



Episode 3: “What’s up With COVID-19 Vaccination Mandates? Part 1: CMS and NY Vaccine Rules, With Maggie Surowka”

Speakers: Ari Kwiatkowski, Barclay Damon, and Maggie Surowka, Barclay Damon

[Ari Kwiatkowski]: Hi, everyone, this is a Barclay Damon live broadcast where we discuss all things L&E, labor and employment. I’m Ari. Let’s dig in.

[AK]: Hi, everyone, welcome to what’s up with COVID-19 vaccination mandates. This is the next episode in our series of episodes where we tell you everything you need to know about navigating workplace issues surrounding the pandemic. Today, we are going to be talking about the vaccination mandate issued by the Centers for Medicare and Medicaid Services, or CMS, and the New York vaccine rule. And I am thrilled to announce that today our guest is Maggie Surowka. Maggie is an attorney in our Albany office. She is counsel. Maggie is a former general counsel at the New York State Dental Association. She has years of experience representing providers in Medicare and Medicaid audits and licensure issues. And Maggie has a wealth of experience in the labor and employment space as well, so she really is the perfect guest to talk to us about the CMS mandate and the New York vaccine rule. Maggie, welcome.

[Maggie Surowka]: Thank you, Ari. It’s been a ... it’s been quite a ride, and we continue on this roller coaster ride that we’ll talk about today.

[AK]: Absolutely. Thank you so much for joining us. So, Maggie, I am first going to just put you on the spot a little bit. I know from knowing you, you have many interesting or fun facts about yourself, but one of the first things I like to ask our guests is, you know, if you can tell us something interesting or fun about you, whether it’s a hobby, I know you have some pretty cool hobbies or personally, professionally, you know, whatever you prefer, but just so we can get to know you a little bit better.

[MS]: You know this about me, and so I’ll tell those people listening as well. I’m a family of skiers. I’ve lived all my life in New York state, but I live right on the border of Vermont right now and I have two kids and we ski a lot. Actually, last year we skied in Vermont, so we had to navigate the Vermont rules on COVID. So even my two kids, who are young adults, have had to deal with all these different regulations that are going on so that we can do the thing we love and that is skiing.

[AK]: Awesome. Well, as you mentioned, quite a ride and as you know our listeners know I’m in our Buffalo office. You know, I do have some friends who live in Vermont, so I know that they were very careful and they had, you know, the state of Vermont had a lot of extra precautions in place. Or I shouldn’t say extra, but some, you know, distinct precautions in place as it related to the pandemic. So I’m sure that was fun to navigate all of those rules as well.

[MS]: Yeah. And it seems like this year we’re we’re having, you know, things that we’re navigating again and we’ll continue to, unfortunately. But we’re all getting used to it and we we are learning how to deal with what comes at us...

[AK]: Absolutely.

[MS]: ... every day.

[AK]: ... like the CMS interim rule or COVID-19 vaccination mandate. So perfect segue to hop right into our topic.

[MS]: It is. And, you know, health care providers in New York state have really been hit with a number of different things. So I'm going to start out with saying that, you know, first health care providers in New York state were really dealing with the New York state mandate and whether or not it applied to them. And then the CMS mandate also has come up. So what we're going to talk about today and what I'll try to clarify for people today is really the difference between the two rules, where we stand because it is constantly developing as you may or may not know in terms of court challenges to these mandates, both at the state mandate and the federal mandate and where we stand on it. So we can talk about—and if you'd like me to Ari, we can talk about the CMS rule first or the or the New York state rule.

[AK]: Sounds good. Yeah, thanks, Maggie. And I think this is going to be great, especially for our health care clients, because this I know this is a very complicated space to navigate. And as you mentioned, it seems like things are changing very, very rapidly. So I think if it works for you, let's hop into the CMS mandate and we'll kind of we'll dig in.

[MS]: We will. And so on November 4, CMS really instituted their rule. And at that point in time, health care providers that weren't already mandating vaccines really had to look to see if they had to mandate, what they had to do to mandate, and, in November, I will say that most health care providers that fall under the CMS rule really started preparing, started putting their policies into place, started giving notification to their staff as to what was required. So we can go into that first. And I will say the CMS mandate—when it first was announced and before the rule actually came out from CMS—a lot of health care providers in New York who take Medicaid, for example, assumed that it was going to be applying to them. When the rule actually came out, I do believe it was more limited than many of us anticipated it would be.

