

REOPENING NEW YORK

A Question and Answer Session for NY Employers

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Today's Presentation Will Cover

- Re-Opening your Business: What to Consider
- Business Owners' Liability Risks
- HR COVID Related Liabilities
- Questions

“Unchecked litigation for any injury linked to the coronavirus would significantly increase uncertainty—for small businesses, nonprofits, corporations, universities, transit systems, shopping malls and retirement villages. All of them are trying to protect their people, serve the public, and preserve their organizations. Dealing with urgent needs, scarce information, and often dwindling resources, they make the best decisions they can. And now these businesses all face the threat of litigation for not only present decisions but even actions before the threat of coronavirus was evident. This is wildly counterproductive—and it will be expensive”.

What Won't Cure Corona: Lawsuits - Wall Street Journal

April 21, 2020 Evan Greenburg, CEO Chubb Insurance

When Can I Resume Operations?

New York State Phased Re-Openings

A phased reopening plan in the Mid-Hudson Region

**DUTCHESS COUNTY
REOPENS**



IMPORTANT STEPS EMPLOYERS MUST TAKE TO REOPEN:

- 1 Read the summary guidelines.
- 2 Read and affirm the detailed guidelines.
- 3 Print and fill out the business safety plan template and implement the plan. For guidelines and safety plan template, visit www.forward.ny.gov.

PHASE I

- ▷ Construction
- ▷ Agriculture, Forestry, Fishing & Hunting
- ▷ Retail Trade
*limited to curb side or in-store pickup or drop-off
- ▷ Manufacturing
- ▷ Wholesale Trade

WE ARE HERE
as of 5/26

PHASE II

- ▷ Offices
- ▷ Outdoor Dining Service
- ▷ Real Estate
- ▷ Essential & Phase II In-Store Retail
- ▷ Vehicle Sales, Leases & Rentals
- ▷ Retail Rental, Repair & Cleaning
- ▷ Commercial Building Management
- ▷ Hair Salons & Barbershops

**WE ARE TARGETED
TO BE HERE 6/9**

PHASE III

- ▷ Restaurants/Food Services

PHASE IV

- ▷ Arts/Entertainment/Recreation
- ▷ Education

Generally two week increments between phases if all metrics are met.

June 9, 2020 Phase Two Reopening

- The Mid-Hudson Region is on track to move into Phase Two on Tuesday, June 9. If you're an employer that is included in Phase Two, follow these important steps to prepare now. For help determining whether or not your business is eligible to reopen, use the reopen lookup tool [HERE](#).

- **You must follow these steps to reopen:**

Go to the NY Forward website [HERE](#).

1. Click on “Phase Two Guidance.”
 2. Select your industry by scrolling down on the left side navigation bar.
 3. Click on and read “View Summary Guidelines” for your industry.
 4. Click on and read “Read and Affirm the Detailed Guidelines” for your industry, and then click the link at the bottom of the page or [HERE](#) to complete the form and hit submit.
 5. Click on “Print Business Safety Plan Template” for your industry, and then print and fill out the template, and keep on file at your place of business.
 6. Implement the Safety Plan.
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Update Handbook Policies

- Review policies to ensure compliance with newly enacted laws, such as state and local paid sick leave laws based on COVID-19 related absences
 - Review or revise remote and telework policies
 - Create policies for when an employee becomes symptomatic, tests positive, or is potentially exposed to COVID-19
 - Policy should inform employees of measures to ensure their safety
 - Write policies regarding containment measures: temperature monitoring, handwashing, face mask usage
 - If employers are implementing COVID-19 testing, detail policies regarding frequency, location, testing, HIPAA protections, etc
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Potential HR Related COVID Claims

- **OSHA:** Identify internal and external potential sources of exposure to workers. Develop policies and procedures for prompt identification and isolation of employees who self-report symptoms and illnesses.
- **FLSA:** Clearly identify expectations of hourly employees who temporarily work from home. For example:

Is there a cap on hours worked?

How should they record their time?

What are expectations of their productivity?

