



August 2021

## New York Restaurants, Bars Urged to Mandate Proof of Vaccination for Guests, Employees and Vendors

By Timothy A. Gumaer

**[Update – August 3, 2021]** Mayor Bill de Blasio announced on August 3, 2021, that New York City will require proof of vaccination for both guests and employees of most indoor establishments, including bars, restaurants, nightclubs, entertainment centers, gyms and retail stores, as a condition of admittance. This mandate, known as “Key to NYC Pass,” will go into effect on August 16, with full enforcement beginning on Sept. 13.

Customers and employees can either provide their vaccinations cards or upload proof of vaccination to the New York State [Excelsior Pass](#) application. Notably missing from this mandate is an alternative option for employees and customers to provide negative COVID-19 tests in lieu of proof of full vaccination. Beginning Sept. 13, the City will begin inspecting businesses for compliance. As more information comes out regarding this mandate, please regularly check this Alert for new updates.

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**[August 2, 2021]** Due to the highly contagious nature of the COVID-19 Delta Variant, businesses in New York City should seriously consider adopting policies that require guests and vendors to show proof of vaccination prior to entering the establishment and for employees to show proof of full vaccination prior to re-entering the work place.

On August 2, 2021, Gov. Andrew Cuomo and Mayor Bill de Blasio urged private businesses such as restaurants, bars and nightclubs to require

guests to show proof of vaccination against COVID-19 as a condition of entry.

Gov. Cuomo also reiterated a need for private employers to ensure that their employees are fully vaccinated prior to physically returning to the workplace. With New York experiencing an increase in COVID-19 cases as result of the highly contagious Delta Variant, many New York City employers should seriously consider heeding the government’s advice.

### Requiring Customers/Guests to Show Proof of Vaccination

On [May 19, 2021](#), New York State adopted the Centers for Disease Control and Prevention’s (CDC) May 13, 2021 “Interim Public Health Recommendations for Fully Vaccinated People” for most businesses in public settings. While New York’s May 19 guidance allowed establishments that operate below the State’s social gathering limit of 250 people indoors and 500 people outdoors to operate at full capacity (with certain conditions), it also gave businesses the option to require customers to show proof of full vaccination status through paper form, digital application or the State’s [Excelsior Pass](#) prior to entrance.

New York’s May 19, 2021 guidance is still in effect. With COVID-19 cases rising, employers should consider requiring that guests/customers (and employees, discussed in more depth below) to their premises show proof of vaccination status as a condition of entrance.

If an employer requires its guests to show proof of vaccination, and by extension denies entry to those who cannot show proof of vaccination, it must ensure that it applies this rule to **all** customers, regardless of race, national origin, gender, disability, religion, age or any other protected category.

With that said, while it is legal for businesses to generally deny entry to unvaccinated customers (so long as it is done in a nondiscriminatory manner), businesses must be prepared to offer reasonable accommodations to individuals who might be unable to receive a vaccine because of a disability, a medical condition or their religious beliefs. A reasonable accommodation, however, does not mean allowing the individual to walk into the business or access a business's services in person. Such accommodation could instead take the form of requiring proof of a negative COVID-19 test that was taken within the past 72 hours, offering takeout (to be provided to the individual outside of the establishment) or delivery.

In sum, a business is legally allowed to require its customers to show proof of vaccination prior to entering the establishment so long as it is done in a nondiscriminatory manner.

### **How Guests Can Show Proof of Vaccination**

As outlined above, an employer can require guests to show proof of vaccination at the door through paper form, digital application or the State's Excelsior Pass. Businesses should be prepared to have staff at the entrance who are appropriately trained with respect to what is and is not acceptable proof of vaccination. That employee (or employees) should also be trained to handle security risks in the event a customer who is not vaccinated is denied entry, such as having a manager available to speak with the individual and explain the basis for their denial, or, in the alternative, be ready to call the police.

Employers who offer online reservations can also explore options that would allow customers to show proof of vaccination through and online

reservation portal or third-party provider (e.g., Open Table; Resy). Employers should consult with their technology partners to determine how to implement an effective system that would enable customers to show proof of vaccination.

