

# MSF CLIENT ALERT

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## New York City Issues Details On COVID-19 Vaccine Mandates for Certain Indoor Activities

*Rules and regulations regarding New York City's vaccination mandate for employees and patrons of certain indoor activities clarify the application of the mandate, including exemptions and record keeping requirements.*

August 17, 2021

On August 16, 2021, New York City (the "City" or "NYC") issued an [emergency executive order](#) (the "Order") and an [FAQ](#) containing details of the City's requirement that individuals be vaccinated against COVID-19 in order to participate in, or be employed at, certain indoor activities as discussed in our prior [alert](#). The Order details the establishments covered, the requirements of the mandate, the timeline of the mandate and certain exceptions.

### What Businesses are Covered by the Order?

The mandate applies to indoor entertainment and recreational settings, indoor food services and indoor gyms and fitness settings. The Order defines these categories as follows:

- **Indoor Entertainment and Recreational Settings** – Indoor portions of movie theaters, music or concert venues, adult entertainment, casinos, botanical gardens, commercial event and party venues, museums and galleries, aquariums, zoos, professional sports arenas and indoor stadiums, convention centers and exhibition halls, performing arts theaters, bowling alleys, arcades, indoor play areas, pool and billiard halls, and other recreational game centers.
- **Indoor Food Services** – Indoor portions of food service establishments offering food and drink, including all indoor dining areas of food service establishments that receive letter grades as described in section 81.51 of the Health Code; businesses operating indoor seating areas of food courts; catering food service establishments that

provide food indoors on its premises; and any indoor portions of a food service establishment that is regulated by the New York State Department of Agriculture and Markets offering food for on-premises indoor consumption. Soup kitchens and food service establishments offering food and/or drink solely for off premises or outdoor consumption are not covered.

- **Indoor Gyms and Fitness Settings** – Indoor portions of standalone and hotel gyms and fitness centers, gyms and fitness centers in higher education institutions, yoga/Pilates/barre/dance studios, boxing/kickboxing gyms, fitness boot camps, indoor pools, CrossFit or other plyometric boxes, and other facilities used for conducting group fitness classes.

### What is Required by the Order?

Pursuant to the Order, all covered businesses shall not permit a patron, employee, intern, volunteer or contractor aged 12 or older to enter the premises without providing proof that they are vaccinated against COVID-19 and identification bearing the same identifying information as the proof of vaccination. Covered businesses must also post a required poster in a place clearly visible to patrons before entering their business. The poster can be found [here](#). Finally, covered businesses must develop and maintain a written policy outlining their protocol for implementing and enforcing the requirements of the Order. This policy must detail how the covered business will verify proof of vaccination status for staff and patrons.

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Children under the age of 12 are not covered by the mandate as they are not eligible for vaccination. These children may enter covered businesses without proof of vaccination. However, they must wear a face mask, when not eating or drinking, if they are unable to maintain six feet of social distance from others.

## What Vaccines are Acceptable?

Acceptable vaccines are those authorized for emergency use or licensed for use by the US Food and Drug Administration or authorized for emergency use by the World Health Organization. At the time of this alert, that is limited to:

- Pfizer/ BioNTech
- Moderna
- Johnson & Johnson/Janssen
- AstraZeneca
- Serum Institute of India
- Sinopharm
- Sinovac

## What is Valid Proof of Vaccination?

Acceptable proof of vaccination includes:

- A CDC COVID-19 Vaccination Record Card;
- An official immunization record from the jurisdiction, state or country where the vaccine was administered;
- A digital or physical photo of the individual's CDC COVID-19 Vaccination Record Card or official immunization record;
- A New York City COVID Safe Pass; or
- A New York State Excelsior Pass

## Who is Exempt from the Vaccination Mandate?

The Order identifies four categories of persons who are not subject to the vaccination mandate. However, while exempt from these vaccination requirements, these individuals must wear a mask at all times when they are unable to maintain six feet of distance from other individuals except when they are eating and drinking. The exempt categories include:

- Individuals entering for a quick and limited purpose (for example, using the restroom, placing or picking up an order or service, changing clothes in a locker room, or performing necessary repairs);
- A nonresident performing artist not regularly employed by the covered entity while they are in a covered premises for purposes of performing;
- A nonresident professional athlete/sports team who enters a covered premises as part of their regular employment for purposes of competing; and
- A nonresident individual accompanying a performing artist or professional athlete/sports team into a covered premises as part of their regular employment so long as the performing artist or professional athlete/sports team are performing or competing in the covered premises.

Surprisingly, the Order does not include an exception for individuals who are unable to be vaccinated due to an underlying health condition or sincerely held religious belief. Nor do the FAQs provide for any such exceptions. Significantly, the FAQs, in response to the question "Do I need to provide any reasonable accommodations to patrons and employees?", state that businesses should consider accommodations while being mindful of the purpose of the Order.

However, the Order directs the City's Commissioner on Human Rights to develop guidance to assist covered businesses to comply with the Order consistent with the requirements of the New York City Human Rights Law. Accordingly, we still recommend that covered businesses accommodate individuals who are unvaccinated to an underlying health condition or sincerely held religious belief unless future guidance from the Commission on Human Rights states otherwise. Some examples of such accommodation for guests could include outdoor dining, requiring masks when not eating or drinking, and requiring proof of a negative test within 48 hours of dining. Some examples for employees could include a weekly testing requirement, assigning them to outdoor dining only and requiring masks.

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## What are the Deadlines to Comply with the Order?

The Order goes into effect on August 17, 2021. However, the City will not issue fines, penalties or forfeitures for violations until September 13, 2021.

## What are the Penalties for Failure to Comply with the Order?

A first violation of the Order will result in a \$1,000 fine. A second violation within 12 months of the first violation will result in a \$2,000 fine. All further violations within 12 months of the second violation will result in a \$5,000 fine.

## What Do Covered Businesses Need to Do Now?

With respect to employees, covered businesses should immediately survey their workforce to determine whether any employees remain unvaccinated and advise them about this mandate. Employers should advise employees that they should receive their first dose of the COVID-19 vaccination immediately subject to required reasonable accommodations. Covered businesses should track all employees' vaccination status in order to ensure compliance with the vaccination requirement for employees. Should employees fail to provide proof of vaccination, contact counsel to discuss appropriate next steps.

Covered businesses should also determine how to implement the mandate and reduce the plan to writing, pursuant to the requirements of the Order, and post the required poster at its entrances.

Please contact an attorney in MSF's Employment Group if you need assistance with respect to this information including assistance preparing a compliant plan and with any questions regarding accommodations.



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