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COVID-19 UPDATE

Client Advisor

May 11, 2020

Earlier this month, states across the country began to open, or rollout plans for reopening. As this happened, Massachusetts remained under a stay-at-home advisory and non-essential business closure order set to expire May 18. The Reopening Advisory Board – created to provide guidance and recommendations to the governor on how to reopen the state’s economy – was expected to issue guidance before May 18, but it was unclear when or what form it would take. This afternoon we received some answers. Earlier today Governor Baker unveiled an outline of the state’s 4-phase reopening plan, complete with mandatory safety standards to be implemented in phase 1. While there are still many unanswered questions, including when the 4-phase plan will begin and which industries qualify at which phase, today’s announcement provides a glimpse into what lies ahead. While we wait for more specific guidance and a timeline for Massachusetts’ phased reopening, we take a look at the four phases to come, and continue to offer updates and suggestions of steps you can take as we prepare to return to work.

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A. Preparing to Return to Work

1. Governor Baker Announces Four-Phase Approach to Reopening and Mandatory Workplace Safety Standards

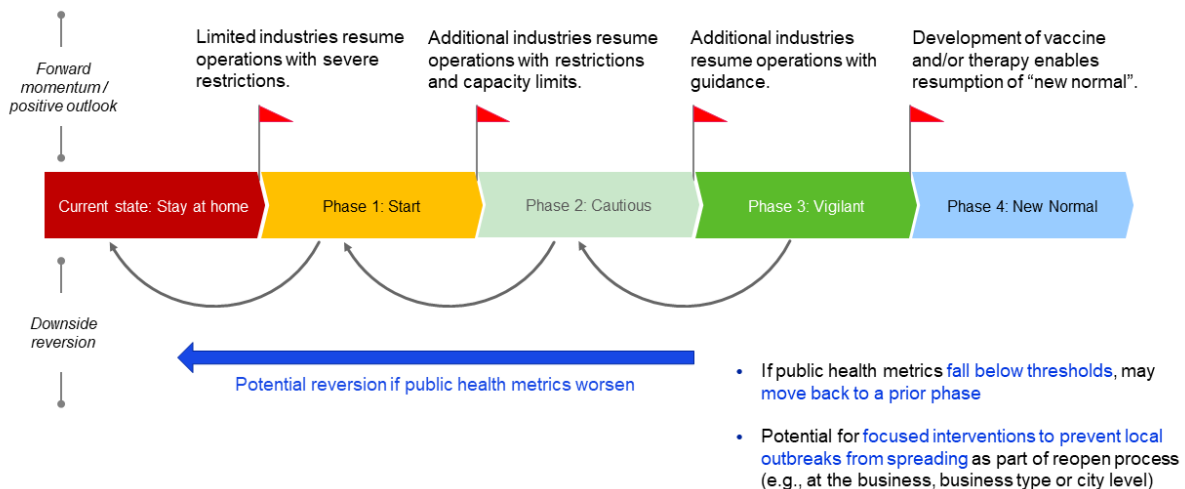
This afternoon, Governor Baker announced a four-phase approach for reopening businesses and workplaces within the Commonwealth. All businesses and activities classified as providing essential services pursuant to Governor Baker’s Executive Order issued on March 23, will remain in operation. The approach calls for businesses and activities that can operate with a lower risk of COVID-19 transmission to reopen in the earlier phases. The administration stated that the public health metrics will dictate decisions on the beginning and progression of the phased reopening. It is unclear at this time exactly what specific criteria or metrics the administration will consider

when making these decisions. The approach provides the administration with the discretion to revert to an earlier phase, should the public health metrics worsen.

The four-phases are as follows:

- Phase 1 (“Start”): limited industries will resume operations with severe restrictions in place
- Phase 2 (“Cautious”): additional industries will resume operations with restrictions and capacity limits
- Phase 3 (“Vigilant”): additional industries will resume operations with guidance
- Phase 4 (“New Normal”): development of vaccine and/or treatment enables resumption of new normal

Four-Phase Approach to Reopening Massachusetts



Governor Baker also announced that the Department of Public Health (DPH) in conjunction with the Commonwealth Reopening Advisory Board has established Mandatory Workplace Safety Standards to reduce the transmission and spread of COVID-19. These safety standards will apply to all sectors and industries during Phase 1 of the plan and will require employers to implement the following measures:

Social Distancing

- Ensure that all employees, customers, and vendors remain at least six feet apart to the greatest extent possible, both inside and outside the workplace
- Establish protocols to ensure that employees can practice appropriate social distancing methods, including proper signage for safe social distancing
- Require face coverings or masks for all employees

Hygiene Protocols

- Ensure that employees wash their hands frequently and provide adequate hand washing supplies throughout the workplace

- Sanitize areas with frequent contact, such as workstations, door handles, equipment, screens, etc., on a regular basis

