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BULLETIN

To: Membership of Allied Building Metal Industries, Inc.

From: Steven N. Davi

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Re: COVID-19: Update No. 21: Reopening New York Construction and Returning Employees Back to Work

During the last week of April into the first week of May, 2020, New York Governor Andrew Cuomo released an initial [soft blueprint](#), and then more specific [regional guidelines](#), regarding his “[New York Forward](#)” Plan for the reopening of non-essential economic activity in New York. As we advised in our detailed Bulletin and related email advisories on May 11, the key features of the governor’s plan are as follows:

- the state is divided into [ten geographic regions](#);
- within each region, the reopening of non-essential economic activity is intended to unfold in four coordinated “phases;”
- each of the four phases is arranged by industry sector, with priority given to industries deemed to have a greater economic impact and a lower risk of exposing employees and customers to infection. A total of twelve industry sectors have been designated across phases one through four. Construction and manufacturing are positioned first and second, respectively, at the top of Phase One;
- no region will be deemed eligible to begin the phased reopening of non-essential economic activity until it has satisfied seven specific public health and safety metrics established by the NYS Department of Health (“DOH”), as detailed in our May 11 Bulletin;
- a real-time [tracking](#) mechanism is in place to monitor each region’s progress toward satisfying DOH’s seven public health and safety metrics;
- once a given region has met all seven of the public health and safety metrics, such region shall be deemed eligible to begin a phased reopening, starting with Phase One; and
- there will be a two-week monitoring period between each phase of the four-phase reopening plan to ensure that hospitalization and infection rates remain stable. If these indicators become problematic, a regional oversight institution will have the authority to slow down or stop the reopening process.

Phase One Commences: Construction

On Thursday evening, May 14, 2020, by [Executive Order No. 202.31](#), the governor further extended the New York On PAUSE in-person workforce reductions and restrictions on non-essential businesses in the state from May 15 through and including May 28; provided, however, that Phase One industries including construction,¹ within geographic regions that satisfy the prescribed public health and safety metrics set forth above by DOH, are cleared to begin the process of reopening effective at 12:01 a.m. on Friday, May 15, 2020. “If a region hits its benchmark at any time, regardless of the pause order, that region can reopen,” Governor Cuomo stated at a press conference Friday morning, May 15, announcing the extension.

To date, seven of the ten geographic regions across the state have satisfied the prescribed public health and safety metrics and have entered Phase One reopening of non-essential work. No region of the state has yet moved to Phase Two. Of the three regions that have not satisfied the prescribed public health and safety metrics, the governor announced yesterday that two of them – Mid-Hudson and Long Island – are on track to meet the last two remaining metrics, and thus, could be cleared to enter Phase One and begin reopening non-essential economic activity on Tuesday or Wednesday of this coming week.²

This would leave New York City as the only region not yet cleared to begin re-opening non-essential economic activity. As of this writing, New York City has met only four of the seven metrics for reopening. Accordingly, as has been widely reported, New York City will likely not be in position to begin the process of reopening Phase One non-essential construction before the first or second week of June, 2020. See attached.

State COVID-19 Reopening Guidance: Construction

Simultaneous with the issuance of Executive Order 202.31, the state also issued [Reopening Guidance](#) on its website for each industry designated for reopening in Phase One including construction.³ As discussed in more detail below, the Reopening Guidance makes clear that every business or entity, including essential businesses that remained open during the shutdown, must develop a written safety plan outlining how it will prevent the spread of COVID-19. The plan need not be submitted to a state agency for approval but must be conspicuously posted onsite, retained on the premises of the business, and made available to DOH or local health or safety authorities in the event of an inspection.

¹ According to relevant guidance, construction is defined to include building equipment contractors; building finishing contractors; foundation, structure, and building exterior contractors; highway, street and bridge construction; land subdivision; nonresidential building construction; residential building construction; and utility system construction. Phase One businesses also include agriculture, forestry, fishing and hunting; retail for delivery and curbside pick-up for certain specifically-defined businesses; manufacturing; and wholesale trade.

² Moreover, the governor made clear during his remarks on Friday, May 22, that construction “staging” in the Long Island and Mid-Hudson regions can begin now. “Before you can begin construction, you have to have staged the construction. The materials have to be on site, et cetera, the safety precautions have to be on site,” Governor Cuomo said. “So we’re going to allow that construction staging now for the Long Island and the Mid-Hudson [regions].”

³ It is worth noting, the Reopening Guidance only applies to non-essential businesses. Businesses already deemed essential by the Empire State Development (“ESD”) Corporation’s [guidance](#) – and those that support essential businesses – have remained open during the shutdown and will continue to remain open during the phased reopening. However, *all* businesses (including essential businesses) will be required to implement health and safety plans, as discussed in more detail below.

