

Employment & Labor Law Alert

December 2021

New York at the Epicenter (Again): New Mask and Vaccination Mandates Impacting New York Private-Sector Employers. What's Next?

Updated Feb. 16, 2022: New York Gov. Kathy Hochul announced that the state's mask mandate for indoor public places and those working in the private sector will not be renewed. In the absence of an affirmative action by the governor, the mandate lapsed on Thursday, Feb. 10. Following the governor's announcement, the New York Department of Labor issued a revised model safety plan under the New York Health and Essential Rights Act (HERO Act), recommending but not requiring masks in those indoor areas without a mask or vaccine requirement as a condition of entry and for anyone who is unvaccinated, including those with medical exemptions. As an added layer of protection, the revised plan recommends wearing a mask even when not required. The New York State Commissioner of Health also extended (once again) the designation of COVID-19 as a "highly contagious communicable disease that presents a serious risk of harm to public health," through March 17, 2022.

While the statewide mask mandate is no longer in place, vaccine requirements under the "Key to NYC" remain in force. Restaurants and bars, fitness centers, and entertainment and recreational venues such as theaters, museums, casinos, and concert and sports venues must require both staff and patrons 5 years old and older to provide proof they are fully vaccinated with an approved COVID-19 vaccination for dining, working out and attending entertainment events indoors. (Read our alert on the Key to NYC [here](#).) While masks are not required



for vaccinated patrons, many of the city's cultural and entertainment venues, including Broadway theaters, are reportedly keeping their mask mandates in place.

New York City businesses with more than one employee must also [require employees who enter the workplace to be vaccinated](#), and they continue to have the option to require employees and visitors to wear masks.

Executive Summary

Spurred by the alarming uptick in COVID cases brought upon by the Omicron variant, which has resulted in an exponential rise in the number of cases in New York City in just the past few days, New York State Gov. Kathy Hochul has issued an updated and expanded mask mandate for indoor public places and those working in the private sector. As of Dec. 13, individuals must wear a mask in all indoor public places—broadly defined in [guidance](#) to include office buildings—unless the businesses or facilities implement a proof of COVID-19 vaccination requirement. The mandate will remain in effect through Jan. 15, 2022, when the state will evaluate and consider whether an extension is warranted. At

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the same time, and as we reported [earlier this month](#), outgoing New York City Mayor Bill DiBlasio announced that all private-sector employees in New York City will be required to be fully vaccinated against COVID-19 by Dec. 27. At that time, the city promised to provide further guidance on enforcement of the mandate and reasonable accommodation, along with additional information to help small businesses implement the requirements. The New York City Department of Health on Dec. 15 issued [workplace vaccination requirement guidance](#).

Key Takeaways:

- Under the statewide mask mandate, businesses other than those in New York City must choose to fully implement either a mask or COVID-19 vaccination mandate and may not “mix and match” requirements. If an office does not require proof of vaccination as a condition of entry, all individuals, regardless of vaccination status, must wear a mask in the office.
- New York City businesses must implement a full-course vaccine requirement (they may also elect to mandate mask wearing) as of Dec. 27.
- New York State employers implementing a vaccine mandate and all New York City employers should implement a plan to maintain worker vaccination records and a process for handling worker requests for reasonable accommodations from the vaccine mandate.
- New York City employers should be prepared to make records available for inspection upon request by any New York City agency.
- New York City employers should sign the required attestation and post it in a conspicuous location at the worksite by Dec. 27.
- **What’s Next?** As publicly reported, several large employers and universities have promulgated their own, heightened policies for returning to in-person environments, including the requirement to receive the vaccination booster (the proverbial “third shot”). Anecdotally, we are also seeing some clients responding to the uptick in cases by delaying return to in-person environments and/or layering on the requirement of a recent, negative test before re-entry, regardless of vaccination status.

Statewide Mask Mandate

Mask Requirements

Under the new mandate, all individuals age 2 and older who are “medically able to tolerate a face covering” must wear a mask while in any indoor public place unless they are eating or drinking, regardless of vaccination status (if the office does not require proof of vaccination as a condition of entry). Unvaccinated individuals, including those with medical and sincerely held religious belief exemptions, must continue to wear masks in indoor public spaces, in accordance with current Centers for Disease Control and Prevention (CDC) guidelines.

Importantly, businesses and facilities must choose to fully implement either a mask or COVID-19 vaccination mandate and may not “mix and match” requirements. For example, a business may not allow fully vaccinated employees and patrons to be unmasked while requiring unvaccinated or partially vaccinated employees and patrons to wear masks. But for New York City businesses as of Dec. 27, as described in more detail below, there is no alternative: They must implement a full-course vaccine requirement (though they may also elect to mandate mask wearing).

Indoor Spaces Include Offices

“Indoor public place” is defined as any indoor space that is not a private residence. This includes businesses, facilities and venues in the state people typically frequent that are either publicly owned or owned by private business entities, including office buildings, indoor entertainment venues, concert halls and indoor recreational spaces.

What About the NY HERO Act?

