


# Reopening Western New York


PART 3 of 4

June 25, 2020

PRESENTED BY




Trust earned.




1


## TODAY'S PRESENTERS



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REOPENING WESTERN NEW YORK  
Part III

2

2

## NY PHASED REOPENING – UPDATE

### Phase One (WNY Since May 19, 2020):

- Construction
- Agriculture, Forestry, Hunting and Fishing
- Retail (curbside pickup only)
- Manufacturing
- Wholesale Trade

### Phase Two (WNY Since June 2, 2020):

- Offices
- Real Estate
- Phase Two In-Store Retail
- Vehicle Sales, Leases, and Rentals
- Retail Rental, Repair, and Cleaning
- Commercial Building Management
- Hair Salons and Barber Shops
- Outdoor and Takeout/Delivery Food Services
- Higher Education Research

### Phase Three (WNY Since June 16, 2020):

- Restaurants / Food Services
- Personal Care
- Child Care & Day Camp Programs (WNY projected June 29, 2020)



3

## NY PHASED REOPENING – UPDATE

### Phase Four (WNY Projected July 1, 2020):

- Higher Education
- Low-Risk Outdoor Arts & Entertainment
- Low-Risk Indoor Arts & Entertainment
- Media Production
- Does not include gyms, malls, movie theaters, or amusement parks

### Executive Orders

- 202.39 – Guidance for public employers
- 202.44 – Increases the size of “non-essential gatherings”
- 202.43 – New responsibilities for businesses selling alcoholic beverages

### Travel Advisory



4

## NY PHASED REOPENING – UPDATE

### Safety Plan

- Occupancy Limitations
- Physical Distancing
- Face Coverings
- Hygiene and Cleaning
- Communication
- Screening
- Contact Tracing and Disinfection

5

## LIABILITY TO EMPLOYEES

- Workers compensation exclusive remedy for workplace injuries
- If employee contracted COVID at work, limited to Workers Compensation benefits
  - Physician will have to certify was due to workplace event
  - May be easier to make that determination in certain businesses (e.g., health care workers)
- Exceptions:
  - Intentional acts
  - Third-party lawsuits involving "grave injuries"

6

## LIABILITY TO NON-EMPLOYEES

- Customers / Patrons / Clients
- Vendors / Delivery Persons / Contractors

7

## NEGLIGENCE

- Definition: "Failure to use ordinary or reasonable care"
- Not required to take every possible measure
- Not required to control things out of your control
- Not required to be a guarantor of the health and safety of everyone who enters premises

8

## LEGISLATIVE INITIATIVES

- Immunity for business which follow applicable guidelines and act in good faith
  - New York: Healthcare sector
  - Federal: Manufacturers of certain PPE and other pandemic-specific goods
    - Watch for next COVID stimulus package
- Currently no broad legislative "safe harbor" for most businesses

9

## PRECEDENT

- Law is based on precedents – what have courts done in similar situations in the past so as to guide future conduct
- There is no precedent with COVID-19 – in uncharted territory
- Courts closed or at least in hibernation – it's going to take years before we see any precedent specific to COVID
- Past factual precedents may not be helpful anyway
  - Changes in business
  - Changes in society generally

10

## GUIDELINES

- Sources:
  - CDC – with few exceptions, not industry-specific
  - New York – highly industry-specific
- Subjects:
  - PPE
  - Social Distancing
  - Disinfection
  - Health checks
  - Reporting

11

## GUIDELINES

- New York
  - Mandatory requirements
  - Recommended best practices
- If concerned about liability to third parties, follow both

12

## LIABILITY CONSIDERATIONS

- Nature of business
- Nature of physical premises
- Nature and duration of likely interactions
- Nature of business-customer relationship

13

## CAUSATION

- Third parties claiming they contracted COVID at your business will still need to establish causation. That:
  1. They got it at your business
  2. Because of something
    - a) You shouldn't have done but did anyway
    - b) You should have done but didn't
- High hurdle, but:
  1. Contact tracing
  2. Outbreaks
  3. Captive audiences

