

## Lum, Drasco & Positan LLC

Attorneys At Law Since 1870

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### FIRM NEWS

**WAYNE J. POSITAN** was reappointed to the Medal of Honor Committee of the New Jersey State Bar Foundation by NJSBF President Kathleen Fennelly, Esq.

**PAUL A. SANDARS, III** presented a program at the Construction SuperConference on December 7, 2021. The title of the Program was “The More the Merrier: Trials and Tribulations of Presenting and Defending Construction Claims”. His presentation focused on Condominium Association Transition Litigation.

**DENNIS J. DRASCO** participated in a program of the American College of Trial Lawyers at Rutgers Law School on September 29, 2021 entitled “Professionalism in Trial Practice” with 2 other New Jersey Fellows and New Jersey United States District Court Judge Zarid Quraishi, in an effort to educate law students on Civility and Professionalism in trial practice.

Chief Judge Freda L. Wolfson of the United States District Court for the District of New Jersey has entered an Order Extending the Term of Partner, **Dennis J. Drasco** through January 31, 2023 as a Member of the U.S. District Court Lawyer's Advisory Committee.

Six of our attorneys were named to the 2022 NJ Super Lawyers List:

- **Dennis J. Drasco** for Business Litigation (Top 100 Lawyers)
- **Wayne J. Positan** for Employment and Labor (Top 100 Lawyers)
- **Paul A. Sandars, III** for Construction Litigation
- **Kevin F. Murphy** for Estate Planning and Probate
- **Kevin J. O'Connor** for Business Litigation
- **Daniel M. Santarsiero** for Employment and Labor

## **EMPLOYER VACCINE MANDATES**

*By: Elizabeth Y. Moon, Esq.*

Since the U.S. Food and Drug Administration approved the first COVID-19 vaccine back in August 2021, three federal mandates pertaining to the vaccination of employees against COVID-19 have been issued by Executive Order, the Department of Labor's Occupational Safety and Health Administration ("OSHA"), and the Centers for Medicare and Medicaid Services ("CMS"). These mandates are commonly referred to as the (1) Federal Contractor Requirement; (2) OSHA Rule; and (3) CMS Rule, respectively. Under these rules, employees were required to be "fully vaccinated" by January 4, 2022 unless they fell within certain exemptions. An employee is considered "fully vaccinated" once he or she receives the second dose in a two-dose series (Moderna or Pfizer) or one dose of a single-dose vaccine (Janssen/Johnson & Johnson).



All three federal mandates either have been, or are currently being, litigated in the courts with some courts striking down the rules and others upholding them. On January 7, 2022, the United States Supreme Court heard oral arguments in consolidated cases challenging both the OSHA Rule and CMS Rule, which are described below. In a decision issued on January 13, 2022, the Court invalidated the OSHA Rule, concluding that OSHA exceeded its authority in issuing that mandate. In contrast, the Court upheld the CMS Rule, finding that the narrowly tailored regulation was similar to other conditions that CMS often imposes on health care providers who receive federal funding.

### **Federal**

#### **Federal Contractors:**

On September 9, 2021, President Biden signed Executive Order (EO) 14042 "Ensuring Adequate COVID Safety Protocols for Federal Contractors." The Order directs all executive departments and agencies ensure that applicable contracts and contract-like instruments include a clause which provides that contractors and subcontractors who are "working on or in connection with a Federal Government contract or contract-like instrument" "comply with all guidance for contractor or subcontractor workplace locations published by the Safer Federal Workforce Task Force (Task Force Guidance or Guidance), provided that the Director of the Office of Management and Budget (Director) approves the Task Force Guidance and determines that the Guidance, if adhered to by contractors or subcontractors, will promote economy and efficiency in Federal contracting."

On December 7, 2021, a federal court in Georgia issued an injunction blocking the enforcement of the Federal Contractor Requirement nationwide while other federal district courts issued more limited injunctions that same month. Appeals from those decisions are currently pending in the Courts of Appeals for the Fifth, Sixth, Eighth, and Eleventh Circuits.

