

Best Practices For Compliance With NYC's New Vaccine Order

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On Aug. 16, New York City Mayor Bill de Blasio issued Executive Order 225[1] and related guidance[2] regarding the "Key to NYC" vaccination requirements for nearly all patrons, employees, interns, volunteers and contractors entering indoor dining, entertainment, recreation and fitness settings.

Under these requirements, all individuals age 12 and older must show proof that they have received at least one dose of an approved COVID-19 vaccine before being admitted to certain covered indoor facilities, except for those entering for a quick and limited purpose of less than 10 minutes, such as using a bathroom.

The guidance also states that businesses

must check identification of anyone appearing to be 18 years of age or older. This identification must be checked at the same time you check proof of vaccination.

This identification verification requirement may come as a surprise to some businesses, as the focus of de Blasio's announcements on the mandate have all focused on individuals showing proof of vaccination only.

These requirements — mandating that businesses verify documented proof of vaccination against proof of identification for employees and patrons alike — were the first of their type to be announced in the U.S.

The definition of a covered business is broad, and includes:

- Nearly all indoor dining services. Businesses that close indoor dining but continue outdoor dining, takeout and delivery are exempt;
- Entertainment and recreational settings, including movie theaters, music and commercial party venues, museums, zoos and aquariums, sports arenas, convention centers, bowling alleys, arcades, billiard halls, casinos, etc.; and



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- Fitness facilities, including stand-alone gyms as well as fitness centers inside another facility, such as a hotel or office building.

The requirements took effect on Aug. 17, and New York City inspectors will begin enforcement, including the potential issuance of fines, on Sept. 13.

Following these announcements, the New York City Commission on Human Rights issued new guidance^[3] on Aug. 17 that provides clarity to businesses on how to handle requests for accommodation by patrons and employees.

The order and related guidance provide key details regarding obligations and compliance with these requirements, but companies could face hurdles in determining how to effectively adjust their operations to comply with the order.

Required Immediate Action Steps

Covered businesses must take two immediate steps.

First, they must develop and keep a written record or policy describing the covered entity's protocol for implementing and enforcing these requirements.

These materials must be maintained on the covered business's premises and made available to government inspectors upon request.

Although the guidance and enacting order do not specify the precise contents these plans must include, businesses should consider including details on who will verify the vaccine status of employees and patrons, how these activities will be completed and how any records will be stored.

While businesses are not required to store any vaccination records they collect, they are permitted to do so to avoid having to check for proof of vaccination and identification each time someone who regularly enters the premises, such as an employee or member of a club, seeks entry.

Second, businesses must also post a notice in a conspicuous place that is viewable by prospective patrons prior to entering the establishment.

Covered businesses can use the city's model notice^[4] or develop their own sign, provided its sign must be no smaller than 8.5 inches by 11 inches and use the text of the model sign in at least 14-point font.

Best Practices and Key Business Considerations

Documentation Requirements

Once businesses determine that they are a covered establishment and must implement a vaccination and identification program, they should consider exactly how they will comply with these requirements.

The guidance provides that acceptable vaccinations include those administered either in the U.S. or outside of the country, so long as they are approved by the World Health Organization.

Sufficient proof of vaccination can include any of the following:

- A photo or hard copy of the individual's Centers for Disease Control and Prevention vaccination card;
- A New York City COVID Safe Pass;
- A New York state Excelsior Pass;
- Official vaccine record; or
- A photo or hard copy of an official vaccination record of a vaccine administered outside the U.S. for one of the above-noted vaccines.

In addition to checking proof of vaccination, the guidance provides that businesses must view identification documents that allow the company to confirm that the person requesting entrance is the same person reflected on the proof of vaccination.

According to the city, this means that the identification must contain either:

- The name of the individual and a photo of the individual; or
- The name of the individual and the individual's date of birth.

Businesses must then compare the name and photo or date of birth with the information displayed on the proof of vaccination.

Covered businesses do not need to verify that an individual's proffered proof of vaccination is real, but they are encouraged (though not required) to report suspected fake vaccination cards by calling 311 or making a report to the New York state attorney general or the New York Department of Health.

Training and Dispute Resolution

Businesses should promptly determine who will be responsible for checking vaccination status, and then conduct training for those individuals on what processes they should follow.

If any vaccination records are collected, those records should be stored in a secure location, and access to them should be limited to just those individuals who have a pressing business need to view this information.

In addition to educating and training individuals on how to verify vaccination and identification documents, covered businesses should also consider what steps they will take if someone wants to enter but does not have proof of vaccination and/or matching identification.

Earlier in the pandemic, similar requirements mandating masks to enter indoor facilities led to confrontations. As such, businesses should consider what steps they can take to avoid or deescalate any confrontations that occur with individuals who refuse to show proof of vaccination and/or matching identification documents.

