

Goodwin Alerts

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Reopening Massachusetts: Next Steps for Employers as the Four-Phase Journey Begins

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Nearly ten weeks after Governor Charlie Baker [declared a state of emergency](#) in Massachusetts due to the outbreak of COVID-19, the Commonwealth has begun reopening its economy in phases.

LOOKING BACK

On March 10, 2020, Governor Baker declared a state of emergency in Massachusetts. Less than two weeks later, on March 23, Governor Baker [ordered](#) businesses and organizations that do not provide “essential services” to close to reduce the spread of COVID-19. In connection with the March 23 Order, Governor Baker published a [list](#) of production and service sectors considered “essential.” The March 23 Order was extended on [March 31](#), [April 28](#), and [May 15](#).

On April 28, Governor Baker formed the Reopening Advisory Board to develop a comprehensive plan for the reopening of the Commonwealth. The Advisory Board is comprised of representatives from the business community, public health officials, and municipal leaders from across the Commonwealth. In developing the Baker-Polito administration’s plan, the Advisory Board considered testimony from business associations, labor unions, non-profits, and community coalitions.

Last week, on May 11, Governor Baker announced a Four-Phase Approach to Reopening Massachusetts and published Mandatory Workplace Safety Standards to apply across all sectors and industries. The Mandatory Workplace Safety Standards, which are available [here](#), require businesses and activities to meet minimum safety standards in four categories: Social Distancing; Hygiene Protocols; Staffing and Operations; and Cleaning and Disinfecting.

On May 18, Governor Baker issued the [Order Implementing a Phased Reopening of Workplaces and Imposing Workplace Safety Measures to Address COVID-19](#) (the “Reopening Order”) and the [Reopening Massachusetts Report](#) (the “Reopening Report”) outlining the phased reopening of physical workplaces and imposing sector-specific workplace safety measures to supplement the Mandatory Workplace Safety Standards.

LOOKING FORWARD

The Four-Phase Approach to Reopening Massachusetts balances the economic benefit and the public health risk of reopening the Commonwealth. Phase 1 (Start) permits limited industries to resume operations with severe restrictions. Phase 2 (Cautious) allows additional industries to resume operations with restrictions and capacity limits. Phase 3 (Vigilant) permits additional industries to resume operations with guidance. Finally, Phase 4 (New Normal) permits the resumption of most businesses and activities. Each phase will last a minimum of three weeks and some phases may be repeated if negative trends develop. Key public health metrics will determine the appropriate phase at any given time.

PHASE 1 BUSINESSES

During Phase 1 of the Four-Phase Approach to Reopening Massachusetts, the following businesses are permitted to reopen with restrictions: manufacturing, construction, and places of worship (May 18); laboratory spaces, office spaces outside of Boston, and limited personal services (for example, hair salons, pet grooming,

and car washes) (May 25); and office spaces located in Boston (June 1). Businesses providing essential services, as defined in the March 23, 2020, Order and subsequently updated, may remain open.

CONTROL PLANS, POSTINGS AND ATTESTATIONS

Before reopening, every business must (1) develop a written control plan (template available [here](#)) that complies with the Mandatory Workplace Safety Standards, and that outlines how the business will implement business sector-specific protocols and best practices to prevent the spread of COVID-19 (the "Control Plan"); (2) post employer and worker posters that provide employees with notice of the Mandatory Workplace Safety Standards (available [here](#) and [here](#)); and (3) post a Compliance Attestation poster (available [here](#)) that provides notice to workers and visitors that the business is taking required steps to comply with the Mandatory Workplace Safety Standards. If a business is already open because it provides essential services, it has until May 25, 2020, to comply with these requirements.

SECTOR-SPECIFIC PROTOCOLS

The Reopening Order includes mandatory safety standards applicable to specific business sectors permitted to open during Phase 1, such as Office Spaces (available [here](#)), Laboratories (available [here](#)), Construction (available [here](#)), and Manufacturing (available [here](#)). Each of the sector-specific protocols contains: Sector-Specific Workplace Safety Standards, a Sector-Specific Protocol Summary, and a Sector-Specific Checklist (collectively, "Sector-Specific Protocols"), which provide sector-specific standards and best practices that supplement the Mandatory Workplace Safety Standards. Sector-Specific Protocols applicable to business sectors that will not be permitted to open until future phases will be released at a later date.

Many of the safety standards are similar across sectors. For example, businesses in the Office Spaces and Laboratories sectors, as well as other sectors, must, among other things, ensure that employees have access to handwashing facilities on site, supply employees with adequate cleaning products such as hand sanitizer and disinfecting wipes, and provide training to their employees on up-to-date safety information and precautions. Employers in each sector are also required to notify the local Board of Health if the employer is notified of a positive COVID-19 case in the workplace, and to work with the Board in the contact tracing process.

Other safety standards are unique to specific sectors. For example, to promote social distancing, the Sector-Specific Protocols applicable to Office Spaces require that a business limit occupancy within its office space to no more than 25% of (1) the maximum occupancy level in any certificate of occupancy or similar permit or as provided for under the state building code or (2) the business's typical occupancy as of March 1, 2020.

