

SECOND CIRCUIT ALLOWS NEW YORK MANDATORY VACCINATION RULE TO STAND

Hodgson Russ Healthcare and Labor & Employment Alert
November 2, 2021

This alert has been updated as of November 11, 2021.

On Friday, October 29, 2021, the U.S. Court of Appeals for the Second Circuit issued an Order vacating a preliminary injunction, previously reported [here](#), that had temporarily blocked the New York State Department of Health (“DOH”) from enforcing its regulation, at 10 NYCRR § 2.61, requiring most healthcare workers to be vaccinated against COVID-19 without an option for a religious exemption. The Order remanded the case, *Dr. A v. Hochul*, to the Northern District of New York, and a related case, *We The Patriots*, to the Eastern District of New York, for further proceedings and stated that a written opinion in both cases would follow at a later date.

In its subsequent Opinion issued November 4, 2021, the Second Circuit ruled that the regulation was a reasonable exercise of the State’s power to enact rules to protect the public health and that plaintiffs had failed to establish that the regulation conflicts with Title VII of the Civil Rights Act of 1964 (“Title VII”). The State took the position, and the Second Circuit agreed, that “[n]othing in [Section 2.61] precludes employers from accommodating religious objectors by giving them . . . assignments—such as telemedicine—where they would not pose a risk of infection to other personnel, patients, or residents.” Of course, for direct care employees, it may not be feasible to offer a reasonable accommodation that does not cause the employer an undue hardship.

For healthcare employers, this means that DOH may now enforce its regulation at 10 NYCRR § 2.61, which requires covered entities, including hospitals, nursing homes, home care agencies, and hospices, to require their covered personnel to be fully vaccinated against COVID-19. Covered entities should review their vaccination policies and their processes for considering requests for religious accommodations to confirm compliance with the DOH regulation as well as Title VII and the Americans with Disabilities Act. The Second Circuit’s Opinion does not affect the requirement that employers provide medical exemptions when a licensed physician or certified nurse practitioner certifies that immunization with a COVID-19 vaccine is detrimental to an employee’s health based upon a pre-existing health condition.

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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 [Labor & Employment](#) Practices.