



Updated Guidance for New York Construction Businesses

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The New York Forward Plan (the “Plan”) has authorized a gradual reopening of non-essential businesses by region based on achieving specific COVID-19 health metrics. On June 8, 2020, New York City entered Phase One, which allowed construction, agricultural, landscaping, manufacturing, and wholesale supply chain businesses to reopen, as well as many retailers if they provide curbside or in-store pickup. A summary and discussion of the New York-issued guidance for Phase One industries can be found [here](#).

The Plan requires that at least two weeks (14 days) must pass and certain metrics be met before the next phase of the economy can open. Phase Two allows many businesses to reopen, including most office-based businesses, administrative services, commercial building management, real estate services, and repair and cleaning services. For each industry in Phase Two of the reopening, New York has promulgated summary guidelines (“Guidelines”), new interim guidance, and forms with which businesses must become familiar as they develop specific workplace safety plans. Guidance is given on physical distancing, protective equipment, hygiene and cleaning, communication, and screenings. Specific guidelines for businesses can be found [below](#).

Considerations for Construction Site Owners for Phase One

Regarding enforcement of the New York Forward Guidelines, the New York Department of Buildings recently advised that:

During the first 30 days of construction resuming, the Department will focus on education to help the industry learn how to implement the new standards and procedures. Initial DOB violations issued during these first 30 days carry no financial penalty. Following this period, violations will result in financial penalties and further noncompliance may result in Stop Work Orders and summonses with accompanying civil penalties of up to \$5,000 for each offense.

The guidance from New York State makes clear that maintaining a safe work site is the obligation of every company performing construction in New York, but the ultimate responsibility for following the safety protocols at any construction site may well rest on the site owner. The owner is expected to contract with the general contractor or another party to enforce the guidelines in view of the specific characteristics of the site.

If any contractor personnel at a construction site becomes sick from COVID-19, the site must immediately undergo a deep cleaning at the expense of the owner. This added owner cost is compounded by having to shut down the site during the cleaning, causing additional delays to the project schedule and potentially impacting the date of completion. Absent conduct contributing to the condition or to project delays, the contractor likely would not be responsible or penalized for these delays.

The Guidelines do not specify who will be ultimately liable if a worker becomes ill at a site. However, it is not inconceivable that a sick worker may name both the owner and the worker's employer in a lawsuit seeking to collect damages for contracting COVID-19.

An employer is usually immune from suit by an employee who suffers a workplace injury or occupational disease, since the employee's exclusive remedy is to file a claim with the employer's workers' compensation carrier. Workers' compensation laws do not bar those same employees from asserting tort claims against property owners.

In the COVID-19 context, such lawsuits may try to impose liability for a property owner's failure to inspect, clean, or sterilize a building and failure to implement the safety guidelines in the Plan. These claims would contend that the owner or employer was negligent in the reopening of the construction site. In order to establish negligence, a court must find that the owner owed a duty to the workers to prevent the spread of COVID-19, that the procedures put in place by the owner were deficient, and that the worker is sick because the owner failed to act properly to prevent the spread of COVID-19.

Property owners, who should be aware of dangerous conditions in communal spaces such as lobbies, stairwells, or elevators but fail to exercise reasonable care to prevent injuries in those spaces, may be subject to suit. In these cases, the owner may implead the employer for contribution or indemnification.

The best defense in actions arising from illness on a construction site will be that the owner's safety plan meets or exceeds the guidelines issued by OSHA, the Centers for Disease Control and Prevention ("CDC"), and the New York Forward Plan. Owners should provide stringent guidelines to all contractors on site and require all contractors to affirm that they will meet the safety procedures outlined in the owner's guidelines. This will afford the owner a credible defense if an individual contracts COVID-19 while working at the site. The owner will be able to show that its plan not only met, but exceeded the guidelines issued by OSHA, the CDC, and the New York Forward Plan; therefore, assuming the existence of a legal duty, the owner can credibly argue that it did not breach such duty and therefore cannot be found negligent.

A central obstacle confronted by plaintiffs seeking to sue owners and their employers is the element of causation. Plaintiffs will need to establish causation, or a connection between the negligence that they are alleging and their own exposure and illness.

It remains to be seen whether owners will be found to have a duty to prevent the spread of COVID-19. The Guidelines do not specify whether owners must develop their own plans or submit affirmations of compliance with the Guidelines. While it is clear that construction sites must comply, the absence of an allocation of responsibility to ensure compliance leaves the relative duties. To read more, [click here](#)

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