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Reopening Businesses in New York State: A New Beginning

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As New York begins moving toward reopening and lifting restrictions on business operations, including permitting select regions to enter Phase Two of reopening as of today, businesses should be mindful of the guidance being issued on both a federal and state level. While some guidance falls into the category of recommended "best practices," other guidance, such as the business guidelines issued by New York State, is mandatory.

Federal Guidance

CDC Guidance

The Centers for Disease Control and Prevention (the "CDC") released various guidelines encouraging communities to "Plan, Prepare, and Respond" before reopening. Included in the released guidelines from the CDC are various resources intended to aid businesses and workplaces to ensure a safe reopening.

For example, the CDC published comprehensive guidance to help communities around the country reopen. In the 60-page detailed guidelines, the CDC provided interim guidance for employers with workers at high risk for illness. According to the CDC, employers should be mindful that some employees, including individuals who are over the age of 65 and those with underlying conditions, are at higher risk for severe illness. Per the CDC, underlying conditions include, but are not limited to, chronic lung disease, moderate to severe asthma, hypertension, severe heart conditions, weakened immunity, severe obesity, diabetes, liver disease, and chronic kidney disease that requires dialysis.

Businesses should take particular care to minimize exposure to the virus while simultaneously complying with all applicable federal, state, and local laws. Additionally, the considerations for reopening that the CDC provided for businesses and places of work include: (1) promoting healthy hygiene practices; (2) intensifying cleaning, disinfection, and ventilation; (3) promoting social distancing; (4) limiting travel and modifying commuting practices; (5) checking for signs and symptoms of the virus; (6) planning for when an employee becomes sick; (7) maintaining healthy operations; and (8) preparing for further closures.

Additionally, the CDC created the "Workplace Decision Tool" which provides considerations for businesses and workplaces for reopening and protecting their workers, especially vulnerable employees. According to the CDC, a business attempting to reopen should first meet two considerations. First, the reopening must be consistent with applicable state and local orders. Second, the business should be ready to protect workers who are at higher risk

for severe illness. If either consideration is not met, the CDC recommends not reopening yet. However, if both considerations are met, the business may go to the next step and determine whether recommended health and safety actions are in place.

Health and safety actions that the CDC recommends businesses should put in place include promoting healthy hygiene practices such as hand washing and the use of cloth face coverings, and increasing cleaning and disinfection practices as well as ventilation. Places of work should also encourage social distancing by increasing the space between employees using physical barriers, changing the layout of workspaces, closing or limiting communal spaces, staggering shifts and breaks, and limiting large events when possible. Employers should consider modifying travel and commuting practices and encouraging employees to telework. Finally, the CDC recommended health and safety actions include training of all employees on the implemented health and safety protocols.

According to the CDC, if a business has these recommend health and safety actions in place, then the final determination the business should make before reopening is whether the business has ongoing monitoring in place. Employers should conduct daily health checks for signs or symptoms in their employees and encourage sick employees to stay home as well as plan accordingly in such a case. Businesses should regularly communicate and monitor developments with local authorities and employees as well as be ready to consult with local health authorities if there are COVID-19 cases in the work facility or an increase in cases in the local area. Businesses should also monitor employee absences and review leave policies and practices in order to provide flexibilities to employees.

EEOC Guidance

The U.S. Equal Employment Opportunity Commission (the "EEOC") has also released guidance relating to reopening businesses. That guidance is covered in a separate alert previously released by Cullen and Dykman, available here.

OSHA Guidance

The U.S. Department of Labor's Occupational Safety and Health Administration ("OSHA") has published various resources for employers to consider and use before reopening and which can be reviewed on the OSHA COVID-19 website. For example, OSHA has provided various types of educational materials to assist businesses and workers in finding and preventing workplace hazards including publications and ebooks. Additionally, OSHA has provided various COVID-19 alerts addressing recommended practices for protecting workers across various industries. Additionally, OSHA has launched websites with COVID-19-related guidance for employers and workers in numerous industries including but not limited to healthcare, dentistry, manufacturing (developed in partnership with the CDC), laboratories, retail operations, and construction.

Further, OSHA released Guidance on Preparing Workplaces for COVID-19. In this guidance, OSHA provides basics steps that businesses can take to reduce the risk of employee exposure to COVID-19 in the workplace. According to OSHA, employers should start preparing by developing an infectious disease preparedness and response plan to help guide protective actions against the virus. Businesses should develop these plans by staying informed on

local, state and federal health agencies' guidance. The plans should take into account and address the risk levels associated with various worksites and job tasks employees perform at those sites. Businesses should also prepare to implement basic infection prevention measures including good hygiene and infection control practices. Additionally, OSHA recently issued an alert entitled COVID-19 Guidance on Social Distancing at Work, which discusses actions that employers can take in the workplace to implement social distancing.

