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A SPECIAL BROKER  
DISCUSSION WITH  
LIBOR LEGAL COUNSEL

WEDNESDAY, MAY 20TH  
12PM EST



# #LIBORCARES

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Development**

The ESD Guidelines  
for Real Estate Remain in Effect

## Real Estate in New York remains “On Pause” and subject to the April 9, 2020 ESD Guidelines

- Real Estate Services were deemed Essential with “Severe Restrictions”.

## What IS included in the ESD Guidelines for Real Estate?

- Real Estate Services shall be conducted Remotely for all transactions including:
  - Title searches
  - Appraisals
  - Inspections
  - Permitting
  - Recordation
  - Legal services
  - Financial services; and
  - Other services necessary to complete a transfer for real property.
- A Real Estate Service may be conducted **in-person only if “legally necessary”** and in accordance with safety protocols.
- No Brokerage office is to be open to the public

## What is NOT included in the ESD written Guidelines?

- There have been many differing opinions and interpretations of this ESD Guidance since specific real estate activities and questions are not covered.
- There also terms used that have not been defined. For example, “legally necessary” has not been defined. As a result, differing opinions have developed causing inconsistency and some confusion.
- NYSAR has provided the field with answers to some frequently asked questions based on conversations NYSAR had with various governmental agencies.
- However, the ESD has not set forth any written guidance confirming what was told to NYSAR over the phone.

## The Guidance is Not Entirely Clear There is a Grey Area

- Therefore, each agent, in consultation with their broker, and each broker in consultation with their attorney, must decide whether to follow the strict wording of the Guidance (which states that all RE Services must be conducted remotely and only if legally necessary can a service be performed in-person) or rely on what the ESD verbally told NYSAR.

So, let's get to some of those  
frequently asked questions



## Can a licensee go to a vacant or unoccupied home or vacant land to view it or take photographs for a listing?

- NYSAR states that based on conversations with ESD the answer to this question is YES as long as you have the informed consent of the seller.
- NYSAR advises that if the property is not vacant or unoccupied upon arrival, the licensee should stop taking photographs or videos and leave the property.
- NYSAR advises against the use of third-party photographer or videographer as they are not deemed essential. However, there is an exception to this if the photographer or videographer received a waiver from the ESD for real estate photography or videographer as an essential business.

Can a professional photographer and/or videographer take photos and/or videos of a property?

- If the photographer/videographer has received a “waiver” or approval for real estate photography as an essential business from the ESD and provides a copy of such approval, the activity is permitted. Such approvals are on a case-by-case basis and it is currently NYSAR’s understanding that photography/videography as a whole has not been deemed an essential business, only those individuals receiving the letter from ESD.

Can I go to a property where nobody is present (meaning if individuals reside there and everyone has left the property) to view it and take photos for a listing?

- NYSAR states YES, with the knowledge and informed consent of the seller. In the event that an individual is still at the property upon arrival or arrives while the licensee is there, the licensee should cease taking photographs/video and leave the property.

Can I have in-person contact with a member of the public?

- **NO!** ESD guidance still states that all real estate services must be conducted remotely for all transactions.

Can a licensee travel to a property and unlock the door so a consumer may enter the property for an unaccompanied showing?

What if the licensee unlocks the door and waits in the driveway or out in the road until the buyer leaves?

- No.
- NYSAR does not recommend that a licensee travel to the property in order to permit access to a member of the public.
- Any licensee choosing to travel to the property for this purpose is doing so at their own risk.

## Can a licensee do an in-person showing?

- No.
- All showings must be conducted virtually.
- NYSAR states that if the home is occupied the licensee can only do the virtual showing if the homeowner leaves the property since there cannot be any person to person contact.

## Can a licensee list a property and post it as “unaccompanied showings only”?

- NYSAR recommends that licensees should not be involved in coordinating an unaccompanied showing.
- NYSAR states that if the seller demands the buyer be permitted to view the property the licensee should not be involved in the process.
- NYSAR states that a licensee can give the buyer the seller’s phone number if the seller instructs the licensee to do so.

