COVID-19 FAQs for Nonprofits

With COVID-19 vaccines widely available to all Americans for several months, many organizations and institutions that last year began working remotely and suspended in-person programming and events are hoping that widespread protection from the virus will allow for a return to in-person activities. This Legal Alert addresses some of nonprofits’ frequently asked questions about vaccination mandates and other vaccine-related policies, as well as government-issued mandates that may affect nonprofits operating in New York City. Note that the information below may become out of date over time; for that reason and as a best practice, Lawyers Alliance encourages nonprofits with questions about their individual vaccination-related policies to seek the advice of legal counsel.

What are the current legal mandates regarding vaccinations in New York City?

In late July, both the federal government and the New York City government issued mandates affecting government employees and government contractors. President Biden announced that all civilian federal employees and onsite contractors either must be vaccinated or submit to regular testing, social distancing, mask requirements, and restrictions on travel. And Mayor de Blasio announced, under the City’s “COVID-Safe Requirement,” that all New York City employees and all contracted employees must provide either (1) a one-time verification of vaccination, or (2) a weekly record of a negative COVID-19 PCR test beginning September 13, with residential and congregate setting employees obligated to comply with the order by August 16. Importantly, the mandate applies to subcontractors, volunteers, and interns as well as employees. Contracted organizations, such as nonprofits with contracts with the City, must submit their updated vaccination policies and procedures to their contracting agency, must submit attestation that they are complying with the new policy to their contracting agency, and are subject to audits for compliance. The City will help providers track compliance with the NYC COVID Safe App, which allows individuals to verify test and vaccination results. Contracted organizations and employees that do not comply with contract requirements risk having their contracts or employment be terminated. The City has published FAQs\(^1\) to help organizations comply with this order.

In early August, Mayor Bill de Blasio issued an executive order, known as “Key to the City,” requiring New Yorkers to show proof of vaccination to enter gyms, bars, restaurants, and live indoor performances beginning August 16, with enforcement beginning September 13. Nonprofits to whom this order may apply include many museums, performing arts theaters, and aquariums and zoos. The City has published guidance\(^2\) and FAQs\(^3\) to help organizations comply with this order.

\(^3\) [https://www1.nyc.gov/assets/counseltothemayor/downloads/Key-to-NYC-FAQ.pdf](https://www1.nyc.gov/assets/counseltothemayor/downloads/Key-to-NYC-FAQ.pdf)
What are the current legal mandates regarding masks in New York City?

In a series of executive orders in August, Mayor de Blasio announced that all City agencies and contractors must require all employees whose salary is paid in whole or in part from funds provided under a City contract, who perform any part of the work under the contract within New York, and whose work under the contract includes physical interaction with City employees or members of the public, including those who are fully vaccinated against COVID-19, to wear a face covering when interacting with members of the public or when present in a pre-kindergarten to twelfth grade school, public transit facility, homeless shelter, correctional facility, nursing home, or health care setting. Employees covered by these orders may only be authorized to remove their face coverings in the workplace (either indoors or outdoors) or when interacting with City employees when they are not in the settings previously listed and they have provided documentation showing that they are fully vaccinated. In addition, Governor Hochul recently announced a universal mask requirement in all schools.4

Can nonprofit employers require employees to be vaccinated?

Employers of all kinds generally may require employees to be vaccinated against COVID-19, so long as such a requirement is justified and the employer makes reasonable accommodations to employees who cannot be vaccinated for certain reasons.

According to guidance issued in December by the federal Equal Employment Opportunity Commission (EEOC),5 employers may require employees to be vaccinated when unvaccinated employees would pose a “significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation.”6 Further, an employer seeking to take any action toward an unvaccinated employee—such as excluding unvaccinated employees from the workplace—may only do so if there is no way to provide a reasonable accommodation that would eliminate or reduce the risk of direct threat to others that an unvaccinated employee might pose. This is especially likely, and especially important, in the case of employees who cannot be vaccinated due to disability or who object on religious grounds, who are protected by anti-discrimination laws, such as Title VII of the Civil Rights Act7 and the Americans with Disabilities and Act.8 The Department of Justice’s Office of Legal Counsel recently reinforced this interpretation of the law, stating in an opinion released in July that the Emergency Use Authorization under which the COVID-19 vaccines are currently available to the public does not prevent public and private entities from imposing vaccine requirements.9 (The opinion does not address whether other federal, state, or local laws or regulations might restrict an organization’s

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6 Employers may only conclude that such a direct threat to safety exists after conducting an individualized assessment of four factors—(1) the duration of the risk; (2) the nature and severity of the potential harm; (3) the likelihood that the potential harm will occur; and (4) the imminence of the potential harm—and making a determination that an unvaccinated individual will expose others to the virus at the worksite. Id.
7 https://www.eeoc.gov/statutes/title-vii-civil-rights-act-1964
8 https://www.ada.gov
9 https://aboutblaw.com/YNR
right to mandate the vaccine. While OLC opinions are not binding on courts, they often carry significant weight in litigation.) Though New York State law has not yet definitively allowed vaccine mandates, many New York employers—the New York City government being the largest among them—are already requiring employees to be vaccinated.¹⁰

Employers should know that inquiring about an individual employee’s health status is generally prohibited, and the prescreening questions that the Centers for Disease Control and Prevention (CDC) recommends be asked before administering a COVID-19 vaccine are “medical examinations” that employers generally may not conduct.

