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## Introduction



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# **Mandatory COVID Vaccination Regulation**



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## Mandatory COVID Vaccination Regulation

- Effective August 26, 2021
- Issued by NYSDOH's Public Health and Health Planning Council
  - Emergency Basis
  - Replaces NYSDOH's Section 16 Order (issued August 18, 2021)
- Requires that "Personnel" affiliated with "Covered Entities" be fully vaccinated against COVID-19
- First dose deadline:
  - September 27 – general hospital and nursing homes
  - October 7 – all other covered entities



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## Mandatory COVID Vaccination Regulation

- "Covered Entities"
  - Any facility included in definition of "hospital" in PHL § 2801, including:
    - General Hospitals
    - Nursing Homes
    - Diagnostic & Treatment Centers
  - Any agency established under PHL Article 36, including:
    - Certified Home Health Agencies
    - AIDS Home Care Programs
  - Hospices
  - Adult Care Facilities under Article 7 of Social Services Law



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## Mandatory COVID Vaccination Regulation

- “Personnel”
  - Broadly defined
  - All persons employed or affiliated with covered entity, including
    - Employees
    - Students
    - Volunteers
    - Any other affiliated persons who “engage in such activities such that if they were infected with COVID-19, they could potentially expose other covered personnel, patients or residents to the disease”
  - Modelled after existing flu vaccination regulation
  - Covers nearly everyone who enters a covered entity (other than patients and visitors)



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## Mandatory COVID Vaccination Regulation

- Explicitly allows for medical exemption to be granted
- But narrowly defined
- Requires medical certification
  - Licensed physician or certified nurse practitioner
- “Immunization...is detrimental to the health” of individual “based upon a pre-existing health condition”
- Exemption inapplicable once immunization is no longer detrimental to their health
- Employers expected to scrutinize certification (and not simply defer to employee’s provider)



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## Mandatory COVID Vaccination Regulation

- Required Documentation
  - Proof of vaccination
    - Signed by administering healthcare practitioner; or
    - Official record (without practitioner signature) including from:
      - Foreign country
      - NYS Countermeasure Data Management System (CDMS)
      - NYS Immunization Information System (NYSIIS); or
    - “Any other documentation determined acceptable by [NYSDOH]”
  - Medical exemption records
    - Certification
    - Accommodation provided
  - Maintained in medical record file in accordance with privacy laws (e.g., ADA)



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## Mandatory COVID Vaccination Regulation

- Report and submit documentation to NYSDOH upon request:
  - Number and percentage of vaccinated personnel
  - Number and percentage of personnel granted medical exemptions
  - Total number of covered personnel
- Must have policy and procedure to ensure compliance
  - Be able to submit such documents upon request
- NYSDOH may require face covering (for all personnel)
  - Provided at no cost to personnel



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## Mandatory COVID Vaccination Regulation

- No “testing” alternative to vaccination
- No mention of religious exemption
  - In contrast to rescinded Section 16 Order
- Temporary regulation
  - In effect for 90 days from August 26<sup>th</sup>
  - NYSDOH can extend duration while it remains in effect or issue notice of proposed rule making for permanent adoption
- No specific penalties identified for non-compliance



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## Mandatory COVID Vaccination Regulation

- Covered entities may terminate personnel who refuse to comply with the vaccination requirement and do not have a valid medical exemption
  - Staffing concerns
  - Unionized employers need to consider bargaining obligation
- Further guidance to be issued
- Stay tuned...



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## COVID Vaccination Accommodation Issues



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## Religious Accommodations – Title VII

- Under Title VII, it is “an unlawful employment practice” for an employer to not make reasonable accommodations, short of undue hardship, for the religious practices of the employer’s employees and prospective employees.
- Title VII provides that the term “religion” encompasses all aspects of religious observance and practice, as well as belief.



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## Religious Accommodations – Title VII

- For a plaintiff to make out a prima facie case of religious discrimination, they must show that they 1) held a bona fide/sincerely held religious belief conflicting with an employment requirement; 2) they informed their employer of this belief; and 3) they were disciplined for failure to comply with the conflicting requirement.
- Once a prima facie case is established by the employee, the employer must offer the employee a reasonable accommodation unless doing so would cause the employer to suffer an undue hardship.
- In the context of religious accommodations, an accommodation will result in an undue hardship whenever it results in “more than a de minimis cost” to the employer.



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## How is “religion” defined under Title VII?

- Both the Second Circuit and Supreme Court define “religion” broadly, and look to see if the belief system involves “ultimate concerns” of individuals and is not purely intellectual in nature.
- Social, political, or economic philosophies, as well as mere personal preferences are not religious beliefs protected by Title VII.
- While it is generally recommended that an employer take an employee’s assertion of a sincerely held religious belief as true, the EEOC has expressly held in recent guidance that if an employee requests a religious accommodation and the employer has an objective belief for questioning either the religious nature or sincerity of a particular belief, the employer is allowed to seek additional supporting information to verify the belief.



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## Religious Accommodations - NYSHRL

- Under the New York State Human Rights Law, Section 296(10) delineates a slightly higher standard for an undue hardship for an employer, defining it as an accommodation which requires “significant expense or difficulty” for the employer.
- The section sets forth several factors for determining an undue hardship, such as such as interference with the safe or efficient operation of the workplace, a violation of a bona fide seniority system, the economic cost of accommodation, and the number of individuals who will need the accommodation.
- Although New York law appears to set forth a higher standard in determining an undue hardship, New York courts tend to defer to federal guidance on the issue and apply the de minimis standard.



