



August 2021

NYC Issues Details of Vaccine Mandate for Indoor Dining, Gyms and Entertainment Venues

By Carolyn D. Richmond, Glenn S. Grindlinger and Alexander W. Bogdan

New York City Mayor Bill de Blasio issued an [Executive Order](#) on August 16, 2021 setting forth the requirements of the “Key to NYC” vaccine mandate that was announced earlier this month for indoor dining, gyms and entertainment venues. The New York City Department of Health also issued a [summary](#) of the law and set of [Frequently Asked Questions](#) concerning the “Key to NYC” requirement.

Businesses impacted by these requirements, including restaurants, bars and nightclubs, should immediately review existing policies on vaccination of employees and guests to ensure they comply with these new mandates.

What Businesses Are Covered?

Under the Executive Order, as of Tuesday, August 17, 2021, no “covered entity” may permit a patron, full- or part-time employee, intern, volunteer or contractor who is 12 years old or older to enter its premises without displaying proof of receiving at least one dose of a COVID-19 vaccine. “Covered entities” under the Executive Order are Indoor Food Services, Indoor Gyms and Fitness Settings, and Indoor Entertainment and Recreational Settings. These categories of businesses are defined as follows:

- **Indoor Food Services**, including indoor portions of food service establishments offering food and drink, including all indoor dining areas of food service establishments that receive letter grades as described in section 81.51 of the 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. The requirements of this Order shall not apply to any food service establishment offering food and/or drink exclusively for off-premises or outdoor consumption, or to a food service establishment providing charitable food services such as soup kitchens;

- **Indoor Entertainment and Recreational Settings**, 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 Gyms and Fitness Settings**, 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.

A limited number of settings are exempt from the Key to NYC vaccination requirements:

- 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
- Senior centers
- Community Centers
- Childcare programs

What Individuals are Covered?

The Key to NYC vaccine requirement applies to all individuals 12 years old or older, with limited exception. The following limited groups of people do not need to provide proof of vaccination so long as they wear a face mask at all times when the person cannot maintain six feet of distance from others:

- Individuals entering for a quick and limited purpose (for example, 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.

Children under the age of 12 who cannot currently receive any COVID-19 vaccine may also be allowed to enter a covered entity without proof of vaccination, but must also wear a face mask while indoors, except when eating and drinking, when they cannot maintain six feet of distance from others. Please note that neither the Executive Order nor the Frequently Asked Questions provide any guidance on what, if anything, a business must do to verify the age of children entering their premises.

Businesses will not be required to check the vaccination status of suppliers, vendors or delivery workers. Individuals who are making deliveries or pickups of supplies or food for takeout or delivery, or individuals entering an establishment solely for the purpose of making necessary repairs do not need to provide proof of vaccination but must wear a face mask.

Proof of Vaccination

In order to prove vaccination status, individuals must show that they have received at least one dose of a COVID-19 vaccine authorized by the U.S. Food and Drug Administration (FDA) or by the World Health Organization (WHO). Thus, businesses may accept proof that individuals received a vaccine approved by the WHO for use in another country that has not yet been approved by the FDA, such as the Astra Zeneca vaccine.

Acceptable forms of proof include:

- A CDC COVID-19 Vaccination Record Card;
- An official immunization record from the jurisdiction, state or country where the vaccine was administered; or

- A digital or physical photo of such card or record, reflecting the person’s name, vaccine brand, and date administered (or picture thereof); or
- The New York City COVID Safe Pass app; or
- The New York State Excelsior Pass app.

No proof or identification beyond a vaccination card is required. Businesses are not required to verify that the proof of vaccination provided by the employee or patron is real. If a person presents what a business believes is a fake vaccination card, businesses may report it by calling 311, the New York State Attorney General, or a New York State hotline (833-VAX-SCAM), or by emailing the New York State Department of Health (stopvaxfraud@health.ny.gov).

