

PROGRAM MATERIALS
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## Practicing in a Post-Covid World

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## PRACTICING IN A POST-COVID WORLD

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NYS Guidance to Notaries Concerning Executive
Order 202.7

## **ATTACHMENT 1**

#### SAMPLE REOPENING PLAN OUTLINE

#### Create Reopening Transition Team To-

- Monitor and provide oversight of the re-opening plan and its implementation
- Develop and update, as needed, internal policies and procedures for the transition from remote work to the workplace
- Communicate with legal and support staff with one voice regarding the transition process, set clear expectations and offer firm-wide training, as needed
- Field questions or concerns
- Develop an employee testing plan for testing employees for COVID-19
- Develop client and visitor policies
- In New York, appoint a "Responsible Party or Parties" who must adhere to all state, local and federal laws relating to office-based work activities and stay current with changes
  - That person also will be required to affirm he or she has read, understands and will follow the New York Interim Guidance on Business Reopening Activities (see attached)

#### Implement a Policy

- Develop and disseminate a clear "Return to Work" policy
- Address issues including: workplace safety, testing, telecommuting and altered schedules, if any
- Designate a representative to receive COVID-19 related complaints and concerns, including reporting symptoms, a positive test, or close contact with an infected person.
- Include specific policies covering:
  - Infection control
  - Employee health screening
  - Visitor screening
  - Vendor/contractor screening
  - o Employees who:
    - Are diagnosed with COVID-19
    - Exhibit symptoms
    - Come into contact with infected/symptomatic person

#### Prepare the Workplace

- Focus on employee safety
- Assess workplace mechanical components including HVAC, fire/life safety systems, entry systems, and water temperature at hand washing locations – and assure they meet recommended guidelines
- Coordinate with landlords and other tenants on opening and safety procedures in common areas and elevators

- Stagger workstations and occupied offices to increase the distance between employees in attendance; use plexiglass or other barriers as necessary
- Install barriers for receptionists or other employees at high foot traffic locations
- Inventory cleaning and other supplies to maintain a disinfected environment and continue to develop supply sources and re-order well in advance
- Develop a cleaning and sanitizing protocol in accordance with most recent recommended CDC and OSHA guidelines and maintain logs that include date, time and scope of cleaning and disinfecting
- Install signage on social distancing and hygiene guidelines
- Develop one-way foot traffic patterns if the workplace facility allows for it; also designate separate doors for ingress and egress
- Reduce or frequently clean touchpoints: e.g., door handles and push plates; kitchen and bathroom faucets and fixtures; light switches; buttons on copiers, elevator buttons; shared telephones; and computer keyboards and mice
- Ensure distancing guidelines are adhered to in restrooms use signage or other "occupied" markings as necessary

#### Prepare Employees for Return

- In as collaborative a way as possible, decide which employees will be permitted or required to return to the workplace; this of course will be subject to overall progress in vaccinating eligible persons, local infection rates, and guidance from state and local health departments
- Continue to encourage those who can work effectively remotely to do so until further notice
- Be prepared to have discussions with employees who are unable or unwilling to return to the office because of:
  - Actual or perceived heightened susceptibility to COVID-19
  - o Disclosure of previously unknown medical conditions, implicating employer privacy and confidentiality obligations under the ADA and state and federal laws
  - o Fear of transmitting disease to a member of their house hold

#### -And-

- Make reasonable accommodations unless this causes undue hardship to the employer
- If testing for COVID-19:
  - Protect the confidentiality of employees' medical information, especially if the affected employee will be sent home
  - Be mindful of confidentiality considerations when informing co-workers of possible exposure
  - Treat all employees in the same manner
  - o Follow federal, state and local leave policies for employees who cannot be in the workplace

#### Stagger Workday Hours and Monitor Returns

- Encourage those who can work remotely effectively to continue to do so until further notice
- Discourage visits by employees from your firm's other offices
- Implement staggered arrival and departure times
- Maintain attendance or sign-in sheets to provide responsible contact tracing information, if needed, and to limit and track hours in the office
- If travel by mass transit is unavoidable, educate employees on best practices for minimizing risk
- Discourage socializing outside the workplace immediately before coming into the office
- Encourage employees to bring their own food and beverages to limit deliveries from outside the office
- Establish one designated area for pick-ups and deliveries
- Temporarily restrict access to kitchens and other common areas

#### **Develop Work-Place Guidelines**

#### Physical Distancing

- Limit total occupants to 50% of maximum occupancy, as set by the certificate of occupancy; stagger work schedules where possible
- Modify work stations and seating areas to have people six feet apart in all directions
- Clean work stations between uses if sharing but seek to limit shared use if possible
- Implement one-way foot traffic by posting signs in narrow hallways and other areas
- Limit onsite interactions to the extent practicable but require those in direct contact to wear masks or other face coverings
- o Temporarily close non-essential amenities and communal areas that promote gatherings or are high touch places (e.g., kitchens/cafeterias/conference rooms)
- o Limit non-essential travel
- Maintain adequate supply of masks and face coverings and supply these to employees at no cost
- o Advise workers, building employees and other visitors to wear face coverings in common areas, elevators, and when traveling around the office
- o Limit sharing of objects, such as Laptops, notebooks and telephones, and encourage hand hygiene before and after any such touching
- o Implement clean desk policy if practical

#### Hygiene and Cleaning

- Prepare and maintain hand hygiene stations in the office, including soap and warm running water, paper towels and lined garbage cans
- o Have alcohol based hand sanitizers available where hand washing is not feasible

- Encourage employees to wash hands/use hand sanitizers after coming into contact with frequently touched surfaces, such as:
  - Door knobs, copiers, coffee machines, microwave, refrigerator door handles
  - Access points: handles, knobs, power buttons, switches, security pads
- Place designated receptacles around office for disposal of soiled/used masks or other PPE

#### Office Cleaning

- Continue normal office cleaning
- Contract for at least daily and possibly more frequent cleaning and disinfecting of frequently touched surfaces and objects, including:
  - Doorknobs
  - Light switches
  - Countertops,
  - Handles,
  - Phones,
  - Keyboards,
  - Toilets,
  - Faucets and sinks
- O In the event that an individual is confirmed to have COVID-19, clean and disinfect exposed areas which at a minimum will include: all heavy transit areas and hightouch surfaces (e.g., elevators, lobbies, building entrances, badge scanners, restrooms, handrails, and door handles)

#### Communications

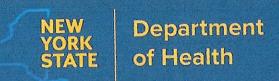
- Add return to work policy on your website
- o Have handouts of the policy available for employees, visitors and others
- Conspicuously post site safety plan at your office and appoint site safety monitor to ensure compliance with site safety plan – see New York Forward Safety Plan Template
- Post signage inside and outside of the office location to remind personnel and others to adhere to proper hygiene, social distancing rules, appropriate use of PPE, and cleaning and disinfecting protocols
- o Train all personnel on new protocols and frequently communicate safety guidelines
- Establish a communication plan for employees and visitors with a consistent means to provide updated information

- Maintain a continuous log of every person, including employees and visitors, who
  may have had close contact with other individuals at the work site
- o If an employee or visitor was in close contact with others at the office location and tests positive for COVID-19, immediately notify state and local health departments and cooperate with contact tracing efforts. These efforts include: notification of potential contacts, such as employees and visitors (if known) who had close contact with the individual, while maintaining confidentiality required by state and federal law and regulations

#### Screening

- Employees who are sick should stay home or return home if they became ill at work
- o Implement mandatory health screening assessments (e.g., questionnaire, online app, temperature checks) for employees, contractors and other visitors, as currently required by state and local health authorities and as updated from time to time
- O At a minimum, screening questions should ask whether the person had:
  - COVID-19 symptoms in past 14 days
  - A positive COVID-19 test in past 14 days
  - Close contact with a confirmed or suspected COVID-19 case in the past 14 days.
- Responses must be reviewed and documented daily:
  - If a person has COVID-19 symptoms AND EITHER tests positive for COVID-19 OR did not receive a test, the individual may only return after completing at least 14 days of self-quarantine
  - If a person does NOT have COVID-19 symptoms BUT tests positive for COVID-19, the individual may only return after completing at least 14 days of self-quarantine
  - If a person has had close contact with a person with COVID-19 for a prolonged period of time AND is NOT symptomatic, the individual must complete a 14-day self-quarantine
- Provide appropriate training for on-site screeners (i.e., familiarity with CDC, DOH, and OSHA protocols) and ensure they wear appropriate PPE, including at a minimum, a face covering
- Identify a point-of-contact at the office as the party for employees and visitors to inform if they later experience COVID- 19-related symptoms
- Have a plan in place for cleaning, disinfection, and contact tracing in the event of a positive case

## **ATTACHMENT 2**



### INTERIM GUIDANCE FOR OFFICE-BASED WORK DURING THE COVID-19 PUBLIC HEALTH EMERGENCY

When you have read this document, you can affirm at the bottom.

As of March 12, 2021

#### Purpose

This Interim Guidance for Office-Based Work during the COVID-19 Public Health Emergency ("Interim COVID-19 Guidance for Office-Based Work") was created to provide businesses and entities that operate in office spaces and their employees and contractors with precautions to help protect against the spread of COVID-19 as their businesses reopen or continue to operate.

This guidance addresses business activities where the core function takes place within an office setting. This guidance may apply – but is not limited – to businesses and entities in the following sectors: Professional services, nonprofit, technology, administrative support, and higher education administration (excluding full campus reopening). Please note that these guidelines may also apply to business operating parts of their business functions under different guidelines (e.g. front office for a construction company). This guidance does not address medical offices, such as doctors' offices or dentists' offices. This guidance also does not address building owners/managers and their employees or contractors. For more information on building management, see, "Interim COVID-19 Guidance for Commercial Building Management."

These guidelines are minimum requirements only and any employer is free to provide additional precautions or increased restrictions. These guidelines are based on the best-known public health practices at the time of publication, and the documentation upon which these guidelines are based can and does change frequently. The Responsible Parties — as defined below — are accountable for adhering to all local, state and federal requirements relative to office-based work activities. The Responsible Parties are also accountable for staying current with any updates to these requirements, as well as incorporating same into any office-based work activities and/or Site Safety Plan.

#### Background

On March 7, 2020, Governor Andrew M. Cuomo issued <u>Executive Order 202</u>, declaring a state of emergency in response to COVID-19. Community transmission of COVID-19 has occurred throughout New York. To minimize further spread, social distancing of at least six feet must be maintained between individuals, where possible.

On March 20, 2020, Governor Cuomo issued <u>Executive Order 202.6</u>, directing all non-essential businesses to close in-office personnel functions. Essential businesses, as defined by Empire State Development Corporation (ESD) <u>guidance</u>, were not subject to the in-person restriction, but were, however, directed to comply with the guidance and directives for maintaining a clean and safe work environment issued by the New York State Department of Health (DOH), and were strongly urged to maintain social distancing measures to the extent possible.

On April 12, 2020, Governor Cuomo issued Executive Order 202.16, directing essential businesses to provide employees, who are present in the workplace, with a face covering, at no-cost, that must be used when in direct contact with customers or members of the public during the course of their work. On April 15, 2020, Governor Cuomo issued Executive Order 202.17, directing that any individual who is over age two and able to medically tolerate a face-covering must cover their nose and mouth with a mask or cloth face-covering when in a public place and unable to maintain, or when not maintaining, social distance. On April 16, 2020, Governor Cuomo issued Executive Order 202.18, directing that everyone using public or private transportation carriers or other for-hire vehicles, who is over age two and able to medically tolerate a face covering, must wear a mask or face covering over the nose and mouth during any such trip. It also directed any operators or drivers of public or private transport to wear a face covering or mask which covers the nose and mouth while there are any passengers in such a vehicle. On May 29, 2020, Governor Cuomo issued Executive Order 202.34, authorizing business operators/owners with the discretion to deny admittance to individuals who fail to comply with the face covering or mask requirements.

On April 26, 2020, Governor Cuomo announced a phased approach to reopen industries and businesses in New York in phases based upon a data-driven, regional analysis. On May 4, 2020, the Governor provided that the regional analysis would consider several public health factors, including new COVID-19 infections, as well as health care system, diagnostic testing, and contact tracing capacity. On May 11, 2020, Governor Cuomo announced that the first phase of reopening would begin on May 15, 2020 in several regions of New York, based upon available regional metrics and indicators. On May 29, 2020, Governor Cuomo announced that the second phase of reopening would begin in several regions of the state, and announced the use of a new early warning dashboard that aggregates the state's expansive data collection efforts for New Yorkers, government officials, and experts to monitor and review how the virus is being contained to ensure a safe reopening.

In addition to the following standards, both essential and non-essential businesses must continue to comply with the guidance and directives for maintaining clean and safe work environments issued by DOH.

Please note that where guidance in this document differs from other guidance documents issued by New York State, the more recent guidance shall apply.

#### Standards for Responsible Office-Based Work Activities in New York State

No office-based work activities can operate without meeting the following minimum State standards, as well as applicable federal requirements, including but not limited to such minimum standards of the Americans with Disabilities Act (ADA), Centers for Disease Control and Prevention (CDC), Environmental Protection Agency (EPA), and United States Department of Labor's Occupational Safety and Health Administration (OSHA). The State standards apply to all office-based work activities (essential and non-essential) in operation during the COVID-19 public health emergency until rescinded or amended by the State.

The State standards contained within this guidance apply to all office-based work activity – both essential and non-essential – in operation during the COVID-19 public health emergency until rescinded or amended by the State. The owner/operator of the business with office-based functions, or another party as may be designated by the owner/operator (in either case, "the Responsible Parties"), shall be responsible for meeting these standards. The designated party can be an individual or group of individuals responsible for the operations of individual office locations/spaces. The building owner, or their designee, shall be primarily responsible for meeting standards with respect to any unleased or common areas, and the tenant, if not the owner, shall be primarily responsible for meeting these standards with respect to their leased space(s), unless the tenant and building owner reach an alternate agreement in regard to such responsibilities (e.g. joint screening protocol). Note that the following guidance specifically addresses tenants occupying office space and their employees, contractors, and visitors. Responsible Parties for the

entities occupying office spaces should coordinate with building owners/managers, where applicable, on the implementation of practices in accordance with this guidance.

Note that, except where noted otherwise, references made to "employees" are to the office-based businesses/tenants and their employees and/or contractors. Responsible Parties should coordinate with building managers, where applicable, on the implementation of practices in accordance with this guidance. For more information on building managers and their employees, see "Interim COVID-19 Guidance for Commercial Building Management."

The following guidance is organized around three distinct categories: people, places, and processes.

#### I. PEOPLE

#### A. Physical Distancing

- Where office-based work is located in a region that is in Phases II, III, or IV, the total number of occupants is limited to no more than 50% of the maximum occupancy at any given time for a particular area as set by the certificate of occupancy. Where applicable, Responsible Parties should work with building owners/managers to maintain capacity limits; and
- Responsible Parties must ensure that a distance of at least six feet is maintained among individuals at all times, unless safety of the core activity requires a shorter distance. Any time individuals must come within six feet of another person, acceptable face coverings must be worn. Individuals must be prepared to don a face covering if another person unexpectedly comes within six feet.
  - Acceptable face coverings for COVID-19 include but are not limited to cloth-based face coverings and disposable masks that cover both the mouth and nose.
  - However, cloth, disposable, or other homemade face coverings are not acceptable face coverings for workplace activities that typically require a higher degree of protection for personal protective equipment (PPE) due to the nature of the work. For those activities, N95 respirators or other PPE used under existing industry standards should continue to be used, as is defined in accordance with OSHA guidelines.
  - Responsible Parties should consider closing any common indoor or outdoor seating areas (e.g. reception areas) within their office space. To the extent that such spaces remain open, Responsible Parties must modify seating areas arrangements (e.g. chairs, tables) to ensure that individuals are at least six feet apart in all directions (e.g. side-to-side and when facing one another).
- Responsible Parties may modify or reconfigure the use and/or restrict the number of workstations, employee seating areas, and desks, so that employees are at least six feet apart in all directions (e.g. side-to-side and when facing one another) and are not sharing workstations without cleaning and disinfection between use. When distancing is not feasible between workstations, Responsible Parties must provide and require the use of face coverings or physical barriers (e.g. plastic shielding walls, in lieu of face coverings in areas where they would not affect air flow, heating, cooling or ventilation).
  - Physical barriers should be put in place in accordance with <u>OSHA guidelines</u>.
  - Physical barrier options may include: strip curtains, cubicle walls, plexiglass or similar materials, or other impermeable dividers or partitions.
- Responsible Parties should consider implementing strict clean-desk policies, so that non-essential items are stored in enclosed cabinets or drawers, rather than on desks.

- Responsible Parties should limit the use of shared workstations (e.g. "hot-desks"), to the extent
  practicable. To the extent that such workstations remain in use, they must be cleaned and disinfected
  between users.
- Responsible Parties should prohibit the use of small spaces (e.g. elevators, supply rooms, personal offices, vehicles) by more than one individual at a time, unless all individuals in such space at the same time are wearing acceptable face coverings. However, even when face coverings in use, occupancy must never exceed 50% of the maximum capacity of the space or vehicle, unless it is designed for use by a single occupant. Responsible Parties should increase ventilation with outdoor air to the greatest extent possible (e.g., opening windows and doors in individual office rooms), while maintaining safety protocols. Responsible Parties should take additional measures to prevent congregation in elevator waiting areas and limit density in elevators, by enabling the use of stairs.
  - Responsible Parties may leverage technology, such as room sensors and real-time dashboards, to quantify and display utilization of spaces throughout the office.
  - Responsible Parties must restrict access to areas that have reached maximum capacity under distancing guidelines.
- Responsible Parties should put in place measures to reduce bi-directional foot traffic using tape or signs with arrows in narrow aisles, hallways, or spaces, and post signage and distance markers denoting spaces of six feet in all commonly used areas and any areas in which lines are commonly formed or people may congregate (e.g. copy rooms, kitchens, reception desks, health screening stations).
  - Responsible Parties should mark six feet distance circles around workstations and other common stationary work areas.
- Responsible Parties must post signs throughout the office, consistent with DOH COVID-19 signage.
   Responsible Parties can develop their own customized signage specific to their workplace or setting, provided that such signage is consistent with the Department's signage. Signage should be used to remind individuals to:
  - Cover their nose and mouth with a face covering when six feet of social distance cannot be maintained.
  - Properly store and, when necessary, discard PPE.
  - Adhere to physical distancing instructions.
  - Report symptoms of or exposure to COVID-19, and how they should do so.
  - Follow hand hygiene and cleaning and disinfection guidelines.
  - Follow appropriate respiratory hygiene and cough etiquette.

#### B. Gatherings in Enclosed Spaces

Responsible Parties should encourage the use of video or teleconferencing for their employee meetings whenever possible to reduce the density of in-person gatherings, per CDC guidance "Interim Guidance for Businesses and Employers to Plan and Respond to Coronavirus Disease 2019 (COVID-19)". Responsible Parties should hold in-person meetings in open, well-ventilated spaces and ensure that individuals maintain six feet of social distance between one another (e.g. if there are chairs, leave space between chairs, have employees sit in alternating chairs) or wear appropriate face coverings. Responsible Parties may consider implementing the following practices to remind participants of appropriate social distancing measures when meetings are held:

- Mark tables in meeting rooms with appropriate distance markers.
- Responsible Parties should encourage social distancing by limiting occupancy or closing non-essential
  amenities and communal areas that do not allow for social distancing protocols. If open, Responsible
  Parties must make hand sanitizer or disinfecting wipes available next to equipment near such
  amenities (e.g. vending machines, communal coffee stations).
- Responsible Parties must put in place practices for adequate social distancing in small areas, such as
  restrooms and breakrooms, and should develop signage and systems (e.g. flagging when occupied) to
  restrict occupancy when social distancing cannot be maintained in such areas.
- Responsible Parties should stagger schedules for employees to observe social distancing for any gathering (e.g. coffee breaks, meals, and shift starts/stops).
- If required, employees that don't need to be in the office may be allowed to collect documents from their place of work on a case-by-case basis, but such collection should occur minimally, not with frequency.
- Non-essential common areas (e.g. gyms, pools, game rooms) may reopen in accordance with any applicable industry-specific guidance. Specifically, gyms and fitness centers must follow the guidelines outlined in DOH's "Interim Guidance for Gyms and Fitness Centers during the COVID-19 Public Health Emergency;" pool operations must follow the guidelines outlined in DOH's "Interim Guidance for Pools and Recreational Aquatic Spray Grounds During the COVID-19 Public Health Emergency;" and recreational activities, such as pool and billiards, must follow the guidelines outlined in DOH's "Interim Guidance for Sports and Recreation during the COVID-19 Public Health Emergency."

#### C. Workplace Activity

- Responsible Parties must take measures to reduce interpersonal contact and congregation, through methods such as:
  - o adjusting workplace hours;
  - reducing in-office workforce to accommodate social distancing guidelines;
  - shifting design (e.g. A/B teams, staggered arrival/departure times to reduce congestion in lobbies and elevators); and/or
  - avoiding multiple teams working in one area by staggering scheduled tasks and using signs to indicate occupied areas.
- Responsible Parties should create polices which encourage employees to work from home when
  feasible. Responsible Parties may choose to develop return-to-office tiers or waves for employees
  based on factors such as function, safe transportation, and ability to work remotely, as noted in Section
  II "People," Subsection C "Phased Reopening."
- Responsible Parties may choose to implement best practices for employees to successfully work from home, such as:
  - Conducting regular surveys of employees to determine what practices are working and what can be improved;
  - Providing tips and tricks for employees to enhance remote work sustainability;
  - Allowing for employees to set morning and evening boundaries and taking regular breaks throughout the day;
  - Informing employees of the resources they have readily available.

TESTED.

#### D. Movement and Commerce

- Responsible Parties should consider limiting all non-essential travel.
- Responsible Parties must establish designated areas for pickups and deliveries, limiting contact to the extent possible.
- Responsible Parties should limit on-site interactions (e.g. designate an egress for employees leaving their shifts and a separate ingress for employees starting their shifts) and movements (e.g. employees should remain near their workstations as often as possible).

#### II. PLACES

#### A. Protective Equipment

- In addition to the necessary PPE as required for certain workplace activities, Responsible Parties must procure, fashion, or otherwise obtain acceptable face coverings and provide such coverings to their employees while at work at no cost to the employee. Responsible Parties should have an adequate supply of face coverings, masks and other required PPE on hand should an employee need a replacement, or should a visitor be in need. Acceptable face coverings include, but are not limited to, cloth (e.g. homemade sewn, quick cut, bandana), surgical masks, and face shields.
- Face coverings must be cleaned or replaced after use and may not be shared. Please consult CDC guidance for additional information on cloth face coverings and other types of PPE, as well as instructions on use and cleaning.
  - Note that cloth face coverings or disposable masks shall not be considered acceptable face coverings for workplace activities that require a higher degree of protection for face covering requirements. For example, if N95 respirators are traditionally required for specific activities, a cloth or homemade mask would not suffice. Responsible Parties must adhere to OSHA standards for such safety equipment.
- Responsible Parties must allow employees to use their own acceptable face coverings but cannot
  require employees to supply their own face coverings. Further, this guidance shall not prevent
  employees from wearing their personally owned additional protective coverings (e.g. surgical masks,
  N95 respirators, or face shields), or if the Responsible Parties otherwise requires employees to wear
  more protective PPE due to the nature of their work. Employers should comply with all applicable
  OSHA standards.
- Responsible Parties must train employees on how to adequately put on, take off, clean (as applicable), and discard PPE, including but not limited to, appropriate face coverings. Such training should be extended to contractors if the Responsible Parties will be supplying the contractors with PPE.
- Responsible Parties must advise employees and visitors to wear face coverings in common areas including elevators, lobbies, and when traveling around the office.
- Responsible Parties must put in place measures to limit the sharing of objects, such as laptops, notebooks, touchscreens, and writing utensils, as well as the touching of shared surfaces, such as conference tables; or, require employees to perform hand hygiene before and after contact.

#### B. Hygiene, Cleaning, and Disinfection

- Responsible Parties must ensure adherence to hygiene and cleaning and disinfection requirements as
  advised by the CDC and DOH, including "Guidance for Cleaning and Disinfection of Public and Private
  Facilities for COVID-19," and the "STOP THE SPREAD" poster, as applicable. Responsible Parties must
  maintain logs that include the date, time, and scope of cleaning and disinfection.
- Responsible Parties must provide and maintain hand hygiene stations on in the office, as follows:
  - For handwashing: soap, running warm water, and disposable paper towels.
  - For hand sanitizing: an alcohol-based hand sanitizer containing at least 60% alcohol for areas where handwashing facilities may not be available or practical.
  - Make hand sanitizer available throughout common areas in the office. It should be placed in convenient locations, such as at entrances, exits, and reception desks. Touch-free hand sanitizer dispensers should be installed where possible.
- Responsible Parties should place signage near hand sanitizer stations indicating that visibly soiled hands should be washed with soap and water; hand sanitizer is not effective on visibly soiled hands.
- Responsible Parties should place receptacles around the building for disposal of soiled items, including PPE.
- Responsible Parties must provide appropriate cleaning and disinfection supplies for shared and
  frequently touched surfaces and encourage their employees (or cleaning staffs) to use these supplies,
  following manufacturer's instructions, before and after use of these surfaces, followed by hand
  hygiene.
  - To reduce high-touch surfaces, Responsible Parties should install touch-free amenities such as water fountains, trash-cans, and hand-dryers.
- Responsible Parties must conduct regular cleaning and disinfection of the building and more frequent cleaning and disinfection for high risk areas used by many individuals and for frequently touched surfaces. Cleaning and disinfection must be rigorous and ongoing and should occur at least after each shift, daily, or more frequently as needed. Please refer to DOH's "Interim Guidance for Cleaning and Disinfection of Public and Private Facilities for COVID-19" for detailed instructions on how to clean and disinfect facilities.
  - Responsible Parties must ensure regular cleaning and disinfection of restrooms. Restrooms should be cleaned and disinfected more often depending on frequency of use.
    - Responsible Parties must ensure distancing rules are adhered to by using signage, occupied markers, or other methods to reduce restroom capacity where feasible.
  - Responsible Parties must ensure that materials and tools are regularly cleaned and disinfected using registered disinfectants, including at least as often as employees or visitors change workstations or move to a new set of materials. Refer to the Department of Environmental Conservation (DEC) <u>list of products</u> registered in New York State and identified by the EPA as effective against COVID-19.
  - o If cleaning or disinfection products or the act of cleaning and disinfection causes safety hazards or degrades the material or machinery, Responsible Parties must put in place hand hygiene stations between use and/or supply disposable gloves and/or limitations on the number of employees using such machinery.

- Responsible Parties must provide for the cleaning and disinfection of exposed areas in the event an individual is confirmed to have COVID-19, with such cleaning and disinfection to include, at a minimum, all heavy transit areas and high-touch surfaces (e.g. touchscreens, printers, keypads, telephones, hand rails, door handles, vending machines, communal coffee stations).
- CDC guidelines on "<u>Cleaning and Disinfecting Your Facility</u>" if someone is suspected or confirmed to have COVID-19 are as follows:
  - Close off areas used by the person suspected or confirmed to have COVID-19.
    - Responsible Parties do not necessarily need to close operations, if they can close off the affected areas.
    - Shared building spaces used by the person suspected or confirmed to have COVID-19 (e.g. elevators, lobbies, building entrances) must also be shut down and cleaned and disinfected in coordination with the building manager (For more information, see, "Interim COVID-19 Guidance for Commercial Building Management").
  - o Open outside doors and windows to increase air circulation in the area.
  - Wait 24 hours before you clean or and disinfect. If 24 hours is not feasible, wait as long as possible.
  - Clean and disinfect all areas used by the person suspected or confirmed to have COVID-19, such as offices, bathrooms, common areas, and shared equipment.
  - o Once the area has been appropriately cleaned and disinfected, it can be reopened for use.
    - Employees without close or proximate contact with the person suspected or confirmed to have COVID-19 can return to the work area immediately after cleaning and disinfection.
    - Refer to DOH's "Interim Guidance for Public and Private Employees Returning to Work Following COVID-19 Infection or Exposure" for information on "close or proximate" contacts.
  - If more than seven days have passed since the person who is suspected or confirmed to have COVID-19 visited or used the facility, additional cleaning and disinfection is not necessary, but routine cleaning and disinfection should continue.
- Responsible Parties must prohibit shared food and beverages among employees (e.g. self-serve meals and beverages), encourage employees to bring lunch from home, and reserve adequate space for employees to observe social distancing while eating meals.

#### C. Phased Reopening

Responsible Parties are encouraged to phase-in reopening activities so as to allow for operational
issues to be resolved before production or work activities return to normal levels. Responsible Parties
should consider limiting the number of employees, hours, and number of customers available to be
served when first reopening so as to provide operations with the ability to adjust to the changes.

#### D. Communications Plan

- Responsible Parties must affirm that they have reviewed and understand the state-issued industry guidelines, and that they will implement them.
- Responsible Parties should develop a communications plan for employees and visitors, and customers that includes applicable instructions, training, signage, and a consistent means to provide employees

with information. Responsible Parties should work with building management to help facilitate any building-wide communications. Responsible Parties may consider developing webpages, text and email groups, and social media.

- Responsible Parties should encourage customers to adhere to CDC and DOH guidance regarding the
  use of PPE, specifically face coverings when a social distance of six feet cannot be maintained, through
  verbal communication and signage.
- Responsible Parties should post signage inside and outside of the retail location to remind personnel
  and customers to adhere to proper hygiene, social distancing rules, appropriate use of PPE, and
  cleaning and disinfection protocols.
- Responsible Parties should provide building managers/owners a list of essential visitors expected to enter the building.

#### III. PROCESSES

#### A. Screening and Testing

- Responsible Parties must implement mandatory daily health screening practices of their employees and, where practicable, visitors, but such screening shall not be mandated for delivery personnel.
  - Screening practices may be performed remotely (e.g. by telephone or electronic survey), before
    the employee or visitor reports to the office, to the extent possible; or may be performed on site.
  - Screening should be coordinated to prevent employees or visitors from intermingling in close or proximate contact with each other prior to completion of the screening.
  - At a minimum, screening must be required for all employees or visitors and completed using a questionnaire that determines whether the employee or visitor has:
    - (a) knowingly been in close or proximate contact in the past 14 days with anyone who has tested positive for COVID-19 or who has or had symptoms of COVID-19;
    - (b) tested positive for COVID-19 in the past 14 days; and/or
    - (c) has experienced any symptoms of COVID-19 in the past 14 days.
- Responsible Parties should coordinate with building managers to facilitate screening. Responsible
  Parties are responsible for screening their own employees and visitors, unless Responsible Parties and
  building management have agreed to an alternate arrangement to ensure screening is in effect.
   Screening best practices include:
  - If space and building configuration allows, screen individuals at or near the building entrance to minimize the impact in case of an individual suspected or confirmed to have COVID-19;
  - Allow for adequate social distancing while individuals queue for screening and/or building entry;
  - Coordinate with building managers to identify individuals who have completed a remote screening;
  - Use contactless thermal cameras in building entrances, in coordination with building management, to identify potentially symptomatic visitors and direct them to a secondary screening area to complete a follow-on screening.

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- Refer to CDC guidance on "Symptoms of Coronavirus" for the most up to date information on symptoms associated with COVID-19.
- Responsible Parties must require employees to immediately disclose if and when their responses to any of the aforementioned questions changes, such as if they begin to experience symptoms, including during or outside of work hours.
- In addition to the screening questionnaire, temperature checks may also be conducted per U.S. Equal Employment Opportunity Commission or DOH guidelines. Responsible Parties are prohibited from keeping records of employee health data (e.g. the specific temperature data of an individual), but are permitted to maintain records that confirm individuals were screened and the result of such screening (e.g. pass/fail, cleared/not cleared).
- Responsible Parties must ensure that any personnel performing screening activities, including temperature checks, are appropriately protected from exposure to potentially infectious employees or visitors entering the office. Personnel performing screening activities should be trained by employeridentified individuals who are familiar with CDC, DOH, and OSHA protocols.
- Screeners should be provided and use PPE, including at a minimum, a face mask, and may include gloves, a gown, and/or a face shield.
- An individual who screens positive for COVID-19 symptoms must not be allowed to enter the office and must be sent home with instructions to contact their healthcare provider for assessment and testing.
  - Responsible Parties should remotely provide such individuals with information on healthcare and testing resources.
  - Responsible Parties must immediately notify the state and local health department about the case if test results are positive for COVID-19.
- Responsible Parties should refer to DOH's "Interim Guidance for Public and Private Employees Returning to Work Following COVID-19 Infection or Exposure" regarding protocols and policies for employees seeking to return to work after a suspected or confirmed case of COVID-19 or after the employee had close or proximate contact with a person with COVID-19.
- Responsible Parties must designate a central point of contact, which may vary by activity, location, shift or day, responsible for receiving and attesting to having reviewed all employees' questionnaires, with such contact also identified as the party for employees and visitors to inform if they later are experiencing COVID-19-related symptoms, as noted on the questionnaire.
  - If Responsible Parties and building management have agreed to an alternate screening arrangement whereby building management administers screening on behalf of tenants, then building management shall be responsible for maintaining a record of the screening process. Maintaining records of employee health data (e.g. the specific temperature data of an individual) is prohibited; the only records to be maintained on a daily basis regarding the screening process are those individuals who were screened and confirmation that no employee or visitor who failed the screening process was granted access.
- Responsible Parties must designate a site safety monitor whose responsibilities include continuous compliance with all aspects of the site safety plan.

To the extent possible, Responsible Parties should maintain a log of every person, including
employees and visitors, who may have close or proximate contact with other individuals at the worksite
or area; excluding deliveries that are performed with appropriate PPE or through contactless means.
The log should contain contact information, such that all contacts may be identified, traced and notified
in the event an employee is diagnosed with COVID-19. Responsible Parties must cooperate with state
and local health department contact tracing efforts.

#### **B.** Tracing and Tracking

- Responsible Parties must notify the state and local health department immediately upon being informed of any positive COVID-19 test result by an employee in their office.
- In the case of an employee or visitor testing positive, the Responsible Parties must cooperate with the state and local health department as required to trace all contacts in the workplace, and the state and local health department where the building is located must be notified of all individuals who entered the site dating back 48 hours before the employee or visitor first experienced COVID-19 symptoms or tested positive, whichever is earlier. Confidentiality must be maintained as required by federal and state law and regulations.
  - As a best practice, Responsible Parties may offer optional tracing and tracking technology (e.g. Bluetooth enabled mobile applications) to streamline contact tracing and communication process among their workforce and others.
- Responsible Parties must ensure that in the case of an employee showing symptoms while in the
  workplace, the building managers are immediately notified with information on where the individual
  has been throughout the building and notify building management if the symptomatic employee tests
  positive.
- State and local health departments will implement monitoring and movement restrictions of infected or exposed persons including home isolation or quarantine.
- Individuals who are alerted that they have come into close or proximate contact with a person with COVID-19, and have been alerted via tracing, tracking or other mechanism, are required to self-report to their employer at the time of alert and shall follow the protocol referenced above.

