

Additional Guidance Issued on NYC COVID-19 Vaccination Mandate for Workers and Patrons of Indoor Dining, Fitness and Entertainment Venues

Law and the Workplace Blog on August 17, 2021

As we previously reported, New York City [is now mandating COVID-19 vaccination](#) for workers and patrons of indoor dining, indoor fitness, and indoor entertainment venues and performances. Mayor Bill de Blasio has issued an [Executive Order](#) and [additional guidance](#) has been released on the mandate – termed the “Key to NYC” – which takes effect on August 17, 2021 (though enforcement will not begin until September 13, 2021).

In addition, the New York City Commission on Human Rights has issued [separate guidance](#) addressing the COVID-19 pandemic and the responsibilities of public accommodations – which includes dining, fitness, and entertainment establishments – under the New York City Human Rights Law (“NYCHRL”).

The following are some key highlights from the Executive Order and additional guidance documents.

Entities and Persons Covered by the Mandate

Under the mandate, both patrons and staff (including full- or part-time employees, interns, volunteers, and contractors) age 12 and older will be required to show proof they have received at least one dose of a COVID-19 vaccine authorized for emergency use by the U.S. Food and Drug Administration (FDA) or World Health Organization (WHO) in order to enter, patronize, attend an event at, or perform services in or for a covered indoor dining, indoor fitness, and indoor entertainment business or facility.

Covered entities do not need to check proof of vaccination for: individuals making deliveries or pickups; individuals who enter the establishment solely for the purpose of making necessary repairs; or gig workers picking up items such as food for takeout or delivery. However, such individuals must wear a face mask whenever they are unable to maintain six feet of social distance from other people in the business or facility. Similarly, individuals under the age of 12 may enter covered businesses and facilities so long as they wear a face mask, except when eating and drinking, whenever they are unable to maintain six feet of social distance from other people.

“Indoor dining” is defined as including:

- indoor portions of food service establishments offering food and drink, including all indoor dining areas of food service establishments that receive letter grades pursuant to the NYC health code;
- businesses operating indoor seating areas of food courts;
- catering food service establishments that provide food indoors on its premises; and
- any indoor portions of food service establishment that is regulated by the New York State Department of Agriculture and Markets offering food for on-premises indoor consumption.

Indoor dining does not include any food service establishment offering food and/or drinks exclusively for take-out, delivery or outdoor consumption, or providing charitable food services such as soup kitchens. If an establishment offers only take-out, delivery or outdoor dining, any indoor tables, chairs, or other furnishings normally used by patrons for indoor dining must be removed or blocked off (e.g., with signs or tape) so they are unavailable for use.

“Indoor fitness” is defined as including indoor portions of: standalone and hotel gyms and fitness centers; gyms and fitness centers in higher education institutions; yoga/Pilates/barre/dance studios; boxing/kickboxing gyms; fitness boot camps; indoor pools; CrossFit or other plyometric boxes; and other facilities used for conducting group fitness classes (defined as two (2) or more participants led by an instructor).

“Indoor entertainment” is defined as including indoor portions of the following locations, regardless of the activity at such locations: movie theaters; music or concert venues; adult entertainment, casinos, botanical gardens, commercial event and party venues, museums and galleries, aquariums, zoos, professional sports arenas and indoor stadiums, convention centers and exhibition halls, performing arts theaters, bowling alleys, arcades, indoor play areas, pool and billiard halls, and other recreational game centers.

Indoor dining, fitness, and entertainment facilities located in the following settings are exempted from the mandate:

- private residential buildings when those settings are available only to residents;
- office buildings when those settings are available only to office staff;
- pre-K through grade 12 schools and child care programs; and
- senior centers and community centers.

Exceptions to the Requirement to Show Proof of Vaccination

There are some exceptions to the requirement to show proof of vaccination at an otherwise covered business or facility as follows:

- individuals entering a covered location for a quick and limited purpose (*g.*, using the restroom, placing or picking up an order or service, changing clothes in a locker room, or performing necessary repairs);
- a nonresident performing artist not regularly employed by the covered entity while they are in a covered premises for purposes of performing;
- a nonresident professional athlete/sports team who enters a covered premises as part of their regular employment for purposes of competing; and
- a nonresident individual accompanying a performing artist or professional athlete/sports team into a covered premises as part of their regular employment so long as the performing artist or professional athlete/sports team are performing or competing in the covered premises.

For purposes of the exceptions, “nonresident” is defined as any individual who is not a resident of New York City. Individuals subject to a covered exception must wear a face mask at all times they are unable to maintain six feet of distance from other individuals inside the covered business or facility.

Requirements for Covered Entities

Businesses and facilities covered by the mandate will be required to check the vaccination status of all staff (as defined above) and patrons age 12 and older who are not subject to an exemption and may not permit entry to any such person who has not received at least one dose of the COVID-19 vaccine. Acceptable proof of vaccination includes:

- CDC Vaccination Card (or photo of same)
- New York State [Excelsior Pass](#)
- NYC COVID Safe App
- [NYC Vaccination Record](#)
- An official immunization record from a U.S. or non-U.S. jurisdiction where the vaccine was administered (in the case of a non-US record, it must include the person's first and last name, date of birth, vaccine product name (only [vaccines authorized by the WHO](#) are acceptable), date(s) administered, and site where the vaccine was administered or name of the person who administered it).

In addition, covered businesses and facilities must require proof of identification for individuals appearing to be 18 years of age or older (and may require proof of identification for individuals under age 18) which must be checked at the same time the entity checks proof of vaccination to confirm that the person requesting entrance is the same person reflected on the proof of vaccination. Proof of identification must include either: (i) the name of and a photo of the individual; or (ii) the name and date of birth of the individual.

