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## NYC Issues Guidance on Accommodations for ‘Key to NYC’ Vaccine Mandate

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

The New York City Commission on Human Rights has issued [guidance for businesses](#) on the accommodations they must provide employees and customers in response to New York City’s “Key to NYC” mandatory vaccination requirements for indoor dining, fitness and entertainment venues. The guidance also outlines how businesses can implement the mandate in a nondiscriminatory manner.

The Commission also issued [guidance for customers and employees](#) that outlines “your right to equitable treatment by businesses covered by Key to NYC.”

As discussed in our [previous alert](#), the Key to NYC program mandates that indoor dining, fitness, and entertainment businesses must require employees and customers 12 years of age or older to provide proof that they have received at least one dose of a COVID-19 vaccine before they may enter the establishment, with limited exceptions.

### Reasonable Accommodations for Employees

Under the New York City Human Rights Law (NYCHRL), businesses must generally provide reasonable accommodations to employees who require them because of a disability, pregnancy, religious belief, or their status as a victim of domestic violence, stalking or sex offenses, unless providing a reasonable accommodation would cause a direct threat to other customers or employees, or impose an undue hardship. This requirement extends to employees who

may require a reasonable accommodation from the Key to NYC vaccination requirements.

If an employee requests a reasonable accommodation from the Key to NYC mandatory vaccination requirements, a business must engage in a “cooperative dialogue” with that employee – in other words, a good faith discussion with the employee to determine if a reasonable accommodation is possible.

In the guidance documents, the Commission provides the following examples of reasonable accommodations that employers could consider granting for employees who are unable to provide proof of vaccination because of a disability, pregnancy, religious belief or their status as a victim of domestic violence, stalking, or sex offenses:

- Working remotely
- Performing job duties outside or isolated from other employees or customers
- Taking a leave of absence

Notably, the accommodation examples provided by the Commission do *not* include allowing an unvaccinated employee to work inside near customers or other employees, even if the employee is wearing a mask and/or subject to regular viral testing for COVID-19.

The Commission describes the steps a business should take when an employee says they cannot provide proof of vaccination.

### Step One

The business should speak with the employee to find out the reason they cannot provide proof of vaccination.

### Step Two

If the reason is related to a disability, pregnancy, religious belief or their status as a victim of domestic violence, stalking, or sex offenses, the business must engage in a cooperative dialogue with the employee to determine if a reasonable accommodation is possible.

### Step Three

After engaging in the cooperative dialogue, the business must provide the employee with a written determination granting or denying an accommodation. The business should also maintain a log of reasonable accommodation requests it receives from employees that includes the final determinations.

As part of the cooperative dialogue, a business may request certain documentation depending on the reason for the accommodation request:

**Disability or pregnancy:** Employers may request a note from a medical provider supporting the employee's inability to show proof of vaccination.

**Religious beliefs:** Employers may request supporting documentation only if the employer has an objective basis to question the sincerity of the stated religious basis for the employee's inability to show proof of vaccination.

**Status as a victim of domestic violence, sex offenses, or stalking:** Employers can request a note from a related service provider supporting the employee's inability to show proof of vaccination.

A business may determine, after engaging in the cooperative dialogue, that there is no reasonable accommodation that would allow

for the unvaccinated employee to continue performing their duties without causing a direct threat to others or without imposing an undue hardship on the business. In these situations, the Commission suggests providing the unvaccinated employee with a leave of absence until that employee can provide proof of vaccination or it is otherwise safe for the employee to return to work. This leave of absence can be unpaid, unless the business pays other workers who are unable to work for similar reasons.

Notably, the Commission does *not* discuss termination as an option for employees who cannot provide proof of vaccination because of a disability, pregnancy, religious belief or their status as a victim of domestic violence, stalking, or sex offenses. The Commission also does not discuss how long businesses are expected to keep unvaccinated employees on a leave of absence. As the Key to NYC requirements do not have an expiration date, the Commission appears to be suggesting that an indefinite leave of absence is a reasonable accommodation.

Employees who are unable to provide proof of vaccination for a reason other than a disability, pregnancy, religious belief, or status as a victim of domestic violence, stalking or sex offenses, do not need to be provided a reasonable accommodation from the Key to NYC requirements.

### Reasonable Accommodations for Customers

The Commission also discusses the obligation businesses have to provide a reasonable accommodation to customers who cannot provide proof of vaccination because of a disability. As with employees, if a customer is unable to provide proof of vaccination because of a disability, the business must engage in a cooperative dialogue to determine if a reasonable accommodation is possible without causing a direct threat to other customers or employees, or imposing an undue burden on

the business. However, unlike with employees, businesses should *not* request that the customer provide proof of any disability. Rather, the business should immediately engage in the cooperative dialogue once the customer informs it of the disability.

The Commission provides examples of reasonable accommodations that could be offered to customers who are unable to provide proof of vaccination because of a disability, such as dining outside, purchasing food to take with them or for delivery, joining a virtual exercise class, or speaking with a sales representative by phone. Similar to the employee examples, the Commission does *not* state that it would be a reasonable accommodation to allow unvaccinated guests 12 years of age or older to dine indoors, even if wearing a mask or providing a negative COVID-19 test. Indeed, the Commission states that businesses do not have to allow unvaccinated guests inside the premises for any reason beyond a quick and limited purpose, such as using the restroom or picking up a “to go” order.

### Non-Discriminatory Implementation

Businesses cannot discriminate against customers or employees based on their religion, disability, race, national origin, gender, age or any other characteristic protected by the NYCHRL when they implement the Key to NYC requirements. The Commission provides examples of discriminatory practices that would violate the NYCHRL:

- Scrutinizing proof of vaccination more closely when it is provided by people of a particular race, national origin or religion based on the perception that people in those groups are less likely to be vaccinated
- Requiring proof of vaccination only for older people or people with disabilities based on the belief that COVID-19 is more dangerous for them

- Refusing to accept certain types of valid proof of vaccination, such as official immunization records from countries outside the United States or photographs of CDC vaccination cards

Businesses should consult with counsel if they have any questions regarding how they should implement the Key to NYC requirements and respond to requests from their employees or customers for accommodations. The requirements and guidance concerning the Key to NYC mandatory vaccination program is an evolving issue and businesses should ensure they are keeping aware of these updates and consulting with counsel on developments.

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