

## UPDATE ON NEW YORK EMERGENCY REGULATION AND FEDERAL IMPENDING COVID-19 VACCINE MANDATES

Health care providers in New York have been subject to regulations and guidance from federal and state agencies mandating COVID-19 vaccinations for providers' staff. Along with those regulations and policies, come requirements for health care providers to track exemptions and reasonable accommodations provided to staff. Those mandates, however, have faced several legal challenges and have undergone changes in their enforcement, including the more recent clarification as to consideration of reasonable accommodations for sincerely held religious beliefs under New York Emergency Regulation. To help you navigate through the requirements, this alert discusses the current state of affairs pertaining to New York Emergency Regulation and the impending federal mandates that will require action by December 6, 2021. Please be on the lookout for further updates to these requirements as things continue to change frequently.

### NY State Vaccine Mandates

1. **DOH Requirements.** The NY State Department of Health (DOH) issued emergency regulations, effective August 26, 2021, requiring "covered entities" to continuously require personnel to be fully vaccinated against COVID-19. For general hospitals and nursing homes, the compliance date was September 27<sup>th</sup>. For all other covered entities, compliance by October 7<sup>th</sup> was required. The emergency regulations include an exemption for personnel for whom the vaccine is medically contraindicated, upon presentment of appropriate certification from a health care professional, but only until the vaccine is no longer found to be detrimental to the personnel's health. Recent court rulings and DOH FAQs have clarified that covered entities should also consider reasonable accommodation requests under federal law for personnel who submit a sincerely held religious belief accommodation request.
  - a. **Who does this Mandate Cover?** The DOH emergency regulations contain the following definitions:
    - **"Covered entities"** include all entities licensed under (i) Public Health Law (PHL) Article 28 (which in addition to hospitals and nursing homes includes diagnostic and treatment centers, ambulatory surgery centers and adult day health care programs); (ii) PHL Article 36 (certified home health agencies, licensed home care agencies, long-term home health care, AIDS home care programs); (iii) PHL Article 40 (hospices); and (v) Social Services Law Article 7 (assisted living and adult care facilities). Other entities may also be subject to the emergency regulation, for example, Programs of All-Inclusive Care for the Elderly (PACE) operate under both Article 28 and Article 36 operating certificates and must comply.
    - **"Personnel"** subject to the NY State mandate include all persons employed or affiliated with a covered entity, whether paid or unpaid, including but not limited to employees, members of the medical and nursing staff, contract staff, students, and volunteers, who engage in activities such that if they were infected with COVID-19, they could potentially expose other covered personnel, patients or residents to the disease. Contractors such as plumbing and electrical workers, medical equipment vendors, vending machine service providers, transportation providers, one-time or occasional contracted entertainers, lab and radiology technicians who do not function as employees/staff and are not under the covered entity's direct control are not subject to the NY State mandate.
  - b. **Status of Legal Challenges.** The legal challenges have mostly centered on the lack of any provision allowing for an exemption on religious grounds, but claims that the mandate violates rights to privacy, medical freedom and bodily autonomy have also been raised. A Federal District Court initially granted a temporary injunction precluding the State's enforcement of the mandate. Subsequently, however, on November 4, 2021, the Second Court of Appeals held that the plaintiff health care workers and a related non-profit organization would not likely succeed on their claims and it lifted the preliminary

injunction. The Court of Appeals issued a clarifying opinion days later that it may be possible for a covered entity to *accommodate*, but not *exempt* personnel with religious objections by employing them in a manner that “removes them from the rule’s definition of ‘personnel.’”

- c. **DOH Dear CEO/Administrator/Operator Letter**. Subsequent to the Circuit Court’s rulings, on November 15, 2021, DOH issued a letter to covered entities advising that all personnel that had previously been granted a religious exemption must provide documentation to the covered entity of either a first dose of vaccine or a valid medical exemption and must do so by **November 22<sup>nd</sup>**.
- d. **DOH Guidance - Religious Accommodation**. In the November 15<sup>th</sup> letter, DOH also advised covered entities that they should have a process in place to “consider reasonable accommodation requests from covered personnel based on sincerely held religious beliefs . . .” This recommendation is also included in an up-dated FAQ where DOH advised covered entities to follow federal, state and local laws and guidance to determine, on a case-by-case basis, whether and in what circumstances it may be appropriate to provide reasonable accommodations for personnel, who, because of sincerely held religious beliefs, do not get vaccinated against COVID-19. **DOH stressed that covered entities cannot permit unvaccinated individuals to continue in “personnel” positions such that if they were infected with COVID-19, they could potentially expose other covered personnel, patients, or residents to the disease.** The logical interpretation of this update confirms that accommodations for staff who submit requests to avoid the vaccine mandate are limited to removing the staff member from in-person work and allow them to work remote or reassign their position to a remote position. This is different from the permissible accommodation for personnel who receive a medical exemption.
- e. **DOH Guidance - Medical Exemption/Accommodation**. The DOH FAQ advises that personnel granted medical exemptions may continue normal job responsibilities provided that they comply with all applicable requirements for personal protective equipment, including masking. In addition, unvaccinated personnel who work in nursing homes are subject to routine COVID-19 testing requirements.

