

Past Guidance Gives NYC Employers Clues On New Vax Rules

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(December 13, 2021, 6:00 PM EST)

On Dec. 6, New York City Mayor Bill de Blasio announced[1] significant new vaccination requirements for nearly all employees working in New York City.

Under the announced requirements, all New York City private sector employees who report to work in person will be required to be fully vaccinated against COVID-19 — i.e., two doses of a two-dose vaccine series, or one dose of a one-dose series.

However, individuals can receive their first shot in a two-dose series by Dec. 27 to comply with the mandate.

De Blasio explained that the health commissioner would issue an order implementing this new rule on Dec. 15, and that the city would also publish guidance, which will include information for businesses on compliance.

De Blasio characterized the new rules as an expansion of the "Key to NYC" requirements, which mandated that certain public-facing organizations, including indoor restaurants, athletic facilities and entertainment venues, confirm that each employee and member of the public using these facilities has received at least one COVID-19 vaccination shot.

The rules for these previously covered establishments, which were already required to check for proof of vaccination, will also expand on Dec. 14, to apply to everyone ages 5 to 11, who will now be required to show receipt of at least one vaccine dose.

In addition, beginning on Dec. 27, everyone ages 12 and older who received the Moderna or Pfizer vaccine will need to show proof of receipt of two doses, instead of the single dose previously required.

De Blasio characterized the new requirements as being a "first in the nation" rule for private employers and explained it would apply to approximately 184,000 businesses.

While he and the New York City health commissioner described certain aspects of the forthcoming rules, there are many unknowns at the moment, which create additional challenges for New York City



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employers, who will be faced with a tight time frame between the release of the applicable orders and guidance on Dec. 15 and the vaccination compliance deadline on Dec. 27.

Requirements for Compliance

At his news conference, de Blasio clarified that the vaccine mandate:

- Will not apply to individuals working remotely or where a business has only one employee;
- Will not provide COVID-19 testing as an alternative to vaccination; and
- Will require that covered employees receive a single dose of a COVID-19 vaccine by Dec. 27.

The mayor noted that the forthcoming guidance would outline a process for employees to request a reasonable accommodation, but he did not elaborate as to who may be eligible to receive a reasonable accommodation, how that term will be defined, or provide any specific information on potentially appropriate reasonable accommodations.

Acceptable proof of vaccination shall include a vaccination card issued by the Centers for Disease Control and Prevention, the New York State Excelsior Pass, the Clear Health Pass and the NYC COVID Safe app.

Open Questions

Thus far, there is only minimal guidance about what businesses must do to comply with the new requirements. This lack of detail leaves numerous open questions for companies to consider in determining the steps they must take to comply with the law.

However, the prior Key To NYC requirements may be a helpful resource for planning purposes, particularly as de Blasio explained that the new rules for private employers would be based on the initial Key To NYC requirements.

Who Will Be Covered?

During the news conference, de Blasio explained that the mandate would apply to all employers and their workers.

However, under the prior Key To NYC order applicable to gyms, indoor dining and entertainment venues, businesses were required to ensure that all patrons, full- and part-time employees, interns, volunteers, and contractors entering the premises displayed both proof of vaccination and identification with a matching name.

Therefore, it is unclear exactly who will be covered under the new rules.

For now, employers that already implemented a process to verify vaccination status of their own employees should consider how they would adopt their processes if required to expand verification to nonemployees coming onto their premises. This issue is particularly relevant for businesses that have significant numbers of nonemployees coming on-site, such as retailers.

Additionally, there may be exceptions to the vaccination rules.

For example, if an employee works outside, will they still be required to be vaccinated? Under the prior Key To NYC rules, they would not have been required to be vaccinated, but the new order may not contain similar exceptions.

Other prior exceptions included individuals making deliveries and pickups, including food delivery; those coming on-site for the sole purpose of making necessary repairs; individuals coming indoors just to use a bathroom or locker room; and professional athletes and performers as well as those accompanying them who live outside New York City.

Will Written Policies and Posters Be Required?

Under the prior Key To NYC rules, employers were required to:

- Display a poster informing individuals coming on premises that they must show proof of vaccination; and
- Develop and keep a written record or policy describing the covered entity's protocol for implementing and enforcing these requirements.

These materials were required to be maintained on the premises and made available to city inspectors upon request. Although the prior guidance did not specify the precise contents of what these plans had to include, many companies included detail on who was responsible for verifying the vaccine status of both employees and patrons, how these activities would be completed, and how any records collected would be stored.

What Documentation Will Employers Need to Keep?

While businesses were not required to store any vaccination records that they collect under the prior Key To NYC rules, they were permitted to do so to avoid having to check for proof of vaccination and identification each time someone entered the premises, such as an employee or returning membership club member.

