

Return to Business in New York City:

Practical Guidance on How
to Reopen in the Big Apple

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Seyfarth Shaw LLP

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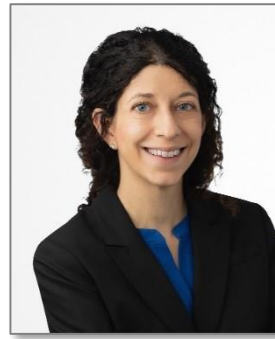
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New York Forward

- New York Pause Order expires on Friday, May 15
- Statewide Reopening of Low Risk Businesses
- Regional plan structure
- Metrics-based reopening
- Phased reopening of businesses

- 10 Regions
- Appointed Regional “Control Rooms”
 - monitor key metrics
 - monitor compliance by businesses

Regions must meet 7 metrics in order to reopen:

1. 14-day decline in hospitalizations OR under 15 new hospitalizations (3-day avg)
2. 14-day decline in hospitalized deaths OR under 5 new (3-day avg)
3. New hospitalizations — under 2 per 100k residents (3-day rolling avg)
4. Share of total beds available (threshold of 30%)
5. Share of ICU beds available (threshold of 30%)
6. 30 per 1k residents tested monthly (7-day average of new tests per day)
7. 30 contact tracers per 100K residents or to meet current infection rate.

STAY HOME.

STOP THE SPREAD.

SAVE LIVES.

Phase 1

- Construction
- Manufacturing and wholesale supply chain
- Retail, curbside pickup only

Phase 2

- Professional services
- Finance and insurance
- Retail
- Administrative support
- Real estate and rental leasing