Cleaning and Disinfecting

- Establish and maintain cleaning protocols specific to the business, including disinfection of all common surfaces at intervals appropriate to the business
- Clean and disinfect the workplace in the event an employee is diagnosed with COVID-19

Staffing and Operations

- Establish plans on how to address situations where an employee becomes ill with COVID-19 at work and when such employees may return to the workplace
- Continue to instruct employees who exhibit COVID-19 symptoms not to report for work
- Train employees on proper social distancing and hygiene protocols

The Reopening Advisory Board is expected to announce more detailed guidance with safety standards and best practices specific to each industry and sector, along with limited exceptions to the above mandatory requirements. The Advisory Board’s full report on reopening is due to Governor Baker on May 18th.

We will continue to update you on any changes and developments with the phased reopening and workplace safety standards as they occur.

2. EEOC Issues Guidance on Reasonable Accommodations for High Risk Employees

The Equal Employment Opportunity Commission (EEOC) recently issued additional guidance regarding protections under the Americans with Disabilities Act (ADA) for certain employees who may be at increased risk of severe complications from COVID-19. The guidance addresses the limited circumstances under which higher risk individuals may be excluded from the work site and how such individuals can request accommodations to reduce their risk. The main points of the EEOC guidance are outlined below.

The EEOC enforces several federal anti-discrimination laws affecting the workplace, including the Americans with Disabilities Act (ADA), the Section 504 of the Rehabilitation Act, Title VII of the Civil Rights Act, the Age Discrimination in Employment Act, and the Genetic Information Nondiscrimination Act (GINA). Both the ADA and Section 504 include requirements for reasonable accommodation and non-discrimination based on disability, and provide rules about employer medical examinations and inquiries.

Who can request reasonable accommodations?

The EEOC guidance states that employees may request reasonable accommodations if the CDC considers them to be at “higher-risk for severe illness” from COVID-19, which include the following groups:

- Employees over sixty-five (65) years of age;
- Employees with underlying medical conditions, including:
 - Employees with chronic lung disease or moderate to severe asthma;
 - Employees with serious heart conditions;

- Employees who are “immunocompromised;”
- Employees with diabetes;
- Employees who are severely obese (BMI of 40 or higher);
- Employees with chronic kidney disease undergoing dialysis; and
- Employees with liver disease

Can employees with these underlying medical conditions be excluded from the workplace?

No, an employer may not exclude from the workplace or take any other adverse action against an employee solely because they have a condition or disability that places them at higher-risk for severe illness, unless that employee’s underlying medical condition or disability results in a direct threat to the employee’s own health that cannot be eliminated or reduced by a reasonable accommodation.

What should an employer consider when determining whether an employee’s disability or condition constitutes a “direct threat” to their own health?

The EEOC provides that the direct threat standard, as set forth in 29 C.F.R. § 1630.2(r), requires an employer to meet a heavy burden of showing that the employee has a disability that poses a “significant risk of substantial harm” to his or her own health. The guidance specifies that simply having a high-risk condition (as identified by the CDC) will not cause an employee to meet the direct threat standard. Rather, the employer must make an individualized assessment based on a “reasonable medical judgment about [the] employee’s disability-not the disability in general-using the most current medical knowledge and/or on the best available objective evidence.” As such, the EEOC requires employers to consider certain factors, including but not limited to: the employee’s particular job duties, health (i.e. is the condition well-controlled), and the likelihood that the employee will be exposed to COVID-19 at the work site.

What if the employer is aware that an employee is at “higher-risk for severe illness,” but the employee does not request a reasonable accommodation?

An employer need not make reasonable accommodations for an employee unless the employee or the employee’s representative (i.e. employee’s physician) requests such an accommodation. Again, as discussed above, employers may not exclude or take adverse action against an employee for merely having a high-risk condition or disability. As usual, employers may ask questions or require the employee to provide documentation to verify that the employee has a disability and to justify any reasonable accommodations. Reasonable accommodations must be provided absent undue hardship to the employer.

What are some examples of accommodations that an employer can implement?

According to the EEOC guidance, examples of accommodations employers can provide include:

- Provide masks, gloves, or other protective gear that would not normally be required for the employee’s job;
- Create additional space between employees or install protective barriers at an employee’s work area;

- Eliminate or substitute certain marginal or less critical job functions that may increase risk of exposure;
- Modify work schedules or move work locations to decrease risk of exposure;
- Allow higher-risk employees to continue teleworking;

Ultimately, an effective workplace accommodation will depend on the employee's specific job duties and their workplace environment. The EEOC guidance encourages both employers and employees to be creative and flexible when discussing or creating accommodations.

