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# Back to Business After COVID-19: NY Requirements for Customer Masks and Phase 2 Guidelines for In-Store Retail and Offices

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New York State continues its phased reopening with upstate areas now entering Phase 2. As it did when areas reopened under Phase 1 of New York's reopening plan, New York State has issued guidelines for the industries that are allowed to reopen under Phase 2 – retail businesses for in-store shopping, office-based jobs, real estate services, and limited barbershop and hair salon services. Businesses in these industries need to familiarize themselves with the requirements now, even if they are not in a region that has begun Phase 2, to ensure compliance once they are allowed to reopen.

## All Businesses May Require Customers to Wear Face Coverings

In conjunction with reopening New York, Gov. Andrew Cuomo issued a new Executive Order allowing businesses to require that customers wear masks. Accordingly, all businesses and building owners in New York State may deny entrance to anyone who refuses to wear a face covering and who is medically able to do so. Businesses that prohibit individuals from entering without a face covering must still comply with the Americans with Disabilities Act and other state and local discrimination laws. Thus, businesses must be prepared to make exceptions for people who cannot wear a face mask because of, for example, medical or religious reasons.

## Phase 2 Guidelines for In-Store Retail

Under Phase 2, retail businesses may reopen for in-store purchases, subject to numerous limitations as set forth in New York's industry-specific guidelines. The Phase 2 guidelines build on those issued for retailers opening as part of Phase 1 and that were summarized in our prior alert. New requirements for retailers reopening for Phase 2 are highlighted below.

### *Requiring Face Masks*

In Phase 2, retailers must require that all customers who are medically able to do so wear masks when entering their premises. Businesses may not, however, request or require that customers who claim they are unable to wear a face mask for medical reasons provide medical documentation supporting their claim. If a customer states that they cannot wear a face covering for medical reasons, that does not necessarily mean that the business can prohibit the person from entering. Rather, the retailer should discuss with the customer whether alternate methods of pickup or delivery would meet the customer's needs, or ask that customer to wait until occupancy has decreased to ensure that adequate physical distancing can be maintained while that customer is in the store.

Employees must also wear face coverings any time they interact with customers, or any time

they come within six feet of another person. For check-out registers, employees must wear face coverings and businesses must enact physical barriers in areas where they would not impact airflow or otherwise impact health and safety.

### ***Occupancy Limitations***

As under Phase 1, retailers are limited to 50% occupancy under Phase 2, including customers who are maintaining physical distancing. Retailers must implement measures to ensure that there is adequate space for employees and customers to maintain physical distancing in stores with those occupancy limitations in mind. For example, retailers must monitor and control the flow of traffic into their establishments to ensure adherence to maximum capacity guidelines. This includes being prepared to have customers wait outside while maintaining physical distancing through signs or distance markers. Inside a store, retailers must also post signs and distance markers designating spaces of six feet in all commonly used areas and areas where lines typically form. Certain features of retail stores must remain closed in Phase 2, such as fitting rooms, self-serve bars or samplers, cafes and dining/beverage service areas (except for delivery or takeout), water fountains or magazine areas.

### ***Health Screenings***

As with Phase 1, retailers open in Phase 2 must conduct daily health screenings of employees. At a minimum, retailers must question employees about whether in the past 14 days they have had COVID-19 symptoms, tested positive for COVID-19 or been in close contact with those showing COVID-19 symptoms or testing positive. If an employee is symptomatic, that employee must be sent home and advised to contact a health care provider. If that symptomatic employee (1) tests positive for COVID-19, (2) does not get tested or (3) had close contact with someone with COVID-19 for a prolonged period of time, that employee must self-quarantine and not come to work for at

least 14 days. Retail employees who themselves are not symptomatic, but have had contact with someone with COVID-19 for a prolonged period of time, may return to the workplace if they follow strict distancing guidelines and the business documents their efforts to do so. Businesses may wish to consult with counsel in these situations to ensure that the appropriate guidelines are being followed while at the same time ensuring adequate protection for that employee's medical privacy.

### ***Hygiene and Cleaning Requirements***

The Phase 1 guidelines required that hand hygiene stations be made available to employees and visitors. Phase 2 now requires that hand sanitizer be made available throughout a store for use by employees and customers. Hand sanitizer must be placed in areas of convenience, such as near a store entrance or cash registers.