Phase 3

- Restaurants and food service
- Hotels and accommodations

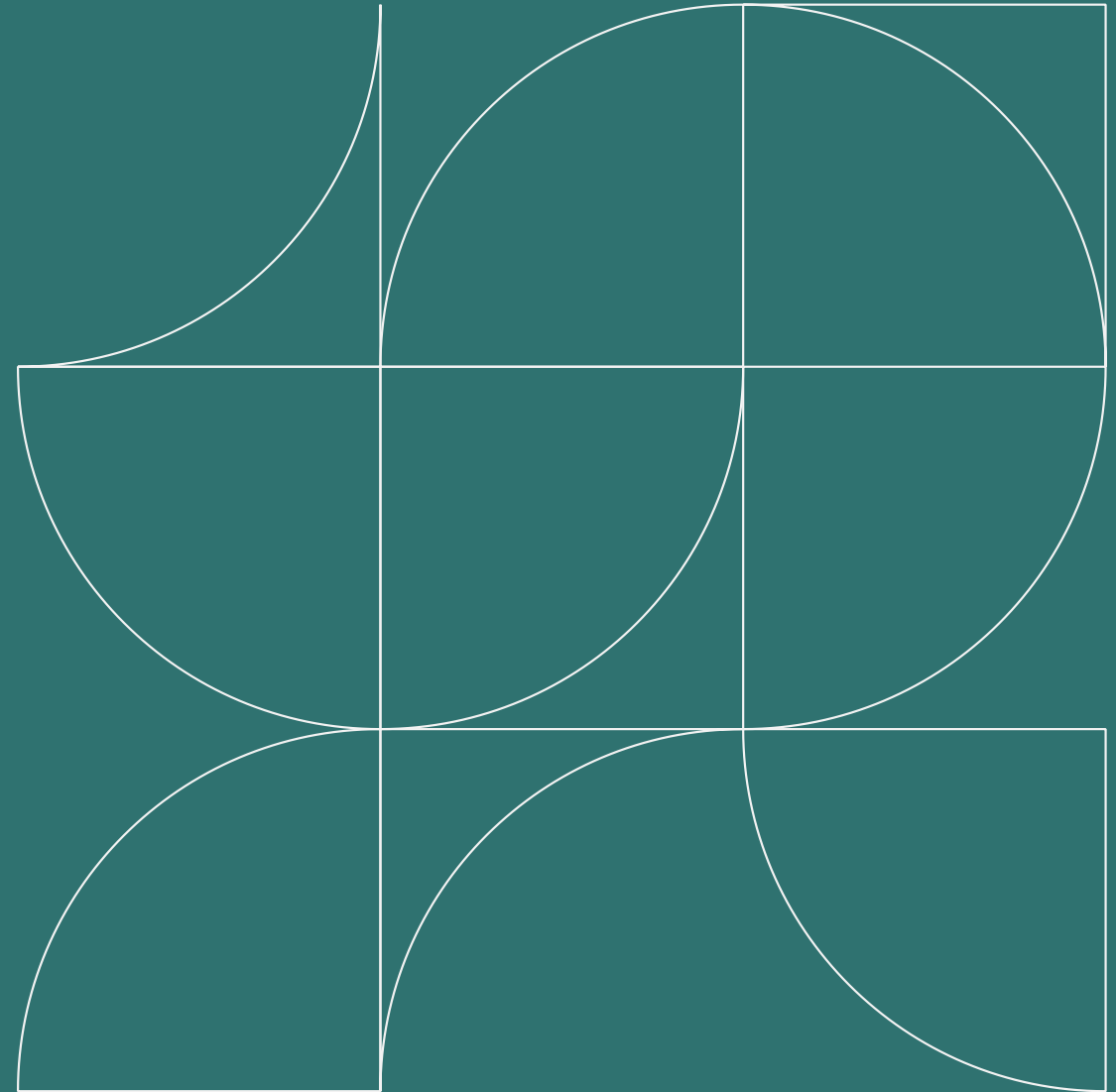
Phase 4

- Arts, entertainment and recreation
- Education

Business Reopening Plans

- Adjust workplace hours and shift design to reduce workplace density
- Enact social distancing protocols
- Restrict non-essential travel
- Require all employees and customers to wear masks if in frequent contact with others
- Implement strict cleaning and sanitation standards
- Enact a continuous health screening process for individuals to enter the workplace
- Continue tracing, tracking and reporting of cases
- Develop “liability processes”

Health Testing: Examinations, Inquiries and Policies/Procedures





Testing and Health Inquiries of Employees

- Governor Cuomo’s reopening guidelines for businesses state that businesses **“must”** have a plan **“to protect employees and consumers, make the physical work space safer and implement processes that lower risk of infection in the business.”**
- Businesses must, among other requirements **“enact a continuous health screening process for individuals to enter the workplace”**
 - What does that mean? Options include...
 - Temperature checks
 - Health questionnaires
 - In lieu of or in conjunction with temperature checks
 - Testing for COVID-19
 - Antibody testing
 - Contact tracing

Policies & Procedures

- Policies

- Infection Control Policy
- Employee health screening policy
- Visitor screening policy
- Vendor/contractor screening policy
- Policy for employees who:
 - Are diagnosed with COVID-19
 - Exhibit symptoms
 - Come into contact with infected/symptomatic person

- Procedure

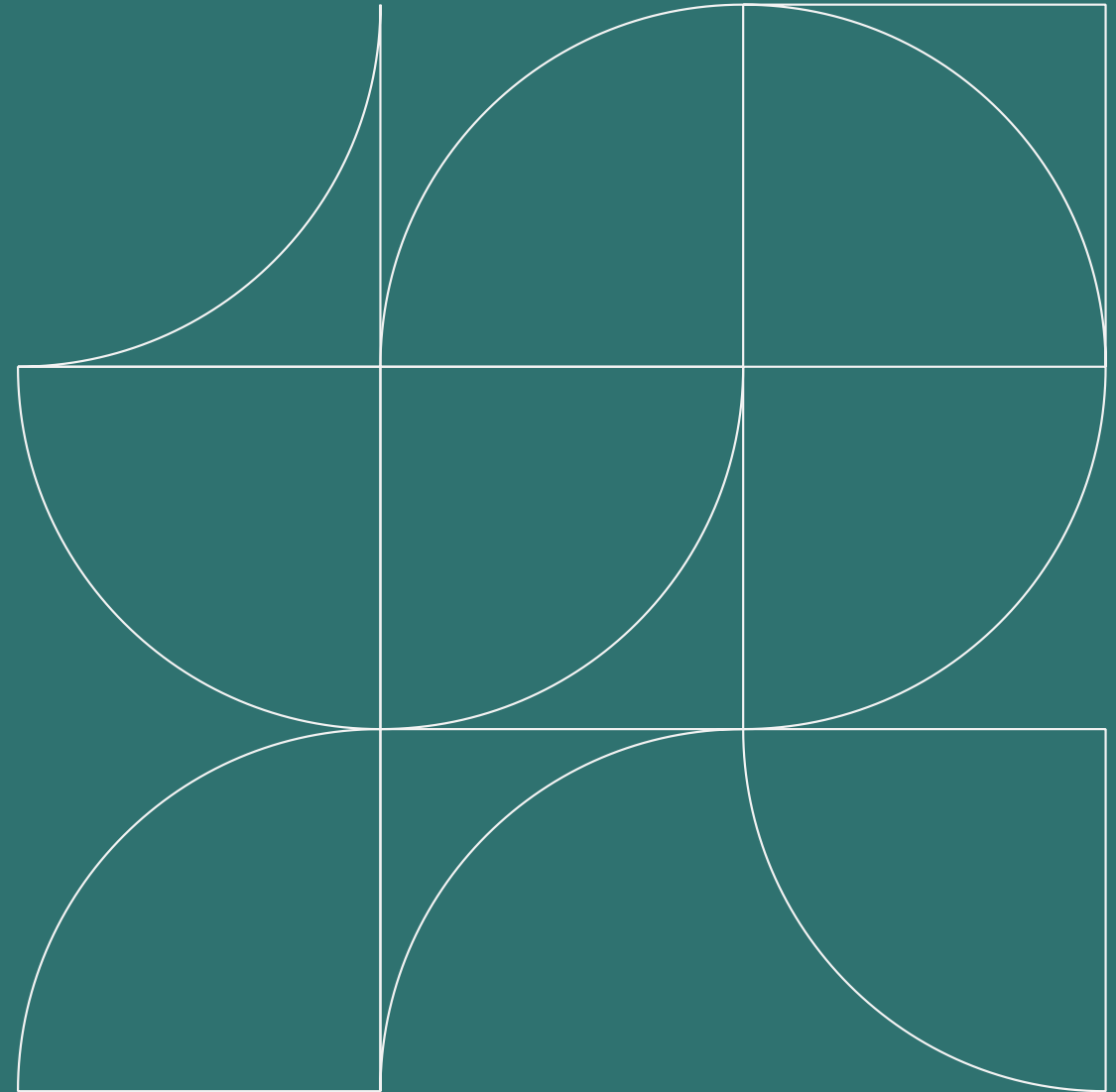
- How to screen
- Who to screen (employee, employer, vendors)
- When to screen (daily, weekly, monthly)
- Where to screen (physical space in workplace?)
- Privacy/confidentiality concerns
- Sourcing of tools needed (PPE, thermal scanners)
- Cost-sharing/reimbursement
- Internal reporting procedure for positive cases
 - Process maps



