

**“New York Forward”<sup>1</sup>: As State Reopens, Nonessential *and Essential* Businesses Must Develop a COVID-19 Safety Plan**

May 28, 2020

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Though it may feel like an eternity to many residents and employers in the state, New York has gone from a shutdown of all but essential businesses to initiating an economic reopening in the span of roughly two months. “New York on PAUSE (Policies Assuring Uniform Safety for Everyone)” has now become “[New York Forward](#)” (“NYF” or “Plan”), upon Governor Andrew M. Cuomo’s Executive Order [202.31](#), which authorized a gradual reopening plan for nonessential businesses. The Plan, supplemented so far with preliminary [guidance](#) (“Guidance”), which includes industry-specific guidelines, statewide guidelines, and [Frequently Asked Questions](#) (“FAQs”), is complex. The Plan imposes on all New York employers myriad obligations, including, most significantly, a mandate to create a COVID-19 health and safety plan (“Mandated Safety Plan”) for employees and the public. Importantly, employers should review the detailed guidelines for their particular industry to ensure full compliance while completing their Mandated Safety Plan.

In addition, employers with operations both inside and outside New York must consider NYF as well as similar documents and guidance in other states in order to create safety plans that are compliant in each state where the employer has employees. Many employers will, of course, strive to create a universal plan that complies in all applicable states.

**At a Glance: The Key Points of New York’s Mandated Safety Plan**

NYF requires all New York employers reopening their business—and *essential businesses that never shut down*—to create a comprehensive and detailed Mandated Safety Plan to mitigate the risk of spreading COVID-19. While there is no affirmative obligation to share the Mandated Safety Plan with any government agencies, the Mandated Safety Plan must be written (the state has provided a [template](#)) and must include the employer’s agreement to:

- **Develop physical distancing protocols**, which may include, for example, the following (protocols marked with an asterisk may only apply in the first phase of the Plan): limiting indoor workforce presence to 50 percent of the maximum occupancy (certain industries);\* restricting in-person presence to only those staff who are necessary to be on site;\* prohibiting non-essential visitors;\* adopting the “six feet of

separation” rule (and/or requiring a face covering, depending on the circumstances); posting distance markers in certain areas; minimizing in-person gatherings; limiting the occupancy of tightly confined spaces (e.g., elevators) to one person at a time, if feasible (if not possible, all occupants must wear face coverings); and staggering schedules to the extent possible.

- **Provide personal protective equipment (“PPE”)**, including a face covering free of charge and gloves, where appropriate, and training to employees on donning, doffing, and caring for their PPE.
- **Create hygiene and cleaning protocols.** Provide handwashing stations and hand sanitizers, conduct regular (e.g., daily) cleaning and disinfection of the facility, maintain a cleaning log, and limit sharing of equipment, tools, etc.
- **Implement communication practices.** Post signage detailing the safety plan and stressing the employees’ obligation to adhere to its mandates, and establish a communication plan for employees, visitors, and customers.
- **Create a COVID-19 screening process,** and conduct a mandatory health screening assessment (e.g. questionnaire and/or temperature check) before employees begin work each day and for “essential visitors.”
- **Adopt contact tracing protocols,** including notification to government officials and at-risk individuals when an employee tests positive for COVID-19, and maintain a continuous log of “every person, including workers and visitors [but not necessarily customers], who may have close contact with other individuals at the work site.”
- **Develop a plan for cleaning and disinfection** in the event an employee tests positive for COVID-19.
- **Designate a “site safety monitor”** to oversee the safety plan.++
- **Post the plan in a conspicuous location at the worksite.++** All employers should retain it on the premises in case of an inspection by government officials.
- **Ensure that an “owner or agent” of the business submits the online [safety plan affirmation form](#),** stating that said person has read the Guidance and understands the company’s obligation to operate in accordance with the Guidance.++

++ Currently, this provision is required by industry-specific guidance that has been issued for Phase One businesses. As of today, there is no general guidance directed toward essential businesses as a group that requires an essential business to comply with the site safety monitor, posting, or affirmation mandates. Accordingly, such mandates are only applicable to an essential business if it is, all or in part, in a Phase One industry, e.g., some retailers. Non-Phase One essential businesses, however, should anticipate that these mandates may be imposed by subsequent guidance.