## Can a licensee conduct a final walkthrough with the purchaser?

- No.
- Licensees are prohibited from going to a property with their customer or client.
- NYSAR recommends the buyers and seller speak with their attorneys about scheduling a final walkthrough without the licensee being physically present.
- The licensee may communicate with their client or customer via phone or video conferencing during the final walkthrough.

## Can the purchaser be present during the inspection?

- No.
- NYSAR states that ESD advised that the inspector can perform the inspection but may only communicate with the purchaser virtually.

Does the Governor's Executive Order requiring individuals to wear face coverings, permit licensees to have in-person contact if they abide by the requirement of the Executive Order?

- No.
- The new EO does not lift the restrictions on in-person contact between licensees and members of the public.

## What can happen if a licensee violates the On Pause Order?

- The State can issue penalties that may range from:
  - Fine of \$2,000;
  - Being charged with a misdemeanor; and
  - Possible license suspension or revocation.
- Possible civil liability – may be subject to a lawsuit.
- Possible NAR Code of Ethics Complaint.

# NYSAR's COVID-19 Disclosure Form



## COVID-19 DISCLOSURE

On January 30, 2020, the World Health Organization (WHO) designated the novel coronavirus, COVID-19, outbreak as a Public Health Emergency of International Concern. On January 31, 2020, the United States Health and Human Services (HHS) Secretary declared a public health emergency for the entire United States and on March 7, 2020, Governor Andrew Cuomo declared a State disaster emergency for the entire State of New York (the "Emergency"). By Executive Order, Governor Cuomo has directed that all businesses shall utilize, to the maximum extent possible, any telecommuting or work from home procedures in order to reduce the in-person workforce at any work locations by 100%. Essential businesses or entities providing essential services or functions to an essential business are not subject to the in-person restriction to the limited extent necessary to provide such service or function.

Empire State Development (ESD) has determined that real estate services shall be conducted remotely for all transactions, including appraisals, inspections and other services necessary to complete a transfer of real property; provided that any services and parts therein may be conducted in-person only to the extent legally necessary and in accordance with appropriate social distancing. It may become necessary in limited circumstances for a real estate licensee, inspector, appraiser or other third party to access the Property. Such access raises the possibility of potential liability resulting from exposure to COVID-19. By agreeing to permit such parties to enter the Property or by agreeing to enter the property, all parties acknowledge there is an assumption of exposure to COVID-19 and any and all consequences and/or injury which may result from

NYSAR has provided this COVID 19 Disclosure Form for the members to use if they so choose

- The form is OPTIONAL.
- You can choose to use it, or not.
- **If you use the COVID-19 Disclosure Form you still cannot perform in-person showings.**
  - In-person showings are prohibited!
  - Using this Disclosure Form does not change that.

The LIBOR Executive Committee decided not to have LIBOR co-brand the form or make it available on our Documents on Demand for the following reasons:

- The form is readily available from the NYSAR website.  
<https://www.nysar.com/covid-19-resources/realtor-covid-faq/>
- Each Broker will have to decide whether or not to use the form.
- If a Brokerage decides to use the form, that brokerage can co-brand their name on the form.

## If you decide to use the COVID-19 Disclosure Form, NYSAR asks that you please follow these guidelines:

- Each agent must have the permission of their broker before using the form.
- Each broker can decide to:
  - a) use the form;
  - b) use a form the broker prepared; or
  - c) not use any form.
- If broker decides to use the form, the form should be presented to the seller or buyer in the same manner an agency disclosure form is presented.
- Licensees should have the seller/buyer sign the form, print their name next to their signature and provide a signed copy to the seller or buyer and retain a signed copy for the broker's file.
- The form may be delivered in any manner currently permitted (paper, electronic transmission).

