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Vaccine Requirements – United States





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United States

In the United States, the federal government has faced challenges in imposing vaccination mandates for [large private employers](#),¹ [federal contractors](#), and [certain health care employees](#). Because of that, choices around vaccination mandates have largely been left to private employers, in compliance with state and local laws relating to vaccination status. While some locations have mandated vaccination for private employers (New York City), others have placed restrictions on private employers' ability to impose vaccine mandate (e. g., Florida, Texas, Utah, etc.). Below is a summary of two of these rules, to show how U.S. jurisdictions are treating vaccine mandates.

New York City Private Employer Vaccine Mandate

Effective December 27, 2021, covered employers must generally exclude unvaccinated individuals from workplaces in New York City. The New York City Commissioner of Health and Mental Hygiene ("City Health Commissioner") issued an [Order To Require COVID-19 Vaccination In The Workplace](#) ("Order"), citing authority under Section 556 and 558 of the [New York City Charter](#) as well as Section 3.01 (d) of the [New York City Health Code](#). The guidance documents, which include a [summary of the vaccination requirement for workplaces](#), [Frequently Asked Questions for Covered Entities](#) (FAQs), [guidance on accommodations for workers](#), and [guidance for employers on equitable implementation of COVID-19 vaccine requirements](#), among other documents (collectively, "Guidance Documents"), contain notice-posting procedures that will apply to all covered workplaces within New York City. The Guidance Documents also contain a broad definition of covered employers and individuals and outline the Order's requirements. New York City businesses had just 10 days to comply with the new rules when they were issued.

Who Is Covered?

The Order defines a "covered entity" as (1) any private entity that employs more than one worker or maintains a workplace in New York City, or (2) any self-employed individual or sole practitioner who works within a workplace or interacts with other workers or the public in the course of doing business. This broad definition includes not-for-profit organizations, non-government agencies, and religious institutions.

¹ The Supreme Court of the United States [blocked](#) the federal rule for employers to require employees to either be vaccinated or regularly tested for COVID-19 as a condition of employment.

Epstein Becker & Green



875 Third Avenue
New York, New York
10022
United States

Susan Gross Sholinsky
sgross@ebglaw.com

Steven M. Swirsky
sswirsky@ebglaw.com

Lauri F. Rasnick
lrasnck@ebglaw.com

Nancy Gunzenhauser
Popper
npopper@ebglaw.com

John Houston Pope
jhpope@ebglaw.com

Christopher Shur
cshur@ebglaw.com

www.ebglaw.com

Tel: +1 (212) 351-4500



United States – (cont'd)

The Order's definitions of "worker" and "workplace" are likewise expansive. Any individual who works in person in New York City at a workplace is covered, whether full- or part-time, paid, or unpaid, as an employee, volunteer, intern, or independent contractor. Any place, including a vehicle, where a worker is on the job in the presence of anyone else, whether a co-worker or a member of the public, falls under the Order's definition of a covered workplace.

Explicitly excluded by the Order are any individuals who work remotely "from their own home" and do not interact in person with any co-workers or members of the public in the course of their employment, as well as anyone who may enter a workplace "for a quick and limited purpose." In addition, the Order does not apply to those non-New York City residents who are performing artists, athletes, or individuals accompanying such performing artists or athletes who do not otherwise have to display proof of vaccination pursuant to [Key to NYC](#) rules.

Notably, the Guidance Documents do not address how they apply to unionized workplaces, and it seems that employers are not granted latitude in implementing the mandate, with the exception of handling individual requests for reasonable accommodations. As such, it appears that employers likely do not have "significant flexibility and/or discretion in implementing" the mandated vaccination policy. [As we advised previously](#), such latitude would trigger a duty to bargain over a change in the terms and conditions of employment [under the recent guidance](#) issued by the General Counsel of the National Labor Relations Board. Employers may, however, face bargaining obligations with respect to treatment of requests for accommodation and the status of those who apply for but do not receive accommodations.

What is required?

All workers must either (1) submit proof of at least one dose of a vaccine or (2) request a reasonable accommodation based on a disability or sincerely held religious belief. To comply, all New York City employers must institute a requirement that any workers (including volunteers and interns, as well as those employed by providers of temporary labor) who enter the workplace be vaccinated against COVID-19. Indeed, unlike some government vaccination programs, the New York City mandate does not offer a so-called "vax or test" option under which employees may choose to submit to frequent testing for COVID-19 in lieu of becoming vaccinated. The Order requires those who are not vaccinated or who have not applied for reasonable accommodation to be excluded from workplaces.





United States – (cont'd)



Acceptable [proof of vaccination](#) includes a CDC vaccine card, Excelsior Pass, Excelsior Pass Plus, a NYC vaccine record, the NYC COVID Safe app, or CLEAR Health Pass. Any worker who presents proof of only one shot of a two-dose series must provide proof of the second dose within 45 days of the date they received their first dose. Employees who received a first vaccine dose (in a two-dose series) more than 45 days ago, but never received their second dose must be excluded from the workplace until they either (1) receive a second dose or (2) request a reasonable accommodation.

Employers must retain records showing compliance with the proof of vaccination requirement. Employers may maintain records of vaccination status in a few ways:

- Retain a copy of the proof of vaccination (to [comply with the Americans with Disabilities Act](#) (ADA), this must be maintained in a separate confidential medical file);
- Review proof of vaccination and create a log containing: (i) worker's name, (ii) whether the worker is fully vaccinated, (iii) for workers who submitted proof of the first dose of a two-dose vaccine, the date by which they can provide proof of a second dose (no later than 45 days after the first dose), or (iv) record of any reasonable accommodation with supporting documentation; or
- Review proof of vaccination each day as the person enters the workplace.

