

**Memorandum
Office of the Westchester County Attorney**

Date: May 26, 2020

Re: Mid-Hudson Regional Reopening

The purpose of this Memorandum is to discuss the guidelines that will go into effect once the Mid-Hudson Region begins Phase I of reopening, and discuss how those guidelines can be enforced. This is not a formal legal opinion, but is offered as guidance based upon this Office's consideration of the issues. Municipalities are urged to consult with their own attorneys and law enforcement officials on these issues, as well as the District Attorney's office.

BACKGROUND

The Governor of New York has outlined four "phases" by which each region of the state will reopen its economy. Each phase allows for the opening of different industries:¹

Phase One:

- Construction
- Agriculture, Forestry, Fishing and Hunting
- Retail (Limited to curbside or in-store pickup or drop off)
- Manufacturing
- Wholesale Trade

Phase Two:

- Professional Services
- Retail
- Administrative Support
- Real Estate / Rental & Leasing

Phase Three:

- Restaurants / Food Services

Phase Four:

- Arts / Entertainment / Recreation
- Education

¹ <https://forward.ny.gov/industries-reopening-phase>

Phases will last a minimum of two weeks.² Several regions (Central New York, Finger Lakes, Mohawk Valley, North Country, Southern Tier and Western New York) began Phase One last week; no regions have progressed to Phase Two.

In order to begin Phase One, the Mid-Hudson Region (which encompasses Westchester, as well as Rockland, Orange, Putnam, Sullivan, Ulster, and Dutchess Counties) must meet seven separate benchmarks. As of May 24th, we had met all but one: the requirement for at least 30 contact tracers per 100,000 residents.³ Over Memorial Day Weekend, New York State announced that the “Mid-Hudson Region is on track to enter Phase One of reopening Tuesday, May 26th.”⁴

APPLICABLE LAW

On March 7, 2020, Governor Cuomo declared a state of emergency in New York due to the COVID-19 pandemic. Pursuant to this declaration and Section 29-a of the New York State Executive Law, the governor has issued a series of executive orders (“EOs”); there are 31 to date. A complete list of the EOs is available online;⁵ some of the most relevant provisions include:

- a ban on social gatherings “of any size for any reason” (EO 202.10);
- a requirement to wear a mask or face covering on public transportation (EO 202.18);
- closure of “in-office personnel functions” for non-essential businesses (EO 202.13);
- a requirement for local municipalities to allow “non-essential personnel, as determined by the local government, to be able to work from home or take leave without charging accruals” (EO 202.4);
- a requirement that “[f]or all essential businesses or entities, any employees who are present in the workplace [] be provided and shall wear face coverings when in direct contact with customers or members of the public” (EO 202.16); and
- enforcement mechanisms remain in effect until June 13, 2020 unless extended or amended by the governor (EO 202.31).

² <https://www.governor.ny.gov/news/amid-ongoing-covid-19-pandemic-governor-cuomo-outlines-phased-plan-re-open-new-york-starting>

³ <https://forward.ny.gov/regional-monitoring-dashboard>

⁴ <https://coronavirus.health.ny.gov/home>

⁵ <https://www.governor.ny.gov/executiveorders>

Certain EOs include enforcement provisions. For example, EO 202.16 states that it “may be enforced by local governments or local law enforcement as if it were an order pursuant to section 12 ... of the Public Health Law.” Section 12(1), in turn, provides that a violation of “any lawful notice, order or regulation ... shall be liable ... for a civil penalty of not to exceed two thousand dollars for every such violation.”

Similarly, EOs 202.17 and 202.18 provide that violations of business closure orders are punishable under Public Health Law § 12-b, which provides that a business or individual who “willfully violates or refuses or omits to comply with any lawful order ... is guilty of a misdemeanor ... punishable by imprisonment not exceeding one year, or by a fine.” For a more detailed discussion of potential enforcement mechanisms, please refer to our April 17, 2020 Advisory Memorandum.