[AK]: Right

[MS]: We have a lot of health care providers who are Medicare/Medicaid, particularly Medicaid waiver services for human service providers, thought that this might apply to them. And when the rule did come out, it was more limited in what in what we thought it would cover in New York state.

[AK]: Right! That makes sense. So, Maggie, before we jump into the specifics, just for our listeners who may not be super familiar with this topic, what is the mandate generally or what does the mandate require?

[MS]: So first of all, the mandate is a vaccine mandate, unlike what you'll hear about in the next episode, which is the OSHA rule, which allowed either a vaccine mandate or testing out option.

[AK]: The CMS rule is a rule that requires employers to require all staff to become vaccinated unless they have certain very limited exemptions.

[MS]: Right. So the rule itself really said that all employees under the facilities that this applied to, eligible facilities, must become fully vaccinated essentially by January 4. Their first dose had to be administered by December 5—so that was last week—in order to comply with this rule.

[AK]: Right. So I think that's very helpful information for us to know and to give us context. But I think before we hop in to the specifics, it's probably important for us to point out that as of right now, as a result of challenges in federal court, the CMS mandate is stayed correct?

[MS]: It is, and it was stayed just last week, literally five days before this had to go into effect. So again, most health care entities that were subject to this rule basically were implementing all their policies, were notifying all their staff, many of their staff may have already gotten vaccinated pursuant to this. And then on November 30 was the second federal court decision which enjoined the... the rule across the country.

[AK]: Right

[MS]: Yeah, there was one court decision on November 29, which was on the Monday following Thanksgiving, and that only enjoined the rule for those states that actually were plaintiffs in that federal lawsuit and

[AK]: That it was Missouri v. Biden, right? And that was the U.S. District Court for the Eastern District of Missouri.

[MS]: That is correct. And then on November 30, the next day, it was the US District Court down in the Western District of Louisiana with which issued an injunction which enjoined this rule across the country, so nationwide. Essentially, the judge in that case said this is a nationwide rule. This should be a nationwide injunction against it.

[AK]: And that was Louisiana v. Javier Becerra, which, as our listeners probably know, is the current secretary of Health and Human Services.

[MS]: That is absolutely correct.

[AK]: So, Maggie, just generally... just so our listeners get a feel for the, you know, the arguments that were set forth in those cases, understanding that with the decision on November 30, it really is a nationwide injunction. What was the basis of the challenge, or why were those particular states challenging the mandate?

[MS]: So the states actually challenged the mandate on many grounds. Let's start off with their procedural grounds. They were actually saying that it was procedurally there should have been a comment period that was put into place on this to allow there to be comments on it before it was actually implemented, in simple terms

[AK]: Right

[MS]: Also the the challengers said that it was outside of the scope of the federal government to enact this. This should have gone through Congress. This was something that that should have gone through Congress, and the judge agreed with that, or at least agreed with the likelihood of success of that argument. He also agreed that the judge thought the rule was arbitrary and capricious. He looked at a number of different arguments. He also looked at the fact that the Biden administration had said that it was not going to issue a mandate and that it did issue a mandate. And so the judge was persuaded that this was arbitrary and capricious. The judge also felt that there could be irreparable harm, looked at really staffing issues in rural areas, and in New York state in particular. This has really been a hot issue.

[AK]: Right

[MS]: We've had many health care providers in rural areas. You may have heard some hospital in the north country that was that had to close its OB services because of this.

[AK]: Right

[MS]: So that has been an issue for health care providers, in particular in New York State, in rural areas, worried about staffing requirements.

[AK]: Right. So I think it's important too Maggie, and I know you you mentioned it was basically the court enjoined the enforcement of this. And for our listeners, you know, the procedural what we call as lawyers "posture" of the case is, you know, this was a preliminary injunction, meaning the plaintiffs or the states in these cases wanted to prevent enforcement of these mandates. But this isn't necessarily the be all end all.

[MS]: That is correct and it's temporary. It's a temporary restraining order. And and again, we expect—and the Biden administration has already asked—that the court stay the enforcement of the injunction until an appeal can be heard. A judge has not agreed with that yet. But we do expect that there are going to be more decisions, more appeals challenged. I expect this month we might hear a little bit more. We should also hear a little more about the briefing schedule on this and we don't know it yet. So in terms of timing, I'm expecting that this ... in the next few weeks, we will be hearing more about this.

