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## BULLETIN

To: Membership of Allied Building Metal Industries, Inc.

From: Steven N. Davi

Date: September 6, 2021

Re: Workplace Vaccine Update

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Over the past several weeks, state and city government officials, through their announcements, press releases, and press conferences, and, more to the point, their executive orders, guidance, and FAQs, have paved the way for state and city agencies to impose vaccine mandates across a range of sectors, including health care, education, mass transit, restaurants and other food-service businesses, indoor fitness, indoor entertainment, and construction. The NYS Department of Health, the NYC Department of Environmental Protection, the NYC Department of Health and Mental Hygiene, the NYC Department of Education, the NYC Department of Transportation, the MTA, the Port Authority, and the NYC School Construction Authority are just a few of the state and city agencies that, during the past several weeks, have implemented broad vaccine mandates aimed at their covered employers, employees and contractors, including contractors providing construction-related services or otherwise performing construction pursuant to a contract with the City of New York.

For instance, as is discussed in more detail below, the Commissioner of the NYC Department of Health and Mental Hygiene issued a [Commissioner's Order](#) on August 24, requiring contractors, sub-contractors and consultants of the NYC Department of Education ("DOE") and the City of New York who work in-person in a DOE school setting or DOE building, including individuals who provide services to DOE students, to provide proof of vaccination to their employer no later than September 27. In turn, the NYC School Construction Authority ("SCA") notified its partners on Monday, August 30, that no SCA contractor, sub-contractor or consultant personnel may enter a school-based setting on or after September 27 without having supplied their employer with proof of vaccination. Moreover, the SCA is requiring all of its contractors, consultants and vendors to complete a [certification form](#) affirming that their organizations maintain policies regarding face coverings and proof of vaccination and to affirm that any personnel visiting or working at a NYC SCA school construction project site is fully vaccinated or will have received their first dose of an approved Covid-19 vaccination no later than September 27.

Similarly, on August 16, then-Governor Andrew Cuomo [announced](#) that all healthcare workers in New York State, including staff at hospitals and long-term care facilities ("LTCF"), including nursing homes, adult care, and other congregate care settings, would be required to be vaccinated against Covid-19 by September 27. Two days later, on August 18, the State Department of Health issued its [Order for Summary Action](#), pursuant to NYS Public Health Law § 16, requiring all covered health care personnel to be fully vaccinated against Covid-19, with the

first dose for current personnel received by September 27, and all hospital, long-term care facilities, and nursing homes to develop and implement a policy mandating employee vaccinations by September 27. Accordingly, NYU Langone Health, among others, notified all of its vendors on August 17 to be fully vaccinated by October 25, with their first dose by September 27, and that vendor personnel may be denied entry or asked to leave NYULH facilities at any time for failure to comply with such directive. As many of you know, New York-Presbyterian Hospital and Northwell Health, among other local health care facilities, have issued similar vaccination mandates in the past several weeks.

Vaccine mandates by public and private employers are set to become more prevalent in the workplace in the coming weeks now that the Food and Drug Administration (“FDA”) has granted [full approval](#) to the Pfizer-BioNTech coronavirus vaccine for people sixteen years of age and older. The Pfizer-BioNTech vaccine is the first in the United States to move beyond emergency use status. Previously, Covid-19 vaccines were only available pursuant to an “emergency use authorization” or “EUA”<sup>1</sup> issued by the FDA under section 564 of the Food, Drug, and Cosmetic Act, which authorizes the issuance of EUAs for medical products, such as vaccines, in certain emergency circumstances.

Almost immediately, the U.S. regulatory approval of the Pfizer-BioNTech vaccine [prompted](#) a number of employers to adopt mandates to combat the delta variant, including the [Pentagon](#), [CVS Health](#), [Chevron Corp.](#), [Goldman Sachs Group, Inc.](#), and the [State University of New York](#) system, among others. These mandates fall in line with a string of major employers, including [Walmart, Inc.](#), [Walt Disney Co.](#), [McDonald's Corp.](#), and [UPS](#), among others, that mandated inoculations to combat the surge in Covid-19 cases caused by the Delta variant well ahead of the FDA granting full approval to the Pfizer-BioNTech vaccine on August 23. This trend is likely to continue. According to a [survey](#) released on Wednesday, September 1, by consultant Willis Towers Watson, a majority of U.S. employers – 52% – are planning or considering requirements for a Covid-19 shot by the end of 2021.