Issue Spotting

- Accommodations specific to testing
- Paid/unpaid leave for employees who cannot be in the workplace
 - FFCRA; NYS COVID-19 Sick Leave law; NYC ESSTA and other local laws
- Privacy/confidentiality concerns
- Lawful, off-duty conduct that may increase chance of infection and ability of employer to regulate
- Availability of testing/PPE
- Density and sanitization challenges

Reconsidering Physical Space and Time in Proximity To/From and Onsite



Protecting Safety and Health



- ... of everyone – employees, contractors, vendors, guests, etc. – coming onsite
- Right thing to do
- OSHA general duty to provide "employment and place of employment free from recognized hazards that are causing or are likely to cause death or serious physical harm"
 - Must make pandemic hazard assessment and develop and/or update preparedness and response plan (in writing strongly advised)
- Other legal obligations and associated risks as summarized throughout this webinar and in Seyfarth's Return to Business Checklist and other publications



Why Space – Time Continuum Matters

- According to CDC, COVID-19 spreads mainly among people who are:
 - in close contact (within about 6 feet)
 - for prolonged period (from 10 minutes or more to 30 minutes or more)
- Transmission primarily via respiratory droplets from speaking, coughing, or sneezing
 - Droplets land in mouths, noses, or eyes or possibly inhaled into lungs of people nearby
 - Transmission also might occur through contact with contaminated surfaces followed by self-delivery to eyes, nose, or mouth
- Later wave(s) of infections likely, but health and safety risks eventually diminishing
 - Development of knowledge, testing, supply chains, treatments, herd immunity, & vaccine(s)

Expanding Space, Diminishing Time In Commute and Onsite

- Promote more distance and less time in proximity
- Arrange for less employees to be in onsite proximity
 - Potential upsides to avoiding being among first to swell onsite workforce
 - Consider phasing returns with 1st phase voluntary to extent practicable business-wise
 - Teams X and Y or X, Y, and Z
 - Other scheduling adjustments, including staggered start, end, and break times
- NYC commuting challenges distinctive
 - Highest percentage used mass transit, with one of lowest percentages of single drivers
 - Many own no vehicle (or bike) or don't own enough for every household worker
 - Very crowded mass transit, streets, and sidewalks
 - Schedule reductions/disruptions likely for some time
 - Resulting reluctance to resume commutes

