

OSHA ISSUES CONFUSING RETURN-TO-WORK GUIDANCE FOR “RELAXING” COVID-19 RESTRICTIONS

Hodgson Russ OSHA Alert
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On June 18, the Occupational Safety and Health Administration (OSHA) released a twenty-four page informational guidance booklet entitled “Guidance on Returning to Work.” The document is intended to assist employers and workers in safely returning to work following COVID-19 exposures and to provide guidance to “non-essential” employers who are reopening their businesses after perhaps weeks or months of being shuttered due to State-initiated COVID-19 stay-at-home orders and proclamations. According to OSHA, “[t]he guidelines provide general principles for relaxing restrictions that were put in place to slow the spread of COVID-19.”

Employers Should Detail and Implement Safety Strategies in their Reopening Plans

At the outset, OSHA describes a three-phased approach to lessening restrictions as businesses reopen. More on that below. The guidance, however, recommends that during all three phases of reopening, employers should continue implementing strategies in the following areas:

- Hazard Assessments—determine how, when, and where workers may be exposed in the course of performing job responsibilities, and implement engineering and engineering controls, safe work practices, and appropriate personal protective equipment (PPE)
- Basic hygiene—hand hygiene, respiratory etiquette, and cleaning and disinfection
- Social Distancing—practices for maximizing, to the extent feasible, and maintaining distance between all people, with six feet of distance as the rule of thumb, subject to change with community transmission
- Identification and Isolation of Sick Employees—practices for worker self-monitoring or screening, and isolating or excluding symptomatic employees from the workplace
- Workplace Controls and Flexibilities—practices for remote work, telework, and sick leave

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- Employee Training—practices to ensure employees receive training on the signs, symptoms and risks of COVID-19, potential sources of exposure in the workplace, and how to prevent spread
- Return to Work—procedures to return employees to the workplace after COVID-19 illnesses and quarantines
- Anti-retaliation—practices to ensure that retaliatory action is not taken against employees who raise safety and health concerns

There is nothing particularly novel about the identification of these general principles and recommendations at this point in the pandemic response. For example, every one of these topics is already incorporated to some degree into the phased reopening guidelines and required COVID-19 Health and Safety Plans that reopening New York employers must prepare. The value of the new OSHA guidance to employers lies primarily in OSHA’s explanation of these principles and the offering of some examples on how to apply them, which may be more instructive of the OSHA implications than the State guidelines. In addition, the document includes a *Frequently Asked Questions* section that discusses OSHA considerations associated with worksite testing and screening of employees, medical record implications, PPE hazard assessments, and recommendations to follow CDC and health department guidance for post-COVID-19-illness return-to-work requirements.

OSHA’s Three-Phase Process for Loosening of Restrictions

In the *Planning for Reopening* section of the guidance, OSHA identifies three phases over which businesses may engage in a relaxing of certain restrictions, described as follows:

- **Phase 1:** Businesses should consider making telework available, when possible and feasible with business operations. For employees who return to the workplace, consider limiting the number of people in the workplace in order to maintain strict social distancing principles. Where feasible, accommodations (i.e., flexibilities based on individual needs) should be considered for works at higher risk of severe illness, including elderly individuals and those with serious underlying health conditions. Businesses should also consider extending special accommodations to workers with household members at higher risk of severe illness. Non-essential business travel should be limited.
- **Phase 2:** Businesses should continue to make telework available where possible, but non-essential business travel can resume. Limitations on the number of people in the workplace can be eased, but continue to maintain moderate to strict social distancing practices, depending on the type of business. Continue to accommodate vulnerable workers as identified above in Phase 1.
- **Phase 3:** Businesses resume unrestricted staffing of work sites.

Unfortunately, OSHA offers no direct explanation on how employers are to determine which “OSHA phase” they are in or the rules for determining how or when businesses can move to the next phase. Nor does it describe the phases themselves with any degree of detail. OSHA’s introductory overview states that “[r]eopening should align with the lifting of stay-at-home or shelter-in-place orders and other specific requirements of the Federal Government and state, local, tribal, and/or territorial (SLTT) governments across the state, as well as with public health recommendations from the Centers for Disease Control and Prevention (CDC) and other federal requirements or guidelines.” OSHA further suggests that “[a]ll employers should monitor SLTT health department communications to understand how the communities in which their

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workplaces are located are progressing through the reopening phases identified in the *Guidelines for Reopening America Again*.”