NYC Mayor Bill de Blasio and former NYS Governor Andrew Cuomo are well ahead of the curve in this regard, making announcements, issuing press releases and holding press conferences at a steady clip since at least as early as July 21, punctuated by a series of executive orders and related guidance intended to provide the legal underpinning necessary to implement vaccine mandates across a wide range of industry sectors, including construction. Here is a rundown:

- On July 21, Mayor de Blasio, [announced](#) the health worker “Covid-Safe Requirement” urging workers employed in the NYC Health + Hospitals health care system and in NYC Department of Health and Mental Hygiene (“DOHMH”) clinical settings to provide either a one-time verification of immunization or weekly proof of a negative Covid-19 test. Sometime later, Mayor de Blasio issued a confusing and wide-ranging Covid-Safe Requirement [FAQ for Contractors](#) urging all NYC Health + Hospitals employees and most DOHMH clinic-based employees, as well as all city employees and so-called “contracted employees” working in residential and congregate settings pursuant to a city contract, certain full-time and part-time NYC employees and all contracted employees interacting with the public or city employees, to provide proof of immunization or weekly proof of a negative Covid-19 test.

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<sup>1</sup> An EUA permits a product to be introduced into interstate commerce and administered to individuals even when the FDA has not approved the product for more general distribution pursuant to its standard review process.

- On July 21, the Commissioner of the NYC DOHMH **issued** a [Commissioner's Order](#) to require Covid-19 vaccination or testing for staff in public healthcare settings by August 2.
- On July 26, Mayor de Blasio **announced** that municipal employees would be required to get vaccinated or to submit to weekly Covid-19 testing starting September 13; that unvaccinated city workers would be required to wear a mask indoors at their workplaces starting August 9; and that workers and contractors in “residential and congregate care settings” would be **required** to be vaccinated or submit to weekly testing by August 16. “Testing out” in this context would require a negative PCR test taken no more than 48 hours before the result is presented.
- On July 28, then-Governor Cuomo **announced** that patient-facing healthcare workers at state-run hospitals would be required to get vaccinated for Covid-19 by Labor Day without the option to be tested in lieu of vaccination; and that New York State employees outside the health care setting would be required either to get vaccinated for Covid-19 by Labor Day or submit to weekly Covid-19 testing.
- On July 31, Mayor de Blasio **signed** [Executive Order No. 74](#) effective August 2 (and later modified by [Executive Order No. 77](#)). Contrary to the mayor’s July 26 announcement, which forecast a vaccination mandate with a *testing* option, Executive Order No. 74 established a vaccination mandate with a *masking* option.

In essence, Executive Order No. 74 required all employers performing work pursuant to a contract awarded by the city, and/or any subcontract underlying such a contract, where such work is to be performed within the City of New York, and where employees can be expected to physically interact with city employees or members of the public in the course of performing such work, to ensure covered employees (i) wear a face covering at all times the covered employee can be expected to physically interact with city employees and members of the public in the course of performing work under the contract, or (ii) provide proof of their full vaccination status.

Executive Order No. 74 Order also tasked all city agencies, effective August 2, to take all “necessary actions” to ensure that covered contractors were requiring their covered employees (i) to wear a face covering at all times the covered employee can be expected to physically interact with city employees and members of the public in the course of performing work under the contract, or (ii) to provide proof of their full vaccination status. A two-page form [notice to contractors with form certification](#) was subsequently made available to city agencies for this purpose, as were a set of explanatory [FAQs](#).

