

**“Restart NYC”:
City Issues Guidance for Retail and
Other Phase One Industries**

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Following New York State’s four-phased guidance for reopening nonessential businesses and expanding essential businesses in the state (“[New York Forward](#)” or “NYF”),¹ New York City begins Phase One of NYF on June 8, 2020. In advance of this initiative, the city issued “[Restart NYC](#)” [guidelines](#) (“Guidance”), mostly in the form of Frequently Asked Questions, for the following industries: (i) [retail](#), (ii) [construction](#), (iii) [manufacturing](#), and (iv) [wholesale trade](#). In addition to complying with the city’s Guidance, Phase One employers must abide by the reopening mandates set forth in the state’s [industry-specific guidelines](#).

General Guidance

Though this Advisory focuses on the Guidance for the retail industry, employers should be aware that the overriding advice for all covered businesses is “continue work from home as much as possible.” The other “key factors” are as follows:

- *Stay home if sick*, unless you are leaving for essential medical care or other essential errands.
- *Practice physical distancing* by staying at least six feet away from other people.
- *Wear a face covering*.
- *Practice healthy hand hygiene*, such as washing your hands often with soap and water or using hand sanitizer, and regularly cleaning frequently touched surfaces.

Further, the Guidance stresses that all employers must comply with the state’s requirement to **create, implement, and post a [safety plan](#) and affirm compliance** with the state’s guidelines for their industry.

¹ Please see Epstein Becker Green’s Advisories on [Phase One](#) and [Phase Two](#) of NYF. Also see the detailed Advisory on [reopening office-based businesses](#).

New York City Retail Industry Guidance

During Phase One of New York Forward, the city's Guidance for the retail industry permits virtually all retail stores to reopen, but only for curbside and in-store pickup.²

Note: *The following discussion focuses on Guidance mandates or recommendations for the retail industry that are in addition to, explanatory of, or different from the state's guidelines (referenced above). **New York City employers must ensure compliance with both the city's and state's instructions for their specific industry.***

Screening, Testing, and Contact Tracing

- Pursuant to the state's mandated screening process, adapt the New York City Department of Health and Mental Hygiene's [model screening tool](#) to your business or create your own.
- Follow confidentiality rules:
 - Maintain medical information about employees in files that are separate from other personnel files.
 - Exceptions to the confidentiality rules allow employers to disclose the data when:
 - appropriate to inform supervisors and managers regarding necessary restrictions on an employee's work or duties or necessary accommodations;
 - appropriate to inform first aid and safety personnel, if someone requires emergency treatment; and
 - requested by government officials investigating compliance with federal antidiscrimination laws.
- Comply with the state's restrictions on keeping medical records, along with the state's requirements to keep records of daily mandatory screening.

² The following retail establishments are allowed to open in Phase One:

- Clothing stores
- Direct selling establishments
- Electronics and appliance stores
- Electronic shopping and mail-order houses
- Furniture and home furnishing stores
- Florists
- General merchandise stores
- Health and personal care stores
- Jewelry, luggage, and leather goods stores
- Lawn and garden supplies stores
- Office supplies, stationery, and gift stores
- Used merchandise stores
- Shoe stores
- Sporting goods, hobby, and musical instrument stores and bookstores
- Other miscellaneous store retailers

Note: As we have [previously discussed](#), the state’s current guidelines prohibit employers from maintaining records of employees’ “health data,” a mandate that appears to conflict with other state requirements, such as documenting the screening process, reviewing that documentation daily, and maintaining logs³ to be provided to the local department of health (“DOH”) for contact-tracing purposes in cases of positive COVID-19 tests and suspected cases.

Attempting to square the state’s ostensibly contradictory mandates, the city’s Guidance states:

We understand this to mean that you should keep a record for each day of the fact that you performed screening — for example, stating the names of personnel who performed the screening, but not recording the results for individual employees who were screened. Documentation could indicate how many people were screened, and how many, if any, were asked to leave as a result of the screening process.

It is unclear, however, how this proposed solution would satisfy the state’s documentation and log-keeping requirements or allow for useful contact tracing to take place, either by the employer or the state or local DOH.

