

Employee Benefit ■ Plan Review

New Jersey Establishes COVID-19 Workplace Safety Guidelines for All Employers, with Reporting Mechanism and Significant Potential Penalties

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New Jersey Governor Phil Murphy has issued a series of executive orders with industry-specific mandates and guidelines governing business reopenings during the COVID-19 pandemic and return-to-work protocols. Recognizing that a significant portion of the state's workforce has returned to in-person work, Governor Murphy issued Executive Order 192¹ ("EO 192" or "the Order"), establishing broad health and safety measures applicable to all employers that permit or require their employees to be physically present at work in New Jersey and that may have on-site customers or other visitors. The Order became effective at 6:00 p.m. on November 5, 2020.

Notably, EO 192 not only identifies the required safety protocols but also authorizes the creation of a mechanism for reporting and investigating noncompliance, as well as provides for potential penalties for noncompliance. The Order does not, however, change the portion of Governor Murphy's Executive Order 107 that requires employers to accommodate telework and work-from-home arrangements whenever practicable.

THE SAFETY REQUIREMENTS

EO 192 rescinds paragraph 2(c) of Executive Order 142,² which limited workgroups to fewer than 10 people, but otherwise expressly "supplements" the requirements outlined in prior executive orders or administrative orders (or similar directives) that apply to employers that had resumed operations during the pandemic. EO 192 provides that where an already existing requirement is inconsistent with a safety requirement in EO 192, the previously issued requirement will continue to apply unless otherwise specified.

EO 192 requires employers to follow the guidelines and directives issued by the New Jersey Department of Health ("DOH"), the federal Centers for Disease Control and Prevention ("CDC"), and the Occupational Safety and Health Administration ("OSHA") to maintain a clean, safe, and healthy work environment. The Order specifically mandates:

- Six-foot social distancing, to the extent possible (and the requirement of mask wearing when such distancing is not possible), and the installation of barriers between workstations;

- Mask-wearing requirements specific to employees and, separately, mask-wearing requirements specific to customers and other visitors (described in more detail below);
- Provision of sanitation materials, such as hand sanitizer;
- Enforcement of employee hand hygiene, and provision of break time and facilities for employees' repeated handwashing throughout the day;
- Routine cleaning and disinfection of high-touch areas (e.g., restrooms, handrails, door knobs, shared equipment, etc.);
- Daily pre-shift employee health checks consistent with guidance from the CDC (e.g., temperature screenings, visual symptom checking, self-assessment checklists, and/or health questionnaires);
- Immediate isolation and sending home of symptomatic employees (in compliance with state and federal leave laws); and
- Prompt notification of all employees of any known exposure to COVID-19, consistent with confidentiality requirements of the Americans with Disabilities Act, other applicable laws, and Equal Employment Opportunity Commission guidance.

MASK-WEARING REQUIREMENTS

EO 192 contains detailed requirements with respect to face coverings. In general, employers must require employees, customers, visitors, and others entering the worksite to wear cloth or disposable face masks, in accordance with CDC recommendations, except for youngsters less than two years old, or when wearing a face covering would be impractical (e.g., while the individual is eating or drinking, or the service cannot be performed on someone wearing a mask).

Requirements Specific to Employees

- Employers may permit employees to remove face masks when employees are situated at their workstations and more than six feet from others in the workplace, or when alone in a walled office.
- Except for employers subject to Executive Order 175 (governing the reopening of schools), an employer must make face masks available to employees at the employer's expense. In addition, employers must provide more protective equipment if required by the nature of the employee's work.
- Employees may wear a more protective face covering than what their employer provides.
- Employers may deny entry to the worksite to any employee who declines to wear a mask, except where doing so would violate state or federal law (e.g., because of disability); in such instances, an employer may be required to provide reasonable accommodation and the employee may be required to produce medical documentation supporting that he or she is unable to wear a face mask because of a disability.

Requirements Specific to Customers and Other Visitors

- Employers may deny entry to a worksite to any customer or visitor who declines to wear a face mask, except for youngsters under two years of age or where doing so would violate state or federal law (e.g., because of disability); in such instances, a business employer may be required to provide reasonable accommodation to the individual, unless doing so would pose an undue hardship on the employer's operations.

- Employers and their employees may not, however, require a customer or other visitor to produce medical documentation verifying the stated condition, unless such production is required by law.

Employers may deny entry to the worksite to any employee who declines to wear a mask, except where doing so would violate state or federal law (e.g., because of disability).

Exceptions

The safety mandates of EO 192 do not apply:

- When “they interfere with the discharge of the operational duties of first responders, emergency management personnel, emergency dispatchers, health care personnel, public health personnel, court personnel, law enforcement and corrections personnel, hazardous materials responders, transit workers, child protection and child welfare personnel, housing and shelter personnel, military employees, and governmental employees engaged in emergency response activities,” or
- To “the United States government, or to religious institutions to the extent that application of the health and safety protocols would prohibit the free exercise of religion.”

TRAINING, COMPLIANCE, AND POTENTIAL PENALTIES

EO 192 also requires the state's Department of Labor and Workforce Development (“DOL”)

to provide safety training, establishes an online mechanism for reporting noncompliance, and makes clear that both the state's DOH and DOL will investigate complaints, with potential penalties for noncompliance.

Training

EO 192 directs the DOL Commissioner to provide compliance and safety training for employers and employees, focusing at least in part on the health and safety protocols required by EO 192, through the following means:

- Establish a program to fund workforce training partners to develop and deliver, including virtually, training to workers and employers throughout the State, subject to the availability of funding; and
- Develop notices and informational materials to inform workers of their rights and employers of their obligations under EO 192.

Compliance

EO 192 authorizes the DOL and the DOH to provide enforcement support by:

- Establishing an “intake mechanism” to receive complaints from employees whose employers are subject to EO 192's requirements;
- Creating a process for investigating complaints, including through employee and employer interviews, and, where necessary,

workplace inspections and subpoenas; and

- Working with other applicable State entities (and OSHA) to establish a process to address the complaints and raise potential deficiencies, and to provide employers with an opportunity to correct an alleged or confirmed deficiency.

EO 192 does not create a private right of action to enforce its requirements.

Potential Penalties

Employers face significant potential exposure for noncompliance, including fines, closure orders, and criminal penalties. However, EO 192 states that employers normally should first be afforded an opportunity to correct an alleged or confirmed deficiency.

WHAT NEW JERSEY EMPLOYERS SHOULD DO NOW

- If you currently require or permit employees to be physically present at the workplace (and you are not exempted from the Order), review your policies and procedures to ensure compliance with EO 192's requirements (including requirements relating to employee screenings, social distancing, mask wearing, hygiene and etiquette, and proper cleaning and disinfecting).
- Determine whether compliance with EO 192 requires seating, schedule, or attendance changes.

- Monitor announcements from the DOL and/or the DOH regarding updated health and safety requirements as well as training and workplace postings.
- Consider establishing an internal reporting mechanism for alleged noncompliance with health and safety requirements, to maximize the opportunity to address and correct any alleged deficiencies.
- Continue to accommodate your workforces for telework or work-from-home arrangements, wherever practicable. 🌐

NOTES

1. <https://nj.gov/infobank/eo/056murphy/pdf/EO-192.pdf>.
2. <https://nj.gov/infobank/eo/056murphy/pdf/EO-142.pdf>.

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