Additionally, a business in the Office Spaces sector must develop a COVID-19 Prevention Plan that, among other things, provides for an Isolation, Contact Tracing, and Communication policy applicable to employees diagnosed as positive with COVID-19 or who come into close contact (within 6 feet for 10 minutes or more) with an individual diagnosed with COVID-19. Employers in the Office Spaces sector are also required to log everyone who comes in contact with the worksite to enable contact tracing, including even those visiting solely for material drop-offs.

WORKPLACE-SPECIFIC APPLICATION OF THE MANDATES

To complete the Control Plan, a business must certify that it is following the Mandatory Workplace Safety Standards and applicable Sector-Specific Protocols. After becoming knowledgeable about the Mandatory Workplace Safety Standards and Sector-Specific Protocols applicable to their businesses, employers must apply these standards and protocols to their particular workplaces. This will involve a careful assessment of physical space, behavioral habits and workplace culture. Employers should rely on the materials published by the Baker-Polito administration, particularly the applicable Sector-Specific Checklist, and consult with various

constituents when developing their company-specific plans and associated work rules and policies ("Company-Specific Work Rules and Policies"), including managers, employees from various job groups, food service providers, and building operations personnel.

Company-Specific Work Rules and Policies should address, among other things, rules concerning staggered lunch and break times, use of common space, cleaning of high-touch areas, use of face coverings, teleworking, workplace visitors, and arrangements for workers who are at higher risk for severe illness according to the Centers for Disease Control and Prevention (the "CDC"). Additionally, in the Office Spaces sector, the plan must be developed in a way that complies with the requirement that such businesses limit their occupancy to 25% of maximum or typical occupancy and minimize the use of confined spaces such as elevators by more than one person at a time. The employer should work closely with building operations personnel and other onsite service providers to ensure compliance with its Company-Specific Work Rules and Policies including in lobbies and elevators.

Each employer's Company-Specific Work Rules and Policies should be attached as exhibits to its Control Plan. Businesses do not need to submit their Control Plan for approval, but must keep the Control Plan on premises and make it available in the case of an inspection or outbreak.

Employers will need to purchase supplies to implement their new safety-related obligations. For example, employees must have access to alcohol-based hand sanitizers and disinfecting wipes and use face coverings or face masks. The Baker-Polito administration has provided a list of supplies that businesses need to have to reopen and a list of vendors from which businesses can purchase such supplies, both of which are available [here](#).

COMMUNICATING WITH AND TRAINING EMPLOYEES

Effective employee communications will be key. In addition to satisfying its employee notice requirements through the posting of the employer and worker posters, every employer should develop a communication plan and assign responsibility for employee communications to one or more designated persons. Further, to comply with a unique Sector-Specific Protocol, businesses in the Office Spaces sector, for example, must establish and communicate a worksite-specific COVID-19 Preparation Plan for all office locations.

Businesses in the Office Spaces and Laboratories sectors, among others, must also provide training to employees on up-to-date safety information and precautions including hygiene and other measures aimed at reducing disease transmission such as social distancing and self-screening, including at home temperature and symptom checks. To be effective, these trainings should explain and model the behaviors expected of employees, such as proper use of and disposal of face masks; social distancing expectations in highly trafficked areas such as hallways, elevators and elevator banks, lobbies, and break rooms; handwashing techniques; and use of any reconfigured spaces. Given that trainings must provide "up-to-date safety information and precautions," the programs should be developed based on the resources provided by public health authorities such as the CDC and OSHA and customized for each workplace. Employers should expect that trainings may need to be revised and delivered multiple times.

MONITORING COMPLIANCE

Employers must ensure that all Company-Specific Rules and Policies are properly implemented and followed on an ongoing basis. This responsibility should be delegated to one or more people who are onsite, have mastered the Company-Specific Rules and Policies, and are committed to the employer's preferred approach to monitoring behavior and addressing non-compliance. Employers may enforce Control Plan work rules through counseling, discipline, and even termination of employment, so long as the Company-Specific Rules and Policies are applied consistently. As with any workplace conduct expectations, tone at the top matters and

employers should guard against special treatment or exemptions for leaders. Employers should also consider developing a procedure through which employees can raise COVID-related concerns and a response process since operating in a highly regimented workplace may cause tension between co-workers. These are important and highly sensitive issues that will affect nearly every worker's life in a meaningful way — asking employees to work out issues among themselves may lead to unnecessary disputes and long-term damage to relationships and culture.

Employers are expected to ensure that all persons, including employees, customers, and vendors, remain at least six feet apart to the greatest extent possible "both inside and outside of the workplace." While monitoring all outside activities would not be possible or prudent, employers should consider requiring all employees and visitors to attest to practicing social distancing in a daily questionnaire that is a condition to entry into the physical workplace. A questionnaire is also a useful tool for employees to self-report if they are experiencing any COVID-19-related symptoms, or if they have been in close contact with individuals who have tested positive for COVID-19. Obtaining this information will help businesses comply with the obligation to require employees who are feeling ill to stay home from work and encourage employees to self-identify any close contact they have had with individuals with known or suspected COVID-19 cases, both of which are Sector-Specific Protocols.

