

The graphic features a dark blue background on the right and a lighter blue background on the left. On the left side, there are several overlapping squares in shades of blue and dark blue, creating a geometric pattern. The text "bolaños lowe client alert" is centered in the dark blue area. "bolaños lowe" is in white, and "client alert" is in a light blue color.

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OCTOBER 12, 2021 UPDATE: On October 12, 2021, a federal district court in Utica issued a preliminary injunction barring New York State from enforcing the Department of Health’s (“DOH”) August 26th revised regulation, to the extent that that regulation failed to include a religious exemption to the vaccine mandate for health care workers. (The same court had previously issued a short-term temporary restraining order, or TRO, against the same regulation. Today’s preliminary injunction replaces, and will extend substantially longer than, the TRO.) After considering arguments from the plaintiffs—a group of health care workers who sought religious exemptions from mandatory vaccination—and from state attorneys, the court found that the DOH’s regulation violated the plaintiffs’ religious exercise rights under the Constitution, as well as their federal statutory rights under Title VII, by denying them any opportunity to seek or obtain a religious exemption from vaccination.

The court’s preliminary injunction therefore continues to bar the State from: (1) requiring health care facilities and other covered entities to deny religious exemptions to the vaccine mandate, or requiring them to revoke any religious exemptions already granted; (2) interfering with the granting of religious exemptions, going forward; or (3) taking action against any of the plaintiffs (for example, revoking licensures, certifications, medical residency status, or hospital admitting privileges) due to their seeking or obtaining religious exemptions from vaccination.

Notably, the court’s decision does *not* mean that employers are obligated to honor every request for religious exemption from health care workers who would otherwise be subject to the vaccination mandate. Rather, health care employers should consider applying their normal religious-accommodation processes under Title VII, which may include: collecting information about the employee’s claimed religious beliefs and how those beliefs require an exemption from vaccination; engaging in limited inquiry into the “sincerity” of the employee’s religious beliefs; documenting the accommodation process for later use (if the employee is found to have offered false or fraudulent reasons for his or her accommodation request); and—if the information offered does not support a religious exemption—denying the employee’s exemption request. In light of the court’s decision, however, employers may *not* simply adopt a blanket policy against religious vaccination exemptions based on the DOH’s now-enjoined regulation.

For more information about how to implement and administer a religious-accommodation process in the workplace, including with regard to the vaccination of employees against Covid-19, please contact us at info@bolanoslowe.com.

Emergency Order from the New York State Department of Health Requires Vaccinations for Nearly All New York Health Care Workers

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On August 26, 2021, the New York State Department of Health (“DOH”) issued a revised emergency regulation which is effective immediately and requires covered entities to ensure that personnel are fully vaccinated against COVID-19 and document proof of vaccination in personnel or other appropriate records.

What entities are covered?

1. Any facility or institution included in the definition of “hospital” in section 2801 of the Public Health Law, including but not limited to general hospitals, nursing homes, and diagnostic and treatment centers
2. Any agency established pursuant to Article 36 of the Public Health Law, including but not limited to certified home health agencies, long term home health care programs, acquired immune deficiency syndrome (AIDS) home care programs, licensed home care service agencies, and limited licensed home care service agencies
3. Hospices as defined in section 4002 of the Public Health Law
4. Adult care facility under NYSDOH regulatory authority as set forth in Article 7 of the Social Services Law

Most county health departments are licensed under Article 28 or Article 36 of the Public Health Law and are therefore subject to regulation. Similarly, certain counties and the City of New York operate facilities licensed under Article 28. These State and local public facilities are required to ensure that personnel are fully vaccinated against COVID-19. Covered entities operated by local governments will be subject to the same requirements as any other covered entity subject to this regulation. Notably, most public mental health facilities are not covered.

What personnel are covered by the emergency regulation?

The regulation requires all personnel in a covered entity to be fully vaccinated. (This will include boosters eventually if NYSDOH and the federal government require boosters). Personnel is defined as “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.”

What is the timetable for vaccinations?

Current personnel: The first vaccination dose for current personnel must be received by September 27, 2021, for general hospitals and nursing homes, and by October 7, 2021, for all other covered entities.

Newly hired personnel: Because the regulation specifies “current personnel” for the September 27 or October 7 vaccination deadlines, and since the regulation was effective upon publication on August 26, 2021, personnel hired on and after August 27, 2021, should be fully vaccinated before beginning work.

Format of proof of vaccination

Proof of vaccination must include:

- the vaccine manufacturer,
- the vaccine lot number(s),
- date(s) of vaccination;
- vaccinator or vaccine clinic site.

