

COVID-19 REOPENING TIPS FOR NEW YORK CITY RESTAURANTS

Presented by



NYC HOSPITALITY
ALLIANCE

1. REOPENING YOUR RESTAURANT

Determining when to reopen is a difficult decision that involves many considerations, including government restrictions, health and safety concerns and economic implications. New York State and New York City have imposed (and likely will continue to impose) restrictions on when you may reopen, in what form you may reopen and how you can operate. To inform your decision, you should monitor and review:

Governor Cuomo's Executive Orders

(<https://www.governor.ny.gov/executiveorders>)

Mayor de Blasio's Executive Orders

(<https://www1.nyc.gov/office-of-the-mayor/news.page>)

Guidance issued by the New York State Department of Health

(<https://coronavirus.health.ny.gov/home>)

Guidance issued by the New York City Department of Health and Mental Hygiene

(<https://www1.nyc.gov/site/doh/covid/covid-19-main.page>)

Guidance issued by the Centers for Disease Control and Prevention (CDC) for businesses and workplaces

(<https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/businesses-employers.html>)

Guidance issued by the Food and Drug Administration (FDA) regarding best practices for restaurants during the COVID-19 pandemic

(<https://www.fda.gov/food/food-safety-during-emergencies/best-practices-retail-food-stores-restaurants-and-food-pick-up-delivery-services-during-covid-19>)

Resources posted by the New York City Hospitality Alliance

(<https://thenycalliance.org/information/covid-19-resources>)

Resources posted by the National Restaurant Association

(<https://restaurant.org/Covid19>)

2. REHIRING OR RECALLING YOUR EMPLOYEES

Deciding Who to Rehire or Recall and in What Capacity

- Understand whether the employees that you are seeking to rehire or recall were terminated or temporarily laid off or furloughed
- Use objective, non-discriminatory criteria for selecting employees for rehire or recall to avoid discrimination claims (e.g., seniority within each job classification)
- Review the composition of returning employees to ensure protected classes are not disparately impacted
- Review existing job descriptions and consider revisions due to changes in operations or business expectations due to COVID-19
- Consider requiring employees to take on additional job duties or cross-training employees in different tasks

- Consider impact of rehire or recalling employees on receipt of government benefits or loans (e.g., analyze loan forgiveness requirements if you received a Paycheck Protection Program loan)

Onboarding Rehired or Recalled Employees

- Prepare offer letter or reinstatement memorandum to returning employees
- Complete a new hire process for employees who were terminated
- Consider completing a new hire process for employees who were temporarily laid off or furloughed (strongly recommended)
- Obtain employees' updated contact information, including personal email address and cell phone number, to ensure effective communications during pandemic
- Consider making a conditional job offer and then screening all applicants for symptoms of COVID-19 and taking all applicants' temperatures
- Delay the start date for any applicant who has COVID-19 or is symptomatic, or consider withdrawing the job offer if the applicant is needed to start work immediately (in consultation with counsel)
 - ▶ Do not unilaterally postpone an applicant's start date or withdraw a job offer because the individual presents a higher risk for COVID-19 complications (e.g., over 65 years of age or pregnant)
- Consider whether any employee benefits available to employees prior to their termination or furlough need to be reinstated (e.g., if employees are rehired or recalled within six months, all accrued and unused time pursuant to the NYC Earned Safe and Sick Time Act must be reinstated and available for immediate use)
- Determine if employees need to reenroll in any health insurance, retirement, or other benefits plans and if any probationary periods apply
- Ensure employees are properly classified as exempt or nonexempt and consider adjusting employee pay or benefits
 - ▶ Employees do not need to be paid the same amount that they were paid prior to their termination or furlough (unless their pay is fixed by an employment contract or collective bargaining agreement) but be mindful of pay equity and discrimination issues
 - ▶ Ensure hourly employees are paid at least the minimum wage (\$15 per hour in NYC before any tip credit) and salaried employees are paid at least the minimum salary threshold (\$1,125 per week in NYC)

This document is intended for general information purposes only. It does not constitute legal advice or create an attorney-client relationship. This document is based on the most current information at the time that it was prepared and is subject to check without notice. Laws and/or other circumstances may have changed since the publication of this document.

