






Un-Pause Your Business

Key Steps and Preparations

Today's Topics

1.  Determining When & How to Open (First May Not Be Best)
2.  Ensuring Workplace Safety (CDC, OSHA, NYS, Oh My!)
3.  Navigating Legal Risks (It'd Be Nice to Have a Crystal Ball)
4.  Appointing Your TP Czar (It's Not What You Think!)
5.  Question & Answer (submit your questions now)

A New/Temporary Normal

- There is no playbook for what is going on right now
- We've not endured a global pandemic of this magnitude during our lifetime
- If you have watched the news, things are changing daily
- These legal updates are through today May 15th, 2020

Determining When and How to Reopen

First May Not Be Best

New York's Plan to "Un-Pause"

	"More-Essential" Industry	"Less-Essential" Industry
Low Infection Risk	Services/product <u>more essential</u> , <u>low risk</u> of workplace or customer infection spread	Services/product <u>less essential</u> , <u>low risk</u> of workplace or customer infection spread
Higher Infection Risk	Services/product <u>more essential</u> , <u>higher risk</u> of workplace or customer infection spread	Services/product <u>less essential</u> , <u>higher risk</u> of workplace or customer infection spread

New York's Plan to "Un-Pause"



New York's Plan to "Un-Pause" Tentative Dates

Phase I (May 15th)	Phase II (May 29th)
Phase III (June 12th)	Phase IV (June 26th)

New York's Plan to "Un-Pause"



The image is a screenshot of a video recording of Governor Andrew M. Cuomo speaking at a press conference. He is seated at a table with a microphone, wearing a dark suit and a blue tie. Behind him is a backdrop with the text "REGIONAL HEALTH" and "ROCHESTER REGIONAL HEALTH". To the right of the video frame, there is a blue overlay with white and yellow text. At the top right of the overlay is a small logo for "NEW YORK MAKING IT HAPPEN". The main heading in the overlay is "Additional Activities Ready to Reopen". Below this, it states: "New York will also reopen statewide certain low-risk business and recreational activities as of May 15, including:". This is followed by a bulleted list: "• Landscaping and gardening", "• Outdoor, low-risk recreational activities (i.e. tennis)", and "• Drive-in movie theaters". At the bottom of the overlay, there is a banner with the text "STAY HOME. STOP THE SPREAD. SAVE LIVES." in yellow and white.

REGIONAL HEALTH

ROCHESTER REGIONAL HEALTH

Governor Andrew M. Cuomo

NEW YORK MAKING IT HAPPEN

Additional Activities Ready to Reopen

New York will also reopen statewide certain **low-risk business and recreational activities** as of May 15, including:

- Landscaping and gardening
- Outdoor, low-risk recreational activities (i.e. tennis)
- Drive-in movie theaters

STAY HOME. STOP THE SPREAD. SAVE LIVES.

Options & Considerations

- Return when the shelter orders lift, at a later date, never?
- Make the return to work voluntary (for the time being)?
- Who from your employee base should return?
- Phased return to work? Rotating schedules (Blue Team, Orange Team, etc.)
- Even if the shelter orders lift, they may go back into effect

NYS Plans

- NYS is developing industry-specific plans for safe workplace
- <https://forward.ny.gov/>
- These plans & companion guidance address physical distancing, gatherings, workplace activity, movement & commerce, PPE, cleaning & hygiene, communications plan, testing & screening
- No need to submit plan to state agency for approval
- But...



New York Forward

Business Affirmation

Use this form to affirm business compliance with the New York Forward reopening guidance.

What industry does your company belong to? *

- ☐ Construction
- ☐ Manufacturing
- ☐ Retail - Curbside Pickup
- ☐ Wholesale Trade
- ☐ Agriculture, Forestry, Fishing and Hunting

Business Name *

Your Name *

First Name

Last Name

Phone Number *

Business Email Address *

Business Address

Street Address *

Ensuring Workplace Safety

CDC, OSHA, NYS, Oh My!