Presumably, employers will only need to check the vaccination records of their own employees once under the new rules, but they should consider what type of proof of vaccination they will require and how they will record this information.

As the U.S. Equal Employment Opportunity Commission has issued guidance stating vaccination documentation is medical information, businesses that retain records regarding vaccination should store these materials in a confidential and secure location separate from personnel files.

While the news conference guidance lists multiple types of proof, including a copy or photo of a CDC vaccination or various phone apps that can verify vaccination status, it may be difficult for employers to retain records of each of these verification options.

Therefore, while employers have the ability to accept app-verified proof, companies do not necessarily need to permit employees to use these options and may instead require submission of a vaccine card so they can more easily maintain these records.

What Types of Accommodations Will Be Required?

Businesses will likely need to consider reasonable accommodations for individuals who cannot be vaccinated for reasons protected under New York City and New York state law, as well as federal law.

Those reasons include a disability, pregnancy and sincerely held religious beliefs, as well as other accommodation categories protected under New York City law, such as for those who are a victim of domestic violence, stalking or sex offenses.

If an employee requests an accommodation for any of these reasons, then the employer should engage with them in a cooperative dialogue, or good faith discussion, to see if a reasonable accommodation is appropriate.

Under the prior Key To NYC guidance, the New York City Commission on Human Rights advised that reasonable accommodations can take many forms and may include letting an employee work remotely, performing their job duties outside or isolated from other employees or customers, or taking a leave of absence.

The NYCCHR further explained that reasonable accommodations do not need to be provided where the accommodation would cause a direct threat to employees or others on the premises, or impose an undue hardship on the business.

The NYCCHR guidance noted that if there is no reasonable accommodation that would enable the employee to continue performing their job duties without posing a direct threat or creating an undue hardship, employers have the option of offering employees an unpaid leave of absence until they are able to provide proof of vaccination, or it is otherwise safe for them to return to work.

Employers should look for further guidance on this question in the new rules and related guidance that will be announced for all private employers on Dec. 15.

Legal Challenges

During de Blasio's press conference, New York City Corporation Counsel Georgia Pestana repeatedly said that the health commissioner has clear authority to implement orders that protect the public health during a public health emergency.

She also emphasized that the new rules would be defensible because they apply to all private employers and they are not treating some industries differently than others.

However, on Dec. 7, New York State Supreme Court Judge Frank P. Nervo issued a stay of enforcement against de Blasio, NYC Department of Health and Mental Hygiene Commissioner Dave Chokshi and New York City enjoining enforcement of the New York City vaccine mandate that is applicable to city employees and certain city contractors. In that case, *Marciano v. de Blasio*, there is a hearing scheduled for 2 p.m. on Dec. 14 to review the temporary stay.[2]

There, the plaintiffs generally challenged the authority of the health commissioner and de Blasio to mandate the vaccination of city employees. A hearing is scheduled for Dec. 14. How that case develops may provide some clues about how challenges to the new rules for private employers will play out.

What Businesses Can Do to Prepare

Once businesses determine that they have employees working in person in New York City, including individuals who normally work outside the city but occasionally work in person in New York City, they should consider how they will comply with the vaccination requirement.

Issues to resolve include: Who will check for proof of vaccination; what types of training will be required; what type of vaccination proof will be acceptable; where and how these materials will be stored; who will handle accommodation requests; and what process will be used to review these requests, including which forms employees will be required to fill out to request an exemption.

While businesses likely will not need to verify that an individual's proffered proof of vaccination is real, they should consider what steps they will take if they believe an employee has submitted a fake vaccine card. New York City encourages, but does not require, businesses to report suspected fake vaccination cards by calling 311 or making a report to the New York state attorney general or the Department of Health and Mental Hygiene.

Timing for Compliance

While the vaccination verification requirements will not go into effect until Dec. 27, the city has not announced whether enforcement will begin immediately, whether there will be fines for noncompliance, or if there will be a period of raising awareness before enforcement begins as there was when the Key To NYC rules were first issued.

De Blasio explained that while fines will be available for noncompliance, the city's focus would be on increasing awareness and compliance and therefore, there is reason to believe the city may not seek to immediately or aggressively issue fines for noncompliance.

That said, under the prior Key To NYC rules, there was a potential fine of \$1,000 for an initial violation with the potential for increased fines or other enforcement action for repeat violations.

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[1] <https://www1.nyc.gov/office-of-the-mayor/news/807-21/mayor-de-blasio-vaccine-mandate-private-sector-workers-major-expansions-to>.

[2] *Marciano v. Bill de Blasio, et al.* (Index No. 160914/2021).