

# LABOR AND EMPLOYMENT LAW

## INFORMATION MEMO

JANUARY 17, 2023

### New York's Healthcare Vaccine Mandate Comes Under Fire . . . Again

In August 2021, the New York State Department of Health (NYSDOH) implemented an emergency regulation – 10 N.Y.C.R.R. § 2.61 (the Regulation) – requiring covered healthcare entities to ensure that their “personnel” are “fully vaccinated” against COVID-19. The NYSDOH Commissioner permanently adopted the regulation in June 2022. Commonly referred to as a COVID-19 vaccine mandate for healthcare workers, the Regulation has been the subject of several legal challenges in both state and federal courts.

On Jan. 13, 2023, Onondaga County Supreme Court Justice, Hon. Gerard J. Neri, struck down the Regulation on the basis that the Commissioner of Health, Gov. Hochul and the NYSDOH (collectively, Respondents) acted beyond the scope of their authority in enacting the Regulation.<sup>1</sup> Judge Neri agreed with Medical Professionals for Informed Consent, an informed consent advocacy group, and two named physicians (collectively, Petitioners-Plaintiffs), that the Regulation was *ultra vires* and, therefore, unenforceable.

Petitioners-Plaintiffs challenged the vaccine mandate, seeking a declaration that the Regulation was promulgated in violation of the New York State Constitution and that the Legislature did not authorize the NYSDOH to enact it. Petitioners-Plaintiffs also brought an Article 78 proceeding, challenging the Regulation on the basis that the Commissioner and NYSDOH acted “in excess of their jurisdiction” and on the basis that the Regulation is “preempted by the New York State Human Rights Law, which requires reasonable religious accommodation absent a finding by the employer that the individual in question cannot be safely accommodated without posing a direct threat.”<sup>2</sup>

In granting Petitioners-Plaintiffs’ request for declaratory relief, Judge Neri held that absent express legislative authority, the Commissioner of Health is prohibited from mandating vaccinations, such as the COVID-19 vaccine. Although the Legislature has authorized certain immunization programs, such as for measles, mumps and rubella for children, the public health law is silent as to COVID-19 or coronaviruses in general. Because mandatory immunization programs may only be implemented pursuant to specific provisions of the public health law, and because the public health law does not speak to COVID-19 vaccination, Judge Neri held that the mandatory vaccination requirements created by the Regulation were determined to be “beyond the scope of Respondents’ authority.”<sup>3</sup>

Turning next to the Article 78 proceeding, Judge Neri held that “Respondents fare no better under the ‘arbitrary and capricious’ standard of Article 78.”<sup>4</sup> In support of the petition, Petitioners-Plaintiffs argued that there is no rational basis for the vaccine mandate in light of the NYSDOH’s acknowledgement that the mandate “fails to accomplish its stated goal – *i.e.*, prevent the spread

<sup>1</sup> *Medical Professionals for Informed Consent et al. v. Mary T. Bassett, et al.*, Index No. 008575/2022, Decision and Order Motion #1 and Motion #2, NYSCEF Doc. No. 87, at p. 12 (Onondaga Cty. Supreme Ct. Jan. 13, 2023).

<sup>2</sup> *Medical Professionals for Informed Consent et al. v. Mary T. Bassett, et al.*, Index No. 008575/2022, Petition, NYSCEF Doc. No. 1, at ¶ 125 (Onondaga Cty. Supreme Ct. Oct. 20, 2022).

<sup>3</sup> *Medical Professionals for Informed Consent*, *supra* note 1, at p. 10.

<sup>4</sup> *Id.* at p. 11.

of COVID-19.”<sup>5</sup> Accepting this argument, Judge Neri noted that the Regulation’s stated purpose of preventing transmission of COVID-19 is inconsistent with Respondents’ public acknowledgement that “COVID-19 shots do not prevent transmission.”<sup>6</sup>

Judge Neri also deemed the Regulation arbitrary and capricious on the basis that the term “fully vaccinated” is defined as “determined by the Department in accordance with applicable federal guidelines and recommendations.”<sup>7</sup> Because this definition is subject to change at the whim of the NYSDOH, Judge Neri held that it “is no definition at all.”<sup>8</sup> Notably, Judge Neri did not address the portion of Petitioners-Plaintiffs’ Article 78 proceeding challenging the Regulation as preempted by the New York State Human Rights Law, leaving the viability of that argument an open question.

According to Judge Neri’s decision, the Regulation is now invalidated and the Commissioner and NYSDOH are “prohibited from implementing or enforcing” the requirement that covered healthcare personnel continue to be fully vaccinated against COVID-19.<sup>9</sup> The long term and practical impacts of this decision, including how the NYSDOH will respond, remain to be seen. According to media reports, the NYSDOH is currently exploring its options, which may include an appeal. If Respondents file a notice of appeal, Judge Neri’s decision enjoining the Regulation will be stayed during the pendency of the appeal.

If you have any questions about the information contained in this memo, please contact [Adam Mastroleo](#), [Hannah Redmond](#) or the Bond attorney with whom you are regularly in contact.

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5 *Id.* at p. 5.

6 *Id.* at p. 11.

7 *Id.* (quoting 10 N.Y.C.R.R. § 2.61).

8 *Id.*

9 *Id.*

