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ALLIANCE

## What the New CDC Mask and Vaccine Rules Mean for New York Restaurants

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Effective May 19, 2021, New York State will adopt the Center for Disease Control's (CDC) Public Health Recommendations for Fully Vaccinated People (CDC Guidance). As Gov. Andrew Cuomo previously announced, the State on that day also will lift percentage-based restrictions on building capacity limits that have been in place since the beginning of the COVID-19 pandemic. Businesses will be able to operate at full capacity, only limited by their ability to maintain any required social distancing measures. What does this mean for restaurants in New York? Answers to some important questions are below:

### **New York will be following CDC Guidance. What is the CDC saying?**

The CDC Guidance states that fully vaccinated people do not need to wear a mask or physically distance in any setting, except where required by federal, state, local, tribal, or territorial laws, rules and regulations, including local business and workplace guidance.

Fully vaccinated people also no longer need to:

- Be tested for COVID-19 following a known COVID-19 exposure unless they are residents or employees of a correctional or detention facility or a homeless shelter;
- Be tested for COVID-19 before leaving the United States for international travel (unless required by the destination);
- Self-quarantine after arriving back in the United States;

- Quarantine following a known exposure if asymptomatic; or
- Participate in routine COVID-19 screening testing if feasible.

All travelers on public transportation, including vaccinated individuals, must still wear a mask on all planes, buses, or trains and in any transportation hubs such as airports or stations.

Fully vaccinated people should also continue to wear a well-fitted mask in correctional facilities and homeless shelters.

### **What occupancy restrictions will be in place for restaurants and bars in New York?**

As of May 19, business capacity limits for restaurants that were based on a percentage of a building's maximum occupancy in New York are eliminated. Restaurants will only be limited by the space needed to allow the required six feet of space between parties for social distancing.

New York will allow businesses to eliminate the six feet of required social distancing, and therefore increase capacity, only if all patrons within an establishment, or in a separate designated part of the establishment, **present proof** of full vaccination status, through paper form, digital copy or the State's Excelsior Pass.

- While additional guidance would be helpful, it is assumed that proof can include originals or copies of the CDC card

provided with vaccinations or digital copies of the card.

- According to additional guidance issued by the State on May 19, businesses that do not congregate patrons and/or that operate below the State's social gathering limit of 250 people indoors and 500 people outdoors, may rely on self-reporting of vaccination status – i.e., the honor system.

Previously, restaurants could use physical barriers to separate parties when six feet of distancing in all directions was not feasible between tables. We anticipate this exception will still apply where physical distancing remains necessary, but no official guidance from the State has been issued to date.

**Can I ask guests or customers about their vaccination status?**

Yes. If a restaurant wishes to operate without social distancing between parties, they will need to ask guests to present proof of full vaccination status. Guests may provide such proof in paper form, a digital copy or the State's Excelsior Pass.

**Can I refuse service to a guest that is not vaccinated?**

The State has not explicitly stated this, but it can be inferred that the State contemplates restaurants being allowed to restrict dining to vaccinated guests.

As the State will allow restaurants to eliminate required social distancing guidance if all patrons in an establishment show proof of vaccination, it would follow that restaurants can prohibit guests from entering if they cannot show proof of vaccination while the restaurant is not enacting social distancing measures.

However, as discussed below, requiring that all guests be vaccinated potentially creates issues concerning discrimination if those guests are not vaccinated because of a disability, their religion or

their age. Restaurants will need to provide accommodations to these guests to avoid potential discrimination claims.

**If my restaurant requires proof of vaccination for indoor dining, can I prohibit unvaccinated people from dining outdoors?**

The State has not directly addressed this issue. However, the State has not yet removed social distancing guidelines for outdoor dining. As such, it can be inferred that if a restaurant wishes to eliminate required social distancing measures for outdoor dining it can only do so if all guests provide proof of vaccination.

**What if a guest claims they are not vaccinated because of a medical and/or religious reason?**

The State has not yet addressed these concerns. As a place of public accommodation, restaurants generally must modify their business practices and procedures when necessary to serve customers with disabilities. Similarly, restaurants generally cannot discriminate against guests based on their religion. If a person claims they cannot get the COVID-19 vaccine because of a disability or their religious beliefs, restaurants risk a discrimination claim if they deny such guests service.

