



Webinar

Reopening New York During COVID-19: Phase 2 Considerations for Office-Based Employers

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Proskauer»

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Agenda

1. New York Forward Plan and Phase 2 Guidance

- Employee Screening and Questionnaires
- Social Distancing and Workplace Safety Measures
- Responding to COVID-19 Cases in the Workplace

2. Other Considerations for Re-Opening

- Pre-return Survey
- Discrimination and Harassment Issues
- Employees Refusing to Return
- Liability Waivers
- Layoffs and Furloughs

3. Additional Resources and Your Questions



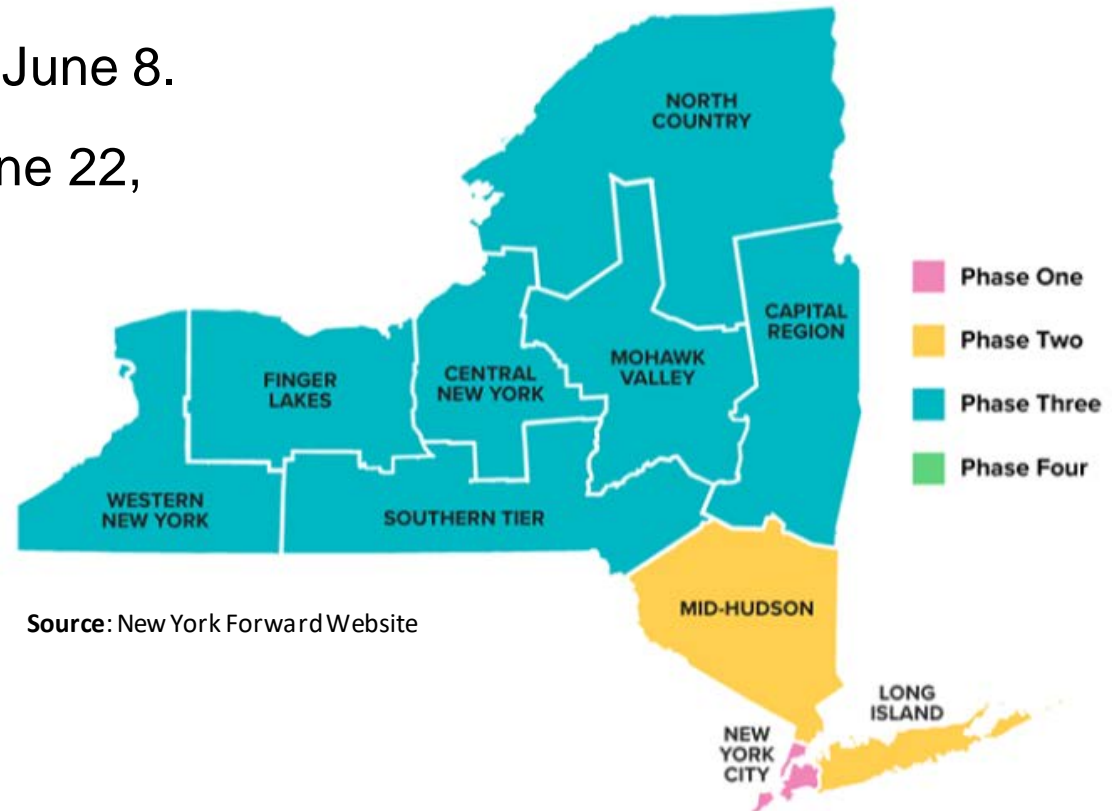
New York Forward Plan and Phase 2 Guidance

New York Forward (Re-Opening) Plan

- Under New York's plan, regions began re-opening in phases beginning on May 15 after they satisfied seven criteria.
- Phased approach within each region:
 - **Phase 1:** Construction, manufacturing, agriculture, wholesale trade, curbside pickup retail.
 - **Phase 2:** Offices, real estate, in-store retail, vehicle sales, hair salons and barbershops.
 - **Phase 3:** Restaurants, food services, personal care.
 - **Phase 4:** Arts, entertainment, recreation, education.
- At least two-weeks between phases to monitor hospitalization and infection rates.