Employers should also develop policies and procedures for prompt identification and isolation of sick people, if appropriate, as well as develop, implement, and communicate with employees about workplace flexibilities and protections. Businesses should implement controls to avoid workplace hazards including engineering controls, administrative controls, safe work practices, and personal protective equipment ("PPE"). Finally, OSHA advises that businesses should follow existing OSHA standards which may apply to protect employees from exposure and infection with the virus.

This OSHA guidance also focuses on jobs classified as having low, medium, high, and very high exposure risks and provides specific recommendations for employers and workers within specific risk categories. The very high exposure risk category includes healthcare workers treating known or suspected COVID-19 patients, healthcare or laboratory personnel collecting or handling specimens from known or suspected COVID-19 patients, and certain morgue workers. The high exposure risk category includes healthcare delivery and support staff exposed to known or suspected COVID-19 patients, medical transport workers moving known or suspected COVID-19 patients in enclosed vehicles, and certain mortuary workers involved in preparing the bodies of individuals who were known or suspected to have COVID-19 at the time of their death. The medium exposure risk category includes jobs that require frequent and/or close contact within people who may be infected with the SARS-CoV-2, the coronavirus that causes COVID-19, but who are not known or suspected COVID-19 patients. The workers in the lower exposure risk category include those who have minimal occupational contact with the public and other workers.

New York State Guidance

New York State has also announced its plan for reopening businesses throughout the State. Specifically, on April 26, 2020, the Governor announced his plan for reopening the State, which was subsequently expanded upon and is now referred to as "New York Forward" (the "Plan"). Under the Plan, the State is broken down into 10 regions – Western New York, Finger Lakes, Southern Tier, Central New York, Mohawk Valley, North Country, Capital Region, Mid-Hudson, New York City, and Long Island – and each region will be required to meet certain metrics before they are permitted to reopen. Individuals can see how many criteria a region has met via the State's Regional Monitoring Dashboard. Regional control rooms will continue to monitor these metrics during the reopening process, which occurs in four distinct phases, and adjust or slow the process in that region as needed.

All regions except New York City have met all of the criteria to begin Phase One of reopening. New York City will remain "on PAUSE" through June 27, 2020 per Governor Cuomo's Executive Order 202.34, but is eligible to begin Phase One of reopening whenever the required metrics are met and is expected to do so on June 8, 2020. On May 29, 2020, the five regions that had entered Phase One on May 15, 2020 - Central New York, North Country, Finger Lakes, Southern Tier and Mohawk Valley - were permitted under Executive Order 202.35 to enter Phase Two. A Business Reopening Lookup Tool has been provided to assist New Yorkers in determining the reopening eligibility

of a business; users can enter the NAICS code for the business in question and will be told whether that business is permitted to open.

The Plan

The Plan consists of Four Phases and requires at least two weeks between the implementation of each phase. If infection and hospitalization rates remain stable during Phase One, regions will proceed to subsequent phases in which additional businesses thought to have less economic impact and a higher risk of infection will re-open. Per the NY Forward Reopening Guide:

- Phase One includes the reopening of the following industries: "Construction," "Agriculture, Forestry, and Fishing," "Select Retail for Curbside Pickup Only," "Manufacturing," and "Wholesale Trade."
- Phase Two industries include "Professional Services," "Finance and Insurance," "Retail," "Administrative Support," and "Real Estate, Rental, and Leasing."
- Phase Three pertains to "Restaurants and Food Services."
- Phase Four covers "Arts, Entertainment, and Recreation" as well as "Education."

For each industry covered by Phase One, the State released a more detailed list of the types of businesses covered by each category as well as industry-specific "summary guidelines" and "read and affirm detailed guidelines." A "Business Safety Plan Template" is also supplied for each industry but is not industry-specific. The State has also now released specific guidance for Phase Two Industries, which also includes a reminder about which businesses remain closed even in Phase Two. The guidance in Phase Two does not strictly follow the announced categories, but instead is broken down into "Offices," "Real Estate," "Essential and Phase II In-Store Retail," "Vehicle Sales, Leases, and Rentals," "Retail Rental, Repair, and Cleaning," "Commercial Building Management," and "Hair Salons and Barbershops." There has not yet been industry-specific guidance issued for Phase Three or Phase Four.

Industry-Specific Guidelines

The summary guidelines, which make clear that the guidelines apply to both businesses that are just starting to reopen as well as those that had continued operating as essential businesses, contain mandatory guidelines as well as "recommended best practices." Though there is a separate document with a summary and detailed guidelines for each industry, many of the mandates appear to overlap. For example, every industry's summary guidelines mandate social distancing in the workplace (i.e., keeping a 6-foot distance between individuals) "unless safety or core function of the work activity requires shorter distance," that employees, customers, and/or visitors wear "acceptable face coverings" when social distancing is not being maintained (and in some cases, at all times regardless of social distancing), and that regular cleaning and disinfecting of the workplace occur.

