

Executive Order 202.31: Essential Business and New Reopening Guidance – A Whirlwind of Activity

There have been numerous developments in New York over the past few days regarding New York On PAUSE and New York Forward. First, [Executive Order 202.31](#) (the Order), issued on May 14, gives some direction on what businesses must remain closed and which may reopen. The Order reopened five regions on Friday, while the remainder of the state remained closed, excluding essential businesses. Second, Empire State Development Corporation (ESD) issued updated essential business guidance. Third, the state issued new reopening guidance. We break down each of these developments below.

Executive Order 202.31

Among other things, this Order extends and modifies New York On PAUSE and officially authorizes regional reopening. New York On PAUSE has been extended until May 28. As a reminder, New York On PAUSE consists of numerous Executive Orders closing or restricting public and private businesses and cancelling all non-essential gatherings of any size, including meetings, parties, games or other social events.¹

Beyond extending New York On PAUSE, the Order sets forth the reopening process for the state. The regions that may reopen first are Central New York, the Finger Lakes, Mohawk Valley, the North Country and the Southern Tier. These regions consist of 35 counties and about 18% of the state's population.

The Order provides that "Phase One" industries are exempt from the reductions and restrictions on the in-person workforce required by New York On PAUSE. Phase One industries consist of Construction, Agriculture, Forestry, Fishing and Hunting, Curbside or In-Store Pickup Retail, and Manufacturing and Wholesale Trade. Notably, the fishing that is described in the guidance is commercial and for-hire vessels. Individual fishing is and remains a permissible recreational activity.

Additionally, the Order extends enforcement of all Executive Orders by state and local government to June 13.

Updated ESD Guidance on Essential Businesses

In addition to the Order, [ESD issued revised guidance](#) regarding essential businesses. Remember, essential businesses may continue to operate throughout New York. The updated guidance contains new businesses and industries that are now considered essential. The changes to the guidance are as follows:

1. Essential health care operations including...
 - [acupuncture, prescribed by medical professional ...](#)

¹ The relevant Executive Orders are 202.3, 202.4, 202.5, 202.6, 202.7, 202.8, 202.10, 202.11, 202.13 and 202.14

4. Essential retail including ...

- **in regions that are not within the first phase of the state's regional reopening plan**, delivery for orders placed remotely via phone or online at non-essential retail establishments; provided, however, that only one employee is physically present at the business location to fulfill orders ...

5. Essential services including ...

- auto repair **and maintenance** ...
- animal shelters and animal care including dog walking, animal boarding **and pet grooming but only to the extent necessary to ensure animal health**
- landscaping, ~~but only for maintenance or pest control and not cosmetic purposes~~ **gardening and horticulture** ...

11. Essential services necessary to maintain the safety, sanitation and essential operations of residences or other businesses including ...

- general **and specialized** maintenance whether employed by the entity directly or a vendor, **including but not limited to heating, ventilation, and air conditioning (HVAC) and pool maintenance** ...
- **cleaning**, disinfection, **and sanitation services**
- **occupational safety and health professionals**
- residential **and commercial** moving services ...

13. Recreation ...

- **Outdoor, low-risk recreational activities are permitted so long as social distancing and cleaning/disinfecting measures are in place:**
 - **tennis;**
 - **non-motorized boat use and rentals, such as row boats, kayaks, canoes; and**
 - **golf and driving ranges, except miniature (mini) golf, with food and retail services subject to the restrictions that are currently in effect within the region**
- **Drive-in movie theaters so long as social distancing and cleaning/disinfecting measures are in place**

New Reopening Guidance

On May 14, the state issued guidance regarding the reopening of Phase One industries. For a breakdown of that guidance, please see [this information memo](#). Remember, businesses and entities that are reopening must have a reopening plan complete and submit an affirmation to the state certifying that such a plan exists.

Based on the governor's press conference on Sunday, it appears the criteria for regional reopening has changed. Prior to Sunday, the state's reopening website indicated that regions could only reopen if (1) there was a 14-day decline in hospitalizations OR the hospitalizations did not exceed a three-day average of 15 net new hospitalizations; and (2) the

rate of deaths declined over 14-days OR did not exceed a three-day average of five deaths. On Sunday, the governor's aide Jim Malatras explained that the metrics reset with the issuance of Executive Order 202.31. This means the Capital Region and Western New York are very close to meeting the reopening criteria.

Additionally, over the weekend, the state issued the "[New York Forward Business Reopening Lookup Tool](#)." This tool allows businesses and nonprofits to lookup, using their NAICS Code, to see whether they may reopen. The tool applies to both non-essential businesses in regions that are permitted to reopen, and essential businesses throughout New York that may remain open.

Remember, if your business is eligible to reopen, you need a plan. The attorneys at Bond, Schoeneck and King can help you develop a reopening plan. Our attorneys have already worked with clients on the development and submission of plans to the state and regional Empire State Development directors. We have also formed a new practice, [COVID-19 Recovery for Business](#) to help clients recover and reopen.

If your industry needs its voice to be heard, now is the time to act. Please contact [Hermes Fernandez](#), [Caitlin Anderson](#) or the attorney at the firm with whom you are regularly in contact.



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