Coordinate With Building or Site Owner or Agent

- Building entrances, security, and travel paths (such as elevators and stairs) often responsibility of building owners or agents
 - Security may require touching surfaces and contribute to bottleneck crowding
 - Can doors, gates, and buttons be kept open/on or reengineered for no touch (such as electronic triggering from cards or fobs)?
 - Elevators/lifts/stairs/escalators definitely cramped and likely sources of bottleneck crowding
 - Consider cab sizes, # of floors, and daily # of riders to determine max occupancy per elevator
 - Mark where to queue while waiting for elevators and where to stand while in them
 - Reprogram smart elevators to only take passengers to and from one floor per circuit
- Coordinate early and often with building or site owner or agent on effective measures
 - Not just arrival and departure logistics such as above
 - Also cleaning and disinfection of common areas, HVAC, and other building services
 - Nearby tenants



Solutions Customized to Employer's Circumstances

- Each employer's solutions may vary based on variables such as:
 - Industry (retail, industrial, office-based, construction, etc.)
 - Worksite characteristics
 - Size
 - Pandemic-influenced business outlook
 - Culture
- Be wary of one-size-fits-all templates
 - Choose what's effective and practicable from government and other guidance
 - Still core commonalities like social distancing, disinfection, and likely face coverings

Surfaces and Hand Sanitation



- CDC Reopening Guidance for Cleaning and Disinfecting
 - Very detailed guidance on planning and implementation, including products and methods at <https://www.cdc.gov/coronavirus/2019-ncov/community/reopen-guidance.html>
- Surfaces warranting particular disinfection, cordoning off, removal, or propping include:
 - Shared materials (tools, copiers, keys, coffee/vending machines, kitchenware, refrigerators, etc.)
 - Delivered items (mail, packages, food, etc.)
 - Access points (handles, knobs, locks, power buttons, switches, time clocks, security pads, etc.)
- Establish and highlight soap-and-water washing stations and provide plentiful hand sanitizer, disinfecting wipes, and tissues

Airflow, Ventilation, and Barriers



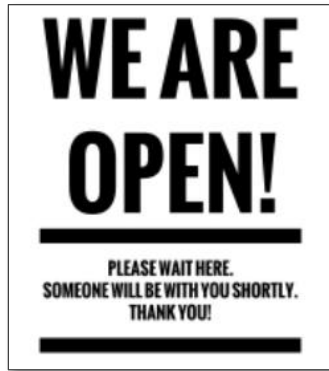
- Studies suggest transmission of respiratory droplets least effective outside
- Good interior ventilation (open windows, air filtration, well-engineered HVAC, etc.) helpful ...
- BUT pronounced forced horizontal or upward airflow can contribute to viral spread
- Depending on space–time continuum, limiting spread may also be warranted through barriers such as:
 - Personal face coverings (masks and even shields or hoods)
 - Plexiglass or other physical separations (aka “sneeze guards”)
 - Enclosed offices or other work rooms



