

Practice Update

Restaurants and Bars - Best Practices for Minimizing Spread and Liability in the COVID-19 Era

July 16, 2020

As restaurants and bars struggle to remain viable in the midst of the pandemic, they are confronted with the additional threat of lawsuits by employees and customers. Restaurants and bars should take steps now, both to mitigate the spread of COVID-19 and to try to limit their liability.

Lawsuits have been filed all over the country on multiple theories claiming that employers have failed to provide a safe workplace. Whether alleging inadequate safety protocols, lack of personal protective equipment or lack of training, these claims all make one thing clear: restaurants and bars should take steps now to protect their workers and their business.

What is the best way to do that? Follow established guidance from the U.S. Center for Disease Control (CDC), the Occupational Safety and Health Administration (OSHA) and state and local authorities. A restaurant or bar defending a COVID-19-related claim will need to establish, at a minimum, that it has complied with such guidance.

Note that compliance with federal guidance is not enough. Restaurants and bars must comply with state and local guidance and orders as well. Depending on the business's location, local guidance can be very specific and may even vary from city to

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city within the same county. Further, a standard that complies with a city-issued COVID-19 Order may not be sufficient to comply with the Order issued by the county in which the city is located. For example, under a reopening Order for the City of Miami, an employee was not permitted to enter the worksite with a temperature of 99.5 or higher, even though elsewhere in Miami-Dade County, the cutoff was 100.4 degrees.

So it is critical to pay attention to ever-evolving guidance issued by local authorities, in addition to that from federal and state authorities.

New Federal Guidance for Restaurants and Bars

On June 30, 2020 the CDC issued new guidance specifically for restaurants and bars, closely following on the heels of OSHA issuing new guidance generally for employers on re-opening. Both indicate that during all phases of reopening, employers should implement strategies that are appropriate for the particular workplace and phase for:

- determining when, where and how employees might be exposed;
- basic hygiene (hand hygiene, sneezing and coughing etiquette);
- cleaning and disinfection;
- social distancing;
- identification and isolation of sick employees;
- policies for return after illness and exposure;
- engineering and administrative controls;
- safe work practices and personal protective equipment selected as a result of an employer's hazard assessment;
- workplace flexibilities around telework and sick leave;

- training on the signs, symptoms and risk factors associated with COVID-19 and how to prevent its spread; and
- anti-retaliation policies that ensure that no adverse action is taken against an employee who raises workplace safety and health concerns.

The CDC's guidance with respect to restaurants and bars includes specific recommendations on a wide range of categories, such as: promoting behaviors that reduce spread; cleaning and disinfection; use of shared objects; ventilation and water systems; modifying layouts and procedures; use of physical barriers and guides; protections for employees at higher risk of severe illness from COVID-19; staggering shifts and sittings; travel and transit issues for employees; designating a COVID-19 point of contact; establishing communications systems; implementing flexible time off policies; cross-training and backup staffing; training employees on safety protocols; and preparing for sick employees.

For example, among the specific recommendations, the CDC says restaurants should:

- avoid use of shared items such as menus, condiments and food containers and instead offer disposable or digital menus, single serving condiments and no touch trash cans and doors;
- use touchless payment options;
- use disposable utensils, dishes;
- modify layouts to ensure parties remain at least six feet apart;
- offer drive- through, curbside take out or delivery options where possible;
- ask customers to wait in their cars to pick up food or be seated;
- use phone apps or text technology rather than shared buzzers to notify guests when tables are ready;

- offer ordering options ahead of time to limit the time diners spend in the restaurant; and
- avoid buffets and self-serve drink stations.

Employees should be educated about when they should stay home and when they can return to work, the CDC notes. Hand-washing, proper coughing and sneezing etiquette and cloth face coverings should be required where feasible. (Note that face coverings are required – not just recommended – in many locations.) Restaurants should also post signs at entrances and other “highly visible locations” about how to stop the spread of germs, and the importance of wearing cloth face coverings, the CDC says. The CDC site offers links to multiple printable posters that restaurants can use.

While some restaurants have been reluctant to ban customers who refuse to wear masks, in most instances, they can treat them just like individuals who refuse to wear shoes or shirts. Indeed, a whole range of posters are now commercially available with the resounding message “No Shirt, No Shoes, No Mask, No Service.”

Akerman is standing by to assist restaurants and bars with reopening guidance, including the development of COVID-19 plans, policies and training for staff.

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