- On August 2, then-Governor Andrew Cuomo **announced** that MTA and Port Authority employees working in New York facilities would be required to be vaccinated for Covid-19 or be tested weekly starting Labor Day.
- On August 2, Mayor de Blasio **issued** [Executive Order 75](#), (subsequently amended by [Executive Order No. 76](#)), requiring all newly-hired city employees to provide proof of at least one dose of the Covid-19 vaccine upon hire and proof of full vaccination within thirty days thereafter.
- On August 3, Mayor de Blasio **announced** that New York City would become the first major city in the United States to **mandate** Covid-19 vaccinations for workers and patrons of

indoor dining, indoor fitness, and indoor entertainment venues and performances. This proposed mandate – coined the “Key to NYC Pass” – would launch on August 16, and would require covered patrons and workers to have received at least one dose of a Covid-19 vaccine beginning August 17, with enforcement scheduled to commence on September 13 to coincide with the expected reopening of schools. As proposed, there would be no alternative to “test out” of the mandate for those who cannot receive the vaccine based on medical contraindication, religious objection or age, or those who have declined to get vaccinated.

- On August 10, the Commissioner of the NYC DOHMH **issued** a [Commissioner's Order](#) requiring that, effective August 16, employees of a city agency or of a contractor of a city agency working in a residential or congregate setting who has not submitted proof of full vaccination against Covid-19 to their employer must provide proof of a negative COVID-19 PCR diagnostic test (not an antibody test) at least once per week.
- On August 16, Mayor de Blasio **signed** [NYC Emergency Executive Order 225](#) (subsequently amended on August 20 by [NYC Emergency Executive Order 226](#)) – the “Key to NYC Pass” mandate – requiring vaccination (at least one dose) of patrons (12 years and older), full- or part-time employees, interns, volunteers or contractors for indoor dining, gyms, including hotel gyms and fitness centers, and entertainment venues. (See [Defeat Delta](#) press release and additional [guidance](#) on the Key to NYC Pass mandate.)
- On August 16, then-Governor Cuomo [announced](#) (i) that all healthcare workers in the State of New York, including staff at hospitals and long-term care facilities (“LTCF”) and other congregate care settings, would be required to be vaccinated against Covid-19 by September 27; and (ii) that the State Department of Health (“DOH”) would issue Section 16 Orders requiring all hospital, LTCF and nursing homes to develop and implement a policy mandating employee vaccinations, with limited exceptions for those with sincerely-held religious beliefs or disabilities.
- On August 18, the State DOH **issued** its [Order for Summary Action](#), pursuant to NYS Public Health Law § 16, requiring all covered health care personnel to be fully vaccinated against Covid-19, with the first dose for current personnel received by September 27, and all hospital, long-term care facilities and nursing homes to develop and implement a policy mandating employee vaccinations by September 27. This Summary Order has been generally construed to supersede the city’s earlier “test out” option for employees of NYC Health + Hospitals and in DOHMH clinical settings.
- On August 23, Mayor de Blasio [announced](#) that all New York City teachers, administrators, support staff and employees of the NYC DOE would be required to have at least one Covid-19 vaccination shot by September 27. In response, District Council 37, the union that represents classroom aides, school lunch staff and other school employees, [said](#) that it would file a formal complaint against the city to block any such vaccine initiative.
- On August 24, the NYC DOHMH Commissioner **issued** a [Commissioner's Order](#) requiring contractors, sub-contractors and consultants of the DOE and the city who work in-person in a DOE school setting or DOE building, including individuals who provide services to DOE students, to provide proof to their employer no later than September 27, that
  - (i) they have been fully vaccinated; or

- (ii) they have received a single dose vaccine, even if two weeks have not passed since they received the vaccine; or
  - (iii) they have received the first dose of a two-dose vaccine, and they must additionally provide proof that they have received the second dose of that vaccine within 45 days after receipt of the first dose.
- On August 26, the State Department of Health’s Public Health and Health Planning Council (“PHHPC”) **approved** [emergency regulations](#) that institute a broad vaccine mandate for New York healthcare facilities. These emergency regulations supersede earlier vaccine directives aimed at healthcare workers first announced by then-Governor Cuomo on August 16 and implemented by the State DOH by Summary Order on August 18. The new emergency regulations impose a mandate that extends beyond general hospitals and long-term care facilities, which would have been covered by the Summary Order, to many other types of healthcare providers. The emergency regulations also preclude any potential exemption from the vaccine mandate for sincerely-held religious beliefs, an option that was previously contained in both the Summary Order and the initial version of the emergency regulations.

These emergency regulations became effective on August 26, upon filing with the Department of State. Due to their temporary emergency nature, the emergency regulations are set to expire on November 24, 2021, unless they are renewed or modified, or a notice of proposed rulemaking is issued for their permanent adoption.