#### IV. EMPLOYER PLANS

Responsible Parties must conspicuously post completed safety plans on site. The State has made available a business reopening safety plan template to guide business owners and operators in developing plans to protect against the spread of COVID-19.

Additional safety information, guidelines, and resources are available at:

New York State Department of Health Novel Coronavirus (COVID-19) Website https://coronavirus.health.ny.gov/

Centers for Disease Control and Prevention Coronavirus (COVID-19) Website https://www.cdc.gov/coronavirus/2019-ncov/index.html

Occupational Safety and Health Administration COVID-19 Website <a href="https://www.osha.gov/SLTC/covid-19/">https://www.osha.gov/SLTC/covid-19/</a>

At the link below, affirm that you have read and understand your obligation to operate in accordance with this guidance:

https://forms.ny.gov/s3/ny-forward-affirmation

## **ATTACHMENT 3**



## **Business Affirmation**

Use this form to affirm business compliance with the New York Forward reopening guidance.

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What industry does your company belong to? *						
	0	Agriculture, Forestry, Fishing and Hunting	0	Outdoor Amusement and Water Parks		
(	0	Arts & Entertainment - Low-Risk:	0	Personal Care Services		
(		Indoor	0	Private Auto Transportation		
	O	Arts & Entertainment - Low-Risk: Outdoor	0	Private operator of lake or ocean beach		
	0	Child Care and Day Camps	0	Professional Sports Competitions -		
	0	Commercial Building Management		No Fans		
	0	Construction	0	Professional Sports Competitions - With Fans		
	0	Dentistry	0			
	0	Dining - Outdoor and take-		Professional Sports Training		
		out/delivery food services		Public Transportation		
	0	Food Services - Phase III	0	Racing - Auto Racetracks		
	0	Gaming Facilities	0	Racing Activities		
	0	Gyms and Fitness Centers	0	Real Estate		
	0	Hair Salons and Barbershops	0	Religious organization or funeral		
	0	Higher Education Institutions	_	service operator		
1	0	Higher Education Research		Retail - Essential and Phase II Retail: In-Store Shopping		
	0	Indoor Amusement and Family Entertainment	0	Retail - Phase I Retail: Curbside and In-Store Pickup		
	0	Low-Risk Indoor Arts & Entertainment	0	Retail - Rental, Repair, and Cleaning		
	0	Low-Risk Outdoor Arts & Entertainment	0	Schools: Pre-K to Grade 12		
			0	Ski Facilities		

		Arts and Entertainment			
Media Production		O Sports and Recreation			
Movie Theaters		Trade Schools and Private     Instruction			
NYC Indoor Food Service		O Vehicle Sales, Leases, and Rentals			
Offices		O Wholesale Trade			
Business Name *					
Your Name *					
First Name		Last Name			
Business Location Address  Business Location Address					
Enter the address of your physical place of business in New York State or, if a construction project, the					
primary address of the construction site.					
Street Address *					
Apt/Suite/Office					
City *	State *	Zip Code *			
	NY				
County *					

I am the owner or agent of the business listed. I have reviewed the New York State interim guidance for business re-opening activities and operations during the COVID-19 public health emergency and I affirm that I have read and understand my obligation to operate in accordance with such guidance.

## **ATTACHMENT 4**



### **GUIDANCE FOR RE-OPENING BUILDINGS**

ASHRAE is a global professional society of over 55,000 members committed to serve humanity by advancing the arts and sciences of heating, ventilation, air conditioning, refrigeration and their allied fields. ASHRAE has established a Task Force to help deploy technical resources to address the challenges of the COVID-19 pandemic and possible future epidemics as it relates to the effects of heating, ventilation, and air-conditioning (HVAC) systems on disease transmission. Guidance and building readiness information for different operational conditions have been developed for several building types, including commercial; residential; schools and universities; and healthcare facilities, as well as general guidance for re-opening buildings.

ASHRAE's <u>reopening guidance</u> provides practical information to help your HVAC system mitigate the transmission of SARS-CoV-2. Some general recommendations are provided below. *Please consult the full guidance for important details and consider reaching out to qualified design professionals for additional analysis as needed.* 

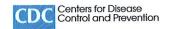
- Systems Evaluation: Inspect equipment, systems, and controls to check for existing issues. Evaluate outdoor
  air ventilation for compliance with design requirements. Make note of existing filters' MERV rating. Analyze
  each HVAC system for appropriate engineering controls to improve its potential to reduce virus transmission.
  Check calibration per the guidance in ASHRAE Guideline 11-2018, Field Testing of HVAC Control Components.
- Inspection and Maintenance: Verify HVAC systems function per design intent using ASHRAE Standard 180-2018, Standard Practice for Inspection and Maintenance of Commercial Building HVAC Systems, or equivalent. Ensure that energy recovery devices can be operated safely.
- Ventilation and Filtration: Confirm systems provide required minimum amounts of outdoor air for ventilation and that the filters are MERV 13 or better filters for recirculated air. Combine the effects of outdoor air, filtration, and air cleaners to exceed combined requirements of minimum ventilation and MERV-13 filters.
- **Building Readiness Plan:** Create a plan to document the intended operation for the building, highlighting the mitigation strategies, temporary and permanent, to be implemented for the facility.
  - Non-HVAC Strategies: Note if face masks are required or recommended; implement social distancing, establish occupancy levels, and establish cleaning and handwashing requirements.
  - HVAC Strategies: Increased ventilation, improved filtration, and/or air cleaning technologies.
- Pre- or Post-Occupancy Flush with Outdoor Air: Focus on removing bio-burden pre-or post-occupancy of the building. Flush building for a time required to achieve three air changes of outdoor air (or equivalent, including effect of outdoor air, particulate filtration, and air cleaners).
- Modes of Operation for the Building: Operate in Occupied Mode when people are present in the building, including times when the building is occupied by a small fraction of its allowable capacity.
- Water Systems: In general, building water systems should be flushed before they are reopened. Refer to EPA
  Guidance on this topic <a href="here">here</a> and ASHRAE Standard 188-2018, Legionellosis: Risk Management for Building Water
  Systems, and Guideline 12-2020, Managing the Risk of Legionellosis Associated with Building Water Systems.
- Energy Savings: During Evaluation and Inspection, determine optimized control strategies that can be implemented per ASHRAE Guideline 36-2018, High-Performance Sequences of Operation for HVAC Systems.

HVAC&R systems play an important role in minimizing the spread of harmful pathogens, and ASHRAE is ready to provide technical resources and answer questions.

The most up-to-date ASHRAE COVID-19 guidance can be found <a href="here">here</a>. The most up-to-date information on building re-opening can be found <a href="here">here</a>. For further assistance, please contact <a href="mailto:GovAffairs@ashrae.org">GovAffairs@ashrae.org</a>.

The information above is provided as a service to the public. While every effort is made to provide accurate and reliable information, this isadvisory, and is provided for informational purposes only. They are not intended and should not be relied upon as official statements of ASHRAE.

## **ATTACHMENT 5**





### COVID-19

# Guidance for Businesses and Employers Responding to Coronavirus Disease 2019 (COVID-19)

Plan, Prepare and Respond to Coronavirus Disease 2019

Updated Mar. 8, 2021

Print

### **Summary of Recent Changes**

Updates as of Dec 31, 2020



#### As of December 31, 2020

- Expanded section on in-person or virtual health checks
- Added a section on considerations for testing for SARS-CoV-2, the virus that causes COVID-19
- Addressed shortened quarantine options. Shortening quarantine may increase willingness to adhere to public
  health recommendations; however, shortened quarantine may be less effective in preventing transmission of
  COVID-19 than the currently recommended 14-day quarantine.
- Clarified that all workers should wear masks (unless respirators or facemasks are required) in accordance with CDC and Occupational Safety and Health Administration (OSHA) guidance and any state or local requirements
- Clarified that, in addition to preventing the wearer's respiratory droplets from reaching others, masks might be protective to the wearer

View Previous Updates

### **Purpose**

This guidance is based on what is currently known about the transmission of SARS-CoV-2, the virus that causes coronavirus disease 2019 (COVID-19). COVID-19 is a respiratory illness that can spread from person to person, especially between people who are physically near each other (within about 6 feet). People who are infected but do not show symptoms can also spread the virus to others.

Implementing this guidance may help prevent workplace exposures to SARS-CoV-2 in non-healthcare settings; separate guidance is available for healthcare settings. CDC also has guidance for critical infrastructure work settings. Unless otherwise specified, this interim guidance for businesses and employers applies to critical infrastructure workplaces as well.

### Role of Businesses and Employers in Responding to COVID-19

Businesses and employers can play a key role in preventing and slowing the spread of SARS-CoV-2 within the workplace. Employers' COVID-19 preparedness, response, and control plans should take into account workplace factors such as feasibility of social distancing in the workplace, ability to stagger employee shifts, degree to which employees interact with the public in person, feasibility of accomplishing work by telework, geographical isolation of the workplace, whether employees

live in congregate housing  $\square$ , proportion of employees at increased risk for severe illness, policies regarding sick leave for staff, and priority for continuity of operations. Employers should also consider the level of COVID-19 disease transmission in their communities.

As an employer, if your business operations were interrupted, resuming normal or phased activities presents an opportunity to update your COVID-19 preparedness, response, and control plans. All employers should implement and update as necessary a plan that:

- Is specific to your workplace,
- Identifies all areas and job tasks with potential exposures to SARS-CoV-2, and
- Includes control measures to eliminate or reduce such exposures.

Talk with your employees about planned changes and seek their input. Additionally, collaborate with employees and unions to effectively communicate important COVID-19 information.

See the OSHA Guidance on Mitigating and Preventing the Spread of COVID-19 in the Workplace ( for more information on how to protect workers from potential exposures, according to their exposure risk. Plans should consider that employees may be able to spread COVID-19 even if they do not show symptoms.

All employers need to consider how best to decrease the spread of SARS CoV-2, the virus that causes COVID-19, and lower the impact in your workplace. This should include activities to:

- · prevent and reduce transmission among employees,
- · maintain healthy business operations, and
- · maintain a healthy work environment.

### **Prevent and Reduce Transmission Among Employees**

Monitor federal, state, and local public health communications about COVID-19 regulations, guidance, and recommendations and ensure that workers have access to that information. Frequently check the CDC COVID-19 website.

#### Actively encourage sick employees to stay home

- Employees who have symptoms should notify their supervisor and stay home. CDC recommends testing for people with any signs or symptoms of COVID-19 and for all close contacts of persons with COVID-19.
- Employees who are sick with COVID-19 should isolate and follow CDC-recommended steps. Employees who are
  asymptomatic (have no symptoms) or pre-symptomatic (not yet showing symptoms) but have tested positive for SARSCoV-2 infection should also isolate and follow CDC-recommended steps. Employees should not return to work until the
  criteria to discontinue home isolation are met, in consultation with healthcare providers.
- Employees who are well but who have a sick household member with COVID-19 should notify their supervisor and follow CDC-recommended precautions.
- Employers are encouraged to implement flexible, non-punitive paid sick leave and supportive policies and practices as part of a comprehensive approach to prevent and reduce transmission among employees. Some employees may be eligible to take leave under the Family Medical Leave Act (FMLA) or the Families First Coronavirus Response Act .

Consider conducting daily in-person or virtual health checks (e.g., symptom and temperature screening) of employees before they enter the facility, in accordance with state and local public health authorities and, if available, your occupational health services. Screening and health checks are not a replacement for other protective measures such as social distancing, mask wearing (unless respirators or facemasks are required), and engineering controls, including proper ventilation. Symptom and temperature screening cannot identify people with SARS-CoV-2 infection who are asymptomatic (do not have symptoms) or are presymptomatic (have not developed signs or symptoms yet but will later).

For virtual health checks, encourage individuals to self-screen prior to coming onsite. An electronic monitoring system could be implemented in which, prior to arrival at the facility, employees report absence of fever and symptoms of COVID-19, absence of a diagnosis of SARS-CoV-2 infection in the prior 10 days, confirm they have not been exposed to others with SARS-CoV-2 infection during the prior 14 days, and confirm they are not undergoing evaluation for SARS-CoV-2 infection such as pending viral test (nucleic acid amplification test or antigen test).

For **in-person health checks**, conduct them safely and respectfully and in a way that maintains social distancing of workers in and entering the screening area. Workers should not enter the worksite past the screening area if any of the following are present:

- Symptoms of COVID-19
- Fever of 100.4 degrees Fahrenheit (°F) or higher or report feeling feverish
- Undergoing evaluation for SARS-CoV-2 infection (such as pending viral test)
- Diagnosis of SARS-CoV-2 infection in the prior 10 days
- Close contact to someone with SARS-CoV-2 infection during the prior 14 days

Follow guidance from the Equal Employment Opportunity Commission [2] regarding confidentiality of medical records from health checks. To prevent stigma and discrimination in the workplace, make employee health screenings as private as possible. Do not make determinations of risk based on race or country of origin and be sure to maintain confidentiality of each individual's medical status and history.

Ensure personnel performing in-person screening activities are appropriately protected against exposure to potentially infectious workers entering the facility. Methods known to reduce risk of transmission include social distancing, physical barriers, and mask wearing. If social distance or barrier controls cannot be implemented during screening, personal protective equipment (PPE) can be used when the screener is within 6 feet of an employee. However, reliance on PPE alone is a less effective control and may be more difficult to implement given PPE shortages and training requirements. Ensure screeners are trained on proper use and reading of thermometers per manufacturer standards; improper calibration and use can lead to incorrect temperature readings.

Below are examples that can be incorporated into the in-person screening process.

- Social Distancing: Ask employees to take their own temperature either before coming to the workplace or upon arrival at the workplace. Upon their arrival, stand at least 6 feet away from the employee and:
  - Ask the employee to confirm that their temperature is less than 100.4° F (38.0° C)
  - Make a visual inspection of the employee for signs of illness, which could include flushed cheeks, sweating
    inappropriately for ambient temperature, or difficultly with ordinary tasks
  - Screening staff do not need to wear PPE if they can maintain a distance of 6 feet; however, screening staff and employees being screened should wear masks.
- Barrier/Partitional Controls: During screening, the screener should stand behind a physical barrier, such as a glass or
  plastic window or partition, that can protect the screener's face and mucous membranes from respiratory droplets that
  may be produced when the employee sneezes, coughs, talks, or breathes. Upon arrival, the screener should wear a
  mask and wash hands with soap and water for at least 20 seconds or, if soap and water are not available, use hand
  sanitizer with at least 60% alcohol. For each employee:
  - Make a visual inspection of the employee for signs of illness, which could include flushed cheeks, sweating
    inappropriately for ambient temperature, or difficulty with ordinary tasks.
  - Conduct temperature and symptom screening
    - · Put on disposable gloves.
    - Check the employee's temperature, reaching around the partition or through the window. Make sure the screener's face stays behind the barrier at all times during the screening.
    - Contact thermometers need to be cleaned and disinfected after each screened employee according to
      manufacturer's instructions and facility policies. Non-contact thermometers should be cleaned and disinfected
      according to manufacturer's instructions and facility policies.
  - Remove and discard gloves, and wash hands with soap and water for at least 20 seconds between each employee.
     If soap and water are not available, use hand sanitizer with at least 60% alcohol.

- If disposable or non-contact thermometers are used and the screener does not have physical contact with the
  individual, the screener's gloves do not need to be changed before the next check. Gloves should be removed
  and discarded if soiled or damaged. Gloves should not be worn continuously for more than for four hours.
  After removing gloves, screeners should wash their hands with soap and water for at least 20 seconds or use
  hand sanitizer if soap and water are not available. Gloves should be removed and discarded anytime they are
  soiled or damage.
- PPE: Screeners need to be trained on how to properly put on, take off and dispose of all PPE. Upon arrival, the screener should wash their hands with soap and water for at least 20 seconds or use hand sanitizer with at least 60% alcohol and put on a facemask or respirator, eye protection (goggles or disposable face shield that fully covers the front and sides of the face), and a single pair of disposable gloves. Extended use of a facemask or respirator and eye protection may be implemented. A gown could be considered if extensive contact with an employee is anticipated.
  - Make a visual inspection of the employee for signs of illness, which could include flushed cheeks, sweating
    inappropriately for ambient temperature, or difficulty performing ordinary tasks.
  - Conduct temperature and symptom screening
    - If performing a temperature check on multiple individuals, the screener should change their gloves and wash their hands or use hand sanitizer with at least 60% alcohol between each employee.
    - Contact thermometers need to be cleaned and disinfected after each screened employee according to
      manufacturer's instructions and facility policies. Non-contact thermometers should be cleaned and disinfected
      according to manufacturer's instructions and facility policies.
    - If disposable or non-contact thermometers are used and the screener does not have physical contact with the
      individual, the screener's gloves do not need to be changed before the next check. Gloves should not be worn
      continuously for more than for four hours. After removing gloves, screeners should wash their hands with
      soap and water for at least 20 seconds or use hand sanitizer if soap and water are not available.
    - Any PPE, including gloves, facemask, respirator, eye protection, and gown, should be removed and discarded if soiled or damaged.

#### Consider incorporating testing for SARS-CoV-2 into workplace preparedness, response, and control plans

- Consider implementing an approach to testing based on the guidance for select non-healthcare workplaces.
- Approaches may include initial testing of all workers before entering a workplace, periodic testing of workers at regular
  intervals, or targeted testing of new workers or those returning from a prolonged absence such as medical leave or
  furlough, or some combination of approaches. Several factors may be helpful in determining the interval for periodic
  testing, including availability of testing, results of previous testing, and level of community transmission.

#### Identify where and how workers might be exposed to individuals with COVID-19 at work

Employers are responsible for providing a safe and healthy workplace . Conduct a thorough hazard assessment of the workplace to identify potential workplace hazards related to COVID-19. Use appropriate combinations of control measures from the hierarchy of controls to limit the spread of COVID-19, including engineering controls, workplace administrative policies, and PPE to protect workers from the identified hazards (see table below):

- Conduct a thorough hazard assessment [2] to determine if workplace hazards are present, or are likely to be present, and determine what type of controls or PPE are needed for specific job duties.
- When engineering and administrative controls cannot be implemented or are not fully protective, employers are required by OSHA standards to:
  - Determine what PPE is needed for their workers' specific job duties,
  - Select and provide appropriate PPE to the workers at no cost, and
  - Train their workers on its correct use.
- Ensure all employees wear masks in accordance with CDC and OSHA guidance as well as any state or local requirements.
   This applies if the hazard assessment has determined that they do not require PPE, such as a respirator or medical facemask for protection.
  - CDC recommends wearing a mask, that covers the nose and mouth and fits snugly against the sides of the face, as
    a measure to contain the wearer's respiratory droplets and help protect their co-workers and members of the
    general public. Masks should not be placed on young children under age 2, anyone who has trouble breathing, or is
    unconscious, incapacitated or otherwise unable to remove the mask without assistance.

- Masks are meant to help prevent workers who do not know they have the virus that causes COVID-19 from spreading it to others; however, masks might provide some protection to wearers.
- Masks do not provide the same level of protection as a medical facemask or respirator and should not replace PPE required or recommended at the workplace.
- Remind employees and customers that CDC recommends wearing masks in public settings and when around people
  who do not live in their household, especially when other social distancing measures are difficult to maintain. Wearing a
  mask, however, is not a substitute for social distancing. Masks should still be worn in addition to staying at least 6 feet
  apart.
- See the OSHA COVID-19 webpage for more information on how to protect workers from potential SARS-CoV-2 exposures and guidance for employers including steps to take for jobs according to exposure risk.

#### Separate sick employees

- Employees who appear to have symptoms upon arrival at work or who become sick during the day should immediately
  be separated from other employees, customers, and visitors, and sent home.
- Have a procedure in place for the safe transport of an employee who becomes sick while at work. The employee may need to be transported home or to a healthcare provider.

#### Take action if an employee is suspected or confirmed to have COVID-19

In most cases, you do not need to shut down your facility. If it has been less than 7 days since the sick employee has been in the facility, close off any areas used for prolonged periods of time by the sick person:

- Wait 24 hours before cleaning and disinfecting to minimize potential for other employees being exposed to respiratory droplets. If waiting 24 hours is not feasible, wait as long as possible.
- During this waiting period, open outside doors and windows to increase air circulation in these areas.

If it has been 7 days or more since the sick employee used the facility, additional cleaning and disinfection are not necessary. Continue routinely cleaning and disinfecting all high-touch surfaces in the facility.

#### Follow the CDC cleaning and disinfection recommendations:

- Clean dirty surfaces with soap and water before disinfecting them.
- To disinfect surfaces ☑ , use products that meet EPA criteria for use against SARS-Cov-2 ☑ , the virus that causes COVID-19, and are appropriate for the surface.
- Always wear gloves and gowns appropriate for the chemicals being used when you are cleaning and disinfecting
- Ensure there is adequate ventilation when using cleaning and disinfection products to prevent from inhaling toxic vapors.
- You may need to wear additional PPE depending on the setting and disinfectant product you are using. For each product
  you use, consult and follow the manufacturer's instructions for use.

Determine which employees may have been exposed to the virus and may need to take additional precautions:

- Employers have an obligation to manage the potentially exposed workers' return to work in ways that best protect the health of those workers, their co-workers, and the general public.
- Inform employees of their possible close contact (within 6 feet of an infected person for a cumulative total of 15 minutes or more over a 24-hour period) with someone with confirmed or suspected SARS-CoV-2 infection in the workplace, but maintain confidentiality as required by the Americans with Disabilities Act (ADA) 🖸 .
- Most workplaces should follow the Public Health Recommendations for Community-Related Exposure. The most
  protective approach for the workplace is for exposed employees (close contacts) to quarantine for 14 days, telework if
  possible, and self-monitor for symptoms. This approach maximally reduces post-quarantine transmission risk and is the
  strategy with the greatest collective experience at present.
- Although CDC continues to recommend a 14-day quarantine, options are provided for shorter quarantine that may end
  after day 7 or after day 10 based on certain conditions. Alternatives to the 14-day quarantine are described in the
  Options to Reduce Quarantine for Contacts of Persons with SARS-CoV-2 Infection Using Symptom Monitoring and

However, shortened quarantine may be less effective in preventing transmission of COVID-19 than the currently recommended 14-day quarantine.

- Workplaces could consider these quarantine alternatives as measures to mitigate staffing shortages, but they are not the
  preferred options to mitigate staffing shortages. Workplaces should understand that shortening the duration of
  quarantine might pose additional transmission risk. Employers should also consider workplace characteristics when
  considering if this additional transmission risk is acceptable (e.g., level of community transmission, ability to maintain
  social distancing, proportion of employees at increased risk for severe illness, and priority for continuity of operations).
  Employers should counsel workers about the need to monitor for symptoms and immediately self-isolate if symptoms
  occur during the 14 days after their exposure and the importance of consistent adherence to all recommended
  mitigation strategies (e.g., mask wearing, social distancing, hand hygiene, cleaning and disinfection, and proper
  ventilation).
- Implementation of testing strategies can supplement measures to reduce transmission in the workplace. Repeated
  testing over time, also referred to as serial testing, may be more likely to detect infection among workers with exposures
  than testing done at a single point in time.
- Critical infrastructure workplaces should follow COVID-19 Critical Infrastructure Sector Response Planning and guidance on Testing Strategy for Coronavirus (COVID-19) in High-Density Critical Infrastructure Workplaces after a COVID-19 Case is Identified.

### Educate employees about steps they can take to protect themselves at work and at home

- Encourage employees to follow any new policies or procedures related to illness, cleaning and disinfecting, and work meetings and travel.
- Advise employees to:
  - Stay home if they are sick, except to get medical care, and to learn what to do if they are sick.
  - Inform their supervisor if they have a sick household member at home with COVID-19 and to learn what to do if someone in their home is sick.
  - Wear a mask when out in public and when around people who do not live in their household, especially when other social distancing measures are difficult to maintain. Masks should not be placed on young children under age 2, anyone who has trouble breathing, or is unconscious, incapacitated or otherwise unable to remove the mask without assistance.
  - Wash their hands often with soap and water for at least 20 seconds or to use hand sanitizer with at least 60% alcohol if soap and water are not available. Inform employees that if their hands are visibly dirty, they should use soap and water instead of hand sanitizer. Key times for employees to clean their hands include:
    - Before and after work shifts
    - · Before and after work breaks
    - After blowing their nose, coughing, or sneezing
    - After using the restroom
    - · Before eating or preparing food
    - After putting on, touching, or removing cloth face coverings
  - Avoid touching their eyes, nose, and mouth with unwashed hands.
  - Cover their mouth and nose with a tissue when you cough or sneeze or use the inside of their elbow. Throw used tissues into no-touch trash cans and immediately wash hands with soap and water for at least 20 seconds. If soap and water are not available, use hand sanitizer containing at least 60% alcohol. Learn more about coughing and sneezing etiquette on the CDC website.
  - Practice routine cleaning and disinfection of frequently touched objects and surfaces such as workstations, keyboards, telephones, handrails, and doorknobs. Dirty surfaces can be cleaned with soap and water prior to disinfection. To disinfect, use products that meet EPA's criteria for use against SARS-CoV-2 . the cause of COVID-19, and are appropriate for the surface.
  - Avoid using other employees' phones, desks, offices, or other work tools and equipment, when possible. Clean and disinfect them before and after use.
  - Practice social distancing by avoiding large gatherings and maintaining distance (at least 6 feet) from others when
    possible.

- If feasible, offer employees incentives to use forms of transportation that minimize close contact with others (e.g., biking, walking, driving or riding by car either alone or with household members).
- Ask employees to follow the CDC guidance on how to protect yourself when using transportation.
- Allow employees to shift their hours so they can commute during less busy times.
- Ask employees to clean their hands as soon as possible after their trip.

# **Maintain Healthy Business Operations**

Identify a workplace coordinator who will be responsible for COVID-19 issues and their impact at the workplace.

Implement flexible sick leave and supportive policies and practices

- Ensure that sick leave policies are flexible, non-punitive, and consistent with public health guidance and that employees
  are aware of and understand these policies.
- Maintain flexible policies that permit employees to stay home to care for a sick family member or take care of children
  due to school and childcare closures. Additional flexibilities might include giving advances on future sick leave and
  allowing employees to donate sick leave to each other.
- Some workers may be eligible to take leave under the Family Medical Leave Act (FMLA) or the Families First Coronavirus Response Act .
- Employers with fewer than 500 employees are eligible for 100% tax credits [2] for Families First Coronavirus Response Act COVID-19 paid leave provided through March 31, 2021, up to certain limits.
- Employers that do not currently offer sick leave to some or all of their employees should consider drafting non-punitive "emergency sick leave" policies.
- Employers should not require a COVID-19 test result or a healthcare provider's note for employees who are sick to validate their illness, qualify for sick leave, or to return to work.
  - Under the American's with Disabilities Act, employers are permitted to require a doctor's note from their employees
     to verify that they are healthy and able to return to work. However, as a practical matter, be aware that healthcare provider offices and medical facilities may be extremely busy and not able to provide such documentation in a timely manner. Most people with COVID-19 have mild illness and can recover at home without medical care and can follow CDC recommendations to determine when to discontinue home isolation and return to work.
  - The U.S. Equal Employment Opportunity Commission (EEOC) ☑ has established guidance regarding Pandemic Preparedness in the Workplace and the Americans with Disabilities Act ☑ . The guidance enables employers to take steps to protect workers consistent with CDC guidance, including requiring workers to stay home when necessary to address the direct threat of spreading SARS-CoV-2 infection to others.
- Review human resources policies to make sure that your policies and practices are consistent with public health recommendations and with existing state and federal workplace laws (for more information on employer responsibilities, visit the Department of Labor's and the Equal Employment Opportunity Commission's websites).
- Connect employees to employee assistance program (EAP) resources, if available, and community resources as needed.
   Employees may need additional social, behavioral, and other services, for example, to help them manage stress and cope.

Protect employees at higher risk for severe illness through supportive policies and practices

Older adults and people of any age who have certain underlying medical conditions are at higher risk for severe illness from COVID-19.

- Support and encourage options to telework, if available. This will eliminate the need for employees living in higher transmission areas to travel to workplaces in lower transmission areas and vice versa.
- Consider offering employees at higher risk for severe illness duties that minimize their contact with customers and other
  employees (e.g., restocking shelves rather than working as a cashier), if the worker agrees to this.
- Ensure that any other businesses and employers sharing the same workspace also follow this guidance.

Communicate supportive workplace polices clearly, requently, and via multiple metrious

Employers may need to communicate with non-English speakers in their preferred languages.

- Train workers on how implementing any new policies to reduce the spread of SARS CoV-2 may affect existing health and safety practices.
- Communicate to any contractors or on-site visitors about changes that have been made to help control the spread of SARS CoV-2. Ensure that they have the information and capability to comply with those policies.
- Create and test communication systems that employees can use to self-report if they are sick and that you can use to notify employees of exposures and closures.
- Consider using a hotline or another method for employees to voice concerns anonymously.

Assess your essential functions and the reliance that others and the community have on your services or products.

- Be prepared to change your business practices, if needed, to maintain critical operations (e.g., identify alternative suppliers, prioritize existing customers, or temporarily suspend some of your operations).
- Identify alternate supply chains for critical goods and services. Some goods and services may be in higher demand or unavailable.
- If other companies provide your business with contract or temporary employees, talk with them about the importance
  of sick employees staying home and encourage them to develop non-punitive leave policies.
- Talk with business partners about your response efforts. Share best practices with other businesses in your communities (especially those in your supply chain), chambers of commerce, and associations to improve community response efforts.
- Identify and prioritize job functions for continuous operations. Minimize the number of workers present at worksites by balancing the need to protect workers with support for continuing operations.

Determine how you will operate if absenteeism spikes from increases in sick employees, those who stay home to care for sick family members, and those who must stay home to watch their children until childcare programs and K-12 schools can resume their normal schedules.

- Plan to monitor and respond to absenteeism at the workplace.
- Implement plans to continue your essential business functions in case you experience higher-than-usual absenteeism.
- Prepare to institute flexible workplace and leave policies.
- Cross-train employees to perform essential functions so the workplace can operate even if key employees are absent.

**Establish policies and practices for social distancing.** Alter your workspace to help workers and customers maintain social distancing and physically separate employees from each other and from customers, when possible. Here are some strategies that businesses can use:

- Implement flexible worksites (e.g., telework).
- Implement flexible work hours (e.g., rotate or stagger shifts to limit the number of employees in the workplace at the same time).
- Increase physical space between employees at the worksite by modifying the workspace.
- Increase physical space between employees and customers (e.g., drive-through service, physical barriers such as partitions).
- Use signs, tape marks, or other visual cues such as decals or colored tape on the floor, placed at least 6 feet apart, to indicate where to stand when physical barriers are not possible.
- Implement flexible meeting and travel options (e.g., postpone in-person non-essential meetings or events in accordance with state and local regulations and guidance).
- · Close or limit access to common areas where employees are likely to congregate and interact.
- Prohibit handshaking.
- Deliver services remotely (e.g., phone, video, or web).
- Adjust your business practices to reduce close contact with customers for example, by providing drive-through service, click-and-collect online shopping, shop-by-phone, curbside pickup, and delivery options, where feasible.
- Move the electronic payment terminal/credit card reader farther away from the cashier, if possible, to increase the

distance between the customer and the cashier.

Shift primary stocking activities to off-peak or after hours, when possible, to reduce contact with customers.

If you have more than one business location, consider giving local managers the authority to take appropriate actions outlined in their COVID-19 response plans based on their local conditions.

# Maintain a healthy work environment

Since COVID-19 may be spread by those with no symptoms, businesses and employers should evaluate and institute controls according to the hierarchy of controls to protect their employees and members of the general public.

Consider improving the engineering controls using the building ventilation system. This may include some or all of the following considerations:

- Increase outdoor air ventilation, using caution in highly polluted areas.
- When weather conditions allow, increase fresh outdoor air by opening windows and doors. Do not open windows and doors if doing so poses a safety or health risk (e.g., risk of falling, triggering asthma symptoms) to occupants in the building.
- Use fans to increase the effectiveness of open windows. To safely achieve this, fan placement is important and will vary
  based on room configuration. Avoid placing fans in a way that could potentially cause contaminated air to flow directly
  from one person over another. One helpful strategy is to use a window fan, placed safely and securely in a window, to
  exhaust room air to the outdoors. This will help draw fresh air into room via other open windows and doors without
  generating strong room air currents.
- Decrease occupancy in areas where outdoor ventilation cannot be increased.
- Ensure ventilation systems operate properly and provide acceptable indoor air quality for the current occupancy level for each space.
- Increase airflow to occupied spaces when possible.
- Turn off any demand-controlled ventilation (DCV) controls that reduce air supply based on occupancy or temperature
  during occupied hours. In homes and buildings where the HVAC fan operation can be controlled at the thermostat, set
  the fan to the "on" position instead of "auto," which will operate the fan continuously, even when heating or airconditioning is not required.
- Open outdoor air dampers beyond minimum settings to reduce or eliminate HVAC air recirculation. In mild weather, this
  will not affect thermal comfort or humidity. However, this may be difficult to do in cold, hot, or humid weather.
- · Improve central air filtration:
  - Increase air filtration to as high as possible without significantly reducing design airflow.
  - Inspect filter housing and racks to ensure appropriate filter fit and check for ways to minimize filter bypass.
  - Check filters to ensure they are within their service life and appropriately installed.
- Ensure restroom exhaust fans are functional and operating at full capacity when the building is occupied.
- Inspect and maintain local exhaust ventilation in areas such as kitchens, cooking areas, etc. Operate these systems any
  time these spaces are occupied. Consider operating these systems, even when the specific space is not occupied, to
  increase overall ventilation within the occupied building.
- Consider portable high-efficiency particulate air (HEPA) fan/filtration systems to help enhance air cleaning (especially in higher risk areas such as a nurse's office or areas frequently inhabited by persons with increased risk of getting COVID-19).
- Generate clean-to-less-clean air movement by re-evaluating the positioning of supply and exhaust air diffusers and/or dampers (especially in higher risk areas).
- Consider using ultraviolet germicidal irradiation (UVGI) as a supplement to help inactivate SARS-CoV-2, especially if options for increasing room ventilation are limited. Upper-room UVGI systems can be used to provide air cleaning within occupied spaces, and in-duct UVGI systems can help enhance air cleaning inside central ventilation systems.

*Note:* The ASHRAE Guidance for Building Operations During the COVID-19 Pandemic ☑ provides further information on ventilation and building operations during the COVID-19 pandemic.

#### Ensure the safety of your building water system and devices after a prolonged shutdown

 Follow the CDC Guidance for Building Water Systems, which describes 8 steps to take before you reopen your business or building.