## What Does the COVID-19 Disclosure Form do?

- The COVID-19 Disclosure Form notifies the seller and buyers of the risks associated with permitting an individual to enter the property or by entering another person's property.
- By signing the form, the seller or buyer acknowledges that by permitting such access or by accessing the property they assume the risk of potential exposure to COVID-19.
- NYSAR states that licensees should explain to the seller and/or buyer that the form outlines the risks of COVID-19 exposure and by signing the form they are acknowledging and assuming such risks.

## NYSAR also advises the following regarding the COVID-19 Disclosure Form:

- In the event the seller and/or buyer is exposed to COVID-19 as a result of permitting or gaining access to the property, the form acts as a disclosure outlining the risks and having the party acknowledge that they are assuming such risk through their actions.
- If a licensee and/or broker were named in a lawsuit alleging exposure to COVID-19 by the seller and/or buyer (or a member of their household), the form could be used to show the seller and/or buyer were aware of the risks and assumed the risk of permitting access or gaining access to the property.

## What if the buyer/seller refuse to sign the COVID-19 Disclosure Form?

- If the seller and/or buyer refuse to sign the COVID-19 Disclosure form you should follow the same procedure when a consumer refused to sign an agency disclosure form.
- If the seller and/or buyer refuse to sign the form, the agent shall set forth a written declaration of the facts of the refusal and shall maintain a copy for the broker's file.

## Under what circumstances would a licensee use the COVID-19 Disclosure Form while New York City and Long Island are still On Pause?

- Licensees can give the COVID-19 Disclosure Form to sellers to sign under the following situations:
  - Seller permits a Licensee to enter the property to take photos, videos, or to perform a virtual showing (reminder: the seller must vacate the property when the licensee goes to the property).
  - Licensee arranges for an inspector or appraiser to enter the property with the seller's consent (NYSAR states that Licensees can open a property for an Inspector or Appraiser as long as person to person contact is minimized by using alternate means in granting access).

Under what circumstances would a licensee provide the COVID-19 Disclosure Form to the buyer to sign?

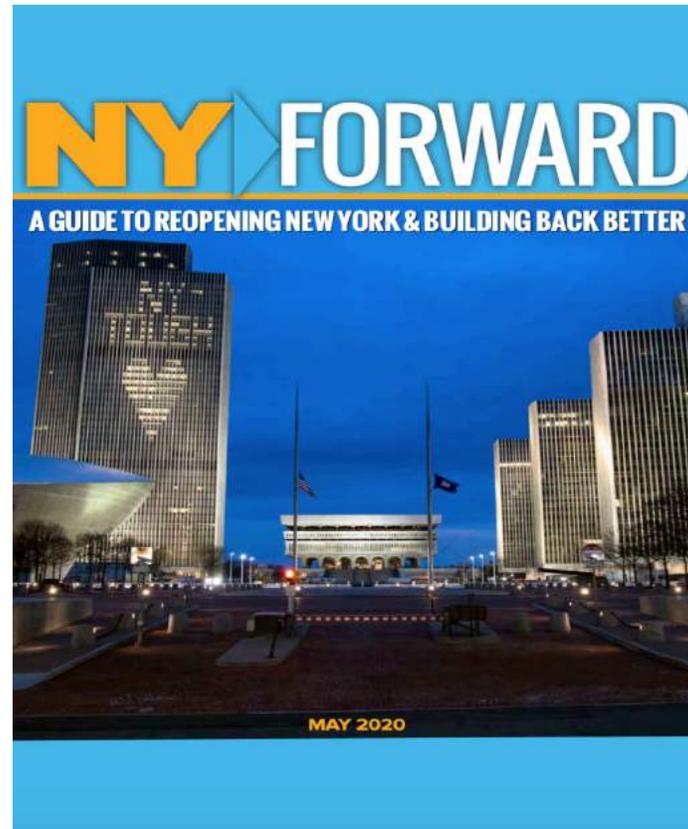
- When NY On Pause has been lifted and Licensees are again permitted to coordinate in-person showings to a buyer.

Should a licensee have a potential buyer sign the COVID-19 Disclosure Form while our area is still On Pause?

