

Local Legal Strategies to Increase Vaccination During the COVID-19 Pandemic — Lessons from New York City

Health Policy Portal

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Keywords: Vaccines, COVID-19, Pandemic, Law, New York City

Abstract: Vaccine mandates played a critical role in the success of New York City's COVID-19 response. By relying on evidence as a substantive basis for the mandates and adhering to procedural requirements and precedent, New York City leveraged its position and expertise as a local governmental authority to devise mandatory vaccine policies that withstood numerous legal challenges. New York City's experience highlights the role of municipal government in mounting a meaningful public health response, and the strategies adopted by NYC may provide a blueprint for municipalities around the world facing the ongoing COVID-19 pandemic and the threat of future public health emergencies.

New York City's mass vaccination campaign began with targeted distribution through hospital and outpatient provider channels, as well as city-run vaccination sites. In the first three months, vaccination access was limited to the populations with the greatest risk of exposure, including

healthcare workers, teachers, front-line workers, and vulnerable populations such as the elderly. As of April 2021, all adult New Yorkers were eligible for free vaccination. By the end of that month, 45% of New York City residents had received at least one dose.¹

Vaccine uptake began to slow in May 2021. The government of New York City (NYC) took additional measures to increase rates of vaccination, augmenting the availability of convenient vaccines through mobile vans and expanded provider access, engaging partners to collaborate on education campaigns targeted to the particular needs and constraints of each neighborhood and community in NYC, and implementing cash-incentive programs for vaccination, including \$100 prepaid debit cards, free tickets to sporting events, and free memberships to various museums and theaters. This multi-pronged approach produced moderate increases in vaccination rates: as of July 1, 2021, some 58% of NYC residents had received at least one dose.² However, vaccination rates slowed once again, while rates of infection began to rise with the new Delta variant.

In this precarious moment for vaccine uptake, the NYC Department of Health and Mental Hygiene (DOH) began gradually rolling out a series of vaccine mandates through orders issued by the Commissioner of Health

About This Column

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and subsequently ratified by NYC's Board of Health. As a result of these mandates — ultimately numbering over a dozen — New York City's vaccination campaign prevented an estimated 1.9 million cases, 303,000 hospitalizations, and 48,000 deaths as of March 2022.³

The success of these mandates was the result of several key conditions and commitments in their development: (1) The legal authority granted to the Health Commissioner to pro-

tections brought against them — none of which have succeeded thus far.

Leveraging Local Authority

Historical Precedent

The citizens and the courts within New York City's jurisdiction have years of experience with vaccine mandates. As far back as the 1860s, New York State required school-age children to be vaccinated against smallpox,⁴ and to protect patients from communicable diseases, the

review of federal employer mandates issued by the Occupational Safety and Health Administration (OSHA) and the Centers for Medicare and Medicaid Services (CMS) has had mixed results. Notably, an initiative by OSHA to impose mandates on private employers to require vaccination for their employees was struck down by the US Supreme Court.

To explain this disjuncture in the legal treatment of ostensibly analogous mandates, we can look to the

The success of these mandates was the result of several key conditions and commitments in their development: (1) The legal authority granted to the Health Commissioner to protect the public during a public health emergency, and clear historical precedent for exercising that authority by issuing vaccine mandates; (2) Reliance on evidence in promulgating orders, with clear explanation of the basis and strong scientific and public health expertise in the Department and on the Board of Health to corroborate to that basis; (3) A strategy of prudence and restraint, progressively adding and expanding mandates as conditions and evidence dictated; and (4) A judiciary that applied the law to give primacy to the Department's duty to protect the public health. As a result of these key factors, the profound public health impact of the mandates remained unimpeded by the many legal challenges brought against them.

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state has required hospital employees who pose a risk of transmission to patients to be immunized against rubella (since 1980) and measles (since 1991).⁵

More recently, at the municipal level, New York City took action during a local measles epidemic, mandating vaccination in zip codes where outbreaks were taking place — a policy upheld by an appeals court.⁶ Similarly, the City's influenza vaccine requirement for children in childcare settings was upheld by the State's highest court as within the City's powers.⁷

National Context

The employer vaccination mandates issued in NYC have largely withstood legal attacks. By contrast, judicial

process employed by NYC in developing evidence-based vaccine mandates and leveraging the unique position and authority of municipal government to promulgate those mandates.

Municipal Authority

The New York City Charter establishes the NYC Department of Health, granting it broad authority to "regulate all matters affecting health" in NYC.⁸ When the public health is threatened, the NYC Commissioner of Health has the power to declare a public health emergency under the NYC Health Code,⁹ and may subsequently issue orders to take urgent public health actions — in the form of Commissioner Orders — when necessary.¹⁰ More specifically, the City administrative code provides that

the Department of Health may adopt vaccination measures to effectively prevent the spread of communicable diseases.¹¹

Commissioner Orders must be ratified by the NYC Board of Health on the basis of supporting scientific evidence. The Board of Health — created in 1866 to address living conditions that were causing cholera in NYC — is currently made up of 11 experts in the fields of medicine, science, and public health, who are appointed by the mayor and approved by the NYC Council. The Board holds public meetings to review Commissioner Orders, and it renders decisions on ratification of those orders by way of a public vote.

