



COVID-19 safety plans: what employers need to know



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Introduction

COVID-19 safety plans (also referred to as preparedness plans) are a way for employers to demonstrate to their employees, the public (for public-facing businesses) and, in certain cases, state governments that they have considered the risks associated with COVID-19 in their respective workplaces and have developed a response to these concerns. The plans establish and explain the policies, practices and conditions necessary to meet the Centres for Disease Control and Prevention (CDC) and Occupational Safety and Health Administration (OSHA) standards relating to worker and customer exposure to COVID-19. These plans may also incorporate guidance from the state department of health and industry-specific guidelines issued via state executive orders.

COVID-19 safety plans generally address:

- infection prevention measures;
- the identification and isolation of sick persons;
- administrative controls for social distancing, cleaning, disinfecting, decontaminating and ventilating the workplace; and
- what will be done if an employee tests positive for COVID-19 in terms of cleaning, disinfecting and contact tracing.

Are there state-specific requirements?

A minority of states, including New York and Minnesota, have provided templates and instructions for their respective safety plans. Other states simply describe the areas that employers must address in these plans, while others still merely impose the requirement with little direction. Most, if not all, jurisdictions that require safety plans also require employers to train their employees on the contents of these plans. In New York, all businesses must have a written safety plan explaining how their workplaces will prevent the spread of COVID-19. Although employers need not submit their written safety plans to the state for approval, the plans must be retained on premises and be made available to the New York State Department of Health (DOH) or local health or safety authorities in the event of an inspection.

When developing their plan, employers in New York must reference the state's industry-specific reopening guidance as applicable. The plan includes physical distancing measures to ensure that persons remain six feet apart and require all persons to wear face coverings where six feet of distance is impossible. The plan further limits the capacity of tightly

confined spaces to 50% unless all occupants are wearing face coverings. Employers must also provide employees with an acceptable face covering at no-cost to the employee and have an adequate supply of replacement face coverings.

In New York, plans must be consistent with the hygiene and sanitation requirements issued by the CDC and the DOH and provide for the maintenance of cleaning logs on-site that document the date, time and scope of cleaning. Employers must also provide and maintain hand hygiene stations for employees.

Further, in New York, employers' plans must provide for the implementation of mandatory health screening assessments before employees begin to work each day and for essential visitors. These health assessments include asking about:

- COVID-19 symptoms in the past 14 days;
- positive COVID-19 tests in the past 14 days; and
- close contact with a confirmed or suspected COVID-19 case in the past 14 days.

Assessment responses must be reviewed every day and such review must be documented. As mentioned above, under the plan, businesses must also have a plan for cleaning, disinfecting and contact tracing in the event of a positive case.

Other states requiring preparedness plans generally cover the same topics as New York; however, there are variations from state to state, including with respect to:

- when face coverings are required;
- the capacity limits for particular industries; and
- training requirements for employees and managers.

Should employers adopt COVID-19 safety plans in states where there is no obligation to do so?

Employers may want to adopt safety plans or exposure control plans in states that do not require them. Safety plans are an important way to demonstrate to employees and customers that the business is taking adequate precautions to limit the spread of COVID-19. Further, safety plans provide helpful documentation and evidence of employers compliance, or good-faith efforts to comply, with applicable requirements or best practices. As numerous states actively consider whether the workers' compensation bar should apply to COVID-19 cases, a safety plan can serve as helpful evidence of employers' exercise of due care. (In Indiana and Ohio, for example, COVID-19 claims may not be covered by the workers' compensation statute, as workers' compensation generally applies only to illnesses that employees would not normally contract outside of the specific workplace.)

Employers should be wary of drafting plans that they are unable – or have no genuine intention – to implement and enforce. There has been an increasing number of cases, including a matter unrelated to COVID-19 before the US Court of Appeals for the District of Columbia Circuit earlier in 2020 (*BHC Northwest Psychiatric Hospital v Secretary of Labor*, DC Cir, 19-1089 (3 March 2020)), in which OSHA has issued citations against employers that failed to adequately implement the core terms of their written safety plans.

When should employers update their COVID-19 safety plans?

Employers should continue to monitor state and local guidance relating to COVID-19 preparedness, and their safety plans should be updated whenever the applicable jurisdictions update their guidance.

The CDC, OSHA and individual states are increasingly issuing sector-specific guidance as part of ongoing reopening plans. Some of these requirements may become more stringent – for example, in early April 2020, the public was instructed not to wear masks, but within one month many employers were required to provide facial coverings to employees. On the other hand, some states are relaxing requirements, such as permitting outdoor dining, limited retail operations and the reopening of non-essential offices, which employers should be aware of with regard to their safety plans.

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