- Licensees are not permitted to coordinate in-person showings with the buyer and having a buyer sign the COVID-19 Disclosure Form does not change that.

# NY Forward

## How to Prepare for the Reopen



# The Timeline for Reopening

- Governor Cuomo created 10 regions and 4 phases.
- Long Island and New York City are separate regions.
- Real Estate is in Phase 2.
- Regions will get to Phase 1 once they meet 7 metrics.
  - Long Island has met 5 metrics.
  - NYC has met 4 metrics.
- Once a region gets to Phase 1, it has been reported there will be approximately 2 weeks before a region can advance to Phase 2.
- The state will issue guidelines for how businesses in each Phase can open.

## Phase 1 Guidelines Are a Good Prediction for Phase 2

- Phase 1 Guidelines can be found at [www.forward.ny.gov](http://www.forward.ny.gov)
- Summary Guidelines provide both “Mandatory” steps that businesses **must** follow, as well as “Best Practices”.
- ESD has advised that **no waivers** will be granted from mandatory requirements.
- If you cannot procure the necessary PPE or operate safely, then your business cannot reopen.
- All businesses **must** create a re-opening plan.

# Engage in Active Planning NOW!

- Be ahead of the curve.
- Use this time to establish a COVID-19 Re-entry Plan.
- Now is the time to consider re-entry issues and develop the mandated opening plan.
- Acquire the necessary supplies, make the modifications to your workplaces and create new work schedules.
- The Phase 1 Guidelines for each industry are all very similar and we are very likely to see similar Guidelines for Phase 2.

# Mandatory Physical Distancing

- Ensure 6 ft. distance between personnel, unless safety or core function of the work activity requires a shorter distance.
- Tightly confined spaces (e.g. elevators) should be occupied by only one individual at a time, unless all occupants are wearing face coverings. If occupied by more than one person, keep occupancy under 50% of maximum capacity.
- Any time personnel are less than 6 ft. apart from one another or a customer and without a physical barrier (e.g. plexiglass), personnel must wear acceptable face coverings.
- Post social distancing markers using tape or signs that denote 6 ft. of spacing in commonly used and other applicable areas on the site
- Limit in-person gatherings as much as possible and use tele- or video-conferencing whenever possible. Essential in-person gatherings (e.g. meetings) should be held in open, well-ventilated spaces with appropriate social distancing among participants.

# Mandatory Protective Equipment

- Employers must provide employees with an acceptable face covering at no-cost to the employee and have an adequate supply of coverings in case of replacement.
- Acceptable face coverings include cloth (e.g. homemade sewn, quick cut, bandana) and surgical masks.
- Face coverings must be cleaned or replaced after use or when damaged or soiled, may not be shared, and should be properly stored or discarded.
- Limit the sharing of objects (e.g. copiers, computers) and discourage touching of shared surfaces; or, when in contact with shared objects or frequently touched areas, wear gloves (trade-appropriate or medical); or, sanitize or wash hands before and after contact.

# Mandatory Cleaning & Hygiene

- Adhere to hygiene and sanitation requirements from the Centers for Disease Control and Prevention (CDC) and Department of Health (DOH) and maintain cleaning logs on site that document date, time, and scope of cleaning.
- Provide and maintain hand hygiene stations for personnel, including handwashing with soap, water, and paper towels, as well as an alcohol based hand sanitizer containing 60% or more alcohol for areas where handwashing is not feasible.
- Provide and encourage employees to use cleaning/disinfecting supplies before and after use of shared and frequently touched surfaces, followed by hand hygiene.
- Conduct regular cleaning and disinfection at least every day, and more frequent cleaning and disinfection of shared objects and surfaces, as well as high transit areas, such as restrooms and common areas.

