

New York Releases Phase Three Guidance for Reopening of Restaurants / Food Services and Personal Care Businesses

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Continuing New York State's four-phased plan for reopening nonessential businesses and expanding essential businesses in the state ("[New York Forward](#)" or "NYF"), New York has released summary and detailed [guidelines](#) ("Guidance") for the two industries that will be permitted to open in Phase Three—restaurants / food services and personal care. Notably, the Guidance makes clear that it applies to essential businesses that remained open throughout the shutdown, nonessential businesses that were allowed to reopen in a prior phase of NYF, and "commercial and recreational activities that have been permitted to operate statewide with restrictions."¹

This Advisory addresses the requirements for reopening or expanding restaurant / food service establishments, including food trucks and other food concessions, based upon both the [summary](#) and [detailed](#) Guidance. Under the Guidance, all such establishments may provide outdoor² and indoor dining services, as long as they comply with the state's myriad distancing and other safety mandates, discussed below, and all applicable federal laws (e.g., the Americans with Disabilities Act), as well as relevant regulations and guidance from the Centers for Disease Control and Prevention ("CDC"),

¹ Please see Epstein Becker Green's Advisories on [Phase One](#) and [Phase Two](#) of New York Forward. Also see the Advisories on the state's guidance for [reopening office-based businesses](#) and on [New York City's guidance for retail and other Phase One industries](#). A business that is currently in Phase Two of NYF, which was initiated on May 29, 2020, will be allowed to enter Phase Three once the region in which it is located has met the [health metrics](#) set forth by the state for moving to the next phase (i.e., a 14-day decline in both total and new COVID-19 hospitalizations and death rates). As a reminder, restaurants and other food service establishments in regions that are in Phase One may only operate by take-out and delivery. In regions that have reached Phase Two, such establishments may open outdoor spaces with seating for customers, in accordance with Phase Two's "[Interim COVID-19 Guidance for Outdoor and Take-Out/Delivery Food Services](#)."

As we previously [reported](#), New York City entered Phase One on June 8, 2020. [Five regions](#) of New York State entered Phase Three, beginning June 12, 2020: Central New York, the Mohawk Valley, the Southern Tier, the Finger Lakes, and the North Country.

² An "outdoor space" is defined as "an open-air space designated for the consumption of food and/or beverage, which may have a temporary or fixed cover (e.g. awning or roof) so long as such cover has at least two open sides for airflow."

the Environmental Protection Agency, and the U.S. Department of Labor's Occupational Safety and Health Administration ("OSHA").

Note: Employers should ensure adherence to the requirements set forth in the detailed Guidance, and not rely solely on the summary guidelines or the [model safety template](#) when formulating their safety plan and other mandated policies.

The Mandated Safety Plan for Restaurants and Other Food Services

Restaurant and other food services employers must develop, implement, and conspicuously post their safety plan and other signage at the workplace. In addition, they are required to designate a workplace safety monitor whose responsibilities include "continuous compliance with all aspects of the site safety plan."

Physical Distancing Mandates³

- Limit indoor capacity to no more than *50 percent of maximum occupancy*, exclusive of employees. (Thus, employers may bring back their entire workforce, if they so desire.)
- Restrict indoor and outdoor capacity to the number of tables that can be arranged in a manner that ensures at least six feet of distance in all directions from any table.
 - If such distancing is not feasible, install physical barriers between the tables, which are at least five feet in height, do not block emergency or fire exits, and comport with OSHA guidelines.
- Ensure that workers maintain a distance of at least six feet from patrons and co-workers "at all times, unless the core activity requires a shorter distance."
 - If such distancing is not feasible (e.g., at cash registers), install physical barriers.
- "Clearly signal" distancing requirements, e.g., mark six feet of distance in any area where customers may stand in line to place an order, pick up food, be seated, use the restroom, or pay their bill.
- Implement specific practices for adequate social distancing in small areas, such as restrooms and breakrooms (e.g., limiting occupancy, flagging when occupied, etc.), and post appropriate signage.
- Designate discrete work zones for servers and specific stations for kitchen staff, where possible.

³ The summary and detailed guidelines also contain recommended "best practices" with which employers are not required to comply, but which employers may find helpful. For the most part, this Advisory focuses on the guidelines' mandates.