The link to the EEOC guidance can be found here: <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>

B. Extended School Year and Summer Education Services

The Department of Elementary and Secondary Education (DESE) is telling Districts to plan for a continuation of remote learning for the summer and the provision of Extended School Year (ESY) Services for their special needs students. More guidance on this subject is expected from the DESE soon.

Similarly, the Department of Early Education and Care (EEC) and the Department of Public Health (DPH) plan to communicate by May 15 regarding the status of summer programs run by those agencies. Emergency protocols have been drafted to regulate the reopening of these programs which include recreational summer programs and home-based and center-based childcare. Once finalized these protocols will give us a window into what to expect when schools are allowed to reopen. The protocols will cover sanitation, hygiene, teacher-student ratios, social distancing, screening, and PPE.

The question of whether and what access parents will have to summer programs for their children (and whether they will be held in person or remotely) is a big question that effects not only teachers and childcare providers, but employers of parents who may find themselves without childcare or non-remote summer programming for their special needs children beyond June and through the summer.

C. Pending Legislation

1. NEW: Massachusetts Legislature to Address Uncertainty Surrounding School Service Contractor Payments.

On May 4, 2020, the Senate passed S.2680, *An Act Relative to Municipal Governance During the COVID-19 Emergency*. The bill includes provisions permitting payments to school and education service contractors (like bus companies) who have been unable to provide contracted services due to the school closures.

Although some municipalities and school districts have already negotiated amendments to existing service and transportation contracts to maintain the availability of services, the bill would expressly permit municipalities and regional school districts to approve payments for certain school or education related services as part of existing contracts through the remainder of FY 2020.

The legislation relaxes the M.G.L. Chapter 41, Section 56 requirement that limits expenditures for services to those that have actually been provided to the municipality or school district.

The bill would require the service contractor, prior to receiving payment, to report any grants, discounted loans, or other financial support that it received from a federal, state, or local government as a result of the COVID-19 crisis. Similarly, service contractors who have not previously received any financial assistance must certify that they will not receive any financial assistance for the remainder of FY 2020 before receiving any payments. The bill further provides that service contractors may not receive any payments from municipalities together with other financial assistance that would exceed the amount they were originally entitled to receive as part of the original contract.

Other highlights of the proposed legislation include provisions that address quorum requirements and remote participation for town meetings, and the authority to hold town meetings outside the geographic limits of the town, if adequate safety measures are not available within the town.

2. NEW: Potential Changes to Massachusetts Emergency Paid Sick Leave - *An Act Relative to Emergency Paid Sick Time (SD. 2918)*

This legislation, which was recently referred to the Senate Committee on Workforce and Labor Development, would provide full time employees, including state and municipal employees, with an additional eighty (80) hours of paid sick leave during a declared state of emergency or disaster based on a public health emergency. Part-time employees would receive a pro-rata benefit. The bill does not currently contain a length of service or other eligibility requirements. However, the bill as currently written caps the benefit at the equivalent of \$850 per week and provides for reimbursement by the Commonwealth for amounts paid under the program.

Employees would be eligible for emergency sick leave in the following circumstances:

1. An employee who is required to self-isolate and care for oneself as a result of being diagnosed with a communicable illness; experiencing symptoms of a communicable illness, to seek medical diagnosis, or preventative care concerning a communicable illness related to a public health emergency;
2. An employee who is required to care for a family member subject to any of the reasons above;
3. A determination by a local, state, or federal public health official, the employee's employer, or a health care provider that the employee's presence in the workplace would jeopardize the health of others because the employee's exposure to or exhibiting symptoms of a contagious illness, regardless of whether the employee has been diagnosed with such contagious illness;
4. An employee who is required to care for a family member subject to a determination in reason 3 above;
5. An employee who is unable to work or telework while subject to an individual or general local, state, or federal quarantine, including a shelter-in-place order, related to a public health emergency; or closure of the employee's place of business by order of a local, state, or federal public official or health authority or at the discretion of the employer due to the public health emergency.

The proposed expansion of sick leave benefits would be in addition to any leave benefits already provided by an existing policy or collective bargaining agreement, however, employees would not

be eligible to use these expanded sick leave benefits if they are eligible for leave provided under the FFCRA at the time the leave is requested. Furthermore, this proposed legislation is broader than the protections provided under the FFCRA, which does not allow an employee to take leave as a result of business closure due to a general shelter-in-place order. We will keep you posted on this bill as we learn additional information.

D. COVID-19 Postings on NMP Website

NMP continues to post COVID-19 orders, advisories, guidelines and legislation on its website (www.nmplabor.com). Also, our attorneys continue to be available by email, telephone and video conference to answer any questions and provide any advice. The following is a list of the new materials added to our website since our last Advisor:

- EEOC Posts New Q & A Document Regarding COVID-19 and EEO Laws
- DESE Updates Guidance on 2019-2020 School Year Requirements

If you have any questions or would like to discuss the information above in more detail, please feel free to contact:

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