
COVID-19: New York, New Jersey and Connecticut Each Announce Tentative Plans to Relax Workplace Restrictions

May 7, 2020

More than six weeks after ordering most employers to reduce or eliminate staff working on-site, New York Governor Andrew Cuomo recently outlined the state's plan to relax workplace restrictions in phases by industry and region, after each region meets certain health- and healthcare-related criteria, and after each business modifies operations to reduce transmission risk. New Jersey Governor Phil Murphy and Connecticut Governor Ned Lamont previously announced their own frameworks for easing restrictions on employers, which also rely on meeting certain health- and healthcare-related criteria.

None of these plans has been formalized in an executive order or authoritative text. Each state must still release concrete details and could modify its plans or delay implementation. In addition, with the exception of Connecticut's plan to allow certain industries to reopen on May 20, these states have declined to specify dates by which their work-from-home restrictions will be modified or eliminated. As a result, definitive answers to three key questions concerning the resumption of commercial activity—Which employers can resume in-person operations? When can that resumption begin? What must employers do to resume operations?—remain elusive. The states' respective plans nevertheless do shed light on each state's expectations concerning workplace restrictions and modified operations going forward.

A. New York's Regional and Phased Reopening Plan

On March 20, 2020, Governor Cuomo issued Executive Order No. 202.8¹ restricting employers' on-site operations as part of New York's PAUSE initiative. The order has been extended multiple times, most recently until May 15.²

¹ https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO_202.8.pdf

² https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO_202.18.pdf

Through his daily update press conferences, Governor Cuomo has set out his vision for how, region by region, the state will gradually relax the restrictions set forth in the PAUSE order. The governor has divided the state into regions for these purposes: Capital Region, Central New York, Finger Lakes, Long Island, Mid-Hudson Valley, Mohawk Valley, New York City, North Country, Southern Tier and Western New York. As described below, employers in each region will be allowed to resume on-site operations based on (1) when their region meets certain health- and healthcare-related metrics, (2) the type of on-site operations conducted—and the relative risk of transmitting the coronavirus during those operations—and (3) the safety modifications adopted by employers to reduce the risk of transmission.

1. Which employers can resume in-person operations?

For several weeks, Governor Cuomo has said the state would permit employers in given industries to resume on-site activities through an evaluation of (a) how “essential” its activities are to a functioning state economy and (b) the risk of coronavirus transmission posed by their activities.³ Presumably based on this evaluation, the state now envisions a resumption of on-site commercial activities in phases, by industry, assuming a region meets the requisite health- and healthcare-related criteria. New York has published the following list of “priority industries for re-opening” on its website:⁴

Phase 1

- Construction
- Manufacturing and wholesale supply chain
- Select retail using curbside pickup only

Phase 2

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

³ <https://www.governor.ny.gov/news/video-audio-photos-rush-transcript-amid-ongoing-covid-19-pandemic-governor-cuomo-outlines-1>

⁴ <https://www.governor.ny.gov/new-york-forward/regional-guidelines-re-opening-new-york#priority-industries-for-re-opening>

Phase 3

- Restaurants and food service
- Hotels and accommodations

Phase 4

- Arts, entertainment and recreation
- Education

2. *When can in-person operations resume?*

Governor Cuomo has said he will allow the statewide PAUSE order to expire on May 15. Thereafter, local leaders in the eight regions will be empowered to permit the phased resumption of on-site commercial activities so long as their regions meet the following health- and healthcare-related metrics.

- **New Infections:** Regions must have at least 14 days of decline in total net hospitalizations and deaths on a three-day rolling average. A region with few COVID-19 cases cannot exceed 15 net new total hospitalizations or five new deaths on a three-day rolling average. Such a region must also have fewer than two new COVID-19 patients admitted per 100,000 residents per day.
- **Healthcare Capacity:** Regions must have at least 30 percent of total hospital and ICU beds available, as well as at least 90 days of personal protective equipment (PPE) stockpiled.
- **Diagnostic Testing Capacity:** Each region must have the capacity to conduct 30 diagnostic tests for every 1,000 residents per month.
- **Contact Tracing Capacity:** Regions must have a baseline of 30 contact tracers for every 100,000 residents, and an unspecified number of additional tracers based on the projected number of cases in the region.⁵

The governor implied that each of the metrics above must be met prior to a region's reopening. No region in the state currently meets all these requirements, with New York City and Long Island particularly far from doing so; unless the state modifies its plans, reopening in these regions remains a more distant prospect.