The vaccine mandates issued by Commissioner Order and ratified by the Board of Health in 2021 were legally authorized as consistent with the requirements of the Health Code and City administrative code. This process was not always linear: the final mandates were honed through collaboration and iteration during the regular public meetings held by the Board of Health during the COVID-19 pandemic. Ultimately, after completing this collaborative process, the Board of Health moved to ratify every Commissioner Order mandating vaccination.

Architecture of Legal Strategies

The strength and sustainability of the NYC vaccine mandates were a function of the principles undergirding their implementation:

1. Rooting the scope and substance of mandates in rigorous public health science by constructing the policies with input from numerous experts.
2. Strategically sequencing a phased rollout of mandates: beginning narrowly, where justification was strongest (e.g. protecting vulnerable populations in healthcare and congregate settings, and prioritizing mandates for public sector employees); then building on that foundation to encompass the

broader population and expand mandates to the private sector.

3. Establishing stringent, legible parameters for the mandates by prioritizing vaccine requirements over a testing option and limiting medical and religious exemptions to those required by law.

Two key features related to the scientific grounding of NYC vaccine mandates were repeatedly invoked in court rulings. First, evidence of the need for each mandate was expressly stated in every Commissioner Order. This evidence was proffered in the “whereas” clauses in the preamble to each order — for example: “Whereas a study by Yale University demonstrated that the City’s vaccination campaign was estimated to have prevented about 250,000 COVID-19 cases, 44,000 hospitalizations and 8,300 deaths from COVID-19 infection since the start of vaccination through July 1, 2021.”¹² During public proceedings, the Board of Health thoroughly reviewed, discussed, challenged, and ultimately deemed this evidence sufficient for the purpose of ratifying each order.

Second, city scientists and established experts were largely in agreement over the data and willing to attest to the facts supporting each of the Orders — and the courts, in turn, were unanimous in deferring to the expertise of the Department of Health. For instance, one court decision emphasized an affidavit provided by the DOH chief medical officer, invoking her reasoning that “from a public safety perspective, vaccination provides a more certain and verifiable record of immunity than that afforded by prior COVID-19 infection,” and consequently, “vaccination of individuals providing City services and working in City facilities will save lives, protect public health, and promote public safety.”¹³

When New York City began implementing vaccine mandates in summer 2021, city authorities constrained the scope of their mandates to prioritize protecting vulnerable New Yorkers: patients in health care settings,¹⁴

and residents of congregate and residential care facilities.¹⁵ Two separate vaccine mandates were issued in July and August to require staff of these facilities to be vaccinated or undergo weekly testing.

Subsequent vaccine mandate Orders followed the greatest needs as dictated by societal circumstances and burgeoning evidence. By late August, with the school year about to begin, cases rising, and no vaccinations yet available for children under 12, the NYC Health Commissioner issued a mandate requiring employees of the Department of Education to have at least one vaccination by October 1, without a testing option.¹⁶ Failure to demonstrate vaccination would result in employees being placed on leave without pay. Around this same time, the NYC Mayor issued the “Key to NYC” Executive Order, requiring that public accommodations — like restaurants, museums, and sporting arenas — only admit patrons who had proof of receiving at least one vaccine dose.¹⁷ Between September and December, the Commissioner issued four more vaccine mandates designed to protect children: for childcare programs,¹⁸ high-risk extracurricular activities,¹⁹ early intervention programs,²⁰ and nonpublic schools.²¹

After the City’s previous vaccine mandates had all been implemented and largely upheld by the courts, the Commissioner issued an additional Order mandating that all private businesses in NYC — approximately 184,000 in total — require their employees to be vaccinated.²² The Board of Health ratified that Order on December 20, 2021, making it the first vaccine mandate of the pandemic to apply broadly to all private employers within a municipality.

Rather than including express exemptions in the content of the Orders, NYC relied on existing protections for those seeking medical and religious exemptions for similar mandates. The mandates simply provided: “Nothing in this Order shall be construed to prohibit any reasonable accommodations otherwise required by law.”²³ Employees, for example,

could still request a religious or medical exemption under federal, state, or local law. This formulation permitted reasonable accommodations while precluding broad exemptions that would have invited confusion and undermined the public health impact of the mandates.

To promote vaccine uptake, the Orders also limited the duration and availability of options to test or provide evidence of prior infection as an alternative to vaccination. Although these alternative options would have made the mandates more politically palatable, the scientific experts of the NYC DOH felt strongly about strict vaccination requirements as the most impactful from a public health perspective. According to a subsequent Health Department analysis, vaccination rates for municipal employees increased more quickly after the test-

ing option was eliminated from the mandate in October.²⁴

Legal Challenges

Two categories of legal claims were levied against the NYC vaccine mandates: claims challenging the validity of their form and claims against the substance of the mandates. None of these initial challenges succeeded in stopping the mandates from moving forward (Table 1).