## **Putting the Mandated Safety Plan into Context: Phased Reopening**

The goal of the Mandated Safety Plan is to help ensure the success of NYF by gradually restarting the state’s economy without causing an increase in COVID-19 cases. Under NYF, nonessential businesses in New York will reopen in four phases. The Plan takes a regional approach, permitting each of the state’s 10 regions to reopen a limited number of industries per phase once various [health metrics](#) recommended by Centers for Disease Control and Prevention (“CDC”) [guidelines](#) are met. These metrics

include such factors as (i) a 14-day decline in the hospitalization rate and number of COVID-19 deaths in the region, and (ii) the region's hospital capacity, COVID-19 testing capacity, and contact tracing ability.<sup>1</sup>

Under Phase One of the Plan, businesses in the following industries are allowed to reopen: (i) construction, (ii) agriculture, (iii) forestry, (iv) fishing and hunting, (v) retail (limited to curbside or in-store pickup or drop off), (vi) manufacturing, and (vii) wholesale trade. If, after another 14-day period from the start of Phase One, the region continues to meet the health metrics, it will move into Phase Two, allowing certain other industries to open, based on priority and risk level (i.e., businesses considered "more essential with inherent low risks of infection in the workplace and to customers"), followed by other businesses considered "less essential" or that present a higher risk of infection spread. Thereafter, as the infection rate declines, the state will increase the pace of reopening businesses.<sup>2</sup>

### **The Mandated Safety Plan: The Details**

Keep in mind these three general rules:

- The Mandated Safety Plan applies to all nonessential **and essential** businesses, even if the essential business was never shut down and therefore is not technically "reopening."
- Every business must comply with the minimum state standards set forth in the Guidance, as well as applicable federal laws, such as the Americans with Disabilities Act, and regulations and guidelines from such agencies as the CDC, the Environmental Protection Agency, and the U.S. Department of Labor's Occupational Safety and Health Administration ("OSHA").
- There are **no exceptions** to the compliance requirements—the state will not issue waivers for any of the Mandated Safety Plan requirements. If, for example, an employer is having difficulty in procuring PPE, the FAQs advise the employer to contact the county Office of Emergency Management for assistance.

**Note:** The Guidance for Phase One includes industry-specific summary guidelines and detailed guidelines, FAQs, and a general business safety plan [template](#). Employers should keep in mind that the mandates and guidelines will likely be amended in subsequent phases. For example, one key mandate of industries opening in Phase One is a limitation on occupancy in indoor work spaces (discussed below). As regions are able to progress to succeeding phases, the occupancy limits presumably will be revised or will be subject to different requirements by industry.

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<sup>1</sup> For a discussion of the CDC guidelines, see the Epstein Becker Green blog post titled "Protecting Lives and Livelihoods Amid the COVID-19 Pandemic: An Overview of Return-to-Work Guidance and Related Legal Implications," available [here](#). The CDC's most recent guidance on reopening is available [here](#). For more information on NYF's health metrics, see [here](#). For a list of regions that have been allowed to reopen, see the state's [Regional Monitoring Dashboard](#), which is updated daily.

<sup>2</sup> The list of industries permitted to reopen in subsequent phases is available [here](#).