Employers in other states should look into the state-level legislation and executive guidance where they are, especially since legislators in a number of states have introduced legislation that would restrict employers’ abilities to set vaccine requirements.

Must employers provide paid time off for employees to be vaccinated?

Employers in New York must provide employees with paid time off to receive a COVID-19 vaccine. Under a law passed in March,¹¹ employers must provide employees with “a sufficient period of time, not to exceed four hours” per vaccine dose, and employers may not discriminate or retaliate against employees who request or take a leave of absence to be vaccinated. The leave taken to receive the vaccine must be paid at the employee’s regular rate of pay for the entire leave period, and according to the governor’s office’s statement about the new law,¹² may not be charged against any other leave the employee has earned or accrued, such as vacation or standard sick leave. This law will be in effect until December 31, 2022.

Can employers ask employees whether they have been vaccinated?

Employers may ask employees whether they have been vaccinated. They should, however, avoid asking any related or follow-up questions, since those run the risk of soliciting information that employers are not legally allowed to ask of employees. For example, an employer may ask an employee whether she has been vaccinated, but, if she answers that she has not, the employer may not ask why she has not been vaccinated.

Can employers ask job applicants whether they have been vaccinated?

Employers may generally ask job applicants about their vaccination status so long as they follow the same standards for job applicants and employees. For example, an employer who has implemented a vaccination requirement for employees may ask prospective employees whether they have been vaccinated, but an employer who has not issued such a requirement for employees may run into legal risk by asking job applicants about their vaccination status.

¹⁰ https://www.nytimes.com/2021/03/05/health/coronavirus-vaccination-elder-facilities.html
¹¹ https://www.nysenate.gov/legislation/bills/2021/S2588/amendment/A
Can nonprofits that provide direct services require clients or program participants to be vaccinated in order to receive services or participate in programming in person?

A growing number of universities—now over 600—are requiring vaccinations for students, while accommodating a subset of students with medical or religious reasons for not being vaccinated. And some long-term care facilities have begun providing for all residents to be vaccinated as a matter of policy, with individual exceptions as required. However, the nonprofit and legal communities are awaiting more guidance from government agencies and courts on this question, so it is important to proceed with caution.

Can companies require employees who aren’t vaccinated to take COVID-19 tests?

Requiring antibody (as opposed to antigen) testing is legally allowed. However, keep in mind that a nonprofit employer wanting to do this would either have to arrange to have it done onsite (some area hospitals are doing it) or pay for an employee’s time to go elsewhere, plus pay for the test in either scenario, which may not be practical.

Can nonprofits that offer housing or run housing-related services require residents and guests to be vaccinated as a condition of receiving housing?

There is no clear answer yet, so the nonprofit and legal communities are awaiting more guidance from government agencies and courts. A growing number of universities are requiring vaccinations for students, while accommodating a subset of students with medical or religious reasons for not being vaccinated. Such a policy, if implemented by an organization that provides housing, would therefore align with the policies of these educational not-for-profit organizations whose work includes offering housing—though schools are a distinct type of institution, and one with a long-established history of requiring that students show proof of vaccination.

Are there any particular requirements regarding vaccines for nonprofits providing child care?

Yes. In June, then Governor Cuomo announced health and safety measures that apply to all child care, day camp, and overnight camp programs in New York State. Under the guidance, such programs are required to collect COVID-19 vaccine status and documentation for all staff and children in their care. The guidance includes additional requirements for limiting capacity and ensuring mask-wearing and social distancing, particularly for those children and staff who are not vaccinated. Nonprofits that are providing child care, summer, or overnight camp programs are strongly encouraged to read the full guidance.

This memo is meant to provide general information only, not legal advice. Please contact Ciarra Chavarria at Lawyers Alliance for New York at cchavarria@lawyersalliance.org or visit our website, www.lawyersalliance.org, for further information. Lawyers Alliance would also like to thank Peter F.

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14 Note that this guidance applies to School-Aged Child Care licensed programs.

Martin, a Legal Fellow working with Lawyers Alliance through NYU School of Law’s National Center on Philanthropy and the Law, for his assistance in preparing this Legal Alert.

Lawyers Alliance for New York is the leading provider of business and transactional legal services for nonprofit organizations that are improving the quality of life in New York City neighborhoods. Our network of pro bono lawyers from law firms and corporations and staff of experienced attorneys collaborate to deliver expert corporate, tax, real estate, employment, intellectual property, and other legal services to community organizations. By connecting lawyers, nonprofits, and communities, we help nonprofits to develop affordable housing, stimulate economic development, promote community arts, strengthen urban health, and operate and advocate for vital programs for children and young people, the elderly, and other low-income New Yorkers.