New York Forward (Re-Opening) Plan

- Every region is now in Phase 1, 2 or 3.
 - New York City entered Phase 1 on June 8.
 - Phase 2 in New York City: TBA (June 22, at the earliest).



Source: New York Forward Website

New York Forward (Re-Opening) Plan (cont'd)

- Before re-opening, each office must implement a health and safety plan in accordance with the Phase Two guidance for offices.
- The plan does **NOT** need to be submitted to the State.
- Employers must do three things:
 1. Develop a plan in accordance with the guidance.
 - A plan template is available on the State's website.
 2. Post the plan in a conspicuous location in the office.
 3. Affirm online that they have read and understand their obligations to operate in accordance with the guidance.

New York Forward (Re-Opening) Plan (cont'd)

- The Phase Two office guidance contains requirements related to:
 1. Screening of employees and visitors;
 2. Physical distancing;
 3. Protective equipment;
 4. Hygiene and cleaning;
 5. Communication; and
 6. Confirmed and suspected cases of COVID-19.
- **These requirements also apply to essential businesses!**

Phase 2 Guidance: Screening of Employees and Visitors

- Employers must implement **mandatory daily health screening practices**.
 - Screening may be performed remotely.
- At a minimum, screening is required of employees and visitors using a **questionnaire** asking about:
 - (1) COVID-19 symptoms in past 14 days;
 - **Note**: Consult the most up-to-date list of symptoms from the CDC.
 - (2) Positive COVID-19 tests in past 14 days; and/or
 - (3) Close contact with confirmed or suspected COVID-19 cases in past 14 days.
- Employers must review responses and retain a record of this review.
- Employers must identify a contact person for individuals to notify if answers change.

Phase 2 Guidance: Screening of Employees and Visitors (cont'd)

- **Temperature checks** → May also be conducted.
 - Temperature screenings are currently permitted under the ADA's "direct threat" exception.
 - They would otherwise be prohibited under federal law by the ADA.
- **Diagnostic testing** → Indicates whether the person is currently infected.
 - The EEOC has temporarily approved diagnostic testing.
 - Employers should ensure that tests are accurate and reliable before implementing.
- **Antibody testing** → Indicates whether the person has developed antibodies.
 - CDC guidance recommends against using antibody test results to make decisions about returning employees to the workplace.

Phase 2 Guidance: Screening of Employees and Visitors (cont'd)

- Employers should coordinate with building managers to facilitate screening.
 - Tenants are responsible for screening their own employees and visitors, unless building management has agreed to ensure screening is in effect.
- Other screening considerations:
 - Subject all employees in the same job category to the same requirements.
 - Have in-person screening be conducted by a medical professional (or someone in HR).
 - Adhere to current social distancing recommendations.
 - Provide in-person screeners with PPE (at least a face covering) and adequate training.
 - Adhere to ADA confidentiality requirements.
 - Note: The Phase Two guidance prohibits employers from keeping records of employee health data (e.g., temperature data).

Phase 2 Guidance: Physical Distancing

- Offices are limited to 50% occupancy (per the certificate of occupancy).
- A distance of six feet must be maintained at all times, unless safety of the core activity requires a shorter distance.
 - If people must come within six feet, acceptable face coverings must be worn.
- Place physical distancing markers throughout the workplace.
- To maintain physical distancing at workstations, employers must either:
 - Modify or restrict the use of workstations so that employees are six feet apart;
 - Install physical barriers (e.g., Plexiglas); or
 - Require the use of face coverings.

Phase 2 Guidance: Physical Distancing (cont'd)

- Implement protocols for small spaces (e.g., elevators, supply rooms, offices).
 - One individual at a time or 50% occupancy if face coverings are worn.
- Implement protocols for restrooms and breakrooms.
 - Consider signage systems and social distancing markers.
- Limit the sharing of objects such as tools, laptops, notebooks, phones, screens, and writing utensil.
 - Otherwise, require workers to wear gloves and perform hygiene before and after use.
- Non-essential common areas (e.g., gyms, game rooms) must remain closed.
- Reduce interpersonal contact (A/B schedules, adjusted hours).
- Establish designated areas for pickups and deliveries.

