

# Covid-19 Regulations: Where We Are and Where We Are Headed



A RPJ Guide on 2021 Projections for Covid-19 Regulations by Ethan Krasnoo, Esq.

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**Table of Contents**

**Introduction**..... 1

**Offices** ..... 1

**Schools**..... 2

**Restaurants and Bars** ..... 3

**Hotels**..... 5

**Gyms** ..... 5

**Arts, Entertainment and Recreation**..... 6

    Sports, Museums and Cultural Institutions ..... 6

    Movie Theaters ..... 6

    Concerts and Live Theater ..... 7

**Contact Us**..... 9

### Introduction

The rollercoaster ride of 2020 has sure had its ups and downs, and 2021 is destined to continue this trend with regulatory action expanding and contracting in order to attempt to contain the spread of Covid-19 while balancing the desire to keep the economy going. This guide examines regulations that have been put in place primarily in New York to deal with Covid-19, but also throughout the United States, and projects future regulatory and related trends and repercussions that are expected in 2021 for offices, schools, restaurants, bars and hotels, gyms, and arts, entertainment and recreation, including sports, museums, cultural institutions, movie theaters, live theaters and concert venues.

New York, like much of the country, following closure of all non-essential businesses in March of this year, thereafter instituted a phased reopening that was slated to be applied in four phases. However, some institutions that were intended to be open upon phase 4 remained closed following its activation. Since then, there have been additional reopenings and expansions followed by, more recently, restrictions and closings. Some states such as New Mexico and Oregon have recently instituted broad range lockdowns and curfews, while New York has opted for piecemeal regulations on certain industries, institutions and high infection rate locations.

### Offices

Following massive closures excepting essential businesses, most office-based businesses in New York City were allowed to reopen on June 22, 2020 with restrictions on the total number of occupants limited to 50% maximum occupancy for a particular area at one time, as set by a certificate of occupancy. Physical distancing, cleaning, and personal protective equipment (PPE) requirements were mandated as well. For more details on office reopening requirements see my colleagues Deena R. Merlen and Elizabeth Stork's article [\*What You Need to Know About Returning to Work During COVID-19: A Guide for U.S. Employers and Employees.\*](#)

While some New York offices have reopened their doors subject to the state requirements, others have opted to continue in remote environments. It is expected that many company employees will return to their offices in 2021, but at the same time, employers are expected to extensively increase their remote workforce capabilities and will be cutting down on office space as well.

As the number of Covid-19 infected workers continues to rise, 2021 is likely to see increased allegations of Covid-19 transmission occurring "on the job," not just in office environments, but other work environments discussed below as well. As such, it is expected that 2021 will bring an increase in reports to governmental bodies of unsafe working conditions based on lack of PPE or other protective safety measures. Similarly, we would expect to see increased citations of companies and work facilities for

## RPJ Guide – Covid-19 Regulations: Where We Are and Where We Are Headed

violations of workplace safety, including those given by the Occupational Safety and Health Administration (OSHA). To date, OSHA has issued more than 200 citations for violations with proposed penalties totaling near \$3 million in association with Covid-19 safety based working conditions. While OSHA has centered its enforcement actions on nursing homes, rehab, and medical facilities, the scope of industries targeted is expected to increase in 2021. Increased challenges to safety precautions may also result in accusatory and potentially defamatory statements against companies or co-workers alleging that they failed to provide or mandate safety precautions or caused specific Covid-19 transmission. For additional discussion of the legal issues surrounding such accusations, see my *Bloomberg Law* article, [INSIGHT: Sorting Out Defamation and Covid-19 Transmission Accusations](#).

There is a decently high probability that 2021 will also bring further lockdowns for non-essential businesses in New York City, similar to those that have been instituted in other parts of the United States over the last month, which would temporarily move entire office workforces to remote stations and platforms again. Whether that occurs depends on how quickly infection rates spike and how quickly vaccines and other protective measures can be effected and enforced to stop the increased spread. Such closures are expected to face legal court challenges, as they did during the March lockdown, as well as cease and desist mandates, which were issued during the initial New York City lockdown last spring to select violators who, in violation of the government mandate, participated in non-essential in-person transactional events. Any such shutdown may also renew and bring forth additional legal disputes over insurance coverage and rent abatements to be brought by companies against their insurance companies and landlords. For additional insight on such contract disputes see my article written with my colleague Mark H. Moore titled [Force Majeure and Insurance Provisions for Business Losses Sustained by COVID-19](#).

