

MANDATORY VACCINATIONS IN NEW YORK: NEW YORK FEDERAL COURT PRELIMINARILY ENJOINS DOH FROM ENFORCING ITS COVID-19 VACCINATION MANDATE WITHOUT A RELIGIOUS EXEMPTION

Hodgson Russ Healthcare and Labor & Employment Alert
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In a closely watched development, on October 12, 2021, the U.S. District Court for the Northern District of New York issued a [Decision and Order](#) enjoining the New York State Department of Health (“DOH”) from enforcing its regulation, at 10 NYCRR § 2.61(c), requiring most healthcare workers to be vaccinated against COVID-19 without an option for a religious exemption. The preliminary injunction bars DOH from requiring employers to deny religious exemptions from COVID-19 vaccination and from interfering with the grant of religious exemptions from COVID-19 vaccination going forward.

As background, on August 18, 2021, DOH had issued an “Order for Summary Action” requiring hospitals and nursing homes to require all covered personnel to be fully vaccinated against COVID-19, with limited exceptions for religious exemptions or medical contraindications. Five days later, on August 23, 2021, the Public Health and Health Planning Council announced a special meeting to consider an emergency regulation requiring most healthcare providers to require their personnel to be fully vaccinated against COVID-19. The original proposal included both a medical exemption based on pre-existing conditions and a religious exemption based on a genuine and sincere religious belief contrary to the practice of immunization. On the eve of the August 25, 2021 meeting, however, the proposal was [amended](#) to remove the religious exemption option. On August 26, 2021, the Public Health and Health Planning Council adopted the regulation, without the religious exemption.

In response, a group of health care workers, including New York physicians, nurses and others, filed a federal civil rights action against the New York Governor, Commissioner of Health and Attorney General to enjoin them from enforcing the regulation, to the extent it requires health care employers to deny or revoke religious exemptions from the COVID-19 vaccination mandates. The plaintiffs asserted a sincere religious belief that they cannot consent to inoculation with vaccines tested, developed or produced with fetal cell lines derived from abortions. They argued that the emergency regulation violates their constitutional rights under the Free Exercise

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Clause of the First Amendment and federal requirements under Title VII of the Civil Rights Act of 1964, because it forbids employers from considering workplace religious accommodations.

The court agreed. On September 14, 2021, the federal district court issued a temporary restraining order, and on October 12, 2021, it converted the TRO to a preliminary injunction.

The court held that plaintiffs had demonstrated a likelihood of success on their preemption claim under Title VII, which prohibits discrimination in employment on the basis of religion, because the plain terms of the regulation do not make room for covered entities to consider requests for reasonable religious accommodations. While Title VII does not require an employer necessarily to grant an exemption in all cases, the court recognized, it “does require employers to entertain requests for religious accommodations and to ‘reasonably’ accommodate those requests absent a showing of undue hardship.”

The court also held that plaintiffs had demonstrated a likelihood of success under the free exercise component of the First Amendment, which protects religious observers against unequal treatment and laws that impose special disabilities on the basis of religious status. The regulation is not neutral, the court concluded, when viewed in light of the prior summary order, which included both medical and religious exemptions. The intentional deletion of the religious exemption language reflects “religious gerrymandering,” in the court’s view, which triggers heightened scrutiny review. The regulation also is not “generally applicable,” because it includes a medical exception, but not a religious one. And the regulation is not the “least restrictive means” of achieving its objective, because there is no explanation as to why the “reasonable accommodation” that must be extended to a medically exempt healthcare worker could not be extended to a healthcare worker with a sincere religious objection. In other jurisdictions, the court noted (citing Illinois and California), the healthcare vaccination mandates include the kind of religious exemption language originally present in the August 18 summary order.

Due to the exceptional importance of the issues to health and religious freedoms, the court recognized that an appeal may very well be appropriate. Stay tuned for developments.

For healthcare employers, the decision means that, for so long as the preliminary injunction is in effect, DOH cannot enforce the vaccination mandate against employers that grant employees a religious exemption from the COVID-19 vaccination or interfere in any way with the operation of religious exemptions from COVID-19 vaccination already granted or the grant of such exemptions going forward. In light of the court’s decision, covered entities should review their existing vaccination policies to confirm they include a process for determining whether they can make a reasonable accommodation for religious and medical exemptions to the vaccine mandates.

Under this process, a healthcare employer, when considering an employee’s request for a religious accommodation, first will need to decide whether the employee’s objection to the COVID-19 vaccine is based on a personal choice or a “sincerely held religious belief.” Where an employer has an objective basis for questioning the employee’s stated religious belief, it may request additional information from the employee to decide whether to grant the religious accommodation request.

If the employee’s concern is based on a sincerely held religious belief, the employer will need to engage in an interactive process with the employee to determine what reasonable accommodation, if any, may be appropriate. An accommodation that renders an employee unable to perform essential job functions or impairs workplace safety may, under certain

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circumstances, be denied as an “undue hardship.”

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), [Peter C. Godfrey](#) (716.848.1246), [Charles H. Kaplan](#) (646.218.7513), or any member of Hodgson Russ’s Healthcare or Employment Practices.