Also, remind employees that working from home is not a substitute for leave and how to request paid time off and/or FMLA consistent with your policies when they are unable to work from home due to illness or for personal reasons. Employers should determine whether to extend, modify or adjust paid time off policies to provide additional paid time benefits to employees on a temporary basis.

Title VII: There is potential for racial and national origin profiling and comments among employees, particularly towards those individuals perceived or believed to be from countries where COVID-19 originated. It is important to remind employees not to engage in inappropriate discussions or rumors about coworkers and to restate your expectations for maintaining a respectful workplace.

Potential HR Related COVID Claims

- **ADA:** Determine the essential functions of job positions, whether they are conducive to working from home. Remind key managers of the dangers of concluding an employee who exhibits common symptoms has COVID-19 from a “regarded as” disabled stand point.
 - **FMLA:** Review possible scenarios that would require unexpected employee leaves and whether the leave is Family and Medical Leave Act (FMLA)
 - **Workers’ Compensation:** Consult with your workers’ compensation insurance administrator to determine when COVID-19 is a work-related injury that needs to be reported. To be reportable to WC, the disease must be “occupational,” meaning it arose out of and was in the course of employment. The illness or disease must arise out of or be caused by conditions peculiar to the work and creates a risk of contracting the disease in a greater degree and in a different manner than in the public generally. Unless employees are exposed to the virus by the nature of their profession (health care workers, first responders, etc), COVID cases will most likely not be covered by WC
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Potential Claims by Customers, Vendors and Other Third Parties

- Premise Liability Statutes – Create duty to make your property safe for customers, vendors and others who you allow to enter your business. In the context of COVID 19, premises liability claims can be asserted if business owners fail to properly protect their visitors from COVID 19 exposure, fail to warn about risks such as those created if an employee has been infected or fail to take steps to identify those who might have contracted COVID-19 who pose a risk to other visitors.
 - Negligence Based Claims – Can arise where a business owner puts a visitor at risk or fails to reasonable act when the risk of harm was reasonably foreseeable.
 - State Consumer Protections Acts and Misleading Advertising Claims – Claims could arise from statements made by businesses. If a business is advertising that it is taking precautions to protect customers, care must be taken to be factually accurate.
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Why Documentation is SO Important

- When paying employees ePSL or EFLMA time, make sure to “code” the pay in your time card system.
 - The FFCRA provides that employers may recapture benefits paid towards emergency paid sick leave or expanded FMLA protections through a refundable tax credit, applied against the employer’s Federal Insurance Contribution Act (or “FICA”) taxes.
 - The extent of these credits aligns with the amounts to be paid eligible employees. In other words, for those employees eligible to receive emergency paid sick leave benefits up to \$511 per day, the employer may claim a credit up to \$511 per employee per day, and for those employees eligible to receive emergency paid sick leave or expanded FMLA benefits up to \$200 per day, the employer may claim a credit up to \$200 per employee per day. These credits can be claimed by employers each quarter.
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GUIDANCE FOR CLEANING & DISINFECTING

PUBLIC SPACES, WORKPLACES, BUSINESSES, SCHOOLS, AND HOMES



SCAN HERE FOR MORE INFORMATION

1 DEVELOP YOUR PLAN

DETERMINE WHAT NEEDS TO BE CLEANED.

Areas unoccupied for 7 or more days need only routine cleaning. Maintain existing cleaning practices for outdoor areas.

DETERMINE HOW AREAS WILL BE DISINFECTED. Consider the type of surface and how often the surface is touched. Prioritize disinfecting frequently touched surfaces.

CONSIDER THE RESOURCES AND EQUIPMENT NEEDED. Keep in mind the availability of cleaning products and personal protective equipment (PPE) appropriate for cleaners and disinfectants.

Follow guidance from state, tribal, local, and territorial authorities.

2 IMPLEMENT

CLEAN VISIBLY DIRTY SURFACES WITH SOAP AND WATER prior to disinfection.