It is expected that any such shutdown would last for a few weeks at most in an effort to slow the spread of Covid-19 and avoid oversaturating medical facilities.

## Schools

After closing down in-person attendance last spring, and reopening for eight weeks in the fall, on November 19th New York City public schools closed and all learning moved back to entirely remote platforms when New York City reached the 3% test positivity 7-day average, meaning that New York City became an “orange zone” in accordance with the state’s Covid-19 micro-cluster strategy analysis. The Mayor of New York had used this metric to woo teachers back to schools this past summer for the school year with a promise that if the metric was reached the schools would close. However, school-based positivity rates have been quite low despite the general population positivity rates, recently recorded at .28 %, and at the time of publication of this article, Mayor de Blasio recently announced that elementary schools would reopen, which occurred last week, while middle and high schools would remain closed for now. Mayor de Blasio also announced that the city would abandon the 3% test positivity threshold that it had adopted for school closings and instead would focus on increased testing and shutdowns where outbreaks are reported. Additionally, de Blasio reported that New York City in

## **RPJ Guide – Covid-19 Regulations: Where We Are and Where We Are Headed**

the near future would aim to push schools back to a five-day week in person schedule for those who had opted for non-remote attendance at the beginning of the school year.

For the fall semester, higher education institutions have often been operating with a hybrid in-person/remote model, and while some schools have been forced to close temporarily, other institutions, like New York University, have been able to maintain the continuous hybrid model for 2020 despite reported cases of Covid-19 on campus. The school, as are many, is expected to continue operating on the same model as next semester commences in January.

### **Restaurants and Bars**

The hospitality and service industry has been hit extremely hard during the pandemic, and much regulatory focus has been directed to restaurants and bars with an effort to keep them afloat. In New York City, over the summer and throughout the first part of November, things were starting to look up for restaurants as both restaurants and their customers took advantage of the popular Open Restaurants program that allowed for expanded outdoor seating, which was given some permanence on September 25th. Specifically, the Open Restaurant program allows restaurants to use the sidewalk or curb lane adjacent to their business (that which goes beyond private property), and to expand in front of adjacent properties with that property owner's approval. Additionally, under Emergency Executive Order No. 153, which was signed by Mayor de Blasio on October 14th, the restaurants have been permitted to use temporary heating, including electric radiant heaters on sidewalks and roadway seating setups, or natural gas radiant heaters or portable propane heaters on sidewalks only, and partial or full tent enclosures outside, each with unique ventilation and capacity requirements. Additionally, the Open Streets sub-program allows community based organizations, or groups of three or more restaurants on a single block, to join together to apply online for outdoor dining on streets closed to traffic. Bars that serve food are also able to take advantage of some of the reopening and expansion efforts.

Furthermore, to help the restaurant industry recovery, beginning on October 16th, restaurants and bars with fewer than 15 or more locations were allowed to begin adding a Covid-19 Recovery Charge to the bill for in-person New York City dining at a maximum of 10%, which is also subject to sales taxes and disclosure requirements. This additional optional charge is set to expire 90 days after full indoor dining is once again permitted, although a new bill under consideration by the New York City Counsel would permanently allow restaurants to add up to a 15% surcharge as long as the restaurants pay their staffers a base wage of at least \$15 an hour.

Indoor dining, which had been suspended last spring, resumed at 25% capacity in NYC on September 30th under New York State Executive Order 202.61. New York State issued guidelines to accompany indoor dining allowances, including 6 feet or physical barriers between tables, and limiting tables to no more than 10 people. To assist with the restrictions, the New York State Department of Health published Interim Guidance for NYC Indoor Food Services During the COVID-19 Public Health Emergency,

## **RPJ Guide – Covid-19 Regulations: Where We Are and Where We Are Headed**

and the New York Department of Buildings provided guidance for how restaurants can determine their number of diners and make internal dining space changes as needed.

More recently, the regulations to the restaurant industry have increased, with Governor Andrew Cuomo announcing that beginning November 13th New York restaurants and bars that hold liquor licenses now have a new nightly curfew that only allows takeout and delivery between 10:00 p.m. and 5:00 a.m. Violations can incur fines of up to \$10,000. As a result, according to the *New York Post*, some restaurants reported a 30% drop in sales at their locations over the first three days after the curfew took effect, as many restaurants had to stop taking reservations as early as 8 p.m. in order to meet the 10 p.m. cut-off. New Jersey and Connecticut have instituted similar curfews on the industry earlier in November. An additional announcement made by Governor Cuomo on December 11th requires all New York State food establishments to discontinue indoor dining starting Monday, December 14th. Restaurants and bars still have to abide by the curfew mentioned above requiring outdoor dining and to-go alcohol service to end nightly at 10:00 p.m.

