

# CLIENT ALERT: The Continuing Reopening of New York – An Overview of Relevant New York, CDC, OSHA and EEOC Guidelines

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In an effort to curb the spread of COVID-19, state and local governments instituted a number of measures to require “non-essential” employees to work remotely (or not at all) rather than reporting to their physical work locations. In light of decreasing rates of COVID-19 infections in certain geographic areas, state and local governments in those areas and other government agencies have begun to ease restrictions allowing employees to return to their workplace. This client alert discusses some of these measures as this trend continues.

## PRACTICE AREAS

Employee Benefits

Employment Practices

### A. New York State

On May 11, 2020, Governor Cuomo outlined a plan known as “New York Forward” (the “Program”) to reopen regions and industries of New York in phases. According to New York’s reopening guide (the “Guide”), the Program “focuses first and foremost on getting people back to work and easing social isolation, without triggering renewed spread of the virus or overwhelming the hospital system.”

The Program divides the state into ten (10) distinct regions for reopening purposes ([hyperlink map here](#)). Each region is required to meet seven (7) metrics before it is allowed to begin the reopening process. The reopening process permits different categories of businesses and industries to reopen in four (4) phases. As of July 8, 2020, New York City is in Phase Three and the other nine (9) regions are in Phase Four.

As a threshold matter, all employers must complete a written safety plan, post it conspicuously on site and make it available to state or local authorities for inspection. Additionally, employers must comply with federal standards, some of which are addressed below.

Business offices were allowed to reopen in Phase Two, and New York's extensive and detailed guidance for offices (the "Office Guidance") addresses many of the issues that are unique to working in an office during COVID-19. The Office Guidance mandates that "Responsible Parties" (generally, although not necessarily, the owner/operator of the office) shall be responsible for complying with the state and federal requirements for reopening.

Responsible Parties must implement environmental protections so that office workers can return to workplaces in a safe fashion. Responsible Parties must: provide face coverings to all employees at no cost; limit occupancy to 50%; ensure social distancing of six (6) feet or a face covering where social distancing is not feasible, including guidelines for common areas such as elevators and lobbies; and close non-essential common areas (e.g., gyms). In addition, Responsible Parties must adhere to hygiene, cleaning and disinfecting guidelines, such as setting up hand hygiene stations throughout the office (especially in common areas); cleaning and disinfecting shared workstations between users; limiting sharing of objects; providing cleaning supplies at highly-touched areas (e.g., copy machines); and cleaning and disinfecting the office on a regular schedule. Finally, Responsible Parties must implement mandatory daily health screenings of employees and report positive test results to state and local health officials.

In addition to the requirements imposed on Responsible Parties for reopening offices, the Office Guidance provides suggestions such as closing common areas; reconfiguring work stations; implementing staggered or phased schedules; encouraging working from home and video/tele meetings; limiting non-essential travel; and marking appropriate distances around commonly used areas.

#### B. CDC Guidance

Since the beginning of the COVID-19 outbreak, the Center for Disease Control (the "CDC") has provided information and guidance related to COVID-19. The CDC's primary guidance, the Interim Guidance for Businesses and Employers Responding to Coronavirus Disease 2019 (COVID-19) (the "Interim Guidance"), continues to be updated to reflect the gradual reopening of America.

Before entering into specific courses of action, the Interim Guidance advises employers to listen to national, state and local guidance announcements. The Interim Guidance also provides that employers implement and update "preparedness, response, and control plans" that are specific to such employer's workplace, identify all areas and job tasks with potential exposure to COVID-19 and include control measures to eliminate or reduce such exposures.

Employers reopening should be proactive in preventing and reducing transmission among employees by maintaining healthy business operations and a healthy work environment. The Interim Guidance outlines practical advice for each of the foregoing.

#### *Prevent and Reduce Transmission Among Employees*

- Actively encourage sick employees to notify their supervisor, stay home, and follow CDC-recommended actions. Additionally, employees with a sick family member should also notify their supervisor and follow CDC-recommended actions.

- Daily in-person or virtual health checks, such as symptom and/or temperature screening of employees before entering the facility. In-person health checks should adhere to social distancing, including using partitions and/or personal protective equipment. The EEOC has blessed temperature screening as permissible during this pandemic.
- Identify where and how workers might be exposed to COVID-19 and ensure a workplace that is safe and healthy. Employees should be encouraged to wear masks.
- Separate sick employees and follow CDC cleaning and disinfecting recommendations.
- Incentivize employees to not use public transportation and/or allow employees to shift hours so as to commute during less busy times.

*Maintain Healthy Business Operations*

- Identify a workplace coordinator who will be responsible for COVID-19 issues in the workplace.
- Implement flexible and supportive leave policies, including adopting supportive policies for employees at high risk for contracting COVID-19, and communicate such policies to employees.
- Assess essential functions, which may include using alternative supply chains and/or minimizing workers present at the workplace.
- Establish social distancing policies – flexible workplaces; flexible work hours; modify workplace to increase distance; increase space between employees and customers; use cues to denote safe distances; flexible meeting/travel options; limit access to common areas; prohibit handshaking.

