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Back to Business After COVID-19: Employment Requirements for Retail Stores in New York State as Part of a Phase 1 Reopening

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New York State is slowly reopening regions of the state for business in phases. As of May 20, 2020, seven of New York's ten regions had begun a Phase 1 reopening, leaving New York City, Long Island and the Mid-Hudson region as the only areas of the state waiting to begin business again. Under Phase 1, the first businesses in a region that are allowed to reopen are those in the construction, agriculture, forestry, fishing and hunting, manufacturing and wholesale trade industries. In addition, retail businesses may reopen but only for delivery, and curbside and in-store pickup. As part of the reopening process, New York State has issued [guidelines](#) to businesses in construction, agriculture, manufacturing, wholesale and retail that set forth required and suggested steps these businesses must take if they are to reopen in Phase 1.

For retailers who are reopening for delivery, curbside, or in-store pickup, New York's [Phase 1 guidelines](#) require numerous changes to the workplace. Employers in the seven regions that have reopened need to comply with these regulations now, and retailers in New York City, Long Island and the Mid-Hudson region, should begin to familiarize themselves with these requirements so they are prepared to reopen once Phase 1 begins there.

Employee Health Screenings

The Phase 1 guidelines for retail businesses offering delivery, and curbside and in-store pickup, require that employees undergo daily health screenings prior to entering the workplace. The guidelines provide that these health screenings may be performed remotely or performed on site. Employers who ask their employees to perform health screenings remotely before they arrive at the workplace should consider the potential wage and hour implications of doing so, as the time performing such screenings may be considered compensable and may also impact whether employers may owe spread of hour payments to those employees if they end their work day more than 10 hours from when they conduct the health screening.

Health screenings are required of all workers and "essential visitors" under Phase 1, but not of customers. In contrast to other states, the New York guidelines state that retail businesses *cannot* mandate that customers complete a health screen or provide contact information, but that they may encourage them to do so. It remains to be seen whether these guidelines will change for customers when full retail operations are allowed under a region's Phase 2 reopening.

The health screening must, at a minimum, ask whether the employee or visitor has:

- Knowingly been in close or proximate contact in the past 14 days with anyone who has tested positive for COVID-19 or who has symptoms of COVID-19;
- Tested positive for COVID-19 in the past 14 days; or
- Has experienced any symptoms of COVID-19 in the past 14 days.

New York State uses the CDC's guidance to determine whether an employee is symptomatic of COVID-19, which includes employees who have the following symptoms or combinations of symptoms: fever, cough, shortness of breath or at least two of the following symptoms: fever, chills, repeated shaking with chills, muscle pain, headache, sore throat or new loss of taste or smell. Notably, the guidelines do not require that employers check employees' temperatures on a daily basis, but they do state that such checks may be conducted pursuant to EEOC or Department of Health guidelines. However, employers may not keep records of employee health data, including temperature data.

Handling Employees Who Fail a COVID-19 Screen

The guidelines instruct businesses on how they must handle employees who fail a required COVID-19 health screening. The actions employers must take will depend on the reason the employee failed the health screen.

- If an employee screens positive for COVID-19 symptoms, that employee should not be allowed to enter the worksite and should be sent home to contact their healthcare provider for assessment and testing. Businesses must also immediately notify the state and local department of

health about the suspected case of COVID-19.

- If an employee has COVID-19 symptoms and then also:
 1. Tests positive for COVID-19;
 2. Does not get tested for COVID-19; or
 3. Has had close contact with someone with COVID-19 for a prolonged period of time

that employee may only return to work after a 14-day self-quarantine. If that employee is critical to the operation or safety of the facility, the business may consult with the local department of health and the most recent CDC and Department of Health guidelines to determine the minimum number of days the employee can return to work with extra precautions in place to minimize the risk of COVID-19 transmission.

- If an employee does not have COVID-19 symptoms, but tests positive for COVID-19, that employee also may only return to work after a 14-day self-quarantine.
- If a person has had close contact with a person with COVID-19 for a prolonged period of time, but is not symptomatic themselves, they can be allowed into the workplace but must adhere to the following precautions, and the business must document that such precautions were followed:
 - Regular monitoring: The employee should self-monitor under the supervision of the employer's occupational health program for an increased temperature or COVID-19 symptoms.
 - Wear a mask: The employee should wear a face mask at all times while in the workplace for at least 14 days after last exposure.

