

MANDATORY VACCINATIONS IN HEALTHCARE: THE STATE OF THE STATE IN NEW YORK TODAY

Hodgson Russ Healthcare Alert
August 25, 2021

Over the past several weeks, there have been increasing initiatives – federally, in New York, and in other states – to mandate COVID-19 vaccination for healthcare workers. From a regulatory perspective, the initiatives reflect a public policy effort to reduce the spread of COVID-19 by increasing vaccination rates.

Some commenters have expressed concern about the potential loss of staff in healthcare if mandatory vaccination requirements take effect. It remains to be seen whether the August 23, 2021 decision by the U.S. Food and Drug Administration (the “FDA”) to give [full approval](#) to the Pfizer-BioNTech COVID-19 Vaccine, Comirnaty, will ease the concern. The initiatives also raise a host of employment issues.

To assist healthcare providers in staying current and in compliance with the rapidly shifting terrain, this Alert sets out a summary of key vaccine-related regulatory developments in healthcare. We will offer additional updates and guidance as these issues develop.

Federal Initiatives. On August 18, 2021, the Centers for Medicare & Medicaid Services (“CMS”) and CDC [announced](#) a forthcoming emergency regulation, and the White House issued a related [fact sheet](#), requiring staff vaccinations in Medicare and Medicaid-participating nursing homes. The announcement left open a number of issues including whether, consistent with recent [EEOC guidance](#), the federal regulation will require employers to consider the potential for reasonable accommodations on the basis of medical condition or sincerely held religious beliefs.

Previously, on May 13, 2021, CMS issued [interim final regulations](#), effective May 21, 2021, relating to COVID-19 vaccines in long-term care facilities and intermediate care facilities for individuals with intellectual disabilities. CMS’s regulations address educational outreach, offering vaccines when supplies are available, and reporting vaccination status to the CDC.

New York State Initiatives. In New York, once the U.S. epicenter of the COVID-19 pandemic, authorities have implemented various alternative approaches in recent weeks. The situation is complicated by the departure of former Governor Andrew M.

Attorneys

Christine Bonaguide
David Bradley
Jane Bello Burke
Roopa Chakkappan
Glen Doherty
Reetuparna Dutta
Joshua Feinstein
Peter Godfrey
Charles H. Kaplan
Michelle Merola
Matthew Scherer
Gary Schober
David Stark

Practices & Industries

Healthcare

MANDATORY VACCINATIONS IN HEALTHCARE: THE STATE OF THE STATE IN NEW YORK TODAY

Cuomo, whose resignation took effect at midnight on August 23, 2021, and new Governor Kathy Hochul's announced intention to clean house.

Emergency Regulation on Mandatory Vaccinations. Most recently, the Public Health and Health Planning Council [announced a special meeting](#) to be held on Thursday, August 26, 2021, to consider an emergency regulation to require "covered entities" to require their personnel to be fully vaccinated against COVID-19. The term "covered entity" encompasses any facility within the statutory definition of a "hospital," which includes general hospitals, nursing homes, and diagnostic and treatment centers, among others; "Article 36" home care agencies, which include CHHAs (certified home health agencies), LTHHCPs (long-term home health care programs), and LHCSAs (licensed home care service agencies), among others; hospices; and adult care facilities. Under the proposal, personnel need to receive the first dose of the vaccine by September 27, 2021 for general hospitals and nursing homes and by October 7, 2021 for other covered entities. The proposed regulation includes medical exemptions based on pre-existing conditions and religious exemptions for personnel with a genuine and sincere religious belief contrary to the practice of immunization.

Section 16 Orders. Just one week earlier, on August 16, the former Governor [announced](#) that the Commissioner of Health would issue "Section 16" orders requiring all healthcare workers in New York State, including staff at hospitals, long-term care facilities such as nursing homes and adult care facilities, and other congregate care settings, to be vaccinated against COVID-19, with the first dose required by September 27, 2021. According to the release, the orders would require these facilities to develop and implement a policy mandating employee vaccinations, with limited exceptions for religious objections or medical contraindications.

