

What Stage 2 Of California's Reopening Means For Businesses

By **Thomas Sprankling, Michael Mugmon and Noah Guiney** (May 20, 2020, 5:04 PM EDT)

On May 7, Gov. Gavin Newsom announced in a press conference that the state was moving into Stage Two of a four-stage plan for reopening California that he had put forth only the prior week.[1]

He characterized this transition — which he previously said could be weeks in the offing — as a switch from dividing businesses into essential versus nonessential into dividing nonessential businesses into lower risk (e.g., curbside retail sales) and higher risk (e.g., large indoor gatherings). He also announced the basic standards that counties will have to meet if they wish to move at a faster pace in reopening than the rest of the state.

On May 12, just five days later, the governor released new, more detailed guidelines for those fast-moving counties, which permitted an additional group of businesses — e.g., dine-in restaurants — to reopen if certain conditions are met.[2] Importantly, however, Newsom cautioned that the process of reopening the state of California is constantly evolving and that state guidelines may change as events — and public health — dictate.

The Transition to Stage Two

A short time after Newsom's phased reopening plan was announced in late April, several rural counties in northern California defied the state's guidance[3] by quickly moving forward with reopening their local economies and a number of closed businesses — such as barbershops, hair salons and beauticians[4] — challenged the legality of the plan.

Newsom has nevertheless emphasized that he made the decision to move the state from Stage One into Stage Two because the state had begun to meet certain public health goals embodied in the six guiding indicators that he had laid out in mid-April.[5] He has cautioned, however, that continued success in meeting these goals was, by no means, guaranteed.

Accordingly, in early May, he announced that the state would ease into Stage 2 in several phases.[6] In the first phase, starting on May 8, the state allowed businesses,[7] such as bookstores, sporting goods stores, florists, clothing stores and jewelry stores, to open for delivery or curbside pickup — subject to certain public health requirements and recommendations[8] including allowing customers to pay using hands-free devices and having employees wear gloves and masks for car drop-off. Businesses in the supply chain that help support these establishments were allowed to begin operation as well.

In order to reopen, such businesses must meet state guidelines, which include:

- Performing a detailed risk assessment and implementing a site-specific protection plan;



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- Training employees on how to limit the spread of COVID-19, including how to screen themselves for symptoms and stay home if they have them;
- Implementing individual control measures and screening;
- Implementing disinfecting protocols; and
- Implementing physical distancing guidelines.

Also on May 8, California's Occupational Safety And Health entity, or CalOSHA, released new, specific guidelines for 17 industries or sectors. To take just one example: To be in compliance with new guidelines issued by CalOSHA, manufacturing operations[9] need to be able to restrict nonemployees from entering any facilities and take measures such as shift-staggering to minimize the number of people on site at any one time. Relatedly, manufacturers should convert outdoor areas into break rooms and warehouses should carry sanitizing supplies for making deliveries.

Finally, all businesses opening in Stage Two will be strongly encouraged to post an industry-specific checklist[10] that explains the steps they are taking to follow state guidelines.

On May 12, Newsom went a step further and announced that businesses such as shopping malls and dine-in restaurants[11] — as well as schools[12] — can reopen under the second phase of Stage Two.

While curbside pick-up or delivery is no longer barred by the state, the governor's new guidance also allowed those businesses to open for in-person shopping and dining as long as the businesses follow state safety guidelines and the counties they are in attest that they can safely enter Stage Two's second phase. The county-based certification process is discussed in more detail below.

Importantly, Newsom has continued to emphasize that businesses and activities that necessarily require people to be in close proximity to each other will not be permitted to reopen until after the state formally moves into Stage Three — an event he has indicated will occur in the next few months.[13] These Stage Three entities include gyms and tattoo parlors, bars and nightclubs, indoor museums, religious services and cultural activities, hotels, and concerts.

Regional Variance: Counties Given Some Discretion to Move at Their Own Pace

Newsom has acknowledged that there can be regional variance[14] in the pace at which counties move through Stage Two. (The state website makes clear[15], however, that no county will be permitted to move into Stage Three at this time).

In broad strokes[16], for a county to quickly progress through Stage Two, the county's public health officer must consult with the [California Department of Public Health](#)[17] and submit a written attestation[18] that the county has met the following criteria:

- The county has seen no more than one COVID-19 case per 10,000 residents in the past 14 days;
- There has not been a single COVID-19 death in the county in the past 14 days;

- Guidance has been developed for employers and essential critical infrastructure workplaces on how to structure the physical environment to protect essential workers;
- There is sufficient disinfectant and protective equipment for essential workers;
- There is a minimum daily testing volume of 1.5 per 1,000 residents (although the state indicated that low-density counties might be able to argue that this requirement should not apply to them);
- Testing is readily available for 75% of the county's population;
- There is sufficient contact tracing to accurately measure the spread of the virus;
- Housing is available for at least 15% of the county's homeless population;
- Local hospitals have a plan to deal with a COVID-19 surge and enough personal protective equipment to protect doctors and nurses if this happens; and
- There is a plan in place for caring for vulnerable populations, such as the elderly in nursing homes.