### **Requiring Employees to Be Vaccinated**

Federal, state and local guidance is more developed with respect to whether an employer may require its employees to obtain the COVID-19 vaccination. As explained in our February 8, 2021 [alert](#), the Equal Employment Opportunity Commission (EEOC) continues to provide guidance that allows employers to institute a policy that requires employees to be vaccinated against COVID-19. Most state and local jurisdictions, including New York State and New York City, continue to follow EEOC guidance on this issue.

The EEOC's most recent guidance on the matter, published on [June 28, 2021](#), states that federal anti-discrimination laws "do not prevent an employer from requiring all employees physically entering the workplace to be vaccinated for COVID-19, so long as the employers comply with the reasonable accommodation provisions" of the Americans with Disabilities Act (ADA), Title VII of the Civil Rights Act of 1964 (Title VII) and other EEO considerations.

In other words, an employer can require its employees who are physically present in the workplace to obtain the vaccine, but must provide reasonable accommodation for those employees who cannot be vaccinated due to medical, health or religious issues. In such cases, the employer must discuss the matter with the employee, i.e., engage in the so-called "interactive process," to arrive at a reasonable accommodation if doing so does not cause the employer undue hardship.

Yet, employers should note that an employee requesting an accommodation is not necessarily entitled to the accommodation they specifically request. Rather, the employer need only make an effective accommodation under the particular circumstances and only if an accommodation does

not create an undue hardship. Whether a reasonable accommodation is available to an employee is extremely fact specific. Thus, an employer that is engaged in the interactive process with an employee who is unable to be vaccinated is highly encouraged to discuss with an experienced employment attorney whether a reasonable accommodation is available.

Employers are allowed to provide incentives to employees to obtain the vaccination without running afoul of anti-discrimination laws, so long as the incentive is nominal and not “so substantial as to be coercive.” Employers should keep in mind, however, that certain financial incentives, such as cash bonuses or gift cards, may be taxable. Although an employer’s request for proof of vaccination is not a disability-related inquiry under the law, an employer must nonetheless keep such information confidential, as required by the ADA.

As explained in our March 11, 2021 [alert](#), employees in New York are entitled to up to four (4) hours of paid leave to receive the vaccination. If the vaccination requires two doses, the employee is entitled to four (4) hours of paid leave for each injection. This leave is separate and apart from any sick/safe leave (or Paid Time Off) that the employee has already accrued. An employer who requires employees to be vaccinated should be prepared to offer paid leave.

In sum, New York employers can require employees who are physically present in the workplace to obtain the COVID-19 vaccination. However, in the event that an employee cannot obtain the vaccine due to a medical condition, disability or sincerely held religious belief, the employer should be prepared to engage in the interactive process to determine whether a reasonable accommodation is feasible.

### **How Employees Show Proof of Vaccination Status**

Vaccination records are “health records” under applicable law, and thus employers must be very

cautious in determining what information to obtain regarding proof that an employee has been vaccinated.

If an employer wants to have employees submit proof of vaccination, it can require employees to submit a copy or picture of their vaccination card or other documentation that is available from the provider upon request. If the employer wants to obtain such information directly from the vaccine provider, the employer first needs to have the employee submit a HIPAA authorization permitting such communication. As explained above, an employer must ensure that any documentation provided by an employee or a provider is kept strictly confidential.

### **Requiring Vendors to Show Proof of Vaccination**

A business can also require that its vendors’ employees show proof of vaccination prior to physically entering the establishment. Similar to customers, the business must apply this requirement to **all** vendors who enter the workplace, regardless of race, national origin, gender, disability, religion, age or any other protected category, or risk running afoul of federal, state and local anti-discrimination laws. As with employees and guests, businesses should be prepared to determine whether it is necessary to provide accommodations to those vendors who cannot be vaccinated for medical, health or religious reasons. Should the issue arise, it would be prudent for the business to consult with legal counsel as the legal responsibilities with respect to vendors is not as clear as it is with employees and guests.

In sum, if a business decides to institute such policies, it must do so in a non-discriminatory manner and be prepared to offer alternatives to customers, employees and vendors who cannot be vaccinated due to medical, health or religious reasons. Whether a reasonable accommodation is available is largely decided on a case-by-case basis. Employers who adopts a “fully vaccinated” policy for all individuals, whether that be guests, employees, or vendors, should thus consult with a

labor and employment attorney prior to offering such alternatives.

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