14

## POSSIBLE DEFENSES

- Assumption of risk:
  - The plaintiff knew of a dangerous condition but voluntarily exposed himself or herself to it anyway
  - Availability may depend on nature of business

15

## POSSIBLE DEFENSES

- Liability waiver:
  1. Must be clear (*i.e.*, mention COVID)
  2. Cannot overreach (*i.e.*, can include negligence but not gross negligence)
  3. Must be voluntary and not coerced or product of unequal bargaining power
- Not available in all circumstances (*e.g.*, landlords, caterers, contractors, parking garages, pools, gyms, places of public entertainment or recreation)
- Still may help establish assumption of risk
- Business considerations:
  - Practicalities
  - Optics

16



## COMPLAINTS TO GOVERNMENT

- Federal: OSHA (not COVID-specific process, but includes COVID guideline violations)
  - Triggers investigation and historical remedies
- New York (COVID-specific process):
  - Department of Labor (employees only)
  - New York Pause Enforcement Assistance Task Force (anybody)
    - Online complaint form links back to DOL online complaint form
    - Referral to local authorities for enforcement

17

## COMPLAINTS TO NEW YORK GOVERNMENT

- Unclear what will happen
- Almost certainly investigation (telephone call, written inquiry, full-blown)
- Hopefully hearing
- Penalties under Executive Order 202.14 are clear:
  - Violation of Public Health Law (criminal and civil penalties)
  - Up to 1 year in jail
  - Up to \$2,000 fine
  - Up to \$5,000 fine for repeat offenders
  - Up to \$10,000 fine if death or serious injury results

18

## RETALIATION CLAIMS

- Traditional retaliation claims will probably be available for COVID-related safety complaints made by employees
  - OSHA
  - NLRA
  - Workers' Compensation
  - Whistleblower statutes

19

## ACTION ITEMS TO MITIGATE LIABILITY RISKS

- Follow applicable guidelines
  - Mandatory
  - Recommended
- Enforce compliance uniformly
- Document compliance
- Review insurance coverage
  - Deductibles
  - Limits
  - Coverages
  - Exclusions

20

## TODAY'S PRESENTERS



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Director, Freed Maxick



**Joe Aquino, CPA**  
Audit Director, Freed Maxick



21

## MANAGING ENTERPRISE RISKS IN THE POST-COVID WORLD

### What we already know:

- We are in a different world, in an emerging new reality
- Planning to return to your workplace will require new and innovative thinking – don't plan on "picking up where you left off"
- Efforts to return will vary by industry sector
- As the evidence shows, flare-ups are inevitable
- Prepare for a "plan-go-stop-reassess-go" lifecycle
- Don't expect everyone to do the right thing

### **Organizations and businesses will have to change their strategies and tactics to preserve value and to create value.**

When an organization changes strategy and tactics, it must identify, assess, prioritize, mitigate and monitor new enterprise risks.

The characteristics of organizations that will prove most resilient will vary based on how they respond to these new risks.



22

## MANAGING ENTERPRISE RISKS IN THE POST-COVID WORLD

As you rethink your business strategy and other operational or tactical steps to address the “new realities”, consider the following enterprise risks:

- Health and Safety
- Financial
- Legal/Compliance
- Technology/Cybersecurity
- Reputational
- Human Capital
- Political
- Fraud
- Company Policy/Governance



23

## MANAGING ENTERPRISE RISKS IN THE POST-COVID WORLD

### Health and Safety

- Having a business reopen plan, maximum capacity regs & floor plans – as required by NYS
- Procuring and distributing PPE, janitorial services and requiring cleaning logs and documentation, enforcing compliance. Determining discipline for those who intentionally violate plans/policies
  - Mandate a testing regiment?
  - Work with your insurer to find safer and efficient ways to cover your employees healthcare needs
- Handling employees who are symptomatic in the workplace
- Addressing foot traffic/elevators/common areas/restrooms, etc.
- Customer/client/employee interactions
- Other operational matters: cube walls, a plan for reception and mail, conference rooms, delivery intake, etc.