Employers must continue to comply with the NY HERO Act (refer to our earlier client alerts [here](#) and [here](#) for specifics). On Dec. 15, the Acting Commissioner of Health [extended](#) the designation of COVID-19 as a highly contagious communicable disease through at least Jan. 15, 2022.

Vaccine Requirements for New York City Private-Sector Employers

The Vaccine Mandate

By Dec. 27, 2021, workers at covered businesses must provide or have provided proof of vaccination against COVID-19 to their employers. (Pursuant to the order, covered businesses are also required to check the vaccination status of all customers age 5 and older, but can allow customers to use the bathroom or for another reason that will take a small amount of time (for example, less than 10 minutes) without requiring proof of vaccination.)

Covered businesses must exclude from the workplace any worker who has not provided proof, unless (1) the worker is not vaccinated because a religious or medical accommodation applies, (2) the worker only ever enters the workplace for a quick and limited purpose, or (3) the worker is a performing artist or athlete who is not required to be vaccinated per the [Key to NYC Program](#).

Workers in New York City (regardless of residence location) are those who perform in-person work or interact with the public in the course of business. A “worker” means a full- or part-time staff member, employer, employee, intern, volunteer or contractor of a covered business.

- A covered business that wishes to avoid checking each contractor’s vaccination status individually is permitted to instead request that the contractor’s employer confirm that the contractor is vaccinated. However, the covered business must then keep a record of employer’s confirmation that the contractor is vaccinated.

Covered businesses include any nongovernmental entities that (1) employ more than one worker in New York City or (2) maintain or operate a workplace in New York City. Covered businesses include self-employed and sole proprietors who work at a workplace, interact with other workers or interact with the public in the course of their work.

Workplace is considered any location in New York City, including a vehicle, where an employee works in the presence of at least one other person.

Mandate Deadlines

Dec. 27, 2021:

- Deadline for covered workers to show proof they have received at least one dose of a COVID-19 vaccine
- Deadline for workers to apply for a reasonable accommodation because of religion or a medical condition
- Deadline for businesses to fill out and post the required attestation sign in a conspicuous location at the business site

Feb. 10, 2022 (45 days after Dec. 27): Deadline for covered workers to show proof of their second dose (for Pfizer or Moderna vaccines). Workers who do not have proof of a second dose within that time frame must be excluded from the workplace until they can display proof of vaccination for their second dose.

How to Verify Workers’ Proof of Vaccination

Verification of workers’ status is a two-step process: documentation of the worker’s identification and the worker’s actual proof of vaccination.

Worker’s Identification: Covered businesses must ask their workers to provide acceptable forms of identification or copies of such document (a picture on the worker’s phone or by using an app like NYC COVID Safe is permissible), which could include driver’s license, non-driver government ID card, IDNYC card, passport, or school or work ID card.

Proof of Vaccination: Covered business must also inspect proof of vaccination. The order’s accompanying [FAQs](#) note that it is easiest and most efficient for employers to keep a record of each worker’s proof of vaccination. This can be done in one of two ways:

1. Making a copy or taking a picture of the worker’s proof of vaccination
2. Creating the business’s own paper or electronic record that includes the following information for each worker:
 - The worker’s name
 - The worker’s vaccination status
 - For a worker who submits proof of the first dose of a two-dose vaccine, 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

Acceptable proof of vaccination includes:

- CDC COVID-19 vaccine card or a digital photo or photocopy
- NYC Vaccination Record or a digital photo or photocopy
- Official immunization record including from a health care provider, or a digital photo or photocopy
- Phone apps: (1) NYS Excelsior Pass, (2) NYS Excelsior Pass Plus, (3) NYC COVID Safe or (4) CLEAR Health Pass
- A photo or hard copy of an official vaccination record of a vaccine administered outside the United States for one of the following vaccines: AstraZeneca/SK Bioscience, Serum Institute of India/COVISHIELD and Vaxzevria, Sinopharm or Sinovac.

Protocol for Maintaining Workers' Proof of Vaccination Records

According to the order's [FAQs](#), any vaccination information should be collected and stored in a secure manner to ensure that the privacy and security of the information are protected. Such information should only be accessed by employees or other individuals who have a legitimate need to access such information for purposes of compliance with this order or other governmental orders, laws or regulations.

Workers Who Are Not Vaccinated

Unless a worker is subject to an exception, covered businesses must not allow non-vaccinated workers to enter the workplace. The order's [FAQs](#) note that "it is [employers'] decision whether to discipline or fire such worker, or if the worker can contribute to your business while working remotely."

Mandatory Attestation

Businesses must post the "vaccination required" poster in a place that is clearly visible to people before they enter the business. (Note: Covered self-employed and sole proprietors who do not have a fixed workplace or whose workplace is a vehicle may keep their own proof of vaccination with them at all times in lieu of posting the attestation sign.)