## **Federal Mandates**

1. **Medicare and Medicaid Requirements**. On November 5, 2021, the Centers for Medicare and Medicaid Services (CMS) adopted an interim final rule establishing vaccine requirements for personnel of health care providers that are subject to Medicare and Medicaid health and safety standards, namely the CMS Conditions of Participation, Conditions for Coverage and Requirements for Participation.
  - a. **Who does this Mandate Cover?** The CMS rule covers approximately 21 health care provider and supplier types, including, *e.g.*, hospitals, nursing homes, ambulatory surgery centers, home health agencies, hospices, federally qualified health centers, and end stage renal disease providers. It does not apply to physician offices, assisted living facilities, group homes and similar settings that are not subject to CMS health and safety standards.

The CMS rule covers all personnel of covered providers, regardless of whether they have clinical responsibilities or any patient contact, and individual contractors that provide care, treatment or other services for the provider or its patients. This includes administrative staff, facility leadership, volunteer or other fiduciary board members, housekeeping and food services, and others.

The CMS rule mandates that such individuals receive a first dose of a primary vaccine (*e.g.*, Pfizer-BioNTech) or a single dose vaccine (*i.e.*, Johnson & Johnson) no later than December 6, 2021. All personnel must complete the primary vaccine series, unless granted an exemption, by January 4, 2022.

- b. **Exemptions**. Individuals who provide services 100 percent remotely and never interact with staff, patients, residents or clients, such as fully remote telehealth or payroll services, are not subject to the vaccination requirements. The CMS rule further allows exemptions to the vaccination requirement if based on an applicable Federal law, which includes medical contraindications and religious beliefs in certain limited circumstances. In granting such exemptions, providers must have contingency plans for staff who are not fully vaccinated for COVID-19, and ensure that they minimize the risk of transmission to at-risk individuals. CMS acknowledges that employers have the flexibility to establish their own

processes and procedures, including forms, but points to the Safer Federal Workforce Task Force’s “request for a religious exception to the COVID–19 vaccination requirement” template as an example.<sup>1</sup>

- c. **Status of Legal Challenges.** So far, 22 states have challenged the CMS rule and filed two lawsuits in Federal District Courts (one in Louisiana and one in Missouri). Each lawsuit includes a request that the respective courts issue a preliminary injunction to prevent the rule from taking effect. Although each case is being handled on an expedited basis, no injunctions have been issued so far. Thus, as of today, the CMS rule is in effect.

2. **OSHA Requirements.** Also on November 5<sup>th</sup>, the Occupational Safety and Health Administration (OSHA) issued a rule requiring employers with 100 or more workers to ensure their workers are vaccinated against COVID-19 or undergo weekly testing starting January 4, 2022.

- a. **Status of Legal Challenges.** Implementation and enforcement of the OSHA rule is on hold. Lawsuits challenging the rule were immediately filed all across the country and the Fifth Circuit Court of Appeals temporarily blocked the mandate. OSHA announced that in compliance with the court’s action it will not be taking any steps to implement or enforce its rule. This litigation is currently in the hands of the Sixth Circuit Court of Appeals, which will decide if the Fifth Circuit’s temporary block should stay in place.

**Additional Documentation Requirements – Medical Exemptions**

Eligibility for a medical exemption under the DOH emergency rule requires a physician or nurse practitioner to certify that immunization with COVID-19 vaccine is detrimental to the personnel’s health, based upon a pre-existing health condition. The covered entity must document the nature and duration of the medical exemption and the accommodation granted in personnel employment medical records or other appropriate record in accordance with generally accepted medical standards

Additional documentation is required under the Federal CMS rule. This rule requires that the medical exemption documentation be signed and dated by a licensed practitioner (who is not the individual requesting the exemption) and that the documentation contain: (a) all information specifying which of the authorized COVID–19 vaccines are clinically contraindicated for the staff member to receive and the recognized clinical reasons for the contraindications; and (b) a statement by the authenticating practitioner recommending that the staff member be exempted from the COVID–19 vaccination requirements based on the recognized clinical contraindications.

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Following the maze of the COVID-19 vaccination mandates can be daunting. Should you have any questions regarding the above, please contact the [Garfunkel Wild attorney](#) with whom you regularly work, or contact us at [info@garfunkelwild.com](mailto:info@garfunkelwild.com).

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<sup>1</sup> (available at: [https://www.saferfederalworkforce.gov/downloads/RELIGIOUS%20REQUEST%20FORM\\_FINAL%20REVIEW\\_20211003%2010.29%2011am.pdf](https://www.saferfederalworkforce.gov/downloads/RELIGIOUS%20REQUEST%20FORM_FINAL%20REVIEW_20211003%2010.29%2011am.pdf)).