



August 23, 2021

Jeffrey A. Kraut
Chair, Public Health and Health Planning Council
Angel Gutierrez, M.D.
Chair, Committee on Codes, Regulations, and Legislation
c/o Executive Secretary, Public Health and Health Planning Council
Empire State Plaza, Corning Tower, Room 1805
Albany, New York 12237

Re: 21-14 Adding Section 2.61 Title 10 NYCRR (Prevention of COVID-19 Transmission by Covered Entities)

Via E-Mail

Dear Mr. Kraut, Dr. Gutierrez, and members of the Public Health and Health Planning Council,

I am writing on behalf of the members of LeadingAge New York -- non-profit and public providers of long-term and post-acute care services -- to offer comments on the proposed emergency regulation mandating COVID-19 vaccination of health care personnel working in most regulated settings. LeadingAge New York's members include a variety of providers affected by the vaccination mandate: nursing homes, adult day health care programs, adult care/assisted living facilities, certified home health agencies, licensed home care services agencies, hospice programs, and PACE programs. We also represent provider-sponsored managed long-term care plans that serve beneficiaries impacted by the mandate. Our members have been working tirelessly and heroically for 17 months to protect the vulnerable New Yorkers under their care from COVID and other health risks, while providing the highest possible quality of life, despite social distancing requirements, unprecedented staffing shortages, Medicaid rate cuts, onerous reporting requirements, and constantly changing and often inconsistent directives issued with little notice by multiple agencies at the state and federal levels.

Our members and the individuals they serve celebrated the emergency use authorizations of the COVID-19 vaccines. They hastened to implement vaccine clinics and developed creative strategies to encourage vaccination and inform staff, residents, and patients about the safety and efficacy of the vaccines. They had hoped that the vaccines would enable a resumption of the rich social lives that have characterized our long-term care facilities and adult day programs and the resumption community engagement for individuals receiving home care services. Unfortunately, we did not achieve the level of vaccine acceptance among staff that we had hoped -- today, 71 percent of nursing home staff and 77 percent of adult care facility staff in New York are at least partially-vaccinated. Vaccination rate data for home care staff are not publicly available.

If not for the staffing shortages facing our members, we would wholeheartedly endorse a vaccine mandate. Our members are acutely aware of their duty to protect from harm the patients and residents under their care, and vaccination is one way of fulfilling that responsibility. Their employees are already subject to measles and rubella vaccination requirements that allow for only medical exemptions, not religious ones.

However, long-term care providers are confronting the most challenging workforce shortages in memory. Open positions simply cannot be filled. There are no applicants, or the applicants who appear fail to complete the onboarding process. Existing staff are exhausted and don't want to pick up extra hours. Supervisors and executives are taking evening and weekend shifts. Staffing agency resources are depleted. Several of our

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nursing home members have closed units and suspended admissions because they simply don't have the staff to care for more residents. One home care agency reports that 25 percent of its staff did not return to work after the first wave of the pandemic, and they expect another 25-30 percent of their frontline staff to resign if the vaccine becomes a condition of employment. Another agency expects 15-20 percent to resign in response to the mandate. Managed long term care plans, including those that serve the New York City area, indicate that they are experiencing increasing difficulty staffing cases. With the announcement of the nursing home vaccine mandate a week ago, several of our nursing home members are already experiencing resignations and threatened resignations. Assisted living facilities anticipate similar losses. Across all settings, our members are concerned that the vaccination mandate will only exacerbate the workforce crisis.

The state must do more to support the recruitment and retention of staff by long-term care providers. It cannot continue to turn a blind eye to the needs of vulnerable older adults and the staffing needs of facilities, programs, and home care agencies. It must not only restore the reimbursement cuts imposed in the midst of this pandemic, but also invest sizeable sums in long-term care provider rates to support recruitment and retention. The state must recognize that every new reporting requirement and every new operating mandate diverts precious staff time from resident and patient care and depresses staff morale. It must weigh these impacts against the expected benefits of those mandates. In implementing the vaccination mandate, the state must exercise enforcement discretion when providers are facing severe staffing shortages. It should not force providers to choose between properly serving patients and residents and maintaining a 100 percent vaccination rate at all times.

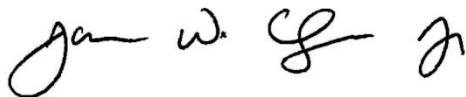
Moreover, the state must ensure that any vaccination mandate applies across all health care settings and that clear and consistent guidelines are issued regarding exemptions. Otherwise, health care personnel who are hesitant to accept the vaccine may migrate from a setting with a vaccine mandate to one that is not subject to a mandate or from a provider with a stringent approach to exemptions to one with a more liberal approach. Thus, we were pleased to see that this emergency regulation expanded the vaccine mandate to additional health care providers. Nevertheless, several provider types were omitted from the regulation and should also be covered – most notably physician and dental practices and Consumer Directed Personal Assistance Program (CDPAP) personnel. If these provider types are not subject to the same mandates as other providers, nurses may migrate from long-term care and hospital jobs to physician practice jobs, and home care aides may migrate from licensed home care agencies to the CDPAP. Further, the long-term care consumers who are served by nursing homes, ACFs and home agencies also have doctor and dentist appointments, where they may be exposed to the virus with devastating consequences.

Finally, this regulation raises several questions that must be addressed:

- For new hires, what is the required timing of vaccination? In nursing homes and ACFs, do the 14/7-day timeframes continue to apply?
- What is the proper scope of the medical and religious exemptions and how should they be assessed?
- What does it mean to reasonably accommodate a medical or religious exemption? May providers impose more stringent PPE and testing requirements and different work assignments on unvaccinated staff?
- Must administrative staff who work in non-patient-facing positions (e.g., finance) be vaccinated?
- Must non-contracted service providers (e.g., transportation vendors, managed care nurse assessors, EMS) who provide services to residents and patients be vaccinated?
- Are staff who refuse vaccination and are required to resign eligible for unemployment benefits?

Thank you very much for your consideration of these issues.

Sincerely yours,

A handwritten signature in black ink, appearing to read "James W. Clyne, Jr.", with a stylized, cursive script.

James W. Clyne, Jr.
President and CEO

Cc: Colleen Leonard
Lisa Thomson
Vanessa Murphy
Emily Lutterloh