

> Client Alert

New York City Issues Accommodation Guidance on Mandatory Vaccination Requirements Under “Key to NYC” Program

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If you require any additional information regarding the “Key to NYC” program or other workplace issues related to COVID-19-related, please contact any of the attorneys listed below.

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On August 17, 2021, the New York City Commission on Human Rights (“NYCCHR”) issued guidance on the “Key to NYC” program, requiring that certain businesses adhere to the protocols of the City’s mandatory vaccination requirements with respect to both customers and employees. The “Key to NYC” program covers all employers with four or more employees, interns and independent contractors in New York City. A copy of the agency’s guidance for employers can be found [here](#).

As of August 17, individuals 12 and older in New York City are required to show proof that they have received at least one dose of a COVID-19 vaccine authorized for emergency use by the FDA or WHO in order to be admitted to indoor dining, fitness, and entertainment establishments covered by the “Key to NYC” program. This alert covers how New York City businesses should handle requiring proof of vaccination for customers and employees alike, as well as necessary notice and recordkeeping requirements, and potential penalties for noncompliance.

Handling Customers’ Proof of Vaccination

Valid proof includes presentation of either a physical government or CDC-issued vaccination card or digital vaccination proof through New York State’s Excelsior Pass protocol. Per the NYCCHR, customers under the age of 12 are excused from showing proof of vaccination, as are customers who only need to enter the covered premises for limited purposes such as using a restroom or placing a to-go food order, so long as they wear a mask and practice social distancing.

If a customer asserts that they are unable to show proof of vaccination because of a disability that has prevented them from receiving the vaccine, businesses are required to engage in a “cooperative dialogue,” meaning a good-faith discussion, as to whether any reasonable accommodation can be provided that will not pose a direct threat to other customers or staff, and will not impose an undue burden on the business. There is no “testing out” option under the “Key to NYC” program.

Addressing Unvaccinated Employees

Employers may ask employees whether they are vaccinated and also request proof of vaccination. As employers are not permitted to store medical information of their employees, any proof of vaccination should be discarded once a given employee’s vaccination status is confirmed.

Employers may ask unvaccinated employees if the reason they are unvaccinated is related to any of the following categories:

- Pregnancy;
- Disability;
- Religious belief; or
- Status as a victim of domestic violence, stalking, or sex offenses.

If an employee confirms that one or more of the above circumstances apply, the employer may ask for supporting documentation and must engage in a cooperative dialogue with that employee to discuss potential reasonable accommodations. Depending on the employment setting, reasonable accommodations for unvaccinated employees may include working remotely, working outside of the traditional office space, working in areas separated from other staff and visitors, or a change in shift time. Employers are only required to provide accommodations that will not impose an undue burden on the business.

Pregnant employees or those with disabilities may present a note from a medical provider supporting inability to get vaccinated, and employees asserting domestic violence or stalking victim status may similarly provide a note from a related service provider establishing their inability to show vaccination status. Employers may not request supporting documentation for employees requesting a reasonable accommodation based on religious belief unless the employer has an objective reason to question the sincerity of the stated religious basis for not getting vaccinated.

Unvaccinated employees that cannot be accommodated may be offered a leave of absence until they are either able to provide proof of vaccination or can otherwise safely return to work without posing a direct threat to other staff and visitors. This leave of absence may be unpaid unless the employer is compensating other employees unable to work for similar reasons.

Employers that prefer to allow unvaccinated employees who are not entitled to reasonable accommodations as a result of disability or religious belief may allow such employees to work on premises, subject to certain restrictions: they may only be allowed into the interior portion of any business for a quick and limited purpose, such as putting on a uniform in a locker room. They must wear a face mask any time they are unable to maintain a safe social distance of 6 feet from other individuals, including staff.

The NYCCHR has also issued a Fact Sheet that businesses may provide to their customers and employees, containing the above information and more details about the “Key to NYC” program. A copy of that Fact Sheet can be found [here](#).

In its haste to issue its guidance and Fact Sheet, however, the NYCCHR has left open as many questions as it has answered, so employers should expect updates and clarifications as they are addressed by the Agency. As but two examples of areas likely to spawn uncertainty, we note (i) that the guidance refers to “religious belief” as opposed to “sincerely held religious belief” as referenced in EEOC guidance. And while the NYCCHR guidance suggests an employer may not seek documentation from an employee asserting religious belief as a basis for refusing to be vaccinated, unless the employer has an objective reason to question the sincerity of the stated religious basis for not getting vaccinated, there are no empirical guidelines of any kind to assist an employer in determining what constitutes such an objective reason as opposed to telling an employer precisely what type of documentation would suffice as proof of such a belief. So too, (ii) the NYCCHR guidance references placing an employee for whom no reasonable accommodation exists on unpaid leave, but there is no specific guidance as to whether this is protected leave and, if so, how long is it “protected” before the employer is able permanently to replace such an employee on leave for operational reasons? These and other portions of the NYCCHR guidance will require swift and easily understood clarifications in order to permit employers to implement appropriate measures to operate their businesses while providing employees with reasonable accommodations in accordance with the mandates set forth in the “Key to NYC” program.

Notice and Recordkeeping Requirements

The “Key to NYC” program regulations also require businesses to post a sign advising of the vaccination requirement in a location that is easily visible to customers before they enter an indoor area. Businesses may use the poster created by the City or create their own with identical language, so long as it is at least 8.5×11 inches in size and in no smaller than 14-point font. The City’s poster can be found [here](#).

NYC businesses must also maintain a written record on-site describing how it will verify proof of vaccination for staff and patrons and produce it for inspection on demand. Businesses are not required, however, to keep records showing that it has satisfied the “Key to NYC” program requirements, but it may keep a log of people who have previously provided proof of vaccination and identification for administrative convenience purposes.

Penalties for Noncompliance

As of September 13, 2021, a noncompliant establishment may be fined up to \$1,000. Repeat violations may result in increased fines or other enforcement action.

Next Steps for NYC Businesses:

As the “Key to NYC” program is now in effect, with enforcement beginning by September 13, 2021, NYC employers should take the following steps to prepare for and ensure proper implementation of these new regulations:

- Place the vaccination poster in a place that is clearly visible to people before they enter a business establishment.

- Become familiar with the accepted proofs of vaccination as discussed above, and how it is to be logged without retaining medical information.
- Help staff get vaccinated and/or engage in cooperative dialogue with employees who request a reasonable accommodation.
- Develop a written implementation plan that will be available for inspection. This should include how a business will check the vaccination status of staff and customers before they enter — or immediately after they enter — the business establishment.

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The Morrison Cohen LLP Labor & Employment Law Team is available to provide legal advice concerning the “Key to NYC” program or other COVID-19 policies in the workplace, or any additional employment law questions that may arise from time to time and as needed.