- **Mandate that ALL workers, including kitchen staff, wear a face covering AT ALL TIMES, regardless of the distance between tables.**
- Ensure that patrons wear face coverings at all times, except while seated, but, even when seated, encourage them to wear face coverings when not eating or drinking.
 - Be aware that patrons who are under the age of two or unable to medically tolerate a face covering need not wear one.⁴
- Require individuals seated at the same table to be “members of the same party,” although they may be from different households.
- Limit seating arrangements to a maximum of 10 people per table.
 - Permit seating in bar areas and at “communal tables” only if at least six feet can be maintained between “parties,” i.e., groups of patrons.
 - Ensure that bar area staff keep a distance of at least six feet between each other and customers, when possible.
- Where possible, designate separate entrances/exits for customers and employees.
- Take measures to reduce interpersonal contact and congregation, such as:
 - restricting on-site staff to only those workers who are necessary,
 - adjusting workplace hours, and
 - staggering arrival/departure times.
- Limit in-person gatherings, such as staff meetings, “to the greatest extent possible.”
- Minimize contact with delivery and pickup vendors by establishing, if feasible, designated areas for those activities.

⁴ The Guidance does not address how an employer should respond if an employee—or customer—asserts that he or she cannot medically tolerate wearing a face covering. Prior [guidance](#) from the New York State Department of Health instructs, “If a face covering would inhibit or otherwise impair an individual’s health ... an individual is not required to wear or use such a covering.... [Employers] and enforcement authorities are prohibited from requesting or requiring medical or other documentation from an individual who declines to wear a face covering due to a medical or other health condition that prevents such usage.”

With respect to employees who refuse to wear a face covering for medical reasons, employers should engage in an interactive process with the worker to determine if a reasonable accommodation is available that would not cause the employer undue hardship, such as adjusting his or her job duties to avoid interfacing with co-workers or customers. Employers should also seek to provide a reasonable accommodation to customers who cannot medically tolerate wearing a face covering.

Personal Protective Equipment (“PPE”)

- Provide workers with a face covering (and replacements), free of charge.
 - Prohibit the sharing of face coverings.
 - Be aware that a cloth face mask is acceptable, unless the work being performed requires a higher degree of protection under OSHA [guidelines](#).
- Mandate that all employees wear gloves where appropriate, and make sure that they change gloves when moving from one task to another, such as from serving customers to pre-rolling silverware, or when bussing tables (i.e., replace gloves before and after cleaning tables).
- Follow CDC [guidance](#) for the use, maintenance, and disposal of PPE.
- Train employees on how to don, doff, clean (as applicable), and discard PPE.

Hygiene, Cleaning, and Disinfection

- Before reopening, conduct checks and assessments of kitchen systems, ventilation equipment, and the like.
- Ensure that employees wash hands frequently and/or use hand sanitizer, and “use bare hand barriers consistent with state and local sanitary codes.”
- Limit the sharing of objects (e.g., kitchen tools, pens, pads), as well as the touching of shared surfaces, including doorknobs, keypads, and touch screens.
 - In the alternative, require workers to wear gloves when in contact with shared objects or frequently touched surfaces, or mandate that workers wash their hands before or after such contact.
 - To the extent possible, minimize employee sharing of kitchen equipment (e.g., knives, pots, rags/towels).
- Ensure that workers in food trucks and concessions where there is no running water wear gloves or regularly use hand sanitizer and otherwise comply with federal, state, and local food handling and hygiene requirements.
- Follow the hygiene, cleaning, and disinfection guidance from the [CDC](#) and the [New York State Department of Health](#) (“DOH”).
- Maintain logs that document the “date, time, and scope of cleaning.”
- Provide and maintain “hand hygiene stations” (e.g., soap, water, and paper towels) and hand sanitizer where handwashing is not available or practical.

- Provide and encourage employees to use cleaning and [registered](#) disinfection supplies for shared surfaces and equipment before and after using these surfaces or equipment, followed by hand hygiene.
- Make sure that cleaning occurs “at least after each shift, daily, or more frequently if needed.”
 - Regularly clean and disinfect the entire establishment and “more frequently” clean and disinfect frequently touched surfaces and high-risk areas used by many individuals (e.g., restrooms).
- Prohibit employees from sharing food and beverages, and provide areas for employees to observe social distancing while eating meals.
- Do not use customer alert devices (e.g., buzzers) to notify patrons about seating or an order, unless such devices are cleaned and disinfected between each use.
- Develop a plan for cleaning and disinfecting exposed areas in the event an individual is confirmed to have COVID-19, including, “at a minimum, all heavy transit areas and high-touch surfaces.”
- **For take-out/delivery:**
 - Provide hand hygiene stations for customers waiting for food or drinks.
 - Ensure that workers wash their hands, use sanitizer, or wear gloves.
 - Make sure that all condiments provided directly to customers are in single-use disposable containers or reusable containers that are regularly cleaned/disinfected.
 - If non-disposable menus are used, “clean and disinfect the menu after each person’s use.”
 - Use pre-packaged silverware or, if pre-rolled silverware is used, require workers performing that job to wear a mask and gloves.

