

# Healthcare and Labor & Employment Law Alert: Federal Court Permits Implementation of New York Vaccine Mandate Without a Religious Exemption CMS Issues Vaccine Mandate Requiring Religious Accommodation

On October 29, 2021, the United States Court of Appeals for the Second Circuit vacated the preliminary injunction regarding religious accommodations which had forestalled full implementation of New York's vaccine mandate for certain health care employers. The mandate, which took effect on September 14, 2021, was imposed by emergency regulations issued by the New York State Public Health and Health Planning Council. Further, on November 4, 2021, CMS announced that it will issue **regulations** imposing a vaccine mandate on certain Medicare-participating providers, including those covered by the New York state mandate. The CMS regulations require that covered participating providers consider—and in some circumstances grant—requests for vaccine-related accommodations based on employees' sincerely held religious beliefs.

## Federal Court Action

At issue before the Court was whether employers subject to the mandate may exempt employees from the vaccination requirement based on their sincerely held religious beliefs. While the Second Circuit has not yet issued a full opinion and the Department of Health has offered no additional guidance on the issue, hospitals, nursing homes, home care providers and other healthcare-related facilities and programs must now consider what to do regarding religious accommodations previously afforded to certain employees and how to address such requests in the future.

The New York emergency regulations do not explicitly provide for a religious exemption from the vaccine mandate. However, Title VII of the federal Civil Rights Act of 1964 applies to employee requests to be excused from vaccination on religious grounds. Title VII requires employers to engage in an interactive process with employees to determine whether a reasonable accommodation can be provided that will permit such employees to continue performing their jobs. Title VII also, however, relieves an employer from granting accommodations that impose an “undue burden” on it. Except for circumstances where employees can work remotely or in another manner that eliminates contact with other covered personnel, patients or residents—thus excluding such employees from the reach of the New York mandate—any other accommodation (such as masking and frequent testing) could cause the employer to violate the New York mandate and, hence, could arguably be considered an undue burden.

In other words, New York State health care employers to which the mandate applies may be unable to offer those employees seeking accommodations due to religious beliefs any option other than remote work. That means employees with direct patient care responsibilities who object to the vaccine on religious grounds may face a choice between getting vaccinated or losing their jobs.

While as yet there has been no word from the Department of Health on how it may enforce the vaccine

mandate, health care employers to which it applies should plan to fully implement the emergency regulation.

### **CMS Vaccine Mandate**

As this Alert was going to press, the Centers for Medicare & Medicaid Services (CMS) announced the issuance of Interim Regulations mandating COVID-19 vaccination of employees of certain Medicare-participating providers, including those covered by the New York State vaccine mandate. The CMS regulations require participating providers to consider, and in certain circumstances grant, accommodations based on employees' sincerely held religious beliefs. While the narrative accompanying the regulations indicates that they will preempt state regulations that allow broader accommodations than those required by federal law, it is silent on how the federal regulations might impact state regulations with more narrow accommodation requirements. Hancock will issue a more detailed analysis on the CMS regulations shortly.

We will continue to follow these developments. Please contact the attorneys in our [Healthcare Industry](#) or [Labor and Employment Practice Area](#) with any questions.