Phase 2 Guidance: Physical Distancing (cont'd)

- Other measures to consider:
 - Encourage the use of video or teleconferencing. When in person meetings are needed:
 - Maintain social distancing (sit every other chair); and
 - Hold meetings in open, well ventilated areas.
 - Close non-essential amenities (e.g., vending and coffee machines).
 - Limit non-essential travel and visitors.
 - Post signage to reduce bi-directional foot traffic.
 - Continue to encourage remote work (and consider implementing a remote work policy).
 - The policy should address reimbursement of expenses, which may be required under state law.
 - Reimbursement may also be required under employment contracts, policies, and CBAs.

Phase 2 Guidance: Personal Protective Equipment

- Provide acceptable face coverings at no cost to employees.
 - Employees must be permitted to bring their own.
 - Acceptable face coverings include: cloth masks, surgical masks, face shields, etc.
- Require workers and visitors to wear face coverings in common areas and when social distancing cannot be maintained.
- Train workers how to put on, take off, and clean/discard PPE.
 - Training should be extended to contractors if they will be provided with PPE.

Phase 2 Guidance: Hygiene and Cleaning

- Regularly clean and disinfect the workplace using registered disinfectants in accordance with CDC and DOH guidance.
 - Cleaning should occur at least after each shift, daily, or more frequently, as needed.
 - Arrange for more frequent cleaning of high-risk areas (e.g., restrooms).
 - Workstations and tools must be cleaned and disinfected between users.
- Maintain a cleaning log that documents the date, time and scope of cleaning.
- Provide employees with cleaning supplies for commonly touched objects and surfaces.

Phase 2 Guidance: Hygiene and Cleaning (cont'd)

- Hand hygiene:
 - Handwashing stations should be supplied with soap, warm water, and paper towels.
 - Place hand sanitizer throughout the office with at least 60% alcohol.
 - Place receptacles around the office to dispose of PPE.
- Prohibit shared food and beverages.
 - Encourage employees to bring meals from home.
- Other optional measures:
 - Implement clean desk policies.
 - Install touch free water fountains, trash cans, and hand dryers.

Phase 2 Guidance: Communication

- Post signage reminding people to adhere to proper hygiene, social distancing rules, appropriate use of PPE, and cleaning/disinfection protocols.
 - Consult your local health department's website (or the CDC's website) for signage.
- Maintain a log of every person, including employees and visitors, who may have close contact with other individuals at the work site or area.
- Businesses should provide building managers with a list of essential visitors.
- Coordinate with landlords and other tenants regarding procedures in common areas and elevators.

Phase 2 Guidance: Confirmed and Suspected Cases

- Close areas used by the person with the confirmed or suspected case.
 - Clean and disinfect these areas (e.g., offices, bathrooms, and shared equipment).
 - Consider hiring an external cleaning company.
 - Coordinate with the building manager regarding shared spaces (e.g., elevators, lobbies).
- Notify the following parties of the suspected or confirmed case:
 - The state and local health departments.
 - Provide a list of all individuals present in the office within 48 hours before symptoms/diagnosis.
 - Cooperate with contact tracing efforts, including notification of potential contacts.
 - Building management.
 - You may also notify:
 - Employees who work in that office of the case and office closure.
 - Others with whom the employee may have had close contact.

Phase 2 Guidance: Confirmed and Suspected Cases (cont'd)

- In all communications, do **not** disclose the name of the infected employee.
 - The same applies even if others can ascertain the identity of the employee.
 - Instead, provide enough information to allow others to assess their level of risk.
- The employee with the suspected or confirmed case must be sent home to quarantine in accordance with DOH guidance.
 - Generally, if the employee is symptomatic or tests positive → 10 days.
 - If the employee has had close contact with a person with COVID-19 and is not symptomatic → 14 days (but if essential, may return with additional precautions).

Phase 2 Guidance: Confirmed and Suspected Cases (cont'd)

- Other considerations for a confirmed or suspected case:
 - Consider OSHA reporting requirements: Coronavirus is reportable to OSHA when an employee is infected in the workplace.
 - If the employee is hospitalized, a report must be made within 24 hours.
 - If an employee dies, a report must be made within eight hours.
 - Consider OSHA recording obligations.



