

# MSF CLIENT ALERT

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## Indoor Dining Returns to New York City on September 30, 2020 – What Restauranters Need to Know in New York City and Across the State as Operations Increase

*On September 9, 2020, Governor Cuomo announced that New York City restaurants may resume indoor dining on September 30, 2020 subject to various limitations and regulations. In addition to the restrictions on operations in New York City, restaurants across the state must be mindful of compliance and best practices as their operations increase.*

September 2020

### **Indoor Dining Returns to New York City**

To the relief of one of the industries hit hardest by the COVID-19 pandemic, Governor Cuomo announced that restaurants in New York City may resume indoor dining on September 30, 2020 subject to, *inter alia*, the following restrictions:

- Indoor capacity is restricted to 25% of the maximum occupancy for a particular area as established by the certificate of occupancy, excluding employees
- The number of patrons equal to 25% of capacity must be conspicuously posted in the restaurant
- The maximum size of events at a restaurant may not exceed the lower of 25% capacity or 50 people
- Temperature checks of all customers and employees are required with no one whose temperature is 100.0° Fahrenheit or higher permitted entrance
- One member of each party must provide contact information including their phone number and address, and the restaurant must maintain this information for 28 days
- No bar service – bars may solely be used for preparing drinks that are served at tables
- Customers must always wear masks when not seated at a table
- Employees must always wear face coverings and, in addition to satisfactory temperature checks prior to entrance, employees must also satisfactorily complete daily health screenings
- Tables must be 6 feet apart
- There must be separate entrances/exits for customers and employees, where possible
- Restaurants must stop service of food and beverages at midnight and cannot commence service before 5:00AM
- Restaurants should operate with enhanced air filtration, ventilation and purification standards with a minimum filtration level of MERV 13 or higher
- Restaurants must limit air recirculation and allow for outside air ventilation

More information on these restrictions and other requirements can be found in the Interim Guidance for New York City Indoor Food Services During the COVID-19 Public Health Emergency issued on September 11, 2020 and

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accessible [here](#). All restaurants commencing indoor dining must affirm that they have read this document and will operate in compliance with the guidance prior to commencing indoor dining. Restaurants must also develop a written safety plan outlining how its workplace will prevent the spread of COVID-a9.

## ***New York City Employers May Not Ban Cash as of November 1, 2020***

In the face of the current pandemic many businesses and individuals have spurned the use of cash to pay for goods and services in favor of credit and/or debit cards in an effort to avoid the spread of germs and as a result of the national coin shortage. However, effective November 1, 2020, businesses in New York City can no longer maintain a policy of refusing to accept cash as a form of payment.

## ***Restaurants Across New York Must be Mindful of Potential Pitfalls in their Return to Operations***

Employers across New York must also take certain steps to comply with existing legal obligations and newly enacted requirements related to COVID-19.

### ***Employee Participation in the Tip Pool***

In the past, bartenders regularly participated in restaurant tip pools as they provided direct service to customers. However, the restriction on bar service imposed upon New York City restaurants may preclude bartenders from participating in tip pools since they may no longer provide direct service to customers. Restaurants should perform an individualized analysis of their operations to determine

whether any employee, not just bartenders, can participate in the tip pool based upon their actual duties upon a return to operations. Restaurants also should review written tip pool and tip credit policies and ensure that they are updated to reflect any changes in the restaurant's procedures. Employees should be provided these policies and asked to acknowledge receipt.

### ***Restaurant Ability to Take the Tip Credit***

With increased cleaning requirements, lower staff levels and other operational changes caused by the COVID-19 pandemic, employees may be performing a variety of tasks that were not their responsibility in the past. Several of these responsibilities may not be tip generating work. To avoid violating New York's 80/20 rule, employers should carefully review the amount of time employees spend performing tip generating work versus work that does not generate tips. The 80/20 rule prohibits employers from taking a tip credit if more than 20 percent of the employee's time worked is spent performing work that does not generate tips, *i.e.* side work, cleaning, etc.

### ***Misclassification of Employees as Exempt***

With the potential that restaurants may return customer facing staff in a phased approach, restaurants should review managerial responsibilities to ensure their duties continue to qualify for exempt status. If managers take on serving or other non-exempt tasks in order to maintain restaurant operations they may no longer be permissibly classified as exempt and paid a salary under applicable wage and hour law. Restaurants must undertake careful review of managerial tasks and responsibilities to determine whether they can properly be classified as exempt

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based upon their duties. If their primary duty is no longer the management of the business or if they no longer supervise two or more employees, they can no longer be paid on a salary basis and must be paid hourly and receive overtime pay when required. In such circumstances, they must be provided with an accurate Notice of Pay Rate and Payday appropriate to and in line with their new status. Regardless of their exempt status, no one with managerial responsibilities, including hiring, firing, scheduling, etc. should participate in the tip pool.