The Reopening Guidance relating to construction consists of three key features, as follows;

1. [Summary Guidelines](#) (attached) explaining which safety practices are mandatory and which safety practices are merely recommended;
2. [Interim Guidance \(and Affirmation\)](#) (attached) directing employers to develop a written safety plan outlining how its workplace will prevent the spread of COVID-19, setting forth “minimum” health and safety requirements in this regard (any employer is free to provide additional precautions or increased restrictions), and concluding with a link for covered businesses to affirm via an online form that they have read and understand their obligation to operate in accordance with the State’s guidance;⁴ and
3. [Safety Plan Template](#) (attached) that businesses may but are not required to use to fulfill the written safety plan mandate.

The state has also issued on its website a “[Reopening Lookup Tool](#)” that employers can use to determine whether or not their business is permitted to reopen.

According to the Reopening Guidance, Phase One construction businesses that are now eligible to reopen pursuant to Executive Order 202.31, as well as construction businesses statewide that were previously permitted to operate as essential, must, in addition to a number of other precautions:

- Post social distancing markers that denote six feet of spacing in commonly used areas;
- Provide acceptable face coverings at no cost to employees and maintain an adequate supply of replacements;
- Conduct regular cleaning and disinfecting at least after every shift, daily, or more frequently as needed; and more frequent cleaning and disinfecting of shared objects, surfaces, and high-transit areas;
- Post signage throughout the worksite to remind personnel to adhere to proper hygiene and cleaning practices, social distancing rules, and appropriate use of personal protective equipment (PPE);
- Implement mandatory health screening assessments before employees begin each workday and for essential visitors, which must be reviewed and documented every day, asking about: (1) COVID-19 symptoms; (2) positive COVID-tests; and (3) close contact with a confirmed or suspected COVID-19 case within the past 14 days;
- If an employee tests positive for COVID-19, immediately notify state and local health departments and cooperate with contact tracing efforts, while maintaining confidentiality required by applicable state and federal law and regulations; and

⁴ The affirmation is somewhat of a curiosity at this point. For example, it is unclear whether it is mandatory or who is supposed to sign it (owner, developer, general contractor/construction manager, subcontractor, or all of the above). Moreover, since the affirmation, as designed, is an online form automatically submitted to the DOH upon its execution, it is also unclear what the state intends to do with executed affirmations, including whether it intends to utilize them (or the lack thereof) as an enforcement tool relative to a given business. We will provide additional information regarding the affirmation as soon as it becomes available.

- Implement a plan for cleaning, disinfecting, and contact tracing in the event of a positive case.

As stated above, after developing a health and safety plan, covered employers must post the plan in a conspicuous place on-site⁵ and affirm via an online form that they have read and understand their obligation to operate in accordance with the State's guidance.

The above Reopening Guidance tracks in large part the remobilization plan and COVID-19 health and wellness protocols that were developed over the past several weeks through the coordinated efforts of the BCTC and REBNY, with substantial input from the BTEA and individual trade associations including Allied, and that were submitted to the governor's office for approval in late-April, early May. We have reported on these industry developments relating to remobilization in previous Bulletins. The Reopening Guidance also fits with many of the practices already in place on union essential construction projects that have remained active despite the New York ON PAUSE mandate. As of the week ending May 15, the NYC Department of Buildings estimated there were approximately 7,800 active essential construction sites within the five boroughs.

Enforcement

As we have previously advised, employers should make preparations regarding their safety plans, particularly with respect to procuring PPE and other materials that are necessary to operate safely. According to an [FAQ](#) recently issued by the ESD, businesses that cannot fully comply with the Reopening Guidance will not be eligible for waivers. Businesses that are having trouble complying because they cannot procure an adequate supply of PPE are encouraged to contact the Allied office directly.

The governor's website is currently inviting individuals to submit complaints through an online form against businesses that do not comply with the Reopening Guidance. These complaints will be reviewed by a team of investigators from multiple state agencies and then referred to local authorities, which will then be responsible for responding to the alleged violations. For continued or egregious non-compliance, local law enforcement will be empowered to enforce the Reopening Guidance. Compliance with the Reopening Guidance will also be monitored by an oversight institution to be appointed within each region.

We will continue to monitor and report on all material and relevant developments concerning these matters as they arise.

⁵ There is some uncertainty here as well. Since the relevant guidelines generally do not delineate or allocate who (owner, developer, general contractor/construction manager, subcontractor, all of the above) is responsible for implementing which protocols on a multiemployer construction site, mandatory practices such as "conspicuously post[ing] completed safety plans on site" will have to be addressed and resolved on the ground at individual job sites, absent additional guidance from state or local officials.