Physical Space Reconfigurations

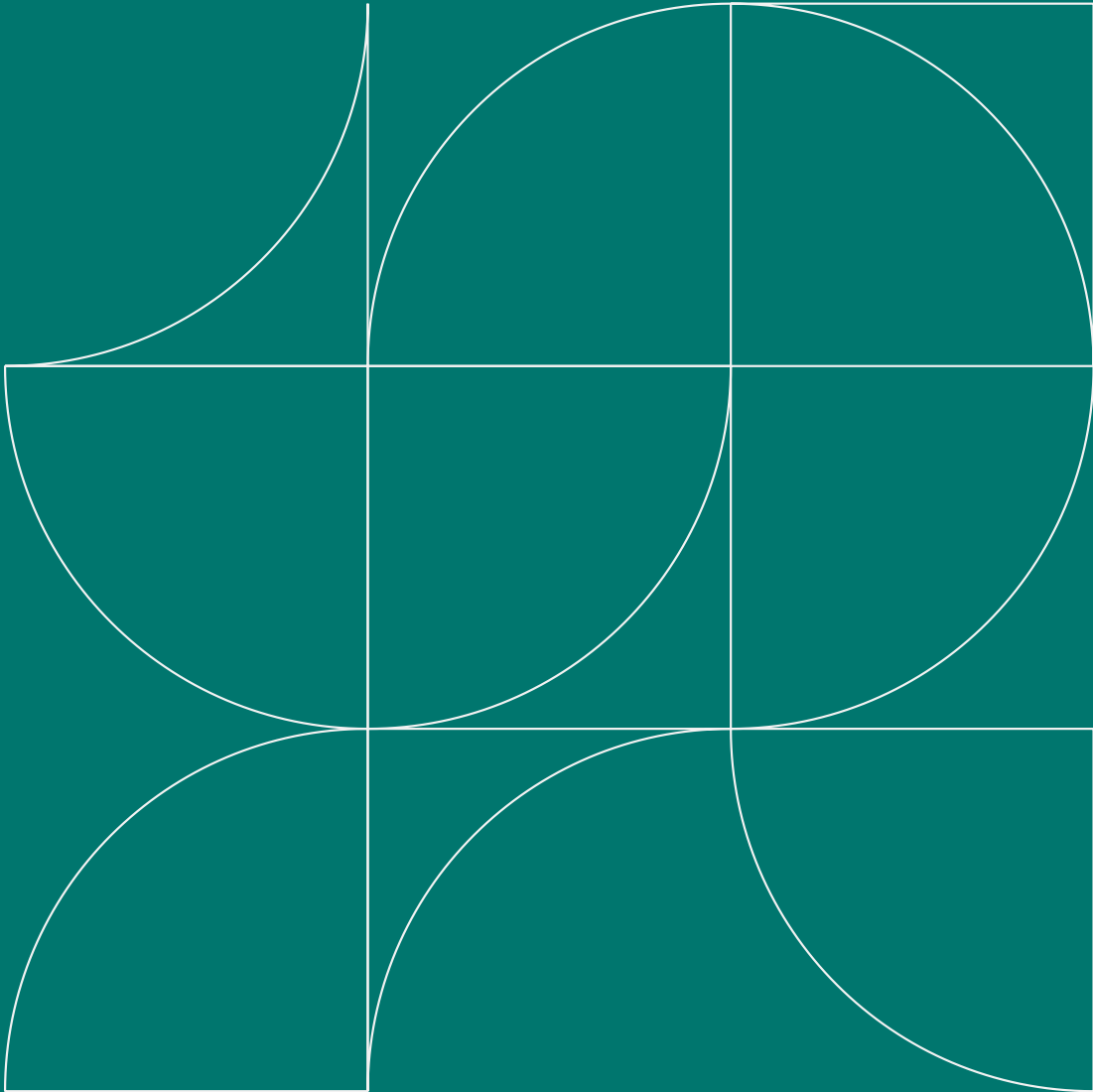
- Move workers into enclosed, semi-enclosed, or shielded space (including meeting rooms unlikely to be used soon for those purposes)
- Redesign production lines
- Remove or close off “huddle” spaces and features like break rooms and inviting furniture
- Engineer and mark off one-way pathways through narrow spaces like hallways

Postings / Signs



- Follow requirements for postings and signage (occupancy, social distancing, customer flow, etc.)
- Consider health and safety and p.r. in relation to promotional signage
- Use postings / signs (and training) to further all objectives discussed in this webinar

Return to Work – Reasonable Accommodations, Cooperative Dialogues Mandated by NYC, NYS and Federal Law



Requests to Work Remotely After Worksite Opens



Anticipated Requests

- Requests for reasonable accommodations for a disability
- Requests due to membership in a vulnerable population
- Requests due to household family members / care-giver being in a vulnerable population (pre-vaccine)
- Requests due to fear of COVID-19
- Requests due to transportation challenges
- Requests due to allegation(s) of violations of health and safety orders and/or laws
- Requests due to need to quarantine because of potential exposure
- Requests due to child/senior care challenges

Requests for Reasonable Accommodation for a Disability

- **Overview of the applicable laws**

- Americans with Disabilities Act (ADA) → EEOC
- New York State Human Rights Law (NYSHRL) → State Division
- New York City Human Rights Law (NYCHRL) → City Commission
 - Reasonable accommodation unless “undue hardship”
 - “Disability” means any “physical, medical, mental or psychological impairment,” or a history or record of such impairment
 - Defense → person could not, with reasonable accommodation, satisfy the essential requisites of the job
 - Cooperative Dialogue / Written Determination

- ***Same analysis / process as before the pandemic!***

Requests Due to “Vulnerable Population”

- **Basis for Requests**

- Employee is a member of the vulnerable population -- *versus* --
- Employee lives with someone (spouse, child, parent, etc.) or is a caregiver to a member of the vulnerable population