USE THE APPROPRIATE CLEANING OR DISINFECTANT PRODUCT. Use an EPA-approved disinfectant against COVID-19, and read the label to make sure it meets your needs.

ALWAYS FOLLOW THE DIRECTIONS ON THE LABEL. The label will include safety information and application instructions. Keep disinfectants out of the reach of children.

3 MAINTAIN AND REVISE

CONTINUE ROUTINE CLEANING AND DISINFECTION. Continue or revise your plan based upon appropriate disinfectant and PPE availability. Dirty surfaces should be cleaned with soap and water prior to disinfection. Routinely disinfect frequently touched surfaces at least daily.

MAINTAIN SAFE PRACTICES such as frequent handwashing, using cloth face coverings, and staying home if you are sick.

CONTINUE PRACTICES THAT REDUCE THE POTENTIAL FOR EXPOSURE. Maintain social distancing, staying six feet away from others. Reduce sharing of common spaces and frequently touched objects.

For more information, please visit [CORONAVIRUS.GOV](https://www.cdc.gov/coronavirus)



What Monitoring Protocols Should We Have?

Sick employees should stay home!

Establish routine, daily employee health checks

Monitor absenteeism and have flexible time off policies

Have an action plan if an employee tests positive/ presumptive positive for COVID-19

Create and test emergency communication channels for employees

Establish communications with state and local authorities

Be prepared to close quickly if needed to based on applicable guidelines

Which Employees Should Return First?

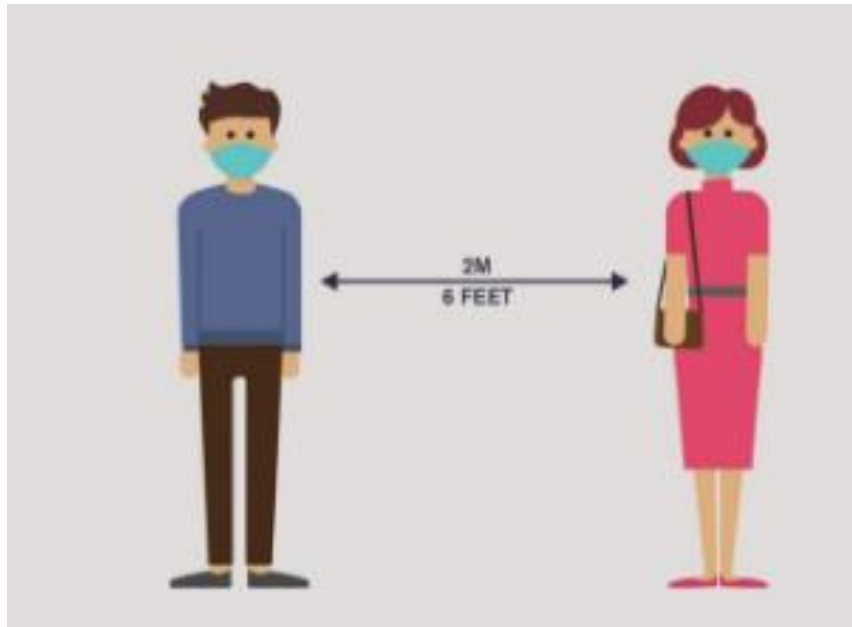
Base decisions on who should return to work on the following criterion:

- Business need
- Compliance with ongoing restrictions regarding limitations of operations to “essential business”
- Compliance with health precautions such as social distancing

DOCUMENT the selection process to provide evidence of non-discriminatory selection criteria

What Employee Guidelines Will be Required?

- Social distancing rules – Communicate these rules electronically or in hardcopy at workstations and common areas
- Employees should acknowledge receipt of rules
- Train supervisors on how to enforce social distancing rules
- Employers may require employees to wash hands at specified frequencies, following recommended practice



COVID 19 Tests in the Workplace

The EEOC has approved use of the following screening mechanisms if completed in a manner that is consistent with the EEOC guidance including confidentiality of medical information:

Screening for Symptoms: Employers may ask employees entering the workplace about any symptoms identified by public health authorities as associated with COVID-19. For instance, employers may ask employees about fever, cough, shortness of breath, loss of smell or taste, as well as gastrointestinal problems such as nausea, diarrhea and vomiting. Employers must maintain the confidentiality of any notes or documentation related to this screening.