Broadly, the Mandated Safety Plan requirements are similar across all industries, with some industry-specific mandates. The Guidance separates the mandates into three categories—“**people, places, and processes.**” The following discussion adheres to this structure in summarizing the Guidance. **As noted above, employers should review the detailed guidelines for the industry applicable to their business to ensure full compliance.**

### “PEOPLE” Mandates/Guidance

- **Physical Distancing**

- Limit *indoor* workforce presence.
  - *Manufacturing, Non-Food Related Agriculture, Wholesale Trade:* Limit indoor workforce to 50 percent of the maximum occupancy as set by the certificate of occupancy, excluding supervisors, unless the facility requires more employees “to safely operate core functions” (e.g., supplying critical materials). A similar restriction, including customers, applies to retailers allowing in-store pickup.
  - *Construction, Forestry, Fishing:* Limit indoor workforce presence to no more than one worker per 250 sq. ft. on site, excluding supervisors, unless additional personal protective measures are implemented (e.g., face coverings at all times).
- Maintain at least six feet of distance between workers at all times, unless safety considerations require a shorter distance.
- Require that any time an employee comes within six feet of another person, he or she must wear an acceptable face covering (discussed below under “PPE”).
  - Consider installing physical barriers when distancing is not feasible between workstations.
- Limit occupancy in confined spaces (e.g. elevators, vehicles) to one person at a time, unless all present are wearing face coverings, in which case occupancy should still be limited to 50 percent of maximum capacity, and restrict congregation in elevator waiting areas.
- Make corridors and hallways one-directional, where feasible.
- Use distance markers where people congregate, e.g., elevators, clocking in/out areas, screening stations.
- Post New York State Department of Health (“DOH”) COVID-19 [signs](#) or custom signs throughout the workplace.

- **Gatherings in Enclosed Spaces**

- Limit in-person gatherings as much as possible, and use other methods, such as video or teleconferencing.
- If you must hold meetings, ensure the meeting space is well ventilated, and enforce distancing protocols.
- Establish distancing protocols for bathrooms and breakrooms.

- **Workplace Activity**

- Limit in-person presence to only those staff who are necessary to be on site.
- Stagger schedules for shift starts/stops, meal breaks, tasks, etc.

- **Movement and Commerce**

- Prohibit non-essential visitors on site.
- Designate areas for pickups and deliveries to minimize contact with others.
- Create separate entrances and exits.
- Require employees to stay near their workstation as much as possible.

***“PLACES” Mandates/Guidance***

- **Protective Equipment**

- Maintain an adequate supply of PPE for workers (including replacement PPE) and visitors.
- Provide all required PPE, including face coverings, free of charge to employees.
- Require face coverings where physical distancing cannot be maintained (cloth-based face coverings are acceptable unless the nature of the work requires a higher degree of protection, e.g., an N95 mask).
  - Allow employees to use their own face coverings, if they meet OSHA standards/business needs.
- Make sure that face coverings are (i) cleaned or replaced after use or when damaged or soiled, (ii) properly stored or discarded, and (iii) not shared (see [CDC guidance](#)).

- Train workers on proper donning, doffing, cleaning, and discarding of PPE.

- **Hygiene and Cleaning**

- Adhere to DOH and CDC hygiene and sanitation requirements, including [“Guidance for Cleaning and Disinfection of Public and Private Facilities for COVID-19,”](#) and the [“STOP THE SPREAD” poster,](#) as applicable.
- Maintain cleaning logs that include the date, time, and scope of cleaning.
- Limit the sharing of tools, machinery, materials, and vehicles and the touching of shared surfaces, such as railings and fences, or require workers to wear gloves or to sanitize or wash their hands before and after contact with shared surfaces.
- Provide hand hygiene stations.
- Regularly clean and disinfect the work site, including equipment, tools, etc.
  - Conduct more frequent cleaning and disinfection for high-risk areas (such as restrooms).
  - Require cleaning and disinfecting to occur at least after each shift, daily, or more frequently, as needed.
  - Clean and disinfect shared workstations between uses.
- If cleaning or disinfection products cause safety hazards or degrades the material or machinery, ensure hand hygiene stations and/or disposable gloves are available.
- Develop and implement special cleaning and disinfecting protocols in the event a worker contracts COVID-19.
  - Be aware that workers without close contact with the person who is sick can return to the work area immediately after disinfection.
  - Follow the [CDC’s “Evaluating and Testing Persons for Coronavirus Disease 2019 \(COVID-19\).”](#)
  - Discontinue special cleaning after seven days have passed since the person who is sick visited or used the facility.
- Prohibit shared food and beverages (e.g. buffet style meals).