⁵ <https://www.governor.ny.gov/news/amid-ongoing-covid-19-pandemic-governor-cuomo-outlines-additional-guidelines-when-regions-can>

In addition, the governor suggested that reopening would stop—and could be reversed—if the rate of transmission is higher than 1.1—a reference to the “basic reproduction number” used by epidemiologists to model the expected number of infections directly generated by one case in a population where all individuals are susceptible to infection.⁶ He has not said whether such a halt to reopening would be at a regional or statewide level.

The governor previously stated that at least 14 days would elapse between Phases 1 and 2, so as to ensure that the rate of transmission does not significantly increase.⁷ It is not clear whether such a requirement will be a part of any forthcoming state order, or whether a similar 14-day period will be required between Phases 2, 3 and 4.

3. *What steps must employers take in order to resume in-person operations?*

Governor Cuomo has also said employers must make a series of health-related changes in order to resume on-site operations. On April 28, he announced the creation of the New York Forward Re-opening Advisory Board, a group of trade associations, employers and labor organizations developing workplace safety measures, industry by industry, that must be adopted.⁸ Industry-specific guidelines have yet to be announced. For now, the governor’s guidance lists three broad categories of “business precautions”—people, places and processes—that employers must adopt. They must:

- adjust workplace hours and shift design as necessary to reduce density in the workplace;
- enact social distancing protocols;
- restrict nonessential travel for employees;
- 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; and

⁶ <https://www.governor.ny.gov/news/video-audio-photos-rush-transcript-amid-ongoing-covid-19-pandemic-governor-cuomo-outlines-1>

⁷ <https://www.governor.ny.gov/news/video-audio-photos-rush-transcript-amid-ongoing-covid-19-pandemic-governor-cuomo-outlines>

⁸ <https://www.governor.ny.gov/news/amid-ongoing-covid-19-pandemic-governor-cuomo-outlines-additional-guidelines-phased-plan-re>

- develop liability processes.

While the details of these changes remain unclear, they nevertheless point toward the types of changes employers will be expected to undertake—likely by law—in order to resume on-site operations. Pursuant to Executive Order No. 202.16,⁹ essential businesses that have continued on-site operations during this period must follow the current New York State Department of Health requirements concerning requiring face coverings for any employee who interacts with the public.¹⁰

B. New Jersey’s “The Road Back” Framework

On March 21, 2020, Governor Murphy issued New Jersey’s work-from-home order, Executive Order No. 107, which remains in effect until further notice.¹¹ On April 27, 2020, the governor announced a broad framework for reopening, titled “The Road Back: Restoring Economic Health Through Public Health.”¹²

1. Which employers can resume in-person operations?

New Jersey has not yet announced which industries or employers will be allowed to reopen as part of its plan.

2. When can in-person operations resume?

New Jersey’s framework includes “six key principles” to guide the process of lifting workplace restrictions.¹³ These principles are:

1. demonstrating sustained reductions in new COVID-19 cases and hospitalizations, including a “14-day trend line showing [an] appreciable and sustained drop in new COVID-19 cases, hospitalizations, and other metrics reflecting decreasing burden of disease” and “[h]ospitals stepping down from functioning under crisis standards of care”;
2. expanding diagnostic testing capacity;
3. implementing robust contact tracing;

⁹ <https://www.governor.ny.gov/news/no-20216-continuing-temporary-suspension-and-modification-laws-relating-disaster-emergency>

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https://coronavirus.health.ny.gov/system/files/documents/2020/04/doh_covid19_eo20216employeefacecovering_041420.pdf

¹¹ <https://nj.gov/infobank/eo/056murphy/pdf/EO-107.pdf>

¹² <https://nj.gov/governor/news/news/562020/approved/20200427b.shtml>

¹³

http://d31hzlhk6di2h5.cloudfront.net/20200427/db/2d/77/6c/2a8a498ff2edda855c3f456d/The_Road_Back_-_Restoring_Economic_Health_Through_Public_Health.pdf

4. securing safe places and resources for isolation and quarantine;
5. executing a responsible economic restart, including continuation of social distancing measures, required face coverings and work-from-home directives “where feasible and appropriate”; and
6. ensuring New Jersey’s resiliency, by, among other things, confirming that hospitals have inventories of PPE and ventilators.

