

# New York Health and Essential Rights Order



As New York considers re-opening the economy, elected officials and employers must continue to do more to protect the essential workforce as long as there are COVID-19 cases in the state and in preparation for a second wave. Across the nation and the state, there has been unprecedented attention to workers' demands on safety and health, and growing support for more protections among the public. New York State should not put its guard down--COVID-19 still poses significant threats to public health at this moment. The pandemic has proved more than ever that worker health is public health.

While many New Yorkers continue to observe social distancing at home, **there are approximately 2.2 million frontline workers in New York State who have no choice but to leave their homes and report to work in sectors deemed "essential," potentially exposing themselves, their families, and their communities to the virus.** The COVID-19 pandemic has disproportionately impacted Black and Latinx workers in New York, who are least likely to work in jobs that allow them the social distancing protections of working from home.

In the absence of federal leadership and without an enforceable airborne infectious disease standard in the Occupational Safety and Health Administration (OSHA), New York State must step in as a leader to address the challenges in slowing the spread of infection among the population. Many essential workplaces are still crowded spaces where workers must congregate in large numbers, creating high risks of infection not only among the workforce, but the general public as well when workers leave the workplace at the end of their shifts or when workers must interact with the public in the course of performing their jobs. While outbreaks grow among workers in essential sectors across the country, OSHA has recently issued an enforcement directive that states the agency will not formally investigate any complaints from essential workers outside of the healthcare industry.

While we urge the State to consider adoption of an Infectious Disease Standard in New York, we understand that more permanent and comprehensive solutions require deliberation and assessment of lessons learned across sectors during this difficult time. Employers and the state of New York continue to put worker safety and health at risk in order to keep our state functioning--workers are in need of more support and protection. That is why the State should immediately move to mitigate the risks on the essential workforce and the communities they serve. Therefore, we urge the Governor to issue an Executive Order that includes the following directives:

# HEALTH & SAFETY PROTOCOLS TO PROTECT PUBLIC HEALTH

In order to protect all New Yorkers and in the interests of public health, the following shall constitute an essential business' COVID-19 policy during the pandemic to mitigate the risks of exposure and spread of COVID-19 among the general public:

## 1) Personal Protective Equipment (PPE) Requirements:

A) PPE must be provided at all times by every essential employer to all essential workers without exclusion. PPE must be available in sufficient numbers and as appropriate to each sector, and employers must provide enough PPEs to allow workers to replace soiled PPE with new PPE.

i) *Healthcare sector*: Workers shall be provided with N95 or more protective respirators such as reusable ½-face elastomeric respirators and in accordance with OSHA Protection Standard (1910.134); gloves; surgical masks; gowns; face shields; and booties. For all single-use, disposable PPE, workers shall have access to new PPE after each use between patients as per employer policies and CDC guidelines in existence prior to the COVID-19 emergency, as soon as there are ample supplies available in a given area served by the healthcare facility. Healthcare facilities that are not experiencing surge or crisis conditions of COVID-19 patients, shall be required to implement pre-COVID, protective measures and procedures.

ii) *All other essential sectors*: All workers shall be provided with cotton fabric face masks (of at least 2-3 layers), gloves, and eye protection. For workers who must interact with the public on a regular basis, workers shall have access to new PPE at a minimum of one per day.

(1) Respirators, not face masks, may also be required by some essential workers.

There should be a risk assessment that determines the level of protection needed.

(2) Nothing in this Order shall be construed as lowering any standard for existing PPE issued to any work group.

B) Customers and guests shall be required to wear facemasks when entering any place of work.

C) New York State will secure a guarantee of PPE that are available to employers for distribution to workers by creating a stockpile that can be accessed by essential businesses when there is a decrease in supply in the external market. To the extent possible, the State shall secure supplies of reusable PAPRs and elastomerics for masks.

i) New York State will reserve a portion of its PPE stockpile for use by workers in industries covered by NYS Executive Order 159 establishing the Joint Task Force on Worker Exploitation and Employee Misclassification. Labor unions and worker organizations representing workers in those industries may access this stockpile on behalf of workers to ensure delivery of PPE.

**2) Physical Distancing Requirements:** The employer shall maintain at minimum six feet between workers, and between workers and customers, by using one or more of the following measures: implementing flexible worksites (e.g., telework); implementing flexible work hours (e.g., staggered shifts, staggered start and end times for shifts); increasing physical space between workers at the worksite to six feet; increasing physical space between workers and customers (e.g., drive-throughs, partitions, and limits to the number of customers in grocery stores, for example); implementing flexible meeting and travel options (e.g., postpone non-essential meetings or events); delivering services remotely (e.g. phone, video, or web); or delivering products through curbside pick-up or delivery. Further, this should include reconfiguring spaces where workers congregate including lunch and break rooms, locker rooms and time clock areas. Employers shall temporarily allow workers to record their start and end times without utilizing time clocks that require workers to physically punch in and out. Physical distancing requirements shall also apply in cases where workers travel via transportation that is operated or controlled by the employer.