Ensuring a Safe & Hygienic Workplace

- Key sources of authority: CDC, OSHA, and NYS & local guidance
- OSHA's general duty clause: employers must provide, "*employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm.*"
- OSHA: Guidance on Preparing Workplaces for COVID-19:
<https://www.osha.gov/Publications/OSHA3990.pdf>

OSHA Recommendations

- Develop (or update) an Infectious Disease Preparedness and Response Plan
- Implement basic infection prevention measures
- Develop policies & procedures for prompt identification & isolation of sick employees
- Develop, implement & communicate workplace flexibilities & protections
- Implement workplace controls (engineering, admin, PPE)

Ensuring a Safe & Hygienic Workplace

- CDC:
 - Reopening Guidance for Cleaning and Disinfecting
https://www.cdc.gov/coronavirus/2019-ncov/community/pdf/Reopening_America_Guidance.pdf
 - Decision Tree for Cleaning
https://www.cdc.gov/coronavirus/2019-ncov/community/pdf/ReOpening_America_Cleaning_Disinfection_Decision_Tool.pdf
 - Interim Guidance for Businesses (last updated May 6, 2020)
<https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html>
 - Recommendation re: Use of Cloth Face Coverings
<https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/cloth-face-cover.html>

How Do You Create a Safe Workplace?

- Follow guidance and modify the workplace (+ policies, planning & training)
 - Consider reorganizing workspaces to provide appropriate distance and physical barriers
 - Assess employee lounge/cafe/common area layouts--limit access?
 - No-touch doors & receptacles; automatic faucets; hand sanitizer; wipes
 - Alter food & drink offerings
 - Reduce shared touching of objects
 - Increase cleaning & disinfection (+cleaning log)
 - Improve building ventilation
 - Post signs
 - Secure your supply chain
 - Work on shared space/visitor rules

Personal Protective Equipment (PPE)

- PPE is defined by OSHA as protective equipment that shall be provided, used, and maintained when necessary by reason of hazards in the environment capable of causing injury
- Employers must provide properly fitting PPE, or ensure employee-provided PPW is adequate and train employees on proper use
- Employers are also required to conduct workplace hazard assessments, and certify date of completion

Should Your Employees Wear Masks?

- Short answer, **YES**, where they cannot maintain social distance
- CDC's guidance: Everyone should wear a face covering in public where social distancing is difficult to maintain
- Should you provide employees with masks? **YES**.
- NYS is mandating face coverings requiring all employees and customers to wear masks if in frequent close contact with others

Protocols for Identifying & Responding to Symptomatic or Sick Employees: EEOC Guidance

- It is permissible to ask employees about symptoms associated with COVID-19 beyond fever or cough (e.g. nausea, diarrhea, vomiting, loss of smell/taste, body aches, chills)
 - But beware of singling out certain employees
 - If a particular employee is asked medical questions, ADA requires the employer to have a reasonable belief based on objective evidence the person might have the disease

Protocols for Identifying & Responding to Symptomatic or Sick Employees: EEOC Guidance

- Employees may refuse testing/answer questions
 - However, EEOC encourages asking the reasons for the employee's refusal and providing reassurance that employers are taking these steps for everyone's safety
- Keep all medical information separate, including any statements that an employee has or suspects having the disease and other documentation from questioning an employee about symptoms
- Consider potential accommodations & encourage self-monitoring

Temperature Check Protocols

- Temperature checks & questions about symptoms permitted under ADA exception
- Considerations for checks:
 - NYS does not require a notice to employees (some states like CA require this)
 - Consistent application is the key to avoiding claims
 - If feasible, perform scan remotely in private setting, ensure personnel have PPE
 - Maintain social distancing
 - Use non-contact temporal infrared thermometers
 - Ensure a threshold for fever (e.g. 100.4 degrees)
 - How often?
 - Confidentiality

Other Workplace COVID-19 Testing

Medical Testing

- Nasal Swab testing – at work vs. at home
- ADA and state law compliance issues
- Invasiveness of COVID-19 tests
- Privacy issues
- Safety concerns

Return to Work Certifications

- Can require a fitness-for-duty certification to return to work
- Consider accepting less time-intensive certifications (form, stamp or email certifications sanctioned by EEOC)

Antibody Testing

- Evolving area
- Considerations: differences from a temperature check; reliability issues; FDA imposing greater oversight; potential adverse impact issues; privacy risks
- EEOC has advised that employers following guidance from the CDC or other public health authorities are “acting consistent with the ADA”

Navigating Legal Risks

It'd Be Nice to Have a Crystal Ball

What if an Employee Refuses to Return to Work?