We anticipate the State will issue further guidance directly addressing these issues. Until such time, restaurants considering requiring guests to show proof of vaccination may wish to delay such a requirement, or set aside a section of their restaurant where social distancing will be maintained to accommodate guests who cannot be vaccinated due to a disability or religious reasons.

**What if a guest is from a foreign country where they are not yet eligible to receive the COVID-19 vaccine?**

As with issues of disability and religion, the State has not yet addressed these concerns. Denying such guests service creates a risk of a discrimination claim based on national origin

and/or citizenship. Until the State issues further guidance, restaurants may want to delay requiring all guests to be vaccinated and set aside an area or section where social distancing will be observed for unvaccinated guests.

### **What about children?**

Currently, children under the age of 12 cannot receive any FDA approved COVID-19 vaccine. Children between the ages of 12 and 15 have only been allowed to receive the Pfizer COVID vaccine since May 13. Thus, no person under the age of 16 in New York is fully vaccinated, and the earliest any child between the ages of 12 and 15 in New York could be fully vaccinated is June 17 (if the child received the first injection May 13, receives the second injection three weeks' later on June 3, and then allow for the two weeks it takes for the vaccine to become fully effective). Therefore, any requirement that guests be fully vaccinated will necessarily prohibit children from entering the business and risk claims of age discrimination under state and local law.

The State's guidance thus far has only addressed this issue with respect to children attending large scale events. As discussed below, children under the age of 16 may attend large scale events and sit in sections designated solely for vaccinated patrons if they are accompanied by a fully vaccinated adult. It remains to be seen if the State will allow for such an exception for restaurants.

As with the issues concerning disability and religion above, until further guidance is issued by the State, restaurants may want to delay requiring all guests to be vaccinated and should set aside an area or section where social distancing will be observed for unvaccinated children to dine.

### **Can I require my employees or guests to wear masks even if they are vaccinated?**

Yes. New York will still authorize businesses to continue to require masks for all in their establishments.

### **Are my employees required to continue to wear masks?**

Vaccinated employees are no longer required to wear masks in restaurants. Unvaccinated employees must continue to wear masks. As set forth above, you may require that all employees continue to wear masks if you wish.

### **Can I prohibit my employees from wearing masks?**

If any of your employees are not vaccinated, they must continue to wear masks.

If your employees are vaccinated, you need to allow them to wear masks as well as other PPE, if they choose to do so.

### **Do restaurants in New York City still need to check guest temperatures and keep contact tracing if offering indoor dining?**

This remains unclear. Until the State officially rescinds or updates the Interim Guidance for New York City Indoor Food Services. During the COVID-19 Public Health Emergency, restaurants should continue this practice with respect to both vaccinated and unvaccinated guests.

### **Are daily employee health screenings still required?**

This remains unclear. Until the State officially rescinds or updates the Interim Guidance for New York City Indoor Food Services. During the COVID-19 Public Health Emergency, restaurants should continue this practice with respect to both vaccinated and unvaccinated employees.

### **Must we still follow New York State's cleaning and disinfecting protocols after a known COVID-19 exposure in the restaurant (e.g., close off areas used by the person, wait 24 hours to clean and disinfect, etc.)?**

This remains unclear. Until the State officially rescinds or updates the Interim Guidance for New

York City Indoor Food Services. During the COVID-19 Public Health Emergency, restaurants should continue following these protocols.

### **What about catering or other events?**

The revised mask and capacity rules will apply differently to small and large-scale events.

For small-scale events – *i.e.*, events below the State's social gathering limit of 250 people indoors or 500 people outdoors – venues will be able to require masks for all patrons. Social distancing of 6 feet will be required between parties of attendees unless all attendees present proof of full vaccination status. Unvaccinated people should still wear masks.

For large scale events – *i.e.*, events above the State's social gathering limits – venues will only be limited by the space available for parties to maintain physical distancing. Unvaccinated attendees or attendees with an unknown vaccination status must be spaced six feet apart in assigned sections. Masks must be worn in indoor event settings, except while seated and eating or drinking. Fully vaccinated attendees may be spaced directly next to each other, or at 100 percent capacity, in assigned sections designated for fully vaccinated individuals. Children under 16 may accompany and be seated with a vaccinated adult in a fully vaccinated section. Proof of a recent negative COVID-19 test result for attendees over the age of 4 is required for unvaccinated attendees of indoor large-scale events but is optional in outdoor large-scale event settings.

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