Covered businesses and facilities may keep a record of people who have previously provided proof of vaccination and identification, rather than require the proof be displayed every time the person enters the establishment.

In addition, covered businesses and facilities must:

- Place the [Vaccination Required Poster for Businesses](#) (or a sign including the same information as on the poster) in a place that is clearly visible to persons before they enter the establishment. The poster should be no smaller than 8.5 inches by 11 inches and in at least 14-point font.
- Develop a written plan for implementing and enforcing the mandate, including how the establishment will check the vaccination status of patrons and staff before, or

immediately after, they enter the business/facility. Such written plan must be made available for inspection by the City upon request.

Employers are also encouraged to hang [posters about the COVID-19 vaccines](#) in break rooms and provide information to staff about [where to get vaccinated](#).

Reasonable Accommodation Relating to the Mandate

The guidance issued in connection with the Executive Order states that “[e]ach Key to NYC business should consider appropriate reasonable accommodations, mindful of the purposes behind this policy and public health,” but does not provide any additional details on the scope of reasonable accommodations or what may constitute “appropriate” accommodations to the mandate.

However, as noted above, the New York City Commission on Human Rights (the “Commission”) has issued [separate guidance](#) on the responsibilities of public accommodations under the NYCHRL and how they interact with the Key to NYC mandate. Specific to the mandate, the Commission guidance states:

- business owners cannot treat customers or employees differently because of their race, national origin, disability, gender, religion/creed, age, or any other characteristic protected by the NYCHRL when requesting or reviewing proof of vaccination;
 - for example, by scrutinizing proof of vaccination more closely when it is provided by people of a particular race, national origin, or religion, or refusing to accept certain types of valid proof of vaccination, such as official immunization records from outside the United States;
- covered businesses must provide reasonable accommodations to patrons who need them because of a disability; and
- covered businesses must also provide reasonable accommodations to employees who need them because of a disability, pregnancy, religious belief, or status as a victim of domestic violence, stalking, or sex offenses.

With regard to providing reasonable accommodation to patrons with disabilities, the Commission’s guidance states:

- if a customer is unable to show proof of vaccination due to a disability, the covered entity must engage with the customer in a cooperative dialogue, or a good faith discussion, to see if a reasonable accommodation is possible;

- reasonable accommodations can take many forms, including, for example, permitting a customer to take out their food rather than eat it indoors, or directing a customer to a virtual exercise class; and
- public accommodations do not have to provide a reasonable accommodation if it would cause a direct threat to other customers or employees of the business, or impose an undue hardship on the business.

Notably, the Commission guidance states that “[b]usinesses should not ask customers for evidence that they are unable to show proof of vaccination due to a disability,” but rather should engage in the cooperative dialogue process directly with the customer.

With regard to providing reasonable accommodations to employees, the Commission guidance notes that an employer also must engage in a cooperative dialogue with an employee requesting accommodation regarding the vaccine mandate based on a covered reason under the NYCHRL (*i.e.*, disability, pregnancy, religious belief, or status as a victim of domestic or related violence). The Commission guidance further states:

- reasonable accommodations can take many forms, including, for example, permitting an employee to work remotely or perform their job duties outside or isolated from other employees or customers;
- employers do not have to provide a reasonable accommodation if it would cause a direct threat to other customers or employees of the business, or impose an undue hardship on the business; and
- if there is no reasonable accommodation that would enable the employee to continue performing their job duties without posing a direct threat or an undue hardship, an employer can offer the employee a leave of absence until they are able to provide proof of vaccination, or until it is otherwise safe for them to return to work.

With regard to documentation that may be requested from employees to support a reasonable accommodation request, the Commission guidance states that if the employee is seeking a reasonable accommodation because of a disability or pregnancy, the employer can request a note from their medical provider supporting their inability to show proof of vaccination. If the employee is seeking a reasonable accommodation because of their religious beliefs, the employer can request supporting documentation only if they have an objective basis to question the sincerity of the stated religious basis for the employee's inability to show proof of vaccination. If the employee is seeking a reasonable accommodation because of their status as a victim of domestic violence, sex offenses, or stalking, the employer can request a note from a related service provider supporting their inability to show proof of vaccination.

Notably, the Commission guidance states that covered entities do not have to provide a reasonable accommodation to any employee who falls outside of the categories covered by the NYCHRL, and further states that, if a covered entity wants to allow an unvaccinated employee who is not entitled to a reasonable accommodation to continue working for their business, they can only allow them into the interior portion of the premises only if it is for a quick and limited purpose, such as changing clothes in a locker room, and if they wear a face mask at all times they are unable to maintain six feet of distance from other people.

Penalties for Non-Compliance

Covered businesses and facilities that do not comply with the mandate will be subject to a fine of not less than \$1,000 for an initial violation, not less than \$2,000 for a subsequent violation within 12 months of an initial violation, and not less than \$5,000 for each violation thereafter committed within 12 months of a second violation. Each instance that a covered entity fails to check an individual's vaccination status shall constitute a separate violation.

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Covered businesses and facilities should take immediate steps to ensure compliance with the mandate, including implementing the required plan and hanging the advisory poster. We will continue to monitor this requirement and provide updates as they become available.

Proskauer's cross-disciplinary, cross-jurisdictional Coronavirus Response Team is focused on supporting and addressing client concerns. Visit our [Coronavirus Resource Center](#) for guidance on risk management measures, practical steps businesses can take and resources to help manage ongoing operations.

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