24

## MANAGING ENTERPRISE RISKS IN THE POST-COVID WORLD

### Technology/Cybersecurity:

- Hybrid workforce (some in the office, some working remotely)
- Use of technology to screen/trace/monitor employees and impact on privacy
- IT Service Delivery - helpdesk services
- Security/Privacy: safeguarding information when working remotely and impact on current policies and processes
- Availability/continuity – access to IT resources beyond “work hours”
- IT Budgets – new technology investments to accommodate the new norm
- Tele/Video conferencing - security and confidentiality to address business and regulatory needs
- Training – proper use of technology in a remote/hybrid work environment



25

## MANAGING ENTERPRISE RISKS IN THE POST-COVID WORLD

### Reputational

- Building trust and transparency – with your employees and customers
- Complying with just the “minimum” guidelines may increase risks
- Employees’ use of social media – policy, processes, monitoring, enforcing
- Don’t become a hot spot. You probably won’t recover from it

### Human Capital

- Surveying employees about their concerns and addressing them to their satisfaction
- Attracting and retaining talent: recruiting, onboarding and training employees in a virtual environment
- Meals/beverages, lunchrooms, etc.
- Employee camaraderie, teamwork, professional connection



26

## MANAGING ENTERPRISE RISKS IN THE POST-COVID WORLD

### Political

- Current news, views and beliefs are driving employee and customer/client behavior

### Fraud

- Increased potential for fraud committed by internal resources or external sources

### Company Policy/Governance

- Existing policies and governance structures will need to be reassessed based on the new realities, strategies, tactics and associated risks and responses
- Alignment with enforcing COVID requirements (employee and client/customers)
- Communication from the top – consistent and clear



27

## PAYROLL PROTECTION PROGRAM FLEXIBILITY ACT (PPPFA)

### Recap of the significant provisions and updates include:

- New interim guidance dated June 22, 2020
- Extension of “covered period” to 24 weeks or December 31, 2020
  - Early forgiveness applications are allowed if all of the proceeds used
  - Borrowers have 10 months from the last day of the covered period to apply
  - Wage reductions - full covered period
- Reduce threshold of required use on payroll from 75% to 60%
- Loan term extension from 2 years to 5 years (for loans after June 5, 2020)
  - Loans prior to June 5, 2020 - mutual agreement of both parties
- Extension of rehire date to December 31, 2020
  - FTE Safe harbors



28

## ADDITIONAL INTERIM GUIDANCE UPDATES

### Payroll costs include:

- Salary and wages cap of \$46,154 per individual for the 24 week covered period
- Covered benefits (health care, retirement, etc.) paid by employer spent over 24 week period
- Does not apply to owners (owner-employees, self-employed or general partners)

### Owner compensation replacement and benefits:

- Lesser of (8/52) of 2019 compensation or net profit (Sch C) or \$15,385 (8 weeks)
- Lesser of (2.5/12) of 2019 compensation or net profit (Sch C) or \$20,833 (24 weeks)
- Applies to each individual, across all businesses
- Health insurance not included if already in compensation
- Retirement benefits for S and C Corporation owners included
  - Clarification on possible limitation



29

## PPP EZ FORGIVENESS APPLICATION

### Form 3508EZ issued in order to simplify forgiveness application process if certain criteria are met:

- (1) Self-employed, independent contractor or sole proprietor with no employees at time of application **or**
- (2) Did not reduce salary or hourly wages of employees by more than 25 percent during the Covered Period compared to January 1, 2020 - March 31, 2020 **and** did not reduce FTEs between January 1, 2020 and the end of the Covered Period **or**
- (3) Did not reduce salary or hourly wages of employees by more than 25 percent during the Covered Period compared to January 1, 2020 - March 31, 2020 **and** could not operate at the same level of activity as before February 15, 2020 due to compliance with requirements or guidance related to COVID-19



30

## UNANSWERED QUESTIONS REMAIN

- Further clarification of owner- employee payroll cost rules?
- Tax impact? There is still no final determination on whether deductions will be allowed for covered expenses.
- PPE included as a non-payroll expense?
- New interim guidance and FAQs expected and will continue to be monitored.



31

## THANK YOU



32