COVID-19 Tests: Employers may administer a COVID-19 test (designed to detect the presence of the COVID-19 virus) before permitting employees to enter the workplace without running afoul of the Americans with Disabilities Act. Employers considering this course of action should review [guidance from the U.S. Food and Drug Administration](#) concerning safe and accurate testing.

Temperature Checks: Employers may require all employees to have a daily temperature check before entering the workplace and may maintain a log of the results. Again, employers must maintain the confidentiality of this medical information.

All medical information about a particular employee, including information relating to COVID-19, should be stored separately from the employee's personnel file, thereby limiting access to this confidential information. However, employers may store medical information related to COVID-19 in existing medical files and need not create a new file system solely for this information.

COVID 19 in the Workplace

New CDC Recommendations

The CDC has learned that asymptomatic and pre-symptomatic individuals can be highly contagious and spread the disease when “interacting in close proximity—for example, speaking, coughing, or sneezing—even if those people are not exhibiting symptoms.”[1] Face coverings may capture droplets and minimize some exposures to the virus.[2] Accordingly, the CDC “advises the use of simple cloth face coverings to slow the spread of the virus and help people who may have the virus and do not know it from transmitting it to others.”[3] Further, the CDC “recommends wearing cloth face coverings in public settings where other social distancing measures are difficult to maintain (e.g., grocery stores and pharmacies) especially in areas of significant community-based transmission.” These “cloth coverings” are not surgical masks or filtering face-piece respirators which are “critical supplies” that the CDC recommends be limited to use by healthcare workers.

COVID 19 in the Workplace

Employer Safety Challenges from Face masks

Under the Occupational Safety and Health Act, employers have a general duty to provide a workplace free from recognized hazards likely to cause serious physical harm or death. As we have consistently recommended, employers can help ensure compliance with their legal duties regarding COVID-19 by carefully tracking the CDC recommendations, communicating hazards and agency recommendations to employees, and training employees on safety measures such as including PPE.

ADA Liabilities

Employees with compromised immune systems and respiratory conditions may be at heightened risk from community transmission of COVID-19. In workplaces that have not permitted voluntary use of face masks, these employees may request to use face masks as a reasonable accommodation. Employers will be required to engage in a robust interactive process and come to a determination as to whether a face mask is a reasonable accommodation or cannot be allowed, for example, if the face mask presents a direct threat due to the health of that employee or an entanglement hazard.

