

OSHA GUIDANCE FOR COVID-19 HEALTH AND SAFETY PLANS REQUIRED FOR PHASED REOPENINGS OF NEW YORK BUSINESSES

Hodgson Russ OSHA Alert
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Employers in certain regions across New York began reopening on May 15 in accordance with Governor Cuomo’s Executive Order 202.31 and satisfaction of required COVID-19 metrics. Whether your business is an existing “essential business” continuing its current operations, a Phase 1 business that is reopening, or a Phase 2, 3, or 4 business preparing for a future reopening, your business will likely need to prepare a COVID-19 Reopening Health and Safety Plan. The current Phase 1 guidance states that there will be no waivers from this requirement. In developing their Plans, employers must also consider the implications of the Occupational Safety and Health Act.

The New York Forward website provides reopening guidance and template COVID-19 Reopening Health and Safety Plans for each individual industry sector in Phase 1 (construction, manufacturing, retail, wholesale trade, agriculture, forestry, fishing or hunting). In addition to creating such a Plan, each employer seeking to reopen must review and electronically affirm its obligation to operate in accordance with the New York Forward Reopening guidance. That guidance and affirmation does not merely expect compliance with New York State Department of Health (NYSDOH) recommendations and Centers for Disease Control (CDC) hygiene and cleaning requirements, but it also demands compliance with minimum standards applicable under federal law, including the Occupational Safety and Health Act. Employers who fail to recognize and incorporate applicable OSHA requirements into their COVID-19 Reopening Safety Plan may find themselves in violation of both State and Federal requirements. New York has established a complaint and enforcement process through both the New York Department of Labor (for employees) and the New York State PAUSE Enforcement Assistance Task Force (for third party complaints). Not only will non-compliant employers risk potential enforcement action by State officials, but inadequate safety planning may prompt OSHA inspections based on employee safety complaints or State agency referrals to OSHA, or employee whistleblower activity under Section 11(c) of the Occupational Safety and Health Act for any actions taken against employees raising safety or compliance concerns.

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To some extent, the template COVID-19 Reopening Health and Safety Plans incorporate certain activities that would constitute, in OSHA-speak, administrative and engineering controls designed to mitigate the risk of COVID-19 spread. These include controls such as social distancing, face coverings, workforce reductions, shift work, handwashing, physical barriers, cleaning and disinfecting, and screening and monitoring of employees. The Plans also encourage use of face coverings, face masks, face shields, gowns and other personal protective equipment (PPE) as may be necessary or appropriate to manage risk. And while there is no COVID-19 OSHA regulation per se, employers should be mindful of several OSHA regulations that may come to bear, as well as the General Duty Clause found in Section 5(a)(1) of the Occupational Safety and Health Act. That clause requires employers to provide a workplace “free from recognized hazards that are causing or are likely to cause death or serious physical harm to... employees.”

An employer’s first step should be a hazard assessment, through which the employer assesses its worksite for COVID-19 risks and hazards as a prelude to developing appropriate administrative and engineering controls. Where such risks cannot be adequately managed through those controls, appropriate PPE must be implemented. *See*, 29 C.F.R. §§ 1910.132 and 1926.28 and Subpart E.

Masks and PPE will surely be the prime and foremost top-of-mind consideration of employers. Ordinarily, the decision of what PPE is appropriate to manage a particular workplace risk is generally one for the employer, though in the COVID-19 setting the selection may be subject to, or influenced by, specific minimal requirements as set forth in NYSDOH guidance. Employers should thus be mindful of the availability of desired PPE when developing a plan, and consider alternatives that may be more readily available but still provide the necessary level of protection. OSHA regulations mandate that all required PPE must be provided by the employer at no cost to the employees. And the NY Forward guidance requires employers to “procure, fashion or otherwise obtain” and supply face coverings to employees at no cost to them. In meeting this requirement, employers should consider whether certain types of PPE, face coverings, or tie straps may create other hazards to employees, such as entanglement or “caught-in” risks, and avoid choosing devices that introduce new hazards or risks to the employees.