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## What is an Undue Hardship?

- There is often not a clear-cut determination as what types of accommodations would be undue hardship, as each accommodation request should be evaluated on a case-by-case basis.
- Examples:
  - Cost
  - Interference with workplace safety
  - Legal Risk
  - Violation of existing company policies/seniority systems
  - Disparate impacts on other employees



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## Robinson v. Children's Hospital of Boston

- Illustrates how courts may apply the undue hardship standard to mandatory Covid-19 vaccination policies.
- Plaintiff refused to get vaccinated after her employer implemented a mandatory flu vaccination policy, claiming a religious exemption.
- Employer tried to relocate her to another position internally, allowed her to use her accrued PTO to look for another job, and granted her an additional two weeks of leave to find another job.
- Court held that the accommodations granted (efforts made to help find another job were reasonable) and it would have been an undue burden to grant an accommodation due to the risk that her unvaccinated status would place on patients.



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## Possible Accommodations for Religious Accommodation Requests

- For health care workers – potentially none pursuant to the August 26, 2021 regulation.
- For everyone else:
  - Mask Mandate/Social Distancing
  - Remote Work
  - Mandatory Testing
  - Relocation to different role (less physical interaction with others)
  - Shift Changes
  - Allowing use of PTO for new job search/aid in job search



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## Main Takeaways

- There is often not going to be a scenario where an accommodation request is clearly an undue hardship or not, particularly in the context of a vaccine mandate.
- While it may be easy to show an undue burden in this context, it is still crucial employers fully go through the interactive process with each employee to see if an accommodation is available, based upon the nature of the employer and employee's needs.



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## Update from Albany



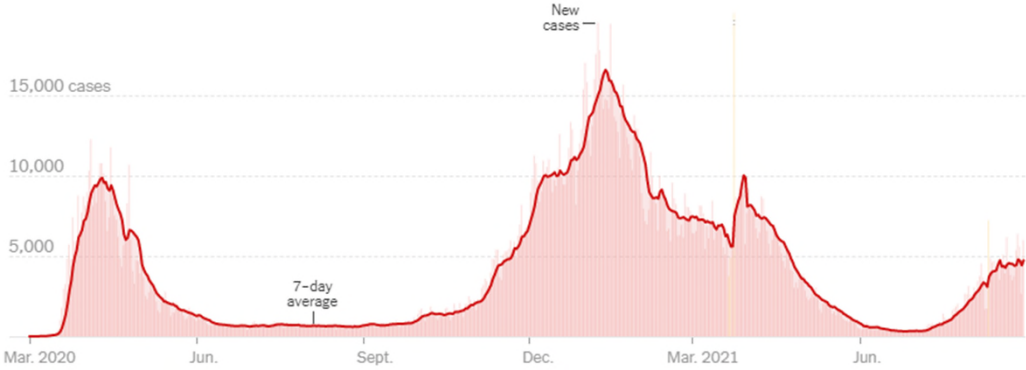
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New reported cases



	DAILY AVG. ON AUG. 23	14-DAY CHANGE
Cases	4,517	+38%
Tests	108,201	+24%
Hospitalized	2,196	+40%
Deaths	23	+125%

	DAILY AVG. ON AUG. 30	14-DAY CHANGE
Cases	4,736	+6%
Tests	105,819	Flat
Hospitalized	2,684	+29%
Deaths	25	+32%

[About this data](#)

## Vaccination progress

- All New Yorkers:
  - 60% fully vaccinated
  - 67% one dose
- 18 and older:
  - 72% fully vaccinated
  - 80% one dose

## Mask Mandate

### 2.60. Face Coverings for COVID-19 Prevention

(a) As determined by the Commissioner based on COVID-19 incidence and prevalence, as well as any other public health and/or clinical risk factors related to COVID-19 disease spread, any person who is over age two and able to medically tolerate a face-covering may be required to cover their nose and mouth with a mask or face-covering when: (1) in a public place and unable to maintain, or when not maintaining, social distance; or (2) in certain settings as determined by the Commissioner, which may include schools, public transit, homeless shelters, correctional facilities, nursing homes, and health care settings, and which may distinguish between individuals who are vaccinated against COVID-19 and those that are not vaccinated. The



## Department of Health

KATHY HOCHUL  
Governor

HOWARD A. ZUCKER, M.D., J.D.  
Commissioner

LISA PINO, M.A., J.D.  
Executive Deputy Commissioner

### Commissioner's Determination on Indoor Masking Pursuant to 10 NYCRR 2.60

August 27, 2021

- Healthcare Settings: Everyone must wear masks, regardless of vaccination status. Applies to entities regulated under Public Health Law Articles 28 (Hospitals), 36 (Home Care), and 40 (Hospice).
- Adult Care Facilities: Same.
- Correctional Facilities: Same.
- Homeless Shelters: Same.
- Public Transportation: Same.



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## Mask Requirements

- P-12 Schools: Masks need to be worn at all times indoors, regardless of vaccination status. Exceptions: eating, drinking, singing, or playing a wind instrument – must be spaced 6 feet apart.



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## Other Albany Developments

- Special Session: Legislature returning Wednesday to extend the eviction moratorium.
  - Rental assistance is going faster – total payments made = \$203 million; total payments promised = \$605 million.
- HERO Act Activation?
  - Written copy of plan must be distributed to all employees by September 4, 2021.



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### COVID Vaccination Accommodation Issues

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### Update from Albany

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