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New York City Issues Guidance on Upcoming COVID-19 Vaccine Mandate for Private Employers

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On December 15, 2021, New York City issued much-anticipated guidance on its COVID-19 vaccine mandate for private sector employers, which goes into effect on December 27, 2021. It is the first state or local private-sector vaccination mandate of its kind in the nation, and it is expected to apply to approximately 184,000 businesses.

This alert provides need-to-know information about the mandate for New York City private-sector employers.

Covered Entities

The mandate generally applies to any business that employs more than one worker or operates a workplace in New York City, as well as any self-employed individual or solo practitioner who works at a workplace, or interacts with workers or the public in the course of their business. A "workplace" is defined as any place where work is performed in the presence of another worker or member of the public, including vehicles. The City specifies that this includes coworking spaces, which must check the proof of vaccination of individuals, as well as the workers of small companies, who rent space there.

The mandate does not apply to businesses or individuals who are already subject to another Order of the Commissioner of the Department of Health and Mental Hygiene (DOHMH), Board of Health, the Mayor, or a federal or state entity that requires proof of full vaccination.

Workers of Covered Entities and Exceptions

A "worker" is defined by the mandate as an individual who works in-person in New York City at a workplace and includes a full-time or part-time staff member, employer, employee, intern, volunteer, or contractor of a covered entity, as well as a self-employed individual or solo practitioner. Since the mandate applies to workplaces in New York City, workers' residency is not relevant, apart from a limited exception for performing artists and athletes (discussed below).

There are a few notable exceptions. First, the mandate does not apply to workers who qualify for a reasonable accommodation (discussed below). Second, the mandate does not apply to workers who are only entering the workplace for a "quick and limited purpose." The City provides the following examples of a "quick and limited purpose": using the bathroom, making a delivery, clocking in and receiving an assignment before leaving to begin a solitary assignment. Third, the mandate does not apply to non-NYC resident performing artists, college or professional athletes, and anyone who accompanies them. Fourth, the mandate does not apply to workers who work alone without in-person contact with co-workers or others in the course of their business.

For workers who refuse to comply with the mandate, and who do not otherwise qualify for

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exemption or reasonable accommodation, the City makes clear that it is in the covered entity's discretion whether to discipline or fire such workers, so long as they are kept out of the workplace.

Verification of Workers' Proof of Vaccination

By December 27, covered workers must have received at least one-dose of a COVID-19 vaccine. Covered entities must confirm all workers' proof of vaccination, which requires reviewing (1) a form of identification and (2) proof of vaccination.

Acceptable forms of identification include:

- Driver's license
- Non-driver government ID card
- IDNYC card
- Passport
- School or work ID card

Copies of the above identification documents are permitted, including pictures.

Acceptable proof of vaccination includes:

- A photo or hard copy of a CDC vaccination card
- NYC COVID Safe App
- New York State Excelsior Pass
- CLEAR Digital Vaccine Card
- CLEAR Health Pass
- Official vaccination record
- A photo or hard copy of an official vaccination record of one of the following vaccines administered outside the United States: AstraZeneca/SK Bioscience, Serum Institute of India/COVISHIELD and Vaxzevria, Sinopharm, or Sinovac

If the vaccine is authorized to be administered in a two-dose series, workers have 45 days after providing proof of their first dose to receive their second dose. If workers do not show proof of a second dose within the requisite 45 days, covered entities must exclude them from the workplace until they provide proof of a second dose.

Reasonable Accommodation Requests

The City also provides important guidance for covered entities with regard to workers who request a reasonable accommodation to the mandate based on a sincerely held religious belief or disability. Any such existing workers must apply for a reasonable accommodation by December 27, 2021, and covered entities may permit workers to continue coming into the workplace while the request is being evaluated.

Covered entities are required to keep a record of accommodation requests, including when the request was granted or denied, the basis for doing so, and any supporting documents provided by the worker with respect to the request.

Importantly, the City's guidance includes a checklist that covered entities may follow to process a reasonable accommodation, which "will demonstrate that the employer handled the reasonable accommodation request appropriately."

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Recordkeeping Requirements

Covered entities are also required to keep a record of each worker's proof of vaccination. (For workers who have received an accommodation, the employer must maintain documentation as described above). The City has outlined three ways to meet this requirement:

1. Maintaining a copy of the worker's proof of vaccination;
2. Maintaining a paper or electronic record created by the covered entity that includes: (i) the worker's name; (ii) whether the worker is fully vaccinated; and (iii) for workers who have submitted proof of one-dose, the date by which the worker must provide proof of a second dose; or
3. Checking workers' proof of vaccination each day before they enter the workplace and keeping a record of each verification.

For workers employed by a contractor, covered entities may either keep a record of proof of vaccination or may request that the contractor's employer confirm the contractor is vaccinated and then maintain a record of that request and confirmation.

Covered entities with multiple locations (*e.g.*, a chain restaurant) may store vaccination and reasonable accommodation records in one central location. In case of inspection by the City, each location should have available the contact information of the business representative who is centrally storing such records.

Finally, records should be stored in a secure manner and only made accessible to individuals who have a legitimate need to access such information for purposes of compliance with the mandate or other governmental orders, laws, or regulations.

Public-Facing Affirmation Sign

By December 27, covered entities are additionally required to fill out and post in a conspicuous location the DOHMH's Affirmation of Compliance with Workplace Vaccination Requirements. Businesses, such as restaurants, fitness centers, and entertainment venues, that have previously posted the requisite Key to NYC notice poster do not have to post the additional DOHMH affirmation sign.

Mandate Enforcement

The mandate will be enforced by inspectors from various City agencies and monetary penalties may be assessed for covered entities that are non-compliant. This includes an initial fine of $1,000 and escalating penalties for persisting violations. According to the City's guidance, enforcement of the mandate will begin immediately – *i.e.*, December 27.

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Although legal challenges to the City's mandate might be filed, covered entities may wish to act promptly in light of the mandate's fast-approaching December 27 deadline.

The following Gibson Dunn attorneys assisted in preparing this client update: Eugene Scalia, Jessica Brown, Harris M. Mufson, Lauren Elliot, Andrew G.I. Kilberg, Kate Googins, and Meika Freeman.

Gibson Dunn's lawyers are available to assist in addressing any questions you may have regarding these developments. To learn more about these issues, please contact the Gibson Dunn lawyer with whom you usually work, any member of the firm's Administrative Law and Regulatory or Labor and Employment practice groups, or the following:

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