

NOW & NEXT

Labor & Employment Alert

AUGUST 26, 2021

New York Department of Health issues COVID-19 vaccination mandates for healthcare workers

By Tara E. Daub, Stephanie M. Caffera, Conor T. Tallet, Laurie T. Cohen, and Justin D. Pfeiffer

The new emergency regulations, alongside the previous order, outline the COVID-19 vaccination requirements for hospitals, residential facilities, and other types of health service providers in the state.



What's the Impact

- / General hospitals, nursing homes, diagnostic and treatment centers, home care agencies, hospices and adult care facilities must comply with new regulations, which mandate COVID-19 vaccination for personnel but which do not include a religious exemption
- / For general hospitals and nursing homes, the COVID-19 vaccine order clarifies the scope of "covered personnel" subject to the order
- / The order and the regulations require covered entities to develop and implement policies and procedures to ensure compliance with the vaccine mandate

Last week—consistent with Governor Cuomo's announcement, as [we previously discussed](#)—the New York Department of Health ("Department of Health") issued an order mandating that

healthcare workers in general hospitals and nursing homes in New York receive at least the first dose of an approved COVID-19 vaccine by September 27, 2021 (the “order”).

Additionally, on Thursday, August 26, 2021, the New York State Public Health and Health Planning Council (“PHHPC”) adopted emergency regulations that implement a similar requirement for all healthcare entities regulated by the Department of Health (the “emergency regulations”). The emergency regulations also are immediately effective and, while they maintain the September 27 compliance date for general hospitals and nursing homes, they further impose a first dose compliance date of October 7, 2021, on diagnostic and treatment centers (D&TCs), home care agencies, hospices, and adult care facilities. However, in a last minute change, the emergency regulations were amended to remove religious exemptions to vaccination for all healthcare providers subject to the regulations.

These new requirements follow other recent federal, state, and local vaccination orders for employees in certain healthcare, education, and other segments of the workforce. At the federal level, President Biden announced last week that the Department of Health and Human Services (HHS) will issue regulations requiring nursing homes to have vaccinated staff in order to participate in Medicare and Medicaid and receive funding from the federal programs, with details and effective date yet to be announced. Support for employer vaccination mandates has been growing over recent weeks, in anticipation of the Food and Drug Administration (FDA) granting full approval of the Pfizer/BioNTech vaccine for people ages 16 and over. The FDA announced its full approval on August 23, 2021.

Although the Department of Health’s order and regulations provide much-needed clarification as to the requirements of New York’s new COVID-19 vaccine mandate, the existence of two distinct legal requirements—each with a separate scope and enforcement mechanism—warrants special attention. Below, we discuss the scope and requirements of both the order and the emergency regulations, in turn.

The Department of Health’s order

Notably, both the order and the emergency regulations use the term “covered entities” to describe who is subject to their respective legal requirements; however, the scope of the term differs between the documents. Specifically, the order establishes the scope of the “covered entities” and “covered personnel” as follows:

- / **Covered Entities:** The Department of Health’s order extends only to “general hospitals” and “nursing homes,” as defined by Section 2801 of the New York Public Health Law. (In contrast, as we discuss below in Part B, when used in the regulations the term applies not only to general hospitals and nursing homes, but also to D&TCs, home care agencies, hospices, and adult care facilities.)
- / **Covered Personnel:** The Department of Health’s order extends to “[a]ll 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[] patients, residents, or personnel working for such entity to the disease”

Significantly, the “covered personnel” subject to the vaccination mandate extends beyond direct employees of the hospital and nursing home, to include persons “affiliated” with it, including members of the medical staff with privileges, contract staff, and other non-employees and volunteers. The vaccine mandate appears broad enough to require vaccination of any “affiliated” individual who could come into contact with the covered entity’s patients, residents, or personnel, whether on-site or off-site. This may include many other non-employees, such as contracted service providers, staffing agency employees, and other individuals who work for entities that have a relationship with the covered entity.