- ▶ Provide the proper New York State Notice and Acknowledgement of Pay Rate and Payday form in English and the employee's primary language (<https://labor.ny.gov/formsdocs/wp/ellsformsandpublications.shtm>)
- Verify the identity and employment authorization of all individuals rehired or recalled
 - ▶ Consult with counsel about whether to complete a new Form I-9 or Section 3 (the "Rehire" section of Form I-9)
- Ensure that employees complete all new hire paperwork and receive all notices required under federal, state and local law, and that all required employment posters are posted in the restaurant
 - ▶ Refer to our "Required Employment Documents and Posters for New York City Hospitality Employers" checklist document (https://www.foxrothschild.com/content/uploads/2020/05/NYC_RequiredEmploymentDocumentsPoster.pdf)
 - ▶ Don't forget the new FFCRA poster! (https://www.dol.gov/sites/dolgov/files/WHD/posters/FFCRA_Poster_WH1422_Non-Federal.pdf)
- Provide all employees with your Employee Handbook and ensure that they sign and date an acknowledgement of receipt
- Update your policies to comply with recently enacted laws, such as the Families First Coronavirus Response Act, New York State COVID-19 Quarantine Leave, and New York State Paid Sick Leave Law
- Provide tipped employees with a compliant tip policy and require them to sign an acknowledgement of receipt
 - ▶ If a tip credit is taken, make sure that tipped employees have been provided with the documents necessary to lawfully take a tip credit
 - ▶ Track tips received and ensure that the tip credit rate plus each employee's tips equal at least the regular minimum wage—otherwise, you must make up the difference!
 - ▶ Consider the implications of assigning employees to perform non-tipped work—80/20 violations may be harder to avoid in this new environment
- Communicate with employees about actions taken and procedures implemented to ensure their safety prior to commencing work
- Provide employees with written protocol to follow in the event they become ill or potentially exposed to COVID-19, including reporting requirements

3. ACCOMMODATING EMPLOYEES AND GRANTING LEAVES OF ABSENCE

You should anticipate an increase in accommodation requests related to COVID-19.

- Prepare protocol for responding to employees requesting a delayed start date due to COVID-19 concerns, including child care concerns
- Consider requests for reasonable accommodations for reasons related to COVID-19 and engage in cooperative dialogue with employees

- Review essential functions of jobs and consider whether working remotely is possible for certain positions
- Advise employees of leave benefits available under federal, state, and local laws for reasons related to COVID-19
 - ▶ Remember that employees do not need to be sick to be entitled to leave—for example, employees may be permitted to take time off to care for their child or a family member who is ill
 - ▶ For further information about various leaves that may be available to your employees, please refer to our Alert: <https://www.foxrothschild.com/publications/new-york-employers-leave-obligations-for-covid-19-absences-under-federal-state-and-local-law/>
- Train managers regarding employee leave policies and entitlements, the importance of not retaliating against employees for exercising their rights, and the possibility of individual liability under certain laws
- Consider granting unpaid leaves of absence after employees exhaust all leave entitlements
- Consider offering resources to help employees cope with stress and anxiety

4. MAINTAINING A SAFE ENVIRONMENT FOR EMPLOYEES AND GUESTS

To inform your practices and procedures for making your restaurant safe, you should regularly monitor and review:

- Guidance issued by the Occupational Health and Safety Administration (OSHA) (<https://www.osha.gov/SLTC/covid-19/>)
- Guidance issued by the CDC (<https://www.cdc.gov/coronavirus/2019-ncov/community/reopen-guidance.html>)
- Guidance issued by the U.S. Environmental Protection Agency (EPA) regarding disinfectants (<https://www.epa.gov/coronavirus>)
- Guidance issued by the New York City Department of Health and Mental Hygiene for cleaning and disinfecting (<https://www1.nyc.gov/assets/doh/downloads/pdf/imm/disinfection-guidance-for-businesses-covid19.pdf>)

Temperature Checks and Reporting of COVID-19 Symptoms (During Pandemic)

- Post signage at the entrance stating that persons with a fever and/or other COVID-19 symptoms are not permitted inside the restaurant
- Consider implementing a regular practice of taking temperatures of all employees and guests and inquiring about CDC designated symptoms before entering premises
 - ▶ Symptoms currently include: cough; shortness of breath or difficulty breathing; fever; chills; repeated shaking with chills; muscle pain; headache; sore throat; and new loss of taste or smell (<https://www.cdc.gov/coronavirus/2019-ncov/symptoms-testing/symptoms.html>)
 - ▶ Screen everyone or no one and do not inquire beyond the aforementioned symptoms or as may be revised by the CDC
 - ▶ You may send employees home or refuse service to guests as long as not for an unlawful or discriminatory reason

- ▶ Pay hourly employees for time required for temperature taking and responding to medical inquiries and consider call-in pay requirements
- Set expectations by issuing a policy to employees, posting a notice on-premises, and providing advanced notice to vendors or other regular third parties of temperature checks and required reporting of symptoms
 - ▶ Consider requiring employees to sign and return a written consent form
- Train employees responsible for taking temperatures on appropriate procedures, safety precautions and protocol for consistent treatment of employees and guests
- Consider requirements for confidentiality of medical records, privacy issues and data security concerns
 - ▶ Only document whether temperatures are above or below the CDC threshold (100.4 degrees Fahrenheit)
 - ▶ All medical records must be maintained separately from personnel files
- Monitor and follow guidance from
 - ▶ U.S. Equal Employment Opportunity Commission (https://www1.eeoc.gov/eeoc/newsroom/wysk/wysk_ada_rehabilitaion_act_coronavirus.cfm?)
 - ▶ New York State Division of Human Rights (<https://dhr.ny.gov/coronavirus-discrimination>)
 - ▶ New York City Commission on Human Rights (<https://www1.nyc.gov/site/cchr/media/covid19.page>)

