandates;²⁷¹ it is not unreasonable to assume that at least some

²⁶⁸ See *supra*, Section II.C.iii.

²⁶⁹ Rubin & Rubin, *supra* note 244, at 285.

²⁷⁰ City employees are subject to residency requirements that may be different depending on the position, but most City workers are permitted to live in one of six counties outside of the five boroughs after two years of employment. N.Y.C. ADMIN. CODE §§ 12-119-121.

²⁷¹ See *supra* Section II.B.ii.2.

city workers opposed the vaccines themselves.²⁷² But one benefit to collaboration is the opportunity to “provid[e] an open door for skeptics,”²⁷³ building credibility and potentially combating distrust and misinformation.

3. Expected Challenges

One inherent difficulty in conceptualizing a collaborative governance framework to be used in such exceptional circumstances as the COVID-19 pandemic is this question of institutionalization and iteration.²⁷⁴ How does the collaborative relationship continue to exist when there is no extraordinary challenge to be met? Such a framework requires the parties involved, especially city as government and unions, to cede some of their authority. Such a collaborative body would also raise some of the inherent tensions underlying public sector collective bargaining, namely, creating a separate process by which a select few workers can access policymakers and impact public policy decisions.²⁷⁵ As such, allowing such a framework outside of times of unusual need would likely be untenable for several parties involved.

The prospect of such a framework also raises potential issues under labor law. As discussed prior, existing collaborative efforts between management and labor have run into issues and limitations under the NLRA sections 8(a)(2) and 8(a)(5),²⁷⁶ and public sector bargaining statutes often contain the same or similar language to these sections.²⁷⁷ But the continued popularity of LMCs indicates that the limitations on labor-management collaboration under the NLRA can be worked around with careful structuring and planning. This points to the importance of involving a neutral labor body such as PERB or the OCB who will be able to help develop guidelines to keep the body and its potential output in line with legal requirements.

Additionally, when forming LMCs, the proper topics for discussion through collaboration are established through collective

²⁷² See Li Ping Wong, Yulan Lin, Haridah Alias, Sazaly Abu Bakar, Qinjian Zhao, and Zhijian Hu, *COVID-19 Anti-Vaccine Sentiments: Analyses of Comments from Social Media*, 9 *HEALTHCARE* 1530 (2021), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8622531/> [<https://perma.cc/GK2R-84JD>] (pointing out that the U.S. has had relatively low COVID-19 vaccine acceptance rates compared to other nations: in May 2020, only 67% of Americans expressed vaccine acceptance, and, by October 2020, only 51% of Americans said they intended to receive the vaccine).

²⁷³ FMCS, *supra* note 252.

²⁷⁴ See *supra* Section IV.B.i.

²⁷⁵ See *supra* Section II.C.iii.

²⁷⁶ See *supra* Section IV.A; see also *E.I. DuPont de Nemours & Co.*, 311 N.L.R.B No. 88 (1993).

²⁷⁷ See e.g., N.Y. Civ. Serv. Law §§ 200-215 (McKinney).

bargaining.²⁷⁸ While certainly not impossible, CBAs will have to be very carefully drafted in order to give the collaborative framework sufficient authority to address the unforeseen problems that inevitably arise in times of crisis, while also not requiring labor or management to cede too much power to the other or to the framework itself. Careful drafting could also help address the above questions of institutionalization and iteration by limiting topics of discussion outside of exigent circumstances and allowing greater flexibility in response to actual crisis. This raises numerous and significant questions though, such as what triggering language could adequately encompass every potential catastrophe, or whether the decision to allow for greater decision-making powers should be determined by a vote of the parties, that would be specific to the circumstances of implementation.

Finally, the simple logistics of getting four self-interested parties attempting to reach decisions that will impact potentially millions of people while advocating for their own varied and distinct interests are, to put it *very* mildly, difficult. But the benefits to all parties involved as well as the general citizenry through improved provision of services in times of crisis are arguably worth the immense effort it would take to start such an initiative.

V. CONCLUSION

In engaging in collaborative governance with public sector unions, NYC and its public sector unions could have created a COVID-19 response that focused less on vaccination as the sole path to overcoming the pandemic, and merely as one tool in a holistic, multifactor approach developed through joint consideration of political and bureaucratic government, unions, and the rank-and-file. Not only would public health and worker safety outcomes improve, but union members and the city would benefit from increased buy-in and trust from the rank-and-file. While adversarial union bargaining practices have undoubtedly led to invaluable gains for workers, supplementing those practices in light of exigent circumstances to include models focused on collaborative decision making will help continue those important successes for workers.

²⁷⁸ See FMCS, *supra* note 252.