Notably, the federal Equal Employment Opportunity Commission has [directly weighed in](#) on this issue and advises that (i) employers may store all medical information “related to COVID-19 in existing medical files,” including “an employee’s statement that he has the disease or suspects he has the disease, or the employer’s notes or other documentation from questioning an employee about symptoms,” and (ii) employers may maintain a log of the results of daily temperature checks, as long as they ensure the confidentiality of the records. We will continue to review whether the state addresses these inconsistencies in guidance.

- Communicate directly with employees who refuse to be screened about the importance of the screening, and address their concerns. However, if an employee still refuses to comply, you may discipline the worker (including termination), as long as any adverse action taken is consistent with your policies and any rights provided under an applicable collective bargaining agreement.⁴

³ Under the state’s guidance, employers must maintain “a continuous log of every person, including workers and visitors, who may have close contact with other individuals at the work site or area; excluding customers; and excluding deliveries that are performed with appropriate PPE or through contactless means.” Further, the state recommends that employers encourage—but do not require—customers to complete a health screen and provide contact information “so that they can be logged and contacted for contact tracing, if necessary.”

⁴ On June 6, 2020, New York’s Governor Cuomo signed [Executive Order No. 202.38](#), which grants commercial building owners, retail store owners, and “those authorized on their behalf to manage public places within their buildings and businesses the discretion to require individuals to undergo temperature checks prior to being allowed admittance.” Such entities also have “the discretion to deny admittance to (i) any individual who refuses to undergo such a temperature check and (ii) any individual whose temperature is above that proscribed by New York State Department of Health Guidelines.”

- If you are a small employer that does not provide health insurance, advise employees that they can call 311 to find free or low-cost health care.
- Provide information about [free COVID-19 testing](#) to employees who do not have a doctor.
- Do not allow workers who have or had symptoms consistent with COVID-19 to return to work until **all** the following are true:
 - At least 14 days have passed since their symptoms started, or if no symptoms develop, 14 days after their first positive test;
 - They have not had a fever for the prior three days, without the use of fever-reducing drugs, such as Tylenol or ibuprofen; and
 - Their “overall health has improved.”

Note: State guidelines require only that an employee meet the quarantine mandate, though the fever-reduction language is consistent with Centers for Disease Control and Prevention [guidance](#).

- “Relax leave policies” so that workers are encouraged to stay home “until they meet the criteria for ending self-isolation.”
- Do not require employees to get diagnostic or antibody testing before returning to work, unless public health guidance or their health care provider recommends it.
- Do not exclude someone from work or make other employment decisions based on an antibody test result, as the science is not yet definitive on whether the presence of antibodies means that a person cannot be reinfected with the virus. However, the city encourages all New Yorkers to get COVID-19 diagnostic testing whether or not they have symptoms or are at increased risk should they catch the virus.
- For employees who cannot isolate at home, share information with them about the city’s [COVID-19 Hotel Program](#).
- Provide information to employees about [what to do when sick](#).
- Refer employees with mental health issues to [NYC Well](#) or New York State’s COVID-19 Emotional Support Helpline (844-863-9314).
- Notify the city of actual or suspected cases of COVID-19 by emailing to CovidEmployerReport@nychhc.org.⁵

⁵ The city will only follow up on confirmed cases, reported through an electronic laboratory reporting system. The state’s guidance mandates that employers must also immediately notify the state health department if a worker, visitor, or customer was in close contact with others at the retail location and tests positive for COVID-19.

- If an employee tests positive, notify other staff or customers/clients that they may have been exposed, but do not share the identity of the infected employee or any of his or her medical information. The NYC Test and Trace Corps will attempt to identify close contacts who were potentially exposed and direct them to get tested and “isolate based on their exposure.”
- Advise individuals who are concerned that they were exposed to the virus but have not been contacted by the city to contact their health care provider or visit nychealthandhospitals.org/test-and-trace/testing.
- Instruct employees to alert the company if they have tested positive for COVID-19.