- Consider why employee is refusing to return to workplace
 - Generally, fear of contracting COVID-19 is not protected
 - What if employee is in a higher risk group (older, underlying medical condition)?
 - What if employee lives with family member who is in a higher risk group?
 - What if employee is pregnant?
 - What if employee can't return because of childcare obligations?
- Potential outcomes
 - Can you assuage or accommodate the concerns?
 - Work from home
 - Sick leave, PTO & leave of absence (plus FFCRA benefits)

What to do if there is an outbreak at work?

- **Be prepared, act quickly, and go remote again**
- **Inform impacted employees of potential exposure**
 - Retrace the infected employee's contacts over 14-day period
 - Identify & communicate risk of exposure by proximity to infected employee
 - Consider location-wide communications when contact is widespread
 - Don't identify by name!
- **Clean, clean, clean**
- **Return after 14+ days**
- **OSHA reporting?**

OSHA Recordkeeping & Reporting Obligations

- COVID-19 is a recordable illness that requires reporting to OSHA, but only if it is work-related, meaning contracted it at work
- April 10, 2020 guidance: most employers do not need to make work-related determinations except where:
 - There is objective evidence that a COVID-19 case may be work related, and
 - The evidence was reasonably available to the employer
- All employers must report work-related cases of COVID-19 that result in in-patient hospitalization (24 hours) or death (8 hours)
 - Annual reporting for less severe cases

Appointing Your TP Czar

It's Not What You Think!



TP Czar: Keep It Simple

- Training & Policies: The Return-to-Work Program Manager
- Understands the big picture
- Sets strategy & oversees execution
- Responsible for staying on top of evolving guidance & laws
- Oversees policies & training
- Ensures consistent messaging
- Acts as an escalation point
- Collaborates with legal, leadership, ops, facilities & HR
- Creates good evidence; mitigates against bad evidence

It's All About the Policies!

- Create a one-stop-shop for COVID policies
- Use posters for emphasis
- Create new policies
 - Phased return to work
 - Safety measures
 - Reporting complaints
- Update existing policies
 - Leave
 - Remote work
- Emphasize existing policies
 - Anti-discrimination, Code of Conduct, disability

Now Train on Those Policies-Keep it Simple!

- Employee training
 - Before return to work
 - Upon return to work
 - Signed acknowledgment
 - Simple communications
 - Reminders
 - Check-ins
 - Health & Wellness Programs
 - Specialized training for screeners, disinfection team, HR

Now Train on Those Policies-Keep it Simple!

- Management training
 - Expectations of managers
 - Knowledgeable & supportive
 - Training & FAQs
 - Consistent messaging
 - Enforcement of policies
 - Employee requests
 - Spotting & avoiding legal issues

Final Takeaways

- Form a plan for ensuring a safe & hygienic workplace consistent with CDC, OSHA and NYS guidelines
- Determine what you have, what you'll need and you'll restock
- Consider staggered return-to-work plans, schedule adjustments, & develop social distancing protocols
- Carefully consider both whether to require medical testing on return to work and more importantly how to implement testing & how results are used

Final Takeaways

- Get your house in order-appoint your TP Czar, set your plan, put together your policies and train, train, train
- Keep health data secure and limit sharing
- This is not the end! Keep abreast of guidance from regulators and agencies in the US and NYS

Question & Answer Session

**Today's materials
will be available at:**

<https://themarronelawfirm.com/covid19/>

Questions?

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