[AK]: Right! And it's such a timely topic. You know, hopefully we can get a bit of resolution or at least proceed to the next steps. You know, as you pointed out, and in the next few weeks to get clarity, really for the entities that are covered.

[MS]: I do wonder if the Omicron variant will change the analysis at all. I do expect that the Biden administration will probably raise that and raise those developments. And that could have an impact on a court's decision.

[AK]: If you're in this field, you know how quickly things can change. Within a few hours of finalizing this episode, on December 15th, 2021, the Fifth Circuit Court of Appeals issued a decision in CMS's appeal of the injunction issued by the Louisiana Federal District Court. Essentially, the Fifth Circuit held that four those states that were involved in the lower litigation as plaintiffs, the injunction could remain in effect, however, the Fifth Circuit questioned the authority of the lower Federal District Court to issue a nationwide injunction. So, it looks like as a result of this decision, the CMS mandate will go into effect in the states that were not parties to this litigation or the other federal lower court case we discussed. We have yet to hear from CMS how it intends to enforce the mandate in those states. We will be sure to keep you updated.

[AK]: Really good point. So, in addition to these two federal courts and really the the decision issued on November 30, basically enjoining or staying the the mandate nationally, has CMS come out and said anything about the mandate or or whether they're going to enforce it.

[MS]: CMS has indicated that they are suspending enforcement action on this. So similar to what happened with OSHA, the federal government did indicate that it would stay enforcement of these rules pending further judicial review. So, they have confirmed that. And so we are aware that this CMS rule will not go into effect. I mean, there is there is some ... I guess you could say some chance that a judge would look at this and a court would look at this, an appeals court, and issue a decision before that January 4 deadline.

[AK]: Right

[MS]: I would anticipate, however, that pending further judicial review that there would be new deadlines set after there is additional review.

[AK]: Yeah, that makes I think that makes sense just to take into account the time period that it's the enforcement has been stayed.

[MS]: I agree with that.

[AK]: So, Maggie, you know, I think it's good for our listeners to know that, you know, technically as of right now, this mandate is not being enforced. But, you know, given your experience in the health care space and the labor and employment space and all the work you do with providers, I would think you would agree that it's important for our listeners to know what this mandate is about and basically what it requires from the covered employers.

[MS]: It is, and in New York state, I think a lot of health care providers in particular have been listening not only to the federal government's response, but also to the state government.

[AK]: Right

[MS]: Right. As you know, New York state had really put in their own health care vaccine mandate that was stricter even than the CMS rule, and that was subject to some court challenges as well because it did not allow for a religious exemption. But right now, New York State's health care mandate is in place so that that really applies to a whole host of health care providers. The CMS rule applied to some health care providers that weren't covered by that New York state rule.

[AK]: Right, and that's a good segue, Maggie, because I think we'll talk in detail about the, you know, the New York mandate a little bit later. But I would like for you to tell us, if you don't mind, and tell our listeners what providers or what entities does the CMS mandate apply to?

[MS]: So I'm going to talk generally, Ari, it talks about ambulatory surgical centers, hospices, psychiatric residential treatment facilities, hospitals, long term care facilities. Interesting for New York, it added what was not under the New York state health care mandate and that was intermediate care facilities for individuals with intellectual and developmental disabilities. So that was new, it included home health agencies, comprehensive outpatient rehabilitation facilities, critical access hospitals, clinics, rehabilitate patient agencies, home infusion therapy services, community mental health centers, rural health centers, end stage renal disease facilities. So it includes a whole host of providers who are Medicare and Medicaid facilities. And what it did, Ari, is it actually made it a condition of participation for these facilities to comply with these requirements. Now under the health care space, that adds something a little bit different than even employment law has, because that essentially means for these health care facilities that if they're not complying with it, there could be a payback from Medicare or Medicaid because they are not complying with it because it is a condition of participation. It could also mean that if they fail to comply with it, their participation in Medicaid and Medicare programs could be in jeopardy. So it's a little bit more than just what the Department of Labor has. It really includes an enforcement element for health care providers that is over and above what the Department of Labor might have.