The required official attestation sign (available to download [here](#)) affirms that a business is complying with the order. In signing the attestation, businesses affirm that they have read the [Dec. 13, 2021 order](#) and that their

workplaces are in compliance. Businesses must post this attestation sign even if they previously had their own signage about employee vaccination status. However, businesses that previously posted a notice per the Key to NYC requirements for restaurants, fitness centers and entertainment venues do not need to also post this attestation sign.

Businesses With Multiple Locations

Employer Attestation: Each individual business location of a covered business is subject to the order and must post the official employer attestation sign at each business location in a conspicuous spot that affirms compliance with the order.

Employee Vaccination and Reasonable

Accommodation Records: A covered business with multiple locations may store employee vaccination records and reasonable accommodation records in one central location instead of having these records available at each location. The order's [FAQs](#) note that each business location should have contact information available to offer to city inspectors to put them in touch with the business representative who is centrally storing the records.

Businesses That Use Co-working Shared Spaces

Pursuant to the order's accompanying [FAQs](#), co-working spaces such as WeWork are covered entities under the order, and must check each individual worker's proof of vaccination when they rent space to individuals. This does not extend to commercial landlords that do not operate co-working spaces, which are only covered by the order with respect to their own employees.

Co-working spaces where small companies rent space regularly can instead request that a small company confirm that all its workers entering the shared workspace are vaccinated. However, the co-working space does need to keep a record of these requests, and of the companies' confirmations that their workers are vaccinated. The co-working space must additionally post the official attestation sign confirming compliance with the order in a conspicuous location at each coworking space.

Covered business renting workspace in a co-working space must verify and maintain the appropriate vaccination records for their workers.

Mandate Exceptions

As noted above, the order recognizes three exceptions to the vaccine mandate: (1) the worker is not vaccinated because a religious or medical accommodation applies, (2) the worker only ever enters the workplace for a quick and limited purpose, and (3) the worker is a performing artist or athlete who is not required to be vaccinated per the [Key to NYC Program](#).

Religious or Medical Accommodation: Employers with employees who do not get vaccinated because of employer-approved reasonable accommodations based on religion or a medical condition must maintain a record of (1) when the accommodation was granted, (2) the basis for providing the reasonable accommodation and (3) any supporting documents the worker provided for the reasonable accommodation.

Quick and Limited Purpose Entry: Workers may enter for a quick and limited purpose even if they have not shown the required proof of vaccination. The order's accompanying [FAQs](#) note a non-exhaustive list of examples of quick and limited purposes, including using the bathroom, making a delivery, or clocking in and receiving an assignment before leaving to begin a solitary assignment.

Nonresident Artists and Athletes: Non-New York City resident performing artists, college or professional athletes, and anyone who accompanies them.

Note that the order permits covered business to adopt stricter vaccination policies so long as these policies are not discriminatory or otherwise unlawful. Therefore, a covered business that did not want to make exceptions for quick and limited purpose entry and/or for nonresident artists and athletes would not have to. An employer would still have to provide accommodations from the vaccine mandate for medical or sincerely held religious beliefs, however.

Additionally, the order does not apply to covered businesses or workers who are subject to another order of the New York City Health and Mental Hygiene Commissioner, the New York City Board of Health, the New York City Mayor, or a New York State or federal entity that requires them to maintain or provide proof of full vaccination. However, the order does apply to covered

businesses and workers who are subject to federal requirements that are not currently in effect because of a court order (this would include the [OSHA ETS](#), the federal contractor/subcontractor vaccine mandate and the CMS health care provider vaccine mandate, all of which have been stayed on a nationwide basis by courts).

More About Religious and Medical Accommodations

Workers who have a sincerely held religious belief (not a social or political belief) or a medical condition that prevents them from being vaccinated may apply for a reasonable accommodation no later than Dec. 27. The order does not recognize reasonable accommodations for any other reasons. Upon an employee's notice of an accommodation request, a covered business must begin the reasonable accommodation process. Employers may—but are not required to—allow workers to continue coming into the workplace while their reasonable accommodation request is pending. Note that New York City agencies may review a covered business's reasonable accommodation process and records to ensure the employer is handling requests promptly and appropriately.

In conjunction with the order, New York City has released [Guidance on Accommodations for Workers](#), which includes checklists "intended to guide employers and managers in evaluating requests they may receive from workers for reasonable accommodations or exemptions from the requirement that they be vaccinated against COVID-19." The checklists include helpful questions to screen whether the worker has a valid basis for the accommodation request, and further provides potential accommodations that employers may consider in lieu of vaccination.

Enforcement and Penalties for Noncompliance

Inspectors from various city agencies (i.e., not just the New York City Department of Health and Mental Hygiene) will begin enforcing the order as of Dec. 27. If a covered business refuses to comply with the order, it will be subject to a fine of \$1,000 and escalating penalties thereafter for continuing violations.

Conclusion

The exponential rise in infection rates due to the omicron variant has already whiplashed New York, and the responsive governmental and private sector actions have been fluid and dynamic.

Should you have questions about compliance with these new provisions or about more progressive, voluntary approaches, or to discuss updates to your corporate reopening strategy, please contact your Loeb lawyer.

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