
DECEMBER 21, 2021

COVID-19 Update: NYC Issues Guidance on Vaccine Mandate for Private Employers

New York City's private employer COVID-19 vaccine mandate is scheduled to take effect on December 27, 2021 (the "NYC Employer Mandate"). The NYC Employer Mandate requires workers in New York City who perform in-person work or interact with the public to show proof that they have received at least one dose of a COVID-19 vaccine by December 27. Workers who submit proof of the first dose of a two-dose vaccine by December 27 have 45 days after that submission to show proof of the second dose. Employers who are covered by the NYC Employer Mandate are required to exclude from the workplace any worker who has not provided proof of vaccination, unless an exception due to a religious or medical accommodation applies, or a worker only enters the workplace for "a quick and limited purpose." The NYC Employer Mandate is expected to apply to approximately 184,000 businesses. While the NYC Employer Mandate does not apply to businesses that are already subject to another federal, state, or local vaccine mandate, businesses that are subject to federal vaccination requirements that are not currently in effect due to a court order are still required to comply with the NYC Employer Mandate. New York City Mayor-elect, Eric Adams, is expected to revisit the NYC Employer Mandate and other COVID-19 measures when he takes office on January 1, 2022. Given the upcoming change in administration and the possibility of potential legal challenges against the NYC Employer Mandate, employers are advised to monitor further developments, including the City's plan to enforce the mandate and/or defend it against potential legal challenges.

Key Takeaways

- By December 27, 2021, the NYC Employer Mandate requires private employers that employ more than one worker in New York City or maintain a workplace in New York City to exclude from the workplace any worker who has not provided proof of one dose of COVID-19 vaccination, unless an exception due to a religious or medical accommodation applies, or a worker only enters the workplace for "a quick and limited purpose." Covered employers are also required to complete and post an attestation of compliance at the workplace by December 27. Enforcement of the NYC Employer Mandate is set to begin on December 27.
- By December 27, employees with a medical condition or a sincerely held religious belief that prevents them from being vaccinated are required to request a reasonable accommodation. Covered employers may permit workers to continue entering the workplace while their reasonable accommodation request is pending.
- To be in compliance with the recordkeeping requirements of the NYC Employer Mandate, covered employers should maintain (1) a copy of each worker's proof of vaccination (*e.g.*, Centers for Disease Control and Prevention COVID-19 Vaccination Record Card) and, if applicable, a record of reasonable accommodation; (2) their own paper or electronic record of such proof of vaccination; or (3) a record of having checked each worker's proof of vaccination before allowing a worker to enter the workplace.

- The NYC Employer Mandate does not apply to covered entities and individuals who are already subject to another federal, state, or local vaccination requirement that is in effect or individuals who have been granted a reasonable accommodation pursuant to such requirement. However, covered entities or individuals who are subject to any federal requirement that is not currently in effect because of a court order must comply with the NYC Employer Mandate.
- Employers are permitted to adopt and implement a vaccination policy that is “stricter” than the NYC Employer Mandate so long as it is not discriminatory or otherwise unlawful.

NYC Employer Mandate

Background

On December 6, Mayor Bill de Blasio unveiled the NYC Employer Mandate, described as “first-in-the-nation measures to encourage New Yorkers to keep themselves and their communities safe.”¹ Mayor de Blasio stated that the NYC Employer Mandate would apply to “roughly 184,000 businesses” and that the City would issue, at a later date, enforcement and reasonable accommodation guidance, along with additional resources to support small businesses with implementation of the mandate. On December 15, New York City issued guidance on the NYC Employer Mandate (the “NYC Guidance”), including a set of FAQs, a reasonable accommodations checklist (the “NYC Checklist”), guidance on equitable implementation of COVID-19 vaccine requirements, and an official attestation that employers can complete to affirm that they are in compliance with the NYC Employer Mandate (the “Affirmation of Compliance”).