[AK]: And that enforcement element is significant if you're a provider and you're operating and you're subject to the mandate. You know, those potential penalties or, you know... the limitations of not complying with the mandate are severe.

[MS]: They are. And health care providers, particularly those in government programs, already are very much aware of those enforcement mechanisms and how significant they are. So when this rule was put into play, you know, the health care providers really said, how are we going to how are we going to deal with this? What are we going to do? And really started to put into play their programs, their policies, etc. ... so that they could make sure they were in compliance with this. And now they're really sitting and waiting in a holding pattern.

[AK]: Right. So, Maggie, we talked about what health care facilities or what providers are covered, I wanted to ask, does the mandate apply to all employees at the required or covered facilities or providers?

[MS]: For the most part, it does. It includes employees, it includes volunteers. It essentially includes anyone who may be coming into the facility—other than visitors—who are working there. So what it doesn't include is employees who are completely remote, so they aren't included. But if you have staff that are coming in even on a part-time basis, they are included. Volunteers on a part-time basis. They are also included. Trainees, students, anyone who provides care or treatment in the facility itself and who might potentially have contact with the individuals at that facility.

[AK]: So the mandate or who the mandate covers as it relates to, you know, individuals at these covered facilities or providers is pretty broad.

[MS]: It is very broad. It is, you know, we had many providers who at first thought maybe their administrative staff would not be covered by this. But if their administrative staff are in the workplace of the facility, they're not offsite or if they come onsite at all, then they are covered by this. The only ones who would not be, again are those that are remote and do not come on site.

[AK]: Right. So if you have employees, you're a health care provider or a facility or one of these other covered entities, and you have an employee who maybe works administratively from home two days a week, but then comes physically to the worksite, you know, the other days of the week, then that individual would be covered by this mandate...

[MS]: They would be they would be the only ones who are exempt from it are those who work full time remotely from home and are not coming on. You know, we have a lot of facilities where they'll have a physician, for example, who comes in once a week. That position would be covered by this, you know, admitting anybody who's admitting or any kind of privileges at a facility, that position would be covered by this as well.

[AK]: Yeah, I think that's an important point to make, although I think if the health care space, obviously the pandemic has not affected the work-from-home versus report-to-work aspect of I think, you know, those particular professions, but I think it's still important to point out, you know, for for certain providers or certain facilities that we represent.

[MS]: I think it is, and I think there's a distinction that you can make between the direct care staff and then non-direct care staff, but who are still on site. So a lot of people say, well, they aren't giving direct care. It doesn't matter; if they are on site, they are included within this role.

[AK]: Yes. So, Maggie, I think we covered, you know, who the mandate covers in respect to, you know, on the provider side and also on the employee side. One thing I wanted to ask you about this particular mandate is whether there is any testing requirement built into the mandate.

[MS]: There is not a testing ... There's not a testing opt out. Let me put it that way. So this does require vaccination itself. What it does do, though, is it includes some exemptions really to Title VII exemptions. And we're talking about an exemption for a medical condition and that is a recognized clinical contraindication of a COVID-19 vaccine that a licensed practitioner has signed and delivered. Those individuals who have that kind of an exemption may continue to practice and provide clinical care. As long as they're taking other precautions, they're masking, they're testing, etc... There's also an exemption for this sincerely held religious belief. And really, what CMS points to is the EEOC's guidance on a sincerely held religious belief and what you can do on that. What they have said on this is there's been some confusion. Does that mean an individual who has been exempted under this can still deliver direct care? I will note that the New York state mandate and New York State's health care and the Department of Health has indicated that for employees who have this religious exemption, that they should not be delivering any direct clinical care for this.

[AK]: Yes.

[MS]: And so really CMS is encouraging facilities to follow their EEOC guidance on this. But I think that is that's a vexing issue for a lot of health care providers and exactly what they might have to do for that.

[AK]: Yes, and we'll definitely talk about that religious exemption issue in a few minutes when we talk about the New York vaccine rule, because that has been a very hot button issue as it relates to the New York vaccination mandate. Maggie, you know, you mentioned the first exemption is for a medical condition. I wanted to ask, you know, as it relates to the exemption and really the mandate generally, are there specific record-keeping requirements that providers or covered facilities need to be aware of?

