

## New York Department of Health Issues Interim Guidance for Employees Returning to Work Following COVID-19 Infection or Exposure, Retroactively Revising Phase One and Two Industry-Specific Guidance

June 15, 2020

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One of the biggest concerns for New York employers as they plan or begin to reopen or expand their operations under the four-phase [New York Forward](#) reopening initiative (“NYF”) is, “What do I do if an employee tests positive for COVID-19, has symptoms of the virus, or was exposed to a COVID-19-positive individual?” As we previously reported,<sup>1</sup> the industry-specific guidelines (“Guidance”) that the State issued for the first two phases of NYF laid out detailed protocols for employers to follow in such situations. Notably, as we also have reported,<sup>2</sup> the guidelines for NYF’s Phase Three do not contain these protocols. Rather, the Phase Three guidelines refer employers to the website for the New York State Department of Health (“DOH”) for information on the State’s return-to-work rules for infected or exposed workers. The likely reason? On May 31, 2020, the DOH—with virtually no publicity—[revised](#) its protocols for responding to infected or exposed employees (“DOH Interim Guidance”).<sup>3</sup>

The amended DOH protocols announced in the Phase Three Guidance apply to *all* New York employers, *even if their business is not in one of the industries covered by that Guidance*.<sup>4</sup> Considering the multitude of mandates contained in each industry-specific set of guidelines, employers may be forgiven for overlooking the following admonishment (or some version thereof) in every set of Guidance:

These guidelines are based on the best-known public health practices at the time of publication, and the documentation upon which these guidelines are based can and does change frequently. ... [Employers are] accountable for staying

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<sup>1</sup> Please see Epstein Becker Green’s Advisories on [Phase One](#) and [Phase Two](#) of NYF. Also see the Advisory on the state’s guidance for [reopening office-based businesses](#).

<sup>2</sup> Please see our Advisory on [Phase Three of NYF](#).

<sup>3</sup> The DOH Interim Guidance ostensibly was revised to more closely track the Centers for Disease Control and Prevention’s [recommendations](#) on this matter, although significant differences between the two sets of guidance remain.

<sup>4</sup> NYF’s Phase Three provides guidelines for the restaurant/food services and personal care industries.

current with any updates to these requirements, as well as incorporating same into any ... Site Safety Plan.

Thus, employers that developed, or are developing, their safety plans according to either Phase One or Phase Two Guidance must revise their plan to conform to the updated protocols discussed below.

## **DOH Protocols for Infected and Exposed Employees**

The DOH Interim Guidance sets forth the following amended protocols for responding to COVID-19-positive employees, as well as employees with COVID-19 symptoms or exposure to the virus (with or without symptoms). Differences from the guidance in Phases One and Two are included below in **red font**.

### ***An Employee Who Tests Positive for COVID-19***

An employee who tests positive for COVID-19, regardless of whether the employee is symptomatic or asymptomatic, may return to work *if he or she remains asymptomatic*<sup>5</sup> **and** either:

- completes at least 10 days of “isolation”<sup>6</sup> from the onset of symptoms, or
- concludes 10 days of isolation after the first positive test.

**Under Phase One and Phase Two, the following provisions were included, but now are absent:**

- Completion of a 14-day quarantine, and
- For both symptomatic and asymptomatic COVID-19-positive employees, allowing employees who are deemed “critical to the operation or safety of a facility” to return sooner under certain circumstances.

### ***SYMPTOMATIC Employees in Close or Proximate Contact with a COVID-19-Positive Person***

- An employee who has had “close or proximate contact” with a person with COVID-19 for a “prolonged period of time” *and is symptomatic* must complete at least 10 days of isolation from the onset of symptoms before returning to work. The DOH defines a “close contact” as an individual “who was within 6 feet of an

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<sup>5</sup> The DOH does not specify the length of time that the employee has to be asymptomatic before he or she can return to work. However, the CDC [advises](#) that an employee should be fever-free (without any fever-reducing medication) for three days, and his or her respiratory symptoms should be improved, before returning to the workplace.

<sup>6</sup> The DOH Interim Guidance does not address the distinction, if there is one, between “quarantine” and “isolation.”

infected person for at least 10 minutes starting from 48 hours before illness onset until the time the person was isolated.”<sup>7</sup>

Under Phase One and Phase Two, the following provisions were included, but now are absent:

- Completion of a 14-day quarantine, and
- For both symptomatic and asymptomatic COVID-19-positive employees, allowing employees who are deemed “critical to the operation or safety of a facility” to return sooner under certain circumstances.

### ***ASYMPTOMATIC Employees in Close or Proximate Contact with a COVID-19-Positive Person***

- An employee who has had close or proximate contact with an infected person for a prolonged period of time *and is not symptomatic* may return to work upon completing 14 days of self-quarantine.
  - However, an exposed, asymptomatic employee who is deemed “essential and critical for the operation or safety of the workplace” may return to workplace sooner if (i) his or her supervisor and a human resources representative, after consulting “with appropriate state and local health authorities” make a “documented determination” that it is safe for the employee to return to work before completion of the mandated 14-day quarantine, and (ii) the employee complies with the following practices prior to and during his/her work shift, “which should be monitored and documented by the employer and employee”:
    - Self-monitors for a temperature of at least 100.0 degrees Fahrenheit every 12 hours and COVID-19 symptoms “under the supervision of their employer’s occupational health program”;
    - Wears a face mask at all times while in the workplace for 14 days from the date of last exposure;
    - Practices social distancing, including maintaining at least six feet of distance from others; and
    - Self-quarantines and self-monitors for temperature and symptoms when not at the workplace for 14 days after last exposure.

Additionally, the employer must continue to regularly clean and disinfect all areas of the workplace and shared electronic equipment.

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<sup>7</sup> The DOH advises employers to contact their local health department “if the extent of contact between an individual and a person suspected or confirmed to have COVID-19 is unclear.”

Under Phase One and Phase Two, there was not a quarantine requirement, and there was no carve-out for “critical employees.”

***Employees Who Arrive at the Workplace and Are Symptomatic, or Who Become Symptomatic at Work***

An employee who is symptomatic when he or she arrives at the workplace or becomes sick with COVID-19 symptoms while at work, but has not been in close or proximate contact with an infected person, must be separated and sent home immediately for “at least 10 days of isolation from the onset of symptoms OR upon receipt of a negative COVID-19 test result.”

Under Phase One and Phase Two, the employee was required to self-quarantine for 14 days.

**What New York Employers Should Do Now**

- Revise already drafted safety plans to conform to the DOH’s updated return-to-work protocols, including the shortened isolation period and the now more limited exception for “critical” workers.
- Communicate the change in rules to managers and supervisors, employees, and contractors.
- Keep abreast of all new guidelines (including Phase Four Guidance when that is released) and other announcements concerning reopening protocols, even if they do not appear to apply to your industry.

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