Additional safety regulations pertaining to outdoor seating protections and precautions specifically focused on protections related to snow and other winter weather attributes were also posted to the New York City Department of Transportation's website on November 13th and the measures must be instituted by December 15th. As such, restaurant operators are now grappling with how to retrofit their outdoor setups to meet the new compliance requirements and more restrictions may be coming. Until recently, restrictions on restaurants have been implemented in the last few months based on zip codes with high infection rates of Covid-19, rather than being administered to the entirety of New York City. But with the resurgence of virus levels, the more recent broader shutdown of the restaurant industry, as detailed above, has blanketed the entire City.

Despite all of the efforts to revitalize the restaurant industry, restaurants across the city continue to close *en masse* with no end in sight. To date, more than 1,000 restaurants in New York City have closed their doors since March. In all likelihood, we are expected to see many more permanent closures of restaurants as profits remain unrealized, rent payments which are overdue continue to mount, and especially because winter inhibits dining interest and options for customers and the allowed outdoor heating options remain costly. One survey conducted by the New York City Hospitality Alliance found that roughly 88 % of restaurants could not pay full rent in October.

According to a September survey from the New York State Restaurant Association, absent additional governmental financial support, which seems unlikely, as many as two-thirds of New York State's restaurants could permanently close before January 1, 2021, the current deadline for New York City's rent moratorium. Despite the fact that rents in 2021 are expected to drop, the number of restaurant closures are still likely to extend into the spring of 2021, especially if contemplated indoor dining eliminations are enforced. However, warmer weather could have some effect in raising profit levels, to the extent that restaurants can hold out that long. Additional small business focused initiatives passed by Congress, which may come in 2021 as they are unlikely to occur before the new administration takes over, may also help to stave off some additional closures. Furthermore, privately offered grants could

## **RPJ Guide – Covid-19 Regulations: Where We Are and Where We Are Headed**

offer minimal assistance as well, such as those that have recently been made to 100 New York City restaurants in the total amount of \$500,000 by food delivery service DoorDash, in partnership with the NYC Hospitality Alliance, in order to help the restaurants “winterize” their outdoor dining setups.

### **Hotels**

New York State has implemented a robust protocol for visitors to New York State, which has put hotels in the position of acting as compliance enforcers. All out-of-state travelers from designated states and international travelers from designated countries must complete the New York State Department of Health traveler form upon entering New York. Mayor de Blasio has ordered that New York City hotels and short-term rentals require guests from restricted states to fill out a traveler health form before beginning their stay. Travelers originating from the states of Connecticut, Massachusetts, New Jersey, Pennsylvania and Vermont, as well as first responders and essential workers, are currently exempt from quarantine requirements, but otherwise those who have spent more than 24 hours out of state must complete the New York State Traveler Health Form upon entry and (1) quarantine for 14 days upon arrival or (2) test out by taking a Covid-19 test three days or fewer prior to arrival in New York State and a second test on the fourth day of quarantine, and receive a negative test for both tests after which time, upon receiving the results, travelers can leave quarantine. Travelers who have spent less than 24 hours out of state and do not meet the other exceptions described above must still complete the New York State Traveler Health Form upon entry into New York and take a Covid-19 test four days after arrival in the State, after which they are required to quarantine for 14 days if they receive positive results.

The hotel occupancy rate is currently around 39%, which is down from 95% last November according to research provided by the firm STR. 2021 is expected to see additional challenges for hotels as they remain extensively vacant until the public is vaccinated against Covid-19. Hotel closures are expected, as are opportunities for larger or wealthier hotel conglomerates and financiers to take over smaller independent struggling hotels.

### **Gyms**

Following total closure last spring, in New York City gyms reopened on or around September 2nd with strict cleaning and 33% limited capacity restrictions in place, amongst other requirements, including Covid-19 health screenings of members. However, on November 13th the curfew applied to bars and restaurants was also applied to gyms, requiring them to close between 10 p.m. to 5 a.m. daily.

