New York City Issues COVID-19 Vaccination Mandate for Private Sector Employers

ALERTS

December 22, 2021

On December 15, 2021, New York City enacted the strictest vaccination mandate in the country for private sector employers. By Order of the Commission of the New York City Department of Health and Mental Hygiene, all private sector employers are required to exclude unvaccinated employees from the workplace effective on December 27, 2021. Unlike the federal Occupational Safety and Health Administration Emergency Temporary Standard (ETS), which has been delayed as a result of legal challenges, New York City's mandate is not limited to larger employers. It applies to all private sector employers that employ more than one worker in New York City. In addition, unlike the ETS, New York City's mandate does not permit testing as an alternative to vaccination.

Verifying and Maintaining Records of Vaccination Status

Beginning December 27, 2021, private employers in New York City must verify that all in-person workers, including employees, interns, volunteers, and contractors, have received at least one dose of a COVID-19 vaccine before permitting entry to the workplace. If the vaccine is part of a two-dose series, employers must receive proof that workers have received the second dose within 45 days after receiving proof that they received the first dose.

Employers must verify workers’ proof of vaccination and keep records of each worker’s vaccination status using one of the following methods:

- Maintain a copy of each worker’s proof of vaccination and, if applicable, a record of reasonable accommodation(s); or
- Maintain a record of such proof of vaccination, provided that such record includes: (i) the worker’s name, (ii) whether the worker is fully vaccinated, (iii) for workers receiving a two-dose vaccine series, the date by which the worker must submit proof of their second dose, which must be no later than 45 days after the proof of first dose was submitted, and (iv) for a worker who does not submit proof of COVID-19 vaccination because of a reasonable accommodation, the record must indicate that such accommodation was provided, and the employer must separately maintain records stating the basis for such accommodation and any supporting documentation provided by such worker; or
- Check the proof of vaccination before allowing a worker to enter the workplace and maintain a record of such verification.

Proof of vaccination includes any of the following: (i) a CDC COVID-19 Vaccination Record Card or other official immunization record, or photo or photocopy thereof, (ii) the New York City COVID Safe App showing a vaccination record, (iii) a valid New York State Excelsior
Pass/Excelsior Pass Plus, (iv) CLEAR Health Pass, or (v) any other method specified by the Commissioner.

For non-employees, such as an independent contractor, companies may instead require that the contractor's employer confirm vaccination status in compliance with this order.

Currently, the Order defines “fully vaccinated” to be when at least two weeks have passed after an individual received a single dose of a COVID-19 vaccine that requires only one dose, or the second dose of a two-dose series of a COVID-19 vaccine approved or authorized for use by the U.S. Food and Drug Administration or World Health Organization, or any other circumstance defined by the Department in its guidance associated with this Order. Employers should watch for changes to the definition of “fully vaccinated” and be prepared to update their records to confirm workers' receipt of a booster shot.

**Workers Exempt from Mandate**

The mandate does not apply to workers who work from their own home, whose employment does not involve interacting in person with other people, or to individuals who enter the workplace “for a quick and limited purpose.”

The mandate also does not apply to those workers who are entitled to accommodations from the mandate for medical or religious reasons. In a previous client alert, we discussed an employer's obligation to provide reasonable accommodations for employees and applicants who are unable to receive the COVID-19 vaccine due to a disability or sincerely held religious belief. Likely anticipating a flurry of requests for exemptions from the vaccine mandate, New York City published checklists for employers to help them evaluate accommodation requests. The medical exemption checklist is narrow, and unlike federal or state law, contemplates only two reasons for a permanent medical exemption to be granted and three reasons for a temporary medical exemption to be granted.

The religious accommodation checklist draws a clear distinction between covered sincerely held religious, moral, or ethical beliefs that must be accommodated and personal, political, or philosophical preferences that do not entitle workers to an exemption. Specifically, the checklist for religious accommodation requests states that a belief that the government should not force people to receive vaccines, that the vaccine is not safe or effective, that COVID is a hoax, or other expression of personal or political beliefs, do not qualify a worker for a religious accommodation. In a departure from the EEOC's guidance on religious objections under Title VII, which approves an employer's questioning of the sincerity of an employee's alleged religious belief only in limited circumstances, the checklists also encourage employers to inquire into whether the worker has received other vaccines or used over-the-counter medications and, if so, to seek an explanation as to why those vaccines and medications do not contradict the worker's beliefs.

The checklists expressly state that they are not legal advice. Employers should discuss with counsel the qualifying reasons for accommodation under federal and state law before adopting these checklists and should not use these checklists to evaluate accommodation requests for employees outside of New York City.

In determining whether and what type of accommodation should be granted, employers should keep in mind that the New York HERO Act requires all employees to wear masks in the workplace when at least one individual on the premises is not fully vaccinated, irrespective of any individual employee's vaccination status. This means that if an employer grants an accommodation to the vaccination mandate and permits an unvaccinated employee to enter the workplace, all other employees at the workplace must wear face coverings.

**Employer Affirmation**

No later than December 27, employers must affirm that they are in compliance with the Order by completing the affirmation provided on the New York City Department of Health and Mental Hygiene’s website, available at: https://www1.nyc.gov/assets/doh/downloads/pdf/covid/covid-19-vaccination-workplace-requirement-affirmation.pdf. The affirmation must be posted in a public place.

**Enforcement**
New York City inspectors from various New York City agencies are tasked with enforcing this Order. The Frequently Asked Questions for Covered Entities guidance issued by the City states that the inspectors’ goals are to educate and work with businesses to help them achieve compliance and to avoid fines and penalties. However, if a business refuses to comply, it will be subject to a fine of $1,000 and escalating penalties thereafter if violations persist.

**Action Items for Employers**

As we have seen with other vaccine mandates, the New York City order may be challenged as unconstitutional, violative of collective bargaining laws, and on other grounds. However, the Second Circuit Court of Appeals recently upheld New York’s vaccine mandate for healthcare workers, which may indicate how courts will evaluate the legality of this Order. In the meantime, employers should take the following steps to ensure compliance with the new requirements:

- Develop a legally compliant procedure for verifying the vaccination status of their in-person workers in New York City and maintaining records as required under the Order. We also suggest that employers ascertain the vaccination status of their remote workers to prepare for such employees’ potential return to the office.
- Be prepared to address workers’ requests for medical and religious exemptions.
- Complete and post the affirmation.
- Consult legal counsel if any in-person worker refuses to provide proof of vaccination against COVID-19 and is not entitled to an exemption.

Wilson Sonsini Goodrich & Rosati’s Employment and Trade Secret Litigation Group is actively following developments related to COVID-19-related employment law issues. For more information, please contact Rico Rosales, Marina Tsatalis, Jason Storck, Rebecca Stuart, or another member of the Group.

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[3] The two reasons to grant a permanent exemption are when a worker: (1) has had a severe allergic reaction (for example, anaphylaxis or angioedema) after a previous dose or to a component of all three approved COVID-19 vaccines, or (2) has a known diagnosed allergy to a component in all three approved COVID-19 vaccines. The three reasons to grant a temporary medical exemption are when a worker: (1) has presented medical documentation showing that she or he is within 90 days of monoclonal antibody or convalescent plasma treatment of COVID-19, (2) has presented medical documentation showing that she or he recently underwent stem cell transplant, CAR T-cell therapy, or other therapy or treatment that would temporarily interfere with the worker’s ability to respond adequately to vaccination, or mount an immune response due to treatment, or (3) has pericarditis or myocarditis.