While not mandatory, the state also strongly recommends that counties develop a COVID-19 containment plan that lays out what the county will do to meet the guidelines above and how the county will collaborate with the governments of its cities and neighboring counties. Finally, the county board of supervisors and local hospitals must also write letters of support for the plan.

However, counties have some flexibility^[19] in adhering these guidelines, and Newsom has indicated that local governments can still be granted a variance even without meeting all of the enumerated requirements if they make a compelling case that a particular requirement that does not make sense in the local context.

County governments have already begun to take the governor up on his offer of a faster reopening. As of May 18, 22 counties have submitted written attestations and certified that they are ready to move deeper into Stage Two.^[20] The vast majority of these counties are located in the fairly rural northern part of the state. Businesses in these counties that fall under phase two of Stage Two (e.g., dine-in restaurants) are permitted to open as long as they self-certify that they are following the relevant CalOSHA regulations.

Notably, the regional variance model also permits counties to move slower than the rest of the state as well. In particular, six Bay Area counties (Alameda, Contra Costa, Marin, San Francisco, San Mateo and Santa Clara) have generally imposed stricter requirements than the rest of the state — a move that Newsom has now expressly indicated is permissible.^[21]

And even those counties, which have operated as a bloc for two months, have begun to gradually reopen at slightly different paces. For example, as of May 18, San Francisco, Marin and San Mateo counties are permitting retail stores to reopen for delivery and curbside pickup; Alameda and Contra Costa counties are planning to take a similar step.^[22]

Implications

California's statewide response to COVID 19 — and the political reaction to it at the local level — is changing rapidly, so it is difficult to make concrete predictions about what comes next. However, Newsom's recent announcements regarding Stage Two share several themes.

First, Newsom has increasingly allowed counties to set the pace at which they reopen. While there was initially some doubt about local autonomy to deviate from statewide guidelines, the newest announcement is crystal clear that counties have some control over how whether and how quickly they move through Stage Two of the state's reopening plan.

For larger businesses and chains with footprints in multiple counties across the state, that makes it difficult to implement a one-size-fits-all approach to reopening in California. Such businesses are best served by carefully examining the local guidance on what is allowed to reopen and under what conditions.

Second, businesses themselves have an important role to play in implementing the state's reopening plan. Newsom's latest guidance requires individual businesses to self-certify that they comply with the CalOSHA guidelines before they reopen, even if the businesses falls into a category that is permitted to reopen at Stage Two.

On one hand, this is a boon to the private sector, in that it permits businesses to reopen quickly and without navigating complicated bureaucratic red tape. On the other hand, this regulatory scheme also puts the onus on the businesses to ensure that they are in compliance with the state rules, making it very important that businesses both self-police and pay close attention to any changes in guidance from both state and local governments.

Third, Newsom's public communications continue to announce new and substantive information about the state's COVID-19 policy. This approach is understandable, given that the rapidly shifting public health information on COVID-19 has created a need for the government to communicate with the public in real time. Accordingly, businesses and Californians alike would be well-served by following Governor Newsom's semi-daily press conferences very closely.

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[1] For details on that plan, please see <https://www.wilmerhale.com/en/insights/client-alerts/20200430-covid19-california-announces-framework-for-gradual-reopening>.

[2] <https://www.latimes.com/california/story/2020-05-12/gavin-newsom-restaurants-malls-offices-guidelines-reopening-california-coronavirus-rules>.

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- [4] <https://www.politico.com/states/california/story/2020/05/06/barbers-beauticians-plan-to-sue-newsom-over-stay-at-home-order-1282868>.
- [5] <https://www.gov.ca.gov/2020/04/14/governor-newsom-outlines-six-critical-indicators-the-state-will-consider-before-modifying-the-stay-at-home-order-and-other-covid-19-interventions/>.
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- [7] <https://www.latimes.com/california/story/2020-05-07/gavin-newsom-businesses-reopen-california-second-coronavirus-phase-details>.
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- [12] <https://abc7news.com/newsoms-plan-to-reopen-california-when-will-newsom-guidelines/6178845/>.
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- [15] <https://covid19.ca.gov/roadmap-counties/>.
- [16] <https://www.sfchronicle.com/politics/article/Testing-tracing-and-homeless-housing-What-15254748.php>.
- [17] <https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/COVID-19-County-Variance-Attestation-Memo.aspx>.
- [18] <https://www.cdph.ca.gov/Programs/CID/DCDC/CDPH%20Document%20Library/COVID-19/CDPH%20COVID19%20County%20Variance%20Attestation%20Form.pdf>.
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- [20] <https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/Local-Variance-Attestations.aspx>.
- [21] <https://sanfrancisco.cbslocal.com/2020/05/08/coronavirus-update-california-newsom-70-percent-economy-reopen-bay-area-counties/>.

[22] <https://www.sfchronicle.com/bayarea/article/Once-united-Bay-Area-counties-take-divergent-15275526.php>.