

Healthcare and Labor & Employment Law Alert: What Might Healthcare Providers Face for Failure to Comply with the State Vaccine Mandate?

The New York State Department of Health (“NYSDOH”) emergency regulations mandating vaccinations against COVID-19 for certain healthcare personnel have created difficult choices for covered healthcare providers. Covered entities, including hospitals, nursing homes, home health agencies, adult homes and other providers, are already dealing with critical staffing shortages and must consider compliance with conflicting state and federal rules. Despite these challenges, covered entities must consider the legal enforcement mechanisms available to NYSDOH, which include the potential for financial penalties for a provider’s failure to comply with the mandate. Moreover, the [regulatory impact statement](#) accompanying the new emergency regulations provides some insight into what NYSDOH may or may not consider a reasonable alternative for personnel requesting a medical exemption.

Standard Enforcement Actions – Section 12

Section 12 of the New York State Public Health Law (“PHL”) sets forth civil penalties for violations of the PHL and associated regulations. NYSDOH has previously used Section 12 to levy fines against nursing homes and hospitals when a survey identified certain violations or repeats of previously cited violations. The allowable financial penalties are:

1. Fines not in excess of \$2,000 for every violation;
2. An increased penalty up to \$5,000 per repeated violation if (a) a subsequent survey identifies the same violation committed by the same person within 12 months of the original violation, and (b) the violation in question is a serious threat to the health and safety of an individual or individuals; and
3. An increased penalty up to \$10,000 per violation if the violation directly results in serious physical harm to any patient or patients.

These penalties are “per violation.” NYSDOH could assert that each staff member allowed to work while unvaccinated in contravention of the mandate is a separate “violation.” It is uncertain at this early date whether DOH might also assert that every day any staff member comes to work without being vaccinated is a repeat violation. Efforts are underway to secure additional enforcement guidance and other feedback from NYSDOH in advance of the mandate’s effective date.

In the past, NYSDOH has taken the position that it will seek a penalty for each violation if it proceeds with an enforcement action; however, providers may get a break from the per-violation penalty if they reach a settlement prior to a formal enforcement action. It is too soon to tell whether NYSDOH would proceed similarly in a mandate enforcement action.

Finally, Section 12 also permits NYSDOH (through the New York State Attorney General) to seek an injunction, which might take the form of a court order to legally force facilities to implement the

vaccine mandate. That raises the specter of further charges related to the violation of a court order.

Possible Criminal Actions – Section 12-b

Section 12-b of the PHL provides for criminal and additional monetary penalties for willful violations. While it is unusual for NYSDOH to use this authority, there are a handful of cases where criminal penalties were sought. Therefore, this authority is on the books. A provider that affirmatively chooses to implement a policy permitting unvaccinated personnel without medical exemptions to work could arguably find itself subject to criminal charges and additional financial penalties.

Nursing Home Administrators

In the case of nursing homes, nursing home administrators can personally face enforcement actions, including suspension of their license pursuant to Section 2897 of the PHL. A violation may include, among other things, a finding that they “intentionally participated in any act, practice or policy...that endangered the health or safety of its patients.” While, again, it would be unusual for NYSDOH to seek enforcement against a nursing home administrator pursuant to Section 2897 or Section 12-b, it has been our experience that in the standard stipulation and order of settlement of a Section 12 action, NYSDOH will specifically reserve the right to pursue Section 2897 remedies against the administrator. Although we have not seen NYSDOH pursue such enforcement actions after entering into a settlement stipulation and order, it does reserve the right to do so.

In short, NYSDOH has significant tools available, depending upon how aggressive its enforcement stance is on the vaccine mandate. Historically, however, DOH has utilized the monetary penalties under Section 12 for violations of its rules.

Reasonable Accommodation Requests

NYSDOH discussed alternatives to the vaccine mandate in the regulatory impact statement accompanying the new regulations, which may give some insight into reasonable accommodations available to covered entities. While NYSDOH was quite clear that testing protocols and masking strategies that did not require fit-tested N95 face coverings were not sufficient, its statement suggests that requiring personnel to wear a fit-tested N95 face covering (as opposed to other kinds of masks) at all times may be an acceptable alternative. Thus, use of a fit-tested N95 mask may be a reasonable accommodation for those granted medical exemptions. Of course, employers must always consider their obligations under federal rules, including the Americans with Disabilities Act, and analyze disability accommodation requests on a case-by-case basis, including the special duties and responsibilities of the position sought to be accommodated.

While the new regulations do not specifically provide for religious or disability exemptions, they arguably do not prohibit employers from considering such requests. Notably, the new regulations do not eliminate or supersede employers’ obligations to comply with Title VII of the Civil Rights Law of 1964, the Americans with Disabilities Act, and/or the New York State Human Rights Law. Providers may be able to mitigate their potential employment discrimination liability by documenting such requests, undergoing the interactive process and discussing with the employee possible accommodations and obstacles, and ultimately determining whether accommodations are reasonable in light of the undue hardship it would impose on the provider. For example, some positions may be accommodated by assigning an employee to work remotely on a permanent basis so the employee never enters the

medical facility. However, any accommodation requiring the provider to violate the new emergency regulations likely creates an undue burden on the provider and could ultimately justify a rejection of the accommodation request. For disability accommodation requests, a provider may also argue that allowing an unvaccinated employee to continue working in the facility poses a direct threat to the health and safety of its employees, patients and others as a basis to deny accommodation requests. The direct threat defense is undermined, however, by past practice which allowed and continues to allow unvaccinated personnel to work in the facility.

Federal Vaccine Mandate

On August 18, 2021, President Joseph Biden announced that nursing homes (no mention of hospitals or other kinds of providers) will be required to vaccinate all workers to remain eligible to receive Medicare and Medicaid payments. To date, the Centers for Medicaid and Medicare Services have not issued regulations detailing how this mandate will be implemented.

We expect additional guidance from NYSDOH on the vaccine mandate in the coming weeks. We will continue to follow these developments. Please contact the attorneys in our [Healthcare Industry](#) or [Labor and Employment Practice Area](#) with any questions.