### ***Safety Plan***

As under Phase 1, employers must create and post a safety plan in the workplace if they reopen in Phase 2. New York State has made a [sample template](#) that businesses can follow.

## **Phase 2 Guidelines for Offices**

The [Phase 2 requirements for offices](#) share many mandates with those for other industries, with required daily health screenings for employees and physical distancing mandates. Many of these guidelines have been specifically tailored for an office environment.

### ***Physical Distancing Requirements***

Unlike retail, the Phase 2 guidelines for offices do not state that offices "must" limit occupancy to 50% of the maximum occupancy of an area. However, the guidelines strongly encourage office businesses to do so, stating that "[o]ffice-based work can be safely conducted by limiting the number of occupants at any given time to 50% of the maximum occupancy."

Employers must ensure that employees are stationed at least six feet away from each other in the office at all times, unless the safety of a core activity requires that a shorter distance be maintained. As with retail businesses, employees must be provided with face coverings and such face coverings must be worn whenever an employee does come within six feet of another person.

In-person gatherings must be limited in offices to the greatest extent possible. The guidelines suggest that businesses add desks to spaces previously used for group gatherings, or mark tables in meeting rooms with appropriate distance markers to ensure physical distancing is maintained. Employers must also put in place practices for small areas, such as restrooms or break rooms, to ensure proper physical distancing. Nonessential common areas, such as gym rooms, game rooms or pools, must remain closed. The guidance does not specifically address how employers are to address lactation rooms. Businesses should at a minimum increase cleaning and disinfecting of lactation rooms to ensure they are cleaned each time an employee uses the room and also review and update their lactation room policies to ensure that employees who require the use of a lactation room can do so safely and in accordance with the Phase 2 guidance. Employers also must implement policies to limit sharing of objects such as laptops, touchscreens and writing instruments.

Businesses must also take steps to minimize interpersonal contact and congregation in the office. The guidelines suggest that, among other things, businesses limit in-person presence to only necessary staff, stagger employee shifts or work schedules and avoid having multiple teams working in the same area. Employers are encouraged to have employees work from home whenever possible or return to the office in waves or phases.

If employers choose to return employees to an office in phases or waves, employers must be sure to base any decisions on which employees to include in those waves on legitimate, nondiscriminatory factors such as job functions. Employers may not base a decision on who to recall to the workplace because of the employer's belief that certain employees may be at a lower risk of COVID-19 complications than other employees because of, for example, age or underlying medical conditions. Employers who choose not to recall employees who are older, pregnant or have an underlying medical condition risk discrimination claims by those employees. Employers can, and should, however encourage employees to bring any concerns they have about returning to an office to their attention and work with employees to address any reasonable accommodations that may be needed because of COVID-19.

#### ***Employee Health Screening***

As with other industries, offices must also perform daily COVID-19 screenings of all employees. Employers will be responsible for conducting their employees' health screenings but should coordinate such screenings with their building managers, where relevant. Building managers may facilitate employee screenings if they agree to do so. As with retail employers, office employers must ask employees if within the past 14 days they have tested positive for COVID-19, have experienced COVID-19 symptoms or had close contact with someone who was symptomatic or tested positive for COVID-19. Furthermore, employees must stay home for at least 14 days if they are symptomatic and (1) test positive; (2) do not get tested; or (3) had close contact with a person with COVID-19. Unlike the Phase 2 retail guidelines, however, the Phase 2 guidelines for offices require that employees who are not symptomatic but had close contact with someone with COVID-19 must also undergo a 14-day quarantine, unless the person is critical to the safety or operations of the

office and the business gets the approval of the local department of health.

If an employee tests positive, the employer must notify the state and local departments of health of the positive test. The business must work with the department of health to trace all contacts the person may have had in the workplace, including notifying the department of health of all individuals who entered the worksite going back 48 hours from when the person first experienced symptoms or tested positive. The guidelines suggest offering optional tracing and tracking technology to streamline contact tracing as a best practice.

### ***Site Safety Plan***

As with all businesses, offices must also develop and post a written site safety plan to document how they are complying with these guidelines and preventing the spread of COVID-19 in the workplace.

Retailers and businesses operating in offices in New York must closely review these guidelines to ensure that they are in full compliance with these requirements for a Phase 2 reopening. Businesses should consult with counsel to discuss any concerns they may have with their ability to fully comply with these guidelines.

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