REOPENING GUIDANCE

As noted above, Phase One includes the Construction, Agriculture, Forestry, Fishing and Hunting, (limited) Retail, Manufacturing, and Wholesale Trade industries. New York State has developed a tool to help business owners determine if they fall within these designated industries.⁶

New York State has also developed detailed re-opening guidelines for each industry;⁷ businesses must “affirm that [they] have read and understand [their] obligation to operate in accordance with this guidance.”⁸ Each reopening business must also:

develop a written Safety Plan outlining how its workplace will prevent the spread of COVID-19. ... This plan does not need to be submitted to a state agency for approval but must be retained on the premises of the business and 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.⁹

⁶ <https://www.businessexpress.ny.gov/app/nyforward>

⁷ <https://forward.ny.gov/industries-reopening-phase>

⁸ <https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/ConstructionMasterGuidance.pdf>

⁹

https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/NYS_BusinessReopeningSafetyPlanTemplate.pdf (emphasis added)

Essential businesses that have remained open to date can remain open, but must adhere to the guidelines set forth for their industry.¹⁰ Notably, even essential businesses will not be allowed to remain open if they “cannot procure the required protective equipment.”¹¹

New York State’s Department of Labor (“DOL”) has established an online complaint system¹² for employees faced with any of the following situations:

- You are being forced to work at a non-essential business
- You know about a business that is non-essential and is operating
- You are being forced to work for an essential business, however:
 - You do not perform an essential function
 - Your employer is making you report to a worksite when your job could be performed from home
 - Your employer is not following health and safety mandates
 - You are particularly frightened because you are over 70 and/or you have an underlying illness
- Your employer has failed to pay you wages owed for hours worked, earned sick pay or paid time off
- Your employer has threatened or fired you for reasons related to COVID-19
- You qualify for COVID-19 paid sick leave and your employer refuses to pay it
- Your employer is forcing you to work when you are sick

Similarly, New York State has created an online complaint system for anyone “aware of any non-essential gatherings or any non-essential businesses or entities operating in violation of New York on PAUSE.”¹³ “These complaints are reviewed for completeness, accuracy, and applicability under the [EOs], and then referred to local authorities (as designated by the county leadership) by a team of investigators from multiple state agencies.”¹⁴ Westchester County, in turn, refers the complaints to the applicable city, town, or village (or County department).

To date, we are unaware of any DOL actions against businesses for non-compliance with the governor’s EOs. Further, we are unaware of any actions by the Office of the New York State

¹⁰ See <https://esd.ny.gov/nyforward-faq>

¹¹ See *id.*

¹² <https://labor.ny.gov/workerprotection/laborstandards/coronavirus-complaints.shtm>

¹³ <https://coronavirus.health.ny.gov/new-york-state-pause>

¹⁴ http://dmna.ny.gov/covid19/docs/all/EXEC_COVID19_PAUSEEnforcement_040120.pdf

Attorney General, beyond the sending of cease-and-desist letters. Accordingly, we believe that primary enforcement responsibility will remain with local (county, city, town, and village) law enforcement. The EOs themselves, however, do not specify a procedure for enforcing the phased reopening guidelines.

Upon receipt of a complaint against a business, local municipalities may consider dispatching law enforcement officers to verify the complaint and confirm whether the business has created the requisite written Safety Plan. If the business: 1) has not created the requisite Safety Plan; 2) is not following its Safety Plan; or 3) otherwise appears to be in violation of the EOs (*e.g.* it is non-essential, or is not utilizing masks), the law enforcement officers may explain the nature of the specific violation(s) to the business owner or manager.

Municipalities may wish to consider warning businesses that EO violations are misdemeanors under Public Health Law § 12-b, punishable by imprisonment or a fine, or may simply forego a warning depending on the seriousness of the violation(s). Municipalities may also consider subsequently dispatching law enforcement officers to follow up with businesses, on location, to ensure compliance.

As a final note, compliance with the state's reopening directives can be coordinated through local chambers of commerce and direct outreach by local municipalities to their small businesses.