As previously discussed, the order establishes a compliance date of September 27, 2021, for general hospitals and nursing homes to ensure that covered personnel receive the first dose of an approved COVID-19 vaccine. The Department of Health’s order further specifies two limited exemptions to the vaccine mandate, which covered entities may grant as reasonable accommodations for covered personnel:

- / **Medical Exemption:** If a “licensed physician or certified nurse practitioner” certifies that the COVID-19 vaccine is “detrimental” to the individual based upon “a specific pre-existing health condition,” but only until the COVID-19 vaccine is found to no longer be detrimental to the individual’s health
- / **Religious Exemption:** The individual holds “a genuine and sincere religious belief contrary to the practice of immunization.” *However, as discussed below, the Department of Health considers the emergency regulations approved today, which do not include a religious exemption, to supersede this provision of the order.* Accordingly, the Department of Health’s current position is that *covered entities may not issue religious exemptions.* Moreover, the Department of Health’s view is that any religious exemptions that have already been issued are effectively revoked.

The order as written appears to be designed to be relatively consistent with the reasonable accommodation framework available to employees under federal law, the New York State Human Rights Law, and the New York City Human Rights Law. The regulations and the order, however, are inconsistent with each other, and the regulations are not entirely consistent with employers’ reasonable accommodation obligations under law. Covered entities may encounter situations where their obligations under the regulations are not easily aligned with their obligations under the Americans with Disabilities Act or Title VII. Covered entities would benefit from further agency guidance on the scope and procedures for evaluating and granting accommodations, for both employees and non-employees. Covered entities should consult with legal counsel on their obligations in this area.

Additionally, the Department of Health’s order requires covered entities to develop and implement a policy and procedure to ensure compliance with the vaccine mandate, and the order also imposes various other obligations on covered entities to:

- / Document proof of vaccination in the “personnel records” of all covered personnel, “in accordance with applicable privacy laws”—which, for employees of the covered entity, should be done in accordance with the Equal Employment Opportunity Commission’s guidance that proof of vaccination should be maintained separate from an employee’s personnel file, in a confidential file;
- / Document any exemption and reasonable accommodation in the personnel records of any covered personnel granted such exemption and reasonable accommodation;
- / Provide a report to the Department of Health upon request of: (i) the number and percentage of covered personnel that have been vaccinated against COVID-19; and (ii) the number of personnel for which medical or religious exemptions have been granted; and
- / Provide face coverings at no cost to all covered personnel, whether vaccinated or unvaccinated, which are acceptable for the setting in which they work, and whose use the Department of Health may mandate.

Given the broad definition of “covered personnel,” both covered entities and the various entities and individuals they have contracts and relationships with—who may come into contact with the covered entity’s patients, residents, or personnel—would benefit from further agency guidance on these requirements.

Lastly, while the Department of Health’s order goes into effect immediately, the Department of Health has scheduled a public hearing by videoconference for September 2, 2021, at 10:00 a.m., to provide any covered entity the opportunity to present evidence that their failure to implement the requirements of the order would not constitute a danger to the health of the people of New York State.

The emergency regulations

In addition to the order, on August 26, 2021, the Department of Health proposed, and PHHPC approved, emergency regulations that also require mandatory COVID-19 vaccination for certain healthcare personnel. Notably, the scope of regulations is significantly broader than that of the order. In particular:

- / **Covered Entities:** The Department of Health’s regulations extend to *all* facilities and institutions included within the definition of “hospital” in Section 2801 of the New York Public Health Law—including *diagnostic and treatment centers (D&TCs)*, which are not covered under the order. Moreover, the definition also applies to:
 - 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, AIDS home care programs, licensed home care service agencies, and limited licensed home care service agencies;
 - hospices as defined in section 4002 of the Public Health Law;
 - and adult care facilities under the Department’s regulatory authority, as set forth in Article 7 of the Social Services Law.

Although the regulations use the term “personnel,” rather than the term “covered personnel” as used in the order, the definitions are substantially identical.

As noted above, although the regulations maintain the September 27, 2021, compliance date for general hospitals and nursing homes, they further impose a first dose compliance date of October 7, 2021, on diagnostic and treatment centers (D&TCs), home care agencies, hospices, and adult care facilities.