Individuals Unable to Be Vaccinated

Businesses also need to understand that certain individuals may be unable to receive vaccinations for

various reasons.

For patrons unable to be vaccinated due to a disability, businesses must engage in a cooperative dialogue with patrons and consider if there is a reasonable accommodation that would enable them to access the business's goods or services without posing a direct threat or undue hardship to the business.

It depends on the business, but reasonable accommodations can take many forms.

For example, a customer could purchase food to take with them, join a virtual exercise class or speak with a sales representative by phone.

Depending on the business, none of these options may be viable, and companies have the right to deny entry to indoor facilities to these patrons if there is not an effective way to provide the requested accommodation.

For employees, it is not as simple.

Under the New York City Human Rights Law, employers must engage in a cooperative dialogue with, and issue a final written determination to, employees requesting an accommodation due to disability, pregnancy, religious belief, or their status as a victim of domestic violence, stalking or sex offenses.

The new guidance makes clear that this accommodation process also applies to vaccination requirements, including when the employer's vaccination policy is pursuant to the city's requirement for indoor dining and recreation facilities.

Therefore, if an employee states that they cannot be vaccinated for any of these reasons — which may go beyond traditional accommodation grounds involving medical conditions or sincerely held religious beliefs — businesses must engage in cooperative dialogue with them

The guidance provides that businesses should determine if there is a way that the employee can continue to perform their job without posing a direct threat or undue hardship to the business.

Potential options an employer can consider include whether an employee can (1) work remotely, (2) work outside the indoor portion of the premises, or (3) work in an area separated from other people.

If there is no reasonable accommodation that would allow the employee to safely perform their job duties, the guidance provides that a covered business "may offer [the employee] a leave of absence until [they] are able to show proof of vaccination or it is otherwise safe for [them] to resume work."

A covered business may require documentation from an employee requesting an accommodation.

Exemptions

There are several significant exemptions to the requirements.

Individuals under the age of 12 do not need to show proof of vaccination, and outdoor areas of covered businesses do not need to check patrons' vaccination status. For example, structures maintained by restaurants on sidewalks do not count as indoors, per the guidance.

Indoor dining, fitness and entertainment locations within office buildings are excluded from the vaccination requirement to the extent that such facilities are only available to office staff. Therefore, if a company has a café on premises that is not open to the public and is just a service/perk available for its employees, that dining establishment is not covered by these requirements.

Individuals may enter covered businesses for a "quick and limited purpose" without showing proof of vaccination — specifically: using the restroom, placing or picking up an order or service, changing clothes in a locker room or making a delivery. The guidance specifies that these individuals should generally be within the indoors area for less than 10 minutes.

Individuals who enter an establishment solely for the purpose of making necessary repairs do not need to show proof of vaccination. Additionally, contractors working on the premises who are not New York City residents are not covered by the requirements.

Vaccination proof is also not required for nonresident performing artists and professional athletes entering a covered business for the purpose of performing or competing, and individuals accompanying them for the purpose of performing or competing in the covered business.

For each of these exemptions, the guidance provides that the exempt individual must wear a face mask at all times while indoors, except when eating and drinking, whenever they are unable to maintain six feet of distance from other people.

Additionally, businesses that find it to be unfeasible to check every individual's vaccination and identification status may consider temporarily closing the portion of their establishment covered by the order.

For example, a restaurant that converts operations just to outdoor dining, takeout and delivery is not required to check the vaccination status of employees or patrons.

Similarly, an office building that has a fitness facility on-site may consider closing that facility, and then they would similarly be exempt from coverage under these new verification requirements.

Timing for Compliance

While the vaccination verification requirements went into effect immediately on Aug. 17, enforcement will not begin until Sept. 13.

Based on de Blasio's announcements, on Sept. 13 city agencies will begin inspections and can issue fines for violations.

A covered business found to be noncompliant may be subject to a fine of \$1,000. Repeated violations may result in increased fine amounts or other enforcement actions.

As enforcement will begin in just a few weeks, covered businesses should act promptly to get their own policies and verification processes in place.

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[1] <https://www1.nyc.gov/office-of-the-mayor/news/225-001/emergency-executive-order-225>.

[2] <https://www1.nyc.gov/assets/counseltothemayor/downloads/Key-to-NYC-FAQ.pdf>.

[3] https://www1.nyc.gov/assets/cchr/downloads/pdf/materials/KeyToNYC_FactSheet-CustomerEmployee.pdf.

[4] <https://www1.nyc.gov/assets/doh/downloads/pdf/covid/posters/covid-19-vaccine-required-poster.pdf>.