



Episode 9: “Key Things to Know about the ‘Key to NYC’ and Workplace Vaccination Requirements”

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[Ari Kwiatkowski]: Hi, everyone, this is a Barclay Damon live broadcast where we discuss all things L&E... labor and employment. I’m Ari. Let’s dig in.

[AK]: Hi, everyone, welcome to key things to know about the Key to NYC and workplace vaccination requirements. This is our next episode in our series of episodes where we tell you everything you need to know about navigating workplace issues resulting from the COVID-19 pandemic.

For our listeners and our viewers on YouTube, you probably can see that I am coming to you from the comfort of my own home just for this week only.

Just have to say that omicron is out here doing the absolute most, and I just hope everyone is being safe and staying healthy. So being that I’m in my home office, as you can see, I think this is a good segue just for one of my fun or interesting facts. If you guys have listened to the last couple of episodes, you know, I have not exempted myself from the requirement that I ask my guests to provide some fun or interesting fact about themselves. So today I’m going to tell you a little bit about me ... or a fun, I think, interesting fact about me. And since I’m in my home office, I have a visual aid. If you’re watching on YouTube, you can see I am pointing to some books on my shelf, which is the full collection of the Harry Potter series. Like any self-respecting millennial, I am a self-identified Potter-head. I love Harry Potter, love the series. I was one of those people who was standing in line at, you know, 11:55 p.m., you know, circa early 2000s at Borders freezing in the parking lot, trying to get the new Harry Potter book, you know, right at midnight. So I thought since I am in my home office and you can see the books in the background, I would just go ahead and let you guys know that I’m a Potter-head and proud of it. And I did watch the news special, the reunion special because I’m sure you’re listening and you also love Harry Potter. You watch it. It was great.

So let’s dig in, guys. Today I wanted to talk a little bit about, you know, the new executive orders that have gone into place in New York City. If you listen to our last few episodes, we’ve talked about federal vaccination mandates. We’ve talked about statewide mask mandates for our listeners and our clients in New York City, we have not forgotten about you. Today, we’re going to talk about the key to NYC vaccination requirement and the workplace vaccination requirement. Just to clarify for our listeners, these are two separate executive orders that were issued by at the time, Mayor de Blasio. And, you know, we’ll kind of go through both of them and the significance of those and how both impact employers.

So just a little bit of background. Back on December 15, Mayor de Blasio announced these expanded mandatory vaccination requirements, like I said, two separate executive orders. Let’s focus on the first, which is the “Key to NYC” program. And just to clarify for our listeners, the Key to NYC program became effective December 27. The executive order cites, you know, a number of reasons for these expanded vaccine requirements, including, you know, the spread of the omicron variant, the high vaccination rate or high vaccination percentage among New Yorkers and the increased risk, excuse me, the increased risk for reinfection as reasons for enacting the mandate.

So let's talk generally about what the Key to NYC program is. So generally, New York City's COVID-19 vaccination requirements have been expanded to include children ages five to 11. So the language from the executive order says "a covered entity shall not prohibit a patron, employee, intern, volunteer or contractor to enter a covered premises without displaying proof of vaccination." And for individuals 18 and older proof of identification.

So let's break that down. So basically, this says people 12 and older participating in indoor public activities have to show proof of vaccination, ID proof of receipt of both vaccines. If Pfizer, if the individual has received Pfizer or Moderna, or proof of one vaccine for J&J, children ages five to 11 are required to have proof of vaccination or at least proof of receiving one vaccine. But starting January 29 of 2022, kids ages five to 11 have to show proof of vaccination ...to prove a full vaccination to be permitted entrance into the specific premises that are covered by the executive order. So under the order, "patron" is defined as any individual five years or older who "patronizes, enters, attends an event or purchases, goods or services within a covered premise." You might be asking what is a "covered premise"? Covered premise under the order is, you know, there are several examples and several specifically identified establishments "indoor entertainment and recreational settings," certain meeting spaces, so movie theaters music concerts, venues, adult entertainment, casinos, museums, zoos, sports arenas, indoor stadiums. Covered premises under the Key to NYC program also include indoor food services such as restaurants, indoor dining areas, indoor portions of dining areas. You know, we talked about this a little bit last week. Indoor food services under the Key to NYC program does not include a structure on the sidewalk or roadway if entirely open on the side facing the sidewalk. So obviously in the city, a lot of restaurants have kind of provided for additional outdoor seating space and little hut-type structures where the side facing the restaurant is open. Those are not covered by this, and outdoor dining structures for individual parties like plastic domes are also not covered by this.