COVID 19 in the Workplace

Whistleblower / Retaliation Liabilities

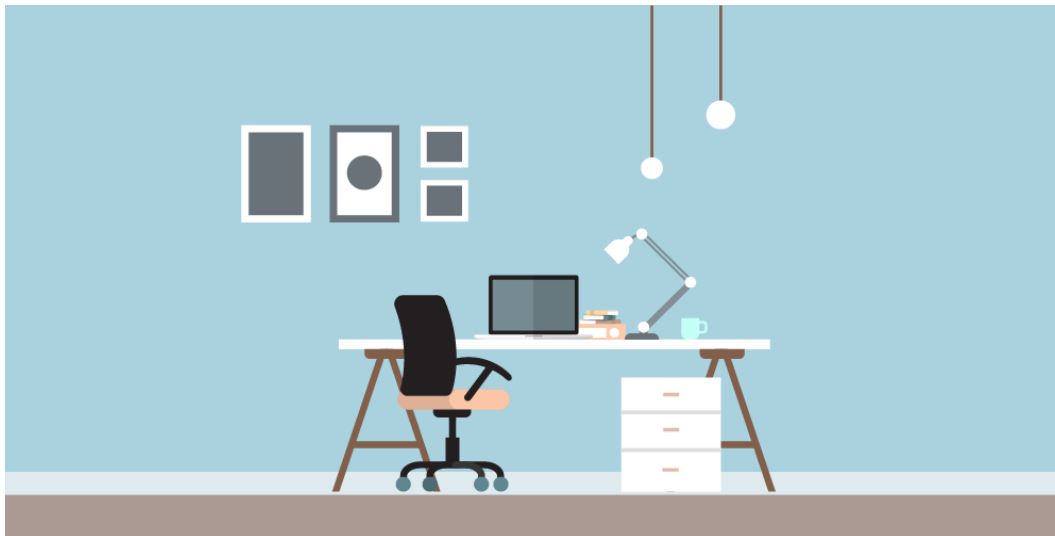
Employees may bring claims for retaliation under Section 11(c) of the Occupational Safety and Health Act if they are not allowed to wear a face mask or are sent home for refusal to wear a company-provided face mask. To state a prima facie case for OSHA retaliation, an employee must establish (1) a protected activity, such as making internal safety complaints, complaining to OSHA, or refusing to perform unsafe tasks, (2) an adverse employment action, and (3) causal connection between the two. The Act gives employees the right to file a whistleblower claim with OSHA within 30 days of the adverse employment action. The agency will then conduct an investigation of the claim; there is no private cause of action under the Act. As to protected activity, employees may complain if they are not permitted to wear face masks or may refuse to perform functions where they work in close contact with others without face masks. Employees generally do not have the right to walk off the job or refuse to attend work entirely on account of a safety concern once the employer demonstrates that it has a program to protect the employee against the hazard. The employee may only refuse to perform specific tasks for which the employee has an objectively reasonable safety concern that the employer has not yet addressed. Accordingly, employers implementing face mask policies must be aware of these potential retaliation issues.

What if the Employee Needs COVID Leave after We Re-Open?

- If the employee becomes ill after re-opening, they still may be eligible for Federal Emergency Paid Sick Leave or other state or local leave or paid leave entitlements.
- If the employee needs to care for someone who is ill or has to take care of a dependent whose school is closed, they may be eligible for Federal Emergency Paid Sick Leave and Emergency FMLA

Can Employees Continue to Work Remotely?

- Yes
- OSHA recommends flexible worksites to increase physical distance among employees
- Many employees may request to continue working remotely
- Consider in advance how to handle such requests, taking into account the Americans with Disabilities Act's (ADA) reasonable accommodation requirements for individuals with disabilities



Working from Home - What to Consider

Making the Decision

- Review existing resources, applicable policies, and customer agreements to determine if remote work is feasible, prudent, and contractually permissible
- Have a plan for resources, communications, expense reimbursements, etc
- Review insurance policies (benefits, WC, cyber) to ensure coverage
- Stay on top of development as plans may need to be changed

Confirm IT infrastructure can support remote work

Communicate clearly and consistently

- Ensure critical lines of communication btw management are open
- In the course of developing communications to employees, examine existing policies closely, such as confidentiality, written information security programs, business continuity, BYOD, etc
- A localized approach may be warranted based on local conditions
- Provide employees system access instructions and where to go for help
- Be understanding and solution-oriented

Ensure data privacy and security

Work from Home Regulations & Policies

- Make sure to comply with all applicable federal, state, and local wage laws
- Pay hourly employees for “waiting time” or “on-call” time (is the employee “engaged to wait” or “waiting to be engaged”)
- Salary exempt employees must be paid for full days in which they engage in work

Covid-19 Cyber Insurance: Do you have the right coverage?

- Most organizations are now requiring that their employees work from home with the ongoing novel coronavirus disease (COVID-19) pandemic.
- However, in the event of a breach or other incident, there may be limitations in your cyber liability insurance policy based upon the type of hardware being used.
- As with all contracts, whether there is coverage or not will depend on the specific terms and conditions of the insurance policy itself.

What Cyber Insurance coverage do you have?

Steps to Minimize Liability Risk

- Know the scope of your insurance coverage
 - Follow Federal, State, County and City guidance on conducting business during this time.
 - Training is important
 - Review indemnification obligations and understand if those obligations are insured.
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Questions?