OSHA’s Guidance Is Based on the White House’s Proposed Phase Guidance To States

OSHA’s three-phased approach largely repackages the phase model set forth in the White House’s *Guidelines for Opening Up America Again*. That guideline sets forth a proposed progression of *reducing restrictions* upon both individuals and employers over three phases. OSHA’s phases are simply a restatement of the portions of the White House guidance that relate to employers, but without meaningfully explaining that connection, or how the phases apply to employers. Progression through phases under the White House proposed guidance is based on satisfaction of certain gating criteria at a State or regional level. The gating criteria are described as a combination of fourteen-day downward trajectory of symptoms, cases, and positive testing results, plus hospital testing of healthcare workers and treatment of patients without crisis care. The purpose of the White House guidance was to provide a framework for States and local authorities to decide when to relax restrictions on individuals and employers as they move through their respective reopenings. The progression through the phases is simply described as follows:

- **Phase 1:** For States and Regions that satisfy the gating criteria.
- **Phase 2:** For States and Regions with no evidence of a rebound and that satisfy the gating criteria a second time.
- **Phase 3:** For States and Regions with no evidence of a rebound and that satisfy the gating criteria a third time.

The gating criteria, rebound evidence, and the phase status are not items that are readily ascertained, monitored, or determined by individual employers. Rather, this guidance was developed as a *proposed* approach for the States and local governments—one which could be significantly modified in its actual application. The White House guidance explicitly says as much:

State and local officials may need to tailor the application of these criteria to local circumstances (e.g., metropolitan areas that have suffered severe COVID outbreaks, rural and suburban areas where outbreaks have not occurred or have been mild). Additionally, where appropriate, Governors should work on a regional basis to satisfy these criteria and to progress through the phases outlined below.

OSHA’s reopening planning guidance suggests that employers should monitor SLTT communications to understand how their communities are progressing through the phases. But what if the SLTT is not reporting progress against OSHA or White House phasing or a State has tailored its reopening process in a different way?

The OSHA Three-Phase Discussion is Likely to Cause Confusion for Employers

OSHA’s selection and inclusion of these “phase” references in the guidance is unfortunate and creates confusion for at least four reasons.

First, the White House guidance is intended for SLTT consumption and use in relaxing stay-at-home restrictions based on monitoring a continuing stream of data. It was not intended for direct application by employers. OSHA’s inclusion of the phasing discussion in guidance intended for employers comes across as a “square peg, round hole” effort. Without context or

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explanation of it beyond the cryptic reference to the White House’s proposed guidelines, the phase discussion will likely engender confusion for employers trying to decipher or apply its meaning in a vacuum.

Second, the three-phase discussion is neither helpful nor instructive as a course of action for employers trying to understand or implement the recommended practices set forth in the balance of the document. The OSHA/White House three phases are disconnected from the substantive OSHA guidance, which recommends that employers continue strategies across all three phases and follow the expectations set by SLTT.

Third, SLTT, OSHA, and employers view the situation from differing perspectives. For employers trying to reopen their businesses, their perspective is likely not that there is a relaxing of restrictions on businesses, but that SLTT and OSHA are actually increasing restrictions, conditions, and planning obligations on their reopening and business operations that did not previously exist.

Fourth, OSHA’s three-phase discussion has the potential to create confusion and misunderstanding for employers in differentiating between the individual States’ COVID-19 reopening “phases,” media reports of State-based phase progression, and State-required COVID-19 Health and Safety Plans that employers may be required to prepare. In New York, for example, OSHA’s and the White House’s three phases bear no outwardly direct or obvious connection or alignment with New York’s four-phase reopening process that has been rolled out to employers. At the time of this writing, most of New York (outside of New York City) has entered New York’s Phase 3 of reopening, which is the terminology repeatedly used by SLTT officials and the media. But Phase 3 in New York most certainly does not mean that businesses may now engage in the unrestricted staffing of worksites. Far from it. As another example, Illinois is following a five-phase reopening approach, with Phase 5 coming only after a vaccine or highly effective treatment becomes widely available.

Employers—particularly those operating in multiple States or sub-regions—must therefore be careful to understand and maintain the distinction between the OSHA/White House phases and the phased reopening information by which SLTT are communicating expectations to employers within a specific State or sub-region. Employers should also recognize that individual SLTT’s may have imposed reopening requirements that are stricter or more detailed than the more generalized OSHA or White House guidance.

If you need Return to Work assistance, have questions about the OSHA implications to your COVID-19 Health and Safety Reopening Plans or have other general OSHA-related concerns, please contact Jason Markel (716.848.1395), Glen Doherty (518.433.2433) or Charles H. Kaplan (646.218.7513).

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

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