Face Coverings, Gloves, other Personal Protective Equipment, and Uniforms

- Follow OSHA guidance and any local requirements issued by New York State or New York City
 - ▶ New York has mandated that all persons wear masks or face coverings in public when social distancing is not possible
 - ▶ New York has mandated that all essential businesses provide employees with face coverings free of charge to wear when in direct contact with customers or guests
- Provide face coverings, gloves and other PPE to employees and maintain any items that employees may safely reuse
- Implement procedures for distributing face coverings to guests and other third parties
- Train employees on best practices for safely using PPE
- Make PPE requirements terms and conditions of employment
- Consider requests for reasonable accommodations for medical or religious reasons prior to taking adverse action against employees who refuse to don PPE
- Consider maintaining uniforms for employees and laundering daily
- Contract with appropriate third party providers for appropriate “deep cleaning” and other sanitary and hygiene practices

Employee Hygiene

- Establish hygiene practices for employees based on CDC guidance
- Require employees to wash their hands often with soap and water for a minimum of 20 seconds
- Provide 60% minimum alcohol-based hand sanitizer by installing dispensers in public and non-public areas of restaurant
- Direct employees to cover their mouths and noses with a tissue (or their sleeve) when coughing or sneezing
- Advise employees to avoid touching their eyes, nose, and mouth with unwashed hands
- Prohibit employees from touching ready-to-eat foods with bare hands

Cleaning of Restaurant

- Establish cleaning and sanitization measures and protocol in accordance with recommendations provided by the CDC
- Train employees on cleaning and disinfecting procedures
- Consider engaging a professional third-party cleaning company and food and safety expert to maintain appropriate standards
- Make cleaning products available to employees
- Use disinfectant products pre-approved and certified by the EPA for use against COVID-19 and other viruses
- Disinfect “high-touch” surfaces frequently, such as doorknobs, countertops, electronic pads/touch screens, and workstations
- Clean and sanitize restrooms regularly and ensure adequate supply of soap and paper towels
- Clean and sanitize table condiments, ordering devices, and check presenters between guests
- Establish procedures for closing the restaurant and conducting a deep cleaning and sanitizing in the event of COVID-19 exposure in the workplace
- Engage HVAC contractors to improve ventilation within restaurant

Social Distancing, Restaurant Layout and Operational Changes

- Require employees to the fullest extent possible to remain at least six feet apart in the workplace
- Prohibit handshaking and any other physical contact at the restaurant
- Implement staggered shifts and meal/break times to avoid overcrowded work areas and minimize congregating among employees
- Consider impact of NYC Fair Workweek law requirements for fast food employers (<https://www1.nyc.gov/site/dca/workers/workersrights/fastfood-retail-workers.page>)

- Change physical layout of restaurant to promote social distancing and consider signage and floor markings
- Reduce seating capacity and reconfigure seating to provide a minimum of six feet of separation between parties
- Limit party size at tables as may be proscribed by law
- Install automatic door openers
- Consider installing partitions at host stands or registers
- Consider installing plexiglass or other protective barriers between public areas and open kitchens
- Consider reservations-only policy or call-ahead seating requirement
- Prohibit guests from congregating in waiting areas or bar areas
- Designate and use a separate entrance and exit (if possible)
- Discontinue any self-service/shared food stations—no more buffets or salad bars!
- Consider access to menus and ordering by mobile means (address accessibility issues for guests with disabilities)
- Use non-touch menus or provide one-time use disposable paper menus for guests not accessing menus by mobile means and discard after each use
- Consider contactless payment options (address accessibility issues for guests with disabilities)
- Implement process for providing clean and sanitized writing utensils to guests
- Limit the number of visitors to the restaurant by requiring vendors and other third parties to visit during non-public hours

Employee Health and Safety Concerns

- Implement and enforce non-retaliation policies—employees have a right to raise concerns about the safety of their workplace, report unhealthy or unsafe working conditions, or join together to protest your actions or perceived inaction
- Communicate regularly and often with employees and provide a forum for employees to raise issues
- Train managers on addressing health and safety concerns and protected concerted activity
- Investigate claims and respond promptly and appropriately to employees

Reporting Requirements

- Review reporting obligations under OSHA and New York Workers' Compensation Law

For more information about this alert, please contact:

Carolyn D. Richmond

✉ crichmond@foxrothschild.com

☎ 212.878.7983

Glenn S. Grindlinger

✉ ggrindlinger@foxrothschild.com

☎ 212.905.2305

Jason B. Jendrewski

✉ jjendrewski@foxrothschild.com

☎ 212.878.7952

or any member of the firm's New York Labor & Employment Group.

This document is intended for general information purposes only. It does not constitute legal advice or create an attorney-client relationship. This document is based on the most current information at the time that it was prepared and is subject to check without notice. Laws and/or other circumstances may have changed since the publication of this document.