New Jersey has not provided additional details, such as a time frame for beginning to lift workplace restrictions. The most-recent announcement from the state confirmed that the governor’s executive orders remain in effect “until further notice.” New Jersey has recently overtaken New York as the state with the most new COVID-19 cases and deaths, so the state’s timeline for reopening may be lengthened.

3. *What steps must employers take in order to resume in-person operations?*

Principle Five, executing a responsible economic restart, includes the governor’s creation of the Restart and Recovery Commission on April 28 to guide the reopening process.¹⁴ Using the state’s current “safe store” requirements for essential retail businesses as a guide,¹⁵ reopening employers can expect rules that require safety measures such as limiting workplace occupancy, installing physical barriers, frequently sanitizing high-touch areas and demarcating six feet of space in areas open to the public.

C. Connecticut’s Phase One Reopening Plan

On March 20 and March 22, 2020, Governor Lamont issued two executive orders restricting on-site operations, Executive Order No. 7H¹⁶ and Executive Order No. 7J,¹⁷ which currently expire on May 20.¹⁸ During a news briefing on April 30, 2020, the governor outlined Connecticut’s plan to lift workplace restrictions by commencing Phase One of four planned phases.¹⁹

1. *Which employers can resume in-person operations?*

¹⁴ <https://nj.gov/infobank/eo/056murphy/pdf/EO-131.pdf>

¹⁵ <https://nj.gov/infobank/eo/056murphy/pdf/EO-122.pdf>

¹⁶ <https://portal.ct.gov/-/media/Office-of-the-Governor/Executive-Orders/Lamont-Executive-Orders/Executive-Order-No-7H.pdf?la=en>

¹⁷ <https://portal.ct.gov/-/media/Office-of-the-Governor/Executive-Orders/Lamont-Executive-Orders/Executive-Order-No-7J.pdf?la=en>

¹⁸ <https://portal.ct.gov/-/media/Office-of-the-Governor/Executive-Orders/Lamont-Executive-Orders/Executive-Order-No-7X.pdf?la=en>

¹⁹ <https://portal.ct.gov/Office-of-the-Governor/News/Press-Releases/2020/04-2020/Governor-Lamont-Coronavirus-Update-April-30>

Governor Lamont said he will allow the following industries to restart on-site operations as part of Phase One on May 20:

- restaurants (outdoor only—no bar areas)
- all retail
- offices (though employers are encouraged to permit office employees to continue to work from home where possible)
- personal services (hair and nail only)
- museums and zoos (outdoor only)
- outdoor recreation
- university research programs

The governor has not said what other industries might see restrictions lifted in subsequent phases.

2. *When can in-person operations resume?*

Connecticut's approach to loosening restrictions will depend on several factors, including disease conditions, virus management, and healthcare capacity and supplies. In his comments on April 30, Governor Lamont listed the following seven criteria as guiding his decision-making:

- 14-day decline in hospitalizations
- availability of increased testing
- sufficient contact tracing capacity
- protection of high-risk populations
- adequate healthcare capacity
- adequate supply of PPE
- appropriate physical distancing regulations

The state has not provided specific metrics that must be met for further resumption of on-site commercial activities.

3. *What steps must employers take in order to resume in-person operations?*

Connecticut has not provided any guidance on health and safety measures employers whose on-site operations have been curtailed should adopt during reopening. However, the Connecticut Department of Economic and Community Development has published a list of “safe workplace rules for essential employers” currently operating that includes requiring employees to wear a mask

or face covering when around others, controlling contact among employees and with customers, eliminating or frequently cleaning transmission points, and adopting protocols for dealing with employees suspected of infection or exposure.²⁰

D. Conclusion

New York, New Jersey and Connecticut are part of a coalition of Northeastern and Mid-Atlantic states coordinating reopening efforts.²¹ Although their governors have repeatedly stressed the importance of coordinated action, and they adopt broadly similar criteria, each state's plan charts its own path to relaxing restrictions. This raises the possibility of a patchwork of rules that vary from state to state or even region by region within states. While many of the details of these plans remain to be seen, the broad approach that each state intends to take is becoming clearer. WilmerHale will continue to monitor these developments and advise employers as to what they can expect and how to comply with the new regulatory landscape they will face as they resume operations.

²⁰ <https://portal.ct.gov/DECD/Content/Coronavirus-Business-Recovery/Safe-Workplace-Rules-for-Essential-Employers>

²¹ <https://www.governor.ny.gov/news/massachusetts-joins-new-york-new-jersey-connecticut-pennsylvania-delaware-and-rhode-islands>

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