[MS]: There are. There are record-keeping requirements and there's actually policy requirements as well, because providers need to show what their policy is, they need to store medical records showing proof of vaccination or in fact, that there is the medical exemption. They need to follow up on that because there has been ... CMS has stated that someone may have contraindications now to a COVID 19 vaccine, but there could be another approved vaccine in the future in which they don't have a contraindication for. So the employer has to follow up on those kind of exemptions and continually show that they're looking at those and they're keeping track of the documentation. They need documentation on the vaccination status for each of their staff members who are subject to this as well.

[AK]: Yes, and what type of documentation, Maggie, will qualify as proof of vaccination under the mandate?

[MS]: The easiest, obviously is your vaccination card because that includes everything that you have. We've had several instances lately, however, where employees have said they've lost that card. There is a way to call the Department of Health in New York state to get a copy of that card because the status should include the date of the vaccination and the actual type of vaccination, the lot, so you really have to have all that information. The other thing is, New York State's Excelsior Pass includes that information as well if they don't have their physical card, vaccination card.

[AK]: And Maggie, the the records as it relates to proof of vaccination, those should be kept separate just from a housekeeping perspective, from the personnel file, correct?

[MS]: They should be. They should, like you would do with any kind of health care information, you would want to keep it separate.

[AK]: Right! All right, well, that's great information, Maggie, and I think since we've talked, you know, we spent most of the episode so far talking about the CMS mandate, I want to switch gears a little bit and talk about the "New York Prevention of COVID-19 Transmission by Covered Entities, Emergency Regulation," also known as the New York vaccine rule. So the New York vaccine rule, Maggie, originally issued August 26, it required covered health care entities to mandate covered employees to be vaccinated.

[MS]: It did, and essentially it applied to the Article 28 hospitals in New York state. Interesting, just so you know, it did not apply to private medical practices. It didn't apply to many of our what I'll call the "O" agencies; the human services providers; didn't apply to home and community-based service facilities. And just so you know, the CMS rule did not apply to home and community-based services, either. We've heard from the governor and I know she has stated that she might expand that health care mandate, but at this time, it does not apply to all those. So we're really looking at hospitals, psychiatric hospitals under that. And those rules went into effect in September. And September 27 was the original deadline for the vaccine mandate. And as you know, there were court challenges.

[AK]: Yes.

[MS]: Specifically, the court challenge was really relating to whether New York was required to have a religious exemption in place. And so we've seen different court decisions. I'll cut to the chase on that one because the Second Circuit has indicated that New York state's mandate is valid. We do know that they're going to try to appeal that. And it's valid even without the religious exemption. But employers do have to look at Title VII, and the Department of Health has issued some guidance on that. But to boil it down: Health care workers that are subject to the New York state mandate must consider whether or not there is an undue burden in allowing someone who has a religious exemption or a sincerely held religious belief. But the Department of Health has indicated that those individuals, even if they do have a valid exemption, those individuals should not be providing direct clinical care to patients in those facilities.

[AK]: So I think we should definitely talk a little bit more about that, Maggie. But before we dive in, I did want to clarify one thing just for our listeners. So, you know, our listeners have heard us talk about how the CMS mandate is stayed. Does that have any effect on the enforcement of the New York, the New York vaccine rule?

[MS]: It does not. New York state vaccines rule is not preempted by the CMS rule. There are certain states rules that are inconsistent with the CMS rule that might have been preempted, but that stay does not have any effect on New York's vaccine rule as it stands right now.

[AK]: If you are a covered provider in New York, even though you may not be required to comply with the CMS mandate, you are required to comply with the New York vaccine rule.

[MS]: If you fall under the New York vaccine rule, that is correct.

[AK]: So I know we talked about, you know, what health care facilities are covered by the New York rule, Maggie, can you tell us what employees or what individuals are covered by the New York vaccine rule?

[MS]: So it's broad. It's all staff members, and they're all persons who are employed, whether they're paid or unpaid, so that it would include volunteers. And it includes members of the medical nursing staff, contract staff, students, volunteers. So it is a broad definition for anyone who could expose any patients that are being treated in the facility to COVID-19 if they had it.

[AK]: That makes sense, I think that the broad coverage of it really comports with the rule's purpose or intent.