#### Give employees, customers, and visitors what they need to clean their hands and cover their coughs and sneezes

- · Provide tissues and no-touch trash cans.
- Provide soap and water in the workplace. If soap and water are not readily available, use alcohol-based hand sanitizer
  with at least 60% alcohol. Ensure that adequate supplies are maintained.
- Ideally, place touchless hand sanitizer stations in multiple locations to encourage hand hygiene.
- Place posters that encourage hand hygiene to help stop the spread at the entrance to your workplace and in other
  workplace areas where they are likely to be seen. This should include signs for non-English speakers, as needed.
- Discourage handshaking. Encourage employees to use other noncontact methods of greeting.
- Direct employees to visit CDC's coughing and sneezing etiquette and clean hands webpage for more information.

#### Perform routine cleaning and disinfection

- Follow the Guidance for Cleaning and Disinfecting to develop, implement, and maintain a plan to perform regular cleanings to reduce the risk of exposure to SARS-CoV-2, the virus that causes COVID-19.
- Routinely clean all frequently touched surfaces in the workplace, such as workstations, keyboards, telephones, handrails, and doorknobs.
  - If surfaces are dirty, clean them using a detergent or soap and water before you disinfect them.
  - For disinfection, most common, EPA-registered, household disinfectants should be effective. A list of products that are EPA-approved for use against the virus that causes COVID-19 ☑ is available on the EPA website. Follow the manufacturer's instructions for all cleaning and disinfection products (e.g., concentration, application method, and contact time).
- Discourage workers from using each other's phones, desks, offices, or other work tools and equipment, when possible.
- Provide disposable disinfecting wipes so that employees can wipe down commonly used surfaces (e.g., doorknobs, keyboards, remote controls, desks, other work tools and equipment) before each use.
- Store and use disinfectants in a responsible and appropriate manner according to the label.
- Do not mix bleach or other cleaning and disinfection products together. This can cause fumes that may be very dangerous to breathe in.
- Ensure there is adequate ventilation when using cleaning and disinfection products.
- Advise employees to always wear gloves appropriate for the chemicals being used when they are cleaning and disinfecting and that they may need additional PPE based on the setting and product.

#### Perform cleaning and disinfection after persons suspected/confirmed to have COVID-19 have been in the facility

 If a sick employee is suspected or confirmed to have COVID-19, follow the CDC cleaning and disinfection recommendations.

#### Delay travel

- Advise employees, if they must travel, to follow CDC's latest recommendations for travel during COVID-19.
- Ensure employees who become sick while traveling or on temporary assignment understand that they should notify their supervisor and promptly call a healthcare provider for advice if needed.
- If they are outside the United States, sick employees should follow company policy for obtaining medical care or contact a healthcare provider or overseas medical assistance company to help them find an appropriate healthcare provider in that country. A U.S. consular officer can help locate healthcare services. However, U.S. embassies, consulates, and military facilities do not have the legal authority, capability, or resources to evacuate or give medicines, vaccines, or medical care to private U.S. citizens overseas.

#### Minimize risk to employees when planning meetings and gatherings

- Use videoconferencing or teleconferencing when possible for work-related meetings and gatherings.
- Cancel, adjust, or postpone large work-related meetings or gatherings that can only occur in-person in accordance with state and local regulations and guidance.
- When videoconferencing or teleconferencing is not possible, hold meetings in open, well-ventilated spaces continuing to maintain a distance of at least 6 feet apart and wear masks.

Maintain a tobacco-free workplace that protects those in workplaces from involuntary, secondhand exposure to tobacco smoke.

- Being a current or former cigarette smoker increases a person's risk for severe illness from COVID-19.
- Smokefree polices improve health. Review Promoting Health and Preventing Disease and Injury Through Workplace Tobacco Polices.

# Employers: Use the table below to implement the most appropriate controls for your workplace

The table below presents examples of controls to implement in your workplace. The most effective controls are those that rely on engineering solutions, followed by administrative controls, then PPE. PPE is the least effective control method and the most difficult to implement. Worksites may have to implement multiple complementary controls from these columns to effectively control the hazard.

## Example controls to prevent the spread of SARS-CoV-2 in the work environment

#### Engineering

#### Facilities and Equipment

- Assess job hazards for feasibility of engineering controls
- Ensure ventilation and water systems operate properly
- Alter workspaces to maintain social distancing. Examples include:
  - Configure partitions as a barrier shield
  - Move electronic payment reader away from cashier
  - Use verbal announcements, signage, and visual cues to promote social distancing
  - Remove/rearrange furniture
  - Provide remote shopping alternatives (e.g., delivery, pick-up)

#### Administrative

#### Screening

- Temperature and symptom screening
- Testing for SARS-CoV-2, the virus that causes COVID-19

#### Management and Communications

- Monitor state and local public health communications about COVID-19
- Encourage sick workers to report symptoms, stay home, and follow CDC guidance
- · Develop strategies to:
  - manage worker concerns
  - communicate with workers
- Remind workers of available support services
- Communicate to partners, suppliers, other contractors on policies and practices
- Encourage social distancing and the use of masks (if appropriate) in the workplace

- Use technology to promote social distancing (e.g., telework and virtual meetings)
- · Cancel group events
- Close/limit use of shared spaces
- · Ask customers who are ill to stay home
- Consider policies that encourage flexible sick leave and alternative work schedules.
- Schedule stocking during off-peak hours
- Maintain a tobacco-free workplace

#### Cleaning and Disinfection

- Clean and disinfect frequently touched surfaces, (e.g., counters, shelving, displays)
- Provide employees with disposable disinfectant wipes, cleaner, or sprays that are effective against the virus that causes COVID-19

#### **Training**

Provide employees with training on:

- Policies to reduce the spread of SARS-CoV-2
- General hygiene
- Symptoms, what to do if sick
- · Cleaning and disinfection
- Masks
- Social distancing
- Use of PPE
- Safe work practices
- Stress management

#### Personal Protective Equipment (PPE)

#### PPE

- Conduct workplace hazard assessment
- Determine what PPE is needed for workers' specific job duties based on hazards and other controls present
- Select and provide appropriate PPE to the workers at no cost

#### Resources for more information:

#### **CDC** Guidance

COVID-19 Website

Business and Workplaces webpage

**General Business Frequently Asked Questions** 

**Small Business** 

Transportation and Delivery

What You Need to Know About COVID-19

What to Do If You Are Sick With COVID-19

What Workers and Employers Can Do to Manage Workplace Fatigue during COVID-19

People at Higher Risk of Severe Illness

Public Health Recommendations for Community-Related Exposures

Public Health Recommendations after Travel-Associated COVID-19 Exposure

Health Alert Network

Travelers' Health Website

National Institute for Occupational Safety and Health's Small Business International Travel Resource Travel Planner

Managing Workplace Fatigue

#### Other Federal Agencies and Partners

OSHA COVID-19 Website [2]

OSHA Guidance on Mitigating and Preventing the Spread of COVID-19 in the Workplace 🖸

# **Previous Updates**

**Updates from Previous Content** 

As of May 6, 2020

- Updated strategies and recommendations for employers responding to COVID-19, including those seeking to resume normal or phased business operations:
  - Conducting daily health checks
  - Conducting a hazard assessment of the workplace
  - Encouraging employees to wear cloth face coverings in the workplace, if appropriate
  - Implementing policies and practices for social distancing in the workplace
  - Improving the building ventilation system
- A table outlining the engineering controls, administrative controls, and personal protective equipment (PPE) that employers may use to help prevent the spread of COVID-19 in the workplace

#### As of March 21, 2020

- Updated cleaning and disinfection guidance
- Updated best practices for conducting social distancing
- Updated strategies and recommendations that can be implemented now to respond to COVID-19

Last Updated Mar. 8, 2021

# **ATTACHMENT 6**

#### COVID-19

/ Protecting Workers: Guidance on Mitigating and Preventing the Spread of COVID-19 in the Workplace

# Protecting Workers: Guidance on Mitigating and Preventing the Spread of COVID-19 in the Workplace

OSHA will update this guidance over time to reflect developments in science, best practices, and standards.

Guidance posted January 29, 2021

#### On this Page

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Purpose
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What Workers Need To Know about COVID-19 Protections in the Workplace
The Roles of Employers and Workers in Responding to COVID-19
Additional Detail on Key Measures for Limiting the Spread

## **Executive Summary**

This guidance is intended to inform employers and workers in most workplace settings outside of healthcare to help them identify risks of being exposed to and/or contracting COVID-19 at work and to help them determine appropriate control measures to implement. Separate guidance is applicable to healthcare (CDC guidance) and emergency response (CDC guidance) settings. OSHA has additional industry-specific guidance. This guidance contains recommendations as well as descriptions of mandatory safety and health standards. The recommendations are advisory in nature, informational in content, and are intended to assist employers in providing a safe and healthful workplace.

**COVID-19** is a highly infectious disease that is spread most commonly through respiratory droplets and particles produced when an infected person exhales, talks, vocalizes, sneezes, or coughs. COVID-19 is highly transmissible and can be spread by people who have no symptoms. Particles containing the virus can travel more than 6 feet, especially indoors, and can be spread by individuals who do not know they are infected.

**Face Coverings**, either cloth face coverings or surgical masks, are simple barriers that help prevent respiratory droplets from your nose and mouth from reaching others. Face coverings protect those around you, in case you are infected but do not know it, and can also reduce your own exposure to infection in certain circumstances. Wearing a face covering is complementary to and not a replacement for physical distancing.

Employers should implement COVID-19 Prevention Programs in the workplace. The most effective programs engage workers and their union or other representatives in the program's development, and include the following key elements: conducting a hazard assessment; identifying a combination of measures that limit the spread of COVID-19 in the workplace; adopting measures to ensure that workers who are infected or potentially infected are separated and sent home from the workplace; and implementing protections from retaliation for workers who raise COVID-19 related concerns.

The guidance below provides additional detail on key measures for limiting the spread of COVID-19, starting with separating and sending home infected or potentially infected people from the workplace, implementing physical distancing, installing barriers where physical distancing cannot be maintained, and suppressing the spread by using face coverings. It also provides guidance on use of personal protective equipment (PPE), when necessary, improving ventilation, providing supplies for good hygiene, and routine cleaning and disinfection.

OSHA will continue to update this guidance over time to reflect developments in science, best practices, and standards, and will keep track of changes for the sake of transparency. In addition, OSHA expects to continue to update guidance relevant to particular industries or workplace situations over time.

### Purpose

The Occupational Safety and Health Administration (OSHA) has prepared this guidance for planning purposes. Employers and workers should use this guidance to help identify risks of being exposed to and of contracting COVID-19 in workplace settings and to determine any appropriate control measures to implement.

This guidance is not a standard or regulation, and it creates no new legal obligations. It contains recommendations as well as descriptions of existing mandatory safety and health standards. The recommendations are advisory in nature, informational in content, and are intended to assist employers in recognizing and abating hazards likely to cause death or serious physical harm as part of their obligation to provide a safe and healthful workplace.

Pursuant to the Occupational Safety and Health Act ("the OSH Act" or "the Act"), employers must comply with safety and health standards and regulations issued and enforced either by OSHA or by an OSHA-approved state plan. In addition, the Act's General Duty Clause, Section 5(a)(1), requires employers to provide their workers with a workplace free from recognized hazards that are causing or likely to cause death or serious physical harm.

#### About COVID-19

COVID-19 is a highly infectious disease that is spread from person to person through particles produced when an infected person exhales, talks, vocalizes, sneezes, or coughs. COVID-19 may also be transmitted when people touch a contaminated object and then touch their eyes, nose or mouth, although that is less common. COVID-19 is highly transmissible and can be spread by people who have no symptoms and who do not know they are infected. Particles containing the virus can travel more than 6 feet, especially indoors. The CDC estimates that over fifty percent of the recent spread of the virus is from individuals with no symptoms at the time of spread.

More information on COVID-19 is available from the Centers for Disease Control and Prevention.

# What Workers Need To Know about COVID-19 Protections in the Workplace

- The best way to protect yourself is to stay far enough away from other people so that you are not breathing in particles produced by an infected person generally at least 6 feet (about 2 arm lengths), although this is not a guarantee, especially in enclosed spaces or those with poor ventilation.
- Practice good personal hygiene and wash your hands often. Always cover your mouth and nose with a tissue when you cough or sneeze or use the inside of your elbow and do not spit. Monitor your health daily and be alert for COVID-19 symptoms (e.g., fever, cough, shortness of breath, or other symptoms of COVID-19).

- Face coverings are simple barriers to help prevent your respiratory droplets or aerosols from reaching others. Not all face coverings are the same; the CDC recommends that face coverings be made of at least two layers of a tightly woven breathable fabric, such as cotton, and should not have exhalation valves or vents.
- The main function of wearing a face covering is to protect those around you, in case you are infected but not showing symptoms. Studies show that face coverings reduce the spray of droplets when worn over the nose and mouth.
- Although not their primary value, studies also show that face coverings can reduce wearers' risk of infection in certain circumstances, depending upon the face covering.
- You should wear a face covering even if you do not feel sick. This is because people with COVID-19 who never develop symptoms (asymptomatic) and those who are not yet showing symptoms (pre-symptomatic) can still spread the virus to other people.
- It is especially important to wear a face covering when you are unable to stay at least 6 feet apart from others since COVID-19 spreads mainly among people who are in close contact with one another. But wearing a face covering does not eliminate the need for physical distancing or other control measures (e.g., handwashing).
- It is important to wear a face covering and remain physically distant from co-workers and customers even if you have been vaccinated because it is not known at this time how vaccination affects transmissibility.
- Many employers have established COVID-19 prevention programs that include a number of important steps to keep workers safe – including steps from telework to flexible schedules to personal protective equipment (PPE) and face coverings. Ask your employer about plans in your workplace.

### The Roles of Employers and Workers in Responding to COVID-19

Under the OSH Act, employers are responsible for providing a safe and healthy workplace free from recognized hazards likely to cause death or serious physical harm.

Implementing a workplace COVID-19 prevention program is the most effective way to mitigate the spread of COVID-19 at work.

The most effective COVID-19 prevention programs engage workers and their representatives in the program's development and implementation at every step, and include the following elements:

- Assignment of a workplace coordinator who will be responsible for COVID-19 issues on the employer's behalf.
- 2. Identification of where and how workers might be exposed to COVID-19 at work. This includes a thorough hazard assessment to identify potential workplace hazards related to COVID-19. This assessment will be most effective if it involves workers (and their representatives) because they are often the people most familiar with the conditions they face.
- 3. Identification of a combination of measures that will limit the spread of COVID-19 in the workplace, in line with the principles of the hierarchy of controls. This should include a combination of eliminating the hazard, engineering controls, workplace administrative policies, personal protective equipment (PPE), and other measures, prioritizing controls from most to least effective, to protect workers from COVID-19 hazards. Key examples (discussed in additional detail below) include:
  - In addition to these general guidelines, more specific guidance is available for certain industries.
  - A. eliminating the hazard by separating and sending home infected or potentially infected people from the workplace;
  - B. implementing physical distancing in all communal work areas [includes remote work and telework];
  - C. installing barriers where physical distancing cannot be maintained;
  - D. suppressing the spread of the hazard using face coverings;

- E. improving ventilation;
- F. using applicable PPE to protect workers from exposure;
- G. providing the supplies necessary for good hygiene practices; and
- H. performing routine cleaning and disinfection.
- 4. Consideration of protections for workers at higher risk for severe illness through supportive policies and practices. Older adults and people of any age who have serious underlying medical conditions are at higher risk for severe illness from COVID-19. Workers with disabilities may be legally entitled to "reasonable accommodations" that protect them from the risk of contracting COVID-19. Where feasible, employers should consider reasonable modifications for workers identified as high-risk who can do some or all of their work at home (part or full-time), or in less densely-occupied, better-ventilated alternate facilities or offices.
- 5. Establishment of a system for communicating effectively with workers and in a language they understand. Ask workers to report to the employer, without fear of reprisal (see 12 below), COVID-19 symptoms, possible COVID-19 exposures, and possible COVID-19 hazards at the workplace. Communicate to workers, in a language they can understand and in a manner accessible to individuals with disabilities, all policies and procedures implemented for responding to sick and exposed workers in the workplace. See below for additional elements involving educating and training workers of COVID-19 procedures.
  - In addition, a best practice is to create and test two-way communication systems that workers can use to self-report if they are sick or have been exposed, and that employers can use to notify workers of exposures and closures, respectively.
- 6. Educate and train workers on your COVID-19 policies and procedures using accessible formats and in a language they understand. Communicate supportive workplace policies clearly, frequently, in plain language that workers understand (including non-English languages, and American Sign Language or other accessible communication methods, if applicable), and in a manner accessible to individuals with disabilities, and via multiple methods to employees, contractors, and any other individuals on site, as appropriate, to promote a safe and healthy workplace. Communications should include:
  - Basic facts about COVID-19, including how it is spread and the importance of physical distancing, use of face coverings, and hand hygiene. See About COVID-19 and What Workers Need to Know About COVID-19, above and see more on physical distancing, PPE, face coverings, and hygiene, respectively, below;
  - Workplace policies and procedures implemented to protect workers from COVID-19 hazards (the employer's COVID-19 prevention program); and
  - Some means of tracking which workers have been informed and when.

In addition, ensure that workers understand their rights to a safe and healthful work environment, whom to contact with questions or concerns about workplace safety and health, and their right to raise workplace safety and health concerns free of retaliation. This information should also be provided in a language that workers understand. (See Implementing Protections from Retaliation, below.) Ensure supervisors are familiar with workplace flexibilities and other human resources policies and procedures.

- 7. Instruct workers who are infected or potentially infected to stay home and isolate or quarantine to prevent or reduce the risk of transmission of COVID-19. Ensure that absence policies are non-punitive. Policies that encourage workers to come to work sick or when they have been exposed to COVID-19 are disfavored. See below for additional guidance involving eliminating the hazard.
- 8. Minimize the negative impact of quarantine and isolation on workers. When possible, allow them to telework, or work in an area isolated from others. If those are not possible, allow workers to use paid sick leave, if available, or consider implementing paid leave policies to reduce risk for everyone at the workplace. The Families First Coronavirus Response Act provides certain employers 100% reimbursement through tax

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credits to provide employees with paid sick leave or expanded family and medical leave for specified reasons related to COVID-19 through March 31, 2021.

- 9. Isolating workers who show symptoms at work. Workers who appear to have symptoms upon arrival at work or who develop symptoms during their work shift should immediately be separated from other workers, customers, and visitors, sent home, and encouraged to seek medical attention. See below for additional elements involving screening and testing.
- 10. Performing enhanced cleaning and disinfection after people with suspected or confirmed COVID-19 have been in the facility. If someone who has been in the facility is suspected or confirmed to have COVID-19, follow the CDC cleaning and disinfection recommendations. This includes:
  - a. Closing areas used by the potentially infected person for enhanced cleaning.
  - b. Opening outside doors and windows to increase air circulation in the area.
  - c. Waiting as long as practical before cleaning or disinfecting (24 hours is optimal).
  - d. Cleaning and disinfecting all immediate work areas and equipment used by the potentially infected person, such as offices, bathrooms, shared tools and workplace items, tables or work surfaces, and shared electronic equipment like tablets, touch screens, keyboards, and remote controls.
  - e. **Vacuuming the space if needed**. Use a vacuum equipped with a high-efficiency particulate air (HEPA) filter, if available. Wait until the room or space is unoccupied to vacuum.
  - f. **Providing cleaning workers with disposable gloves**. Additional PPE (e.g., safety glasses, goggles, aprons) might be required based on the cleaning/disinfectant products being used and whether there is a risk of splash.
  - g. After cleaning, disinfecting the surface with an appropriate EPA-registered disinfectant on List N: Disinfectants for use against SARS-CoV-2.
  - h. **Following requirements** in OSHA standards 29 CFR 1910.1200 and 1910.132, 133, and 138 for hazard communication and PPE appropriate for exposure to cleaning chemicals.

Once the area has been appropriately disinfected, it can be opened for use. Workers without close contact with the potentially infected person can return to the area immediately after disinfection.

If it is more than 7 days since the infected person visited or used the facility, additional cleaning and disinfection is not necessary. Continue routine cleaning and disinfection, described below.

11. Providing guidance on screening and testing: Follow state or local guidance and priorities for screening and viral testing in workplaces. Testing in the workplace may be arranged through a company's occupational health provider or in consultation with the local or state health department. Employers should inform workers of employer testing requirements, if any, and availability of testing options. CDC has published strategies for consideration of incorporating viral testing for SARS-CoV-2, the virus that causes COVID-19, into workplace COVID-19 preparedness, response, and control plans. (See below for more on the use of testing to determine when a worker may return to work after illness or exposure.)

Note: Performing screening or health checks is not a replacement for other protective measures such as face coverings and physical distancing. Asymptomatic individuals or individuals with mild non-specific symptoms may not realize they are infected and may not be detected during through screening.

12. Recording and reporting COVID-19 infections and deaths: Employers are responsible for recording work-related cases of COVID-19 illness on their Form 300 logs if the following requirements are met: (1) the case is a confirmed case of COVID-19; (2) the case is work-related (as defined by 29 CFR 1904.5); and (3) the case involves one or more relevant recording criteria (set forth in 29 CFR 1904.7) (e.g., medical treatment, days away from work). Employers must follow the requirements in 29 CFR 1904 when reporting COVID-19 fatalities

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and hospitalizations to OSHA. More information is available on OSHA's website. Employers should also report outbreaks to health departments as required and support their contact tracing efforts.

In addition, employers should be aware that reprisal or discrimination against an employee for speaking out about unsafe working conditions or reporting an infection or exposure to COVID-19 to an employer or OSHA would constitute a violation of Section 11(c) of the Act. In addition, 29 CFR 1904.35(b) also prohibits discrimination against an employee for reporting a work-related illness.

13. Implementing protections from retaliation and setting up an anonymous process for workers to voice concerns about COVID-19-related hazards: Section 11(c) of the OSH Act prohibits discharging or in any other way discriminating against an employee for engaging in various occupational safety and health activities. For example, employers may not discriminate against employees for raising a reasonable concern about infection control related to COVID-19 to the employer, the employer's agent, other employees, a government agency, or to the public, such as through print, online, social, or any other media; or against an employee for voluntarily providing and wearing their own personal protective equipment, such as a respirator, face shield, gloves, or surgical mask.

In addition to notifying workers of their rights to a safe and healthful work environment, ensure that workers know whom to contact with questions or concerns about workplace safety and health, and that there are prohibitions against retaliation for raising workplace safety and health concerns or engaging in other protected occupational safety and health activities (see educating and training workers about COVID-19 policies and procedures, above); also consider using a hotline or other method for workers to voice concerns anonymously.

- 14. Making a COVID-19 vaccine or vaccination series available at no cost to all eligible employees. Provide information and training on the benefits and safety of vaccinations.
- 15. Not distinguishing between workers who are vaccinated and those who are not: Workers who are vaccinated must continue to follow protective measures, such as wearing a face covering and remaining physically distant, because at this time, there is not evidence that COVID-19 vaccines prevent transmission of the virus from person-to-person. The CDC explains that experts need to understand more about the protection that COVID-19 vaccines provide before deciding to change recommendations on steps everyone should take to slow the spread of the virus that causes COVID-19.
- 16. Other applicable OSHA Standards: All of OSHA's standards that apply to protecting workers from infection remain in place. These standards include: requirements for PPE (29 CFR 1910, Subpart I (e.g., 1910.132 and 133)), respiratory protection (29 CFR 1910.134), sanitation (29 CFR 1910.141), protection from bloodborne pathogens: (29 CFR 1910.1030), and OSHA's requirements for employee access to medical and exposure records (29 CFR 1910.1020). There is no OSHA standard specific to COVID-19; however, employers still are required under the General Duty Clause, Section 5(a)(1) of the OSH Act, to provide a safe and healthful workplace that is free from recognized hazards that can cause serious physical harm or death.

# Additional Detail on Key Measures for Limiting the Spread

Eliminating the Hazard by Separating and Sending Home Infected or Potentially Infected People from the Workplace

One key element involves eliminating the hazard, which means isolating workers who are infected or potentially infected so they cannot infect other workers. Most employers will follow a symptom-based strategy for identifying and separating and sending home workers. However, there are certain circumstances where employers may consider a COVID-19 test-based strategy.

# 1. Workers who have or likely have COVID-19 should be isolated until they meet CDC guidelines for exiting isolation:

- a. If they think or know they had COVID-19 and had symptoms, they can return after:
  - i. At least 10 days since symptoms first appeared and
  - ii. At least 24 hours with no fever without fever-reducing medication and
  - iii. Other symptoms of COVID-19 are improving (loss of taste and smell may persist for weeks or months and need not delay the end of isolation).
- b. Some workers might need to stay home and isolate longer than 10 days, as recommended by their healthcare providers:
  - i. A healthcare provider may recommend that a worker who had severe illness from COVID-19 (admitted to a hospital and needed oxygen) stay in isolation for up to 20 days after symptoms first appeared.
  - ii. Workers who had COVID-19 or tested positive for COVID-19 **and** have a weakened immune system should consult with their healthcare providers for more information. Their doctors may work with infectious disease experts at the local health department to determine when they can be around others.

#### Notes:

- Under the Americans with Disabilities Act, employers are permitted to require a doctor's note from workers to verify that they are healthy and able to return to work. But given potential delays in seeking treatment and demands on the healthcare system, requiring a COVID-19 test result or a healthcare provider's note for workers who are sick to validate their illness or return to work may cause significant delays affecting employers and workers alike.
- A worker who has recovered from symptoms after testing positive for COVID-19 may continue to test positive for three months or more without being contagious to others. For this reason, these workers should be tested only if they develop new symptoms of possible COVID-19. If they have new symptoms, they should discuss getting tested again with their healthcare provider, especially if they have been in close contact with another person who has tested positive for COVID-19 in the last 14 days. CDC reports that instances of reinfection have so far been infrequent.
- CDC does NOT recommend that employers use antibody tests to determine which workers can work. Antibody tests check a blood sample for **past infection** with SARS-CoV-2, and are not very reliable. Viral tests check a respiratory sample (such as swabs of the inside of the nose) for **current infection** with SARS-CoV-2.

# 2. Workers should quarantine if they have been exposed to COVID-19, which means:

- a. They were within 6 feet of someone who has COVID-19 for a total of 15 minutes or more within a 24-hour period, starting from 2 days before illness onset (or, for asymptomatic patients, 2 days prior to test specimen collection) until the time the patient is isolated, or
- b. They provided care at home to someone who is sick with COVID-19, or
- c. They had direct physical contact with a person who has COVID-19 (hugged or kissed them), or
- d. They shared eating or drinking utensils with a person who has COVID-19, or
- e. Someone who has COVID-19 sneezed, coughed, or somehow got respiratory droplets on them. Local public health authorities determine and establish the quarantine options for their jurisdictions. CDC guidance provides that individuals who have been exposed should:
- Stay home for 14 days after last contact with a person who has COVID-19,
- Watch for fever (100.4°F), cough, shortness of breath, or other symptoms of COVID-19, and
- To the extent possible, stay away from others, especially people who are at higher risk for getting very sick from COVID-19.

CDC also recognizes that local public health departments may consider other options for ending quarantine; for example, end quarantine after day 10 without testing, or after day 7 after receiving a negative test result (test must occur on day 5 or later). CDC continues to endorse quarantining for 14 days and recognizes that any

quarantine shorter than 14 days balances reduced burden against a small possibility of spreading the virus. Therefore, after stopping a quarantine of less than 14 days, these individuals should:

- Watch for symptoms until 14 days after exposure;
- Immediately self-isolate and contact the local public health authority or their healthcare providers if symptoms appear; and
- Wear a face covering, stay at least 6 feet from others, wash hands, avoid crowds, and take other steps to prevent the spread of COVID-19.

Employers may consider permitting critical infrastructure workers to continue to work in limited instances when it is necessary to preserve the function of critical infrastructure workplaces.

# Implement Physical Distancing in All Communal Work Areas

The best way to protect individuals is to stay far enough away so as not to breathe in particles produced by an infected person – generally at least 6 feet, although this is not a guarantee of safety, especially in enclosed spaces or those with poor ventilation.

- Limit the number of people in one place at any given time:
  - Implement flexible worksites (e.g., telework).
  - Implement flexible work hours (e.g., rotate or stagger shifts to limit the number of workers in the workplace at the same time).
  - o Deliver services remotely (e.g., phone, video, or web).
  - Implement flexible meeting and travel options (e.g., postpone non-essential meetings or events, in accordance with state and local regulations and guidance on size limits for meetings).
- Increase physical space:
  - Between workers at the worksite to at least 6 feet. This may require modifying the workspace or slowing production lines.
  - Between workers and customers by adjusting business practices to reduce close contact with customers
     — for example, by moving the electronic payment terminal/credit card reader farther away from the cashier,
     or by providing drive-through service, click-and-collect online shopping, shop-by-phone, curbside pickup,
     and delivery options.
- Alter workspaces to help workers and customers maintain physical distancing and physically separate workers by at least 6 feet from each other and from customers. Methods of physical distancing include signs, tape marks, decals, or other visual cues, placed 6 feet apart, to indicate where to stand.
- Shift primary stocking activities to off-peak or after hours, to reduce contact with customers.
- Offer vulnerable workers duties that minimize their contact with customers and other workers (e.g., restocking shelves rather than working as a cashier), if the worker agrees to this.
- Other measures that may reduce close contact:
  - Close or limit access to common areas where workers are likely to congregate and interact.
  - Prohibit handshaking or other forms of physical contact.
  - Ensure that all businesses and employers sharing the same workspace follow this guidance.
- When work tasks do not allow for adequate physical distancing, employers should check for additional industryspecific guidance.

# Installing Barriers Where Physical Distancing Cannot Be Maintained

At fixed workstations where workers are not able to remain at least 6 feet away from other people, transparent shields or other solid barriers (e.g., plexiglass, flexible strip curtains) should be installed to separate workers from other people.

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- The barriers should block face-to-face pathways between individuals in order to prevent direct transmission of respiratory droplets. The posture (sitting or standing) of users should be considered when designing and installing barriers.
- Where an opening in the barrier is necessary to permit the transfer of items, the opening should be as small as possible.
- Barriers do not replace the need for physical distancing 6 feet of separation should be maintained between individuals whenever possible.

# Suppressing the Spread of the Hazard Using Face Coverings

Provide all workers with face coverings (i.e., cloth face coverings, surgical masks), unless their work task requires a respirator. Employers should provide face coverings to the workers at no cost. Employers must discuss the possibility of "reasonable accommodation" for any workers who are unable to wear or have difficulty wearing certain types of face coverings due to a disability. In workplaces with employees who are deaf or have hearing deficits, employers should consider acquiring masks with clear coverings over the mouth for all workers to facilitate lip-reading.

Face coverings should be made of at least two layers of a tightly woven breathable fabric, such as cotton, and should not have exhalation valves or vents. They should fit snugly over the nose, mouth, and chin with no large gaps on the outside of the face.

Require any other individuals at the workplace (e.g., visitors, customers, non-employees) to wear a face covering unless they are under the age of 2 or are actively consuming food or beverages on site.

- Wearing a face covering that covers the nose and mouth is a measure to contain the wearer's respiratory droplets and helps protect others. It may also protect the wearer.
- Wearing a face covering does not eliminate the need for physical distancing of at least 6 feet apart.
- For operations where the face covering worn by workers can become wet and soiled, provide workers with replacements daily or more frequently. Face shields may be provided for use with face coverings to protect them from getting wet and soiled, but they do not provide protection by themselves.
- Workers in a setting where face coverings may increase the risk of heat-related illness indoors or outdoors or cause safety concerns due to introduction of a hazard (for instance, straps getting caught in machinery) may consult with an occupational safety and health professional to determine the appropriate face covering/respirator for their setting.

## Improving Ventilation

The CDC has released important guidance about ways to improve ventilation and prevent the spread of COVID-19 in buildings. Below are a number of strategies to do so. Some of these recommendations are based on ASHRAE Guidance for Building Operations During the COVID-19 Pandemic. Review these ASHRAE guidelines for further information on ventilation recommendations.

- Ensure ventilation systems operate properly and provide acceptable indoor air quality for the current occupancy level for each space.
- Increase ventilation rates when possible.
- When weather conditions allow, increase fresh outdoor air by opening windows and doors. Do not open windows and doors if doing so poses a safety or health risk (e.g., risk of falling, triggering asthma symptoms) to occupants in the building.
- Use fans to increase the effectiveness of open windows. To safely achieve this, fan placement is important. Avoid placing fans in a way that could potentially cause contaminated air to flow directly from one person over another. One helpful strategy is to use a window fan, placed safely and securely in a window, to exhaust room

air to the outdoors. This will help draw fresh air into the room via other open windows and doors without generating strong room air currents.

- Disable demand-controlled ventilation (DCV).
- Reduce or eliminate recirculation, for example by opening minimum outdoor air dampers. In mild weather, this will not affect thermal comfort or humidity. However, this may be difficult to do in cold or hot weather.
- Improve central air filtration to the MERV-13 (the grade of filter recommended by ASHRAE) or the highest compatible with the filter rack, and seal edges of the filter to limit bypass.
- Check filters to ensure they are within service life and appropriately installed.
- Keep systems running longer hours, 24/7 if possible, to enhance air exchanges in the building space.
- Ensure restroom exhaust fans are functional and operating at full capacity.
- Inspect and maintain local exhaust ventilation in areas such as kitchens and cooking areas.
- Use portable high-efficiency particulate air (HEPA) fan/filtration systems to help enhance air cleaning (especially in higher-risk areas such as a nurse's office or areas frequently inhabited by persons with higher likelihood of COVID-19 and/or increased risk of getting COVID-19).
- Generate clean-to-less-clean air movement by re-evaluating the positioning of supply and exhaust air diffusers and/or dampers (especially in higher-risk areas).
- Consider using ultraviolet germicidal irradiation (UVGI) as a supplement to help inactivate SARS-CoV-2, especially if options for increasing room ventilation are limited. Upper-room UVGI systems can be used to provide air cleaning within occupied spaces, and in-duct UVGI systems can help enhance air cleaning inside central ventilation systems.
- If ventilation cannot be increased, reduce occupancy level in the building. This increases the effective dilution ventilation per person.

# Use Personal Protective Equipment When Necessary

When the measures described above cannot be implemented or do not protect workers fully, OSHA standards require employers to provide PPE to supplement other controls.

- Determine what PPE is necessary to protect workers.
- Provide all PPE, if necessary, including respirators (N95 filtering facepiece respirators or better, including elastomeric respirators, without exhalation valves or vents), face shields, protective gowns and gloves, to the workers at no cost.
- Make sure to provide PPE in accordance with relevant OSHA standards and other industry-specific guidance. Respirators, if necessary, must be provided and used in compliance with 29 CFR 1910.134 (e.g., medical determination, fit testing, training on its correct use), including certain provisions for voluntary use when workers supply their own respirators, and other PPE must be provided and used in accordance with the applicable standards in 29 CFR 1910, Subpart I (e.g., 1910.132 and 133). See additional information on PPE flexibilities and prioritization in the Personal Protective Equipment Considerations section within the Interim Guidance for U.S. Workers and Employers of Workers with Potential Occupational Exposures to SARS-CoV-2.
- There are times when PPE is not required under OSHA standards or other industry-specific guidance, but some workers may have a legal right to PPE as a "reasonable accommodation" under the Americans with Disabilities Act, or other workers may want to use it if they are still concerned about their personal safety (e.g., if a family member is at higher-risk for severe illness, wearing a face shield in addition to a face covering as an added layer of protection). Encourage and support voluntary use of PPE in these circumstances.