Personnel must show one of the following for proof of vaccination:

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- A record prepared and signed by the licensed health practitioner who administered the vaccine, which may include a CDC COVID-19 vaccine card
- An official record from one of the following, which may be accepted as documentation of immunization without a health practitioner's signature:
 - a foreign nation
 - NYS Countermeasure Data Management System (CDMS)
 - the NYS Immunization Information System (NYSIIS)
 - City Immunization Registry (CIR)
 - Department-recognized immunization registry of another state
 - An electronic health record system
 - Any other documentation determined acceptable by NYSDOH

Documentation of such vaccination must be maintained in personnel records or other appropriate records in accordance with privacy laws.

For all covered entities, documentation must occur continuously, as needed, following the initial dates for compliance, and documentation of any reasonable accommodation must be included.

NYSDOH Oversight

NYSDOH may require inspection of the medical proof maintained by the covered entity, which means covered entities should maintain copies of vaccination records inspected.

NYSDOH will require covered entities to report the following information and submit requested documentation in a manner and format determined by NYSDOH:

1. The number and percentage of personnel that have been vaccinated against COVID-19
2. The number and percentage of personnel for which medical exemptions have been granted
3. The total number of covered personnel

Additionally, covered entities must develop and implement a policy and procedure to ensure compliance with the emergency regulations, which must be submitted to NYSDOH upon request.

Medical Exemption

"Personnel" shall only be exempt from the COVID -19 vaccination requirement with a "medical exemption". There is no religious exemption available under this regulation.

For a valid medical exemption, a licensed physician or certified nurse practitioner must certify that immunization with COVID-19 vaccine is detrimental to the health of the person based upon a pre-existing health condition. This must be in accordance with generally accepted medical standards. A resource mentioned by the regulations is: Recommendations of the Advisory Committee on Immunization Practices of the U.S. Department of Health and Human Services.

The exemption will be available only until the immunization is found no longer to be detrimental to such individual's health.

The nature and duration of the medical exemption must be documented in the individual's employment medical record, or other appropriate record maintained by the covered entity. The documentations must be maintained pursuant to privacy laws. Any reasonable accommodation may be granted and must

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also be documented in the employment medical record.

Face Coverings Still Required

NYSDOH may require all personnel, whether vaccinated or unvaccinated, to wear an appropriate face covering for the setting in which such personnel are working in a covered entity. Covered entities shall supply face coverings required by this section at no cost to personnel.

NYSDOH Stated Justification

“The CDC has identified a concerning national trend of increasing circulation of the Delta variant. Since early July, cases have risen 10-fold, and 95 percent of the sequenced recent positives in New York State were the Delta variant. Recent New York State data show that unvaccinated individuals are approximately 5 times as likely to be diagnosed with COVID-19 compared to vaccinated individuals. Those who are unvaccinated have over 11 times the risk of being hospitalized with COVID-19.”

“The COVID-19 vaccines are safe and effective. They offer the benefit of helping to reduce the number of COVID-19 infections, including the Delta variant, which is a critical component to protecting public health. Certain settings, such as healthcare facilities and congregate care settings, pose increased challenges and urgency for controlling the spread of this disease because of the vulnerable patient and resident populations that they serve. Unvaccinated personnel in such settings have an unacceptably high risk of both acquiring COVID -19 and transmitting the virus to colleagues and/or vulnerable patients or residents, exacerbating staffing shortages, and causing unacceptably high risk of complications.”

Penalty

The regulation does not state any specific penalty. Standard penalties for violation of health regulations will apply. Public Health regulations are generally enforceable civilly, administratively, and in some cases, criminally, under Public Health Law § 12-b (2), which provides for a misdemeanor for willful violations of any “regulation lawfully made or established by any public officer or board under the authority” of the Public Health Law.

Additionally, on August 18, 2021, President Biden announced that as a condition of participating in the Medicare and Medicaid programs, the United States Department of Health and Human Services will be developing regulations requiring nursing homes to mandate COVID-19 vaccination for workers. This has not yet been published.

What Should Covered Entities Do With Personnel Who Refuse Vaccination?

Under the regulations, “covered entities may terminate personnel who are not fully vaccinated and do not have a valid medical exemption and are unable to otherwise ensure individuals are not engaged in patient/resident care or expose other covered personnel.”

This issue raises mandatory/impact bargaining issues with respect to unionized employees.

This also raises concerns about staffing levels if personnel are terminated or placed on leave.