Numerous gyms have closed as a result of the impacts faced from COVID-19, with New York Sports Club’s parent company, Town Sports International Holdings Inc., having filed for bankruptcy, under which it seeks to sell itself to investors and other interested parties on an expedited basis. Other gyms and fitness facilities have filed for bankruptcy since the pandemic began, including FlyWheel, Gold’s

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Gym, and 24 Hour Fitness. With limited capacity and fear of exposure to Covid-19, many gym members have opted to freeze or cancel their accounts, and those efforts are expected to last well into 2021, potentially causing additional gym closures and bankruptcies. Due to increased infection rates, gyms may also soon be forced to close entirely, which will cause even more increased financial harm to their operations.

## **Arts, Entertainment and Recreation**

### **Sports, Museums and Cultural Institutions**

Following the shutdown, New York began to allow professional sports to be played without live audiences on August 24, 2020 as part of Phase IV of New York's reopening plan. Bowling alleys were also allowed to operate at 50% capacity, with every other lane closed, beginning the same day. Furthermore, on August 24th, low-risk outdoor botanical gardens and zoos were allowed to open with capacity restrictions, and indoor museums and cultural institutions deemed "low-risk Indoor arts & entertainment" facilities were allowed to reopen as well. Workforce and visitors for indoor museums have been limited to 25% maximum capacity, and mandatory social distancing and face coverings are required. Most museums require timed entries and reservations are often required. Despite the hindrance, due to the entrance limitations, one can visit the Metropolitan Museum of Art for a mid-morning weekend day spent near-alone with a number of Renoir, Monet, and Picasso masterpieces. Whether museums and other indoor facilities and programs which opened in Phase IV will be halted in the near term is less clear, but certainly to the extent that infection rates skyrocket drastically, they are also likely to be halted next year.

### **Movie Theaters**

Governor Cuomo announced on October 17th that New York State's movie theaters located outside of New York City could reopen at 25% capacity under state guidance beginning on October 23rd. No more than 50 people are allowed in front of each screen in each movie theater at once. Because movie theaters can only open outside of New York City in counties that have Covid-19 positivity rates of less than two percent on a 14-day average and do not have any cluster zones, due to recently high infection rate averages, many New York theaters may have been unable to open or remain open. Movie theaters are also subject to rigorous state guidance and enforcement. No date has been set for reopening of New York City's movie theaters.

With increased Covid-19 infection rates, it is unlikely that many of New York's movie theaters will be able to remain open extensively, at least into the spring. In addition to the fact that many patrons are too scared to return to the movies, the absence of blockbusters, which studios have delayed from opening in the near future, also inhibits revenues if movie theaters do open. As such, some movie



## RPJ Guide – Covid-19 Regulations: Where We Are and Where We Are Headed

theaters in the country have forgone opening due to too low revenue expectations if they did, even where those theaters are allowed to open under local governmental regulations. “Wonder Woman 1984”, a blockbuster action sequel, is set to open in some theaters on Christmas, which may provide a revenue boost to those theaters open and presenting it, but at the same time Warner Bros. is releasing the movie on HBO Max, thus allowing patrons who subscribe as an alternative to watch from the comfort and safety of their homes. Whether one blockbuster can have a large impact on revenues for those theatrical venues that are or will open is doubtful but an open question. Other studios have forgone standard theatrical releases and opted to bring new films only to digital platforms, and Covid-19 may cause more studios to do so in the future, or at least to offer contemporaneous releases both in theaters and via streaming platforms.

While New York City movie theaters wait for permission to reopen, some have gone digital as well. For example Metrograph, an independent two-screen cinema on the Lower East Side of New York City has, in an effort to bring in revenue, provided digital offerings of on demand screenings of films like the “Phantom Thread” and “Raising Victor Vargas” while coupling them with discussions among cast members, filmmakers, and critics. Such virtual events have costs ranging between \$8 - \$12. Additionally, some movie theaters in the United States have been offering private watch parties which have allowed private groups to rent out a theater. To date, Cinemark, which owns 525 theaters worldwide, has sold out at least 50,000 of these private screenings, which has helped keep it afloat. Next year may bring an increase in these private watch parties until reopening is fully allowed and customers are willing to return *en masse*, but these private showings may also take up a more permanent home in the movie theater industry model thereafter.

