

Reopening is upon us — what businesses need to know



VIEWPOINT

Kevin J. Mulvehill

Many businesses in Upstate New York that have been hit hard by COVID-19 are eager to get back to work. While a COVID-19 vaccine is currently in the trial stage, it is unlikely that it will be available to the public in the immediate future. As a result, as employers develop their reopening plans, they must continue to account for challenges relating to the virus. This will continue to significantly affect businesses for the foreseeable future.

On this point, New York State has adopted a gradual four-phase process of reopening its economy. This process is anticipated to allow State and local leaders the opportunity to monitor the effects of the reopening and ensure hospitalization and infection rates are not increasing before moving to the next phase and permitting more economic activity.

Accordingly, each of New York State's 10 regions must meet seven benchmarks in order for that region to be eligible for phase one of the State's reopening plan. The benchmarks include a decline in COVID-19 hospitalizations and hospital deaths, as well as having certain testing and hospital capacity and contact tracing capabilities.

Happily, the Finger Lakes region (which includes Rochester) has met the seven benchmarks. As a result, the area was permitted to begin phase one of the reopening plan on May 15. This allowed the following businesses to operate in the Finger Lakes, subject to State-issued guidelines:

- (1) Construction;
- (2) Agriculture, forestry, fishing and hunting;
- (3) Retail (limited to curbside or in-store pickup or drop-off);
- (4) Manufacturing; and
- (5) Wholesale trade businesses.

Phase one of the reopening plan in the Finger Lakes will last for a minimum of two weeks. During that time, the region's benchmarks will be monitored. Depending on how things go, the region's reopening plan will be adjusted. However, phase two could begin as early as May 29. Phase two will allow the following to operate, subject to forthcoming guidelines:

- (1) Professional services;
- (2) Retail;
- (3) Administrative support; and
- (4) Real estate/rental and leasing.

Thereafter, if things continue to go well, phase three could begin as early as June 12. If this is the case, it will finally be possible to push aside leftovers, jump in the car and break bread at favorite area restaurants.

If progress continues on the same positive trajectory, the region could reach the final phase of reopening as early as June 26. Phase four allows arts, entertainment, recreation, and educational entities and organizations to reopen. This is likely a dream come true for many loving parents who are now struggling with their new responsibilities as their child's or children's full-time, full-service interim teacher, principal, janitor and lunch person.

Importantly, New York State has published industry-specific mandatory guidelines for reopening. The guidelines deal with practices businesses must implement in order to open or stay open, relating to (1) physical distancing, (2) protective equipment, (3) hygiene and cleaning, (4) communication and (5) screening individuals. If a business was previously allowed to operate because it was deemed essential or because it provided a support function for an essential business, the business is allowed to continue to operate to the extent previously permitted. However, all businesses must follow the new NYS guidelines.

In addition, NYS has published a number of industry-specific business safety plan templates for companies to adopt and tailor to their business. In most cases, developing a business safety plan is mandatory in order for a company to open or remain open.

Litigation and other risks

Businesses should not rush to reopen without a proper plan in place. Plaintiffs' attorneys across the country are clamoring for the chance to sue companies. They will no doubt claim, among other things, that organizations did not engage in proper health and safety practices, which will lead to individual and class action

lawsuits from sick and deceased employees and patrons.

In relation to employees, workers' compensation generally covers injuries or illnesses that are caused unintentionally by an accident or exposure in the work environment. However, damages under workers' compensation are often limited by statute.

Therefore, it is likely that aggrieved individuals will claim intent or willfulness and bring tort claims directly against employers in civil court in an attempt to enhance their potential recovery.

It is also likely that claims will surface by employees for alleged violations of the Fair Labor Standards Act and New York Labor Law stemming from, among other things, purported violations relating to employees working at home during the pandemic. This will result in a new wave of wage and hour class and collective actions.

In addition, the pandemic has led to the passage of a number of new employment laws, which many employers have struggled to navigate. These laws include the Emergency Paid Sick Leave Act, Emergency Family Medical Leave Expansion Act and the New York COVID-19 Sick Leave Law. The confusion surrounding these laws will no doubt also result in litigation.

Similarly, as employers seek to have their workforces return to the workplace, the following are likely to result:

- (1) An increased level of ADA and New York Human Rights Law claims relating to reasonable accommodation and disability issues;
- (2) OSHA investigations; and
- (3) Unfair labor practice charges filed under the National Labor Relations Act.

Finally, union activity is often fueled by perceptions of fear, job insecurity, unsafe work practices, and lack of communication or fairness. Unions see the current crisis and its real and perceived effects on workers as a window through which to accelerate their organizing efforts at many businesses. As such, be vigilant.

What can be done to prepare?

Companies cannot eliminate the risk of potential litigation or liability; however, they can take important steps to mitigate those risks. There is no one-size-fits-all approach. Strategies should be tailored to the needs and realities of each business. Common elements include:

- Following New York State, Centers for Disease Control and Prevention (CDC), World Health Organization (WHO), and Occupational Safety and Health Administration (OSHA) guidelines for businesses, including best practices relating to social and physical distancing, cleaning and disinfecting the workplace, screening employees, protective equipment and quarantining employees exposed to COVID-19;

- Following Equal Employment Opportunity Commission (EEOC), NYS Department of Health and U.S. Department of Health and Human Services (HHS) guidelines relating to the workplace;
- Sending employees with confirmed cases home until they are released by a medical professional and/or until they meet the guidelines for discontinuing self-quarantine or isolation;
- Reviewing applicable Federal, State and Local Laws and orders to determine if/how they may impact the reopening process;
- Ensuring that employees are provided and properly wearing all required PPE;
- Phasing return to work, such as bringing back employees in stages or staggering schedules;
- Educating employees on new policies, practices, rules and the symptoms of COVID-19;
- Encouraging employees to seek medical attention if they experience symptoms;
- Notifying employees of confirmed cases of COVID-19 in the workplace, including employees who were potentially exposed;
- Developing and implementing written policies regarding new legal developments and compliance strategies;
- Conducting a union-organizing vulnerability audit of new and traditional hot button issues; and
- Consulting with experienced labor and employment counsel as businesses develop their plans in order to assess related risks.

If a lawsuit is filed against an individual or a company, they should take immediate steps to defend the claim, including, but not limited to, notifying counsel and insurers that may provide coverage for such a claim, e.g., general liability, employment practices liability, workers' compensation, and premises liability insurers.

Reopening New York State businesses presents numerous challenges. Phillips Lytle LLP and Employment attorneys recommend that employers carefully craft and implement reopening plans anticipating the issues outlined above, and closely follow additional developments — in particular, new or revised Executive Orders and guidelines from New York State, the CDC and the EEOC, and pronouncements from federal, county and municipal departments of health.

Kevin J. Mulvehill is a partner with Phillips Lytle LLP and leader of the firm's Labor & Employment Practice Team. He concentrates his practice in labor and employment litigation; wage and hour compliance and litigation; corporate law; commercial litigation; counseling business entities; and representing public and private sector organizations, including universities, hospitals, manufacturers, law firms, retail, auto dealerships, hospitality companies, not-for-profits, municipalities and business processing outsourcing companies. He can be reached at kmulvehill@phillipslytle.com or (585) 238-2095.