# Provide the supplies necessary for good hygiene practices

Ensure that workers, customers, and visitors have supplies to clean their hands frequently and cover their coughs and sneezes:

Provide tissues and no-touch trash cans.

- Provide soap and warm or tepid water in the workplace in fixed worksites. If soap and water are not readily available, use alcohol-based hand sanitizer that is at least 60% ethanol or 70% isopropanol. Ensure that adequate supplies are maintained, and follow safe handling and storage requirements for sanitizer supplies and similar flammable liquids.
- Place touchless hand sanitizer stations in multiple locations to encourage hand hygiene.
- Provide workers with time to wash their hands often with soap and water (for at least 20 seconds) or to use hand sanitizer. Inform workers that if their hands are visibly dirty, soap and water is preferable to hand sanitizer. Key times for workers to clean their hands include:
  - · Before and after work shifts
  - Before and after work breaks
  - · After blowing their nose, coughing, or sneezing
  - · After using the restroom
  - Before and after eating or preparing food
  - After putting on, touching, or removing PPE or face coverings
  - After coming into contact with surfaces touched by other people
- Place posters that encourage hand hygiene and physical distancing to help stop the spread of COVID-19 at the entrance to your workplace and in other workplace areas where they are likely to be seen. This should include signs for non-English speakers, as needed.
- Promote personal health monitoring and good personal hygiene, including hand washing and good respiratory etiquette.
- Supplies necessary for good hygiene should be provided to the workers at no cost.

# Perform routine cleaning and disinfection

- Follow the Guidance for Cleaning and Disinfecting to develop, implement, and maintain a plan to perform regular cleanings to reduce the risk of exposure to COVID-19.
- Routinely clean all frequently touched surfaces in the workplace, such as workstations, keyboards, telephones, handrails, and doorknobs.
  - If surfaces are dirty, clean them using a detergent or soap and water before you disinfect them.
  - For disinfection, most common, EPA-registered, household disinfectants should be effective. A list of
    products that are EPA-approved for use against the virus that causes COVID-19 is available on the EPA
    website. Follow the manufacturer's instructions for all cleaning and disinfection products (e.g.,
    concentration, application method, and contact time).
- Do not share objects or tools between workers, but if shared tools are required, ensure appropriate cleaning and disinfection is performed between uses.
- Provide disposable disinfecting wipes so that workers can wipe down commonly used surfaces (e.g., doorknobs, keyboards, remote controls, desks, electronic payment terminals, other work tools and equipment) before each use.
- Store and use disinfectants in a responsible and appropriate manner according to the label.
- Do not mix bleach or other cleaning and disinfection products together. This can create toxic vapors.
- Advise workers always to wear gloves appropriate for the chemicals being used when they are cleaning and disinfecting and that they may need additional PPE based on the setting and product.

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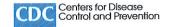
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# **ATTACHMENT 7**





# COVID-19

# Science Brief: SARS-CoV-2 and Surface (Fomite) Transmission for Indoor Community Environments

Updated Apr. 5, 2021

Print

The principal mode by which people are infected with SARS-CoV-2 (the virus that causes COVID-19) is through exposure to respiratory droplets carrying infectious virus. It is possible for people to be infected through contact with contaminated surfaces or objects (fomites), but the risk is generally considered to be low.

# Background

SARS-CoV-2, the virus that causes COVID-19, is an enveloped virus, meaning that its genetic material is packed inside an outer layer (envelope) of proteins and lipids. The envelope contains structures (spike proteins) for attaching to human cells during infection. The envelope for SARS-CoV-2, as with other enveloped respiratory viruses, is labile and can degrade quickly upon contact with surfactants contained in cleaning agents and under environmental conditions. The risk of fomite-mediated transmission is dependent on:

- · The infection prevalence rate in the community
- The amount of virus infected people expel (which can be substantially reduced by wearing masks)
- The deposition of expelled virus particles onto surfaces (fomites), which is affected by air flow and ventilation
- The interaction with environmental factors (e.g., heat and evaporation) causing damage to virus particles while airborne and on fomites
- The time between when a surface becomes contaminated and when a person touches the surface
- The efficiency of transference of virus particles from fomite surfaces to hands and from hands to mucous membranes on the face (nose, mouth, eyes)
- The dose of virus needed to cause infection through the mucous membrane route

Because of the many factors affecting the efficiency of environmental transmission, the relative risk of fomite transmission of SARS-CoV-2 is considered low compared with direct contact, droplet transmission, or airborne transmission <sup>1, 2</sup>. However, it is not clear what proportion of SARS-CoV-2 infections are acquired through surface transmission. There have been few reports of COVID-19 cases potentially attributed to fomite transmission <sup>1, 2</sup>. Infections can often be attributed to multiple transmission pathways. Fomite transmission is difficult to prove definitively, in part because respiratory transmission from asymptomatic people cannot be ruled out <sup>3, 4, 5</sup>. Case reports indicate that SARS-CoV-2 is transmitted between people by touching surfaces an ill person has recently coughed or sneezed on, and then directly touching the mouth, nose, or eyes <sup>3, 4, 5</sup>. Hand hygiene is a barrier to fomite transmission and has been associated with lower risk of infection <sup>6</sup>.

Quantitative microbial risk assessment (QMRA) studies have been conducted to understand and characterize the relative risk of SARS-CoV-2 fomite transmission and evaluate the need for and effectiveness of prevention measures to reduce risk. Findings of these studies suggest that the risk of SARS-CoV-2 infection via the fomite transmission route is low, and generally less than 1 in 10,000, which means that each contact with a contaminated surface has less than a 1 in 10,000 chance of causing an infection <sup>7, 8, 9</sup>. Some studies estimated exposure risks primarily using outdoor environmental SARS-CoV-2 RNA quantification data. They noted that their QMRA estimates are subject to uncertainty that can be reduced with additional data to improve the accuracy and precision of information that is entered into the models. Concentrations of infectious SARS-CoV-2 on outdoor surfaces could be expected to be lower than indoor surfaces because of air dilution and movement, as well as harsher environmental conditions, such as sunlight. One QMRA study also evaluated the effectiveness of prevention

measures that reduce the risk of fomite transmission and found that hand hygiene could substantially reduce the risk of SARS-CoV-2 transmission from contaminated surfaces, while surface disinfection once- or twice-per-day had little impact on reducing estimated risks <sup>9</sup>.

# Surface survival

Numerous researchers have studied how long SARS-CoV-2 can survive on a variety of porous and non-porous surfaces 10, 11, 12, 13, 14, 15. On porous surfaces, studies report inability to detect viable virus within minutes to hours; on non-porous surfaces, viable virus can be detected for days to weeks. The apparent, relatively faster inactivation of SARS-CoV-2 on porous compared with non-porous surfaces might be attributable to capillary action within pores and faster aerosol droplet evaporation 16.

Data from surface survival studies indicate that a 99% reduction in infectious SARS-CoV-2 and other coronaviruses can be expected under typical indoor environmental conditions within 3 days (72 hours) on common non-porous surfaces like stainless steel, plastic, and glass 10, 11, 12, 13, 15. However, experimental conditions on both porous and non-porous surfaces do not necessarily reflect real-world conditions, such as initial virus amount (e.g., viral load in respiratory droplets) and factors that can remove or degrade the virus, such as ventilation and changing environmental conditions 8, 9. They also do not account for inefficiencies in transfer of the virus between surfaces to hands and from hands to mouth, nose, and eyes 8, 9. In fact, laboratory studies try to optimize the recovery of viruses from surfaces (e.g., purposefully swabbing the surface multiple times or soaking the contaminated surface in viral transport medium before swabbing). When accounting for both surface survival data and real-world transmission factors, the risk of fomite transmission after a person with COVID-19 has been in an indoor space is minor after 3 days (72 hours), regardless of when it was last cleaned 8, 9, 10, 11, 12, 13, 15.

# Effectiveness of cleaning and disinfection

Both cleaning (use of soap or detergent) and disinfection (use of a product or process designed to inactivate SARS-CoV-2) can reduce the risk of fomite transmission. Cleaning reduces the amount of soil (e.g., dirt, microbes and other organic agents, and chemicals) on surfaces, but efficacy varies by the type of cleaner used, cleaning procedure, and how well the cleaning is performed. No reported studies have investigated the efficacy of surface cleaning (with soap or detergent not containing a registered disinfectant [2]) for reducing concentrations of SARS-CoV-2 on non-porous surfaces. From studies of cleaning focused on other microbes, a 90–99.9% reduction of microbe levels could be possible depending on the cleaning method and the surface being cleaned 17, 18. In addition to physical removal of SARS-CoV-2 and other microbes, surface cleaning can be expected to degrade the virus. Surfactants in cleaners can disrupt and damage the membrane of an enveloped virus like SARS-CoV-2 19, 20, 21.

To substantially inactivate SARS-CoV-2 on surfaces, the surface must be treated with a disinfectant product registered with the Environmental Protection Agency's (EPA's) List N or technology that has been shown to be effective against the virus 22. Disinfectant products might also contain cleaning agents, so they are designed to clean by both removing soil and inactivating microbes. Cleaners and disinfectants should be used safely, following the manufacturer guidance. There have been increases in poisonings and injuries from unsafe use of cleaners and disinfectants since the start of the COVID-19 pandemic 23. Some types of disinfection applications, particularly those including fogging or misting, are neither safe nor effective for inactivating the virus unless properly used 24.

Surface disinfection has been shown to be effective for preventing secondary transmission of SARS-CoV-2 between an infected person and other people within households <sup>25</sup>. However, there is little scientific support for routine use of disinfectants in community settings, whether indoor or outdoor, to prevent SARS-CoV-2 transmission from fomites. In public spaces and community settings, available epidemiological data and QMRA studies indicate that the risk of SARS-CoV-2 transmission from fomites is low—compared with risks from direct contact, droplet transmission or airborne transmission <sup>8, 9</sup>. Routine cleaning performed effectively with soap or detergent, at least once per day, can substantially reduce virus levels on surfaces. When focused on high-touch surfaces, cleaning with soap or detergent should be enough to further reduce the relatively low transmission risk from fomites in situations when there has not been a suspected or confirmed case of COVID-19 indoors within the last 24 hours, the presence of infectious virus on surfaces is more likely and therefore high-touch surfaces should be disinfected <sup>26</sup>.

# Response to a case in an indoor environment

When a person with suspected or confirmed COVID-19 has been indoors, virus can remain suspended in the air for minutes to hours. The length of time virus remains suspended and is infectious depends on numerous factors, including viral load in

respiratory droplets or in small particles, disturbance of air and surfaces, ventilation, temperature, and numidity 21, 20, 23, 30, 31. Wearing masks consistently and correctly can substantially reduce the amount of virus indoors, including the amount of virus that lands on surfaces 32.

Based on limited epidemiologic and experimental data, the risk of infection from entering a space where a person with COVID-19 has been is low after 24 hours. During the first 24 hours, the risk can be reduced by increasing ventilation and waiting as long as possible before entering the space (at least several hours, based on documented airborne transmission cases), and using personal protective equipment (including any protection needed for the cleaning and disinfection products) to reduce risk. Certain techniques can improve the fit and filtration effectiveness of masks <sup>32</sup>.

After a person with suspected or confirmed COVID-19 has been in an indoor space, the risk of fomite transmission from any surfaces is minor after 3 days (72 hours). Researchers have found that 99% reduction in infectious SARS-CoV-2 on non-porous surfaces can occur within 3 days <sup>8, 9, 10, 11, 12, 13</sup>. In indoor settings, risks can be reduced by wearing masks (which reduces droplets that can be deposited on surfaces), routine cleaning, and consistent hand hygiene.

# Conclusion

People can be infected with SARS-CoV-2 through contact with surfaces. However, based on available epidemiological data and studies of environmental transmission factors, surface transmission is not the main route by which SARS-CoV-2 spreads, and the risk is considered to be low. The principal mode by which people are infected with SARS-CoV-2 is through exposure to respiratory droplets carrying infectious virus. In most situations, cleaning surfaces using soap or detergent, and not disinfecting, is enough to reduce risk. Disinfection is recommended in indoor community settings where there has been a suspected or confirmed case of COVID-19 within the last 24 hours. The risk of fomite transmission can be reduced by wearing masks consistently and correctly, practicing hand hygiene, cleaning, and taking other measures to maintain healthy facilities.

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Last Updated Apr. 5, 2021

# **ATTACHMENT 8**

# STANDARDIZED EMPLOYEE SCREENING QUESTIONNAIRE

If you answer **"yes"** to any of the following questions, please contact HR about reasonable accommodations or alternative work options.

#### To be asked daily: To be asked upon return to work: Have you had a fever, cough, shortness Do you have anyone in your home/ of breath, difficulty breathing, chills, have you interacted with anyone that muscle pain, sore throat, or new loss of is at a higher risk for contraction? taste or smell that cannot be attributed (nurses, essential workers, etc.) to another health condition in the past Do you have anyone in your home 2-14 days?\* that could be more susceptible to contracting COVID-19? Please acknowledge the following upon arrival: To be asked weekly: I certify I will follow my employer's Have you had contact with a person COVID-19 policy. known to be infected, potentially I certify that all answers are true and infected, or exposed to someone correct to the best of my knowledge. infected with COVID-19 within the previous 14 days? \* Definitions represent CDC-designated guidance and symptoms of COVID-19 at the time of drafting. For the most current list of Have you or someone you've been in symptoms and guidance please consult the CDC's website. contact with traveled domestically or This questionnaire is meant as a recommendation and should not internationally in the last 14 days? represent a dispositive indication of an employee's exposure risk. While we tried to be comprehensive, we make no representations or warranties regarding the completeness of these materials in Have you or someone you've been complying with your state and local laws. in contact with attended a gathering Please consult the Center for Disease Control (CDC), U.S. Equal Employment Opportunity Commission (EEOC), and appropriate where proper social distancing protocol authority in your jurisdiction's applicable guidance. The U.S.

was not followed in the past 14 days?\*

Chamber of Commerce cannot ensure safety and disclaims all

liability arising from use of these materials.

# **ATTACHMENT 9**



## OFFICIAL SITE OF THE STATE OF NEW JERSEY

return to nj.gov



## **NEW JERSEY COVID-19 Information Hub**

Call (General COVID-19 Questions): 2-1-1 (24/7)

Call (Medical COVID-19 Questions): 1-800-962-1253 (24/7) Call (Vaccine Appointment Support): 1-855-568-0545 (8a-8p)

Text NJCOVID to 898-211 to receive alerts

Download COVID Alert NJ app here

Select a Language ∨

# Search for COVID-19 and Reopening Information Here

How do I d





**CHECK YOUR SYMPTOMS** 

**COVID ALERT NJ** 

**REOPENING** 



■ Back to All FAQs

# Can my employer require me to get the COVID-19 vaccine in order to enter my workplace?

Last Updated: 03/19/2021

Copy Link to Article

Yes. An employer can require that an employee receive the COVID-19 vaccine in order to return to the workplace, unless the employee cannot get the vaccine because of a disability, because their doctor has advised them not to get the vaccine while pregnant or breastfeeding, or because of a sincerely held religious belief, practice, or observance.

If an employee has a disability that precludes them from getting a COVID-19 vaccine, has been specifically advised by their doctor not to get the COVID-19 vaccine while pregnant or breastfeeding, or has a sincerely held religious belief, practice or observance that precludes them from getting a COVID-19 vaccine, their employer must provide a reasonable accommodation from their mandatory vaccine policy, unless doing so would impose an undue burden on their operations.

Employers generally may request medical documentation to confirm a disability or to confirm that an employee who requests a reasonable accommodation on the basis of pregnancy or breastfeeding was advised by their doctor to seek such accommodation. Employers must ensure that all information about an employee's disability is kept confidential and must maintain all information about employee illness as a confidential medical record.

If a sincerely held religious belief, practice, or observance precludes you from getting a COVID-19 vaccine, an employer generally may not question the sincerity of an employee's religious beliefs, practices, or observance, unless the employer has an objective basis for questioning either the religious nature or the sincerity of a particular belief, practice, or observance. In that case, the employer may make a limited inquiry into the facts and circumstances supporting the employee's request.

Safety-your safety as well as the safety of your coworkers, clients, and customers —is a factor in evaluating whether a potential accommodation would be reasonable. An employer must base its decisions regarding any potential safety hazard on objective, scientific evidence, including evidence reflected in policies and guidance from federal, state, and local authorities (including the CDC), and not on unfounded assumptions or stereotypes.

A reasonable accommodation may include allowing the employee to continue to work remotely, or otherwise to work in a manner that would reduce or eliminate the risk of harm to other employees or to the public. A reasonable accommodation may also include providing the employee with personal protective equipment that sufficiently mitigates the employee's risk of COVID-19 transmission and exposure.

Under the New Jersey Law Against Discrimination, if there is no reasonable accommodation that your employer can provide that would mitigate the risk of COVID-19 transmission to its employees and customers, then your employer can enforce its policy of excluding unvaccinated employees from the physical workplace, even if you are unvaccinated because of a disability, pregnancy, or breastfeeding, or a sincerely held religious belief. However, that does not mean that your employer can automatically discipline you if you cannot get vaccinated, as the employer may be precluded from doing so by other laws, regulations, or policies.

For employers with a unionized workforce, the applicable collective bargaining agreement already may vest the employer with the management right to unilaterally develop and implement a vaccine program.

The U.S. Equal Employment Opportunity Commission and the New Jersey Division on Civil Rights enforce these laws. See question K.2-K.7 of What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws for more information on protections from the U.S. Equal Employment Opportunity

Commission, and see <a href="https://www.njoag.gov/about/divisions-and-offices/division-">https://www.njoag.gov/about/divisions-and-offices/division-</a> on-civil-rights-home/covid-19-faqs/ for more information on protections enforced by the New Jersey Division on Civil Rights.

Stay up to date with the latest COVID-19 news and updates from the State of New Jersey.		
	Enter email here	☐ By checking this box, you cor to our <u>data privacy policy</u> .
OPRA   Open Public Records Act New Jersay Department of Health		
Sign up for Email Updates   Report a Correction   Legal Statement   Privacy Policy		
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NJ Office of Innovation		
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# **ATTACHMENT 10**

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#### STATE OF NEW YORK

4602

2021-2022 Regular Sessions

#### IN ASSEMBLY

February 4, 2021

Introduced by M. of A. DiPIETRO -- read once and referred to the Committee on Health

AN ACT to amend the public health law, in relation to prohibiting a mandatory immunization against the novel coronavirus/COVID-19

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Article 21 of the public health law is amended by adding a 1 2 new title 8 to read as follows:

#### TITLE 8

NOVEL CORONAVIRUS, COVID-19

Section 2180. Novel coronavirus/COVID-19; immunization.

§ 2180. Novel coronavirus/COVID-19; immunization. 1. No immunization used for the purposes of inducing immunity against COVID-19 in humans in this state shall be made a mandatory immunization. No person shall be required to receive such vaccine.

No child under the age of eighteen shall be required to receive such vaccine against COVID-19 unless a person in a parental relation to such child requests and consents to have the child vaccinated. For the purpose of this subdivision the term "person in parental relation to a child" shall have the same meaning as set forth in section twenty-one hundred sixty-four of this article. Prior to administering the immunization every health care provider or practitioner shall provide a list of ingredients contained in the vaccine as provided by the manufacturer product insert and all potential side effects as indicated by industry studies.

 No incapacitated person shall be required to receive such immuniza-21 tion against COVID-19 unless a person who is the legal guardian of such 22 incapacitated person chooses to have the incapacitated person vaccinated. For the purposes of this subdivision: (a) the term "incapacitated 23 person" shall mean any person over the age of eighteen who is unable to 24 make or communicate decisions affecting their physical health, safety,

EXPLANATION--Matter in italics (underscored) is new; matter in brackets [-] is old law to be omitted.

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- 1 or self-care; and (b) the term "legal guardian" shall mean and include
- 2 any person who is over the age of eighteen and designated by an incapac-
- 3 <u>itated person prior to incapacitation as their legal guardian or a</u>
  4 <u>person legally appointed by a court as guardian of such incapacitated</u>
  5 person.
  - 4. No immunization against COVID-19 shall be required for:
- 7 (a) attendance by students or employment of teachers and staff at any 8 public or private educational institution or day care facility;
- 9 (b) travel to or from any location, including other states or coun-10 tries:
- 11 (c) receipt of any government services;
- 12 (d) entrance into public buildings;
- 13 (e) employment or continued employment in any business or not-for-pro-14 fit organization; or
  - (f) use of public transportation.
- 5. (a) No governmental entity shall provide any special privileges or financial rewards to any individual for receiving immunization against COVID-19.
- (b) No health care provider or practitioner which administers vaccine
  shall be offered any incentive or compensation to achieve targeted
  vaccination rates.
- (c) No insurance company or other entity that could profit from the sale of COVID-19 vaccines shall provide any funding, incentives or advertising to any party to increase sales of a COVID-19 vaccine.
- 6. No nursing home, state-sponsored group home for adults or children or any other group home shall require immunization against COVID-19 as a condition of residency.
- 28 <u>7. No person shall be required to have, carry or present evidence of</u> 29 <u>having received immunization against COVID-19.</u>
- 30 § 2. This act shall take effect immediately.

# **ATTACHMENT 11**

# Case No. 3:20-cv-30144-KAR UNITED STATES DISTRICT COURT DISTRICT OF MASSACHUSETTS

#### Peeples v. Clinical Support Options, Inc.

Decided Sep 16, 2020

Case No. 3:20-cv-30144-KAR

09-16-2020

GABRIEL PEEPLES, Plaintiff, v. CLINICAL SUPPORT OPTIONS, INC., Defendant.

ROBERTSON, U.S.M.J.

DRAFT 9-15-20 MEMORANDUM AND ORDER REGARDING PLAINTIFF'S FIRST MOTION FOR A TEMPORARY RESTRAINING ORDER (Docket No. 2) ROBERTSON, U.S.M.J.

#### I. INTRODUCTION

This matter is before the court on plaintiff Gabriel Peeples' ("Plaintiff," "they," "them," "their") motion for a preliminary injunction under Fed. R. Civ. P. 65(a) and (b) to preclude the termination of their employment by defendant Clinical Support Options, Inc. ("Defendant" or "CSO") (Dkt. No. 2). Plaintiff, who suffers from moderate asthma, alleges that notwithstanding their increased vulnerability to the novel coronavirus, Defendant has refused to permit them to continue to telework in violation of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12112, et seq. (Count I) and Mass. Gen. Laws ch. 151B, § 16(4) ("Chapter 151B") (Count II). The parties have consented to this court's jurisdiction (Dkt. No. 12). See 28 U.S.C. §636(c); Fed. R. Civ. P. 73. After hearing from the parties via videoconference September 11, 2020, \*2 Plaintiff's motion for preliminary injunctive relief is GRANTED for the reasons and on the terms that follow.

Plaintiff moved for expedited discovery in support of their motion for preliminary injunctive relief (Dkt. No. 10). In view of the court's ruling on Plaintiff's motion for injunctive relief, Plaintiff has withdrawn this request and assented to an order from the court denying this motion without prejudice. This order will be separately docketed.

#### II. BACKGROUND FACTS<sup>2</sup>

Unless otherwise stated, the background facts are drawn from the verified complaint (Dkt. No. 1).

Plaintiff began working as an assistant manager for CSO's Center for Community Resilience after Trauma ("CCRT") program at One Arch Place in Greenfield, Massachusetts on March 2, 2020. On March 10, 2020, Massachusetts Governor Charles Baker declared a state of emergency based on the coronavirus outbreak. The Centers for Disease Control and Prevention ("CDC") acknowledged that people with underlying conditions, such as asthma, were at a greater risk of serious illness if they contracted COVID-19. Because of Plaintiff's asthma, their doctors advised them to telework in order to avoid exposure to the virus. On March 18, 2020, Plaintiff advised their direct supervisor, Kelly Boardway, that they needed to telework to protect their health. Plaintiff performed all the essential duties of their position along with other job-related tasks while teleworking.

On May 14, 2020, Sandi Walters, Boardway's supervisor, indicated that CSO wanted managers to return to the office on May 18, 2020. After Plaintiff submitted a note from their primary care

provider indicating that Plaintiff needed to work from home for the next four weeks, Plaintiff was granted that accommodation and successfully continued to perform the essential functions of their job.

On June 19, 2020, Plaintiff's request to continue teleworking was denied. Walters' stated reason was "that they are not approving work from home for managers since [they] need managers in the building and supporting operations." Walters indicated that Plaintiff's duties \*3 when they returned to the office would not differ from those that they performed at home. On June 23, 2020, Walters reiterated that Plaintiff's request to telework was denied. Plaintiff alleges that CSO did not conduct an individualized assessment of whether Plaintiff could perform the essential functions of their job via telework, or whether Plaintiff's telework would unduly burden CSO. Plaintiff did not return to the office from June 29, 2020 to July 3, 2020 and, instead, used all of their allotted leave time.

Plaintiff "reluctantly" reported to the office on July 6, 2020. With the exception of an air purifier, none of the other protective items they had requested - personal protective equipment ("PPE"), masks, hand sanitizer, and wipes - were provided. On July 7, 2020, Defendant provided Plaintiff with four KN95 masks. Plaintiff alleges that they could not effectively perform their job while wearing a mask, particularly when interacting with children. Plaintiff alleges that "working in the office has caused [them] significant hardship and emotional distress." For example, because Plaintiff believed they could not safely eat or drink in the building, they ate lunch in their car and became dehydrated during the workday. In addition, Plaintiff was exposed to people who were not wearing masks in the workplace.

On July 27, 2020, Plaintiff emailed a reasonable accommodation request to Boardway with a supporting letter from their allergist asking CSO

to allow Plaintiff to resume teleworking. Boardway also provided a letter in support of Plaintiff's request stating that they could perform all their essential duties from home. On July 29, 2020, Walters informed Boardway that Plaintiff's request was denied. During a videoconference meeting on July 30, Walters told Plaintiff that CSO denied their request because "it expect[ed] all managers to work from the office." According to Plaintiff, CSO did not undertake an individual assessment of their circumstances in view of COVID-19. \*4

Plaintiff tendered a conditional resignation on August 10, 2020 to take effect on September 5, 2020. The resignation letter indicated that it would be rescinded if Plaintiff was permitted to telework.

During a telephone call with all managers on August 27, Walters indicated that managers with children could ask to work remotely for up to two days a week. On that date, Boardway submitted a letter to Walters in support of Plaintiff's request to work from home. Boardway's letter contained details of Plaintiff's value as a CSO employee. Based on Walters' statement and Boardway's letter, Plaintiff rescinded their resignation and renewed their telework request.

On September 1, 2020, Walters informed Plaintiff that their telework request was denied because CSO was not permitting managers to work remotely. CSO purportedly did not undertake an individualized assessment of Plaintiff's situation. Plaintiff learned that their clinical supervisor was permitted to work remotely.

In a September 1, 2020 email message to Walters, Plaintiff indicated that they would work in the office that week and would resume teleworking on September 8. Through counsel, CSO has informed Plaintiff that it "will enforce its applicable policies" if they try to telework on September 8. Plaintiff has interpreted that statement to mean that CSO will terminate their employment.

On September 3, 2020, Plaintiff filed a complaint claiming disability discrimination, failure to provide a reasonable accommodation, and creation of a hostile work environment, in violation of the ADA and Chapter 151B. Plaintiff has requested that the court issue a preliminary injunction requiring Defendant to permit Plaintiff to telework "for the duration of the [COVID-19] pandemic" and otherwise "to discontinue its discriminatory practices." Defendant has opposed Plaintiff's motion and has submitted the affidavit of Melody Arsenault, CSO's \*5 Senior Vice President of Human Resources and Compliance, in support of its opposition (Dkt. No. 16-1, Arsenault Aff.).

#### III. LEGAL STANDARD

"In determining whether to grant a preliminary injunction, the district court must consider: (i) the movant's likelihood of success on the merits of the claims; (ii) whether and to what extent the movant will suffer irreparable harm if the injunction is withheld; (iii) the balance of hardships as between the parties; and (iv) the effect, if any, that an injunction (or the withholding of one) may have on the public interest." Corp. Techs., Inc. v. Harnett, 731 F.3d 6, 9 (1st Cir. 2013) (citing Ross-Simons of Warwick, Inc. v. Baccarat, Inc., 102 F.3d 12, 15 (1st Cir. 1996)). "The party seeking the preliminary injunction bears the burden of establishing that these four factors weigh in its favor." Esso Standard Oil Co. v. Monroig-Zayas, 445 F.3d 13, 18 (1st Cir. 2006).

#### IV. ANALYSIS

#### A. Plaintiff is likely to succeed on the merits of their failure to accommodate claim.

Plaintiff claims that CSO failed to provide a reasonable accommodation for their disability (asthma) in view of COVID-19 and failed to engage in the requisite interactive process to address their request for a reasonable accommodation for their disability. "With respect to the claim of failure to accommodate, a plaintiff must demonstrate that (1) [they are] "disabled

within the meaning of the ADA, (2) [they were] able to perform the essential functions of the job with or without a reasonable accommodation, and (3) [the employer], despite knowing of [their] disability, did not reasonably accommodate it." Ouattrucci v. Mass. Gen. Hosp., CIVIL ACTION NO. 17-11250-GAO, 2020 WL 1323111, at \*3 (D. Mass. Mar. 20, 2020) (third alteration in original) (quoting E.E.O.C. v. Kohl's Dep't Stores, Inc., 774 F.3d 127, 131 (1st Cir. \*6 2014) (quotations omitted)). "Failing to provide reasonable accommodations for a qualified employee's known or mental limitations constitutes physical discrimination, unless an employer demonstrate that such an accommodation would impose an undue hardship." Eustace v. Springfield Pub. Schs., Civil Action No. 17-30158-MGM, 2020 WL 2798260, at \*6 (D. Mass. May 29, 2020) (quoting Audette v. Town of Plymouth, MA, 858 F.3d 13, 20 (1st Cir. 2017)).

"Under the third element, an employee's request for accommodation sometimes creates 'a duty on the part of the employer to engage in an interactive process." Kohl's Dep't Stores, Inc., 774 F.3d at 132 & n.5 (quoting Enica v. Principi, 544 F.3d 328, 338 (1st Cir. 2008)). "The employer has an obligation upon learning of an employee's disability to 'engage in a meaningful dialogue with the employee to find the best means of accommodating that disability." Freadman v. Metro. Prop. & Cas. Ins. Co., 484 F.3d 91, 104 (1st Cir. 2007) (quoting Tobin v. Liberty Mut. Ins. Co., 433 F.3d 100, 108 (1st Cir. 2005)). "The employee also has an obligation: 'The appropriate reasonable accommodation is best determined through a flexible, interactive process that involves both the employer and the [employee] with a disability." Id. (alteration in original) (quoting 29 C.F.R. pt. 1630, app. § 1630.9). "There may well be situations in which the employer's failure to engage in an informal interactive process would constitute a failure to provide reasonable accommodation that amounts to a violation of the ADA." *Jacques v. Clean-Up Grp.*, *Inc.*, 96 F.3d 506, 515 (1st Cir. 1996).

As to the first element, Plaintiff is likely to prevail on their contention that their asthma is a disability, at least during the COVID-19 pandemic. The ADA defines "disability" as: "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." 42 U.S.C. § 12102(2). \*7

In order to determine whether a person is disabled under the ADA, the court must conduct a tripartite analysis. First, plaintiff must prove that he suffers from a physical or mental impairment. Second, the court must evaluate the life activities affected by the impairment to determine if they constitute a "major life activity." Lastly, "tying the two statutory phrases together, [the court] ask[s] whether the impairment substantially limits the activity found to be a major life activity."

Rivera-Mercado v. Scotiabank De Puerto Rico-Int'l, 571 F. Supp. 2d 279, 294 (D.P.R. 2008) (citations omitted). Plaintiff's moderate asthma, as described in the complaint, qualifies as an impairment. See Lima v. Middlesex Sheriff's Ofc., CIVIL ACTION NO. 19-11372-RGS, 2020 WL 823088, at \*5 (D. Mass. Feb. 19, 2020). "Unobstructed breathing" qualifies as a major life activity. Id. See Ramos-Echevarria v. Pichis, Inc., 659 F.3d 182, 187 (1st Cir. 2011) ("Major life activities are basic activities of daily life that an average person in the general population can perform with little or no difficulty—'functions such as caring for oneself, performing manual walking, seeing, hearing, speaking, tasks, breathing, learning, and working." (quoting 29) C.F.R. § 1630.2(i) (1991)). "Whether a plaintiff with asthma is substantially limited in his ability to work or to breathe is a fact specific question."

Murtha v. N. Y. State Gaming Comm'n, No. 17 Civ. 10040 (NSR), 2019 WL 4450687, at \*10 (S.D.N.Y. Sept. 17, 2019) (citing Burke v. Niagara Mohawk Power Corp., 142 F. App'x 527, 529 (2d Cir. 2005) (noting that "asthma does not invariably impair a major life activity")). Plaintiff alleges that, although they are under the care of several health care providers for treatment of their asthma and abide by treatment recommendations, they still have comparatively frequent asthma attacks during which they cannot breathe properly (Compl., ¶¶ 23-34). Further, Plaintiff has pled that, because of their asthma, they are at higher risk for serious illness or even death if they contract COVID-19. See Silver v. City of Alexandria, CASE NO. 1:20-CV-00698, 2020 WL 3639696, at \*4 (W.D. La. July 6, 2020) (during the COVID-19 pandemic, whether a plaintiff has a disability should be judged by the totality of the circumstances, including the heightened risks of an impairment \*8 caused by the pandemic); Valentine v. Collier, Civil Action No. 4:20-CV-1115, 2020 WL 3625730, at \*2 (S.D. Tex. July 2, 2020) (plaintiffs successfully pled a failure to accommodate claim where they identified disabilities that subjected them to a heightened risk of death or serious illness if they contracted COVID-19). The court finds persuasive this limited precedent addressing the standard for determining whether an individual has impairment that substantially limits a major life activity, thus rising to the level of a disability, during this pandemic.

As to the second element, Plaintiff is also likely to be able to prove by a preponderance of the evidence that they are able to perform the essential functions of their job with or without reasonable accommodation. Plaintiff has, in their verified complaint, set forth the text of an August 27, 2020 email from their immediate supervisor detailing Plaintiff's value as a CSO employee and their ability to perform the essential functions of their job (Compl., ¶ 178).