While “face coverings” (not regulated by OSHA as respirators) may be appropriate for many employees, an employer may determine that an N95 filtering face-piece respirator, or other NIOSH-rated equivalent, is necessary or required for employees engaged in certain operations or tasks. To the extent an employer requires an employee to wear an N95 or other respirator to manage COVID-19 risks or otherwise, a Respiratory Protection Program is required to be implemented in general industry and construction settings. *See*, 29 C.F.R. §§ 1910.134 and 1926.103. OSHA has temporarily suspended the fit testing element of such programs, but employers should continue to monitor that status. For employers selecting N95 masks, OSHA has released a short training video on how to properly don, use, and remove them, a poster with similar guidance to hang in the workplace, and other training-related materials explaining the differences between a respirator and a surgical mask. These are useful resources for training returning employees who will be using these devices.

When disposable PPE is being utilized, consider developing procedures for the method of distribution to employees, as well as the collection and disposal of used materials. Employers should evaluate the implications of the sanitation and housekeeping standards governing cleaning and stocking of restrooms with soaps, cleaning agents, etc. under 29 C.F.R. § 1910.141(d) and 1926.51. They should also follow the refuse and waste disposal regulations under 29 C.F.R. §§ 1910.141(a)(4) (“garbage shall be removed in such a manner as to avoid creating a menace to health”) and 1926.25(c) (“[g]arbage

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and other waste shall be disposed of at frequent and regular intervals”), particularly as relates to soiled or used PPE.

Employers’ COVID-19 Reopening Health and Safety Plans are required to detail out the cleaning and disinfection protocols to be implemented. For many employers, that may result in the introduction of hazardous chemicals for the very first time in the workplace, or additional disinfection and sanitation chemicals not previously in service. Employers may need to develop a Hazard Communication plan or update an existing plan, provide employee training, and obtain Safety Data Sheets for any new chemicals introduced into the workplace. *See*, 29 C.F.R. §§ 1910.1200, 1926.59, and 1928.21(a)(5). Employees engaged in cleaning activities may also need additional training or PPE as appropriate to manage risks of exposure to the chemicals, as identified through a hazard assessment relative to the cleaning and disinfection tasks to be undertaken.

OSHA’s Bloodborne Pathogens regulation for general industry (29 C.F.R. § 1910.1030) does not have direct application to COVID-19 exposures or infections, as a respirable virus does not fit within the existing definitions of blood or “other potentially infectious materials.” However, the concepts surrounding exposure control afford some guidance where designated first aid responders become involved. In cases of workplace incidents involving exposure to blood or bodily secretions the standard will remain applicable. And employers should recognize the potential COVID-19 exposure hazards to designated first aid responders who, in the course of providing assistance, will be unable to maintain social distancing and may need additional respiratory protection or PPE that is otherwise not currently in use.

The final component of New York’s Phase 1 template COVID-19 Health and Safety Plans focuses on employee screening and monitoring. While employers are required to screen and monitor employees, ongoing daily temperature testing is not currently required in all Phase 1 industry settings. Temperature testing may be required, however, in return-to-work situations under NYSDOH guidelines for employees—particularly those of essential businesses—who had prior exposures or tested positive to COVID-19. Temperature testing should be developed consistent with Equal Employment Opportunity Commission (EEOC) limitations and implications under the Americans With Disabilities Act. An employer who undertakes temperature testing, either voluntarily or where required, should implement administrative and engineering controls that minimize the risk of exposure to persons performing and undergoing the tests, require appropriate PPE, and train employees on the protocols to be followed. Bear in mind that non-contact medical-rated infrared thermometers are in high demand and may be difficult to obtain in the short term. And employers should be attentive to their obligations to maintain privacy over all medical and health records both under OSHA and other applicable State and Federal law confidentiality requirements. The NY Forward guidance purports to prohibit keeping records of employee health data, including temperature data, though it is unclear how an employer would demonstrate monitoring compliance if such data is not retained.

As with all safety-related programs, adequate employee training, management and employee buy-in, and enforcement at all levels are critical components to success. Adherence to a well-considered COVID-19 Reopening Health Safety Plan that incorporates OSHA compliance will contribute to a safer workplace and promote risk reduction for the benefit of the business and its employees.

Please contact Jason Markel (716.848.1395) if you would like assistance or have questions about developing an appropriate COVID-19 Reopening Safety Plan for your business or have other OSHA-related concerns.

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