The NYC Employer Mandate is scheduled to take effect on December 27, five days before Mayor de Blasio leaves office. The spokesperson for Mayor-elect Adams, who takes office on January 1, 2022, stated that the Mayor-elect will “evaluate this mandate and other Covid strategies when he is in office and make determinations based on science, efficacy and the advice of health professionals.”²

Guidance on NYC Employer Mandate

Covered Entities and Individuals. The NYC Employer Mandate applies to (1) all private employers that employ more than one worker in New York City or that maintain a workplace in New York City and (2) self-employed individuals who work at a workplace or interact with the public in the course of their business. “Workplace” is broadly defined to include “any location, including a vehicle, where work is performed in the presence of” others. The NYC Employer Mandate applies not only to full-time employees, but also to part-time workers, interns, volunteers, and contractors. Individuals (1) who work from home and whose work does not involve interacting with other people; (2) who enter the workplace for “a quick and limited purpose”; and (3) who are not required to be vaccinated per the City’s Key to NYC program, including certain performing artists and athletes,³ are not covered by the NYC Employer Mandate. Commercial landlords who do not operate co-working spaces are not covered by the NYC Employer Mandate except in regards to their own employees.⁴

Vaccination Requirements. By December 27, workers are required to provide proof of one dose of the COVID-19 vaccination, and covered entities must exclude from the workplace any worker who has not provided such proof, unless an exception due to a religious or medical accommodation applies, or a worker only ever enters the workplace for “a quick and limited purpose,” which includes “using the bathroom, making a delivery, or clocking in and receiving an assignment before leaving to begin a

¹ Office of the Mayor, Mayor de Blasio Announces Vaccine Mandate for Private Sector Workers, and Major Expansions to Nation-Leading “Key to NYC” Program (Dec. 6, 2021), <https://www1.nyc.gov/office-of-the-mayor/news/807-21/mayor-de-blasio-vaccine-mandate-private-sector-workers-major-expansions-to>.

² N.Y. Times, Will Eric Adams Keep N.Y.C.’s Newest Vaccine Mandate? Check Back Later (Dec. 6, 2021), <https://www.nytimes.com/2021/12/06/nyregion/eric-adams-employee-vaccine-mandate.html>.

³ NYC, Vaccination Requirement: Indoor Public Activities (Key to NYC), <https://www1.nyc.gov/site/doh/covid/covid-19-vaccines-keytonyc.page>.

⁴ NYC, Frequently Asked Questions for Covered Entities (Dec. 15, 2021), <https://www1.nyc.gov/assets/counseltothemayor/downloads/Workplace-FAQ.pdf>.

solitary assignment.”⁵ Workers who submit proof of the first dose of a two-dose vaccine by December 27 have 45 days after that submission to show proof of the second dose. If workers do not provide proof of a second dose within that timeframe, covered entities are required to exclude such workers from the workplace until they submit proof of vaccination for their second dose.

The NYC Employer Mandate does not prevent covered entities from imposing “stricter” COVID-19 vaccination requirements so long as they are not discriminatory or otherwise unlawful.⁶

Reasonable Accommodations and Prohibition on Discrimination/Retaliation. The NYC Employer Mandate does not prohibit covered entities from providing “reasonable accommodations for medical or religious reasons.”⁷ By December 27, workers who have a sincerely held religious belief or a medical condition that prevents them from being vaccinated for COVID-19 are required to make a request for a reasonable accommodation.⁸ The NYC Checklist contemplates that a permanent or temporary medical exemption may be granted if an employee’s medical condition falls under the enumerated categories therein and a religious exemption may be granted if the employee’s request is based on a sincerely held religious belief and not solely on “a personal, political, or philosophical preference.”⁹ The NYC Checklist provides that employers need not grant a reasonable accommodation if the unvaccinated worker “would likely pose a direct threat to themselves or others” or the accommodation “presents an undue burden on the employer.”¹⁰ Covered entities may permit workers to continue entering the workplace while their reasonable accommodation request is pending.¹¹ Covered entities need not “fire or discipline” workers who are not in compliance with the NYC Employer Mandate so long as they exclude the worker from the workplace.¹²

The NYC Checklist provides the following non-exhaustive options for reasonable accommodations available to eligible employees: (1) weekly PCR testing for COVID-19 and masking at all times when not eating or drinking; (2) remote work that does not expose others to the accommodated worker; and (3) leave of absence.¹³ Under the New York City Human Rights Law (the “NYCHRL”), employers do not need to pay unvaccinated employees during a leave of absence unless the employer pays other workers who

⁵ *Id.*

⁶ *Id.*

⁷ Order of the Commissioner of the Department of Health and Mental Hygiene to Require COVID-19 Vaccination in the Workplace (Dec. 13, 2021), <https://www1.nyc.gov/assets/doh/downloads/pdf/covid/covid-19-vaccination-workplace-requirement.pdf>.

⁸ NYC, Frequently Asked Questions for Covered Entities (Dec. 15, 2021), <https://www1.nyc.gov/assets/counseltothemayor/downloads/Workplace-FAQ.pdf>.

⁹ NYC, Guidance on Accommodations for Workers, <https://www1.nyc.gov/assets/doh/downloads/pdf/covid/vaccination-workplace-accommodations.pdf>.