**3) Hand Hygiene Requirements:** Employers must ensure that handwashing facilities are available and accessible, and that recognized and generally accepted good infection control practices for hand hygiene are followed. In general, CDC recommends handwashing with soap and water, or if handwashing facilities are not available, using alcohol-based hand sanitizers containing at least 60 percent alcohol (CDC, 2013c). Employers must allow workers to wash and sanitize their hands frequently throughout the day.

**4) Disinfection and Deep Cleaning Requirements:** Employers without existing requirements must clean and disinfect, at least once a day, all frequently touched surfaces in the workplace, such as workstations, touchscreens, telephones, handrails, and doorknobs. If a worker is suspected or confirmed to have COVID-19, the employer shall close off workplace areas visited by the ill person. The employer shall wait 24 hours or as long as practical, and then conduct cleaning and disinfection as directed by CDC Cleaning and Disinfection for Community Facilities guidelines. For disinfection, products should be used that are on the U.S. EPA's List N of Registered Antimicrobial Products for Use Against the Novel Coronavirus SARS-CoV-2, the Cause of COVID-19. If workers are scheduled to work shifts during closure of workplace areas for cleaning and disinfection, employer shall compensate for lost wages during that period.

**5) Requirement to Provide Notice to Workers and Local Health Departments:** If a worker is confirmed to have COVID-19 infection, the employer must inform fellow workers of their possible exposure to COVID-19 in the workplace while keeping the infected worker's identity confidential as required by the Americans with Disabilities Act (ADA). The employer shall also provide notice to the local health department.

**6) Application to Employer Provided Lodging:** The above standards and requirements shall apply to any physical spaces that: 1) are designated as a work site; and 2) constitute lodging provided by the employer to workers. For agricultural operations where lodging is provided by the employer, the employer shall designate quarantine housing for workers who show symptoms of COVID-19. Quarantine housing shall include separate sleeping quarters, bathrooms, and cooking areas.

# ENFORCEMENT & PROHIBITION ON RETALIATION

## 1) Worker Health and Safety Committee

- a) In order to protect worker and public safety, this Order authorizes the establishment of and prohibits employers from interfering with a health and safety committee in each worksite that can raise concerns about violations of health and safety standards under this Order, other statutes, and/or regulations to the employer; and to report violations when the employer fails to respond in a timely manner.
  - i) Nothing in this Section shall abridge the right of any individual worker or representative of workers to raise concerns about violations of health and safety standards or to make suggestions about health and safety conditions to the employer.
- b) Composition of each committee shall be as follows:
  - i) Each health and safety committee shall be composed of a majority of non-supervisory frontline workers and at least 1 employer representative with decision-making authority on behalf of the employer. Under no circumstances shall employer representatives constitute more than 1/3 of the committee.
    - (1) For workplaces with less than 10 workers and for non-supervisory frontline workers who do not report to one permanent designated worksite controlled by the employer in order to perform their duties as workers:
      - (a) an individual worker or group of individual workers shall be empowered to raise concerns about violations of health and safety standards under this Act or other statute, with the same powers associated with a health and safety committee as described in this section; or
      - (b) a group of workers in the same essential industry may establish a health and safety committee with the same powers described in this section.
    - (2) For facilities covered by a Collective Bargaining Agreement or multiple Collective Bargaining Agreements, the union representing each bargaining unit shall determine the committee that will be used to perform the functions of a facility pandemic safety committee, including, but not limited to, labor management committees, health and safety committees, or other committees deemed appropriate by the union. The composition of the committee may include union representatives, in addition to an appropriate number of workers and employer representatives with decision-making authority.
  - ii) Workers who are part of the health and safety committee shall be selected by non-supervisory, frontline workers in each workplace. The employer and employer representatives are prohibited from selecting or in any other manner interfering with the selection of the workers who will serve on the committee.
- c) The health and safety committee shall have access to any reports related to health and safety produced by the employer, with an opportunity to review, comment and make available to the public; and shall be empowered to raise complaints about health and safety violations to the employer and to obtain a response from the employer within 24 hours.

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- d) The committee may survey workers and offer suggestions to the employer on health and safety issues at the worksite.
- e) If an employer fails to respond to health and safety complaints within 24 hours after notice from the health and safety committee, the committee or any individual worker or representative of workers shall be empowered to file a complaint with the Attorney General, the NYS Department of Labor, or any other local public health or labor agency.
- f) Essential businesses and employer shall be responsible in ensuring compliance with this order.
  - i) Non-supervisory workers shall not be responsible for ensuring members of the public and/or customers comply with any COVID-19 requirements or guidance under this order or any other order.