Employers are also mandated to comply with new notice posting requirements. New York City's Department of Health and Mental Hygiene (DOHMH) has created a one-page [attestation sign](#) that employers must fill out and post in a public location at each of their workplaces within New York City. An additional [optional poster](#) has also been released.

How to Handle Requests for Reasonable Accommodations?

Workers who have a sincerely held religious belief (not a social or political belief) or a medical condition or disability that prevents them from being vaccinated may apply for a reasonable accommodation. According to the guidance, workers may be permitted to continue coming into the workplace while their reasonable accommodation requests are being evaluated.

Employers may deny a reasonable accommodation request that imposes an undue burden on the employer.



United States (cont'd)

The FAQs provide examples of accommodations that are likely to pose a direct threat per the guidance as accommodations that would allow an unvaccinated employee to engage in a high-risk activity, such as yelling or exercising, while in close proximity to high-risk individuals.

Recordkeeping

Additionally, employers are required to keep a record of any reasonable accommodation. The [FAQs](#) document provides that if any workers remain unvaccinated because of an approved reasonable accommodation based on their religion or medical condition, the employer must maintain a record consisting of:

- when the employer granted the accommodation,
- the basis for granting such accommodation, and
- any supporting documents the worker provided.

None of the guidance specifies whether such information should be kept confidential, but to the extent that such records contain medical information, employers should maintain them separately from other personnel records [as required under the ADA](#). As detailed above, the checklist will demonstrate that the employer handled the reasonable accommodation request appropriately if followed and kept on file.

Enforcement and Penalties for Noncompliance

According to the Guidance Documents, inspectors from various City agencies were authorized to begin enforcing the Order on December 27, 2021, and all inspectors, no matter which agency they are from, will be inspecting for compliance with the same requirements.

Although the Guidance Documents provide that the goal is to educate and work with businesses to help them achieve compliance, if a business refuses to comply, it would be subject to a fine of \$1,000 and escalating penalties thereafter if violations persist.

Florida Vaccination Exemption Law

Governor Ron DeSantis signed [HB 1-B, Ch. 2021-272, Laws of Fla.](#) (the "Vaccination Exemption Law"), which prohibits every private employer from issuing COVID-19 vaccination mandates for its Florida employees without allowing employees to opt out for five specific exemptions:





United States (cont'd)



(i) medical reasons, including pregnancy or expectation of pregnancy, as determined by a physician, advanced practice registered nurse, or physician assistant; (ii) religious reasons, based on a sincerely held belief; (iii) COVID-19 immunity, based on prior COVID-19 infection, as documented by a lab test; (iv) periodic testing, agreed to by the employee and at no cost to the employee; or (v) based on compliant use of employer-provided personal protective equipment ("PPE"), agreed to by the employee.

Employers that receive a "completed exemption statement" must allow the requesting employee to "opt out" of the employer's vaccination requirements. The Florida Department of Health has posted approved exemption forms, which can be found for the particular exemption here: (i) [medical exemption](#); (ii) [religious exemption](#); (iii) [COVID-19 immunity exemption](#); (iv) [periodic testing exemption](#); and/or (v) [employer-provided PPE exemption](#).

Employers will be found to have violated the Vaccination Exemption Law by failing to provide for exemptions in their COVID-19 vaccination mandate and terminating the employee—which includes "the functional equivalent of termination," as defined below.

On December 2, 2021, the Florida Department of Legal Affairs issued a [Notice of Emergency Rule](#) (the "Rule"), further defining key provisions of the Vaccination Exemption Law. Moreover, this Department (headed by the Attorney General) issued guidance in the form of [FAQs](#) (the "Guidance"), outlining the employee complaint procedure for potential employer violations of the Vaccination Exemption Law.

The Rule clarifies that the Vaccination Exemption Law applies to all private employers, but does not apply to independent contractors, volunteers, or someone who works for nonprofit agencies without compensation. The Rule further provides its own definition of "independent contractor," which differs significantly from the common law criteria, usually employed to differentiate independent contractors from employees, and the Fair Labor Standards Act ("FLSA") definition under wage and hour law.

An employer can be found liable under the Vaccination Exemption Law for terminating an employee who claims an exemption or subjecting the employee to the functional equivalent of termination. The Rule defines "functional equivalent of termination," as used in the Vaccination Exemption Law, to mean: (i) the employee resigned under duress; or about exemptions



United States (cont'd)

(ii) the employee is subject to intolerable working conditions such that a reasonable person in their shoes would feel compelled to resign. Notably, neither the text of the law nor the clarification added by this regulation purports to state any rule

Complaint Procedure

The Guidance outlines the complaint procedure for employees who allege employer violations of the Vaccination Exemption Law, and states that the Vaccination Exemption Law only applies to those private employers who impose COVID-19 vaccination mandates on employees located in Florida. To claim relief, employees must first submit an exemption form to the employer. Employers that do not comply with the Vaccination Exemption Law—by failing to provide for the law's exemptions and taking adverse actions against the employee—will be subject to fines (which may be substantial) but are not required to reinstate the employee.

The Rule provides for a web-based complaint procedure, either through an [electronic portal](#) or submitted via [email](#). Complaints that are received by the Department of Legal Affairs, once deemed legally sufficient, are subject to the Rule's procedures for investigation and adjudication.

Notably, the fines may be avoided entirely if an employer reinstates an affected employee, with full back pay, after being notified by the Department of Legal Affairs of the violation, but before a final determination of the violation is entered. Given that the Rule provides the employer with twenty-one days to respond to a notice of violation, that time period can be seen as a safe harbor to ameliorate a violation through reinstatement and remedy by payment for work time lost.