¹⁰ *Id.* For example, accommodations that would allow an unvaccinated employee to engage in a high-risk activity, such as yelling or exercising, while in close proximity to others, or to work in close proximity to high-risk individuals are likely to pose “a direct threat” to the unvaccinated employee or others at the workplace. See NYC, Guidance for Employers on Equitable Implementation of COVID-19 Vaccine Requirements (Dec. 15, 2021), <https://www1.nyc.gov/assets/cchr/downloads/pdf/publications/Vax-Employment-Guidance.pdf>.

¹¹ NYC, Frequently Asked Questions for Covered Entities (Dec. 15, 2021), <https://www1.nyc.gov/assets/counseltothemayor/downloads/Workplace-FAQ.pdf>.

¹² *Id.*

¹³ NYC, Guidance on Accommodations for Workers, <https://www1.nyc.gov/assets/doh/downloads/pdf/covid/vaccination-workplace-accommodations.pdf>.

are unable to work for similar reasons.¹⁴ The NYC Guidance states that completing the NYC Checklist and keeping it on file “will demonstrate that the employer handled the reasonable accommodation request appropriately.”¹⁵

The NYCHRL requires covered employers who implement vaccination requirements to consider requests for a reasonable accommodation from employees who need them because of “disability, pregnancy, childbirth, lactation, religious beliefs or observances, or status as a victim of domestic violence, stalking, or sex offenses.”¹⁶ The NYCHRL prohibits employers from implementing vaccine requirements in a way that discriminates against employees based any characteristic protected by the NYCHRL. Employers are also prohibited from retaliating against employees because they requested an accommodation, opposed discrimination, or filed or assisted with a claim under the NYCHRL.¹⁷

Recordkeeping and Posting Requirements. Covered entities are required to maintain (1) a copy of each worker’s proof of vaccination and, if applicable, a record of reasonable accommodation; (2) their own record of such proof of vaccination that includes (a) the worker’s name; (b) whether the worker is fully vaccinated; and (c) for a worker who submits proof of the first dose of a two-dose vaccine by December 27, the date by which proof of the second dose will be provided (which must be no later than 45 days after the proof of the first dose was submitted); or (3) a record of verification of proof of vaccination before allowing a worker to enter the workplace.¹⁸

Any record concerning reasonable accommodations should include (1) when a reasonable accommodation was granted; (2) the basis for doing so, and (3) any supporting documents the worker provided in support of the request for reasonable accommodation. As stated above, completing the NYC Checklist and keeping it on file “will demonstrate that the employer handled the reasonable accommodation request appropriately.”¹⁹

Covered entities who hire contract workers need not keep a record of the contractor’s vaccination status. Instead, they can request that the contract worker’s employer confirm that the contractor is vaccinated and maintain a record of both their request and the confirmation.²⁰

Each individual business location is covered by the NYC Employer Mandate and must post the Affirmation of Compliance in a conspicuous location.²¹ However, a business with multiple locations may store employee vaccination records, as well as reasonable accommodation records, if any, in one central location, instead of having such records available at each location.²²

Any vaccination information should be collected and stored in a secure manner to ensure the privacy and security of the information is protected.

¹⁴ NYC, Guidance for Employers on Equitable Implementation of COVID-19 Vaccine Requirements (Dec. 15, 2021), <https://www1.nyc.gov/assets/cchr/downloads/pdf/publications/Vax-Employment-Guidance.pdf>.

¹⁵ NYC, Frequently Asked Questions for Covered Entities (Dec. 15, 2021), <https://www1.nyc.gov/assets/counseltothemayor/downloads/Workplace-FAQ.pdf>.

¹⁶ NYC, Guidance for Employers on Equitable Implementation of COVID-19 Vaccine Requirements (Dec. 15, 2021), <https://www1.nyc.gov/assets/cchr/downloads/pdf/publications/Vax-Employment-Guidance.pdf>.