**2) Prohibition on Retaliation:** No employer or their agent, or person acting as or on behalf of a hiring entity, or the officer or agent of any corporation, partnership, or limited liability company, or any other person shall discriminate or take adverse action against any worker or other person acting on behalf of or in the interest of any worker who raises any concern or provides information about workplace health and safety practices or hazards related to COVID-19 to the employer, the employer's agent, other workers, a government agency, or to the public such as through print, online, social, or any other media or who opposes any workplace health or safety practices or hazards related to COVID-19.

A) No employer or other person shall require or attempt to require any worker to sign a contract or other agreement that would limit or prevent the worker from disclosing information about workplace health and safety practices or hazards related to COVID-19, or to otherwise abide by a workplace policy that would limit or prevent such disclosures. Any such agreements or policies are hereby declared void and unenforceable as contrary to the public policy of this state. An employer's attempt to impose such a contract, agreement, or policy shall constitute an adverse action enforceable under this Order.

B) No employer shall discriminate or take adverse action against a worker who voluntarily brings in and wears their own personal protective equipment, such as a mask, faceguard, or gloves, if such equipment provides a higher level of protection than the equipment provided by the employer.

C) If an employer or other person takes adverse action against a worker or other person within 180 days of the worker or person's engagement or attempt to engage in activities protected by this Order, such conduct shall raise a presumption that the action is retaliation in violation of this Order. The presumption may be rebutted by clear and convincing evidence that the action was taken for other permissible reasons.

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**3) Refusal to Work Under Dangerous Conditions:** A worker shall have the right to refuse to work under conditions that the worker reasonably believes would expose him or her, other workers or the public to an unreasonable risk of illness or exposure to COVID-19. An employer shall not discriminate or take adverse action against a worker for a good faith refusal to work if the worker has requested that the employer correct such a condition and the condition remains uncorrected.

A) A worker shall have the right to refuse to work under conditions that the worker reasonably believes would expose him or her, other workers or the public to an unreasonable risk of illness or exposure to COVID-19.

i) A “good faith reasonable belief” shall include but not be limited to failure to update workers on the number of COVID-19 cases in the workplace, failure to advise workers of exposure to potentially infected fellow workers or other persons, failure to provide necessary PPE equipment or maintain such equipment, failure to provide adequate COVID-19 prevention supplies such as soap, accurate medical thermometers, hand sanitizer, tissues and trash baskets, failure to sanitize and disinfect workplaces and equipment in accordance with the standards in this Order, failure to take steps to assure adequate physical distancing in the workplace or any other violation of the standards and procedures in this Order.

B) An employer shall not discriminate or take adverse action against a worker for a good faith refusal to work if any worker or a representative of workers of that employer or any government representative has requested that the employer correct such a condition and the condition remains uncorrected.

C) A worker who has refused in good faith to work under such a condition and who has not been reassigned to other work by the employer shall, in addition to retaining a right to continued employment, continue to be paid by the employer for the hours that would have been worked until such time as the employer can demonstrate that the condition has been remedied.

D) If an employer or other person takes adverse action against a worker or other person within 180 days of the worker or person's engagement or attempt to engage in activities protected by this Order, such conduct shall raise a presumption that the action is retaliation in violation of this Order. The presumption may be rebutted by clear and convincing evidence that the action was taken for other permissible reasons.

**4) Enforcement of Violations of this Order:** The remedies of Section 215 of New York State Labor Law shall be available to the commissioner of labor and to workers and their representatives to enforce the mandates of this order as if they were in the Labor Law.

# DEFINITIONS

**1) Presumption of employment:** For the purposes of this order, any person providing labor or services for remuneration for an essential business within the State of New York shall be considered a worker covered by this Executive Order. Essential businesses must comply with these mandates to protect all workers, regardless of immigration status and including employees, part-time workers, independent contractors, domestic workers, home care and personal care workers, day laborers, farmworkers and other temporary and seasonal workers.

**2) Essential business:** Essential business shall mean any business or entity as defined under Executive Order 202.6, and any subsequent businesses or entities that are authorized to operate or provide service thereafter for the duration of the COVID-19 public health crisis.

**3) Joint Employer Responsibility:** The purpose of this order is to ensure that workspaces are healthy and safe, regardless of how the companies, individuals or entities involved structure their employment relationship. Therefore, all workers must be treated equally with respect to the order's mandates, and companies that contract out some or all of their labor are responsible for the mandates of this order for all contracted and subcontracted workers.

- a) An employer must comply with the mandates of this order with respect to all workers present at any worksites under its total or partial ownership or control, regardless of whether those workers are employed directly or indirectly by another employer, for example, whether those workers are in the employ of a staffing agency or a contractor or subcontractor of an employer.
- b) Employers using staffing agencies, contractors, or subcontractors share joint responsibility for the mandates of this order. Further, an employer may not require or permit a worker, whether employed directly or indirectly, to work in any location that does not comply with the mandates of this order.
- c) An employer is responsible for compliance with the mandates of this order in any vehicle used by a worker in the course of his work for the employer, including transport of people or deliveries of goods.