Regardless of the efforts made by movie theaters to survive during the pandemic, according to *Variety*, it is estimated that globally movie theater box office revenues will drop 65.6% to a estimated total of \$15.5 billion, the worst result in decades. If big movie theater conglomerates can hold out for patrons to be vaccinated against Covid-19, they may be able to survive. But many small town theaters in the United States are going to be hard pressed to make it that far without declaring bankruptcy or closing. Like the depletion of New York City restaurants, as discussed above, next year is also expected to leave us with a smaller number of movie theater venues in the United States, which may further transform the shift of how and when studio film releases are made. In fact, last week, Warner Bros. announced that it will release all 17 of its 2021 films simultaneously in theaters and via streaming.

### Concerts and Live Theater

Concert venues in New York remain closed by mandate with little detail about when they will collectively reopen. Similarly, Broadway productions have shutdown live performances until at least May 30, 2021. There is little effort to push for reopening of Broadway because any significant social distancing efforts would be challenging to allow the theatrical producers to obtain any profits. Already as much as three out of every four Broadway shows fail to make a profit, and so selling fewer tickets to accommodate extra room in what are traditionally very crowded audience seat layouts is impractical.

## RPJ Guide – Covid-19 Regulations: Where We Are and Where We Are Headed

For additional insights about Broadway's reopening challenges, see my article [\*Another Op'nin, Another Show: What Will It Take for Broadway to Reopen?\*](#)

Smaller theaters may be able to profit even with capped patrons below capacity. However, New York has not allowed other smaller indoor theatrical venues to open either, which has caused some of them to take legal action against the government, claiming a lack of due process and unconstitutional unequal treatment, where indoor dining and bowling alleys have been allowed to be open for months. These off-Broadway theaters claim that they can adhere to required CDC and other safety measures, perhaps even better than indoor restaurants (where patrons must remove their masks to eat). However, given that Covid-19 transmission rates have surged and the government is given a fair amount of discretion to enact emergency measures that do not violate First Amendment rights, the theaters have an uphill battle. To read more about the lawsuit brought by small theaters pushing to reopen, see my article [\*No More: Off-Broadway Theaters Bring Litigation to Obtain the Same New York Reopening Rights Granted to Restaurants and Bowling Alleys.\*](#)

Some theaters have gotten creative and have been able to hold compliant socially-distanced theatrical performances earlier in the year outside. The stage actors' union, Actors' Equity Association (AEA) has also approved union stage productions beginning over the summer for performances both indoors and outdoors in front of live, paying audiences in states that allow it, albeit with heavily mandated restrictions. For more details, see my article [\*Waving Through a Window: Precautions for Live Theater During the Pandemic.\*](#) And some non-union theaters and theme parks resumed indoor performances over the summer as well; at the same time some theaters across the United States moved to transition from their traditional use of union actors to using non-union actors in order to allow productions to proceed without restriction from AEA. Furthermore, numerous virtual theatrical performances and concerts have also been shown on streaming platforms, the frequency of which is expected to continue to increase next year.

Next year, we will hopefully see increased efforts to boost outdoor theatrical performances, once the weather begins to warm up in the spring. Local governments will hopefully be enlisted to assist with such efforts. For example, NYC Local Law 2068 is a bill that could help. It was introduced at the New York City Council but its passage is currently stalled. The bill would require New York City to create an open culture program that would allow art and cultural institutions affected by Covid-19 to use parks, pedestrian plazas, roadways, or public parking areas and other approved open space as temporary performance and rehearsal space. For additional details on Local Law 2068 and related regulatory measures to increase public outdoor performance space utilization, see my article [\*The Parks Are Alive With the Sound of Music.\*](#)

Next year, we also may see some financial help provided to theaters, which along with concert venues and some movie theaters have been lobbying Congress to enact grants and other legislations that could help avoid many bankruptcies. One such bill titled Save Our Stages, a \$15 billion federal grant program, was introduced in Congress in July and, though not passed, has since reemerged as part of another relief bill aimed at small businesses entitled the Heroes Small Business Lifeline Act, introduced in the Senate in

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October by Democrats. However, it is unlikely that such federally funded relief efforts will see any progress at least until a new Congress and president take their seats next year.

### **Contact Us**

Please feel free to contact [Ethan Krasnoo](mailto:ekrasnoo@rpjlaw.com) at [ekrasnoo@rpjlaw.com](mailto:ekrasnoo@rpjlaw.com) if you have questions or need further guidance about your particular situation. Please note, this guide is intended as a general discussion of these matters and legal issues only, and is not considered to be legal advice or relied upon in connection with any particular situation. We wish you all continued success, safety and well-being in these challenging times. We are here to help.

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