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Employer liability during Phase Four of reopening in New York City - by Mark Silverstein and Lynn Judell

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Mark Silverstein

Lynn Judell

New York City has just reached an important milestone. As of July 20th, the city has entered Phase Four of reopening, in which retail businesses, hair salons and personal service businesses, low-risk outdoor venues (zoos and gardens), media production companies (film, music and television), sports (without fans) and libraries (for grab and go service) are allowed to re-open. Office-based jobs, which re-opened, with restrictions, in Phase Two continue to re-open but are still restricted to welcoming back up to 50 percent of their employees. Social distancing measures must be in place,

employees will likely wear masks as they move around the office, and employees will be spaced throughout the office, perhaps necessitating repurposing of cafeterias and conference rooms. In fact, employers are required to have a supply of face masks on hand at no-cost to employees. While this is an extremely positive step, it raises important issues and considerations for employers. Top on the list is ensuring that employees are safe and feel safe. At the same time, employers must follow guidelines as best as possible to reduce their potential liability in the event that an employee contracts COVID-19.

While this is a major step forward for the city, moving us closer to a new normalcy, offices are required to comply with numerous guidelines and safety precautions, ranging from social distancing and protective gear to testing and hygiene.

Employers must consider implementation of many different safety precautions. Occupancy in the office cannot exceed 50% of the maximum occupancy for a particular area as set by the certificate of occupancy, and social distancing must occur even with an office is at half capacity. Employers are encouraged to implement staggered arrival times to reduce crowding in lobbies and elevators. Everyone must wear protective face covering while they are in a public work area and not able to maintain a social distance. However, different businesses have different mask requirements; some more intense than others. Many businesses are requiring employees to wear masks as they move around the office, but not while at their desks.

Employers are required to work with building managers to screen employees—conducting temperature checks, for example—before they enter the workplace. At a minimum, on a daily basis, all employees and visitors must complete a self-certification that seeks information, for example, as to whether the person has been experiencing COVID-19 symptoms. What an employer does with these records is important because they represent protected health information. In-person gatherings, such as meetings and conferences, must be restricted and should be avoided. It is also advised that businesses use tape markers to reduce foot traffic in the workplace and post signs informing employees on protocol. Many businesses are implementing one-way traffic patterns to reduce interaction and exposure.

Employers should also try to reduce touch points. For example, leaving interior doors propped open or setting them in a way to be pushed without turning a knob or handle should be considered. Some employers are also providing employees with devices that can be used to turn door handles and press keypads and touchpads.

Employers also are required to report potential positive cases of COVID-19. If and when there is a positive case in the workplace, employers must notify state and local health services so that contact tracing can be conducted. However, individuals who test positive are entitled to discretion and privacy, and employers must ensure employee anonymity within the bounds of the law. If an employee shows symptoms consistent with COVID-19, employers are required to contact a building manager with further information.

The scope of city, state and federal guidelines, combined with industry best practices, create a

significant burden on employers and raise numerous questions and concerns. How does an employer effectively enforce social distancing measures in the workplace? Who is in charge of medical safety precautions such as temperature checks, and how does one become qualified to conduct these tests? What privacy considerations are triggered when employers are gathering personal health information of their employees? What happens when a mistake is made and an employer fails to fully follow protocols?

Some guidance, but not all the answers, can be found in the New York Interim Guidance for Office-Based Work During the COVID-19 Public Health Emergency, which can be found at <https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/offices-interim-guidance.pdf>.

Employers must have at least one responsible person take charge of complying with these guidelines and there is a link at the very end for an employer to “affirm that you have read and understand your obligation to operate in accordance with this guidance.” One aspect of these guidelines is to have a Safety Plan. A model template is available at https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/NYS_BusinessReopeningSafetyPlanTemplate.pdf. Whether or not an employer uses this template for its Safety Plan, the plan must be posted “conspicuously” in the office.

As stated above, there are still a number of unknowns. If an employee tests positive for COVID-19, is it a workers’ compensation issue, or are employers at risk of being sued for failing to maintain safety measures? Should employers encourage employees to return to in-person work places, or does this increase their liability if something goes wrong? Will workplace-return waivers help employers if they are sued? What if an employee refuses to sign the waiver?

Employers are responsible for their employees’ health in a way they could not have imagined six months ago, and liability issues have been increased. We are in new territory, and there are no concrete answers to the seemingly endless list of questions employers will face. Most scenarios require specific case-by-case solutions, and there is no one-size-fits-all answer. However, it is critical for employers to demonstrate caution and care as they reopen their offices at a time of extraordinary uncertainty.

Mark Silverstein is a partner, and Lynn Judell is of counsel at Schwartz Sladkus Reich Greenberg Atlas LLP (SSRGA LLP), New York, N.Y.

New York Real Estate Journal - 17 Accord Park Drive #207, Norwell MA 02061 - (781) 878-4540