- **Phased Reopening**

- Try to phase in the reopening so as to allow for operational issues to be resolved before production or work activities return to normal levels.

- **Communications Plan**

- Submit to the state the online [safety plan affirmation form](#) in which an “owner or agent” of the business attests that the Guidance has been reviewed, is understood, and will be implemented. (**Note:** Guidelines and safety plan affirmation forms do not yet exist for businesses in Phases Two, Three, and Four, or for many essential businesses that have been in continuous operation.)
- Develop a communications plan for employees, visitors, and customers that includes “applicable instructions, training, signage, and a consistent means to provide employees with information.”
  - Consider the use of website, email, and social media.
- Conspicuously post the full safety plan at the workplace. (**Note:** This requirement is currently mandatory only for those businesses opening in Phase One but is expected in other phases.)

### ***“PROCESSES” Mandates/Guidance***

- **“Site Safety Monitor”**

- Designate a “site safety monitor” to oversee compliance with all aspects of the site safety plan. (**Note:** This requirement is currently mandatory only for those businesses opening in Phase One but is expected in other phases.)

- **Screening and Testing**

- Implement mandatory daily health screenings (may be conducted remotely before an employee reports to the workplace).
- Train personnel performing the screenings, e.g., DOH, CDC, and OSHA protocols.
- Structure screenings to avoid congregations of employees.
- Conduct a daily review of all employee and visitor responses collected by the screening process, and keep a record of such review.
- At a minimum, require all workers and visitors to be screened by completing a questionnaire that determines whether the worker or visitor has:
  - “knowingly been in close or proximate contact in the past 14 days” with an individual who has tested positive for COVID-19 or who has or had symptoms of COVID-19 (an employee who responds that he or she has had close contact with a person who is confirmed or suspected for COVID-19 may not be allowed to enter the worksite

- before complying with the precautions outlined below and the employer has documented the employee’s compliance with those precautions);
  - tested positive for COVID-19 in the past 14 days; or
  - experienced any symptoms of COVID-19 in the past 14 days ([see CDC discussion of symptoms](#)).
- Require employees to “immediately disclose” if and when their responses to any of the above questions change.
- Consider conducting daily temperature checks, consistent with the [Equal Employment Opportunity Commission’s guidelines](#).
  - Be aware that, according to New York’s current Guidance, employers may *not* keep records of employee health data (e.g. temperature data).
- If an employee screens positive for COVID-19 symptoms:
  - Do not let the employee enter the workplace—direct him or her to go home and contact his or her health care provider for assessment and testing, and
  - Immediately notify the local health department and DOH.
- Identify a contact to notify if an employee develops symptoms at work.
- Be aware that, per all Phase One industry guidance documents, both employers and employees should take the following actions related to COVID-19 symptoms and contact:
  - “If an employee has COVID-19 symptoms AND EITHER tests positive for COVID-19 OR did not receive a test, the employee may only return to work after completing a 14-day self-quarantine.”
    - “Critical” employees may be allowed to return sooner if such action is approved by the local health department.
  - “If an employee does NOT have COVID-19 symptoms BUT tests positive for COVID-19, the employee may only return to work after completing a 14-day self-quarantine” (similar exception for a “critical” employee, as described above).
  - An employee who has had “close contact with a person with COVID-19 for a prolonged period of time AND is symptomatic” must notify his or her employer and follow the above protocol for a positive case.
  - If an employee has had “close contact with a person with COVID-19 for a prolonged period of time AND is NOT symptomatic,” the employee should notify his or her employer and comply with the following practices before and during their work shift, which should be documented:
    - *Regular monitoring*: As long as the employee does not have a temperature or symptoms, he or she should self-monitor

“under the supervision of their employer’s occupational health program.”