# Mandatory Communication

- Affirm you have reviewed and understand the state-issued industry guidelines, and that you will implement them.
- Post signage to remind personnel and customers to adhere to proper hygiene, social distancing rules, appropriate use of PPE, etc.
- Train all personnel on new protocols, communicate safety guidelines and establish a communication plan for employees, visitors, and clients with a consistent means to provide updated information.
- Maintain a continuous log of every person, including workers and visitors, who may have close contact with other individuals at the work site or area.
- If a worker tests positive for COVID-19, employer must immediately notify state and local health departments and cooperate with contact tracing efforts.
- Must conspicuously post completed safety plans on site.

# NY Forward Business Re-Opening Safety Plan Template



Department  
of Health

## NY FORWARD BUSINESS RE-OPENING SAFETY PLAN TEMPLATE

Each re-opening business must develop a written Safety Plan outlining how its workplace will prevent the spread of COVID-19. A business may fill out this template to fulfill the requirement, or may develop its own Safety Plan. **This plan does not need to be submitted to a state agency for approval** but must be retained on the premises of the business and must be made available to the New York State Department of Health (DOH) or local health or safety authorities in the event of an inspection.

Business owners should refer to the State's industry-specific guidance for more information on how to safely operate. For a list of regions and sectors that are authorized to re-open, as well as detailed guidance for each sector, please visit: [forward.ny.gov](http://forward.ny.gov)

### COVID-19 Reopening Safety Plan

**Name of Business:**

**Industry:**

**Address:**

**Contact Information:**

**Owner/Manager of Business:**

[www.forward.ny.gov](http://www.forward.ny.gov)

# Mandatory Screening

- Employees who are sick should stay home or return home, if they become ill at work.
- Must implement mandatory health screening assessment (e.g. questionnaire, temperature check) before employees begin work each day and for essential visitors, asking about COVID-19 symptoms, positive test, or close contact with COVID-19 case in past 14 days.
- Assessment responses must be reviewed every day and such review must be documented.
- Employees with symptoms should be sent home for medical assessment and testing. If tested positive, employee may only return completing a 14-day quarantine.
- Employees who have had close contact with a confirmed or suspected person with COVID-19 but have no symptoms may be able to work with additional precautions, including regular monitoring for symptoms and temperature, required face covering all times, and appropriate social distancing from others.
- On-site screeners should be trained by employer identified individuals familiar with CDC, DOH, and OSHA protocols and wear appropriate PPE, including at a minimum, a face covering.
- Must have a plan for cleaning, disinfection, and contact tracing in the event of a positive cases.

# Additional Best Practices “Recommended” by the Phase 1 Reopen Guidelines

- Limiting in-person presence to only personnel necessary for the current task(s), adjusting hours to spread employee and customer traffic over a longer period of time, staggering arrival/ departure times, creating A/B teams.
- Modify the use and/or restrict the number of workspaces and employee seating areas to maintain 6 ft. distance.
- Reduce bi-directional foot traffic by posting signs with arrows in narrow aisles, hallways, or spaces.
- Prohibit non-essential visitors.
- Encourage employees to bring lunch from home and reserve adequate space for employees to observe social distancing while eating meals.
- Perform screening remotely (e.g. by telephone or electronic survey), before reporting to the work location, to the extent possible.

# Reasons to Consider Adopting the “Recommended” Guidelines

- Reduces spread of COVID-19.
- Reduces likelihood of having to close entire office in the event of a positive result.
- Reduces the risk of an adverse employment and unemployment claims.

# What will the Phase 2 Guidelines Look Like?

- We do not know for sure yet.
- As far as general in-office requirements, they will probably be very similar to Phase 1 requirements.
- No guidance yet on what out-of-office activities will be allowed.
- NYSAR's May 6, 2020 letter to Governor **suggested**:
  - Limiting showings to one 1 licensee and 2 consumers.
  - Limiting final walk through appointments to 1 licensee and 2 consumers.
  - Requiring all licensees, office staff and consumers to wear masks during in-person contact.
  - Avoiding in-person activities such as driving in a car with a client and attending a closing.
- We will update you as soon as final guidance is issued.

Questions???

Thank You!



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