

Insights

MAYOR DE BLASIO'S FINAL ACT TO NYC PRIVATE SECTOR WORKERS: GET THE JAB BY DECEMBER 27!

Dec 17, 2021

On December 6, 2021, Mayor Bill de Blasio announced major expansions to the “Key to NYC” program, including directing his Commissioner of Health and Mental Hygiene to issue a vaccine mandate for private-sector workers.

On December 13, 2021, Commissioner Dave A. Chokshi (the “Commissioner”) signed a public health order (the “Order”) requiring private sector workers to get vaccinated against COVID-19 due to the ongoing public health emergency in New York City. The Order was released to the public on December 15, 2021. The requirements of the Order go into effect on December 27, 2021 and remains in effect until rescinded.

Vaccine Mandate

The Order applies to “covered entities” which include: (1) non-governmental entities that employ more than one “worker” in NYC or maintain a workplace in NYC, and (2) self-employed individuals or solo practitioners who work or interact with other workers or the public in the course of their business in NYC. The Order defines “worker” as a full-time or part-time staff member, employer, employee, intern, volunteer or contractor working in-person in NYC, and “workplace” as any location, including a vehicle, where work is performed in the presence of another worker or member of the public. Some examples of businesses that are covered by the Order, beyond traditional office spaces, are:

- A clothing store;
- A grocery store;
- A taxicab or rideshare owner-operator, such as an Uber driver;
- A speech therapist who visits clients in their homes; and
- A writer who rents a desk in a shared workspace.

The Order requires all covered entities to obtain proof of vaccination against COVID-19 for their workers before workers enter the workplace. Covered entities are required to exclude from the workplace any worker who has not provided such proof, unless: (1) a medical or religious accommodation applies, or (2) the worker only enters the workplace for a quick and limited purpose (e.g. using the bathroom, making a delivery, or clocking in to receive an assignment before leaving to begin a solitary assignment).

The Order expressly does not apply to:

- (1) Individuals who work from home and do not interact in-person with co-workers or members of the public in the course of business;
- (2) Individuals who enter the workplace for a quick and limited purpose (as described above);
- (3) Non-City residents who are performing artists, college or professional athletes, or individuals accompanying such aforementioned persons, who are not required to provide proof of vaccination pursuant to the [Key to NYC program, Emergency Executive Order No. 316](#) and successor orders;
- (4) Entities and individuals already subject to another order of the federal or state government, the Commissioner, the Board of Health or Mayor, that is currently effective and requires those entities and individuals to maintain or provide proof of full vaccination; or
- (5) Individuals who have been granted a reasonable accommodation from an order of the federal or state government, the Commissioner, the Board of Health or Mayor, that is currently effective and requires vaccination against COVID-19.

Proof of Vaccination

The Order requires covered entities to verify a worker's proof of vaccination by either:

- (1) Maintaining a copy of each worker's proof of vaccination;
- (2) Maintaining a record of (i) the worker's name, (ii) whether the worker is fully vaccinated, and (iii) the date by which proof of the second dose must be provided for a two-shot vaccine, which date cannot be later than 45 days after the worker submitted proof of the first dose; or
- (3) Checking each worker's proof of vaccination before permitting the worker to enter the workplace each day and maintaining a record of the verification.

Acceptable proof of vaccination is: (1) an original, digital photo or photocopy of a CDC COVID-19 Vaccination Record Card or other official immunization record that provides the person's name, vaccine brand and date of administration; (2) NYC COVID Safe App showing a vaccination record; (3) valid NYS Excelsior Pass/Excelsior Pass Plus; (4) CLEAR Health Pass; or (5) any other method specified by the Commissioner as sufficient to demonstrate proof of vaccination.

For a non-employee worker (e.g. contractor), a covered entity may request that the worker's employer confirm proof of vaccination in lieu of maintaining the same records required for employees. The covered entity must maintain a record of its request to the employer for the non-employee worker and the subsequent confirmation.

Reasonable Accommodations

The NYC Department of Health has provided guidance on the Order with respect to reviewing a request for a reasonable accommodation. Pursuant to the Department of Health's guidance and NYC's cooperative dialogue law, a covered entity is required to engage in a cooperative dialogue with its worker who is requesting a medical or religious exemption from the COVID-19 vaccination requirement, as long as such does not cause an undue hardship on the employer. The Order further requires a covered entity to maintain a record of any grant of a reasonable accommodation. Specifically, the covered entity must maintain two records: (1) a record indicating that an accommodation was provided and (2) a separate record indicating the basis for the accommodation and attaching any supporting documentation provided by the worker. Employers should be aware that the New York City Commission on Human Rights has issued [Guidance for Employers on Equitable Implementation of COVID-19 Vaccine Requirements](#).

Additionally, covered entities must treat records related to vaccination and medical or religious accommodations as confidential and keep them in a separate file. These records are subject to inspection by a City agency at any time, upon request.

Next Steps for Covered Entities

As the effective date of the Order is fast approaching, it is imperative that businesses take immediate action. Employers should:

- Review and familiarize themselves with the Order.
- Notify employees of the City's vaccine mandate as well as which of its employees are required to comply with the mandate.
- Implement a system for requesting proof of vaccination.
- Create a plan for maintaining confidential employee vaccination and accommodation records, and determine who will have access to these records. The records should be maintained so that they are both secure and accessible if the City chooses to conduct a records inspection.
- Develop a plan for handling accommodation requests and determine the type(s) of accommodations that can be offered to workers without causing an undue hardship on the employer. Employers should keep in mind that if an unvaccinated worker is permitted in the workplace (even as a reasonable accommodation) all workers will be required to wear masks as provided in the [New York State Health Commissioner's December 10, 2021 Determination](#).

At present, the State Health Commissioner's Determination is in effect through January 15, 2022.

- Develop a plan to address situations where workers remain unvaccinated despite not requesting or qualifying for an accommodation (e.g. permitting remote work, directing the employee to take unpaid leave, or determining whether termination is appropriate).

Finally, by December 27, 2021, covered entities must complete and post, in a public location, an [Affirmation of Compliance](#), affirming that the business has reviewed that Order and is in compliance with the same. Covered entities also must display the Private Sector Vaccine Requirement Flyer in the workplace. If a covered entity refuses to comply with the Order, they are subject to a fine of \$1,000 and escalating penalties thereafter if violations persist.

Bryan Cave Leighton Paisner LLP has a team of knowledgeable lawyers and other professionals monitoring developments surrounding vaccine mandates, and can prepare and review your vaccine policies, and answer your questions. If you or your organization would like more information on this or any other employment issue, please contact any attorney in our [New York City office](#) or the [Employment and Labor practice group](#).

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