[MS]: It does. So again, it wouldn't cover remote employees, those who are fully remote. And so again, if you do have those employees, if you have administrative staff that do not come into the facility, they wouldn't be covered. Again, you're looking at who could expose individuals being treated at the facility.

[AK]: Yes. Maggie, one thing I wanted to ask, and I think this question applies to the CMS mandate as well. I just wanted to clarify that both the CMS mandate and the vaccine, the New York vaccine rule, require that the employee be fully vaccinated by that particular timeframe

[MS]: It does, that is correct.

[AK]: And by fully vaccinated... That means, you know, not having just your first shot if you're doing Pfizer or Moderna, but you're fully vaccinated, meaning you have had your second shot. And is there a period of time that after your second shot, that allows you to be considered fully vaccinated?

[MS]: There's two weeks following that primary vaccine series in which you're considered fully vaccinated. I do know that CMS was very clear, though, that if someone has gotten their second shot and they haven't had that two weeks, they will be considered to have complied with the rule at that time.

[AK]: Understood. I think now a lot of particularly people in the health care space, but now in New York, obviously it's been opened up and it's been broader as it relates to boosters or people getting their third shot. Is there any consideration for boosters in the New York vaccine rule at this point?

[MS]: It does not require a booster. So although boosters are recommended for individuals who are eligible for it, that is that it's after that six month period of time or whatever, for the J&J, I think it's a lesser time period, but it does not require the booster shot at this point in time. That could change.

[AK]: Right, like everything.

[MS]: Yeah.

[AK]: So, Maggie, I know that you briefly mentioned that there is no religious exemption under the New York vaccine rule, and I want to talk about that. But there is a medical exemption under the New York vaccine rule. Is that correct?

[MS]: There is. There is a medical exemption. And it's again, if there is a contraindication that the person has a medical condition where there's a contraindication to the vaccine.

[AK]: Understood. So let's dive into this. You know, as we near the end of our episode, let's dive into this issue regarding religious exemptions under the New York vaccine rule. So if you are a covered employer and you have a covered employee who would normally be subject to the mandate and that employee says, you know, I, I do not want to get vaccinated, I want to request an exemption based on a sincerely held religious belief. What's the process for that? And what can the employer's response be?

[MS]: So really, the response of the employer, it's designed for them to engage in a conversation and see if there's an undue burden on them to accommodate this exemption request. For those of your clinical staff, if you're a health care provider, what the Department of Health has really said is if they cannot work remotely, then it is an undue burden for the health care provider to continue to have the individual employed with them. So we have health care providers who have direct clinical staff who are not being vaccinated, who are trying to say that they have a sincerely held religious belief and that they're exempt. And those providers are at a crossroads because they're telling the individuals under the new court rulings that they cannot accommodate them, and they have to terminate them. And so that's really what health care providers are facing. Many of them are putting their staff on unpaid leave in order to give them time to become vaccinated. But these health care providers are also dealing with staffing shortages and the concerns that they have because of that, and they really don't have much of a choice if you look at the Second Circuit's decision here.

[AK]: So, Maggie, let's talk about that. I know you mentioned it briefly before, but I wanted to go a little bit more into detail onto this Second Circuit decision. What is the name of this case?

[MS]: So it's, "We the Patriots USA Inc. v. Hochul," and the case was actually decided on November 4, 2021. The Second Circuit was really reviewing a case that was brought in Syracuse by a group of providers who were challenging the New York state health care mandate because that mandate did not include a religious exemption. That's the simple way of this. And the Second Circuit upheld New York's mandate that does not include the religious exemption and said that it is constitutional for New York state to not have the religious exemption included, but that New York state employers did have to take into account any kind of reasonable accommodations under Title VII, which I think confused a lot of people because we looked at that and we felt, well, is this saying there is a religious exemption or not? And I think the more analysis of this clearly shows that this court, the Second Circuit, said that it is fine that New York state does not recognize a religious exemption, but employers do have to go through that accommodations inquiry when someone is claiming a religious exemption or a medical exemption to see if there is an undue burden in accommodating them.

[AK]: Hey guys, I'm coming in with a second update for you on this episode. Subsequent to recording, the United States Supreme Court rejected "We the Patriots" challenge to the New York vaccine rule. Therefore, it looks like we are full steam ahead on the law, but we'll be sure to keep you posted on any other updates.

