



September 2021

Reasonable Accommodations and the Key to NYC Vaccine Mandate

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As hospitality establishments in New York City are well-aware, starting on September 13, 2021, the city will impose fines on restaurants, bars and event venues that do not comply with the Key to NYC vaccination mandate. As it is now less than two weeks from that date, it is important to remind employers about their obligations to provide reasonable accommodations to employees who cannot be vaccinated due to a sincerely held religious belief, disability or pregnancy.

In our August 10, 2021 and August 24, 2021 webinars, we discussed the Key to NYC vaccine mandate in detail. Among other requirements, the Key to NYC vaccine mandate requires employees of restaurants, bars and event venues with inside dining to have received at least one dose of a COVID-19 vaccine on or before September 13. We also discussed the obligation of employers to provide reasonable accommodations to employees who cannot be vaccinated due to a sincerely held religious belief, disability, or pregnancy.

During those webinars and afterwards, we have continued to receive questions about what would be a reasonable accommodation for such unvaccinated employees.

Reasonable Accommodations

Under federal, state and local law, employers must provide reasonable accommodations to employees who require them because of a

disability, pregnancy, or a sincerely held religious belief 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. The substance of the cooperative dialogue and the steps taken to provide a reasonable accommodation should be documented by the employer.

In its guidance documents on the Key to NYC program, the New York City Commission on Human Rights (the Commission) provides the following examples of reasonable accommodations that employers could consider granting employees who are unable to provide proof of vaccination because of a disability, pregnancy, or a religious belief:

- working remotely
- performing job duties outside or isolated from other employees or customers

- taking a leave of absence

All of these examples of possible accommodations require the unvaccinated employee to either work away from the establishment and/or in a manner in which the unvaccinated employee does not interact inside with other employees and guests.

None of the examples of acceptable accommodations provided by the Commission are of behaviors that would otherwise violate the Key to NYC requirements. Indeed, the accommodation examples provided **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. Nor do the Key to NYC Executive Orders include any exceptions from the penalties for violations for businesses who allow unvaccinated employees to enter a covered establishment without providing proof of vaccination if the business is doing so as a way to provide a reasonable accommodation to an employee.

Thus, from this guidance and the text of the Key to NYC Executive Orders, it seems that an employer could be subject to fines for violations of the Key to NYC vaccine mandate if the employer permitted an unvaccinated employee to work inside a restaurant, bar or event space, even if the employee wears a mask and regularly tests negative for COVID-19. 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 12 months of a second violation. Each instance that a business fails to check an individual's vaccination status constitutes a separate violation.

Undue Hardship Factors

When considering whether an accommodation would pose an undue hardship, the cost of the accommodation is one of the factors to be considered. The New York City Human Rights Law sets forth the following non-exhaustive list of factors to consider when determining whether an accommodation would pose an undue hardship:

- the nature and cost of the accommodation
- the overall financial resources of the facility or the facilities involved in the provision of the reasonable accommodation
 - the number of persons employed at such facility
 - the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility
- the overall financial resources of the covered entity
 - the overall size of the business of a covered entity with respect to the number of its employees
 - the number, type, and location of its facilities
- the type of operation or operations of the covered entity, including the composition, structure and functions of the workforce of such entity
 - the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity

Despite the potential for significant, quickly escalating fines for allowing an unvaccinated

employee to work inside a restaurant, fitness center or place of entertainment, there is a possibility that a court (or other tribunal) would find that allowing an employee to wear a mask and test regularly is a reasonable accommodation that does not pose an undue hardship to the employer or a direct threat to employees or customers. Unfortunately, it is far too early to know how a court may rule given these issues. Other than the Executive Orders and the Commission's guidance discussed above, there are no cases or other authority to direct employers on this issue. This creates a serious quandary for New York City employers.

Risks and Unknowns

As we discussed during our webinars, there is legal risk regardless of the actions taken by the employer. There is risk of an employee filing suit if the employer does not allow an unvaccinated employee to continue to work provided the employee wears a mask and tests regularly (and the employee is unvaccinated because of disability, pregnancy, or a sincerely held religious belief).

On the other hand, there is also legal risk that the employer could suffer quickly escalating fines for repeated violations of the Key to NYC mandate if they permit an unvaccinated employee to continue to work inside a restaurant, bar or event space where they will interact with other employees and guests.

Because of these unknowns, it is prudent for employers subject to the Key to NYC vaccine mandate to consult with legal counsel to evaluate the risk to the particular employer, weigh that risk and the employee's accommodation request, and otherwise determine how to address these complicated and uncertain legal issues.

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