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There can be little dispute that Plaintiff requested to telework as a reasonable accommodation and that they have provided evidence, in the August 27, 2020 email from their supervisor, that they can perform the essential functions of their job remotely. See Tobin v. Liberty Mut. Ins. Co., 553 F.3d 121, 136 (1st Cir. 2009) (a plaintiff bears the proving that the "proposed burden of accommodation would enable [them] to perform the essential functions of [their] job" and that, "at least on the face of things, [the accommodation] is feasible for the employer under circumstances.") (third alteration in original) (quoting Reed v. LePage Bakeries, Inc., 244 F.3d 254, 259 (1st Cir. 2001)). "Telework is certainly contemplated as a viable accommodation in certain circumstances." Merrill v. McCarthy, 184 F. Supp. 3d 221, 239 (E.D.N.C. 2016) (citing Guidance: Reasonable Enforcement Accommodation and Undue Hardship Under the Americans with Disabilities Act, EEOC Notice No. 915.002, 2002 WL \*9 31994335, at \*24 (Oct. 17, 2002); Work at Home/Telework as a Reasonable Accommodation, https://www.eeoc.gov/facts/telework.html visited 11 April 2016)). Further, their allergist recommended teleworking as a reasonable accommodation. After Plaintiff successfully teleworked for four months, Defendant allegedly denied their request to continue teleworking on June 19, 2020, allegedly without engaging in the interactive process. Instead, CSO issued a blanket statement that all managers were required to work at CSO locations, including One Arch Street "to ensure that its programs can efficiently operate" (Arsenault Aff. ¶ 33).

CSO claims that it has accommodated Plaintiff by providing KN95 face masks, hand sanitizer and wipes, an air purifier, and separate, private work space in the CCRT program area on the second floor which has less foot traffic than the first floor (Arsenault Aff. ¶¶ 10, 20, 21). A majority of these so-called accommodations are workplace safety rules rather than an individualized accommodation

to address Plaintiff's disability (Arsenault Aff. ¶ 10). CSO indicates that, as accommodation, it offered Plaintiff "the use of accrued time or a personal leave of absence if they felt that they did not wish to return to the office" but Plaintiff declined to request a leave (Arsenault Aff. ¶ 24). It is difficult to see how a leave - which Plaintiff has not requested and which is generally an accommodation that should be considered when an employee needs time to recover from an impairment - would enable them to perform the essential functions of their job.

"The interactive process 'requires a great deal of communication between the employee and employer." Eustace, 2020 WL 2798260, at \*12 (quoting Calero-Cerezo v. U.S. Dep't of Justice, 355 F.3d 6, 24 (1st Cir. 2004)). "The scope of the employer's obligation in this process is not crystal clear but '[t]he employer has at least some responsibility in determining the necessary accommodation,' since 'the regulations envision an interactive process that requires \*10 participation by both parties." Calero-Cerezo, 355 F.3d at 24 (alteration in original) (quoting 29 C.F.R. § 1630,2(o)(3)). Plaintiff alleges that their requests to telework were denied on July 29, 2020 and September 1, 2020 without CSO's engagement in the interactive process, see Ralph v. Lucent Techs., *Inc.*, 135 F.3d 166, 171 (1st Cir. 1998) (employers have a continuing duty to provide a reasonable accommodation), and CSO has not provided evidence that it considered Plaintiff's telework request on an individualized basis. Once a plaintiff has made a showing that an accommodation seems reasonable on its face, as Plaintiff has here, "the defendant[] then must show special (typically case-specific) circumstances that demonstrate undue hardship in the particular circumstances." Eustace, 2020 WL 2798260, at \*9 (alteration in original) (quoting U.S. Airways, Inc. v. Barnett, 535 U.S. 391, 401-02 (2002)). According to CSO, all managers were required to be on-site "to enforce agency rules, including COVID-19 safety rules" and to be available for an in-person

response to a client if requested (Arsenault Aff. ¶ 33). CSO's submission, however, shows that there were other managers working on-site (Arsenault Aff. ¶¶ 27-31) and Plaintiff's immediate supervisor believed that they can perform the essential functions of the job while working remotely. It is unlikely that CSO will be able to show that permitting Plaintiff's request to telework would be an undue hardship. See Garcia-Ayala v. Lederle Parenterals, Inc., 212 F.3d 638, 648 n.12, 650 (1st Cir. 2000) (reversing summary judgment for employer and granting judgment for employee where company had "simply rejected the request for the accommodation without further discussion and did so without pointing to any facts making the accommodation harmful to its business needs."). On the record \*11 before the court, it fairly appears that Plaintiff is likely to succeed on the merits of their failure to accommodate claim.<sup>3</sup>

3 Because "'Chapter 151B tracks the ADA in virtually all [relevant] respects," Plaintiff's claims under that statute are not addressed separately. Boadi v. Ctr. for Human Dev., Inc., 239 F. Supp. 3d 333, 349 (D. Mass. 2017) (quoting Smith v. Pub. Schs. of Northborough-Southborough, 133 F. Supp. 3d 289, 295 (D. Mass. 2015)). ------

# B. Plaintiff will suffer irreparable harm if the injunction is not issued.

As the court stated at the hearing, a court should be very hesitant to intrude into the employment relationship. "A federal court must find a cognizable threat of irreparable harm as an essential prerequisite to the issuance of a preliminary injunction." Ralph, 135 F.3d at 170. "Though losses occasioned by employment disputes often do not rise to the level of irreparable harm," id., "cases [nonetheless] may arise in which the circumstances surrounding an employee's discharge, together with the resultant effect on the employee, may so far depart from the normal situation that irreparable injury might be found." Sampson v. Murray, 415 U.S. 61, 91-92 & n.68 (1974). This is not a normal situation.

Plaintiff faces the loss of their employment at a time when the unemployment Massachusetts was the highest in the country (an astounding 16.1%) in July. See Shirley Leung and Larry Edelman, Economic Rebound is Stuck at Home, BOSTON SUNDAY GLOBE, Sept. 13, 2020, at A1. In the midst of the dire economic fallout from the pandemic, CSO's optimistic pronouncements about Plaintiff's employability are less than persuasive (Arsenault Aff., ¶ 42-44). As Plaintiff contends, the loss of employment creates a likelihood of a cascade of further negative consequences, including, at least in the short-term, the likely loss of employer-provided health insurance. In the unusual circumstances of the pandemic, Plaintiff has adequately shown irreparable harm from the likely loss of employment in the absence of a viable accommodation. \*12

Nor is CSO qualified to opine on the risks to Plaintiff posed by COVID-19. Plaintiff's health care provider recommended telework as a reasonable accommodation for Plaintiff's asthma and the increased risk of serious illness or even death in the event of a COVID-19 infection (Compl., ¶ 145). The risk of irreparable harm to Plaintiff - in the form of the possible serious consequences of an infection if they are not permitted to telework - cannot be discounted.

# C. The balance of hardships weighs in Plaintiff's favor.

Defendant's stated reason for refusing to permit Plaintiff to telework was that it needed managers to be present in the office to provide supervision and in-person client visits, if requested (Arsenault Aff. ¶ 33). However, Plaintiff has presented evidence that they performed the same duties onsite that they performed from home and that they are able to perform their job while teleworking as well as they could in the office. With other managers working on-site and Plaintiff's immediate manager supporting her telework request, CSO failed to articulate a hardship that

outweighs the alleged hardship of requiring Plaintiff to continue reporting in person to work at One Arch Place in Greenfield (Compl., ¶¶ 122-144). Consequently, the balance of hardships weighs in Plaintiff's favor.

# D. The withholding of an injunction may have a negative impact on public health.

To the extent there is a public interest in this dispute, this factor also weighs in Plaintiff's favor. CSO performs critical work for a vulnerable population. The record shows that Plaintiff has the skills necessary to serve CCRT's clients who are victims of trauma receiving weekly therapy and support (Arsenault Aff. ¶ 35). The termination of Plaintiff's employment at an organization that provides social services to highly traumatized, atrisk clients may negatively \*13 impact public health by placing additional burdens on those who are already struggling with mental health issues.

#### V. CONCLUSION

Plaintiff has sustained their burden of establishing that they are likely to succeed on the merits of their claims, that they are likely to suffer irreparable harm if they are denied the relief that they seek, that the balance of hardships weighs in their favor, and that the withholding of a

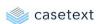
preliminary injunction may have a negative impact on public health. The court grants Plaintiff's motion for a preliminary injunction (Dkt. No. 2) on the following terms: Plaintiff is entitled to telework as a reasonable accommodation pursuant to the ADA and Chapter 151B for sixty (60) days or until further order of the court. During this period of time, CSO is entitled to seek further medical documentation concerning Plaintiff's alleged disability. The parties are strongly encouraged to discuss a mutually acceptable resolution of their dispute. A status conference has been scheduled on October 8, 2020 at 10:00 A.M.

It is so ordered. Date: September 16, 2020

/s/ Katherine A. Robertson

KATHERINE A. ROBERTSON

United States Magistrate Judge



## **ATTACHMENT 12**

# IN THE UNITED STATES DISTRICT COURT DISTRICT OF NEW MEXICO

ISAAC LEGARETTA,	)
and JOHN or JANE DOES 1-20,	
Plaintiffs,	) )
vs.	) Case No.:
FERNANDO MACIAS, Dona Ana County	) ) )
Manager, DIRECTOR BRYAN BAKER, an	)
Official with the Dona Ana County Detention	)
Center, CAPTAIN BEN MENDOZA, an official	) COMPLAINT
with the Dona Ana County Detention Center,	)
CAPTAIN JOSHUA FLEMING, an official with	)
the Dona Ana County Detention Center, and JOHN	)
or JANE DOES 1-20,	)
	)
Defendants.	)

#### **COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF**

The Plaintiff states:

#### **GENERAL ALLEGATIONS**

- 1. He is a resident of the state of New Mexico, County of Dona Ana, City of Las Cruces.

  Defendant Fernando Macias is a governmental official within the state of New Mexico. Defendants

  Director Bryan Baker, Captain Ben Mendoza and Captain Joshua Fleming are supervisors to Plaintiff,
  any of which have the authority from Defendant Macias to terminate Plaintiff from his employment or
  otherwise enforce the illegal mandate for compulsory injection.
- 2. This Court has jurisdiction under Article III because the Plaintiff alleges that Defendant Macias has violated Plaintiff's rights by issuing a mandate requiring him to take a vaccine for COVID-

19 which mandate is in direct conflict with federal law which states that the unapproved vaccine cannot be mandatory.

- 3. The Plaintiff is an employee at the Dona Ana Detention Center which is administered by the Defendants. On or about February 1, 2021, County Manager Fernando Macias issued a "Mandatory COVID-19 Vaccination Directive," requiring first-responders in Dona Ana County to receive COVID-19 vaccination as a condition of ongoing employment. **Exhibit A.**
- 4. On or about February 18, 2021, Plaintiff received a 5 day notice to comply with the mandate to receive the COVID vaccine. Plaintiff has received a "coaching and counseling" write up for not complying with the directive. **Exhibit B.**
- 5. Plaintiff is in imminent danger of being terminated from his job for refusing to accept the vaccine.
- 6. The Mandatory COVID-19 Vaccination Directive issued by Defendant Macias is in direct violation of Federal law, specifically 21 U.S. Code § 360bbb–3 *Authorization for medical products* for use in emergencies. That law states that where a medical product is "unapproved" then no one may be mandated to take it. At Section (e)(1)(A) of the aforementioned statute it states:
  - "With respect to the emergency use of an unapproved product, the Secretary, to the extent practicable given the applicable circumstances described in subsection (b)(1), shall, for a person who carries out any activity for which the authorization is issued, establish such conditions on an authorization under this section as the Secretary finds necessary or appropriate to protect the public health, including the following:
  - (i) Appropriate conditions designed to ensure that health care professionals administering the product are informed--
  - (I) that the Secretary has authorized the emergency use of the product;
  - (II) of the significant known and potential benefits and risks of the emergency use of the product, and of the extent to which such benefits and risks are unknown; and
  - (III) of the alternatives to the product that are available, and of their benefits and risks.
  - (ii) Appropriate conditions designed to ensure that individuals to whom the product is administered are informed--

- (I) that the Secretary has authorized the emergency use of the product;
- (II) of the significant known and potential benefits and risks of such use, and of the extent to which such benefits and risks are unknown; and
- (III) of the option to accept or refuse administration of the product, of the consequences, if any, of refusing administration of the product, and of the alternatives to the product that are available and of their benefits and risks. (emphasis added)
- 7. The Defendants have violated the last two quoted sections (II and III). They did not advise Plaintiff of the "known and potential benefits and risks of such use, and of the extent to which such benefits and risks are unknown" of the COVID-19 vaccine.
- 8. Most importantly for purposes of the injunctive and declaratory relief requested, the Defendants did not inform Plaintiff that he had an option to refuse the vaccine. Quite the opposite, he was advised that he would be fired if he did so.
- 9. That the vaccine being forced upon Plaintiff is "unapproved" cannot be disputed. Even though the FDA granted emergency use authorizations for the Pfizer/BioNTech and Moderna vaccines in December, 2020, the clinical trials the FDA will rely upon to ultimately decide whether to license these vaccines are still underway and are designed to last for approximately two years to collect adequate data to establish if these vaccines are safe and effective enough for the FDA to license. The abbreviated timelines for the emergency use applications and authorizations means there is much the FDA does not know about these products even as it authorizes them for emergency use, including their effectiveness against infection, death, and transmission of SARS-CoV-2, the virus that is allegedly the cause of the COVID disease. Given the uncertainty about the two vaccines, their EUAs (emergency use authorizations) are explicit that each is "an investigational vaccine not licensed for any indication" and require that all "promotional material relating to the Covid-19 Vaccine clearly and conspicuously ... state that this product has not been approved or licensed by the FDA, but has been authorized for emergency use by FDA". See Exhibit C, EUA letter for Pfizer.
  - 10. The FDA on their website has stated the following:

FDA believes that the terms and conditions of an EUA issued under section 564 preempt state or local law, both legislative requirements and common-law duties, that impose different or additional requirements on the medical product for which the EUA was issued in the context of the emergency declared under section 564 ... In an emergency, it is critical that the conditions that are part of the EUA or an order or waiver issued pursuant to section 564A — those that FDA has determined to be necessary or appropriate to protect the public health—be strictly followed, and that no additional conditions be imposed."

11. On August, 2020 at a Centers for Disease Control and Prevention published meeting of the Advisory Committee on Immunization Practices the Committee's Executive Secretary and Chief Medical Officer of the National Center for Immunizations and Respiratory Diseases, Dr. Amanda Cohn stated (@1:14:40):

"I just wanted to add that, just wanted to remind everybody, that under an Emergency Use Authorization, an EUA, vaccines are not allowed to be mandatory. So, early in this vaccination phase, individuals will have to be consented and they won't be able to be mandated."

#### FEDERAL PREEMPTION

12. The Supremacy Clause of the United States Constitution, Art. VI, which is the basis of the federal preemption doctrine, states:

"This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding."

A federal requirement preempts a state requirement if the state requirement actually conflicts with the federal requirement because compliance with both is impossible. *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143 (1963). Preemption will also be applicable if the state requirement "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S.Ct. 399, 404, 85 L.Ed. 581 (1941). Finally, federal exemption applies if a scheme of federal regulation is "so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

A more attenuated analysis of the doctrine of federal preemption including express and implied preemption is succinctly articulated in *Frei v. Taro Pharm. United Statesa*, Inc., 443 F.Supp.3d 456 (S.D. N.Y. 2020):

"Express preemption is present when Congress's intent to preempt state law is explicitly stated in the statute's language." In re PepsiCo., Inc., Bottled Water Mktg. & Sales Practices Litig., 588 F. Supp. 2d 527, 530 (S.D.N.Y. 2008). "Implied preemption arises when, in the absence of explicit statutory language, ... Congress intended the Federal Government to occupy a field exclusively, or when state law actually conflicts with federal law." Air Trans. Ass'n of Am., Inc. v. Cuomo, 520 F.3d 218, 220 (2d Cir. 2008) (citing English v. Gen. Elec. Co., 496 U.S. 72, 79, 110 S.Ct. 2270, 110 L.Ed.2d 65 (1990)).

The latter type of implied preemption, called "conflict preemption," "comes in two forms—impossibility preemption and obstacle preemption." McDaniel v. Upsher-Smith Labs., Inc., 893 F.3d 941, 944 (6th Cir. 2018). The first, impossibility preemption, arises as its title suggests: when compliance with both federal and state law is impossible. Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 98, 112 S.Ct. 2374, 120 L.Ed.2d 73 (1992). "The proper question for impossibility analysis is whether the private party could independently do under federal law what state law requires of it." PLIVA, Inc. v. Mensing, 564 U.S. at 620, 131 S.Ct. 2567. The second form, obstacle preemption, exists "when a state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Wis. Pub. Intervenor v. Mortier, 501 U.S. 597, 605, 111 S.Ct. 2476, 115 L.Ed.2d 532 (1991).

#### Frei v. Taro at 465-466

13. It is evident that the federal law at issue in this case preempts the Defendants' directive which completely disregards it, because compliance with both is impossible. In addition, Defendants' failure to comply with the federal law clearly is an obstacle to the purpose of the federal law which to allow people to not be compelled to take an unapproved drug or vaccine. Moreover, Plaintiff contends that the FDA, an agent of the Department of Health and Human Services, intends to exclusively occupy the field of approval of drugs and the manner in which unapproved drugs may be administered. This would seem to be self-evident. States simply do not venture into the area of drug approval. This is the FDA's field. The Defendants deciding to violate federal law by not giving employees the right to not take the vaccination clearly violates the doctrine of federal preemption. *See generally, Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 570-71 (2001) (overturning a state public health law because it was already the subject of a comprehensive federal scheme to manage public health).

#### RELIEF REQUESTED

#### COUNT ONE - DECLARATORY RELIEF

- 14. Plaintiff requests the Court issue declaratory relief that:
- (a.) 21 U.S. Code § 360bbb-3, Section (e)(1)(A) does not permit Defendants to coerce an employee to accept an unapproved vaccine on penalty of termination or other sanctions.
- (b.) The doctrine of federal preemption invalidates and voids the "Mandatory COVID-19 Vaccination Directive" of Defendant Macias.

#### COUNT TWO - INJUNCTIVE RELIEF

vaccine which federal law states cannot be mandated because insufficient trials have been conducted and its long-term effects are not known. Already there are many news reports of adverse effects and even deaths resulting from the vaccine. If Plaintiff were to be terminated for refusing a vaccine which federal law requires *not* to be mandated, it would be a retaliatory discharge under New Mexico law. The New Mexico Supreme Court has defined a retaliatory discharge as follows:

"For an employee to recover under this new cause of action, he must demonstrate that he was discharged because he performed an act that public policy has authorized or would encourage, or because he refused to do something required of him by his employer that public policy would condemn."

Shovelin v. Central New Mexico Elec. Co-op., Inc., 850 P.2d 996, 115 N.M. 293, 1993 NMSC 15 (N.M. 1993)

- 16. Plaintiff could not sue for damages for the tort of retaliatory discharge because New Mexico's sovereign immunity would not allow it and such immunity for a retaliatory discharge has not been waived in the New Mexico Tort Claims Act. New Mexico's sovereign immunity protects

  Defendants from suits for monetary damages but not suits for injunctions. Lacking the ability to sue for damages for retaliatory discharge, Plaintiff will be irreparably harmed absent injunctive relief.
  - 17. If the Defendants were to terminate Plaintiff for refusing to take a vaccine it would be a

violation of his due process right to life and liberty under the 14<sup>th</sup> Amendment and an invasion of the zone of privacy and right to bodily integrity which have been held to emanate from various Bill of Rights amendments, including the first, fourth and fifth as well as the ninth amendment which speaks of essential but unenumerated rights. The constitutionally protected zone of privacy and right to bodily integrity have been articulated is many Supreme Court cases, including *Mapp v. Ohio*, 367 U.S. 643 (1961), *Griswold v. State of Connecticut*, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965); *Roe v. Wade*, 410 US 113 (1973).

#### In Griswold, the Court said:

The foregoing cases suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. See Poe v. Ullman, 367 U.S. 497, 516—522, 81 S.Ct. 1752, 6 L.Ed.2d 989 (dissenting opinion). Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one, as we have seen. The Third Amendment in its prohibition against the quartering of soldiers 'in any house' in time of peace without the consent of the owner is another facet of that privacy. The Fourth Amendment explicitly affirms the 'right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.' The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment. The Ninth Amendment provides: 'The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.'

The Fourth and Fifth Amendments were described in Boyd v. United States, 116 U.S. 616, 630, 6 S.Ct. 524, 532, 29 L.Ed. 746, as protection against all governmental invasions 'of the sanctity of a man's home and the privacies of life.'\* We recently referred in Mapp v. Ohio, 367 U.S. 643, 656, 81 S.Ct. 1684 1692, 6 L.Ed.2d 1081, to the Fourth Amendment as creating a 'right to privacy, no less important than any other right carefully and particularly reserved to the people.' See Beaney, The Constitutional Right to Privacy, 1962 Sup.Ct.Rev. 212; Griswold, The Right to be Let Alone, 55 Nw.U.L.Rev. 216 (1960).

More recently in *Planned Parenthood v. Casey*, 505 U.S. 833(1992), referencing the Roe v. Wade decision the Court states stated:

Roe, however, may be seen not only as an exemplar of Griswold liberty but as a rule (whether or not mistaken) of personal autonomy and bodily integrity, with doctrinal affinity to cases recognizing limits on governmental power to mandate medical treatment or to bar its rejection. If so, our cases since Roe accord with Roe's view that a State's interest in the protection of life falls short of justifying any plenary override of individual liberty claims. Cruzan v. Director, Mo. Dept. of Health, 497 U.S. 261, 278, 111 L. Ed. 2d 224, 110 S. Ct. 2841 (1990); cf., e. g., Riggins v. Nevada, 504 U.S. 127, 135, 118 L. Ed. 2d 479, 112 S. Ct. 1810

(1992); Washington v. Harper, 494 U.S. 210, 108 L. Ed. 2D 178, 110 S. Ct. 1028 (1990); see also, e. g., Rochin v. California, 342 U.S. 165, 96 L. Ed. 183, 72 S. Ct. 205 (1952); Jacobson v. Massachusetts, 197 U.S. 11, 24-30, 49 L. Ed. 643, 25 S. Ct. 358 (1905). (emphasis added)

18. It is worth noting that in *Planned Parenthood, supra*, the Court includes *Jacobson v.*Massachusetts as a case "recognizing limits on governmental power to mandate medical treatment or to bar its rejection." because *Jacobsen* has often been cited for the opposite proposition since its holding was that a state law requiring vaccination was valid. However, the Jacobsen court said: "Before closing this opinion, we deem it appropriate, in order to prevent misapprehension as to our views, to observe -- perhaps to repeat a thought already sufficiently expressed, namely -- that the police power of a State, whether exercised by the legislature or by a local body acting under its authority, may be exerted in such circumstances or by regulations so arbitrary and oppressive in particular cases as to justify the interference of the courts to prevent wrong and oppression." (*Id*, 197 US 38).

Moreover, *Jacobsen* was decided 116 years ago when many of our most sacred and fundamental rights were still being sorted out. Suffrage had not yet occurred, civil rights barely existed, critical cases on fundamental rights such as interstate travel and bodily privacy had not come into play and the administrative state that we live in today simply did not exist. Since *Jacobsen* the court has decided many critical cases which expanded the conceptual and practical reach of the Bill of Rights as outlined in the preceding paragraphs.

- 19. Plaintiff contends that in light of the facts and the law hereinabove, success on the merits is likely, the balance of equities argues for granting injunctive relief and the public interest will not be harmed by the injunctive relief requested.
- 20. There is no need for a bond since Defendants will not suffer economic harm from injunctive relief.

COUNT THREE – INJUNCTION OR MANDAMUS REQUIRING DEFENDANTS TO REINSTATE PLAINTIFF

- 21. Plaintiff fears that the Defendants may, by the time this Complaint is filed and the Court can enter injunctive relief preventing termination of his employment, have already terminated him.
- 22. If such does occur, Plaintiff requests that the Court issue an affirmative injunction or Writ of Mandamus requiring the Defendants to reinstate him.

WHEREFORE, Plaintiff respectfully requests that the Court:

- 1. Enter declaratory relief as requested in Count One.
- 2. Enter an immediate TRO and a preliminary injunction enjoining the Defendants from terminating, demoting, or taking any negative action against Plaintiff for refusing to take a non-mandatory unapproved vaccine.
- 3. If need be, enter an injunction or Writ of Mandamus requiring Defendants to reinstate Plaintiff to his position of employment.
  - 4. Order any other appropriate relief.

Respectfully submitted,

/s/ N. Ana Garner

N. Ana Garner Attorney for Plaintiff 1000 Cordova Pl., #644 Santa Fe, NM 87505 GarnerLaw@yahoo.com (505) 930-5170

and

Jonathan Diener, Attorney Co-counsel for Plaintiff P.O. Box 27 Mule Creek, NM 88051 (575) 388-1754 jonmdiener@gmail.com

#### **DECLARATION UNDER PENALTY OF PERJURY**

The undersigned declares under penalty of perjury that he is the Plaintiff in the above action, that he has read the Complaint and hat the information contained therein is true and correct. 28 U.S.C. §1746. 18 U.S.C. 1621.

Executed at Las Cruces, New Mexico on February <u>36</u>, 2021.

Isaac Legarreta



### DOÑA ANA COUNTY COUNTY MANAGER'S OFFICE

#### **MEMORANDUM**

To:

All Doña Ana County First Responders

From:

Fernando R. Macias

Date:

January 29, 2021

Subject:

**Mandatory COVID-19 Vaccination Directive** 

On March 11, 2020, the novel coronavirus (COVID-19) was declared a pandemic by the World Health Organization. Due to the severity of illness and risk of death or serious harm that may result from becoming infected with COVID-19, this pandemic rises to the level of a direct threat as defined by the Occupational Safety and Health Administration (OSHA). As required by OSHA and in accordance with the County's duty to provide and maintain a workplace that is free of known hazards, we are adopting a mandatory COVID-19 vaccination directive to safeguard the health of our employees, their families, the customers we serve, and the community at large from this highly contagious, infectious disease. This directive takes into account all applicable laws and guidance from local health authorities.

All first responders will be required to receive the COVID-19 vaccination unless a reasonable accommodation is approved. Vaccines will be available for first responders on February 2, 3 and 4, 2021. First responders include certified law enforcement officers, detention officers and other staff who have face-to-face contact with inmates, firefighters, emergency medical technicians and paramedics. Volunteer firefighters and EMT's are strongly encouraged to be vaccinated next week as well.

There are certain conditions where receiving the COVID-19 vaccination is not advisable such as a history of adverse reactions to vaccines or other qualifying conditions. General information about the COVID vaccine can be found at <a href="https://cv.nmhealth.org/covid-vaccine/">https://cv.nmhealth.org/covid-vaccine/</a>. If you believe that you have a qualifying condition that requires an accommodation, contact the Human Resources department to obtain the accommodation request form and guidance regarding the process. An accommodation may be granted if it does not cause an undue hardship or pose a direct threat to the health and safety of others. If you have an EEO or ADA related concern regarding the vaccination requirement, you will need to speak directly to a Human Resources Administrator to see if an accommodation can be made. Questions and concerns related to an accommodation should not be taken to your supervisor or department head as this type of information is generally private and protected.

According to the New Mexico Department of Health, the COVID-19 vaccine rollout is in phase 1b which includes first responders. To register for the vaccine, go to <a href="https://www.vaccinenm.org">www.vaccinenm.org</a> and follow the steps below:

- 1. Login to the New Mexico Department of Health vaccination website www.vaccincum.org
- 2. Submit basic contact information and select the employment category **First Responder** or **Corrections** and list any medical conditions.
- 3. Once you have completed registration with the State, contact the Designated Infection Control Officer (DICO) for your department to notify them. The DICO will then provide you with additional information about how to register for a specific appointment.

Please note that first responder vaccination events taking place on February 2, 3 and 4, 2021 may be the final opportunity for you to receive priority status for the vaccination. It is required that, if you have not already started your vaccinations, that you be vaccinated with your first dose on one of these days, or contact Human Resources for accommodation. Being vaccinated is a requirement and a condition of on-going employment with the County due to the significant health and safety risks posed by contracting or spreading COVID-19.

Once you receive your vaccination, you must provide the proof of vaccination to the Human Resources Department and your department's DICO for tracking purposes.

Thank you for your commitment to our community. And, thank you for your ongoing service in this critical role to protect our residents!

Coach / Counselor / Supervisor Print Name and ID #

2/11/202/ Date

Coach / Counse or / Supervisor Signature



December 23, 2020

Pfizer Inc. Attention: Ms. Elisa Harkins 500 Arcola Road Collegeville, PA 19426

Dear Ms. Harkins:

On February 4, 2020, pursuant to Section 564(b)(1)(C) of the Act, the Secretary of the Department of Health and Human Services (HHS) determined that there is a public health emergency that has a significant potential to affect national security or the health and security of United States citizens living abroad, and that involves the virus that causes COVID-19. On the basis of such determination, the Secretary of HHS on March 27, 2020, declared that circumstances exist justifying the authorization of emergency use of drugs and biological products during the COVID-19 pandemic, pursuant to Section 564 of the Act, subject to terms of any authorization issued under that section.<sup>2</sup>

On December 11, 2020, the Food and Drug Administration (FDA) issued an Emergency Use Authorization (EUA) for emergency use of Pfizer-BioNTech COVID-19 Vaccine for the prevention of Coronavirus Disease 2019 (COVID-19) for individuals 16 years of age and older, as described in the Scope of Authorization (Section II) of this letter, pursuant to Section 564 of the Federal Food, Drug, and Cosmetic Act (the FD&C Act or the Act) (21 U.S.C. 360bbb-3). On December 23, 2020, having concluded that revising this EUA is appropriate to protect the public health or safety under section 564(g)(2) of the Act, FDA is reissuing the December 11, 2020 letter in its entirety with revisions incorporated to remove reference to the number of doses per vial after dilution, to clarify instructions for vaccination provider reporting to VAERS, and to provide other technical corrections. The Fact Sheet for Healthcare Providers Administering Vaccine (Vaccination Providers) is being revised to clarify the number of doses of vaccine per vial after dilution and the instructions for reporting to VAERS. In addition, the Fact Sheet for Healthcare Providers Administering Vaccine (Vaccination Providers) and the Fact Sheet for Recipients and Caregivers are being revised to include additional information on safety monitoring and to clarify information about the availability of other COVID-19 vaccines.

Pfizer-BioNTech COVID-19 Vaccine is for use for active immunization to prevent COVID-19 caused by severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2) in individuals 16

<sup>&</sup>lt;sup>1</sup> U.S. Department of Health and Human Services, *Determination of a Public Health Emergency and Declaration that Circumstances Exist Justifying Authorizations Pursuant to Section 564(b) of the Federal Food, Drug, and Cosmetic Act, 21 U.S.C.* § 360bbb-3. February 4, 2020.

<sup>&</sup>lt;sup>2</sup> U.S. Department of Health and Human Services, *Declaration that Circumstances Exist Justifying Authorizations Pursuant to Section 564(b) of the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 360bbb-3, 85 FR 18250 (April 1, 2020).* 

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years of age and older. The vaccine contains a nucleoside-modified messenger RNA (modRNA) encoding the viral spike (S) glycoprotein of SARS-CoV-2 formulated in lipid particles. It is an investigational vaccine not licensed for any indication.

FDA reviewed safety and efficacy data from an ongoing phase 1/2/3 trial in approximately 44,000 participants randomized 1:1 to receive Pfizer-BioNTech COVID-19 Vaccine or saline control. The trial has enrolled participants 12 years of age and older. FDA's review has considered the safety and effectiveness data as they relate to the request for emergency use authorization in individuals 16 years of age and older. FDA's review of the available safety data from 37,586 of the participants 16 years of age and older, who were followed for a median of two months after receiving the second dose, did not identify specific safety concerns that would preclude issuance of an EUA. FDA's analysis of the available efficacy data from 36,523 participants 12 years of age and older without evidence of SARS-CoV-2 infection prior to 7 days after dose 2 confirm the vaccine was 95% effective (95% credible interval 90.3, 97.6) in preventing COVID-19 occurring at least 7 days after the second dose (with 8 COVID-19 cases in the vaccine group compared to 162 COVID-19 cases in the placebo group). Based on these data, and review of manufacturing information regarding product quality and consistency, it is reasonable to believe that Pfizer-BioNTech COVID-19 Vaccine may be effective. Additionally, it is reasonable to conclude, based on the totality of the scientific evidence available, that the known and potential benefits of Pfizer-BioNTech COVID-19 Vaccine outweigh the known and potential risks of the vaccine, for the prevention of COVID-19 in individuals 16 years of age and older. Finally, on December 10, 2020, the Vaccines and Related Biological Products Advisory Committee voted in agreement with this conclusion.

Having concluded that the criteria for issuance of this authorization under Section 564(c) of the Act are met, I am authorizing the emergency use of Pfizer-BioNTech COVID-19 Vaccine for the prevention of COVID-19, as described in the Scope of Authorization section of this letter (Section II) and subject to the terms of this authorization.

#### I. Criteria for Issuance of Authorization

I have concluded that the emergency use of Pfizer-BioNTech COVID-19 Vaccine for the prevention of COVID-19 when administered as described in the Scope of Authorization (Section II) meets the criteria for issuance of an authorization under Section 564(c) of the Act, because:

- 1. SARS-CoV-2 can cause a serious or life-threatening disease or condition, including severe respiratory illness, to humans infected by this virus;
- 2. Based on the totality of scientific evidence available to FDA, it is reasonable to believe that Pfizer-BioNTech COVID-19 Vaccine may be effective in preventing COVID-19, and that, when used under the conditions described in this authorization, the known and potential benefits of Pfizer-BioNTech COVID-19 Vaccine when used to prevent COVID-19 outweigh its known and potential risks; and

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3. There is no adequate, approved, and available alternative to the emergency use of Pfizer-BioNTech COVID-19 Vaccine to prevent COVID-19.3 This is false.

#### II. Scope of Authorization

This is false and needs to be disclosed

I have concluded, pursuant to Section 564(d)(1) of the Act, that the scope of this authorization is limited as follows:

- Pfizer Inc. will supply Pfizer-BioNTech COVID-19 Vaccine either directly or through authorized distributor(s)<sup>4</sup>, to emergency response stakeholders<sup>5</sup> as directed by the U.S. government, including the Centers for Disease Control and Prevention (CDC) and/or other designee, for use consistent with the terms and conditions of this EUA;
- The Pfizer-BioNTech COVID-19 Vaccine covered by this authorization will be administered by vaccination providers<sup>6</sup> and used only to prevent COVID-19 in individuals ages 16 and older; and
- Pfizer-BioNTech COVID-19 Vaccine may be administered by a vaccination provider without an individual prescription for each vaccine recipient.

#### **Product Description**

<sup>&</sup>lt;sup>3</sup> No other criteria of issuance have been prescribed by regulation under Section 564(c)(4) of the Act.

<sup>&</sup>lt;sup>4</sup> "Authorized Distributor(s)" are identified by Pfizer Inc. or, if applicable, by a U.S. government entity, such as the Centers for Disease Control and Prevention (CDC) and/or other designee, as an entity or entities allowed to distribute authorized Pfizer-BioNTech COVID-19 Vaccine.