- On August 31, Mayor de Blasio **signed** [Executive Order No. 78](#) requiring city employees to provide the city agency or office where they work with proof of full vaccination by September 13 or, beginning September 13, and on a weekly basis thereafter until the employee submits proof of full vaccination, to provide the city agency or office where they work with proof of a negative Covid-19 PCR diagnostic test (not an antibody test). Under Executive Order No. 78, all city agencies also must take all necessary actions to require their contractors to ensure their covered employees either provide their employer with proof of full vaccination by September 13 or, beginning September 13, and on a weekly basis thereafter until the employee submits proof of full vaccination, provide their employer with proof of a negative Covid-19 PCR diagnostic test (not an antibody test).

The term “full vaccination” in this context means at least two weeks have passed after a person received a single-dose of an FDA- or WHO- approved Covid-19 vaccine or the second dose of an FDA- or WHO- approved two-dose Covid-19 vaccine except that, for the purposes of the Order, a city employee or covered employee of a contractor who provides documentation of having received one dose of any Covid-19 vaccine before September 13, will be considered fully vaccinated even though two weeks have not passed since their final dose, so long as, if such city employee or covered employee of a contractor received a two-dose vaccine, the employee provides documentation that the second dose has been administered before October 28.

The term “covered employee” means a person: (i) employed by a contractor or subcontractor holding a contract; (ii) whose salary is paid in whole or in part from funds provided under a city contract; and (iii) who performs any part of the work under the contract within the City of New York. However, a person whose work under the contract

does not include physical interaction with city employees or members of the public shall not be deemed to be a covered employee.

In short, Executive Order No. 78, by its terms, modifies the *masking* option for certain city employees and contractors contained in Executive Order No. 74, replacing it with a *testing* option as originally envisioned by Mayor de Blasio during his press conference on July 26.

Compared to the public sector, the private sector, particularly construction and construction-related services provided by contractors and subcontractors, is a different story when it comes to vaccine mandates. To date, RXR Realty appears to be the only major private owner/ developer/ manager of Class A commercial real estate in New York City that has implemented a vaccine mandate applicable to construction contractors and subcontractors at its jobsites. With that said, though, there seems to be a growing sentiment within the industry that additional vaccine mandates are soon to follow as soon as this week from owners/developers, as well as general contractors and construction managers, including Turner Construction, Hunter Roberts, and at least two additional CAGNY members.

With this in mind, we have been in discussions with our local unions for the past few weeks regarding the peripheral details that contractors and subcontractors will have to manage when faced with a mandatory vaccine from a third-party, whether it be from a city or state agency or official or from an owner/developer, general contractor or construction manager. Generally, the unions have acknowledged that any such third-party vaccine mandate affecting employees represented by a labor organization would not trigger a *decisional* bargaining obligation under the National Labor Relations Act (the "Act"), meaning that the decision by a contractor or subcontractor to adhere to a third-party vaccine mandate is not a mandatory subject of bargaining with the union. This is because the union represents its bargaining unit members with respect to its terms or conditions of employment, but not with respect to the conditions mandated by a third-party. However, under the Act, employers are still bound to an *effects* bargaining obligation, and thus, are obligated to bargain over the impacts of a third-party vaccine mandate on bargaining unit members if requested by the union. Thus, effects bargaining has been the focus of our discussions with the unions to date, with the most pressing concerns relating to the vaccination status of bargaining unit members as well as associated staffing, referral and placement issues, if any, with regard to bargaining unit members who cannot receive the vaccine based on medical contraindication or religious objection, or those who have declined to get vaccinated.

To facilitate these discussions, **it is important that each Allied member let me know when you are notified that any of your clients have implemented, or intend to implement, a vaccine mandate at their jobsites, and that you include in your communications with me the name of the city or state agency or official, or the name of the owner/developer, general contractor or construction manager, that issued the mandate, as well as the terms and conditions of any such mandate, including but not limited to its effective date.**

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We will continue to monitor all relevant developments in this regard and provide updates as they become available. As always, if you have any questions or wish to discuss any of the above, please do not hesitate to contact me directly.