But other examples of covered premises are indoor fitness facilities, gyms, spas, things like that. Under the executive order, a covered entity ... pretty broad definition. Any entity that operates one or more covered premises, as we just discussed, except a covered entity under the Key to NYC program is not ... does not include pre-K through 12 grade public and non-public schools, houses of worship, childcare programs, senior centers, and community centers. So those are not included. And the Key to NYC program, you know, also talks about proof of vaccination. If you have listened to our last few episodes, you guys know the drill. Very similar to the other mandates that we have discussed; vaccination card, NYC COVID Safe App, Excelsior Pass, CLEAR digital vaccine card—those all qualify as proof of vaccination under the Key to NYC program.

So you know the Key to NYC program really talks about patrons, you know, customers, things like that. So if you're an a business owner in New York and you operate one of these covered premises, you know the Key to NYC executive order tells you what you need to know. You know, mostly for patrons or customers. But in addition to the Key to NYC program, New York City also has a workplace requirement for COVID vaccination. As I mentioned earlier in the episode, this is a separately issued executive order, and this also went into effect on December 27. So let's transition from if you're a business owner or you own a covered premises in New York City from what you need to know about your patrons or customers to what you need to know about your employees.

So the workplace requirement for COVID-19 vaccinations says "workers must provide proof of vaccination against COVID-19 to a covered entity before entering the workplace; and a covered entity must exclude any employee who has not provided such proof, except for those employees who request and are granted accommodations for religious and medical exemption."

So basically, let's break that down. The ... the workplace requirement for COVID-19 vaccination is essentially saying that employers must verify employees' proof of vaccination and that employees must be vaccinated or they can be excluded from the workplace, absent being granted a request for a reasonable accommodation. And if you listened last week, we really dove into that as it relates to what the EEOC has said about requests for accommodation; later in this episode, we're going to talk a little bit more about that as it relates to what

New York City has said about requests for accommodation.

So basically, you know, fully vaccinated under the workplace requirement for COVID-19 means that it has been two weeks since the employee received the Johnson & Johnson vaccine, or it's been two weeks since the second dose of a Pfizer or Moderna vaccine—or an employee has received the first dose of a two-dose vaccine. But in that situation, the employee must present proof of vaccination to the employer within 45 days.

So under the workplace requirement for COVID vaccine... COVID-19 vaccination as of December 27, if an employee had one vaccine employee is required to provide proof of second vaccine within 45 days of the first dose. You know, under the workplace requirement what the city has defined covered entity as is very broad. Basically, a covered entity is defined as a “nongovernmental entity that employs more than one worker in New York City, or maintains a workplace in New York City, or a self-employed individual or sole proprietor who works in a workplace or interacts with others in the course of their business.”

So if you're a sole proprietor and you're in New York City and you're not working remotely, you're interacting with others, you would be covered as a covered entity under the New York City workplace requirement... vaccination workplace requirement, excuse me. Under the workplace requirement, “worker” is also defined very broadly. Quoting from the executive order and the guidance issued by the city, a worker is “an individual who works in person in New York City at a workplace in New York City.” So this is, like I said, a broad definition. This includes full-time, part-time, staff members, employees, interns, volunteers, or contractors. So it is a broad definition of who qualifies as an employee under the New York City COVID-19 workplace requirement.

One interesting thing, though, is that the workplace requirement of the city has said that an employee under excuse me, a worker under the executive order does not include an individual who enters the workplace for “a quick and limited purpose.” “Quick and limited purpose” is the quote taken directly from the executive order. And if you're listening, you know, you might be wondering, or at least I know when I first read it, I was wondering, well, what is what does that mean, “quick and limited purpose”? Basically, the guidance issued by the city has said that, you know, if a worker comes in briefly to use the bathroom, to make a delivery, to receive an assignment for a few minutes, although a time limitation isn't exactly explicitly spelled out, that that worker would not be covered under this because they were just in the workplace for a quick and limited purpose.

One other thing I wanted to point out for our listeners is that a worker under this requirement does not include non-city residents who are performing artists, college or professional athletes, or those individuals who are accompanying performing artists who don't live in the city, or professional or college athletes who don't live in the city. So that's an interesting carve-out. So “workplace” also defined very broadly. It's any location “where work is performed in the presence of another worker or a member of the public,” and the guidance explicitly says that that does also include a vehicle.

So in broad strokes, the New York City workplace vaccination requirement essentially requires businesses to verify proof of vaccination, or verify that their employees are vaccinated against COVID-19. And the city has said that there's three ways that this ... that an employer can identify an employee's vaccination status. One is proof of a vaccination card, two businesses can create their own paper or electronic record that includes the name, you know, what the employee's name, whether the employees vaccinated the date, the second dose will be provided if the employee is not fully vaccinated, and businesses lastly can check each employee's vaccination status each day.

So, you know, those are the three ways that a business can verify, you know that an employee is vaccinated. And, you know, it seems like the third one might be a little more onerous. But you know, what is the business, a business or an employer in New York can really choose which of those three options the employer wants to use to verify employee vaccination status.