- Social distance: The employee should continue to maintain a distance of six feet from others at all times.
- Disinfect and clean workspaces: Offices, bathrooms, common areas and shared equipment must be disinfected and cleaned routinely.

The guidelines are silent as to how to handle employees who fail a health screen and later test negative for COVID-19. Presumably, once those employees are no longer symptomatic and have received their negative COVID-19 test results, they may be permitted to return to the workplace.

Physical Distancing

Retailers reopening in Phase 1 are required to ensure that their employees and customers maintain appropriate physical distancing. Total occupancy of any area of the business must be limited to 50% of the maximum occupancy of the space, including customers coming for in-store pickup, who must maintain six feet of distance from others or wear a face covering. Employees also must maintain a distance of six feet from each other unless safety of a core activity of the business requires a shorter distance. Employees must wear face coverings if they are within six feet of another person and must be prepared to don a face covering if someone unexpectedly comes within six feet of them.

Businesses also must post signs consistent with those published by the New York Department of Health reminding employees to report symptoms of COVID-19, wear face coverings, maintain social distancing, follow cleaning and hygiene guidelines and properly store and discard PPE. In-person gatherings must be limited to the greatest extent possible and video or teleconferences are encouraged. Employers must also put practices in place to

ensure social distancing in confined spaces such as restrooms and breakrooms.

Personal Protective Equipment (PPE) Requirements

Employees must wear face coverings when interacting with customers or coworkers within six feet and without a physical barrier. Employers must provide face coverings to their employees, and maintain a sufficient supply of face coverings in the workplace should an employee need a replacement or should an essential visitor to the business need one. Face coverings must be cleaned or replaced after use and cannot be shared. Businesses must also train employees on how to put on, take off, clean and discard PPE, including face coverings.

If employees will be touching food products, business must ensure that gloves are worn when employees do so. Employers must also limit the sharing of objects or equipment, or require employees to wear gloves when in contact with shared equipment, or require employees to wash or sanitize their hands after contact.

Workplace Modifications

Retailers operating in Phase 1 will also be required to make modifications to the workplace to reduce the risk of COVID-19 transmission. For example, business must provide employees with on-site hand hygiene stations. Hand-washing stations must be provided that include soap, warm running water and disposable paper towels. Where hand-washing stations are available or practical, an alcohol-based hand sanitizer containing at least 60% alcohol must be provided.

Appropriate cleaning and disinfecting supplies must be provided for shared and frequently touched surfaces. Businesses must conduct regular cleaning and disinfecting of their retail

location and more frequent cleaning and disinfecting of high risk areas used by many individuals and of frequently touched surfaces including restrooms, consistent with CDC and Department of Health guidelines. Businesses will need to maintain cleaning logs that include the date, time and scope of cleaning.

Employers must also prohibit shared food and beverages among employees and cannot provide buffet style meals to employees. Employees must be encouraged to bring lunch from home and reserve adequate space for employees to observe social distancing while eating meals.

Site Safety Plan

Businesses must develop a written site safety plan to document how they are complying with these guidelines and preventing the spread of COVID-19 in the workplace. The state has published a [template](#) that can be used. Businesses need not submit a site safety plan to the state, but must keep a copy on record. A site safety monitor must be designated who is responsible for the business's compliance with all aspects of the site safety plan. Employees also must be told of the person they need to contact should they develop COVID-19 symptoms after completing their required health screening.

Retailers must closely review New York's guidance in detail to ensure that they are in full compliance with these requirements for a Phase 1 reopening. The guidelines also contain numerous suggestions on additional steps businesses can take to reduce the risk of COVID-19 transmission in the workplace. Businesses should consult with counsel to discuss any concerns they may have with their ability to fully comply with these guidelines.

For more information about this alert, please contact Alexander W. Bogdan at abogdan@foxrothschild.com or 212.878.7941, or any member of the firm's national Labor & Employment Department.

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