- **CDC guidance for those at high-risk for severe illness from COVID-19**

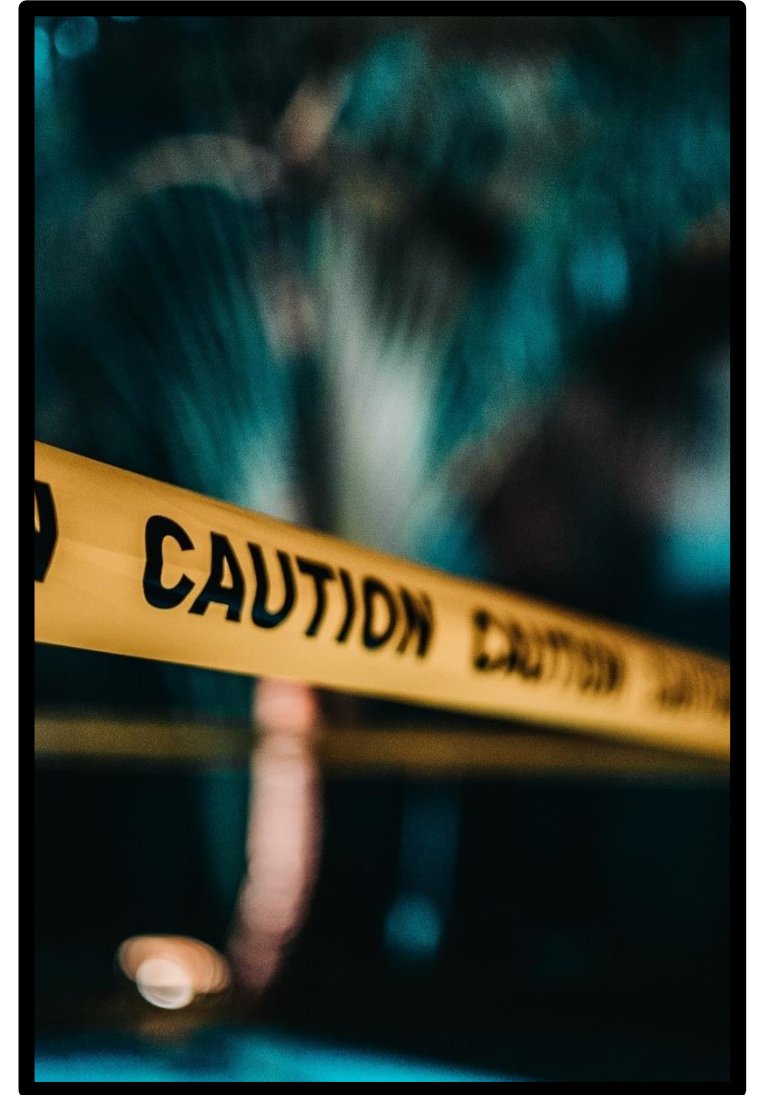
- People of all ages with underlying medical conditions
- People 65 and older

- **CDC guidance for “Others at Risk”**

- People with disabilities
- Pregnancy
- Racial and Ethnic Minority Groups

Request to Work Remotely Due to Fear of COVID-19

- Requests to continue working remotely because the employee is afraid of COVID-19
 - *Potential* for ADA / NYSHRL / NYCHRL accommodation analysis



Agency Guidance

- **EEOC**

- What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws
- Pandemic Preparedness in the Workplace and the Americans with Disabilities Act

- **State Division**

- Discrimination Relating to the Coronavirus Under the New York State Human Rights Law