Outdoor Dining

If a covered entity has both indoor and outdoor portions, only the indoor portions are covered by the Key to NYC requirements. “Indoor portion” means any part of a covered premises with a roof or overhang that is enclosed by at least three walls, except that the following will not be considered an indoor portion: (1) a structure on the sidewalk or roadway if it is entirely open on the side facing the sidewalk; and (2) an outdoor dining structure for individual parties, such as a plastic dome, if it has adequate ventilation to allow for air circulation. If a restaurant offers only take-out, delivery or outdoor dining, any indoor tables, chairs, or other furnishing used by patrons must be removed or blocked off. Businesses may also make an exception for patrons to enter the business without showing proof of vaccination to use the bathroom or for another reason that will take a small amount of time – less than 10 minutes.

Penalties for Non-Compliance

While the Key to NYC requirements go into effect August 17, penalties for violations of the law will

not begin until September 13, 2021. After that date, any entity that is determined to have violated the vaccine mandate shall be subject to a fine of not less than \$1,000 for a first offense, \$2,000 for a second event within 12 months, and \$5,000 for each subsequent offense within 12 months. Each instance that a covered entity fails to check an individual’s vaccination status shall be considered a separate violation of the order.

Recordkeeping and Posting Requirements

Businesses will be required to post a sign in a conspicuous place that is viewable by prospective patrons entering the establishment. The city has published a poster that can be used for this purpose. Businesses also must develop a written implementation plan that will be available for inspection. The written plan must address how businesses will check the vaccination status of staff and customers before they enter, or immediately after they enter, a business. No record-keeping requirements beyond this are currently set forth in the Executive Order or Frequently Asked Questions.

Reasonable Accommodation Requests

Neither the Executive Order nor the guidance issued thus far by the Department of Health provide guidance on how businesses may address requests for reasonable accommodations from employees or guests because of medical reasons or a sincerely held religious belief. The FAQ states:

Do I need to provide any reasonable accommodations to patrons and employees?

Each Key to NYC business should consider appropriate reasonable accommodations, mindful of the purposes behind this policy and public health. For additional information, call the Small Business Services hotline at 888-SBS-4-NYC.

The Executive Order does not contain any exceptions to the penalties that may be issued for businesses who do not require proof of vaccination from an employee or guest because that employee or guest has requested a reasonable accommodation because of a medical condition or sincerely held religious belief. Further, the plain language of the Executive Order states that individuals who are not vaccinated cannot enter the covered entities establishment (subject to limited exceptions) and business will be fined \$1,000 for the first violation, \$2,000 for a second violation, and \$5,000 for subsequent violations.

In light of all of this, covered entities may be able to argue that all of their employees must be vaccinated and that it would be an undue burden to allow into the workplace those who cannot be vaccinated due to religious or health issues. In addition, this Executive Order may require covered entities to limit service to unvaccinated customers by requiring such individuals to eat outside, get take-away, or have their meals delivered. Nevertheless, before invoking any policy or protocol regarding what, if any, reasonable accommodation will be provided to the unvaccinated, covered entities should first consult with counsel to address the matter.

For more information about this alert, please contact Carolyn D. Richmond at 212.878.7983 or crichmond@foxrothschild.com, Glenn S. Grindlinger at 212.905.2305 or ggrindlinger@foxrothschild.com, Alexander W. Bogdan at 212.878.7941 or abogdan@foxrothschild.com, or any member of Fox Rothschild's New York Labor and Employment Group.

Attorney Advertisement

© 2021 Fox Rothschild LLP. All rights reserved. All content of this publication is the property and copyright of Fox Rothschild LLP and may not be reproduced in any format without prior express permission. Contact marketing@foxrothschild.com for more information or to seek permission to reproduce content. This publication is intended for general information purposes only. It does not constitute legal advice. The reader should consult with knowledgeable legal counsel to determine how applicable laws apply to specific facts and situations. This publication is based on the most current information at the time it was written. Since it is possible that the laws or other circumstances may have changed since publication, please call us to discuss any action you may be considering as a result of reading this publication.
www.foxrothschild.com