Test-Out Option. The August 16 announcement had followed a prior [June 28 announcement](#) that New York would require all patient-facing healthcare workers at state-run hospitals to be vaccinated against COVID-19 by Labor Day, September 6, 2021, with state employees who choose to remain unvaccinated required to undergo weekly COVID testing. It is unclear whether the vaccine mandate and September 27 date in the more recent release and proposed emergency regulation would supersede the test-out option and September 6 deadline in the earlier announcement for healthcare workers at state-run hospitals.

Vaccinations for Consenting, Unvaccinated Residents and Personnel. Additionally, on August 18, 2021, the Health Department published an emergency regulation requiring nursing homes to offer and adult care facilities to arrange for COVID-19 vaccination for their consenting, unvaccinated residents and personnel. The regulation requires nursing homes to post conspicuous signage throughout the facility reminding personnel and residents that the facility offers COVID-19 vaccinations, and it requires adult care facilities to document in resident and staff records their "diligent efforts" to arrange for COVID-19 vaccination. It also requires facilities to obtain and maintain, from personnel and residents who decline vaccination, signed affirmations that the facility offered them the opportunity for a COVID-19 vaccination, but they declined. Further, it requires facilities to certify to the Department that they have offered or arranged for, as applicable, all new unvaccinated residents and personnel an opportunity to obtain the COVID-19 vaccine within the prescribed period of time.

MANDATORY VACCINATIONS IN HEALTHCARE: THE STATE OF THE STATE IN NEW YORK TODAY

New York City. Previously, on July 21, 2021, the City of New York [announced](#) that, beginning August 2, 2021, the City would require employees of NYC Health + Hospitals and employees working in Department of Health and Mental Hygiene clinical settings to provide either a one-time verification of immunization, or weekly proof of a negative COVID-19 test. For new hires, on August 2, 2021, the Mayor of New York issued an [Executive Order](#) imposing a vaccination mandate, which requires all new hires to provide proof of having received at least one dose of an approved COVID-19 vaccine prior to beginning employment, except for those who obtain an exception due to medical or religious reasons, and a second dose in a two-dose series within 30 days of the first dose, with failure to do so resulting in termination. On August 17, 2021, the Mayor issued an updated [Executive Order](#) increasing the timing for proof of a second dose from 30 days to 45 days.

Other States. Initiatives are underway in other states to impose mandatory vaccination requirements for healthcare workers.

Additional Considerations. The medical and religious accommodations exceptions to the mandatory initiatives align with the U.S. Equal Employment Opportunity Commission's December 16, 2020 and May 28, 2021 guidance relative to voluntary vaccination initiatives. Even where not required by law, employers may mandate COVID-19 vaccines with caveats for employees with disabilities or sincerely-held religious beliefs. Importantly, under the Americans with Disabilities Act and certain state laws, employers are required to keep any employee medical information obtained in the course of the vaccination program confidential.

Mandatory vaccination laws also implicate labor and wage and hour considerations. On the labor front, unionized employers must determine whether obligations exist in relation to implementation of vaccination programs. And on the wage and hour side, issues may present as to compensating employees who participate for the time spent getting a vaccine. New York, for its part, has enacted Labor Law 196-C which grants employees paid leave time to receive COVID-19 vaccinations. On the federal front, on April 21, 2021, President Biden announced a new tax credit to fully offset the cost for employers with less than 500 employees who provide paid leave for employees to get vaccinated. The tax credit is for up to 80 hours (*i.e.* 10 work days) and up to \$511 per day of paid sick leave offered between April 1, 2021 and September 30, 2021.

We will provide more information on these initiatives in future posts and additional information on changes as they occur. Please check back often for [updates using this link](#): <https://www.hodgsonruss.com/newsroom-news-53.html>

If you have questions regarding mandatory vaccination initiatives or how they may affect your healthcare operations, please contact [Jane Bello Burke](#) (518.433.2404), [David Stark](#) (716.848.1369), or any member of Hodgson Russ's [Healthcare Practice](#).