



## Updated Guidance for New York Businesses in the Construction Industry Entering Phase One of Reopening

The New York Forward Plan (the “Plan”) has authorized a gradual reopening of non-essential businesses by region based on achieving specific COVID-19 health metrics. On June 8, 2020, New York City entered Phase One, which allowed construction, agricultural, landscaping, manufacturing, and wholesale supply chain businesses to reopen, as well as many retailers if they provide curbside or in-store pickup. A summary and discussion of the New York-issued guidance for Phase One industries can be found [here](#).

The Plan requires that at least two weeks (14 days) must pass and certain metrics be met before the next phase of the economy can open. Phase Two allows many businesses to reopen, including most office-based businesses, administrative services, commercial building management, real estate services, and repair and cleaning services.

For each industry in Phase Two of the reopening, New York has promulgated summary guidelines (“Guidelines”), new interim guidance, and forms with which businesses must become familiar as they develop specific workplace safety plans. Guidance is given on physical distancing, protective equipment, hygiene and cleaning, communication, and screenings. Specific guidelines for businesses can be found below.

### Considerations for Construction Site Owners for Phase One

Regarding enforcement of the New York Forward Guidelines, the New York Department of Buildings recently advised that:

During the first 30 days of construction resuming, the Department will focus on education to help the industry learn how to implement the new standards and procedures. Initial DOB violations issued during these first 30 days carry no financial penalty. Following this period, violations will result in financial penalties and further noncompliance may result in Stop Work Orders and summonses with accompanying civil penalties of up to \$5,000 for each offense.

---

<sup>1</sup> [https://www1.nyc.gov/assets/buildings/pdf/restart\\_enforcement\\_guidance.pdf](https://www1.nyc.gov/assets/buildings/pdf/restart_enforcement_guidance.pdf)

The guidance from New York State makes clear that maintaining a safe work site is the obligation of every company performing construction in New York, but the ultimate responsibility for following the safety protocols at any construction site may well rest on the site owner. The owner is expected to contract with the general contractor or another party to enforce the guidelines in view of the specific characteristics of the site.

If any contractor personnel at a construction site becomes sick from COVID-19, the site must immediately undergo a deep cleaning at the expense of the owner. This added owner cost is compounded by having to shut down the site during the cleaning, causing additional delays to the project schedule and potentially impacting the date of completion. Absent conduct contributing to the condition or to project delays, the contractor likely would not be responsible or penalized for these delays.

The Guidelines do not specify who will be ultimately liable if a worker becomes ill at a site. However, it is not inconceivable that a sick worker may name both the owner and the worker's employer in a lawsuit seeking to collect damages for contracting COVID-19.

An employer is usually immune from suit by an employee who suffers a workplace injury or occupational disease, since the employee's exclusive remedy is to file a claim with the employer's workers' compensation carrier. Workers' compensation laws do not bar those same employees from asserting tort claims against property owners.

In the COVID-19 context, such lawsuits may try to impose liability for a property owner's failure to inspect, clean, or sterilize a building and failure to implement the safety guidelines in the Plan.<sup>2</sup> These claims would contend that the owner or employer was negligent in the reopening of the construction site. In order to establish negligence, a court must find that the owner owed a duty to the workers to prevent the spread of COVID-19, that the procedures put in place by the owner were deficient, and that the worker is sick because the owner failed to act properly to prevent the spread of COVID-19. Property owners, who should be aware of dangerous conditions in communal spaces such as lobbies, stairwells, or elevators but fail to exercise reasonable care to prevent injuries in those spaces, may be subject to suit. In these cases, the owner may implead the employer for contribution or indemnification.

The best defense in actions arising from illness on a construction site will be that the owner's safety plan meets or exceeds the guidelines issued by OSHA, the Centers for Disease Control and Prevention ("CDC"), and the New York Forward Plan. Owners should provide stringent guidelines to all contractors on site and require all contractors to affirm that they will meet the safety procedures outlined in the owner's guidelines. This will afford the owner a credible defense if an individual contracts COVID-19 while working at the site. The owner will be able to show that its plan not only met, but exceeded the guidelines issued by OSHA, the CDC, and the New York Forward Plan; therefore, assuming the existence of a legal duty, the owner can credibly argue that it did not breach such duty and therefore cannot be found negligent.

A central obstacle confronted by plaintiffs seeking to sue owners and their employers is the element of causation. Plaintiffs will need to establish causation, or a connection between the negligence that they are alleging and their own exposure and illness. It may be difficult for construction workers to prove

---

2

It remains to be seen whether owners will be found to have a duty to prevent the spread of COVID-19. The Guidelines do not specify whether owners must develop their own plans or submit affirmations of compliance with the Guidelines. While it is clear that construction sites must comply, the absence of an allocation of responsibility to ensure compliance leaves the relative duties of owners and contractors to be developed in practice.



that they contracted COVID-19 at the construction site. Owners and employers may need to employ this defense if they are sued by a worker who contracted COVID-19.

## **Considerations for Office Reopenings in Phase 2**

In addition to New York City entering Phase One, the Central New York, Finger Lakes, Valley, North Country, and Southern Tier regions of New York State have now entered into Phase Two. Phase Two allows many businesses to reopen, including most office-based businesses, administrative services, commercial building management, real estate services, and repair and cleaning services.

As noted above, for each industry in Phase Two of the reopening, New York has promulgated the Guidelines, new interim guidance, and forms with which businesses must become familiar as they develop specific workplace safety plans. These Guidelines encompass physical distancing, protective equipment, hygiene and cleaning, communication, and screenings.

