

Phase Two Begins; Executive Order 202.34 and Phase Two Guidance Issued Overnight

There have been numerous developments overnight. [Executive Order 202.34](#) (the Order) and [Phase Two Guidance](#) were issued during the night of May 28. The Order extends New York on PAUSE to June 27, but with limitations. It also empowers business operators and building owners to expel individuals who are not wearing a face covering and limits their liability for doing so. Phase Two Guidance was published for all office-based jobs, real estate services, in-store retail, retail rental & repair and commercial building management. Finally, the governor announced on Friday, May 29 that five regions—North Country, Finger Lakes, Central New York, Mohawk Valley and Southern Tier—have entered Phase Two. We break down each of these developments below.

Executive Order 202.34

First, Executive Order 202.34 authorizes business operators and building owners to deny admittance to individuals or expel individuals from their property who are not wearing a face covering. As a reminder, [Executive Order 202.17 contained the directive](#) for all individuals in the state to wear a face covering in public if social distancing cannot be maintained. It did not contain enforcement mechanisms. Executive Order 202.34 does. The Order **authorizes state and local enforcement authorities to impose fines or other penalties for violating Executive Order 202.17.**

The explicit authority of a business operator or building owner regarding customer face coverings is notable. Under the prior orders, businesses had an obligation to maintain a safe workplace. Admitting someone without a mask could have been interpreted as failing to do so. This executive order gives the business operator or building owner the discretion to enforce the mask requirement with customers. It also provides some liability protection, which seems to be directed to building owners. According to the Order, the owner or operator “shall not be subject to a claim of violation of the covenant of quiet enjoyment, or frustration of purpose, solely due to their enforcement of such directive.”

Even with this clarification, customer face coverings or masks will continue to present issues. Keep in mind, the discretion regarding enforcement should not be viewed as an invitation to encourage or invite customers not to wear masks. The executive order is simply a grant of discretion not to enforce. A business operation that does not require customers to wear masks could still run afoul of other obligations requiring the need to maintain a safe workplace. From the other side, enforcement **must be applied in a manner consistent with the Americans with Disabilities Act and other provisions of state and local law.** As a practical matter, if a customer credibly states that he/she has a medical condition that prevents wearing a mask, the customer’s position should be accepted.

Second, the Order extends New York on PAUSE. 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 In addition, the Order touches upon reopening. Business or entities that reopen must operate subject to Department of Health guidance. Such interim guidance may be found at the bottom of [this page](#).

¹ The relevant Executive Orders are 202.3, 202.4, 202.5, 202.6, 202.7, 202.8, 202.10, 202.11, 202.13, 202.14, 202.28, 202.32 and 202.33.

Phase Two Reopening Guidance

As many regions in New York approach Phase Two, the state issued guidance for Phase Two industries. First, it clarified which non-essential business may reopen in Phase Two. They are listed below. You can tap on each to find the relevant guidance.

- [Offices](#)
- [Real estate services](#)
- [In-store retail](#)
- [Vehicle sales, leases and rentals](#)
- [Retail rental, repair and cleaning](#)
- [Commercial building management](#)
- [Hair salons and barbershops](#)

Significantly, all the guidance relies on the same four cornerstones: face coverings, social distancing, screening, and sanitizing. This needs to be at the center of your business' reopening plan. Additionally, all the guidance contains the 50% occupancy requirement. Workforce and customer presence must be limited to 50% of the maximum occupancy of the space as determined by the certificate of occupancy. Further, the guidance contains further information regarding what to do if an employee has COVID-19 symptoms or has been exposed to COVID-19.

Remember, this guidance applies to both essential and non-essential business. If you are operating an essential business that fits into any of the above categories, you must read the guidance and affirm that your business is following that guidance. The affirmation can be found at the bottom of each guidance document.

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 [COVID-19 Recovery for Business practice](#) 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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