#### **Federal Employees:**

President Biden also issued an Executive Order on Requiring Coronavirus Disease 2019 Vaccination for Federal Employees on September 9, 2021. The Order provides, in part, that "to promote the health and safety of the Federal workforce and the efficiency of the civil service, it

is necessary to require COVID-19 vaccination for all Federal employees, subject to such exceptions as required by law.”

The original deadline for compliance with the EO requirement was December 8, 2021, but the Biden Administration extended it to January 4, 2022 to be in line with the OSHA and CMS Rules. On January 21, 2022, a federal judge in Texas issued an injunction, which blocks the enforcement of the vaccine mandate for federal employees, explaining that the president does not have the legal authority to require employees to get vaccinated.

**OSHA Rule:**

The Department of Labor’s Occupational Safety and Health Administration (OSHA) issued a COVID-19 Vaccination and Testing Emergency Temporary Standard (ETS). Under this rule, all employers with 100 or more employees were obligated to:

1. ensure each of their workers are fully vaccinated by January 4 (effective 1/4);
2. require all unvaccinated employees to provide a negative COVID-19 test on at least a weekly basis and remove any employee from the workplace who (a) received a positive COVID-19 test or (b) is diagnosed with COVID-19 (effective 1/4);
3. provide their employees with paid-time to get vaccinated and, if needed, sick leave to recover from any side effects from the vaccine that prevent them from working (effective 12/5); and
4. ensure that all unvaccinated workers wear a face mask in the workplace (effective 12/5).

OSHA withdrew its mandate as an enforceable emergency temporary standard effective January 26, 2022, but indicated, on its website, that it would instead focus on “finalizing a permanent COVID-19 Healthcare Standard.” Therefore, it is possible that some form of the OSHA Rule may be proposed again in the future.

**CMS Rule:**

The Centers for Medicare & Medicaid Services (CMS) at the Department of Health and Human Services rule applies to health care workers at facilities that participate in Medicare and Medicaid. Facilities covered by this rule are those that receive federal funding from Medicare or Medicaid as well as individuals who provide treatment or other services under contract or other arrangements. Compliance is required by all employees, students, trainees and volunteers who work at a covered facility regardless of whether their positions are clinical or non-clinical. The CMS Rule requires that all health care workers in hospitals and nursing homes be fully vaccinated by January 4, 2022.

The CMS Rule is expected to preempt any inconsistent state and local laws, including those that ban or limit the authority of an employer to require vaccinations, masks or testing.

**New Jersey**

In New Jersey, employees are considered to be fully vaccinated against COVID-19 two or more weeks after they have receiving the second dose in a two-dose series or after receiving a single-dose vaccine.

New Jersey employers in both the public and private sector may require their employees to receive the COVID-19 vaccine in order to return to the workplace. However, there are exemptions for medical reasons and sincerely held religious beliefs, practices or observances. If an exemption applies, the employer should provide the employee with a reasonable accommodation from the vaccine policy, unless doing so would pose an undue hardship on the business.

Additionally, Governor Murphy has issued the following Executive Orders relating to vaccinations: (1) Executive Order 253 – Instituting Vaccination or Testing Requirement for All Preschool to Grade 12 Personnel and for All State Workers and (2) Executive Order 271 – Instituting Vaccination or Testing Requirement for State Contracted Employees.

On October 20, 2021, Governor Murphy signed EO 271, ordering that each executive department or agency of the State “ensure that contracts or agreements entered into by [them] include a clause that the contractor or any subcontractors, at any tier, that is party to the contract must maintain a policy that requires all covered workers to either provide adequate proof to the covered contractor that they have been fully vaccinated or submit to COVID-19 testing at minimum one to two times weekly.”

The mandate only applies to contractors or subcontractors who enter, work at, or provide services at a state agency location. The weekly testing requirement continues until the worker is fully vaccinated and the contractor must have a policy for tracking the test results and reporting them to local health departments.