<sup>&</sup>lt;sup>5</sup> For purposes of this letter, "emergency response stakeholder" refers to a public health agency and its delegates that have legal responsibility and authority for responding to an incident, based on political or geographical boundary lines (e.g., city, county, tribal, territorial, State, or Federal), or functional (e.g., law enforcement or public health range) or sphere of authority to administer, deliver, or distribute vaccine in an emergency situation. In some cases (e.g., depending on a state or local jurisdiction's COVID-19 vaccination response organization and plans), there might be overlapping roles and responsibilities among "emergency response stakeholders" and "vaccination providers" (e.g., if a local health department is administering COVID-19 vaccines; if a pharmacy is acting in an official capacity under the authority of the state health department to administer COVID-19 vaccines). In such cases, it is expected that the conditions of authorization that apply to emergency response stakeholders and vaccination providers will all be met.

<sup>&</sup>lt;sup>6</sup> For purposes of this letter, "vaccination provider" refers to the facility, organization, or healthcare provider licensed or otherwise authorized by the emergency response stakeholder (e.g., non-physician healthcare professionals, such as nurses and pharmacists pursuant to state law under a standing order issued by the state health officer) to administer or provide vaccination services in accordance with the applicable emergency response stakeholder's official COVID-19 vaccination and emergency response plan(s) and who is enrolled in the CDC COVID-19 Vaccination Program. For purposes of this letter, "healthcare provider" also refers to a person authorized by the U.S. Department of Health and Human Services (e.g., under the PREP Act Declaration for Medical Countermeasures against COVID-19) to administer FDA-authorized COVID-19 vaccine (e.g., qualified pharmacy technicians and State-authorized pharmacy interns acting under the supervision of a qualified pharmacist). See, e.g., HHS. Fourth Amendment to the Declaration Under the Public Readiness and Emergency Preparedness Act for Medical Countermeasures Against COVID-19 and Republication of the Declaration. 85 FR 79190 (December 9, 2020).

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The Pfizer-BioNTech COVID-19 Vaccine is supplied as a frozen suspension in multiple dose vials; each vial must be diluted with 1.8 mL of sterile 0.9% Sodium Chloride Injection, USP prior to use to form the vaccine. The Pfizer-BioNTech COVID-19 Vaccine does not contain a preservative.

Each 0.3 mL dose of the Pfizer-BioNTech COVID-19 Vaccine contains 30 mcg of a nucleoside-modified messenger RNA (modRNA) encoding the viral spike (S) glycoprotein of SARS-CoV-2. Each dose of the Pfizer-BioNTech COVID-19 Vaccine also includes the following ingredients: lipids (0.43 mg (4-hydroxybutyl)azanediyl)bis(hexane-6,1-diyl)bis(2-hexyldecanoate), 0.05 mg 2[(polyethylene glycol)-2000]-N,N-ditetradecylacetamide, 0.09 mg 1,2-distearoyl-sn-glycero-3-phosphocholine, and 0.2 mg cholesterol), 0.01 mg potassium chloride, 0.01 mg monobasic potassium phosphate, 0.36 mg sodium chloride, 0.07 mg dibasic sodium phosphate dihydrate, and 6 mg sucrose. The diluent (0.9% Sodium Chloride Injection) contributes an additional 2.16 mg sodium chloride per dose.

The dosing regimen is two doses of 0.3 mL each, 3 weeks apart.

The manufacture of the authorized Pfizer-BioNTech COVID-19 Vaccine is limited to those facilities identified and agreed upon in Pfizer's request for authorization.

The Pfizer-BioNTech COVID-19 Vaccine vial label and carton labels are clearly marked for "Emergency Use Authorization." The Pfizer-BioNTech COVID-19 Vaccine is authorized to be distributed, stored, further redistributed, and administered by emergency response stakeholders when packaged in the authorized manufacturer packaging (i.e., vials and cartons), despite the fact that the vial and carton labels may not contain information that otherwise would be required under the FD&C Act.

Pfizer-BioNTech COVID-19 Vaccine is authorized for emergency use with the following product-specific information required to be made available to vaccination providers and recipients, respectively (referred to as "authorized labeling"):

- Fact Sheet for Healthcare Providers Administering Vaccine (Vaccination Providers):
   Emergency Use Authorization (EUA) of Pfizer-BioNTech COVID-19 Vaccine to Prevent Coronavirus Disease 2019 (COVID-19)
- Fact Sheet for Recipients and Caregivers: Emergency Use Authorization (EUA) of Pfizer-BioNTech COVID-19 Vaccine to Prevent Coronavirus Disease 2019 (COVID-19) in Individuals 16 Years of Age and Older

I have concluded, pursuant to Section 564(d)(2) of the Act, that it is reasonable to believe that the known and potential benefits of Pfizer-BioNTech COVID-19 Vaccine, when used to prevent COVID-19 and used in accordance with this Scope of Authorization (Section II), outweigh its known and potential risks.

I have concluded, pursuant to Section 564(d)(3) of the Act, based on the totality of scientific evidence available to FDA, that it is reasonable to believe that Pfizer-BioNTech COVID-19

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Vaccine may be effective in preventing COVID-19 when used in accordance with this Scope of Authorization (Section II), pursuant to Section 564(c)(2)(A) of the Act.

Having reviewed the scientific information available to FDA, including the information supporting the conclusions described in Section I above, I have concluded that Pfizer-BioNTech COVID-19 Vaccine (as described in this Scope of Authorization (Section II)) meets the criteria set forth in Section 564(c) of the Act concerning safety and potential effectiveness.

The emergency use of Pfizer-BioNTech COVID-19 Vaccine under this EUA must be consistent with, and may not exceed, the terms of the Authorization, including the Scope of Authorization (Section II) and the Conditions of Authorization (Section III). Subject to the terms of this EUA and under the circumstances set forth in the Secretary of HHS's determination under Section 564(b)(1)(C) described above and the Secretary of HHS's corresponding declaration under Section 564(b)(1), Pfizer-BioNTech COVID-19 Vaccine is authorized to prevent COVID-19 in individuals 16 years of age and older as described in the Scope of Authorization (Section II) under this EUA, despite the fact that it does not meet certain requirements otherwise required by applicable federal law.

#### III. Conditions of Authorization

Pursuant to Section 564 of the Act, I am establishing the following conditions on this authorization:

Pfizer Inc. and Authorized Distributor(s)

- A. Pfizer Inc. and authorized distributor(s) will ensure that the authorized Pfizer-BioNTech COVID-19 Vaccine is distributed, as directed by the U.S. government, including CDC and/or other designee, and the authorized labeling (i.e., Fact Sheets) will be made available to vaccination providers, recipients, and caregivers consistent with the terms of this letter.
- B. Pfizer Inc. and authorized distributor(s) will ensure that appropriate storage and cold chain is maintained until delivered to emergency response stakeholders' receipt sites.
- C. Pfizer Inc. will ensure that the terms of this EUA are made available to all relevant stakeholders (e.g., emergency response stakeholders, authorized distributors, and vaccination providers) involved in distributing or receiving authorized Pfizer-BioNTech COVID-19 Vaccine. Pfizer Inc. will provide to all relevant stakeholders a copy of this letter of authorization and communicate any subsequent amendments that might be made to this letter of authorization and its authorized labeling.
- D. Pfizer Inc. may develop and disseminate instructional and educational materials (e.g., video regarding vaccine handling, storage/cold-chain management, preparation, disposal) that are consistent with the authorized emergency use of the vaccine as described in the letter of authorization and authorized labeling, without FDA's review and concurrence, when necessary to meet public health needs during an emergency. Any instructional and educational materials that are inconsistent with the authorized labeling are prohibited.

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- E. Pfizer Inc. may request changes to this authorization, including to the authorized Fact Sheets for Pfizer-BioNTech COVID-19 Vaccine, that do not alter the analysis of benefits and risks that underlies this authorization and FDA may determine that such changes may be permitted without amendment of this EUA. That determination must be made by joint decision of the Office of Vaccines Research and Review (OVRR)/Center for Biologics Evaluation and Research (CBER), the Preparedness and Response Team (PREP)/Office of the Center Director (OD)/CBER, and the Office of Counterterrorism and Emerging Threats (OCET)/Office of the Chief Scientist/Office of the Commissioner (OCS).
- F. Pfizer Inc. will report to Vaccine Adverse Event Reporting System (VAERS):
  - Vaccine administration errors whether or not associated with an adverse event;
  - Serious adverse events (irrespective of attribution to vaccination);
  - · Cases of Multisystem Inflammatory Syndrome in children and adults; and
  - Cases of COVID-19 that result in hospitalization or death, that are reported to Pfizer Inc.

These reports should be submitted to VAERS as soon as possible but no later than 15 calendar days from initial receipt of the information by Pfizer Inc.

- G. Pfizer Inc. must submit to Investigational New Drug application (IND) number 19736 periodic safety reports at monthly intervals, within 15 days after the last day of a month, beginning after the first full calendar month after authorization. Each periodic safety report is required to contain descriptive information which includes:
  - A narrative summary and analysis of adverse events submitted during the reporting interval, including interval and cumulative counts by age groups, special populations (e.g., pregnant women), and adverse events of special interest.
  - Newly identified safety concerns in the interval; and
  - Actions taken since the last report because of adverse experiences (for example, changes made to Healthcare Providers Administering Vaccine (Vaccination Providers) Fact Sheet, changes made to studies or studies initiated).
- H. No changes will be implemented to the description of the product, manufacturing process, facilities, or equipment without notification to and concurrence by the Agency.
- I. All manufacturing facilities will comply with Current Good Manufacturing Practice requirements.
- J. Pfizer Inc. will submit to the EUA file Certificates of Analysis (CoA) for each drug product lot at least 48 hours prior to vaccine distribution. The CoA will include the established specifications and specific results for each quality control test performed on the final drug product lot.
- K. Pfizer Inc. will submit to the EUA file quarterly manufacturing reports that include a listing of all Drug Substance and Drug Product lots produced after issuance of this

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authorization. This report must include lot number, manufacturing site, date of manufacture, and lot disposition, including those lots that were quarantined for investigation or those lots that were rejected. Information on the reasons for lot quarantine or rejection must be included in the report. The first report is due July 2021.

- L. Pfizer Inc. and authorized distributor(s) will maintain records regarding release of Pfizer-BioNTech COVID-19 Vaccine for distribution (i.e., lot numbers, quantity, release date).
- M. Pfizer Inc. and authorized distributor(s) will make available to FDA upon request any records maintained in connection with this EUA.
- N. Pfizer Inc. will conduct post-authorization observational study(ies) to evaluate the association between Pfizer-BioNTech COVID-19 Vaccine and a pre-specified list of adverse events of special interest, along with deaths and hospitalizations, and severe COVID-19. The study population should include individuals administered the authorized Pfizer-BioNTech COVID-19 Vaccine under this EUA in the general U.S. population (16 years of age and older), populations of interest such as healthcare workers, pregnant women, immunocompromised individuals, subpopulations with specific comorbidities. The study(ies) should be conducted in large scale databases with an active comparator. Pfizer Inc. will provide protocols and status update reports to the IND 19736 with agreed-upon study designs and milestone dates.

#### **Emergency Response Stakeholders**

- O. Emergency response stakeholders will identify vaccination sites to receive authorized Pfizer-BioNTech COVID-19 Vaccine and ensure its distribution and administration, consistent with the terms of this letter and CDC's COVID-19 Vaccination Program.
- P. Emergency response stakeholders will ensure that vaccination providers within their jurisdictions are aware of this letter of authorization, and the terms herein and any subsequent amendments that might be made to the letter of authorization, instruct them about the means through which they are to obtain and administer the vaccine under the EUA, and ensure that the authorized labeling [i.e., Fact Sheet for Healthcare Providers Administering Vaccine (Vaccination Providers) and Fact Sheet for Recipients and Caregivers] is made available to vaccination providers through appropriate means (e.g., e-mail, website).
- Q. Emergency response stakeholders receiving authorized Pfizer-BioNTech COVID-19 Vaccine will ensure that appropriate storage and cold chain is maintained.

#### Vaccination Providers

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- R. Vaccination providers will administer the vaccine in accordance with the authorization and will participate and comply with the terms and training required by CDC's COVID-19 Vaccination Program.
- S. Vaccination providers will provide the Fact Sheet for Recipients and Caregivers to each individual receiving vaccination and provide the necessary information for receiving their second dose.
- T. Vaccination providers administering Pfizer-BioNTech COVID-19 Vaccine must report the following information associated with the administration of Pfizer-BioNTech COVID-19 Vaccine of which they become aware to VAERS in accordance with the Fact Sheet for Healthcare Providers Administering Vaccine (Vaccination Providers):
  - Vaccine administration errors whether or not associated with an adverse event
  - Serious adverse events (irrespective of attribution to vaccination)
  - · Cases of Multisystem Inflammatory Syndrome in children and adults
  - Cases of COVID-19 that result in hospitalization or death

Complete and submit reports to VAERS online at https://vaers.hhs.gov/reportevent.html. The VAERS reports should include the words "Pfizer-BioNTech COVID-19 Vaccine EUA" in the description section of the report. More information is available at vaers.hhs.gov or by calling 1-800-822-7967. To the extent feasible, report to Pfizer Inc. by contacting 1-800-438-1985 or by providing a copy of the VAERS form to Pfizer Inc.; Fax: 1-866-635-8337.

- U. Vaccination providers will conduct any follow-up requested by the U.S government, including CDC, FDA, or other designee, regarding adverse events to the extent feasible given the emergency circumstances.
- V. Vaccination providers will monitor and comply with CDC and/or emergency response stakeholder vaccine management requirements (e.g., requirements concerning obtaining, tracking, and handling vaccine) and with requirements concerning reporting of vaccine administration data to CDC.
- W. Vaccination providers will ensure that any records associated with this EUA are maintained until notified by FDA. Such records will be made available to CDC, and FDA for inspection upon request.

#### Conditions Related to Printed Matter, Advertising, and Promotion

X. All descriptive printed matter, advertising, and promotional material, relating to the use of the Pfizer-BioNTech COVID-19 Vaccine shall be consistent with the authorized labeling, as well as the terms set forth in this EUA, and meet the requirements set forth in section 502(a) and (n) of the FD&C Act and FDA implementing regulations.

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- Y. All descriptive printed matter, advertising, and promotional material relating to the use of the Pfizer-BioNTech COVID-19 Vaccine clearly and conspicuously shall state that:
  - This product has not been approved or licensed by FDA, but has been authorized for emergency use by FDA, under an EUA to prevent Coronavirus Disease 2019 (COVID-19) for use in individuals 16 years of age and older; and
  - The emergency use of this product is only authorized for the duration of the declaration that circumstances exist justifying the authorization of emergency use of the medical product under Section 564(b)(1) of the FD&C Act unless the declaration is terminated or authorization revoked sooner.

#### IV. Duration of Authorization

This EUA will be effective until the declaration that circumstances exist justifying the authorization of the emergency use of drugs and biological products during the COVID-19 pandemic is terminated under Section 564(b)(2) of the Act or the EUA is revoked under Section 564(g) of the Act.

Sincerely,

--/S/--

RADM Denise M. Hinton Chief Scientist Food and Drug Administration

Enclosures

## **ATTACHMENT 13**

# Frequently Asked Questions about Filing Requirements, Residency, and Telecommuting for New York State Personal Income Tax

This page summarizes current New York state law and guidance relating to frequently asked questions due to the COVID-19 pandemic.

- Do I need to file a New York State tax return?
- How do I know if I am a resident of New York State for income tax purposes?
- What is my domicile?
- Can I be a resident of New York State if my domicile is elsewhere?
- If I'm not domiciled in New York and I'm not a resident, do I owe New York income tax?
- What's the difference between filing as a resident vs. nonresident?
- My primary office is inside New York State, but I am telecommuting from outside of the state due to the COVID-19 pandemic. Do I owe New York taxes on the income I earn while telecommuting?
- If I live in New York but work in another state, am I taxed twice?
- What are the rules for New York City residency?
- What are the rules for Yonkers residency?
- Are there different rules for active duty military personnel?

## Do I need to file a New York State personal income tax return?

Before you can decide if you need to file an income tax return with New York State, you first need to determine if you are a resident, nonresident, or part-year resident.

Generally, you must file a New York State <u>resident income tax return</u> if you are a New York State resident and meet any of the following conditions:

- You have to file a federal return.
- You did not have to file a federal return but your federal adjusted gross income plus New York additions was more than \$4,000 (\$3,100 if you are single and can be claimed as a dependent on another taxpayer's federal return).
- You want to claim a refund of any New York State, New York City, or Yonkers income taxes withheld from your pay.
- You want to claim any refundable or carryover credits.

You may still have to file a New York State return if you're a <u>part-year resident</u> of New York or a <u>nonresident</u> with income from New York State sources.

# How do I know if I am a resident of New York State for income tax purposes?

Generally, you are considered a <u>New York State resident</u> for income tax purposes if you are <u>domiciled</u> in the state. For most people this is straightforward: the primary residence where you live is both your state of domicile and the state in which you are a resident for tax purposes. However, you can still be considered a resident of New York State for income tax purposes even if you are not domiciled in the state. (See below, "Can I be a resident of New York State if my domicile is elsewhere?")

### What is my domicile?

The terms <u>domicile</u> and <u>residence</u> are often used synonymously, but for New York State income tax purposes, the two terms have distinctly different meanings.

In general, your domicile is your permanent and primary residence that you intend to return to and/or remain in after being away (for example, on vacation, business assignments, educational leave, or military assignment).

Residence means a *place of abode*. An individual may have several residences—e.g., houses, apartments, condos, and/or other places to live or physical dwellings in which they reside—and some may be in different states.

However, while you may have multiple residences, you can only have one domicile. An individual may live in a certain residence for a temporary period of time, which could be an extended period of time, but if it's not the place they ultimately attach themselves to and intend to return to, it's still not their domicile.

Furthermore, your New York domicile does not change until you can demonstrate with clear and convincing evidence that you have abandoned your New York domicile and established a new domicile outside New York State. This means shifting the focus of your life to the new location. It is not enough simply to file a certificate of domicile or register to vote in the new location. All aspects of a person's life are considered in determining whether a person's domicile has changed.

# Can I be a resident of New York State if my domicile is elsewhere?

You may be subject to tax as a resident even if your domicile is not New York.

You are a New York State resident if your domicile is New York State OR:

- you maintain a permanent place of abode in New York State for substantially all of the taxable year; and
- you spend 184 days or more in New York State during the taxable year. Any part of a day is a
  day for this purpose, and you do not need to be present at the permanent place of abode
  for the day to count as a day in New York.

In general, a permanent place of abode is a building or structure where a person can live that you permanently maintain and is suitable for year-round use. It does not matter whether you own it or not.

#### For more information see:

- Do I need to file an income tax return?
- Income tax definitions
- Tax Bulletin TB-IT-690, Permanent Place of Abode
- TSB-M-18(4)|, Summary of Personal Income Tax Changes Enacted in the 2018-2019 Budget Bill
- <u>TSB-M-09(15)</u>], Amendment to the Definition of Permanent Place of Abode in the Personal Income Tax Regulations Relating to Certain Undergraduate Students
- IT-201-I, Instructions for Form IT-201 Full-Year Resident Income Tax Return
- IT-203-I, Instructions for Form IT-203 Nonresident and Part-Year Resident Income Tax Return
- Nonresident Audit Guidelines

# If I'm not domiciled in New York and I'm not a resident, do I owe New York income tax?

If you do not meet the requirements to be a resident, you may still owe New York tax as a <u>nonresident</u> if you have income from New York sources.

If you were a resident for only a <u>portion</u> of the year, your income subject to tax will be split, with part taxed according to resident rules and the remainder subject to nonresident rules. To compute tax, you first calculate your tax as if you were a full year resident, then determine how much to allocate to New York by an income percentage based on your New York source income and your federal income.

# What's the difference between filing as resident vs. nonresident?

As a resident, you pay state tax (and city tax if a New York City or Yonkers resident) on all your income no matter where it is earned. As a nonresident, you only pay tax on New York source income, which includes earnings from work performed in New York State, and income from real property located in the state. If you are a nonresident, you are not liable for New York City personal income tax, but may be subject to Yonkers nonresident earning tax if your income is sourced to the city of Yonkers.

For a list of what does and does not constitute New York source income, plus other information, see:

- Tax Bulletin <u>TB-IT-615</u>, New York Source Income of Nonresident Individuals, Estates, and Trusts, and Part-Year Resident Individuals and Trusts
- Tax Bulletin TB-IT-620, New York Source Income-Sole Proprietorships and Partnerships

- IT-203-I, Instructions for Form IT-203 Nonresident and Part-Year Resident Income Tax Return
- TSB-M-18(1)I, Definition of New York Source Income of Nonresident Expanded
- <u>TSB-M-18(2)I</u>, Nonresident Partner's Treatment of Gain or Loss on Certain Sales or Transfers of a Partnership or Membership Interest
- TSB-M-15(7)C, (6)I, Impact of New York State Corporate Tax Reform on New York S Corporations and their Nonresident and Part-Year Resident Shareholders
- TSB-M-10(9)I, Income Received by a Nonresident Related to a Business, Trade, Profession, or Occupation Previously Carried on Within New York State
- TSB-M-09(5)], Amendment to the Definition of New York Source Income of a Nonresident Individual

# My primary office is inside New York State, but I am telecommuting from outside of the state due to the COVID-19 pandemic. Do I owe New York taxes on the income I earn while telecommuting?

If you are a nonresident whose primary office is in New York State, your days telecommuting during the pandemic are considered days worked in the state unless your employer has established a bona fide employer office at your telecommuting location.

There are a <u>number of factors</u> that determine whether your employer has established a bona fide employer office at your telecommuting location. In general, unless your employer specifically acted to establish a bona fide employer office at your telecommuting location, you will continue to owe New York State income tax on income earned while telecommuting.

# If I live in New York but work in another state, am I taxed twice?

A person who lives in one state but works in another may have tax liability in both states, but typically will receive a tax credit in their state of residence to eliminate double taxation of that income.

If you were a full-year or part-year resident of New York State and you had income sourced to and taxed by another state you may claim a <u>nonrefundable resident credit</u> against your New York State tax. This credit is allowable only for the portion of the tax that applies to income sourced to and taxed by the other taxing authority while you were a New York State resident.

For more information see, IT-112-R-I, Instructions for Form IT-112-R New York State Resident Credit.

## What are the rules for New York City residency?

The requirements to be a New York City resident are the same as those needed to be a New York State resident. You are a New York City resident if:

your domicile is New York City; or

you have a permanent place of abode there and you spend 184 days or more in the city.

All city residents' income, no matter where it is earned, is subject to New York City personal income tax. Nonresidents of New York City are not liable for New York City personal income tax.

The rules regarding New York City domicile are also the same as for New York State domicile. If your permanent and primary residence that you intend to return to and/or remain in after being away is located in one of the five boroughs of New York City, it is considered a New York City domicile.

Your New York City domicile does not change until you can demonstrate with clear and convincing evidence that you have abandoned your city domicile and established a new domicile outside New York City. Even if you live in a location outside of the city for a period of time, if it's not the place you attach yourself to and intend to return to, it's not your domicile. Your domicile will still be New York City and you will still be considered a New York City resident.

For more information see, <u>IT-201-I</u>, *Instructions for Form IT-201 Full-Year Resident Income Tax Return*.

# What are the rules for Yonkers residency?

For income taxes purposes, your Yonkers resident status depends on where you were domiciled and where you maintained a permanent place of abode during the taxable year. Similar to New York State and New York City requirements, if your domicile is Yonkers you are considered a Yonkers resident. If you maintain a permanent place of abode in Yonkers and spend 184 days or more in Yonkers, you are considered a Yonkers resident.

The rules regarding Yonkers domicile are also the same as for New York State domicile. You can only have one domicile. Unless you can demonstrate with clear and convincing evidence that you have abandoned your Yonkers domicile and established a new domicile outside Yonkers, your domicile remains Yonkers.

Yonkers residents are subject to a Yonkers resident income tax surcharge that is computed and reported on their New York State tax return.

Nonresidents of Yonkers may be subject to the Yonkers nonresident earnings tax if they:

- earn wages or carry on a trade or business there; or
- are a member of a partnership that carries on a trade or business there.

#### For more information see:

- IT-201-I, Instructions for Form IT-201 Full-Year Resident Income Tax Return
- IT-203-I, Instructions for Form IT-203 Nonresident and Part-Year Resident Income Tax Return

# Are there different rules for active duty military personnel?

3/28/2021

Frequently Asked Questions about Filing Requirements, Residency, and Telecommuting for New York State Personal Income Tax

If your domicile was not New York State when you entered the military, but you were assigned to duty in New York State, you do not become a New York State resident even if you have a permanent place of abode here. You are a nonresident and your military pay is not subject to New York State income tax.

#### For more information see:

- Information for military personnel & veterans
- Publication 361, New York State Income Tax Information for Military Personnel and Veterans
- TSM-M-19(3)I, Veterans Benefits and Transition Act of 2018
- TSB-M-10(1)I, Military Spouses Residency Relief Act

Updated: October 19, 2020

# **ATTACHMENT 14**



#### House Bill No. 6516

#### Public Act No. 21-3

AN ACT MITIGATING ADVERSE TAX CONSEQUENCES RESULTING FROM EMPLOYEES WORKING REMOTELY DURING COVID-19, AND CONCERNING THE REMOVAL OF LIENS ON THE PROPERTY OF PUBLIC ASSISTANCE BENEFICIARIES AND A THREE-TIERED GRANTS IN LIEU OF TAXES PROGRAM.

Be it enacted by the Senate and House of Representatives in General Assembly convened:

- Section 1. (Effective from passage) (a) As used in this section, "convenience of the employer rule" means a law or rule that is substantially similar to that set forth in section 12-711 of the general statutes, whether or not reciprocal, and "COVID-19" means the respiratory disease designated by the World Health Organization on February 11, 2020, as coronavirus 19, and any related mutation thereof recognized by said organization as a communicable respiratory disease.
- (b) Notwithstanding any provision of title 12 of the general statutes, for the taxable year commencing January 1, 2020:
- (1) Any resident who paid income tax to any other state that uses a convenience of the employer rule shall be allowed a credit against such resident's Connecticut income tax, for the tax paid to such other state on income earned by such resident while working remotely from this state for said taxable year, including while obligated by necessity to work remotely from this state;

#### House Bill No. 6516

- (2) Any resident who paid income tax to any other state that has enacted a law or rule requiring a nonresident employee to pay nonresident income tax to such other state on income earned while such nonresident employee was working remotely from this state due to COVID-19 if, immediately prior to March 11, 2020, such nonresident employee was performing such work within such other state, shall be allowed a credit against such resident's Connecticut income tax, for the tax paid to such other state on income earned by such resident while working remotely from this state for said taxable year; and
- (3) The Department of Revenue Services shall not consider, in determining whether an employer has nexus with this state for purposes of the imposition of any Connecticut tax, the activities of an employee who worked remotely from this state during said taxable year solely due to COVID-19.
- Sec. 2. Section 4a-13 of the general statutes is repealed and the following is substituted in lieu thereof (*Effective July 1, 2021*):

The Commissioner of Administrative Services may accept mortgage notes and mortgage deeds in payment of claims due for [welfare assistance or] (1) institutional care, and (2) to the extent required under federal law, medical assistance. The commissioner may accept such mortgage notes and mortgage deeds on such terms and conditions as the commissioner deems proper and reasonable, and such encumbrances may be foreclosed in an action brought in a court of competent jurisdiction by the commissioner on behalf of the state. Any such encumbrance shall be released by the commissioner upon payment of the amount by it secured.

- Sec. 3. Section 17b-79 of the general statutes is repealed and the following is substituted in lieu thereof (*Effective July 1, 2021*):
  - (a) As used in this section, "cash assistance" means payments made

# **ATTACHMENT 15**

No,	Original
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#### IN THE

# Supreme Court of the United States

STATE OF NEW HAMPSHIRE,

Plaintiff,

 $\upsilon$ .

COMMONWEALTH OF MASSACHUSETTS,

Defendant.

## MOTION FOR LEAVE TO FILE BILL OF COMPLAINT

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October 19, 2020

Counsel for Plaintiff State of New Hampshire Plaintiff, the State of New Hampshire, respectfully moves this Court for leave to file the attached Bill of Complaint. The grounds for this Motion are set forth in an accompanying brief.

### Respectfully submitted,

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October 19, 2020

Counsel for Plaintiff State of New Hampshire

No.	<del>,</del>	Original
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#### IN THE

# Supreme Court of the United States

STATE OF NEW HAMPSHIRE,

Plaintiff,

υ.

COMMONWEALTH OF MASSACHUSETTS,

Defendant.

#### BILL OF COMPLAINT

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October 19, 2020

Counsel for Plaintiff State of New Hampshire

### BILL OF COMPLAINT

Plaintiff, the State of New Hampshire brings this action against Defendant the Commonwealth of Massachusetts, and for its causes of action asserts as follows:

## NATURE OF THE ACTION

- 1. The Commonwealth of Massachusetts has launched a direct attack on a defining feature of the State of New Hampshire's sovereignty. For decades, New Hampshire has made the deliberate policy choice to reject a broad-based personal earned income tax or a general sales tax. Not only does New Hampshire sit as an island among the New England States, but this choice differentiates New Hampshire from nearly every other State in the union. Indeed, just one other State—Alaska—has such a tax structure.
- New Hampshire's sovereign policy choice 2. has had profound effects. It has resulted in, on income, higher per capita average, unemployment, and a competitive edge in attracting new businesses and residents. In other words, it has helped create a "New Hampshire Advantage" that is central to New Hampshire's identity. It is through this successfully Hampshire New advantage that distinguishes itself as a sovereign and competes in the economic businesses. and market for people, prosperity.
- 3. In the middle of a global pandemic, Massachusetts has taken deliberate aim at the New

Hampshire Advantage by purporting to impose Massachusetts income tax on New Hampshire residents for income earned while working within New Hampshire. Upending decades of consistent practice, Massachusetts now taxes income earned entirely outside its borders. Through its unprecedented action, Massachusetts has unilaterally imposed an income tax within New Hampshire that New Hampshire, in its sovereign discretion, has deliberately chosen not to impose.

- 4. New Hampshire brings this case to rectify Massachusetts' unconstitutional, extraterritorial conduct, which ignores deliberate and unique policy choices that are solely New Hampshire's to make.
- 5. On April 21, 2020, Massachusetts adopted a temporary emergency regulation declaring (for the first time) that nonresident income received for services performed *outside Massachusetts* would be subject to the State's income tax. This emergency regulation applied retroactively to March 10, 2020. Massachusetts extended this regulation on a temporary basis in July and, most recently, adopted it as a final rule, effective October 16, 2020 (the "Tax Rule").
- 6. This extraterritorial assertion of taxing power is unconstitutional. Massachusetts claims the authority to tax New Hampshire residents who earn their incomes from activities they undertake solely within New Hampshire. For example, the *entire* salary of a New Hampshire resident who commuted to work

full time in Boston in February but has not set foot in the Commonwealth for more than eight months continues to be subject to the Massachusetts state income tax as if he were still working every day in Boston.

- 7. This Court has long recognized that States have limited power to tax nonresidents. Both the Commerce Clause and the Due Process Clause prohibit the States from "tax[ing] value earned outside [their] borders." Allied-Signal, Inc. v. Director, Div. of Taxation, 504 U.S. 768, 777 (1992). A State's reach beyond its borders to take money from nonresidents "under the pretext of taxation when there is no jurisdiction or power to tax is simple confiscation." Miller Bros. Co. v. State of Md., 347 U.S. 340, 342 (1954). By taxing income earned entirely outside of its borders, Massachusetts subjects Granite Staters to simple but unconstitutional confiscation.
- 8. This Court's exercise of its original jurisdiction is urgently needed. New Hampshire has fundamental sovereign interests at stake. Indeed, Massachusetts' extraterritorial Tax Rule imposes an income tax on citizens of a state who are not, and historically have not been, subject to one, and who have selected New Hampshire (at least in part) for that reason. New Hampshire has long relied on its sovereign policy choices to create the New Hampshire Advantage, which, in turn, attracts both businesses and workers to the State.
- 9. The Tax Rule is a direct attack on this New Hampshire Advantage. It disrespects New

Hampshire's sovereignty. It undermines an incentive for businesses to locate capital and jobs in New Hampshire, a motivation for families to relocate to New Hampshire's communities, and the State's ability to pay for public services by reducing economic growth. It weakens efforts to recruit individuals to work for the state government. It endangers public health in New Hampshire by penalizing workers for following public health guidance and working from home rather than from their offices. And it undermines New Hampshire's sovereign duty to protect the economic and commercial interests of its citizens.

While the Tax Rule has a set expiration 10. date, there is significant reason to believe the underlying shift in policy will survive the current pandemic. To date, Massachusetts has twice extended the Tax Rule, first as a temporary measure and now as a final rule. Further, the pandemic has drastically altered how work is conducted, with countless Americans now performing job functions at home that they had previously performed only at their places of employment. This Court's ongoing decision to conduct oral arguments by telephone illustrates this point. And some companies are already announcing that remote work will remain a permanent option following the pandemic. See, e.g., Microsoft makes remote work 2020), (Oct. 9, BBC permanent, likely that it is https://bbc.in/2H1fPpX. Thus, Massachusetts will continue to impose the Tax Rule or some similar policy long after the pandemic abates.

11. New Hampshire has no choice but to bring this action in this Court. Under federal law, this Court has "exclusive jurisdiction" over "all controversies between two or more States." 28 U.S.C. §1251(a). This Court therefore is the *only* forum that can hear New Hampshire's claims. The Court should exercise its jurisdiction to hear this dispute and grant New Hampshire declaratory and injunctive relief against Massachusetts' unconstitutional attempt to tax New Hampshire residents.

#### JURISDICTION

12. This Court has original and exclusive jurisdiction because the dispute is both a "Case[]... in which a State shall be Party" and a "controvers[y] between two or more States." U.S. Const., art. III, §2, cl. 2; 28 U.S.C. §1251(a).

#### **PARTIES**

- 13. Plaintiff is the State of New Hampshire. The State of New Hampshire is a sovereign State, whose citizens enjoy all the rights, privileges, and immunities guaranteed by the U.S. Constitution and federal law.
- 14. Defendant is the Commonwealth of Massachusetts, which is also a sovereign State.

## FACTUAL ALLEGATIONS

## A. The Limited Power of States to Tax Nonresidents

- 15. The power to tax may be "essential to the very existence of government, but the legitimacy of that power requires drawing a line between taxation and mere unjustified confiscation." N. Carolina Dep't of Revenue v. The Kimberley Rice Kaestner 1992 Family Tr., 139 S. Ct. 2213, 2219-20 (2019) (citations omitted).
- provide for the preservation of peace, good order, and health, and the execution of such measures as conduce to the general good of [their] citizens." *United States v. City of New Orleans*, 98 U.S. 381, 393 (1878). This reflects a bargain between a State and its citizens: the citizens agree to pay a percentage of their worth in exchange for the State's commitment to provide protection and services.
- 17. A State's power to tax its residents is farreaching. A State like Massachusetts "may, and does, exert its taxing power over [residents'] income from all sources, whether within or without the State." Shaffer v. Carter, 252 U.S. 37, 57 (1920) abrogated on other grounds by Comptroller of Treasury of Maryland v. Wynne, 135 S. Ct. 1787 (2015).
- 18. But a State's power to tax nonresidents is far more circumscribed. Under both the Commerce Clause and the Due Process Clause, a State has no authority to "tax value earned outside its borders."