- **City Commission**

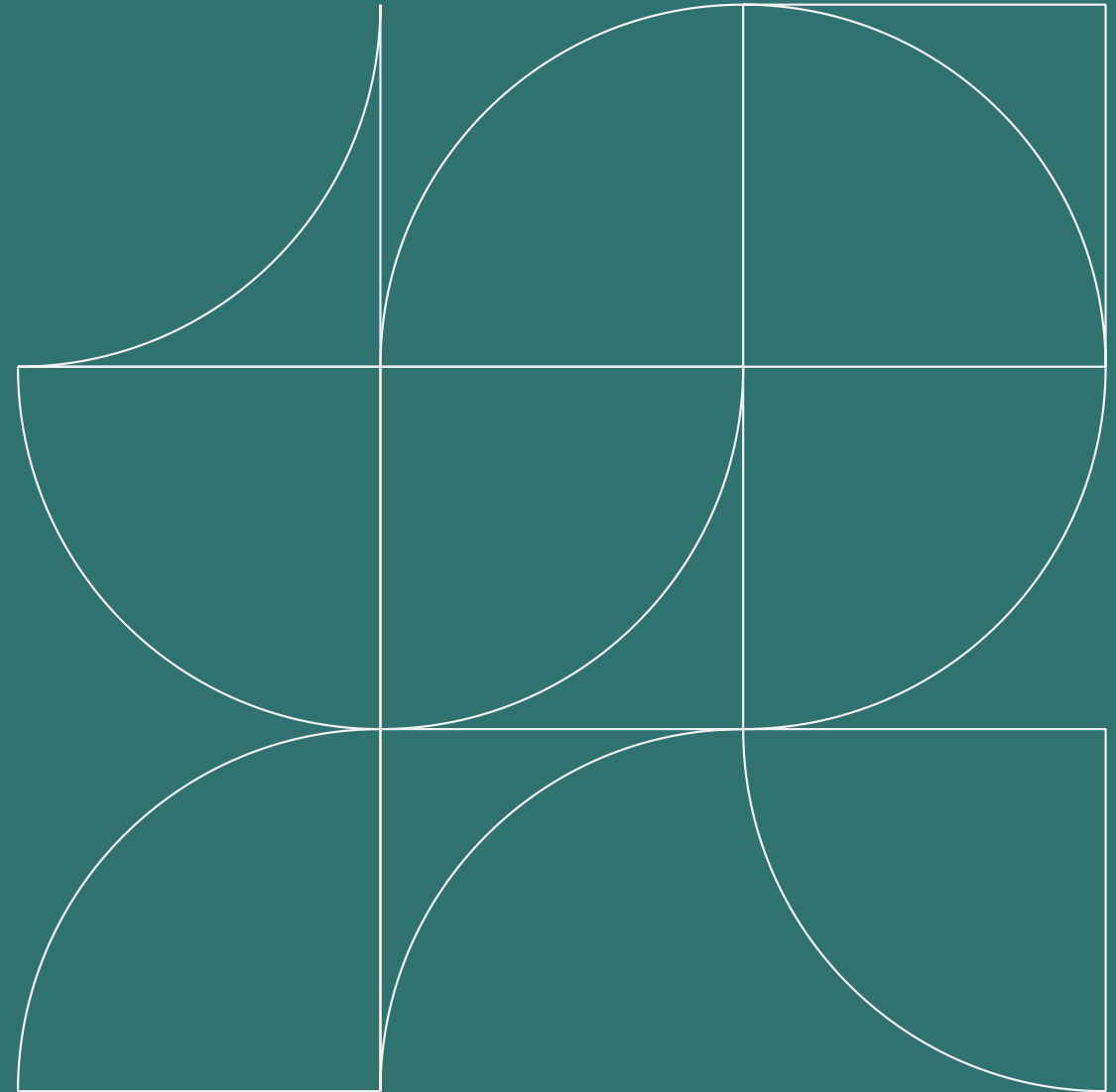
- COVID-19 and Human Rights
 - Fact Sheet
 - Employment Protections

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Key Questions the EEOC's Guidance Addresses Concerning Accommodations

1. Required to postpone accommodation requests while teleworking?
2. What if an employee was already receiving an accommodation prior to the pandemic and now requests an additional or altered accommodation / asks to revisit a denied accommodation?
3. When and how can employers solicit information about accommodation needs?
4. Does COVID-19 impact “undue hardship”?
5. If a job may only be performed at the workplace, are there reasonable accommodations for individuals with disabilities, absent undue hardship, that could offer protection?

