



Garfunkel, Wild & Travis, P.C.  
New York New Jersey Connecticut

# Legal Alert

October 2009

## Judge Signs Temporary Restraining Order Preventing Implementation and Enforcement of Flu Vaccination Mandate for Health Care Workers

On October 16, 2009, an Albany Supreme Court Judge signed a temporary restraining order (TRO) placing a temporary ban on the implementation and enforcement of the recent New York Department of Health (DOH) regulation mandating certain health care facilities to vaccinate their health care workers. The TRO specifically restrains the Commissioner of DOH, DOH, the State Hospital Review and Planning Council, the Governor, and the State of New York from: (1) implementing or enforcing 10 NYCRR 66-3 (the "Regulation"), (2) authorizing or requiring others to use or act upon the Regulation, or (3) otherwise taking any action against or with respect to any health care personnel in New York State or any other individuals who might be adversely affected by the application of the Regulation. The TRO will be in effect until the Court makes a final determination as to the resolution of the matter, and a hearing is scheduled for October 30, 2009. Therefore, until the TRO is lifted, health care facilities are not mandated to require vaccinations of their staff as a condition of employment. However, health care facilities may still require staff to stay home or refrain from reporting to work until the episode has passed if the individual exhibits symptoms of the flu.

As background, under the Regulation, effective as of August 13, 2009, certain health care facilities in New York State must require their personnel to be immunized against influenza virus(es) as a precondition to employment and on an annual basis. At this time, because the H1N1 ("swine flu") vaccine has not yet been widely available, DOH has only required vaccination against seasonal flu. However, it is anticipated that the swine flu vaccine will be more available shortly. Prior to the TRO, facilities were required to confirm vaccination of personnel by November 30. Health care facilities covered under the Regulation include: general hospitals, diagnostic and treatment centers, certified home health agencies, long term home health care programs, acquired immune deficiency syndrome (AIDS) home care programs, licensed home care services agencies, and hospices.

GWT will continue to monitor the status of this ongoing matter and will send updates of any new developments.

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If you have any questions, please contact the GWT attorney with whom you regularly consult.

### About Garfunkel, Wild & Travis, P.C.

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