

CUSTOMER SAFETY A SIGNIFICANT CONSIDERATION WHEN REOPENING NEW YORK PHASE III BUSINESSES AND DEVELOPING A COVID-19 HEALTH AND SAFETY PLAN

Hodgson Russ OSHA Alert
June 15, 2020

New York is moving toward the third phase of reopening, which for businesses will mean a significant increase in interaction with the public. To assist the process the State has again released detailed guidance, and safety plan templates, for each industry encompassed by the Phase III reopening, specifically restaurants/food services and personal care. (See the NY Forward website for a list of businesses considered part of Phase III.) Indoor dining and personal care services will be a different experience under Phase III. And reopening Phase III businesses will surely need to make some significant adjustments to their operations.

Customer Safety Mandates a Different Kind of Dining and Personal Care Experience

Restaurants reopening indoor eating areas are being required to limit capacity to 50% with at least a six-foot separation between tables, or utilize five-foot barriers if the distance requirement is infeasible to implement. Employees must wear face coverings at all times, and patrons may remove theirs only when seated to dine. To facilitate maintaining six-foot distances when standing in lines, entering/exiting, using restrooms, or picking up take-out, floors must be marked at various locations. Reusable menus must be cleaned and sanitized between each use, and hand sanitizing stations are mandated at take-out stations for customer use. Condiments will be single use and all silverware must be pre-packaged or pre-rolled. Signage of various requirements will be posted as reminders to employees and patrons.

Personal care services are likewise capped at 50% employee and patron capacity. In the absence of an appropriate barrier, a six-foot separation must be maintained between stations. Except as between a customer and his/her specific personal care provider, six feet must be maintained between customers and other employees. Patrons may not be permitted entry without a face covering, which must be worn continuously while on premises. Employees are required to wear a face covering whenever interacting with customers, even beyond the six-foot threshold. Note that personal care services that require customers to remove face coverings (e.g., lip/nose piercings, face massage, facials, lip/nose waxing, face tattoos, facial makeup, cosmetic

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lip tattooing) remain prohibited.

NY Forward's Phase III Reopening Requirements

Similar to Phases I and II, the NY Forward guidance calls for Phase III businesses to prepare and retain on their premises a COVID-19 Health and Safety Plan outlining how their workplace will safely reopen and mitigate the prevent the spread of COVID-19. Template plans are available on the NY Forward website that incorporate minimum plan requirements. Employers must also complete an electronic affirmation acknowledging that they have read and understand the obligation to operate their business in accordance with the guidance.

Most of the Phase III guidance is focused on protecting employees and the safety and cleanliness of the businesses. But, as noted above, customer safety is also a significant point of emphasis in the restaurant and personal care settings, where there are likely to be closer, longer, and repeated interactions between employees and patrons in a short period of time. Employee safety and customer safety go hand in hand in these settings. Customers draw assurances of safety by observing employees safeguard themselves, their colleagues, and other customers.

Phase III Reopening Has Commenced

As of June 15, 2020, the following regions are proceeding with Phase III of the reopening process: the Finger Lakes, North Country, Southern Tier, Mohawk Valley, and Central New York. Phase III businesses in the Western New York and Capital Regions are expected to begin reopening on June 16 and June 17, respectively.

If your region has satisfied, or is close to satisfying, the metrics for proceeding to Phase III of reopening, *the time for Phase III employers to assemble their individualized reopening plan is now*.

For help determining whether or not your business is eligible to reopen in Phase III, use the State's reopen lookup tool.

Common COVID-19 Health and Safety Plan Requirements

The Phase III guidance and template plans follow the now familiar Phase I and II pattern and are organized around four distinct categories: (1) people (social distancing and reducing workplace density); (2) places (protective equipment and cleaning); (3) processes (screening, testing, and tracking); and (4) employer plans. Common protective measures required for all Phase III industries also remains consistent with Phase I and II, and include:

- Requiring six feet of distance between all individuals unless safety or core activity requires a shorter distance and individuals are wearing acceptable face coverings;
- Employers must provide employees with an acceptable face covering at no-cost to the employee and have an adequate supply of coverings in case of replacement;
- Conducting regular cleaning and disinfection at least every day, and more frequent cleaning and disinfection of shared objects (g., equipment) and surfaces, as well as high transit areas, such as restrooms and common areas;
- Implementing mandatory health screening assessment (g., questionnaire of COVID-19 symptoms, exposure, or testing positive, and temperature check) for employees and vendors, *but not requiring the same for customers and delivery personnel*.

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(who can be encouraged to provide such information);

- Adhering to Centers for Disease Control (CDC) and New York State Department of Health (NYSDOH) hygiene and sanitation requirements;
- Conspicuously posting completed safety plans on site.

Phase III COVID-19 Health and Safety Plans do not need to be submitted to a State agency for approval, but must be conspicuously retained on the premises of the business and must be made available to the NYSDOH and other local health or safety authorities in the event of an inspection. These reopening standards apply to Phase III businesses for the duration of the COVID-19 public health emergency or until rescinded or amended by the State.

Employers with questions about the guidance or their obligations under Phase III may find answers on the Frequently Asked Questions (FAQ) page on the NY Forward website. For questions not answered by the FAQ, businesses may contact their regional office of the Empire State Development Corporation using the regional contact information provided in the FAQ.

Employers reopening in Phase III should be mindful that their compliance obligations are not limited to the New York State guidance, or following recommendations from the Centers for Disease Control and Prevention ("CDC"). Employers should also be aware of and follow applicable federal requirements, such as the minimum standards of the Americans with Disabilities Act ("ADA") and the United States Department of Labor's Occupational Safety and Health Administration ("OSHA").

Takeaway

New York's reopening process continues at a steady pace. While individual regions may be experiencing phased reopenings on different timetables, Phase III is now here in some areas and is being viewed by many as a significant step in the progression toward a return to normalcy. Not only do restaurants and personal care providers need to think of employee safety, but implementing appropriate measures to promote customer safety is an important consideration in the reopening process and the customer experience. *Phase III businesses hoping to reopen as soon as possible can and should immediately begin the process of formulating and preparing their written COVID-19 Health and Safety Plan* to best position themselves for a timely reopening in their respective phases. Hodgson Russ is continuing to monitor New York's phased reopening, and we stand ready to assist you in getting back to business.

If you have any questions regarding this alert, or need assistance formulating, drafting, and developing safety protocols for your business re-opening plan please contact Jason Markel (716.848.1395), Aaron Saykin (716.848.1345), or Raymond Fadel (716.848.1724), and we would be happy to assist.

Please check our Coronavirus Resource Center and our CARES Act page to access information related to both of these rapidly evolving topics.

If you received this alert from a third party or from visiting our website, and would like to be added to any of our mailing lists, please visit us [HERE](#).