Minimizing Potential Wage and Hour Risks

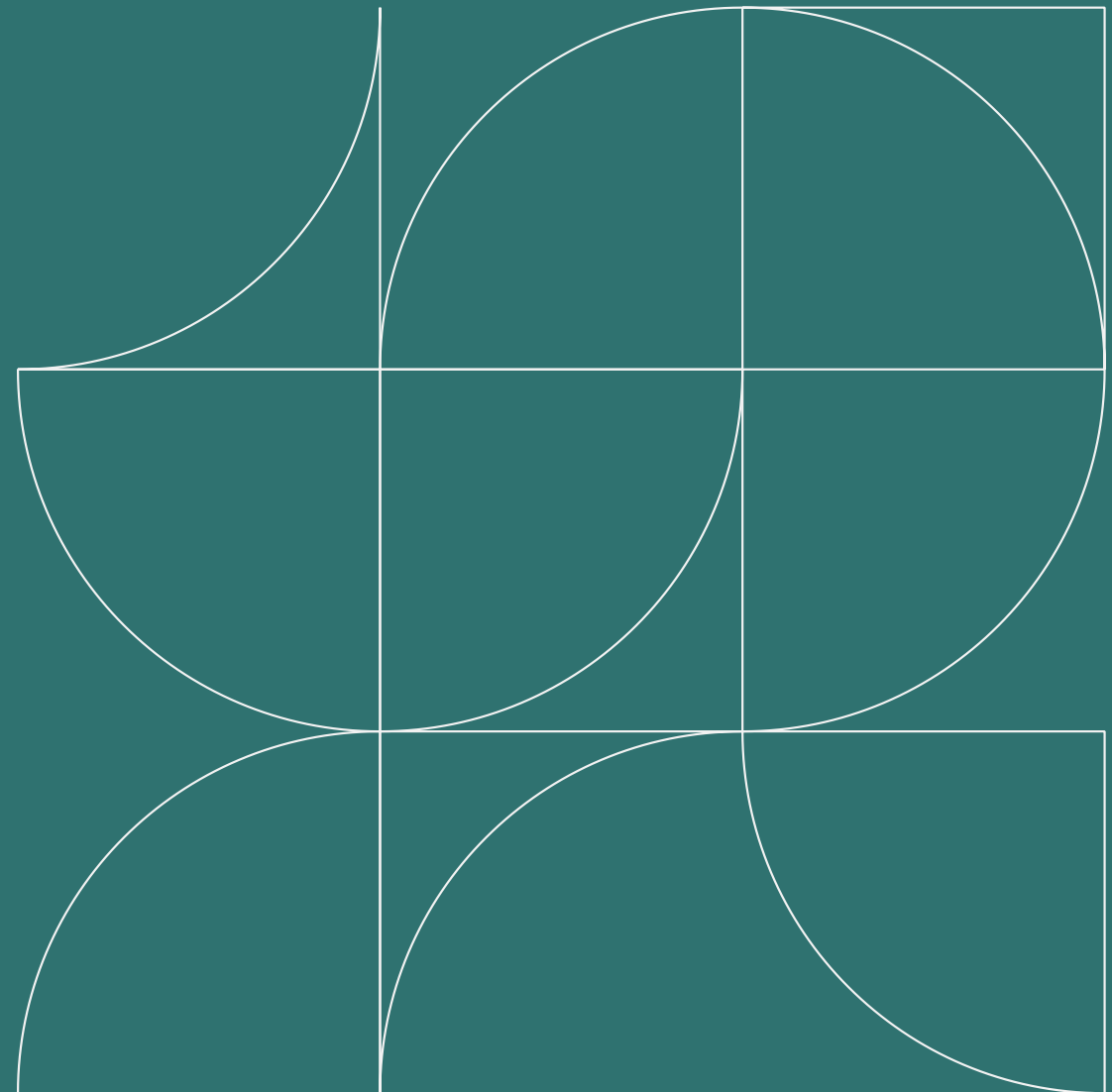




Wage & Hour Considerations When Returning to Work

- Wage reductions in exempt and non-exempt populations
- Off-the-clock claims stemming from work from home arrangements
- Assessment of exempt status due to changing operations
 - Don't forget about the duty test
 - FLSA's emergency exception
- Compensable time concerns: time waiting for "vertical transportation," temperature taking, COVID-19 tests, etc.

Pending New York City Council
“Bill of Rights”
Legislation





NYC Essential Workers Bill of Rights

3 Bills Pending Before NYC Council:

- Premium Pay for Essential Workers
- “Just Cause” Rights for Essential Workers
- Paid Sick Leave for Gig Workers

Premium Pay for Essential Workers

- Rates per length of shift:
 - \$30 for a shift < 4 hours
 - \$60 for a shift = 4-8 hours
 - \$75 for a shift > 8 hours
- “Essential Worker” as defined under Governor’s EO
- Applies to non-salaried, non-bargaining unit employees
- Only applies during current State of Emergency

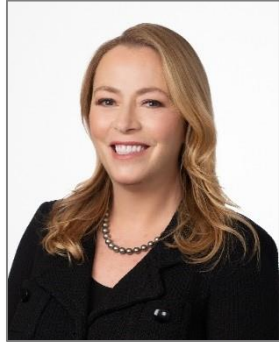
“Just Cause” Rights for Essential Workers

- Requires “just cause” to terminate essential workers
- Must create progressive discipline policy
- Must provide terminated employee with written explanation
- “Essential Worker” as defined under Governor’s EO
- Only applies during current State of Emergency (clarified during hearing)

Paid Sick Leave for Gig Workers

- Extends NYC ESSTA paid sick leave to gig workers and independent contractors
- Exception only if employer proves the individual is truly an independent contractor under a new and stringent ABC test
- Must work 80 hours within NYC in calendar year – retroactive to January 1, 2020
- No sunset provision

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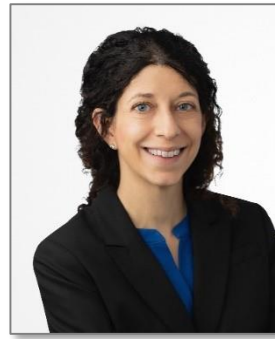
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**thank
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