Allied-Signal, Inc. v. Director, Div. of Taxation, 504 U.S. 768, 777 (1992).

- 19. A State's power to tax an individual's activities is justified only by the "protection, opportunities and benefits' the State confers on those activities." *Id.* (quoting *Wisconsin v. J.C. Penney Co.*, 311 U.S. 435, 444 (1940)).
- 20. Thus, to pass constitutional muster, a state tax on nonresidents must be, among other things, "fairly apportioned" and "fairly related to the services provided by the State." Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 279 (1977); see also Moorman Mfg. Co. v. Bair, 437 U.S. 267, 273 (1978) (requiring "income attributed to the State for tax purposes [to] be rationally related to values connected with the taxing State").
- 21. The tax policies of the various States reflect these constitutional constraints. Nearly every State that imposes a broad-based personal income tax on earned income requires nonresidents to pay tax only on income they earned "within the State." Jerome R. Hellerstein & Walter Hellerstein, State Taxation, ¶20.05[4](a) (3d ed. 2020).
- methods various ofhave 22. States determining when income is earned "within the State," but nearly all methods prevent taxation of nonresident income earned beyond their borders. Id. States' rules for determining the portion of a compensation that nonresident employee's attributable to the State "generally reflect the relative amount of time that the nonresident employee spends

working in the state, or the amounts attributable to the specific services provided within the state." *Id.*; see, e.g., W. Va. Code St. R. §110-21-32.2.1.2.e (taxing nonresidents based on "the ratio of days worked within West Virginia to the total days worked over the period during which the compensation was earned").

23. Income earned by a nonresident who works *outside* of the State is not subject to taxation by any State other than the residence State. See Hellerstein, supra, at ¶ 20.05[4].

# B. Massachusetts' Prior Tax Policies

- 24. Massachusetts long respected these constitutional restraints. Under Massachusetts law, nonresidents with an annual "Massachusetts gross income" of more than \$8,000 are required to pay state taxes on their income. See M.G.L. c. 62C, §6.
- 25. The "Massachusetts gross income" is determined "solely with respect to items of gross income from sources within the commonwealth of such person." M.G.L. c. 62 §5A(a).
- 26. Massachusetts currently taxes earned income at 5%. See Income Tax Rate Drops to 5% on January 1, 2020, Mass. Dep't of Rev. (Dec. 23, 2019), https://bit.ly/3cRwQ11.
- 27. Until recently, Massachusetts regulations made clear that nonresidents owed taxes only for the work they performed while physically within Massachusetts. Under the prior regime, "[w]hen a non-resident employee is able to establish

the exact amount of pay received for services performed in Massachusetts, that amount is the amount of Massachusetts source income." 830 CMR 62.5A.1(5)(a) (2008). When a precise determination was not possible, Massachusetts regulations required allocation of income between taxable Massachusetts sources and non-taxable out-of-state sources by using a fraction, "the numerator of which is the number of days spent working in Massachusetts and the denominator of which is the total working days." *Id.* 

- 28. "Compensation rendered by a non-resident wholly outside Massachusetts, even though payment may be made from an office or place of business in Massachusetts of the employer, [was] not subject to the individual income tax." Mass. Dep't of Revenue, Letter Ruling 84-57, Withholding for Non-Resident Employees (Aug 2., 1984), https://bit.ly/3j6bnDe.
- 29. This allocation rule respected New Hampshire's rights, as a coequal sovereign in our federal system, to enact its own tax policies upon which its residents may rely. It also protected New Hampshire residents from paying unconstitutional taxes on income earned outside of Massachusetts. In those ways, the policy harmonized Massachusetts' sovereign interests with the interests of nonresidents and its neighboring States.

## C. Massachusetts' Taxation of New Hampshire Residents Working in New Hampshire

- 30. That harmony recently came to an abrupt end. In March 2020, Massachusetts, like many States, declared a state of emergency in response to the COVID-19 pandemic. See Governor's Declaration of Emergency, Massachusetts Office of the Governor (Mar. 10, 2020), https://bit.ly/2GuugSM.
- 31. Pursuant to that declaration, Governor Baker ordered all businesses that did not provide "COVID-19 Essential Services" to cease in-person operations by March 24, 2020. See Governor Charlie Baker Orders All Non-Essential Business to Cease in Person Operation, Directs the Department of Public Health to Issue Stay at Home Advisory for Two Weeks, Massachusetts Office of the Governor (Mar. 23, 2020), https://bit.ly/30gWuY4.
- 32. Massachusetts businesses and their employees followed that order, and many employees transitioned to working from home indefinitely. In particular, tens of thousands of Granite Staters who formerly commuted to Massachusetts began working entirely from home in New Hampshire.
- 33. Instead of relying on Massachusetts' services during the workweek—police and fire protection, ambulance services, roads, and more—these individuals now consumed those same services within New Hampshire. Thus, if an emergency arose, these workers called New Hampshire's police and ambulance services, not Massachusetts'.

- 34. Because New Hampshire has made a fundamental policy decision, in its sole sovereign discretion, not to impose an income tax, it pays for these services through various other revenue sources.
- 35. As of 2017, more than 103,000 New Hampshire residents worked for Massachusetts-based companies, accounting for more than 15 percent of New Hampshire workers. U.S. Bureau of the Census, Longitudinal Employer Household Dynamics, https://bit.ly/2HiSLCv.
- 36. Those workers generated billions of dollars of income and paid hundreds of millions of dollars in Massachusetts state taxes.
- 37. Under Massachusetts' longstanding allocation policy, Massachusetts taxed the portion of income that New Hampshire residents earned while physically working in Massachusetts. New Hampshire residents working for Massachusetts enterprises were not taxed on income earned while physically working in New Hampshire.
- 38. On April 21, 2020, Massachusetts published an emergency regulation taxing—for the first time—income earned in New Hampshire.
- Having already required or encouraged 39. from home. work employees to most Commonwealth declared: "[F]or the duration of the Massachusetts COVID-19 state of emergency, all personal for received compensation performed by a nonresident who, immediately prior to the Massachusetts COVID-19 state of emergency, was

an employee engaged in performing such services in Massachusetts, and who, during such emergency, is performing such services from a location outside Massachusetts due solely to the Massachusetts COVID-19 state of emergency, will continue to be treated as Massachusetts source income subject to personal income tax under M.G.L. c. 62 and personal income tax withholding." Mass. Dep't of Revenue, Technical Information Release 20-5, Massachusetts Tax Implications of an Employee Working Remotely due to the COVID-19 Pandemic (Apr. 21, 2020), https://bit.ly/3n2BrCp. Massachusetts imposed the emergency regulation retroactive to March 10, 2020. Id. By its terms, the regulation would expire on the date on which the Governor gave notice that the state of emergency was no longer in effect. Id.

- Under Massachusetts law, emergency 40. regulations are valid for only three months. See M.G.L. c. 30A, §2. Accordingly, on July 21, 2020, emergency second adopted a Massachusetts regulation imposing similar requirements. See Mass. Dep't of Revenue, Technical Information Release 20-10, Revised Guidance on the Massachusetts Tax Implications of an Employee Working Remotely due to 21,2020), Pandemic(July COVID-19 https://bit.ly/316Q05Q.
- 41. That same day, Massachusetts also proposed a formal administrative rule ("Proposed Rule"), which would impose the same requirements over a longer period (until the earlier of December 31, 2020 or 90 days after the Governor ended the state of the emergency). See 830 C.M.R. 62.5A3:

Massachusetts Source Income of Non-Residents Telecommuting due to the COVID-19 Pandemic, Mass. Dep't of Revenue (July 21, 2020), https://bit.ly/2SXirY4.

- The Proposed Rule declared: "[A]ll 42. compensation received for services performed by a prior to immediately non-resident who. Massachusetts COVID-19 state of emergency was an employee engaged in performing such services in Massachusetts, and who is performing services from a location outside Massachusetts due to a Pandemic-Related Circumstance will continue to be treated as Massachusetts source income subject to personal income tax under M.G.L. c. 62, § 5A and personal income tax withholding pursuant to M.G.L. c. 62B, § 2." Id. at 830 CMR 62.5A.3(3).
- 43. The Proposed Rule defined "Pandemic-Related Circumstances" broadly to include, *inter alia*, "any... work arrangement in which an employee who performed services at a location in Massachusetts prior to the Massachusetts COVID-19 state of emergency performs such services for the employer from a location outside Massachusetts during a period in which [the rule] is in effect." *Id.* at 830 CMR 62.5A.3(2).
- 44. The Proposed Rule drew strong opposition during the comment period. More than 100 individuals, including nonresidents and legislators, testified at a hearing to review the Proposed Rule. Many criticized Massachusetts for "attempting to balance the budget on the backs of hard-working

Granite Staters." Greg Moore, Testimony for Massachusetts Dep't of Revenue, Rulings & Regs. Bureau (Aug. 27, 2020), https://bit.ly/3j9EqWg.

- 45. The New Hampshire Attorney General's office submitted comments opposing the Proposed Rule, pointing out that the Proposed Rule unconstitutionally imposed a tax on New Hampshire residents working entirely within New Hampshire and "infringe[d] upon the State of New Hampshire's fundamental interests as a sovereign." See N.H. Atty. Gen. Gordon MacDonald, Comments on Proposed Regulation 830 CMR 62.5A.3, 3 (Aug. 21, 2020).
- The New Hampshire Department of 46. Business and Economic Affairs submitted similar comments criticizing the Proposed Rule. See New Hampshire Department of Business and Economic Relative Regulation Proposed Affairs. Re:Source Income of Non-Residents MassachusettsTelecommuting due to the COVID-19 Pandemic, 2 (Aug. 21, 2020) (noting that the proposed rule "does not reflect the realities of how work is being accomplished" during these difficult times).
- 47. Despite these objections, on October 16, 2020, Massachusetts published and approved the final rule ("Tax Rule"), largely as proposed. See 830 C.M.R. 62.5A3: Massachusetts Source Income of Non-Residents Telecommuting due to the COVID-19 Pandemic, Mass. Dep't of Revenue, (Oct. 16, 2020), https://bit.ly/31fgB9r. The Tax Rule took effect immediately.

- D. New Hampshire's Strong Interest in Challenging the Tax Rule.
- 48. New Hampshire has a strong interest in eliminating the Tax Rule, for multiple reasons.
- 49. First, the Tax Rule infringes on New Hampshire's sovereign right to control its own tax and economic policies and undermines the strategy New Hampshire has deliberately employed to provide current and prospective businesses and residents with the New Hampshire Advantage.
- 50. New Hampshire has never imposed an income tax on its residents. See N.H. Dep't of Revenue, Taxpayer Assistance—Overview of New Hampshire Taxes, https://bit.ly/2ET6i2T.
- 51. This longstanding policy choice is a fundamental part of the New Hampshire Advantage central to New Hampshire's sovereign identity, which distinguishes New Hampshire regionally and nationally.
- 52. By unlawfully levying an income tax on a sizable percentage of New Hampshire residents—on income earned in New Hampshire—Massachusetts has overridden New Hampshire's sovereign discretion over its tax policy to unilaterally impose the precise tax on New Hampshire residents that New Hampshire

<sup>&</sup>lt;sup>1</sup> New Hampshire does impose a tax on interest and dividend income, see N.H. Rev. Stat. Ann. ch. 77 (2016), but does not impose an income tax on residents or nonresidents' individual earned income.

itself has consistently rejected. The Tax Rule directly contradicts New Hampshire's tax policies and effectively negates the express financial incentive (tax savings) that fuels New Hampshire's successful competition for capital and labor resources.

- 53. A State's decision about whether and how it collects revenue is "an action undertaken in its sovereign capacity." Wyoming v. Oklahoma, 502 U.S. 437, 451 (1992). In that sovereign capacity, New Hampshire has set its own revenue collection policies for the benefit of its citizens. Moreover, New Hampshire has a sovereign duty to protect the "economic and commercial interests" of its citizens. Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez, 458 U.S. 592, 609 (1982). This, too, it accomplishes through its sovereign policy choices.
- 54. The New Hampshire Advantage is not merely an abstract concept. New Hampshire's sovereign policy choices have helped boost per capita income, decrease unemployment, and create a competitive advantage that motivates businesses and individuals to choose New Hampshire as their homes.
- 55. New Hampshire has the seventh-highest median household income of any State at \$74,057 per household. U.S. Bureau of the Census, *Median Household Income by State*, https://bit.ly/34XJd8t. This median household income is significantly higher than Maine, Rhode Island, Vermont, and the national average, and is comparable to Connecticut and Massachusetts, which also rank in the top ten. *Id*.

- New Hampshire's Importantly, 56. competitive and successful tax policies have not adversely impacted its ability to provide important public services to its citizens. For example, New Hampshire's public education systems have been ranked the sixth highest quality in the nation by Education Week, see Education Week, Quality Counts 2020, State Grades on Chance for Success: 2020 Map and Rankings, (Jan. 21, 2020), https://bit.ly/3lNyiVm, and New Hampshire ranks in the top ten highest spending per pupil among all states, see U.S. Bureau of the Census, 2018 Public Elementary-Secondary Education Finance Data, Table 11 (Apr. 14, 2020), https://bit.ly/2SZsifV.
- 57. Similarly, in both 2018 and 2019, New Hampshire had the second-lowest average unemployment rate in New England and, respectively, the second-lowest and third-lowest unemployment rates nationally. See U.S. Bureau of Labor Statistics, Regional and State Unemployment 2019 Annual Averages, Table 1 (Mar. 4, 2020), https://bit.ly/3lJa1jy. In both years, New Hampshire's average employment rate was significantly lower than the national average. See id.
- 58. New Hampshire's sovereign policy choices, and the advantageous economic landscape they create, are essential to New Hampshire's economic vitality. Numerous top companies from diverse business sectors call New Hampshire home. See N.H. Division of Economic Development, N.H. Dep't of Business and Economic Affairs, Top Companies, https://bit.ly/34QTwes. New Hampshire's

tax policies are also central to its efforts to motivate businesses to relocate to or expand within the State. See N.H. Division of Economic Development, N.H. Dep't of Business and Economic Affairs, Why New Hampshire, https://bit.ly/31FTRHy.

- The tax policies at the core of the New 59. Hampshire Advantage have likewise succeeded in encouraging individuals and families to move to the State. Tens of thousands of people move to New Hampshire each year. Lori Wright, Univ. of New Hampshire, New Hampshire Agricultural Experiment Station, Migration is Biggest Driver of Population Hampshire (Nov. 19. Change in New https://bit.lv/33KHK63. In 2018, more than 20,000 people moved to New Hampshire from Massachusetts alone. U.S. Bureau of the Census, State to State (July 20, 2020), Table 1 Migration Flows, https://bit.ly/3dwuzZL.
- 60. A significant number of those new residents continue to work for Massachusetts-based employers, and many explicitly cite New Hampshire's tax laws as a reason why they moved. See Kenneth Johnson, Why People Move to and Stay in New Hampshire, Univ. of New Hampshire, Carsey School of Public Policy (Summer 2020), https://bit.ly/33pF3GB.
- 61. Indeed, tax experts agree that New Hampshire's tax policies have been key to "attracting new businesses and . . . generating economic and employment growth." Jared Walczak, 2020 State Business Tax Climate Index at 8, Tax Foundation (Oct.

- 21, 2019), https://bit.ly/3dkZszV; see also Joe Horvath, Why New Hampshire Attracts More Wealth and Commerce Than Maine, Maine Policy Institute (June 22, 2016), https://bit.ly/33R2oBr ("Maine and New Hampshire are similar states," yet "New Hampshire . . . is outperforming Maine" because of "better economic policy").
- 62. By reaching across its borders into the wallets of New Hampshire residents, Massachusetts takes direct aim at New Hampshire's policy choices as a sovereign, and the New Hampshire Advantage that has resulted from those choices. Through the Tax Rule, Massachusetts effectively imposes its income tax in a State in which no comparable tax exists.
- 63. Massachusetts' actions undermine New Hampshire's efforts to maintain attractive economic conditions that motivate new businesses and workers to relocate to the State and existing businesses to expand within the State.
- 64. The Tax Rule also exacerbates the burden on New Hampshire's public services. The COVID-19 pandemic has increased demand for New Hampshire's government services generally, and work-from-home policies mean that tens of thousands of individuals are now exclusively relying on New Hampshire's public services—including police and medical services, taxpayer-supported broadband internet, utilities, roads, and more—rather than Massachusetts'. Yet the Tax Rule ensures that those individuals continue to support public services in Massachusetts that they no longer use.

- Massachusetts' actions harm the fabric 65. of New Hampshire's communities. In recent years, young people and their families have flocked to New Hampshire to take advantage of the State's favorable policies and high quality of life. This migration is "important to New Hampshire's demographic future." These new residents supra. tremendous energy and a wealth of new ideas to the State and further the State's longstanding culture of innovation in the economic and education sectors. The Tax Rule's attack on New Hampshire's migration incentives puts all these gains at risk.
- 66. In short, Massachusetts has taken aim at a defining feature of New Hampshire's sovereign identity through unconstitutional means. For this reason alone, New Hampshire has an existential interest, as a sovereign, in eliminating the Tax Rule.
- 67. Second, and relatedly, the Tax Rule harms New Hampshire's ability to recruit individuals to work for its state government.
- 68. More than 17,000 people work for the State of New Hampshire. Every day, New Hampshire state employees ensure public safety through police, fire, and rescue services, maintain public transportation, operate state courts, run New Hampshire's university system, and much more.
- 69. Many of the employees who New Hampshire recruits have spouses or other family members who work for Massachusetts employers (and may seek to work from home at least part time if they move to New Hampshire). If these families will be

forced to pay Massachusetts income taxes regardless where their work is performed, many will choose to live in Massachusetts.

- 70. New Hampshire has an interest, as a sovereign, in continuing to recruit and retain these individuals and their families.
- 71. Finally, the Tax Rule endangers public health in New Hampshire.
- 72. In March 2020, through his executive order, Governor Baker sent millions of workers home. As a result, tens of thousands of New Hampshire residents who had been traveling to Massachusetts to work were required to perform their duties from New Hampshire. And even now, when governments have rolled back many pandemic-related restrictions, working from home remains best practice for thousands of New Hampshire residents. For these residents, this shift in location is not merely a matter of preference or convenience, but rather required or encouraged by the government or their employers to protect the public health.
- 73. If these residents had *chosen* to work at home prior to the pandemic, any income they earned while working in New Hampshire would not be taxed as Massachusetts income.
- 74. Under the Tax Rule, however, income earned for work performed entirely within New Hampshire is taxed as *Massachusetts* source income.

- And while the Tax Rule purportedly applies solely to remote work resulting from "Pandemic-Related Circumstances," that term is defined so broadly that seemingly any person who transitions to working from home for any reason while the Tax Rule is in effect remains subject to Massachusetts income tax for work performed in New Hampshire. See Tax Rule, 830 CMR 62.5A.3(2) (defining "Pandemic-Related Circumstances" include "any other work arrangement in which an employee who performed services at a location in Massachusetts prior to the Massachusetts COVID-19 state of emergency performs such services for the employer from a location outside Massachusetts during a period in which 830 CMR 62.5A.3 is in effect").
- 76. In other words, the Tax Rule both penalizes individuals who are working from home at the direct request of the Massachusetts Governor and, more generally, disincentivizes *all* individuals from pursuing alternative work arrangements at a time when health officials continue to stress the importance of social distancing and other restrictions on in-person interactions.
- 77. Massachusetts has suggested that the Tax Rule is merely designed to maintain the status quo until the pandemic abates. This suggestion is belied by the definition of "Pandemic-Related Circumstances" in the Tax Rule, which inevitably sweeps up workers who are remote for reasons entirely unrelated to the pandemic. Thus, while Massachusetts paints the Tax Rule as a stopgap

measure designed to bridge a finite period of uncertainty, it in fact reflects an aggressive attempt to impose Massachusetts income tax within the borders of a coequal sovereign. The pandemic in no way alters this fact.

- 78. Yet, the pandemic continues to take its toll on Granite Staters. More than 9,000 New Hampshire residents have contracted the virus and more than 450 have died from it. See N.H. Dep't of Health & Human Servs., COVID-19, https://bit.ly/36s2jG4.
- 79. New Hampshire has a direct interest in protecting its citizens from the continued spread of the virus by incentivizing residents to work from home. Jacobson v. Massachusetts, 197 U.S. 11, 30 (1905) (a core "function" of the State is to "guard the public health" of its citizens); see also North Dakota v. Minnesota, 263 U.S. 365, 373 (1923) ("This Court has entertained [claims] by one state to enjoin . . . another" when the latter state's actions are "dangerous to the health of the inhabitants of the former.").
- 80. The Tax Rule undermines that interest by penalizing New Hampshire residents for following public health requirements and recommendations and incentivizing New Hampshire residents to travel across state borders.
- 81. New Hampshire has a strong interest in challenging the Tax Rule for this reason as well.
- 82. These serious harms to New Hampshire demonstrate the need for this Court's original

jurisdiction. This action "precisely 'implicates serious and important concerns of federalism fully in accord with the purposes and reach of [this Court's] original jurisdiction." Wyoming v. Oklahoma, 502 U.S. at 451 (quoting Maryland v. Louisiana, 451 U.S. 725, 744 (1981)) (exercising original jurisdiction over challenge to Oklahoma law under the Commerce Clause).

83. Indeed, this Court has not hesitated to entertain original actions over challenges by States to another State's taxes. See, e.g., Connecticut v. New Hampshire, 1992 WL 12620398 (U.S. 1992) (exercising original jurisdiction over a suit brought by Massachusetts and other states to challenge a New Hampshire tax); Maryland v. Louisiana, 451 U.S. at 756 (exercising original jurisdiction over a State challenge to a Louisiana tax). This case is equally important.<sup>2</sup>

<sup>&</sup>lt;sup>2</sup> Although the Tax Rule expires on December 31, 2020, that will not moot this case. The legitimacy of the 2020 tax would still be at issue. Moreover, Massachusetts has already extended the rule twice over the vocal opposition of New Hampshire officials and residents, and it will surely do so again. See Kingdomware Techs., Inc. v. United States, 136 S. Ct. 1969, 1976 (2016) (case not moot when issue is "capable of repetition, yet evading review"). Further, the mere existence of this aggressive incursion into New Hampshire's sovereign jurisdiction, if allowed to stand, will cast a shadow over the New Hampshire Advantage in the future.

#### CAUSES OF ACTION

### COUNT I: THE COMMERCE CLAUSE

- 84. Plaintiff incorporates all its prior allegations.
- 85. The Commerce Clause gives Congress the power to "regulate Commerce . . . among the several States." U.S. Const., Art. I, § 8, cl. 3.
- 86. But the clause also has been read as "contain[ing] a further, negative command, known as the dormant Commerce Clause, prohibiting certain state taxation even when Congress has failed to legislate on the subject." Oklahoma Tax Comm'n v. Jefferson Lines, Inc., 514 U.S. 175, 179 (1995).
- 87. This construction serves the Commerce Clause's purpose of "preventing a State from retreating into economic isolation or jeopardizing the welfare of the Nation as a whole, as it would do if it were free to place burdens on the flow of commerce across its borders that commerce wholly within those borders would not bear." *Id.* at 179-80.
- 88. A State's taxation of nonresidents will survive scrutiny under the Commerce Clause only if it meets four requirements. The State's tax must be (1) "applied to an activity with a substantial nexus with the taxing State"; (2) "fairly apportioned"; (3) non-discriminatory—i.e., it must not "discriminate against interstate commerce"; and (4) "fairly related to the

services provided by the State." Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 279 (1977).

- 89. If any of these prongs is not satisfied, the state tax will be found unlawful under the Commerce Clause. See, e.g., Connecticut v. New Hampshire, 1992 WL 12620398, at \*21-38 (Special Master finding that New Hampshire tax violated the Commerce Clause).
  - 90. The Tax Rule fails all four prongs.
- It fails the first prong because when a 91. New Hampshire resident is performing work entirely within New Hampshire, Massachusetts lacks the requisite minimum connection with either the worker or her activity. Allied-Signal, Inc., 504 U.S. at 777-78. "Substantial nexus" requires that "there must be a connection to the activity itself, rather than a connection only to the actor the State seeks to tax." Id. at 778 (emphasis added). The Tax Rule, in contrast, imposes a tax based solely on the location of the employer regardless of the work being done and where. Indeed, that is its very point: to recapture income on activity that used to be performed in Massachusetts. Because the Tax Rule purports to tax nonresidents on income earned from activity lacking any connection with Massachusetts. no "substantial nexus" exists.
- 92. The Tax Rule also fails the second prong of Complete Auto's test, which requires that a tax must be "fairly apportioned." This "ensure[s] that each State taxes only its fair share of an interstate transaction." Goldberg v. Sweet, 488 U.S. 252, 260-61 (1989), abrogated on other grounds by Wynne, 135 S. Ct. at

1798. This prong is not satisfied "whenever one State's act of overreaching combines with the possibility that another State will claim its fair share of the value taxed: the portion of value by which one State exceeded its fair share would be taxed again by a State properly laying claim to it." Oklahoma Tax Comm'n, 514 U.S. at 184. The test, in other words, rejects the possibility of double taxation.

- 93. Through the Tax Rule, Massachusetts imposes a tax on activity that is occurring in New Hampshire. New Hampshire has the authority and prerogative to tax that income. That New Hampshire has decided not to exercise this authority over its own citizens is not a license for Massachusetts to do so; the mere possibility of double taxation is forbidden under the Commerce Clause. See, e.g., Evco v. Jones, 409 U.S. 91, 94 (1972) (state tax on the proceeds of out-of-state sales violated the Commerce Clause where it created a "risk of a double tax burden").
- 94. Simply put, "there is no practical or theoretical justification" allowing Massachusetts to "export tax burdens and import tax revenues." *Trinova Corp. v. Michigan Dep't of Treasury*, 498 U.S. 358, 374 (1991). Indeed, "[t]he Commerce Clause prohibits this competitive mischief." *Id*.
- 95. For similar reasons, the Tax Rule fails Complete Auto's third prong, which prohibits discrimination against interstate commerce. In Wynne, this Court struck down a comparable Maryland tax scheme that "had the potential to result in discriminatory double taxation of income earned

out of state and created a powerful incentive to engage in intrastate rather than interstate economic activity." 135 S. Ct. at 1795. The Court supported its conclusion with reference to similar invalidations in J. D. Adams Mfg. Co. v. Storen, 304 U. S. 307 (1938), Gwin, White & Prince, Inc. v. Henneford, 305 U. S. 434 (1939), Central Greyhound Lines, Inc. v. Mealey, 334 U. S. 653 (1948), noting that "[i]n all three of these cases, the Court struck down a state tax scheme that might have resulted in the double taxation of income earned out of the State and that discriminated in favor of intrastate over interstate economic activity." Wynne, 135 S. Ct. at 1795.

- In Wynne, this Court applied the 96. Commerce Clause's "internal consistency" test to strike down the burdensome tax scheme. The Court stated that "Itlhis test, which helps courts identify tax discriminate against interstate that commerce, 'looks to the structure of the tax at issue to see whether its identical application by every State in the Union would place interstate commerce at a compared with commerce disadvantage as intrastate." Id. at 1802 (quoting Oklahoma Tax Comm'n, 514 U.S. at 179).
- 97. The complex Massachusetts tax scheme under the Tax Rule fails the internal consistency test. If every state imposed a regime like the Tax Rule, a taxpayer who confined her activity to one State would pay a single tax on her income to the State where she was a resident and in which she earned the income. By contrast, the taxpayer who ventured across state lines to earn her income would pay a double tax on

such income, one to her State of residence and another to the State in which she earned the income. As a result, "interstate commerce would be taxed at a higher rate than intrastate commerce." *Id.* at 1791. And if every State passed a rule similar to the Tax Rule, the free movement of workers, goods, and services across state borders would suffer, as individuals would be less inclined to move between States or accept flexible working assignments. The Commerce Clause prevents precisely this type of "economic Balkanization." *Id.* at 1794.

- 98. Finally, the Tax Rule fails *Complete Auto*'s fourth prong, which requires the state tax to be "fairly related to the services provided by the State." 430 U.S. at 279.
- 99. This prong mandates that "the measure of the tax be reasonably related to the extent of the contact, since it is the activities or presence of the taxpayer in the State that may properly be made to bear a just share of state tax burden." Commonwealth Edison Co. v. Montana, 453 U.S. 609, 626 (1981) (citation omitted).
- 100. Under the Tax Rule, New Hampshire residents are taxed as though they are travelling to and working in Massachusetts—even if they never set foot in the State.
- 101. The Tax Rule thus is not in "proper proportion" to New Hampshire residents' "activities within [Massachusetts] and, therefore, to their consequent enjoyment of the opportunities and

protections which the State has afforded in connection with those activities." *Id.* (citation omitted).

- 102. Because Massachusetts' tax is not "assessed in proportion to a taxpayer's activities or presence in a State," the Tax Rule unconstitutionally requires New Hampshire residents to "shoulder[] [more than their] fair share." *Id.* at 627.
- 103. The Tax Rule accordingly violates the Commerce Clause.

### COUNT II: THE DUE PROCESS CLAUSE

- 104. Plaintiff incorporates all its prior allegations.
- 105. Due process "centrally concerns the fundamental fairness of governmental activity." *N.C. Dep't of Rev.*, 139 S. Ct. at 2219.
- 106. The Court has long recognized that the Due Process Clause prohibits a State from "tax[ing] value earned outside its borders." *Allied-Signal Inc.*, 504 U.S. at 778 (1992). That is because the "seizure of property by the State under pretext of taxation when there is no jurisdiction or power to tax is simple confiscation and a denial of due process of law." *Miller Bros. Co.*, 347 U.S. at 342.
- 107. To survive a challenge under the Due Process Clause, there must be "some definite link, some minimum connection, between a [S]tate and the person, property or transaction it seeks to tax." Allied-

Signal Inc., 504 U.S. at 777 (quoting Miller Brothers Co., 347 U.S. at 344-45).

- 108. In the case of a tax on an activity, "there must be a connection to the *activity itself*, rather than a connection only to the *actor*, the State seeks to tax." *Id.* at 778 (emphasis added).
- 109. In addition, the "income attributed to the State for tax purposes must be rationally related to values connected with the taxing State." *Moorman Mfg. Co.*, 437 U.S. at 273 (citation omitted). If the connection is too attenuated, the state tax will violate the Due Process Clause. *See id*.
- 110. The Tax Rule violates these fundamental requirements of due process. It requires no connection between Massachusetts and the nonresidents on whom it imposes Massachusetts income tax other than the address of the nonresident's employer. Put differently, the Tax Rule bears no "fiscal relation to [the] protection, opportunities and benefits given by the state." Wisconsin, 311 U.S. at 444.
- 111. New Hampshire residents earning a living from home offices in New Hampshire are not protected by Massachusetts police, fire, and rescue seek education or housing do not services. opportunities provided by Massachusetts, and do not enjoy the benefits of Massachusetts roads, public transportation, or utilities. They do not "earn" income "in Massachusetts" any more than an outsourced customer service operator in a foreign country "earns" income "in the United States" by working for a U.S.based employer.

112. The Tax Rule accordingly violates the Due Process Clause of the Fourteenth Amendment.

### PRAYER FOR RELIEF

WHEREFORE, New Hampshire requests that the Court order the following relief:

- a) Declare that the Tax Rule violates the Commerce Clause and the Due Process Clause;
- b) Preliminarily and permanently enjoin Massachusetts from enforcing the Tax Rule;
- c) Enter an injunction requiring Massachusetts to refund all funds, including interest, collected from nonresidents pursuant to the Tax Rule;
- d) Award costs and reasonable attorney's fees; and
- e) Grant any other relief available at law or equity.

### Respectfully submitted,

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### **ATTACHMENT 16**

### AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

**Formal Opinion 495** 

**December 16, 2020** 

### Lawyers Working Remotely

Lawyers may remotely practice the law of the jurisdictions in which they are licensed while physically present in a jurisdiction in which they are not admitted if the local jurisdiction has not determined that the conduct is the unlicensed or unauthorized practice of law and if they do not hold themselves out as being licensed to practice in the local jurisdiction, do not advertise or otherwise hold out as having an office in the local jurisdiction, and do not provide or offer to provide legal services in the local jurisdiction. This practice may include the law of their licensing jurisdiction or other law as permitted by ABA Model Rule 5.5(c) or (d), including, for instance, temporary practice involving other states' or federal laws. Having local contact information on websites, letterhead, business cards, advertising, or the like would improperly establish a local office or local presence under the ABA Model Rules.<sup>1</sup>

#### Introduction

Lawyers, like others, have more frequently been working remotely: practicing law mainly through electronic means. Technology has made it possible for a lawyer to practice virtually in a jurisdiction where the lawyer is licensed, providing legal services to residents of that jurisdiction, even though the lawyer may be physically located in a different jurisdiction where the lawyer is not licensed. A lawyer's residence may not be the same jurisdiction where a lawyer is licensed. Thus, some lawyers have either chosen or been forced to remotely carry on their practice of the law of the jurisdiction or jurisdictions in which they are licensed while being physically present in a jurisdiction in which they are not licensed to practice. Lawyers may ethically engage in practicing law as authorized by their licensing jurisdiction(s) while being physically present in a jurisdiction in which they are not admitted under specific circumstances enumerated in this opinion.

### Analysis

ABA Model Rule 5.5(a) prohibits lawyers from engaging in the unauthorized practice of law: "[a] lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so" unless authorized by the rules or law to do so. It is not this Committee's purview to determine matters of law; thus, this Committee will not opine whether working remotely by practicing the law of one's licensing jurisdiction in a particular jurisdiction where one is not licensed constitutes the unauthorized practice of law under the law of that jurisdiction. If a particular jurisdiction has made the determination, by statute, rule, case law, or opinion, that a lawyer working remotely while physically located in that jurisdiction constitutes

<sup>&</sup>lt;sup>1</sup> This opinion is based on the ABA Model Rules of Professional Conduct as amended by the ABA House of Delegates through August 2020. The laws, court rules, regulations, rules of professional conduct, and opinions promulgated in individual jurisdictions are controlling.

the unauthorized or unlicensed practice of law, then Model Rule 5.5(a) also would prohibit the lawyer from doing so.

