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NYC Says Masking, Testing Not a Valid Accommodation for Vaccines

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Yet again, New York City has updated its guidance on the Key to NYC vaccine mandate, this time addressing the issue of acceptable reasonable accommodations. In its latest guidance, the New York City Commission on Human Rights advises that employers cannot allow unvaccinated employees to wear masks and/or be regularly tested for COVID-19 as a reasonable accommodation.

As discussed in detail in our [prior alert](#), restaurants, bars, gyms and event venues subject to the mandatory vaccination requirements of the Key to NYC program have raised many questions concerning reasonable accommodations they can provide to their employees who claim they cannot provide proof of COVID-19 vaccination due to a sincerely held religious belief, disability or pregnancy.

On September 8, 2021, the Commission published [Guidance for Businesses on Equitable Implementation of Key to NYC](#), specifically stating that “masking and/or testing are not a sufficient alternative to vaccination and cannot be provided as a reasonable accommodation if the employee will still be in regular contact with other employees or customers.”

The Commission’s updated guidance is consistent with our discussion in our prior alerts on [August 16](#) and [August 18](#) that discussed the employer’s obligations to provide reasonable accommodations to employees who cannot

provide proof of vaccination due to a disability, pregnancy, or a sincerely held religious belief.

As explained in those alerts and in our prior webinars, the Key to NYC Executive Orders did not provide any exceptions that would allow an employer to have unvaccinated employees work indoors in close proximity to guests and employees, even if the employer required those employees to be masked and/or regularly tested for COVID-19 as an accommodation.

Rather, the Commission in its prior guidance only provided examples of acceptable reasonable accommodations that would keep an unvaccinated employee away from guests and coworkers:

- working remotely
- performing job duties outside or isolated from other employees or customers
- taking a leave of absence

The Commission’s update to its guidance reiterates this point: unvaccinated employees cannot work indoors near others under the Key to NYC requirements under any circumstances. Employers who allow unvaccinated employees to work inside – even if those employees cannot get vaccinated due to a disability, pregnancy or sincerely held religious belief – may be subject to fines and penalties. As a reminder, any entity determined to violate the Key to NYC

requirements is subject to a penalty of up to \$1,000 for a first violation, up to \$2,000 for a second violation within 12 months of the first, and up to \$5,000 for every violation thereafter that occurs within twelve months of a second violation. Each instance that a business fails to check an individual's vaccination status constitutes a separate violation.

While the Commission's guidance does not itself have the force of law, it nonetheless sets forth the Commission's interpretation of how the New York City Human Rights Law's provisions concerning reasonable accommodations should be interpreted given the requirements of the Key to NYC program. It is possible that a court or other tribunal could disregard the Commission's guidance and find that masking and/or testing of unvaccinated employees would be a reasonable accommodation. However, the Commission's guidance provides employers subject to the Key to NYC requirements with strong support that they should not allow unvaccinated employees to work indoors near others, even if the employee requests a reasonable accommodation from a mandatory vaccination policy.

Because the Key to NYC rules and guidance have changed frequently since the program was first announced, businesses should ensure they remain aware of these updates and consult with legal counsel on developments. It is also prudent for employers subject to the Key to NYC vaccine mandate to consult with counsel to evaluate any employee requests for reasonable accommodations to determine how to address these complicated and uncertain legal issues.

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