[AK]: So, Maggie, what about trying to get to the bottom of the sincerity of an employee's religious held belief?

[MS]: You know, we've actually said to employers, you can ask questions. You can say, how long has the individual held this belief? You know, ask if they've been a member of a of a church, if it's a specific church, how long they've done that and has this belief that they have held really prevented them from getting other vaccines? I think that was the one thing many employers have asked, and it's been interesting. And you can actually have employees fill out a form asking them just some questions, basic questions like that. How long have you held this belief? Has this belief prevented you from getting other vaccines and those kind of questions to see if this is really a long held and a sincerely held religious belief. I mean, it doesn't have to be a long-held belief, but to get to the sincerity of it, you really want to see how long they've held the belief.

[AK]: And I think that's a, you know, that can be a difficult thing for employers or health care providers or other covered entities to navigate.

[MS]: It is. And I think that's why most employers put it in a simple form, asking the same questions of every single employee. The bottom line with the Second Circuit case is even if the person does have a sincerely held religious belief, the health care employer can still terminate them. And and they can say, we can't accommodate you. Certainly, we cannot accommodate you in a direct care position. So nurses, for example, let's talk about what most hospitals are facing when they're talking about nurses who are requesting a religious exemption or religious accommodation is really what we're talking about here. How are they going to be able to continue to employ them? They can't employ them in a direct care position. And so they are giving notice of termination if they don't actually get mandated...er, vaccinated.

[AK]: And I think that's very important to note, Maggie, and I think a lot of the questions that we're getting from, you know, providers who are covered under the New York vaccine rule, you know is simply, I have an employee who refuses to get vaccinated on the basis that the employee has a sincerely held religious belief or purportedly has a sincerely held religious belief that prevents me from getting the vaccine. And it's based on the Second Circuit's ruling, although it is somewhat amorphous, the short answer is, well, if you cannot accommodate that belief because you are in a direct care relationship with the patient. The employer or the provider is within their rights to say, sorry, you know, you can no longer be employed by us.

[MS]: They're within their rights and under New York state's mandate, they have to take action.

[AK]: Yes.

[MS]: You know, the Department of Health in New York has not said how they're going to enforce this mandate yet. there are several routes that they can take. They can, they can assess penalties. They can assess, they can say there's violations if they're doing a survey. But many health care providers, because they are licensed under New York state, do fear that New York state can take severe action against them and possibly against their license. And so health care providers in New York state really don't have a choice on this. And although the Second Circuit's case has not, the Supreme Court hasn't considered it yet. The Supreme Court has in fact upheld other state's mandates that do not include a religious exemption. So we do know that the Supreme Court even has upheld these mandates. Maine being the most recent, I think, is the most recent example.

[AK]: Right, and that's important because even though the court has not considered, you know, the Second Circuit decision, it gives us a preview of a preview or at least we think it does into what a potential challenge to that decision would look like a result in.

[MS]: It does. Yes, exactly.

[AK]: Maggie, is there anything else that you think that we should know about the New York vaccine rule that we haven't covered so far?

[MS]: The only thing I would say is that just be mindful of developments. Governor Hochul has indicated that she would consider expanding New York's health care mandate to include some human service providers, and we are waiting to see if she will do that. As you know, this is developing, it's developing with the Omicron variants. And so every employer in New York, but in particular health care employers in New York should be mindful of all the different developments. They are rapid, they're coming, and we do expect more. And we do expect there to be more developments on the CMS mandate as well.

[AK]: Well, thank you, Maggie. I think that is a great point to conclude on. I wanted to say we so much appreciate you coming on the podcast. It was great talking with you today. I think you really streamlined a lot of things for me and for the listeners that, you know, it's a very complicated space to navigate, so we really appreciate it. To our listeners, thank you so much for tuning in. Make sure to tune in next week where we tell you everything you need to know about the OSHA COVID-19 vaccination mandate.

[AK]: The Labor & Employment podcast is available on BarclayDamon.com, YouTube, LinkedIn, Apple Podcasts, Spotify, and Google Podcasts. Like, follow, share and continue to listen.

Disclaimer: This material is for informational purposes only and does not constitute legal advice or a legal opinion. No attorney-client relationship has been established or implied. Thanks for listening.