Other Considerations for Reopening

Pre-Return Survey

- Consider a pre-return survey to help plan for the reopening.
- This survey may be used to identify:
 - The employee's preferences regarding a phased reopening.
 - Whether the employee may not be able to return to work due to childcare responsibilities, issues commuting, because they are at higher risk for COVID-19, etc.
- Additional considerations if the survey requests medical information.
 - Solicitation and confidentiality of medical information.

Preventing Discrimination and Harassment Claims

- Be particularly mindful when making employment decisions.
 - Ensure that decision-makers rely on objective criteria (and document).
- Employees may need new accommodations upon reopening.
 - Those with underlying conditions may be at increased risk for COVID-19 complications.
 - Examples of reasonable accommodations: continued remote work, additional PPE, erecting barriers, modifying job functions and/or work hours.
- Be careful to not inadvertently take adverse action on the basis of a protected characteristic.
 - Employers may only exclude a person at higher risk for COVID-19 due to a disability if:
 - (1) The employee's disability poses a "direct threat" to his health; and
 - (2) The threat cannot be eliminated or reduced by reasonable accommodation.

Preventing Discrimination and Harassment Claims (cont'd)

- **Age Discrimination in Employment Act (“ADEA”).**
 - Employers cannot involuntarily exclude an individual from the workplace because they are 65 or older, even to protect them from COVID-19.
 - Older employees are not entitled to reasonable accommodations.
 - However, employers may provide flexibility to older employees.
- **Pregnancy Discrimination.**
 - Employers also cannot involuntarily exclude a pregnant employee.
 - However, pregnant employees may be entitled to certain job modifications.
- **National Origin Harassment.**
 - Importance of training
- **Alternative Methods of Screening.**
 - If an employee requests an alternative method of screening due to a medical condition or religion, an employer should treat this as a request for reasonable accommodation.

Employees Refusing to Report to Work

- Generally, employers set the terms and conditions of employment, and can require employees to work in the office.
- Exceptions:
 - **ADA:** Employees with a qualifying disability may request reasonable accommodations.
 - No right to a reasonable accommodation for a family member with a disability.
 - **OSHA:** Employees may refuse to work if they believe they will be exposed to an imminent risk of death or serious injury that the employer failed to eliminate.
 - OSHA General Duty Clause
 - **NLRA:** Consider if group activity constitutes “protected concerted activity.”
 - **Whistleblower laws**
 - **Federal and State/Local COVID-19 laws**

Employee Liability Waivers

- Liability waivers are generally enforceable in New York.
- However, liability waivers between **employers and employees** in New York are void as against public policy.
 - They may be enforceable in other jurisdictions.
 - You may wish to ask employees to sign an acknowledgment regarding:
 - (1) Their voluntary return to the office; and/or
 - (2) Their consent to health screening procedures.
- Consider the employee and/or client relations perspective.
- Workers' Compensation May Also Apply

Layoffs and Furloughs

- If you are conducting a layoff or furlough, consult legal counsel to discuss:
 - EEO implications.
 - Benefits and pay issues (e.g., final wage payments).
 - Practical considerations:
 - Employee communications.
 - Return of property.
 - Managing employee exits.
 - Federal and State WARN laws, under which advance notice may be required.
- Upon return from a layoff or furlough:
 - Consider the extent to which a re-onboarding process is necessary.
 - Communicate with employees prior to the date of return.
 - Consider the impact on statutory leave entitlements and employee benefits.

Proskauer's Resources

- **Coronavirus Resource Center**

- <https://www.proskauer.com/market-solutions/coronavirus-covid-19-resource-center>

- **Proskauer Coronavirus Insights**

- <https://coronavirus.proskauer.com/>

- **Law and the Workplace Blog**

- <https://www.lawandtheworkplace.com/>

- Recent Coronavirus blog topics include:

- New York State's Plan to Re-Open Businesses
 - OSHA Guidance Regarding COVID-19 Recordkeeping Requirements
 - EEOC Guidance on COVID-19
 - Federal and State Coronavirus Leave Legislation

Your Questions





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