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## An Overview of the Key to NYC Vaccine Mandate Program

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New York City's Key to NYC mandate for indoor dining, gyms and entertainment venues is now in effect. Below are the requirements of the mandate as set forth in the various Executive Orders that have been issued, as well as in guidance documents issued by the Counsel to the Mayor and the New York City Commission on Human Rights.\*

### What Businesses Are Covered?

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. Under the Executive Order, "covered entities" are defined as:

#### Indoor Food Services

Includes 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.

(Not included: any food service establishment offering food and/or drink exclusively for off-premises or outdoor consumption, or food service establishments providing charitable food services such as soup kitchens.)

#### Indoor Entertainment and Recreational Settings

Includes 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, hotel meeting and event spaces, and other recreational game centers.

#### Indoor Gyms and Fitness Settings

Includes 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.

\*Valid as of October 5, 2021

## Exemptions and Businesses Not Covered

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

An establishment that is purely retail is not required to check for proof of vaccination. If a venue is being rented by a house of worship for a religious event, it is not covered by the Key to NYC requirements during the event. If an establishment is being used as a poll site for an election, the establishment should not require proof of vaccination for those who enter for purposes of voting, accompanying a voter, or to observe the election.

If an establishment has both indoor and outdoor portions (for example, an indoor fitness center with an outdoor pool or a museum with indoor and outdoor spaces for patrons), only the indoor portion is covered by the Key to NYC requirements.

## What Individuals Are Covered?

The Key to NYC vaccine requirement applies to all individuals 12 years old or older, with limited exceptions.

All contractors, including both residents and nonresidents of New York City, must show proof of vaccination to enter a covered business. 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.

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 or a nonresident individual accompanying a performing artist into a covered premises as part of their regular employment so long as the performing artist is performing in the covered premises
- A nonresident professional or college athlete/sports team that is not based in New York City (i.e., not a New York City 'home team'), or a nonresident individual accompanying such professional or college athlete/sports team who enters a covered premises as part of their regular employment for purposes of competing

Individuals age 12 and over may enter Key to NYC establishments without displaying proof of vaccination when they are entering to participate in a school or after-school program sponsored by their school or a City agency, so long as they wear a face mask whenever they are unable to maintain six feet of social distance from other people.

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.

## Proof of Vaccination and Identification Required

To prove vaccination status, individuals must show that they have received at least one dose of a COVID-19 vaccine authorized by the FDA or by the World Health Organization (WHO) or any active (not placebo) COVID-19 vaccine candidate that is part of a U.S.-based clinical trial. 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:

- CDC COVID-19 Vaccination Record Card
- Official immunization record from the jurisdiction, state or country where the vaccine was administered
- Digital or physical photo of such card or record, reflecting the person's name, vaccine brand, and date administered (or picture thereof)
- CLEAR's Digital Vaccine Card and/or the CLEAR Health Pass
- New York City COVID Safe Pass app
- New York State Excelsior Pass app

For individuals who received their COVID-19 vaccine outside of the United States, proof may be demonstrated by an official immunization record that includes ALL of the following information:

- First name and last name

- Date of birth
- Vaccine product name (ex: AstraZeneca/SK Bioscience)
- Date(s) administered
- Site where the vaccine was administered or person who administered the vaccine (the country of origin may be listed as the site where the vaccine was administered).

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](mailto:stopvaxfraud@health.ny.gov)).

In addition to requiring proof of vaccination, employees and customers of covered businesses must provide identification bearing the same identifying information as the proof of vaccination at the same time they present proof of vaccination for entrance to an indoor space. The identification must allow a business to confirm that the person requesting entrance is the same person reflected on the proof of vaccination. This means that the identification must contain either:

- the name of the individual and a photo of the individual
- the name of the individual and the individual's date of birth

A driver's license, non-driver government ID card, IDNYC, passport and school ID card are all acceptable forms of identification. Individuals may also show copies or photos of their identification document.

Businesses must check identification for anyone appearing to be 18 years of age or older. They may check identification for individuals under 18 years old but are not required to do so.

Businesses do not need to check identification for people, such as employees, if the proof of vaccination is matched against identity records the company already maintains. Nor do businesses need to check identification of repeat customers for each visit if the business has electronic or paper records demonstrating that such customers have previously displayed proof of vaccination and identification. Businesses may keep electronic records or a paper log including information such as customer name, type of proof of vaccination provided, date such proof was provided, and name of employee who reviewed such proof.

If a business chooses to keep such information on file instead of checking repeat customers, this practice should be recorded in the business's plan that describes the covered entity's protocol for implementing and enforcing the requirements of Key to NYC.

## 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.

The following will not be considered an indoor portion:

- a structure on the sidewalk or roadway if it is entirely open on the side facing the sidewalk
- 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

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. New York City also published a template for the written implementation protocol.

## Fast Food Employees

Under New York City's Fair Workweek Law, a fast food employer can terminate an employee only for "just cause," which is defined as "a failure to satisfactorily perform job duties or misconduct that is demonstrably and materially harmful to the fast food employer's legitimate

business interest” or due to a bona fide economic reason.

The Key to NYC program modified the definition of “just cause” under the Fair Workweek Law to state:

[A] fast food employer shall be deemed to have just cause when a fast food employee has failed to provide proof of vaccination required by an emergency executive order issued in response to the COVID-19 pandemic ... provided that the employee shall have 30 days from the date when the employer notified the employee of the requirement to submit such proof and the employee shall be placed on leave following such notification until such proof is provided. This provision shall not excuse the employer from the responsibility to provide a reasonable accommodation where required by law.

Under this amendment, fast food employers can terminate employees who fail to provide proof of vaccination as long as the worker was given 30 days from the date their employer notified them of the requirement to provide proof of vaccination and the employee was placed on an unpaid leave until submitting such proof. Nevertheless, this amendment does not excuse employers from their obligation to provide a reasonable accommodation to employees when required by law.

## 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 would 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 New York City Commission on Human Rights (the “Commission”) has provided 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 Commission states 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 describes three 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

Businesses must also 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 has provided 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 has provided the following 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

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