Communications

- Affirm you have reviewed and understand the state-issued industry guidelines, and that you will implement them.⁵
- Post signage throughout the establishment to remind employees and patrons of the establishment’s hygiene protocols, social distancing mandates, rules for use of PPE, and cleaning and disinfection policies.

⁵ A link to the [affirmation](#) is at the end of the detailed guidelines.

Screening and Contact Tracing

- Conduct mandatory daily health screenings (such as a questionnaire and temperature check) of all workers and, “where practicable,” vendors.
 - Consider conducting screenings remotely (e.g., by telephone or electronic survey), before the employee reports to the workplace.
- If screening is performed on site, develop a plan for workers to maintain six feet of distance while waiting their turn to be screened.
- At a minimum, make sure the screening determines whether the employee or vendor has had:
 - COVID-19 symptoms in the past 14 days,⁶
 - a positive COVID-19 test in the past 14 days, and/or
 - close contact with a confirmed or suspected COVID-19 case in the past 14 days.
- Do not keep records of employee health data (e.g., temperature data).
 - However, review all employee and vendor responses collected by the screening process on a daily basis, and maintain a record of such review.⁷
- Designate a point of contact for workers and vendors to notify if they subsequently experience COVID-19-related symptoms.
- Follow DOH [guidance](#) regarding protocols for employees seeking to return to work after a suspected or confirmed case of COVID-19 or after the employee had close or proximate contact with a person with COVID-19.
 - **NOTE:** As discussed [here](#), the DOH guidance, updated May 31, 2020, differs from the mandates set forth in the industry-specific guidelines previously issued for Phases One and Two. The most notable differences are (i) the reduction in the length of the quarantine for employees who test positive for COVID-19, or have been exposed and are symptomatic, from 14 days of self-quarantine to 10 days of “self-isolation,” and (ii) a new requirement that an employee who has had close or proximate contact with a person with COVID-19 for a “prolonged” period of time but is not symptomatic to self-quarantine for 14 days. (The original rule required the exposed, asymptomatic employee to take a series of precautionary measures, but it did not impose a quarantine.)

⁶ See the CDC [guidance](#) on “Symptoms of Coronavirus.”

⁷ As we have [previously discussed](#), the prohibition on keeping employees’ “health data” appears to be inconsistent with the mandate to document the screening process. We hope further guidance on this issue is forthcoming.

- To the extent possible, maintain a log of every person, including workers and vendors, who may have close or proximate contact with other individuals at the workplace, and ensure that the log contains sufficient contact information, “such that all contacts may be identified, traced and notified in the event an employee is diagnosed with COVID-19.”
 - Do not require customers or delivery personnel who wear appropriate PPE or make contactless deliveries to be screened or provide contact information, but encourage customers to comply with these protocols.
- Immediately notify the state and local health departments if a worker or vendor was in close contact with others and tests positive for COVID-19.
 - Cooperate with local DOH contact-tracing efforts by providing information concerning “all employees logged and vendors/customers (as applicable) who entered the food service location dating back 48 hours before the individual first experienced COVID-19 symptoms or tested positive, whichever is earlier.”
 - Be aware that the local DOH may, under its legal authority, “implement monitoring and movement restrictions of infected or exposed persons including home isolation or quarantine.”
 - Maintain confidentiality of screening and logged information, as required by state and federal laws and regulations.
- Advise individuals that, as applicable, they must self-report and follow DOH protocols if they are alerted that they have come into close or proximate contact with a person with COVID-19.

What New York Owners and Operators of Restaurants and Food Service Businesses Should Do Now

- Understand and comply with your obligations under the state’s *detailed* industry-specific guidelines, as well as any applicable local mandates. When in doubt about specific obligations, consult with counsel.
- Keep up to date on the latest COVID-19-related developments; for instance, regularly check Epstein Becker Green’s [Coronavirus \(COVID-19\) Resource Center](#).
- Prior to reopening, ensure that you have:
 - a compliant safety plan, including a designated site monitor, distancing and hygiene protocols, screening, notice, and contact-tracing processes, and training and communications programs (including all required postings);
 - sufficient PPE and hygiene and cleaning materials;
 - conducted a thorough pre-return inspection and cleaning of the premises;

- o implemented policies and procedures to handle various “what if” employee issues, such as requests for accommodation and refusals to work or submit to screening; and
- o developed an initial returning workforce strategy that allows for reopening with as few employees as possible, so as to ensure time to resolve flaws or weaknesses in any of the above before you fully reopen.

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