- *Mask wearing:* The employee should wear a face mask at all times while in the workplace for 14 days after last exposure.
- *Social distancing:* The employee should continue social distancing practices.
- *Work space disinfecting:* The employer should continue to routinely clean and disinfect all areas, such as offices, bathrooms, common areas, and shared electronic equipment.<sup>3</sup>

- **Tracing and Tracking**

- Adhere to these contact tracing requirements:
  - To the extent possible, maintain an ongoing log of “every person, including workers and visitors, who may have close contact with other individuals at the work site.”
    - Make sure the log contains contact information so that all contacts may be “identified, traced and notified” in the event an employee is diagnosed with COVID-19.
    - Be aware that the log need not include “deliveries that are performed with appropriate PPE or through contactless means.”
- Cooperate with the local health department’s contact tracing efforts.
- Notify the local health department and DOH immediately upon being informed of any positive COVID-19 test result by a worker or visitor at the site, per all Phase One industry guidance documents.
  - Inform the health department of all workers and visitors who entered the site “dating back to 48 hours before the worker began experiencing COVID-19 symptoms or tested positive, whichever is earlier,” but they must maintain confidentiality as required by federal and state law.
- Require employees who have been alerted that they have come into close or proximate contact with a person with COVID-19 to immediately self-report to you and to not remain on, or return to, the work site.

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<sup>3</sup> Note that the Guidance does not require an asymptomatic employee who has been in prolonged close contact with a COVID-19-positive person to take a diagnostic test. Nevertheless, Governor Cuomo [announced](#) on May 17, 2020, that any individual returning to the workplace in Phase One of the state’s reopening plan qualifies to be tested.

Employers also should be aware that the CDC’s guidelines concerning when symptomatic, COVID-19 positive, and asymptomatic employees who have been in close contact with a COVID-19-positive individual should return to work are somewhat different. As government guidance on these issues continues to evolve, employers may wish to consult with counsel if they are unsure of the proper standard to apply in a particular situation.

## Enforcement

Individuals can file complaints regarding the operation of businesses or gatherings 24/7, through an [online form](#) or by calling a hotline number. Employees are directed to file specific complaints against their employers to the New York State Department of Labor through the agency's [online form](#).

## What New York Employers Should Do Now

While we anticipate that the state will issue additional industry-specific guidelines as regions move into Phases Two, Three, and Four of the NYF initiative and more industries are authorized to reopen, the Guidance we have to date, particularly with respect to the Mandated Safety Plan, illustrates the formidable task some New York employers already are facing, and many others will soon confront, as they attempt to return to work in a manner that is financially and logistically feasible, and, at the same time, legally compliant. The Mandated Safety Plan has a number of “moving parts”—such as the screening and contact tracing processes—that may well be revised as the medical community's understanding of the virus continues to evolve. Also, of note, the CDC recently [advised](#) that 40 percent of asymptomatic COVID-19 positive individuals may nevertheless be transmitting the disease to others.

Further, some of the mandated protocols raise ostensibly inconsistent requirements, such as the directive not to maintain temperature records, yet at the same the employer must document each person's daily screening process. Hopefully, such issues will be addressed in subsequent guidance or FAQs.

The bottom line is that, as reopening plans are formulated, employers should do the following:

- Proceed cautiously and consult with counsel on potential legal pitfalls, specifically with respect to the Mandated Safety Plan—particularly if you're opening in more than one state.
- If you have operations both inside and outside of New York, consider not only NYF but also similar documents and guidance in other states to create safety plans that are compliant in each state where you have employees, or develop a universal plan that complies in all applicable states.
- Follow advice provided by the Guidance by opening with as small an onsite workforce as possible to allow proper time and space to work out any glitches in the safety plan, as well as in other aspects of the company's reopening policies, such as staggered work schedules.
- Consider allowing employees who have been successfully telecommuting to continue doing so.

- Take note as other states open their workplaces, so as to be mindful of missteps that that can be avoided once New York progresses in its phased reopening process.
- To keep on top of the most recent developments concerning the COVID-19 pandemic, including changes to the Guidance, regularly check Epstein Becker Green's [Coronavirus \(COVID-19\) Resource Center](#).

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