## *New Hire Paperwork & Paystubs*

Restaurants must ensure that all employees are provided with a Notice of Pay Rate and Payday in English and their primary language upon hire, rehire, and/or return from furlough in order to avoid any claims that they were not provided with such notice upon commencing work. All information contained on the notice must be accurate and in line with current pay practices, not those prior to the pandemic. Sample Notices of Pay Rate and Payday approved by the state can be found [here](#).

For all new hires and rehired former employees who must complete a new I-9, ensure that they are provided with the proper form, which can be found [here](#), and that the form is completed properly.

Restaurants should also review their paystubs to ensure that they comply with the requirements contained in the New York Labor Law as well as the Hospitality Industry Wage Order, which requires information beyond that contained in the Labor Law. Now is the time to ensure compliance and avoid potential claims for improper paystubs, which carry significant financial penalties.

## *Required Postings*

In addition to those posters already required by law, employers must post the Employee Rights poster for Paid Sick Leave and Expanded Family and Medical Leave Under the Families First Coronavirus Response Act, which can be found [here](#). New York State has also issued a similar poster discussing employee rights to paid family leave for COVID-19 related reasons, which can be found [here](#).

## *Food Service Guidance Attestation*

Food Services in New York State are required to follow the Interim Guidance for Food Services During the COVID-19 Public Health Emergency and attest that they have read and understand the obligations of the guidance. The guidance applies to all restaurants and food services establishments, including food trucks, and other food concessions. The guidance provides that measures must be taken to reduce interpersonal contact and congregation, such as designating discrete work zones for servers and discouraging employees from entering others' workstations during shifts. There are additional guidelines that address work performed in the kitchen, cleaning, disinfecting, and hygiene requirements, and requirements for the use and provision of protective equipment

The guidance can be accessed [here](#), and food service employers can affirm that they have read and understand the obligations of the guidance [here](#).

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## *Sexual Harassment Training*

Employers should not neglect their obligation to provide employees with the required annual sexual harassment training. Failure to provide such training has significant consequences, particularly in the face of a suit alleging sexual harassment.

## *Questions Restaurants May Have*

In addition to the foregoing issues, restaurants likely have many questions if they are reopening for the first time, increasing their operations to include indoor dining, or operating under restriction during the remainder of the pandemic. We address several common questions below:

### *Can I screen employees before they return to work?*

Employers may screen employees for COVID-19 when entering the workplace provided such screening is consistent with the ADA. Screening is acceptable as long as the screening is implemented consistent with advice from the Centers for Disease Control and Prevention (“CDC”) and public health authorities for the employer’s type of workplace at that time. As of June 19, 2020, appropriate screening may include taking employees’ temperatures, asking questions about symptoms, and/or requiring self-reporting of symptoms. Employers should regularly review symptoms for COVID-19 listed by reputable sources such as the CDC, as the list of symptoms may change.

### *Can I test employees for COVID-19 before they return to work?*

Employers may administer COVID-19 testing, at its own expense, to employees before they enter the workplace to determine if they have the virus. Employers should

ensure that the tests are accurate and reliable consistent with ADA standards. Employers can look to the CDC, U.S. Food and Drug Administration, or other public health authorities for guidance on what is considered safe and accurate testing.

### *Can I require employees to be tested for COVID-19 antibodies before they return to work?*

On June 15, 2020, the EEOC issued guidance addressing employers’ use of antibody testing. According to the EEOC, employers may not require employees to be tested for COVID-19 antibodies before re-entering the workplace in part because antibody tests currently do not meet the ADA’s standard for medical examinations or inquiries for current employees.

### *Can I require employees to provide a doctor’s note certifying fitness for duty?*

Employers can require employees to provide a doctor’s note certifying fitness for duty before permitting their return to work from a break in employment or illness. However, the EEOC’s guidance noted that the increased need for health care providers to handle pandemic related emergencies may make it difficult for employees to obtain such certification and encouraged employers to be flexible and consider adopting a form that employees may have stamped or signed or allow for e-mail certifications.

Employers must maintain all information about employee illness, including doctor’s notes and screening and testing information for COVID-19, as confidential medical records in compliance with the ADA. This means that all medical information must be stored separately from the employee’s personnel file. Employers should further be

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careful not to engage in unlawful disparate treatment based on protected characteristics when making decisions related to screening and certifying fitness for duty. Additionally, while screening, testing, and requesting such a note do not run afoul of the ADA, employers should review applicable state and local laws to ensure that such a practice is permissible.

## *Can I prevent an employee from returning to work if I know they are “higher risk for severe illness” due to their age?*

Although the CDC has determined that individuals age 65 and older may be at higher risk for developing more serious symptoms, employers may not exclude an individual from the workplace based on their age being 65 or older

as such conduct would violate that Age Discrimination in Employment Act.

## *What new employee issues should I be prepared to address?*

Employers should be prepared to address employee concerns with respect to hygiene, social distancing, shared space, and use of personal protective equipment. These complaints may arise out of interactions with other employees, or with customers. Complaints can be avoided by advising all employees and customers of requirements to socially distance from one another, adopting sanitization procedures for shared space, and strictly enforcing use of personal protective gear.

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Please contact an attorney in MSF's Employment Group if you need assistance with respect to this information.



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