

# LABOR AND EMPLOYMENT LAW

## INFORMATION MEMO

AUGUST 23, 2021

## Keys to Compliance with Executive Order 225: Key to NYC

Through [Emergency Executive Order 225](#)<sup>1</sup>, Mayor DeBlasio announced new vaccination requirements for access to indoor entertainment, recreation, dining and fitness centers in New York City. The mayor issued the order to incentivize vaccination, mitigate the spread of COVID-19 and its variants and protect the public health. The responsibility for implementation of the vaccination requirements rests primarily on the shoulders of entities<sup>2</sup> that host: (i) indoor entertainment and recreational settings, (ii) indoor food services and (iii) indoor gyms and fitness settings (covered entities). Covered entities may not permit patrons, employees, interns, volunteers or contractors to enter such areas without first displaying proof of vaccination and Identification.

**What Constitutes Proof of Vaccination and Identification?** The proof of vaccination required by the executive order must demonstrate receipt of at least one dose<sup>3</sup> of a COVID-19 vaccine authorized for emergency use or licensed for use by the U.S. Food and Drug Administration or authorized for emergency use by the World Health Organization.<sup>4</sup> Proof may be established by: (i) a CDC COVID-19 Vaccination Record Card, (ii) a New York City COVID Safe Pass or (iii) a New York State Excelsior Pass. Any official document bearing the name of the individual and a photo or date of birth can be used for identification. Examples include but are not limited to: driver's license, non-driver government ID card, IDNYC, passport and school ID card. Entities may keep a record of people who have previously provided proof of vaccination, rather than require proof of vaccination and identification be displayed every time a person enters the establishment.

**Are There any Exceptions to the Vaccination Requirement?** Yes. The executive order specifically *exempts* the following individuals from the vaccination requirement so long as they wear face masks and maintain six feet of social distancing while in the covered premises: (1) individuals entering for a quick and limited purpose (for example, using the restroom, placing or picking up an order or changing clothes in a locker room); (2) a nonresident performing artist or athlete if they are not an employee and are performing or competing on the covered premises; (3) a nonresident individual accompanying such a performing artist or athlete. Children 12 years of age and younger are also exempt from the vaccination requirement and are required to wear masks and maintain social distancing.

The executive order's accompanying guidance contemplates reasonable accommodations for qualifying individuals:

- The guidance requires entities to engage in a cooperative dialogue and provide reasonable accommodations to patrons with disabilities who cannot provide proof of vaccination and for whom an accommodation is possible. Examples of potential reasonable accommodations include allowing a restaurant patron to order take out or allowing a fitness facility patron to participate in an outdoor or virtual

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

<sup>2</sup> Pre K -12 public and non-public schools, child care programs, senior centers, and community centers are not subject to this requirement.

<sup>3</sup> The executive order requires proof of receipt of one dose of a COVID-19 vaccine, but covered entities may require full vaccination so long as they consider reasonable accommodations where appropriate.

<sup>4</sup> Covered entities are not required to verify the authenticity of a proof of vaccination; however, if you suspect someone is presenting a fake vaccination card, you may file a report with the NYS Attorney General via: <https://ag.ny.gov/complaint-forms>, calling 833-VAX-SCAM (833- 829-7226), or the state Department of Health by emailing [STOPVAXFRAUD@health.ny.gov](mailto:STOPVAXFRAUD@health.ny.gov).

class. An entity need not provide an accommodation that would impose an undue hardship or cause a direct threat to other customers or employees.

- The guidance requires entities to engage in a cooperative dialogue and provide reasonable accommodations to employees who cannot provide proof of vaccination employees because of a disability (which may include pregnancy-related medical issues), religious belief, or their status as a victim of domestic violence, stalking or sex offenses. Examples of reasonable accommodations include the option to work remotely to perform duties outside or to work in a socially-distanced location. The duty to accommodate does not require the entity to change the essential functions of an employee's job, and an accommodation is not reasonable if it imposes an undue hardship or causes a direct threat to other patrons or employees.

**What Does Compliance Entail?** Compliance with the new order requires covered entities to (1) notify patrons and employees of the vaccination requirement,<sup>5</sup> and (2) adopt a comprehensive compliance plan. The notice must include a sign indicating the vaccination requirement, posted in a conspicuous place, viewable by prospective patrons prior to their entrance into the establishment. The plan must be a written record and should describe the entity's protocol for implementing and enforcing the vaccination requirement. The plan must be available for inspection and review upon request of a city official.

Covered entities must ensure that they implement their compliance plans equitably as to all patrons and employees, without regard to an individual's race, national origin, religion, gender, age or any other protected category. For example, vaccination records of individuals should not be scrutinized more or less closely based on the perception that individuals of a particular race, national origin or religion are less likely to be vaccinated. Similarly, proof of vaccination provided by individuals perceived as more vulnerable to COVID-19 due to their age or other factors should not be subject to a higher standard of scrutiny than that applied to others.

**What are the Consequences for Noncompliance?** Covered entities<sup>6</sup> that fail to comply with the executive order can be fined an amount not less than \$1,000 for the first violation. If a covered entity commits a subsequent violation within 12 months of the first violation, the entity will be fined an amount not less than \$2,000. For every violation thereafter, such entity will be fined an amount not less than \$5,000 if the covered entity committed the violation within 12 months of the second violation.

**What Should You Do?** Given the broad application of the order and the diverse array of entities to which it applies, the way that institutions operationalize their compliance obligations will vary based on the nature of the business, staffing and hours of operation and the patrons they serve. The city will commence enforcement of the Key to NYC Executive Order on September 13, 2021, so time is of the essence.

If you would like help developing a compliance plan for your institution, please contact any [attorney](#) in Bond's [Labor and Employment practice](#) or the Bond attorney with whom you are regularly in contact.

<sup>5</sup> A covered entity may use the sign available online at [nyc.gov/keytoNYC](http://nyc.gov/keytoNYC).

<sup>6</sup> The EO references fines issued to "persons," but it is not clear whether fines may be imposed upon individual business owners or employees.