¹⁷ *Id.*

¹⁸ NYC, Frequently Asked Questions for Covered Entities (Dec. 15, 2021), <https://www1.nyc.gov/assets/counseltothemayor/downloads/Workplace-FAQ.pdf>.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

Enforcement and Penalties for Non-Compliance. Enforcement of the NYC Employer Mandate is set to begin on December 27.²³ Businesses that are not in compliance with its requirements may be subject to a fine of \$1,000 and escalating penalties thereafter if violations persist.²⁴

Interplay Between NYC Employer Mandate and Other Vaccine Mandates. The NYC Employer Mandate does not apply to covered entities and individuals “who are already subject to another Order of the Commissioner of the Department, Board of Health, the Mayor, or a State or federal entity that requires them to maintain or provide proof of full vaccination, or to individuals who have been granted a reasonable accommodation pursuant to such requirement.”²⁵ However, covered entities and individuals who are subject to federal requirements that are not currently in effect because of a court order must comply with this order.²⁶

As of the date of this memorandum, the federal COVID-19 vaccine mandate for federal contractors and subcontractors (the “Federal Contractor Vaccine Mandate”) remains paused nationwide.²⁷ The federal COVID-19 vaccine mandate for employers with 100 or more employees (the “Federal Employer ETS”) remains in effect nationwide.²⁸ To provide employers with sufficient time to comply with the Federal Employer ETS, the Occupational Safety and Health Administration stated that it “will not issue citations for noncompliance with any requirements of the ETS before January 10 and will not issue citations for noncompliance with the standard’s testing requirements before February 9.”²⁹ In New York, the COVID-19 vaccine mandate for CMS healthcare workers at facilities participating in Medicare and Medicaid (the “CMS Mandate”) is in effect.³⁰

Implications for Employers

- Given that the date of compliance for the NYC Employer Mandate is fast approaching, employers covered by the NYC Employer Mandate are advised to take steps to comply with its requirements, including by notifying their employees that any request for a reasonable accommodation should be submitted by December 27.
- Employers are advised to review the NYC Guidance to ensure that their policies and procedures for assessing medical and religious accommodations concerning a COVID-19 vaccination requirement are consistent with the NYC Employer Mandate, the Equal Employment Opportunity Commission’s guidance on COVID-19, the Americans with Disabilities Act, Title VII and any other applicable federal, state and local law, rules or regulations.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ On December 17, the U.S. Court of Appeals for the Eleventh Circuit denied the government’s request for a stay of the district court’s injunction of the Federal Contractor Vaccine Mandate pending appeal. *State of Georgia, et al v. President of the United States, et al*, No. 21-14269 (11th Cir. Dec. 17, 2021).

²⁸ Petitions challenging the Federal Employer ETS—filed in U.S. Courts of Appeals across the nation—were consolidated into the U.S. Court of Appeals for the Sixth Circuit. On December 17, the Sixth Circuit dissolved the Fifth Circuit’s stay of the Federal Employer ETS. *MCP No.165, OSHA Covid Rule*, No. 21-7000 (6th Cir. 2021). Emergency applications to the U.S. Supreme Court requesting a stay of the Sixth Circuit’s order pending the Supreme Court’s review have been filed.

²⁹ OSHA, COVID-19 Vaccination and Testing ETS, <https://www.osha.gov/coronavirus/ets2>.

³⁰ The CMS Mandate remains stayed in 10 states that challenged the mandate in the U.S. District Court for the Eastern District of Missouri. *Missouri v. Biden*, No. 4:21-CV-01329, 2021 WL 5564501, at *1 (E.D. Mo. Nov. 29, 2021). It is also stayed in 14 states that challenged the mandate in the U.S. District Court for the District of Louisiana as a result of the U.S. Court of Appeals for the Fifth Circuit’s decision staying the lower court’s injunction with respect to jurisdictions outside of the 14 plaintiff states. *Louisiana v. Becerra*, No. 21-30734, 2021 WL 5913302 (5th Cir. Dec. 15, 2021).

- With multiple lawsuits and appeals relating to the federal vaccine mandates, employers covered by the NYC Employer Mandate are advised to monitor litigation updates to ensure that they are in compliance with any applicable federal, state, and local COVID-19 requirements.
- In light of Mayor-elect Adams' indication that he may revisit the City's COVID-19 strategies when he takes office on January 1, 2022, employers may want to closely monitor any updates from the City authorities regarding the NYC Employer Mandate.
- Additionally, employers may want to monitor COVID-19 guidance from relevant federal, state and local authorities as the public health situation is rapidly developing.
 - The New York City Commissioner of Health and Mental Hygiene's Order on the NYC Employer Mandate can be found [here](#).
 - FAQs on the NYC Employer Mandate can be found [here](#).
 - The NYC Checklist on reasonable accommodation requests can be found [here](#).
 - The NYC Guidance for Employers on Equitable Implementation of COVID-19 Vaccine Requirements be found [here](#).
 - The Affirmation of Compliance can be found [here](#).
 - The EEOC guidance for employers on COVID-19 vaccinations and workplace anti-discrimination laws can be found [here](#).

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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