ENFORCEMENT

The Commonwealth's Department of Labor Standards, the Commonwealth's Department of Public Health, and municipal boards of health have the authority to enforce the terms of the Reopening Order and any directives, regulations, or guidance issued under the authority of the Reopening Order, including the Mandatory Safety Standards for Workplaces and Sector-Specific Protocols. Fines may be issued, and injunctions may be enforced, for non-compliance in accordance with the Reopening Order. Practically speaking, a violation of the requirements will most likely come to the attention of the enforcing agencies through complaints made by employees or customers (as opposed to regimented monitoring by the enforcing agencies). Indeed, Lieutenant Governor Karyn Polito commented at the May 18, 2020, press conference that the Control Plan template and related publications are designed so that employers can individually verify that they have incorporated the required features into their workplaces and then communicate that compliance to both their employees and the public.

EMPLOYEE TESTING

The Mandatory Safety Standards for Workplaces and Sector-Specific Protocols do not require that employees be tested for the COVID-19 virus prior to entering the workplace. Instead, the Reopening Massachusetts Report contemplates optional employer-sponsored testing beginning July 2020. As noted in Goodwin's [April 19, 2020, client alert](#), there are various considerations under federal and state laws to implementing legally-compliant testing, including under the Americans with Disabilities Act (ADA) and applicable state privacy laws. Pursuant to [previously issued federal guidance by the EEOC](#), employers are permitted to require employees to submit to a COVID-19 test in order to protect others from the direct threat of the virus before employees enter the workplace without violating the ADA. The Baker-Polito administration's projections (in the Reopening Massachusetts Report) of optional employer-sponsored testing in July 2020 bolsters the position that employer-mandated testing addresses a significant safety risk, which in turn suggests that there is a legitimate business interest in COVID-19 testing that would outweigh the privacy interests of any employee who may refuse to be tested, especially if the required test is not invasive.

DISCRIMINATION ISSUES AND HIGH-RISK EMPLOYEES

The Reopening Massachusetts Report recommends that people over the age of 65 and people who have underlying health conditions who are at high risk for COVID-19 continue to stay home except in limited (non-work) circumstances. Although keeping vulnerable individuals at home may help keep the Commonwealth's hospital rate on a downward progression and help keep those vulnerable employees safe, employers should be mindful of applicable federal and state anti-discrimination laws that prohibit employers from taking adverse actions against employees because of their age or disability. For example, an employer policy or practice requiring only older workers to telework is not permissible under the Age Discrimination in Employment Act ("ADEA"). Similarly, a policy or practice excluding employees from the workplace solely because the employee has an underlying health condition that places the employee at high risk for COVID-19 (assuming such health condition is a "disability" as defined under the ADA) is not permissible under the ADA. With that said, assuming an employee volunteers certain information, there are potential alternatives for an employer to consider through careful analyses.

Although ADEA does not require employers to provide age-based workplace accommodations, in light of the Reopening Massachusetts Report recommendation as well as the White House's ["Opening Up America Again"](#) guidance regarding "Vulnerable Individuals," employers may encourage employees to volunteer if they would like to be considered for special accommodations in connection with their return to the workplace. For example, employees who volunteer that they would like to be considered for special accommodations because they are over the age of 65 may be granted permission to temporarily work from home, although such an accommodation would not be legally required.

Relatedly, employers may consider encouraging employees to volunteer if they have [a medical condition](#) identified by the CDC that places an individual at a high risk for severe illness if the individual contracts COVID-19. If an employee volunteers such information, an employer may engage in an individualized assessment (aided by medical judgment, medical knowledge and objective evidence) to determine whether the employee has a disability that poses a "significant risk of substantial harm" to the employee's health. If an employer determines that an employee's disability poses a significant risk of substantial harm to the employee's health, the employer should then engage in an interactive process with the employee to determine whether there is a reasonable accommodation to eliminate or reduce the risk so that it is safe for the employee to return to the workplace while still permitting the performance of essential functions of the employee's job. If there is no such reasonable accommodation, an employer must consider accommodations such as telework, a leave of absence, or reassignment. Only if, after taking each of these steps, the facts support the conclusion that the employee poses a significant risk of substantial harm to himself or herself that cannot be reduced or eliminated by reasonable accommodation, then the employer may exclude the employee from the workplace and have an affirmative defense to a disability-based discrimination claim under ADA.

MOVING TOWARD A NEW NORMAL

The Baker-Polito administration has presented a detailed multi-phased plan for reopening Massachusetts. General industry, sector-specific, and company-tailored work rules must be developed, implemented, monitored, and attested to as we move towards the administration's view of the "new normal." Massachusetts employers have their work cut out for them. As always, the Employment practice at Goodwin is pleased to assist.

Please visit Goodwin's [Coronavirus Knowledge Center](#), where firm lawyers from across the globe are issuing new guidance and insights to help clients fully understand and assess the ramifications of COVID-19 and navigate the potential effects of the outbreak on their businesses.

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