Form

Claims brought against the form of the mandates either challenged the authority of the Department of Health to promulgate the Orders — invoking separation of powers — or asserted that the Department’s actions were “arbitrary and capricious” — meaning that the factual basis for the Department’s mandates

did not meet the legal standard prescribed by the state law. On the question of authority, the courts cited the NYC Charter and NYC Administrative code in holding that the Department of Health and Board of Health did indeed have the authority to issue mandates to protect the public health during a public health emergency.²⁵ The courts resoundingly rejected the “arbitrary and capricious” claims, finding that the decision to mandate vaccination was supported by a rational basis and that courts should defer to the agency’s own interpretation of its own regulations. In the words of one such decision, “[A]n agency’s decision to rely on the conclusions of its experts, rather than the conflicting conclusions of challengers’ experts, does not render its determination arbitrary, capricious, or lacking in a rational basis...It is undisputed that

Table 1

Legal Challenges to New York City Vaccine Mandates

Case	Basis for Challenge	Outcome
<i>New York City Municipal Labor Committee v. City of New York</i>	School-based employees allege violation of substantive due process rights to personal autonomy, bodily integrity and right to reject medical treatment.	The court denied Petitioners’ request for injunctive relief and granted Respondents’ motion to dismiss claim in its entirety. The court concluded: “It is undisputed that the Department of Health and Mental Hygiene had the authority to issue the Order...Further, this Court cannot and will not substitute Petitioners’ judgment for that of New York City’s public health experts, especially where, as here, Petitioners submit no medical documentation.” ³¹
<i>In the Matter of the Application of v. Blasio</i>	Uniformed Firefighters Association claims Order violates state and city law, is arbitrary and capricious, and an abuse of discretion.	The court denied Petitioners’ request for injunctive relief and granted Respondents’ motion to dismiss. The court cited the opinion in <i>New York City Mun. Lab. Comm. v. City of New York</i> , noting that “the court ‘cannot and will not substitute Petitioners’ judgment for that of New York City’s public health experts’ vested with the authority to safeguard the public health amid an ongoing global pandemic.” ³²
<i>Maniscalco v. New York City Department of Education</i>	DOE employees claim violation of substantive due process and equal protection, and that Order was arbitrary and capricious.	The second circuit affirmed the district court’s decision to deny Plaintiffs’ request for injunctive relief. The decision by the district court emphasized: “Public school students have already endured two school years that were mired by disruption, leaving many students far behind. Minimizing interruption by providing a safe environment for these students is also a legitimate and important governmental purpose. Although plaintiffs argue that masks and testing adequately can advance this objective, it is not irrational for defendants to conclude the vaccine mandate better enhances this purpose.” ³³
<i>Marciano v. de Blasio</i>	Police detective alleges violation of separation of powers, state law preemption, and Order violates US Constitution due process rights.	The court granted defendants’ motion to dismiss the complaint with prejudice, concluding that “Marciano fails to articulate how this process falls below the constitutional floor...it appears that he was afforded constitutionally adequate process.” ³⁴

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Substance

Substantive challenges were all brought under constitutional claims. Claimants argued that the vaccine mandates violated their substantive due process rights, undermined their right to equal protection under the law, or infringed on their freedom to exercise religion.

Claims brought under the Due Process Clause of the Fourteenth Amendment argued that NYC’s vaccine mandate deprived them of the right to engage in their profession. But in each case, the courts highlighted that the Due Process Clause does not secure the right to a specific job. Furthermore, courts consistently rejected claims that the costs of mandate enforcement mechanisms outweighed the public health benefits. For example, in a case brought by a New York City Police Union, the court held that “while employment rights are significant, equity must favor a policy which respondents have enacted to decrease serious illness and death.”²⁷

In every case invoking the equal protection clause, claimants failed to demonstrate their belonging to a protected class. As a result, courts applied a rational basis standard in lieu of a stricter analysis, leading to consistent decisions to uphold the vaccine mandates. For example, in a case brought by the teachers’ union, the court found that the city’s requirement to be vaccinated — with no test-out option — was rational. The court explained that, “[u]nlike other municipal employees, these DOE employees are necessarily in close contact for long hours with children below twelve — who cannot be vaccinated — in indoor, congregate settings.”²⁸

Conclusion

In decisions rendered on the numerous legal challenges to New York City’s vaccine mandates, courts have highlighted the value of local public health authority for taking informed, responsive, and constitutionally con-

strained action to promote widespread vaccination. By contrast, in the Supreme Court decision rejecting the federal vaccine-or-test mandates promulgated by OSHA, the Court explicitly referenced OSHA’s lack of statutory authority to implement a mandate of this kind, noting “that OSHA, in its half century of existence, has never before adopted a broad public health regulation of this kind,”²⁹ and concluding “that the mandate extends beyond the agency’s legitimate reach.”³⁰

By leveraging its unique position and capability as a local public health authority, the New York City Department of Health honed an evidenced-based process to motivate, shape, and justify vaccine mandates. In the continuing battle against COVID-19 — and in the event of future public health emergencies — municipal health authorities are positioned to take swift, targeted action that may be more difficult to achieve at the national level.

Note

The authors have no conflicts of interest to disclose.

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