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BULLETIN

To: Membership of Allied Building Metal Industries, Inc.

From: Steven N. Davi

Date: July 6, 2020

Re: COVID-19 Update: Phase Two Reopening (NYC):
Return to Work Guidance

At the time of our June 8 Bulletin covering the reopening of Phase One construction in New York City, we noted there was at least some uncertainty around the State's COVID-19 health and wellness guidance as it relates to front- and back-office staff of Phase One construction companies. We also noted that unlike for Phase One, the Reopening Guidance for Phase Two provided more specific and extensive COVID-19 health and wellness protocols for office-based employers and employees.

Specifically, the state's [Reopening Guidance](#) relating to Phase Two office workers consists of three key features, as follows:

1. [Summary Guidelines](#) explaining which safety practices are mandatory and which safety practices are merely recommended;
2. [Interim Guidance \(with Affirmation\)](#) 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; and
3. [Safety Plan Template](#) that businesses may but are not required to use to fulfill the written safety plan mandate.

Where office workers are concerned, the State's detailed Reopening Guidance for Phase Two (effective in NYC since June 22) provides a detailed roadmap for employers looking to plot their return to work plans for office staff. The attached COVID-19 reopening guidelines developed by the Real Estate Board of New York are also a good resource for employers looking to interface with building management regarding adherence to COVID-19 safety and wellness best practices. However, if COVID-19 has taught us anything, it is that our knowledge of the symptoms, prevention, transmission and treatment of COVID-19 is constantly evolving. Accordingly, all employers should be ready to amend their return to work plans—as they relate to all employees—to comply with additional and evolving federal, state, and local guidance or industry best practices.

In this regard, we have set forth below some of the more significant COVID-19 guidance published by OSHA and the EEOC over the past number of weeks that you may want to consider integrating into your COVID-19 prevention strategies. If, after you have reviewed the below guidance, you have any questions, please feel free to contact the Allied office directly.

New COVID-19 Guidance: OSHA

Facial Covering. On June 10, OSHA published new [FAQs](#) regarding the use of masks in the workplace, including how to properly wear masks and which types of masks are appropriate. The guidance makes clear that OSHA does not consider cloth or makeshift coverings to be regulated personal protective equipment (PPE), and also outlines the differences between cloth face coverings, surgical masks, and respirators. The FAQs also remind employers not to use surgical masks or cloth face coverings when respirators are necessary and if respirators are required, a proper respiratory protection program should be in place. In addition, the FAQs note the need for social distancing measures, even when workers are wearing cloth face coverings, and recommends following [guidance](#) published by the U.S. Centers for Disease Control (CDC) on washing face coverings.

Guidance on Returning to Work. On June 18, OSHA issued more extensive [guidance](#) relating to the reopening of non-essential businesses and employees' return to work. These guidelines, which are stratified across each phase of reopening as established by the White House/CDC "[Opening Up America Again](#)" plan, instructs employers how to incorporate the following core principles into their reopening plans: hazard assessment, hygiene, social distancing, identification and isolation of sick employees, return to work after illness or exposure, engineering and administrative controls and PPE, workplace flexibilities, training, and anti-retaliation. OSHA's [press release](#) in this regard is also a worthwhile read insofar as it provides context to the guidance and makes clear the guidance is meant to supplement previously issued reopening guidelines from the U.S. Department of Labor (DOL) and CDC.

FAQs. OSHA's June 18 guidance also contains FAQs, with tips for employers regarding worksite COVID-19 testing, temperature checks, and other health screenings, and related recordkeeping and confidentiality protocols. The FAQs also refer to other federal agencies' return to work guidance, including the U.S. Equal Employment Opportunity Commission (EEOC), DOL, CDC, and state and local health authorities.

New COVID-19 Guidance: EEOC

On or about June 11 and 17, the EEOC issued [revised technical assistance](#), aimed at guiding employer best practices where employees at elevated risk for coronavirus infection are concerned.

Accommodation Related to Age. It is generally understood that people over the age of 65 are at greater risk of the worst effects of COVID-19. A well-intentioned employer might think it reasonable to bring younger employees back to the workplace first and to wait before bringing older employees back. However, the guidance explains that the Age Discrimination in Employment Act (ADEA) would prohibit a covered employer from "involuntarily excluding an individual from the workplace based on [their] being 65 or older, even if the employer acted for benevolent reasons such as protecting the employee due to higher risk of severe illness from COVID-19." The guidance further explains that unlike the Americans with Disabilities Act (ADA), the ADEA does not include a right to reasonable accommodation for older employees due to age.

Nonetheless, employers may provide flexibility to older workers in this regard, as long as such flexibility for workers is voluntary.

Accommodation to Avoid Exposing Family Members. The guidance reinforces that employees are not entitled to an accommodation under the ADA to avoid exposing a family member who, due to an underlying medical condition, is at a higher risk of severe illness from COVID-19, although employers are free to provide such accommodation if they choose to do so.

Accommodation Based on Pregnancy. Employers cannot exclude an employee from the workplace involuntarily due to pregnancy, even if motivated by benevolent concern, or otherwise single out employees on the basis of pregnancy for adverse employment actions, including involuntary leave, layoff or furlough. With that being said, pregnant employees may be entitled to certain job modifications, including telework, changes to work schedules or assignments, and leave to the extent provided for other employees.

Requests for Alternative Screening. If an employee entering the worksite requests an alternative method of screening due to a medical condition or religion, an employer should treat this as a request for reasonable accommodation and proceed as it would for any other request for accommodation under the ADA or Title VII, as applicable, by determining whether the requested accommodation or an alternative effective accommodation can be provided.

Antibody Testing. The guidance also addresses questions around antibody testing related to COVID-19, explaining that in light of current interim guidelines from the CDC, the ADA does not allow employers to require antibody testing before allowing employees to re-enter the workplace. See also EEOC [press release](#) dated June 17. (Please note that an antibody test is different from a test to determine if someone has an active case of COVID-19 [*i.e.*, a viral test]. The EEOC has already stated that COVID-19 viral tests may be [permissible under the ADA](#).)

Testing and Medical Exams. The guidance reaffirms that during a pandemic, employers may ask employees who call in sick if they are experiencing COVID-19-related symptoms. The guidance also confirms that for the duration of the direct threat posed by the pandemic, employers may administer COVID-19 diagnostic tests to employees before they are permitted to enter the workplace. Before doing so, employers are encouraged to consult guidance from the CDC, FDA, and other public health authorities.

Confidential Medical Information. In March, 2020, the EEOC stated that disclosing infected employees by name—even if for benevolent reasons such as to ensure non-infected employees are aware of potential health risks—could violate the ADA’s prohibition on disclosing confidential medical information. The EEOC’s updated guidance appears to relax this position in certain respects. Nonetheless, until this issue is definitively resolved, prudent employers will do well to advise employees of any positive COVID-19 cases in the workplace but to refrain from disclosing to other employees the identity of the infected individual(s). The guidance also makes clear that employers must keep any medical information (including any testing or medical information, and employee temperature logs) separate and confidential from an employee’s personnel file.

Additional Reference

[CDC COVID-19 Homepage](#)

[OSHA COVID-19 Homepage](#)

[EEOC COVID-19 Homepage](#)

[USDOL COVID-19 Homepage](#)

[NYCDOH Reopening FAQs: What the Construction Industry Need to Know](#)

[Empire State Development Corporation Guidance \(Updated 6.29.20\)](#)

We will continue to monitor OSHA, EEOC, CDC, DOL, and state and local government websites and communicate any significant new guidance that you may want to consider integrating into your COVID-19 prevention strategies.