Note: The state guidelines also 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 their employer. They must leave the work site and not return until they have completed the mandated 14-day quarantine (and, if they get sick, they must satisfy the additional city requirements discussed above).⁶

Discrimination-Related Issues

- When sending a sick worker home, do not disclose the reason to co-workers. Regularly remind staff that it is unlawful and against company policy to harass or discriminate against an employee because of a medical condition, such as COVID-19.
- Comply with all obligations under New York City and New York State Human Rights Laws, and under the federal Americans with Disabilities Act, to provide reasonable accommodations for employees with “disabilities” (which includes medical conditions). Unpaid leave time is a form of reasonable accommodation, which may be required, unless it causes the employer undue hardship, even if an employee is not entitled to, or has exhausted, his or her leave under the Family and Medical Leave Act or any applicable state or city leave law.⁷

Face Coverings

- Provide employees with “multiple disposable face coverings or multiple cloth coverings to ensure they have a clean, undamaged face covering each day.”⁸

⁶ There is no mandate for tenants to notify building landlords of confirmed COVID-19 cases, nor must landlords notify tenants; however, the parties may agree to do so, as long as they do not disclose the infected individual’s name or medical information.

⁷ As a reminder, employees may also be eligible for paid leave under the [Families First Coronavirus Response Act](#) during an absence due to being diagnosed or seeking a diagnosis of COVID-19, or under [New York State’s COVID-19 leave law](#) if the person is subject to a mandatory or precautionary order of isolation or quarantine.

⁸ It is not necessary to provide employees with gloves, except when they are engaged in certain activities, such as cleaning or handling food.

- If an employee has a job that requires the wearing of a face covering (e.g., because he or she cannot maintain physical distancing of six feet), but the employee cannot medically tolerate a face covering, engage in a cooperative dialogue with the employee about whether there is a reasonable accommodation available that would not cause undue hardship, such as telework, reassigning the employee to a position that does not require working in close proximity, or a leave of absence.
- Do not allow employees to wear a face covering with an exhalation valve, as it allows unfiltered exhaled air to escape and could transmit the virus to others.

Note: Employers may set a stricter policy and require the use of face coverings even if six feet of distance between people is maintained.

- Require customers to wear a face covering whenever they may be within six feet of another person.

Note: Under [New York State Executive Order 202.34](#) (and Executive Order 202.38 discussed above), a business may refuse service for those not wearing face coverings. However, if an individual states that he or she cannot wear a face covering because he or she has a disability, the business must engage in a cooperative dialogue with the individual to determine whether there is a way to provide a reasonable accommodation that will not cause an undue hardship.

Hygiene and Cleaning

- Before reopening the workplace:
 - conduct a “routine cleaning and disinfection,” with a special focus on frequently touched surfaces and objects, such as doorknobs, handles, and faucets, and
 - follow the manufacturer’s recommendations for restarting systems, such as air or water circulation.
- Comply with the city’s [guidance for cleaning and disinfection](#).
- Create and post hygiene signage or obtain [posters](#), available in multiple languages, from the city.

Commuting and Visitors

- Permit employees to telecommute if the job allows.
- Encourage staff to walk or bike to work.
- Implement staggered schedules.

- “Establish flexible lateness policies so employees can let a crowded subway go by [and take the next one], while also reminding employees to allow extra time for commuting.”

Training and Communications

- Monitor whether the safety plan is working effectively.
- Post the safety plan in a location where employees can read it.
 - Post signs reminding waiting customers of physical distancing requirements.
- Distribute the plan to all employees.⁹
- Train and then retrain and educate workers “as needed,” including “new hires, interns, volunteers, temporary workers and contractors.”
- Implement a process that allows employees to ask questions and raise concerns.
- Communicate in languages employees understand, and use various means of communication, e.g., “email, posting on bulletin boards, announcements.”

Enforcement

- Anticipate that inspectors may visit the premises “to promote compliance.”

Liability

- With respect to incurring liability if an employee or customer contracts COVID-19, “[c]heck with your insurance carrier and attorney regarding liability concerns.”

What New York City Employers Should Do Now

- Understand and comply with your obligations under both the state’s and the city’s industry-specific guidelines. When in doubt about specific mandates, consult with counsel.
- Prior to reopening, ensure that you have:
 - a compliant safety plan, including distancing protocols, screening, notice, and contact-tracing processes, an avenue for employees to raise concerns, and a training program;
 - sufficient personal protective equipment, and hygiene and cleaning materials;
 - conducted an appropriate cleaning and disinfection of the premises;

⁹ State guidelines do not require distribution of the plan, just posting.

- implemented all the necessary policies and procedures to handle various employee issues, such as requests for accommodation and refusals to work or submit to screening; and
- 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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