*Maintain Healthy Work Environment*

- Consider improving ventilation systems.
- Ensure safety of water after prolonged shutdown.
- Provide tissues, soap, hand sanitizer, etc.
- Clean routinely in a safe manner.

The Interim Guidance is broad-based and is intended to apply to as many industries as possible. The CDC also provides tailored guidance to specific industries (e.g., restaurants and bars), specific locations (e.g., parks and recreational facilities, colleges) and specific activities (e.g., cleaning and disinfecting).

C. OSHA

The Occupational Safety and Health Act (the “OSH Act”) has mandated the Occupational Safety and Health Administration (“OSHA”) with the general duty to provide “employment and place of employment free from recognized hazards that are causing or are likely to cause death or serious physical harm.”

OSHA issued guidance (the “First OSHA Guidance”) for “preparing workplaces for COVID-19.” This guidance is not specific to reopening, but nonetheless provides helpful advice for employers.

The First OSHA Guidance “focuses on the need for employers to implement engineering, administrative, and work practice controls and personal protective equipment (“PPE”).” Examples of PPE include gloves, goggles, face shields, face masks and respiratory protection. The OSHA Guidance states unequivocally that “employers are obligated to provide their workers with PPE needed to keep them safe while performing their jobs.”

OSHA issued additional guidance that is targeted specifically at reopening (the “Second OSHA Guidance”). The Second OSHA Guidance divides reopening into three (3) broad phases; “businesses resume unrestricted staffing of work sites” is phase 3. The Second OSHA Guidance reminds employers that during all phases of reopening, they should “implement strategies for basic hygiene, social distancing identification and isolation of sick employees, workplace controls and flexibilities, and employee training that are appropriate for the particular phase.” The Second OSHA Guidance expands its general advice to note that employers’ reopening plans should address the following “guiding principles”: hazard assessment; hygiene; social distancing; identification and isolation of sick employees; return to work after illness or exposure; controls; workplace flexibilities; training; and anti-retaliation.

Both OSHA Guidances are broad-based and are applicable to as many industries as possible. However, OSHA also provides tailored guidance to specific industries (e.g., construction, pharmacies).

#### D. EEOC and Employment Concerns

The Equal Employment Opportunity Commission (“EEOC”) is tasked with the mission to “prevent and remedy unlawful employment discrimination and advance equal opportunity for all in the workplace.” In response to past pandemics, the EEOC published guidance (the “Pandemic Preparedness Document”) entitled “Pandemic Preparedness in the Workplace and the Americans with Disabilities Act.” The EEOC updated this document to account for COVID-19, and published a list of frequently asked questions (the “FAQs,” and, together with the Pandemic Preparedness Document, the “EEOC Guidance”) as well.

Recognizing the obligations of employers to provide a safe working environment for all employees, the EEOC Guidance permits employers to engage in certain practices during this pandemic, which would be problematic during “normal” times:

- Screen job applicants for symptoms of COVID-19;
- Take a job applicant’s temperature as part of a post-offer, pre-employment medical exam;

- Delay the start of a job applicant who has COVID-19;
- Withdraw a job offer because the applicant has COVID-19;
- Take employees' temperatures on a daily basis and record the information;
- Require a doctor's note for employees returning to work; and
- Administer COVID-19 tests before allowing employees to enter the workplace.

Employers still have to conform to general non-discriminatory principles required by the EEOC. Screening and testing of applicants and employees must be done on an across the board basis – employers cannot selectively screen and/or test applicants and employees due to national origin, race, religion, age or other prohibited bases. Furthermore, employers must maintain the confidentiality of screening/testing results (although employers may disclose names of employees with COVID-19 to public health agencies). Finally, employers are still required to engage in the interactive process with employees and provide reasonable accommodations when feasible (absent undue hardship, although the EEOC expressly recognizes that the burden for which accommodations would create an undue hardship may be lower in these pandemic times given the operating and budgetary constraints on employers).

The EEOC recognizes COVID-19's unique effect on the workplace, and the EEOC Guidance seeks to strike a balance between the public health needs of employees and the fairness needs of the EEOC.

#### E. Conclusion

There has been much governmental guidance published by the State of New York, CDC, OSHA and EEOC for reopening the workplace. Reopening in New York City presents challenges that are unique and employers in New York City need to carefully reopen businesses in a way that incorporates the applicable state and federal guidance to ensure the safety of employees at their workplaces.

It is important to emphasize that: (1) the guidance is constantly evolving; (2) agencies at both the federal and local level continue to issue guidance; (3) many municipalities issue their own guidance; and (4) there is no "one size fits all" approach, as different industries, localities and employers have different needs. In addition to the mechanics of reopening described above, reopening itself raises many issues regarding leave policies, employment practices, telework, telehealth, health and welfare benefit plans, employee retirement benefit plans, employer liability, employee privacy, and employee liability. Indeed, many employers might even contemplate shifting to an entirely remote workforce. In many ways, we are entering a new world in which the "new normal" is unprecedented and may represent a long-term paradigm shift.

Please contact the Olshan attorney with whom you regularly work or one of the attorneys listed below for assistance in designing, reviewing and implementing reopening plans, as well as for general employment advice, employee benefit plan design, compliance and administration advice with respect to issues raised by COVID-19.

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