To discuss any of this please contact one of the attorneys below:

Wayne J. Positan	(973) 228-6730	<a href="mailto:wpositan@lumlaw.com">wpositan@lumlaw.com</a>
Daniel M. Santarsiero	(973) 228-6780	<a href="mailto:dsantarsiero@lumlaw.com">dsantarsiero@lumlaw.com</a>
Elizabeth Y. Moon	(973) 228-6792	<a href="mailto:emoon@lumlaw.com">emoon@lumlaw.com</a>

## **THE NEW NORMAL – COURT PROCEEDINGS AND OPERATIONS IN NEW JERSEY IN THE ERA OF COVID-19**

*By: Kevin J. O’Connor, Esq.*

The Covid-19 Pandemic has presented serious challenges as to how access to the New Jersey court system is provided. As the second anniversary of the Pandemic has come, the courts have become more experienced and prepared to deal with those challenges and to provide public access to the judicial process. For the foreseeable future, litigants and attorneys must be prepared for a “new normal” in the manner in which court proceedings are conducted.



On November 18, 2021, Chief Justice Rabner of the New Jersey Supreme Court issued an Order setting forth a roadmap for conducting court proceedings. Based upon the experiences during the Pandemic in which the courts have conducted more than 260,000 virtual court events involving more than 2.7 million participants, as well as more than 3 million municipal court

events, and the input from judges, attorneys, and members of the public, the Order's stated purpose is to provide an outline of a "framework for the future of court operations."

Initially, the framework established by the Supreme Court's Order provides that the judges in this State shall have discretion to determine whether or not to conduct court proceedings in person or virtually. However, that discretion is subject to specific provisions and limitations set forth in the Order. First, criminal proceedings are to be conducted in person. Additionally, there are several types of proceedings that are generally required to proceed in person, but may be conducted virtually with the consent of all parties which generally encompass criminal, juvenile delinquency and municipal court proceedings and matters involving termination of parental rights, incapacity and other matters where constitutional interests are at stake. Further, there are other categories of matters that the Order states shall "generally proceed in person" such as appellate arguments, settlement conferences, certain criminal proceedings involving defendants not in custody, hearings on restraining orders, and Municipal Court hearings in which it is appropriate to require the defendant's appearance in person to resolve code enforcement, public nuisance, and other matters affecting public health and safety.

Additionally, the Order designates certain types of matters that should in general proceed in a virtual format, including routine motion arguments and case management conferences, landlord-tenant proceedings, Special Civil and Small Claims trials, mediations, and prerogative writ matters. Also, there are several specific uncontested General Equity and Family Part matters, Municipal Court cases not involving serious penalties, and Tax Court matters that are to generally proceed in a virtual format. The judges involved in these cases retain discretion to decide if the particular facts involved require in person rather than virtual proceedings. Finally, the Order states that further guidelines will be provided at a later time after the Supreme Court has received additional input from judges, attorneys and the public, which include jury selection and some civil trials.

Further, with respect to those court proceedings that are conducted in-person, the Supreme Court of New Jersey issued an updated Order modifying the mask mandate and social distancing requirements. Based on updated public health metrics, individuals are no longer required to wear masks or maintain social distancing, except that "all participants in in-person grand juries will continue to wear masks and will maintain social distancing of at least three feet." However, individuals entering a court facility have the option to wear a mask or face covering.

In sum, remote proceedings are effectively here to stay. Even after the Pandemic is under control, it is likely that the courts will continue to conduct virtual proceedings for certain matters that previously were held in person. The Supreme Court's orders, and any subsequent directives, should be consulted to determine whether the particular matter is permitted to be conducted virtually and the benefits or problems with agreeing to remote proceedings in each particular case.

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and Estates • Arbitration • Mediation

Lum Law Notes is a publication intended for the clients of Lum, Drasco & Positan LLC and other interested persons. It is designed to keep its readers generally informed about developments in the firm and its areas of practice and should not be construed as legal advice concerning any specific factual situation

**Tel: (973) 403-9000 | Fax: (973) 403-9021**  
**[www.lumlaw.com](http://www.lumlaw.com)**