More significantly, as discussed, the emergency regulations do not include religious exemptions as an option for covered personnel. At the PHHPC hearing, the Department of Health stated that no covered entities, including general hospitals and nursing homes that received the order, may issue religious exemptions. Moreover, the Department of Health’s view is that any religious exemptions already issued are effectively revoked.

Additionally, the regulations differ slightly from the order with respect to what it means to be “fully vaccinated.” Whereas the order states that covered personnel are considered fully vaccinated two weeks after the final dose in a one- or two-dose vaccine series, the regulations state that fully vaccinated status “shall be determined by the Department in accordance with applicable federal guidelines and recommendations.” This likely indicates that the Department of Health considers the regulations to have longer-term relevance compared to the order and, accordingly, it adopted a more flexible standard for determining vaccination status. The regulations’ standard for documentation of vaccination and exemptions is materially identical to the order.

The regulations require all covered entities to submit documentation of the following statistics to the Department upon request and “in a manner and format determined by the Department”:

- / the number and percentage of personnel who have been vaccinated against COVID-19;
- / the number and percentage of personnel for whom medical exemptions have been granted;
and
- / the total number of covered personnel.

Given the regulation’s phrasing, it appears possible that the Department will issue a standing request for such data submissions.

Similar to the order, all covered entities must develop and implement policies and procedures to ensure compliance. The regulations further provide that covered entities shall submit such documents to the Department of Health upon request.

Finally, like the order, the regulations require all covered entities to provide face coverings at no cost to all covered personnel, whether vaccinated or unvaccinated. The regulation further indicates that it may require all personnel to wear such face coverings while working in a covered entity, regardless of vaccination status.

Like all emergency regulations, the Department of Health's regulations are immediately effective. Although the regulations expire after 90 days, the Department of Health likely will seek recurring re-approvals of the regulations at subsequent PHHPC meetings.

Interestingly, when presenting this initial emergency regulation to PHHPC, the Department of Health did not simultaneously request that PHHPC consider the regulation for adoption on a permanent basis, to occur at a future PHHPC meeting. The absence of such a proposal indicates that the Department of Health either expects these regulations to remain in temporary, emergency status, or, perhaps, that it is contemplating revisions to the regulations, to be incorporated in a new version that will be proposed for discussion with PHHPC at a later meeting.

Members of the public, including stakeholders, may submit comments on emergency regulations at any time by emailing regsqna@health.state.ny.us.

What's next?

At this time, it is unclear whether the Department of Health will issue further guidance or frequently asked questions (FAQs) to assist covered entities in navigating their obligations under the order and/or the regulations, or whether that guidance will come soon enough with the deadline approaching for general hospitals and nursing homes to receive at least the first dose of an approved COVID-19 vaccine by September 27, 2021. For now, general hospitals and nursing homes should prepare to comply with both the order and the regulation, for their direct employees and other non-employee personnel covered by the order by that date. D&TCs, home care agencies, hospices, and adult care facilities likewise should prepare to comply with the regulation by October 7, 2021. Additionally, employers who contract with covered entities to provide services involving contact with a covered entity's patients, residents, and personnel should be prepared to take steps to effectuate the relevant requirements for their own employees. Covered entities with unionized personnel should consult with counsel regarding collective bargaining implications.

For more information on the content of this alert, please contact your Nixon Peabody attorney or:

[Tara E. Daub](#)

516.832.7613 or 212.940.3046

tdaub@nixonpeabody.com

[Conor T. Tallet](#)

585.263.1378

ctallet@nixonpeabody.com

[Justin D. Pfeiffer](#)

518.427.2742

jpfeiffer@nixonpeabody.com

[Stephanie M. Caffera](#)

585.263.1066

scaffera@nixonpeabody.com

[Laurie T. Cohen](#)

518.427.2708

lauriecohen@nixonpeabody.com

[Lindsay Maleson](#)

516.832.7627

lmaleson@nixonpeabody.com