The mandatory safety requirements for office workplaces include the following components:

### **Physical Distancing**

- (1) Limit the number of occupants at any given time to no more than 50% of the maximum occupancy for a particular area as set by the certificate of occupancy;
- (2) Maintain a distance of at least 6 feet among all individuals at all times. If someone must be within 6 feet of another person, acceptable face coverings must be worn (ensuring that mouth and nose are covered);
- (3) Prohibit the use of tightly confined spaces. For example, smaller elevators can be used only by one person at a time;
- (4) Post social distancing markers using tape or signs that denote 6 feet of spacing in commonly used and other applicable areas;
- (5) Limit in-person gatherings. Employers are encouraged to continue using video-conferencing as much as possible;
- (6) Disinfect shared workspaces between users;
- (7) Reduce interpersonal contact and congregation by adjusting workplace hours, limiting in-person presence to necessary staff, shifting design, reducing the on-site workforce, staggering arrival/departure times; and
- (8) Close non-essential common areas (e.g., gyms, pools, game rooms).

### **Protective Equipment**

- (1) Provide acceptable face coverings to employees at no cost;
- (2) Acceptable face coverings include homemade sewn, quick cut, bandana, surgical masks, and face shields;
- (3) Prohibit sharing of the acceptable face coverings;



- (4) Train employees on the proper use of the acceptable face coverings; and
- (5) Limit the sharing of laptops, notebooks, telephones, touchscreens, and writing utensils, as well as the touching of shared surfaces; or, require workers to wear gloves when in contact with shared objects or frequently touched surfaces; or, require workers to perform hand hygiene before and after each contact.

## **Hygiene and Cleaning**

- (1) Employers must adhere to hygiene, cleaning, and disinfection requirements of the CDC and Department of Health (“DOH”) and maintain on-site cleaning logs that document date, time, and scope of cleaning;
- (2) Employers must provide and maintain hand hygiene stations in the office, by furnishing soap and hand sanitizer that is at least 60% alcohol;
- (3) Cleaning and disinfecting of the office, shared surfaces, and other areas, as well as equipment, should be performed using Department of Environmental Conservation products identified by the Environmental Protection Agency as effective against COVID-19;
- (4) High-risk areas and frequently touched areas used by many individuals (e.g., restrooms) must be regularly cleaned and disinfected;
- (5) If an individual is confirmed to have COVID-19, areas likely used by that individual must be promptly cleaned and disinfected, including, at a minimum, all heavy transit areas and high-touch surfaces (e.g., elevators, lobbies, building entrances, badge scanners, restrooms, handrails, door handles);
- (6) The sharing of food and beverages should be prohibited; and
- (7) Cleaning and disinfecting is to occur at least after each shift, daily, or more often as needed.

## **Communication**

- (1) An employer must affirm that it has reviewed and understood the state-issued industry guidelines, and that it has implemented these guidelines. It must also:
- (2) Post signage inside and outside the office to remind personnel and customers to adhere to proper hygiene, social distancing rules, appropriate use of PPE, and cleaning and disinfecting protocols;
- (3) Train all personnel on new protocols and frequently communicate safety guidelines;
- (4) Establish a communication plan for employees and visitors with a consistent means to provide updated information;



- (5) Provide building managers/owners a list of essential visitors expected to enter the building;
- (6) Post safety plans on-site;
- (7) Maintain a continuous log of every person, including workers and visitors, who may have close contact with other individuals at the worksite or area; and
- (8) If a worker or visitor was in close contact with others at the office location and tests positive for COVID-19, the employer must immediately notify state and local health departments and cooperate with contact tracing efforts, including notification of potential contacts such as workers, visitors, and/or customers (if known) who had close contact with the individual, while maintaining confidentiality.

## Screening

- (1) Employees who are sick should stay home or return home if they become ill at work;
- (2) Mandatory health screening assessment (e.g., questionnaire, temperature check) must be implemented for employees, contractors and other visitors, asking about (a) COVID 19 symptoms in the past 14 days, (b) positive COVID-19 tests in the past 14 days, and/or (c) close contact with any confirmed or suspected COVID-19 case in the past 14 days. Responses must be reviewed and documented daily;
  - If a person has COVID-19 symptoms AND EITHER tests positive for COVID-19 OR did not receive a test, the individual may only return after completing at least 14 days of self-quarantine;
  - If a person does NOT have COVID-19 symptoms BUT tests positive for COVID-19, the individual can only return after completing at least 14 days of self-quarantine. If a person has had close contact with a person with COVID-19 for a prolonged period AND is symptomatic, the individual should follow the above protocol for a positive case; and
  - If a person has had close contact with a person with COVID-19 for a prolonged period AND is NOT symptomatic, the individual must complete a 14-day self-quarantine;
- (3) Tenants must coordinate with building managers to facilitate screening. Tenants are responsible for screening their employees and visitors unless they and building management have agreed to an alternate arrangement to ensure screening is in effect;
- (4) On-site screeners should be trained by employer-identified individuals familiar with CDC, DOH, and OSHA protocols and should wear appropriate PPE, including at a minimum, a face covering;
- (5) A point-of-contact must be identified for workers and visitors to inform if they later begin



to experience COVID19-related symptoms, as noted in the questionnaire referenced in paragraph (2) above; and

- (6) A plan must be in place for cleaning, disinfection, and contact tracing in the event of a positive case.

The full list of the Guidelines above, as well as related implementation suggestions, can be found [here](#):

To ensure compliance with the Guidelines, offices will need to submit an affirmation that the office has taken the necessary steps under the Guidelines to prevent the spread of COVID-19.

The Affirmation can be found [here](#).

The Guidelines further require that businesses comply with CDC recommendations, regulations under OSHA, and other evolving federal, state, and local public health and COVID-19 safety guidance [here](#).