You know, one interesting thing I wanted to talk about because we've got a couple of questions about this is, you know, contractors. So you know, the vaccination requirement says that contractors need to be vaccinated as well. One important thing to know is if you're an employer and you're using a contractor at the ... at your business or on premises, you don't need to keep a record of the contractor's vaccination status, specifically. You can request that the contractor's employer confirm that the contractor is vaccinated. But if you're going to go that route, then you need to keep a record of the request to the contractor's employer and the response.

One thing I wanted to mention which you know again, if you listen to any of our episodes so far as it relates to vaccination requirements is exemptions or requests for accommodations. So I should note for each of the ways that we just discussed, an employer can verify proof of vaccination, that for each of those or under each of those circumstances, employers should also have a record of any employees who have requested reasonable accommodations for medical or religious reasons and have been granted such accommodations as well. So that's another thing an employer must keep track of. So I want to dive in a little bit on exemptions and requests for accommodations under the New York City workplace vaccination requirement.

New York City has, you know, issued some additional guidance on this and has put some pretty clear parameters on what employers can do and what employers can ask, you know, in response to a request for an accommodation on either of those bases. The executive order said that... says that workers who have a sincerely held religious belief or a medical condition that prevents them from being vaccinated you know must ... must have applied for a reasonable accommodation by December 27. New York City has said that employers may permit workers to remain in the workplace while considering the accommodation request. And actually, New York City has published guidance on hand... on how to handle such requests, including a checklist, and that checklist is available on the city's web site or the web page devoted to COVID-19. So if you listen to our episode a couple episodes ago, we went through, you know, kind of in detail what the EEOC has said about requests for accommodations and things like that nature, and this is very similar. If you look at the checklist, the checklist has, you know, a number of questions that an employer can ask an employee to verify medical conditions and to verify that the employee has a sincerely held religious belief. You know, I would note that similar to what we discussed a couple of weeks ago, you know, an employer in New York City can ask for proof of medical documentation or proof of, you know, documentation for a medical condition that would prevent an employee from being vaccinated in the New York, New York City has said that, you know an employer should not question a religious belief unless the employer has an objective basis to do so, or an objective belief that the belief that the employers, you know, sincerely held religious beliefs is questionable or not objectively sound.

So for our employers in New York, you know, may be a good idea to just take a look at that checklist and follow that checklist. Because New York City has said that if an employer chooses to use that checklist and keeps it on file when evaluating requests for reasonable accommodations, it will likely demonstrate that the employer handled the request appropriately. So I definitely wanted to point that out to our employers and our listeners in the New York City area, because I think that is very helpful and very important.

You know, I wanted to go through a few common questions that I think we've gotten here at Barclay Damon as it relates to this workplace requirement. You know, one question is whether the... the workplace vaccination requirement applies to remote worker. And if a remote worker comes into the office for a quick and limited purpose only, as we discussed a few minutes ago, you know that remote worker is not covered by the New York City workplace vaccination requirements. Another question: you know what if an employee got a first dose before December 27, before this executive order went into effect, but never got their second dose? The answer is that the employee should be excluded from a workplace if they have not requested a reasonable accommodation until they receive the second dose. So that's something that the guidance issued by the city has been explicit about.

You know, another question, which I think is interesting is—and this is pretty common, you know, down in the ... in the city, of course—what if an employee works in New York City but is not a resident of New York City, so works in New York City, but does not live in New York City? The guidance issued by the city says that does not matter. This applies to employees who work in New York, regardless of whether or not they live in New York. So I think that's something important. And, you know, we've gotten a couple of questions about that as well.

You know, there are a couple recordkeeping requirements under the executive order I wanted to point out. One of which is that businesses have to complete the “affirmation of compliance with workplace vaccination requirements certification.” That's right on New York City's website. And that affirmation of compliance has to be posted in a public-facing location. And businesses should be prepared to make their records available for inspection. And, of course, records relative to employee's proof of vaccination should be kept confidential and should not be used for any other purpose. You listen to our other episodes, you know, that's pretty similar to what we've discussed as it relates to, you know, other vaccination mandates we've gone through.

Just wanted to close briefly talking a little bit about the penalties identified by this executive order. You know, there's a fine, a penalty of at least \$1,000 for any person or entity who violates it. Subsequent violation within 12 months, the fine goes up to \$2,000 and every violation thereafter, within 12 months of the prior violation is \$5,000 per violation. You know, it's unclear exactly, you know, the extent to which this will be enforced or the penalties will be assessed, but I wanted to point out for our listeners that that is included you know, in the executive order.

So guys, that's everything I wanted to talk with you about regarding the key to NYC program and workplace vaccination requirements. If you are an employer in New York City, a business and you have employees there or even customers and patrons, definitely important information for you to know. Thank you so much for listening. Tune in next week. See you then.

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