

# Home Care Developments

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## Hochul Signs Executive Order Expanding Scope of Practice for Healthcare Professionals

In response to the healthcare workforce shortage that has been made all the worse by the vaccination mandate, New York Governor Hochul has signed an Executive Order that, in part, expands the scope of practice for New York healthcare professionals and allows some providers to engage professionals from other states and un-registered but licensed New York nurses and LPNs. Here, we discuss the key elements of the EO, as relevant to home care.

As a preliminary matter, the EO is generally geared towards alleviating the hospital and nursing home staffing shortages, not home care. Perhaps because the deadline for vaccinating hospital and nursing home workers was September 27, the EO's primary beneficiaries are hospitals and nursing homes. In anticipation of the October 7 deadline for home care's own vaccination mandate, it will be critically important for the Governor to adopt measures (such as a new EO) that will alleviate LHCSA's workforce shortages.

The Governor's EO establishes the following, as relevant to home care providers:

1. Registered nurses, license practical nurses, and nurse practitioners licensed and in good standing in any state may practice in New York State.
2. Un-registered but licensed New York nurses, LPNs and NPs, may practice in New York, so long as they are in good standing.
3. Graduates of nursing and LPN programs in New York State may be employed to practice nursing under the supervision of a RN in a hospital or a nursing home for 180 days immediately following their graduation. *A provision like this would have been particularly helpful for home care also, but there is no indication in the EO that this "recent graduate" provision extends to home care.*
4. Nursing homes are authorized to "discharge, transfer **or receive**" patients if necessary due to staffing shortages. *This may be helpful to LHCSAs that will be required to discharge patients that they cannot serve due to workforce shortages.*
5. Allows MLTCs to suspend pre-authorization reviews for admission to home care following a hospital admission, to the extent necessary to increase availability of healthcare staff.

Providers should take note of these, welcome, provisions but advocate for further relief from the Governor, as the October 7 deadline approaches.

## NY Minimum Wage for Upstate Counties Scheduled to Increase

The "upstate" minimum wage rate will be increasing from \$12.50 to \$13.20 effective

December 31, 2021. Upstate employers paying minimum wage should ensure that this increase is effective for all work performed on December 31. The first date for when the new minimum wage rate will take effect is not January 1, 2022. As previously established, the minimum wage in Long Island and Westchester County will increase to \$15.00/hour effective December 31, 2021.

Employers should consider the impact of the minimum wage increase on issues such as spread of hours, as the “credit” for the spread of hours will now decrease for non-exempt employees whose base wages are only slightly higher than the minimum wage.

Please let us know if you have any questions about these minimum wage changes.

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## No Unemployment Benefits for Terminated Healthcare Workers

As discussed previously, the New York Commissioner of Health had declared, shortly after the healthcare worker vaccination mandate was enacted, that healthcare workers who lose their employment because they refuse to vaccinate would not be eligible for unemployment insurance benefits. The New York State Department of Labor has now updated its website to confirm these principles.

As stated by the Department, *“Workers in a healthcare facility, nursing home, or school who voluntarily quit or are terminated for refusing an employer-mandated vaccination will be ineligible for UI absent a valid request for accommodation because these are workplaces where an employer has a compelling interest in such a mandate, especially if they already require other immunizations.”*

However, we note that the DOL’s website also states, *“a worker who refuses an employer’s directive to get vaccinated may be eligible for UI in some cases if that person’s work has no public exposure and the worker has a compelling reason for refusing to comply with the directive.”* Thus, the Department has left open the possibility of granting benefits to some healthcare workers who are terminated due to noncompliance with the vaccination mandate.

If you have any questions about unemployment insurance implications of the mandate, please contact us.

## About that Religious Exemption...



Over the last several days, our firm has received a number of questions about the religious exemption. At a high level, only “sincerely” held religiously-based objections to vaccination are entitled to an exemption. Thus, the employer must initially determine that an employee’s objection to the vaccination mandate is motivated by religious reasons, and not political, medical, or philosophical reasons.

Employers have expressed concern about being sued by employees who are improperly denied a religious exemption. There are some, albeit limited, court decisions that illustrate how employers could prevail in such employment lawsuits.

In *Beck v. Williamson College of the Trades et al.* (Pa. Com. Pl. Aug. 24, 2021), a student attending a private, post-secondary school in Pennsylvania brought suit in

state court against the school, alleging religious discrimination, among other things, based on the school's failure to provide him an exemption from its vaccination policy based on his religious beliefs. The student, who identifies as Catholic, claimed that his objection to the COVID-19 vaccine was based on a sincerely held religious belief that the vaccines were developed from aborted fetal cell lines and that receiving any of the vaccines would compromise his ability to act in a way consistent with his Catholic faith. (This same argument has frequently been cited by home care aides seeking a religious exemption). The student sought immediate relief from the court to allow him to continue his studies at the school without having to comply with its vaccination policy.

On September 14, the court denied the student's request for immediate relief, and instead, upheld the school's decision to deny the student's request for exemption from its vaccination policy. As relevant to home care, in analyzing his religious discrimination claim, the court explained that the student failed to establish that his belief — from which the objection to the vaccines derives — was both sincerely held and religious. The court also found that the student failed to show a discriminatory reason for the school's decision to require him to obtain the vaccine.

According to the court, the student could not show a sincerely held religious belief given his acknowledgment that he had previously (within the past two years and prior to matriculating at the school) obtained vaccinations with origins that he knew were similar to those of the COVID-19 vaccines. The MMR vaccine, which many home care healthcare personnel are required to obtain as a condition of working in home care are such examples.

The court also observed that the student's religious discrimination claim appeared to be a more "global," rather than religious, objection to "unprecedented restrictions on basic human freedoms" created by the COVID-19 pandemic.

Finally, the court explained that, even assuming the student's objection to being vaccinated was based on a sincerely held religious belief, the school had a lawful, nondiscriminatory reason for its policy — to protect the health and safety of its students and staff during a global pandemic and to better ensure the continued operations of the school. The school showed that it had applied its policy in the same manner to all students regardless of the identity or faith of those who requested an exemption. The court also found lawful the school's policy, which required requests for religious exemption to include (1) a statement of published doctrine from the student's religious group indicating that the vaccines violated the student's religious beliefs; and (2) a statement from a spiritual leader of the local place of worship indicating that the student was a member of that faith.

The *Beck* decision, although not binding in New York, is reasonable, consistent with precedent and, thus, likely to be cited by New York courts. Employers that are increasingly facing pressure from MLTCs, landlords and other contractual partners to vaccinate their workforce (without any religious or medical exemptions being permitted) should take note of the *Beck* analysis in structuring their religious exemption process. Doing so could mitigate employers' exposure to employment claims from employees who are denied an exemption.

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