Additionally, under the Plan, businesses are instructed to create "a plan to protect employees and consumers, make the physical workspace safer and implement processes that lower risk of infection in the business" ("safety plan"). Three factors must be considered by businesses when devising a safety plan:

1. Employee and Customer Protections – includes "possible adjustments to workplace hours and shift design as necessary to reduce density in the workplace; enacting social distancing protocols, and restricting non-

essential travel for employee."

2. Physical Changes in the Workspace – includes "requiring all employees and customers to wear masks if in frequent close contact with others and implementing strict cleaning and sanitation standards."
3. "Implementing Processes that Meet Our Changing Public Health Obligations" – includes "screening individuals when they enter the workplace, or reporting confirmed positives to customers." The Plan notes that "[w]hile these processes will vary from business to business, almost everyone will have to adapt, in some way or another, to our new normal."

The Read and Affirm Detailed Guidelines (the "Detailed Guidelines") contain a more thorough recounting of the mandates for reopening businesses. Though the individual guidelines may vary, the Detailed Guidelines for each industry all have three large categories – people, places, and processes – which are then broken down into smaller sub-categories. Though some industries also include industry-specific subsections, the following sub-categories appear in each of the Detailed Guidelines. The category of People is comprised of sub-categories entitled "Physical Distancing," "Gatherings in Enclosed Spaces," "Workplace Activity," and "Movement and Commerce." Places covers "Protective Equipment," "Hygiene and Cleaning" (sometimes expanded to also include "Disinfection"), "Phased Reopening," and "Communications Plan." Processes include "Screening and Testing" and "Tracing and Tracking." The Detailed Guidelines also state under a fourth category, "Employer Plans," that the safety plans need to be posted "conspicuously" at the workplace.

Additionally, at the bottom of each set of Detailed Guidelines is a link to a Business Affirmation that the employer must submit affirming that they "have reviewed the New York State interim guidance for business re-opening activities and operations during the COVID-19 public health emergency" and that they "affirm that [they] have read and understand [their] obligation to operate in accordance with such guidance."

Business Safety Plan

The Business Safety Plan Template states that while "[e]ach re-opening business must develop a written Safety Plan outlining how its workplace will prevent the spread of COVID-19," the safety plan "does not need to be submitted to a state agency for approval but must be retained on the premises of the business." However, it "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." Businesses are permitted, but not required, to use the template to meet the safety plan requirement.

Empire State Development Guidance

Empire State Development has also released Frequently Asked Questions (FAQ) on New York Forward and Business Reopening (the "ESD FAQ"). The ESD FAQ, among other things, confirms that the reopening guidelines also apply to essential businesses. Additionally, it states that, "due to health and safety concerns," no waivers regarding the guideline requirements will be issued. In other words, "[y]our business can only reopen when you are able to fully supply adequate protective equipment and to help protect the health and safety of your workers." Thus, businesses must comply with all guidelines in order to reopen.

Filing Complaints for Non-Compliance

Complaints regarding non-compliance are handled by the New York State PAUSE Enforcement Assistance Task Force (the "Task Force"). After review by the Task Force, complaints are forwarded to local authorities for response, though guidance can be provided as needed by the Task Force. Complaints can be filed with the Task force via phone or through an online form. However, employees filing "specific complaints . . . against their employers" should do so using the form provided by the Department of Labor.

Additional Information for Colleges and Universities

Last week the CDC issued specific guidance for colleges and universities as they consider reopening their campuses and practical ways in which higher education institutions can help promote a healthy campus community and slow the spread of the virus. The American College Health Association (ACHA) also recently issued recommended guidelines for colleges to consider in reopening. Additionally, on May 21, 2020, Governor Cuomo announced that summer school would be "conducted through distance learning." State guidelines will be issued in June "so schools and colleges can start to plan for a number of scenarios" and in July, "K-12 schools and colleges will submit plans for approval to the state." Additional details regarding guidance for higher education institutions will be released in a separate alert by Cullen and Dykman.

Additional Information

Businesses and higher education institutions should be mindful that the federal and/or state guidance is likely to be updated or modified as the reopening process continues and should make sure to stay up to date. We will also continue to update our clients as more information becomes available.

Cullen and Dykman is currently working with businesses and institutions as they prepare to resume operations in the coming weeks and months, including working with institutions to draft reopening plans and assisting with the implementation of risk mitigation plans. If you have questions regarding any aspects of employment law and/or the implications of COVID-19 on your place of business or higher education institution, please contact James G. Ryan at (516) 357-3750 or via email at jryan@cullenllp.com, Thomas B. Wassel at (516) 357-3868 or via email at twassel@cullenllp.com, or Hayley B. Dryer at (516) 357-3745 or via email at hdryer@cullenllp.com.

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