Absent such a determination, this Committee's opinion is that a lawyer may practice law pursuant to the jurisdiction(s) in which the lawyer is licensed (the "licensing jurisdiction") even from a physical location where the lawyer is not licensed (the "local jurisdiction") under specific parameters. Authorization in the licensing jurisdiction can be by licensure of the highest court of a state or a federal court. For purposes of this opinion, practice of the licensing jurisdiction law may include the law of the licensing jurisdiction and other law as permitted by ABA Model Rule 5.5(c) or (d), including, for instance, temporary practice involving other states' or federal laws. In other words, the lawyer may practice from home (or other remote location) whatever law(s) the lawyer is authorized to practice by the lawyer's licensing jurisdiction, as they would from their office in the licensing jurisdiction. As recognized by Rule 5.5(d)(2), a federal agency may also authorize lawyers to appear before it in any U.S. jurisdiction. The rules are considered rules of reason and their purpose must be examined to determine their meaning. Comment [2] indicates the purpose of the rule: "limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons." A local jurisdiction has no real interest in prohibiting a lawyer from practicing the law of a jurisdiction in which that lawyer is licensed and therefore qualified to represent clients in that jurisdiction. A local jurisdiction, however, does have an interest in ensuring lawyers practicing in its jurisdiction are competent to do so.

Model Rule 5.5(b)(1) prohibits a lawyer from "establish[ing] an office or other systematic and continuous presence in [the] jurisdiction [in which the lawyer is not licensed] for the practice of law." Words in the rules, unless otherwise defined, are given their ordinary meaning. "Establish" means "to found, institute, build, or bring into being on a firm or stable basis." A local office is not "established" within the meaning of the rule by the lawyer working in the local jurisdiction if the lawyer does not hold out to the public an address in the local jurisdiction as an office and a local jurisdiction address does not appear on letterhead, business cards, websites, or other indicia of a lawyer's presence. Likewise it does not "establish" a systematic and continuous presence in the jurisdiction for the practice of law since the lawyer is neither practicing the law of the local jurisdiction nor holding out the availability to do so. The lawyer's physical presence in the local jurisdiction is incidental; it is not for the practice of law. Conversely, a lawyer who includes a local jurisdiction address on websites, letterhead, business cards, or advertising may be said to have established an office or a systematic and continuous presence in the local jurisdiction for the practice of law.

Subparagraph (b)(2) prohibits a lawyer from "hold[ing] out to the public or otherwise represent[ing] that the lawyer is admitted to practice law in [the] jurisdiction" in which the lawyer is not admitted to practice. A lawyer practicing remotely from a local jurisdiction may not state or imply that the lawyer is licensed to practice law in the local jurisdiction. Again, information provided on websites, letterhead, business cards, or advertising would be indicia of whether a lawyer is "holding out" as practicing law in the local jurisdiction. If the lawyer's website,

<sup>&</sup>lt;sup>2</sup> DICTIONARY.COM, <a href="https://www.dictionary.com/browse/establish?s=t">https://www.dictionary.com/browse/establish?s=t</a> (last visited Dec. 14, 2020).

<sup>&</sup>lt;sup>3</sup> To avoid confusion of clients and others who might presume the lawyer is regularly present at a physical address in the licensing jurisdiction, the lawyer might include a notation in each publication of the address such as "by appointment only" or "for mail delivery."

letterhead, business cards, advertising, and the like clearly indicate the lawyer's jurisdictional limitations, do not provide an address in the local jurisdiction, and do not offer to provide legal services in the local jurisdiction, the lawyer has not "held out" as prohibited by the rule.

A handful of state opinions that have addressed the issue agree. Maine Ethics Opinion 189 (2005) finds:

Where the lawyer's practice is located in another state and where the lawyer is working on office matters from afar, we would conclude that the lawyer is not engaged in the unauthorized practice of law. We would reach the same conclusion with respect to a lawyer who lived in Maine and worked out of his or her home for the benefit of a law firm and clients located in some other jurisdiction. In neither case has the lawyer established a professional office in Maine, established some other systematic and continuous presence in Maine, held himself or herself out to the public as admitted in Maine, or even provided legal services in Maine where the lawyer is working for the benefit of a non-Maine client on a matter focused in a jurisdiction other than Maine.

Similarly, Utah Ethics Opinion 19-03 (2019) states: "what interest does the Utah State Bar have in regulating an out-of-state lawyer's practice for out-of-state clients simply because he has a private home in Utah? And the answer is the same—none."

In addition to the above, Model Rule 5.5(c)(4) provides that lawyers admitted to practice in another United States jurisdiction and not disbarred or suspended from practice in any jurisdiction may provide legal services on a temporary basis in the local jurisdiction that arise out of or reasonably relate to the lawyer's practice in a jurisdiction where the lawyer is admitted to practice. Comment [6] notes that there is no single definition for what is temporary and that it may include services that are provided on a recurring basis or for an extended period of time. For example, in a pandemic that results in safety measures—regardless of whether the safety measures are governmentally mandated—that include physical closure or limited use of law offices, lawyers may temporarily be working remotely. How long that temporary period lasts could vary significantly based on the need to address the pandemic. And Model Rule 5.5(d)(2) permits a lawyer admitted in another jurisdiction to provide legal services in the local jurisdiction that they are authorized to provide by federal or other law or rule to provide. A lawyer may be subject to discipline in the local jurisdiction, as well as the licensing jurisdiction, by providing services in the local jurisdiction under Model Rule 8.5(a).

#### Conclusion

The purpose of Model Rule 5.5 is to protect the public from unlicensed and unqualified practitioners of law. That purpose is not served by prohibiting a lawyer from practicing the law of a jurisdiction in which the lawyer is licensed, for clients with matters in that jurisdiction, if the lawyer is for all intents and purposes invisible as a lawyer to a local jurisdiction where the lawyer is physically located, but not licensed. The Committee's opinion is that, in the absence of a local jurisdiction's finding that the activity constitutes the unauthorized practice of law, a lawyer may practice the law authorized by the lawyer's licensing jurisdiction for clients of that jurisdiction,

while physically located in a jurisdiction where the lawyer is not licensed if the lawyer does not hold out the lawyer's presence or availability to perform legal services in the local jurisdiction or actually provide legal services for matters subject to the local jurisdiction, unless otherwise authorized.

### AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

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### **ATTACHMENT 17**

### AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 498

March 10, 2021

#### **Virtual Practice**

The ABA Model Rules of Professional Conduct permit virtual practice, which is technologically enabled law practice beyond the traditional brick-and-mortar law firm. When practicing virtually, lawyers must particularly consider ethical duties regarding competence, diligence, and communication, especially when using technology. In compliance with the duty of confidentiality, lawyers must make reasonable efforts to prevent inadvertent or unauthorized disclosures of information relating to the representation and take reasonable precautions when transmitting such information. Additionally, the duty of supervision requires that lawyers make reasonable efforts to ensure compliance by subordinate lawyers and nonlawyer assistants with the Rules of Professional Conduct, specifically regarding virtual practice policies.

### I. Introduction

As lawyers increasingly use technology to practice virtually, they must remain cognizant of their ethical responsibilities. While the ABA Model Rules of Professional Conduct permit virtual practice, the Rules provide some minimum requirements and some of the Comments suggest best practices for virtual practice, particularly in the areas of competence, confidentiality, and supervision. These requirements and best practices are discussed in this opinion, although this opinion does not address every ethical issue arising in the virtual practice context.<sup>2</sup>

### II. Virtual Practice: Commonly Implicated Model Rules

This opinion defines and addresses virtual practice broadly, as technologically enabled law practice beyond the traditional brick-and-mortar law firm.<sup>3</sup> A lawyer's virtual practice often occurs when a lawyer at home or on-the-go is working from a location outside the office, but a lawyer's practice may be entirely virtual because there is no requirement in the Model Rules that a lawyer

<sup>1</sup> This opinion is based on the ABA Model Rules of Professional Conduct as amended by the ABA House of Delegates through August 2020. The laws, court rules, regulations, rules of professional conduct, and opinions promulgated in individual jurisdictions are controlling.

<sup>&</sup>lt;sup>2</sup> Interstate virtual practice, for instance, also implicates Model Rule of Professional Conduct 5.5: Unauthorized Practice of Law; Multijurisdictional Practice of Law, which is not addressed by this opinion. See ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 495 (2020), stating that "[l]awyers may remotely practice the law of the jurisdictions in which they are licensed while physically present in a jurisdiction in which they are not admitted if the local jurisdiction has not determined that the conduct is the unlicensed or unauthorized practice of law and if they do not hold themselves out as being licensed to practice in the local jurisdiction, do not advertise or otherwise hold out as having an office in the local jurisdiction, and do not provide or offer to provide legal services in the local jurisdiction."

<sup>&</sup>lt;sup>3</sup> See generally MODEL RULES OF PROFESSIONAL CONDUCT R. 1.0(c), defining a "firm" or "law firm" to be "a lawyer or lawyers in a partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization on the legal department of a corporation or other organization." Further guidance on what constitutes a firm is provided in Comments [2], [3], and [4] to Rule 1.0.

have a brick-and-mortar office. Virtual practice began years ago but has accelerated recently, both because of enhanced technology (and enhanced technology usage by both clients and lawyers) and increased need. Although the ethics rules apply to both traditional and virtual law practice,<sup>4</sup> virtual practice commonly implicates the key ethics rules discussed below.

### A. Commonly Implicated Model Rules of Professional Conduct

### 1. Competence, Diligence, and Communication

### 2. Confidentiality

Under Rule 1.6 lawyers also have a duty of confidentiality to all clients and therefore "shall not reveal information relating to the representation of a client" (absent a specific exception, informed consent, or implied authorization). A necessary corollary of this duty is that lawyers must at least "make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client." The following non-

<sup>&</sup>lt;sup>4</sup> For example, if a jurisdiction prohibits substantive communications with certain witnesses during court-related proceedings, a lawyer may not engage in such communications either face-to-face or virtually (e.g., during a trial or deposition conducted via videoconferencing). See, e.g., MODEL RULES OF PROF'L CONDUCT R. 3.4(c) (prohibiting lawyers from violating court rules and making no exception to the rule for virtual proceedings). Likewise, lying or stealing is no more appropriate online than it is face-to-face. See, e.g., MODEL RULES OF PROF'L CONDUCT R. 1.15; MODEL RULES OF PROF'L CONDUCT R. 8.4(b)-(c).

<sup>&</sup>lt;sup>5</sup> MODEL RULES OF PROF'L CONDUCT R. 1.4(a)(2) – (4).

<sup>&</sup>lt;sup>6</sup> Lawyers unexpectedly thrust into practicing virtually must have a business continuation plan to keep clients apprised of their matters and to keep moving those matters forward competently and diligently. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 482 (2018) (discussing ethical obligations related to disasters). Though virtual practice is common, if for any reason a lawyer cannot fulfill the lawyer's duties of competence, diligence, and other ethical duties to a client, the lawyer must withdraw from the matter. MODEL RULES OF PROF'L CONDUCT R. 1.16. During and following the termination or withdrawal process, the "lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred." MODEL RULES OF PROF'L CONDUCT R. 1.16(d).

<sup>7</sup> MODEL RULES OF PROF'L CONDUCT R. 1.6(c).

exhaustive list of factors may guide the lawyer's determination of reasonable efforts to safeguard confidential information: "the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use)." As ABA Formal Op. 477R notes, lawyers must employ a "fact-based analysis" to these "nonexclusive factors to guide lawyers in making a 'reasonable efforts' determination."

Similarly, lawyers must take reasonable precautions when transmitting communications that contain information related to a client's representation. At all times, but especially when practicing virtually, lawyers must fully consider and implement reasonable measures to safeguard confidential information and take reasonable precautions when transmitting such information. This responsibility "does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy." However, depending on the circumstances, lawyers may need to take special precautions. Heators to consider to assist the lawyer in determining the reasonableness of the "expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. As ABA Formal Op. 477R summarizes, "[a] lawyer generally may transmit information relating to the representation of a client over the Internet without violating the Model Rules of Professional Conduct where the lawyer has undertaken reasonable efforts to prevent inadvertent or unauthorized access."

### 3. Supervision

Lawyers with managerial authority have ethical obligations to establish policies and procedures to ensure compliance with the ethics rules, and supervisory lawyers have a duty to make reasonable efforts to ensure that subordinate lawyers and nonlawyer assistants comply with the applicable Rules of Professional Conduct. <sup>13</sup> Practicing virtually does not change or diminish this obligation. "A lawyer must give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client, and should be responsible for their work product." <sup>14</sup> Moreover, a lawyer must "act competently to safeguard information relating to the representation of a client against unauthorized access by third parties and against inadvertent

<sup>&</sup>lt;sup>8</sup> MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. [18].

<sup>&</sup>lt;sup>9</sup> MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. [19].

<sup>&</sup>lt;sup>10</sup> Id.

<sup>&</sup>lt;sup>11</sup> The opinion cautions, however, that "a lawyer may be required to take special security precautions to protect against the inadvertent or unauthorized disclosure of client information when required by an agreement with the client or by law, or when the nature of the information requires a higher degree of security." ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 477R (2017).

<sup>&</sup>lt;sup>12</sup> MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. [19].

<sup>&</sup>lt;sup>13</sup> MODEL RULES OF PROF'L CONDUCT R. 5.1 & 5.3. See, e.g., ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 467 (2014) (discussing managerial and supervisory obligations in the context of prosecutorial offices). See also ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 483 n.6 (2018) (describing the organizational structures of firms as pertaining to supervision).

<sup>&</sup>lt;sup>14</sup> MODEL RULES OF PROF'L CONDUCT R. 5.3 cmt. [2].

or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision." The duty to supervise nonlawyers extends to those both within and outside of the law firm. <sup>16</sup>

### B. Particular Virtual Practice Technologies and Considerations

Guided by the rules highlighted above, lawyers practicing virtually need to assess whether their technology, other assistance, and work environment are consistent with their ethical obligations. In light of current technological options, certain available protections and considerations apply to a wide array of devices and services. As ABA Formal Op. 477R noted, a "lawyer has a variety of options to safeguard communications including, for example, using secure internet access methods to communicate, access and store client information (such as through secure Wi-Fi, the use of a Virtual Private Network, or another secure internet portal), using unique complex passwords, changed periodically, implementing firewalls and anti-Malware/Anti-Spyware/Antivirus software on all devices upon which client confidential information is transmitted or stored, and applying all necessary security patches and updates to operational and communications software." Furthermore, "[o]ther available tools include encryption of data that is physically stored on a device and multi-factor authentication to access firm systems." To apply and expand on these protections and considerations, we address some common virtual practice issues below.

### 1. Hard/Software Systems

Lawyers should ensure that they have carefully reviewed the terms of service applicable to their hardware devices and software systems to assess whether confidentiality is protected.<sup>17</sup> To protect confidential information from unauthorized access, lawyers should be diligent in installing any security-related updates and using strong passwords, antivirus software, and encryption. When connecting over Wi-Fi, lawyers should ensure that the routers are secure and should consider using virtual private networks (VPNs). Finally, as technology inevitably evolves, lawyers should periodically assess whether their existing systems are adequate to protect confidential information.

When using such services outside the firm, a lawyer must make reasonable efforts to ensure that the services are provided in a manner that is compatible with the lawyer's professional obligations. The extent of this obligation will depend upon the circumstances, including the education, experience and reputation of the nonlawyer; the nature of the services involved; the terms of any arrangements concerning the protection of client information; and the legal and ethical environments of the jurisdictions in which the services will be performed, particularly with regard to confidentiality. See also Rules 1.1 (competence), 1.2 (allocation of authority), 1.4 (communication with client), 1.6 (confidentiality), 5.4(a) (professional independence of the lawyer), and 5.5(a) (unauthorized practice of law).

<sup>15</sup> MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. [18] (emphasis added).

<sup>&</sup>lt;sup>16</sup> As noted in Comment [3] to Model Rule 5.3:

<sup>&</sup>lt;sup>17</sup> For example, terms and conditions of service may include provisions for data-soaking software systems that collect, track, and use information. Such systems might purport to own the information, reserve the right to sell or transfer the information to third parties, or otherwise use the information contrary to lawyers' duty of confidentiality.

### 2. Accessing Client Files and Data

Lawyers practicing virtually (even on short notice) must have reliable access to client contact information and client records. If the access to such "files is provided through a cloud service, the lawyer should (i) choose a reputable company, and (ii) take reasonable steps to ensure that the confidentiality of client information is preserved, and that the information is readily accessible to the lawyer." Lawyers must ensure that data is regularly backed up and that secure access to the backup data is readily available in the event of a data loss. In anticipation of data being lost or hacked, lawyers should have a data breach policy and a plan to communicate losses or breaches to the impacted clients. 19

### 3. Virtual meeting platforms and videoconferencing

Lawyers should review the terms of service (and any updates to those terms) to ensure that using the virtual meeting or videoconferencing platform is consistent with the lawyer's ethical obligations. Access to accounts and meetings should be only through strong passwords, and the lawyer should explore whether the platform offers higher tiers of security for businesses/enterprises (over the free or consumer platform variants). Likewise, any recordings or transcripts should be secured. If the platform will be recording conversations with the client, it is inadvisable to do so without client consent, but lawyers should consult the professional conduct rules, ethics opinions, and laws of the applicable jurisdiction. Lastly, any client-related meetings or information should not be overheard or seen by others in the household, office, or other remote location, or by other third parties who are not assisting with the representation, to avoid jeopardizing the attorney-client privilege and violating the ethical duty of confidentiality.

### 4. Virtual Document and Data Exchange Platforms

In addition to the protocols noted above (e.g., reviewing the terms of service and any updates to those terms), lawyers' virtual document and data exchange platforms should ensure that

<sup>18</sup> ABA Comm. on Ethics & Prof 1 Responsibility, Formal Op. 482 (2018).

<sup>&</sup>lt;sup>19</sup> See, e.g., ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 483 (2018) ("Even lawyers who, (i) under Model Rule 1.6(c), make 'reasonable efforts to prevent the . . . unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client,' (ii) under Model Rule 1.1, stay abreast of changes in technology, and (iii) under Model Rules 5.1 and 5.3, properly supervise other lawyers and third-party electronic-information storage vendors, may suffer a data breach. When they do, they have a duty to notify clients of the data breach under Model Rule 1.4 in sufficient detail to keep clients 'reasonably informed' and with an explanation 'to the extent necessary to permit the client to make informed decisions regarding the representation.").

<sup>&</sup>lt;sup>20</sup> See, e.g., ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 01-422 (2001).

<sup>&</sup>lt;sup>21</sup> Pennsylvania recently highlighted the following best practices for videoconferencing security:

Do not make meetings public;

<sup>•</sup> Require a meeting password or use other features that control the admittance of guests;

Do not share a link to a teleconference on an unrestricted publicly available social media post;

Provide the meeting link directly to specific people;

Manage screensharing options. For example, many of these services allow the host to change screensharing to "Host Only;"

<sup>•</sup> Ensure users are using the updated version of remote access/meeting applications.

Pennsylvania Bar Ass'n Comm. on Legal Ethics & Prof'l Responsibility, Formal Op. 2020-300 (2020) (citing an FBI press release warning of teleconference and online classroom hacking).

documents and data are being appropriately archived for later retrieval and that the service or platform is and remains secure. For example, if the lawyer is transmitting information over email, the lawyer should consider whether the information is and needs to be encrypted (both in transit and in storage).<sup>22</sup>

### 5. Smart Speakers, Virtual Assistants, and Other Listening-Enabled Devices

Unless the technology is assisting the lawyer's law practice, the lawyer should disable the listening capability of devices or services such as smart speakers, virtual assistants, and other listening-enabled devices while communicating about client matters. Otherwise, the lawyer is exposing the client's and other sensitive information to unnecessary and unauthorized third parties and increasing the risk of hacking.

### 6. Supervision

The virtually practicing managerial lawyer must adopt and tailor policies and practices to ensure that all members of the firm and any internal or external assistants operate in accordance with the lawyer's ethical obligations of supervision.<sup>23</sup> Comment [2] to Model Rule 5.1 notes that "[s]uch policies and procedures include those designed to detect and resolve conflicts of interest, identify dates by which actions must be taken in pending matters, account for client funds and property and ensure that inexperienced lawyers are properly supervised."

#### a. Subordinates/Assistants

The lawyer must ensure that law firm tasks are being completed in a timely, competent, and secure manner.<sup>24</sup> This duty requires regular interaction and communication with, for example,

<sup>&</sup>lt;sup>22</sup> See, e.g., ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 477R (2017) (noting that "it is not always reasonable to rely on the use of unencrypted email").

<sup>&</sup>lt;sup>23</sup> As ABA Formal Op. 477R noted:

In the context of electronic communications, lawyers must establish policies and procedures, and periodically train employees, subordinates and others assisting in the delivery of legal services, in the use of reasonably secure methods of electronic communications with clients. Lawyers also must instruct and supervise on reasonable measures for access to and storage of those communications. Once processes are established, supervising lawyers must follow up to ensure these policies are being implemented and partners and lawyers with comparable managerial authority must periodically reassess and update these policies. This is no different than the other obligations for supervision of office practices and procedures to protect client information.

<sup>&</sup>lt;sup>24</sup> The New York County Lawyers Association Ethics Committee recently described some aspects to include in the firm's practices and policies:

Monitoring appropriate use of firm networks for work purposes.

<sup>•</sup> Tightening off-site work procedures to ensure that the increase in worksites does not similarly increase the entry points for a data breach.

<sup>•</sup> Monitoring adherence to firm cybersecurity procedures (e.g., not processing or transmitting work across insecure networks, and appropriate storage of client data and work product).

Ensuring that working at home has not significantly increased the likelihood of an inadvertent disclosure
through misdirection of a transmission, possibly because the lawyer or nonlawyer was distracted by a child,
spouse, parent or someone working on repair or maintenance of the home.

associates, legal assistants, and paralegals. Routine communication and other interaction are also advisable to discern the health and wellness of the lawyer's team members.<sup>25</sup>

One particularly important subject to supervise is the firm's bring-your-own-device (BYOD) policy. If lawyers or nonlawyer assistants will be using their own devices to access, transmit, or store client-related information, the policy must ensure that security is tight (e.g., strong passwords to the device and to any routers, access through VPN, updates installed, training on phishing attempts), that any lost or stolen device may be remotely wiped, that client-related information cannot be accessed by, for example, staff members' family or others, and that client-related information will be adequately and safely archived and available for later retrieval.<sup>26</sup>

Similarly, all client-related information, such as files or documents, must not be visible to others by, for example, implementing a "clean desk" (and "clean screen") policy to secure documents and data when not in use. As noted above in the discussion of videoconferencing, client-related information also should not be visible or audible to others when the lawyer or nonlawyer is on a videoconference or call. In sum, all law firm employees and lawyers who have access to client information must receive appropriate oversight and training on the ethical obligations to maintain the confidentiality of such information, including when working virtually.

### b. Vendors and Other Assistance

Lawyers will understandably want and may need to rely on information technology professionals, outside support staff (e.g., administrative assistants, paralegals, investigators), and vendors. The lawyer must ensure that all of these individuals or services comply with the lawyer's obligation of confidentiality and other ethical duties. When appropriate, lawyers should consider use of a confidentiality agreement,<sup>27</sup> and should ensure that all client-related information is secure, indexed, and readily retrievable.

### 7. Possible Limitations of Virtual Practice

Virtual practice and technology have limits. For example, lawyers practicing virtually must make sure that trust accounting rules, which vary significantly across states, are followed.<sup>28</sup> The

Ensuring that sufficiently frequent "live" remote sessions occur between supervising attorneys and supervised attorneys to achieve effective supervision as described in [New York Rule of Professional Conduct] 5.1(c).

N.Y. County Lawyers Ass'n Comm. on Prof'l Ethics, Formal Op. 754-2020 (2020).

<sup>&</sup>lt;sup>25</sup> See ABA MODEL REGULATORY OBJECTIVES FOR THE PROVISION OF LEGAL SERVICES para. I (2016).

<sup>&</sup>lt;sup>26</sup> For example, a lawyer has an obligation to return the client's file when the client requests or when the representation ends. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 1.16(d). This important obligation cannot be fully discharged if important documents and data are located in staff members' personal computers or houses and are not indexed or readily retrievable by the lawyer.

<sup>&</sup>lt;sup>27</sup> See, e.g., Mo. Bar Informal Advisory Op. 20070008 & 20050068.

<sup>&</sup>lt;sup>28</sup> See MODEL RULES OF PROF'L CONDUCT R. 1.15; See, e.g., ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 482 (2018) ("Lawyers also must take reasonable steps in the event of a disaster to ensure access to funds the lawyer is holding in trust. A lawyer's obligations with respect to these funds will vary depending on the circumstances. Even before a disaster, all lawyers should consider (i) providing for another trusted signatory on trust

lawyer must still be able, to the extent the circumstances require, to write and deposit checks, make electronic transfers, and maintain full trust-accounting records while practicing virtually. Likewise, even in otherwise virtual practices, lawyers still need to make and maintain a plan to process the paper mail, to docket correspondence and communications, and to direct or redirect clients, prospective clients, or other important individuals who might attempt to contact the lawyer at the lawyer's current or previous brick-and-mortar office. If a lawyer will not be available at a physical office address, there should be signage (and/or online instructions) that the lawyer is available by appointment only and/or that the posted address is for mail deliveries only. Finally, although e-filing systems have lessened this concern, litigators must still be able to file and receive pleadings and other court documents.

### III. Conclusion

The ABA Model Rules of Professional Conduct permit lawyers to conduct practice virtually, but those doing so must fully consider and comply with their applicable ethical responsibilities, including technological competence, diligence, communication, confidentiality, and supervision.

### AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

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accounts in the event of the lawyer's unexpected death, incapacity, or prolonged unavailability and (ii) depending on the circumstances and jurisdiction, designating a successor lawyer to wind up the lawyer's practice.").

### **ATTACHMENT 18**

### THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK COMMITTEE ON PROFESSIONAL ETHICS

COMMITTEE NOTE: This Opinion replaces Opinion 2014-2 (2014).

## Formal Opinion 2019-2: USE OF A VIRTUAL LAW OFFICE BY NEW YORK ATTORNEYS

**TOPIC**: Identifying a virtual law office in attorney advertising and on business cards, letterheads and websites.

**DIGEST:** A New York lawyer may use the street address of a virtual law office ("VLO") located in New York as the lawyer's "principal law office address" for the purposes of Rule 7.1(h) of the New York Rules of Professional Conduct (the "New York Rules" or the "Rules"), provided the VLO qualifies as an office for the transaction of law business under New York's Judiciary Law. In addition, a New York lawyer may use the address of a VLO as the lawyer's office address on business cards, letterhead and law firm website. A New York lawyer who uses a VLO must also comply with other New York Rules, including Rules 1.4, 1.6, 5.1, 5.3, 8.4(a) and 8.4(c).

RULES: 1.4, 1.6, 5.1, 5.3, 7.1(h), 7.5(a)(1), 7.5(a)(4), 8.4(a), 8.4(c)

### **QUESTIONS:**

- 1. Is a New York lawyer permitted to use the street address of a VLO located in New York State as a "principal law office address" for purposes of Rule 7.1(h), even though most of the lawyer's work is done at another location?
- 2. Is a New York lawyer permitted to use the street address of a VLO on business cards, letterhead, and law firm website?

#### **OPINION**

A New York lawyer (the "Lawyer") is considering becoming a solo practitioner and plans to do most of her work at her home. The Lawyer does not intend to maintain a traditional "law office" insofar as she will not have a dedicated office space, other than her home, that only she can access. Instead, she plans to use a VLO in New York State, as defined below, to meet with clients, hold "office hours," receive mail, or otherwise be present and available at various times. For privacy and security reasons, she does not wish to identify her home address as her business address. She would like to use the address of the VLO as her "principal office address" for purposes of advertising her legal services under Rule 7.1(h). She would also like to use the VLO address on her letterhead, business cards and law firm website.

A VLO, as it is used in this opinion, refers to a facility that offers business services and meeting and work spaces to lawyers on an "as needed" basis. Although arrangements may vary, VLO's typically provide private or semi-private work spaces, conference rooms, telephones, fax,

printers, photocopy machines, and mail-drop services in exchange for a monthly fee.<sup>1</sup> Unlike a traditional office setting, a VLO will not provide the lawyer with dedicated office space and, instead, the lawyer will share all space and amenities with other VLO subscribers.<sup>2</sup>

This Committee previously addressed a lawyer's use of a VLO in NYCBA Formal Op. 2014-2 (2014) ("Opinion 2014-2"). Opinion 2014-2 concluded that a lawyer could list a VLO on advertisements in order to comply with Rule 7.1(h). In its reasoning, the opinion referred to the evolving jurisprudence regarding Judiciary Law § 470 ("Section 470"), which requires nonresident lawyers admitted in New York to maintain "an office for the transaction of a law business" within New York State.<sup>3</sup> We anticipated that the courts would not require New York lawyers to maintain a physical law office in the state in order to practice here. After we issued that opinion, the New York Court of Appeals and the United States Court of Appeals held that Section 470 requires lawyers admitted in New York but who reside in another state to maintain a physical law office within New York State.<sup>4</sup> Although we adhere to much of our earlier reasoning, we withdraw Opinion 2014-2 and substitute this one to account for the subsequent court opinions interpreting Section 470.

# I. Is a New York Lawyer Permitted to Use the Street Address of a VLO Located in New York State as a "Principal Law Office Address" for the Purposes of Rule 7.1 (h)?

New York Rule 7.1 sets restrictions on advertisements disseminated by lawyers or law firms. One of those restrictions is stated in Rule 7.1(h): "All advertisements shall include the . . . principal law office address . . . of the lawyer or law firm whose services are being offered" (emphasis added). Comment [17] to Rule 7.1 adds: "A law firm that has no office it considers its principal office may comply with paragraph (h) by listing one or more offices where a substantial amount of the law firm's work is performed." As the text of Rule 7.1(h) and Comment [17] make clear, compliance with the rule turns on whether the lawyer is properly listing a "principal law office." As discussed below, whether a VLO can be listed as a "principal law office" implicitly turns in part on whether a VLO, as described in this Opinion,

<sup>&</sup>lt;sup>1</sup> We note that the New York City Bar Association offers its members a VLO service meeting this general description. See <a href="https://www.nycbar.org/member-and-career-services/small-law-firm-overview/virtual-law-office">https://www.nycbar.org/member-and-career-services/small-law-firm-overview/virtual-law-office</a>. (All websites cited in this opinion were last visited on February 26<sup>th</sup>, 2019.)

<sup>&</sup>lt;sup>2</sup> A VLO as it is used in this opinion should be distinguished from a "Virtual Law Practice," which typically has no physical address and operates primarily over the Internet. Virtual Law Practice is also known by terms such as "Digital Law, Online Law, [and] eLawyering." *See, e.g.*, Cal. Op 2012-184 at 2. Although a Virtual Law Practice might make use of the facilities of a VLO to conduct business, this opinion does not address the ethical issues associated with operating a Virtual Law Practice.

<sup>&</sup>lt;sup>3</sup> Section 470 provides "Attorneys having offices in this state may reside in adjoining state. A person, regularly admitted to practice as an attorney and counsellor, in the courts of record of this state, whose office for the transaction of law business is within the state, may practice as such attorney or counsellor, although he resides in an adjoining state."

<sup>&</sup>lt;sup>4</sup> Schoenefeld v. New York, 25 N.Y.3d 22 (2015).

<sup>&</sup>lt;sup>5</sup> An "Advertisement" is defined as "any public or private communication made by or on behalf of a lawyer or law firm about that lawyer or law firm's services, the primary purpose of which is for the retention of the lawyer or law firm. It does not include communications to existing clients or other lawyers." Rule 1.0(a).

qualifies as a law office under Section 470. Assuming a VLO qualifies as a law office under New York law, a question of law on which we cannot opine, a VLO may be listed as a "principal law office" in order to comply with Rule 7.1(h).

### a. The "Principal Law Office" Requirement in Rule 7.1(h)

We begin our analysis by noting that the phrases "law office" and "principal law office address," for purposes of Rule 7.1(h), are not defined in the New York Rules. In a series of ethics opinions, the New York State Bar Association ("NYSBA") recognized that the definition of a "principal law office" in Rule 7.1 is an evolving concept and that Rule 7.1(h), by itself, may not require New York lawyers to maintain a physical office. *Compare* NYSBA Ethics Op. 756 (2002) (Rule 7.1(h) requires "a physical street address at which the principal office of the firm or lawyer offering legal services is located and to which mail, express deliveries and other communications can be addressed"); NYSBA Ethics Op. 964 (2013) (concluding that a "mail drop" does not qualify as a "principal law office address" for the purposes of Rule 7.1(h), with NYSBA Ethics Op. 1025 (2014) (modifying Opinions 756 and 964 and concluding that "[i]n light of [recent developments in the law], we no longer believe that Rule 7.1(h) – a rule that on its face regulates only advertising – provides an independent basis for requiring a physical office.").

As explained in Opinion 964, the intent of Rule 7.1(h) is to require all lawyer advertisements to "disclose the address of an office where the lawyers were present and available for contact, and where personal service or delivery of legal papers could be effected." Opinion 1025 recognized that a VLO may, in certain circumstances, accomplish these goals.

### b. Judiciary Law 470's Physical Office Requirement

As noted, Section 470 requires New York-admitted lawyers who reside outside the state to maintain an office in New York for the "transaction of law business." When we issued Opinion 2014-2, the question of whether Section 470 required nonresident New York lawyers to maintain a *physical* law office was *sub judice* before the courts. Since then, however, the New York Court of Appeals has held that Section 470 does, in fact, require nonresident New York-admitted lawyers to maintain a physical law office within the state and the United States Court of Appeals upheld the constitutionality of this mandate. This had not been a foregone conclusion, and it

<sup>&</sup>lt;sup>6</sup> NYSBA Ethics Op. 756 pre-dates the adoption of the New York Rules, which became effective in 2009, replacing the New York Code of Professional Responsibility (the "Code"). However, the language of Rule 7.1(h) is identical to the corresponding Code provision. Consequently, prior interpretations of this provision remain relevant.

<sup>&</sup>lt;sup>7</sup> By contrast, Opinion 964 concluded that business cards and letterhead do not need to list a physical street address, unless they are used for advertising purposes. Business cards and letterhead are governed primarily by Rule 7.5. An attorney may list a "mailbox service address" on business cards or letterhead that are not used for advertising purposes, provided they are not deceptive. NYSBA Ethics Op. 964. For example, "a mailing address that is in a community other than the one in which the lawyer's physical office is located, or that appears to be a physical address when it is in fact only a mail drop, could be misleading if not adequately explained." This aspect of the opinion is relevant to the inquiring lawyer's second question, discussed further below.

<sup>&</sup>lt;sup>8</sup> Schoenefeld v. New York, 25 N.Y.3d 22 (2015) and Schoenefeld v. New York, 821 F.3d 273 (2d Cir. 2016).

caught some lawyers by surprise.<sup>9</sup> The New York Court of Appeals has now made clear that Section 470 "requires nonresident attorneys to maintain a physical office in New York." <sup>10</sup>

Opinion 2014-2 found that the evolving jurisprudence concerning Section 470 supported its conclusion that Rule 7.1(h) permits using a VLO as one's principal law office address.<sup>11</sup> In light of the courts' clarification of Section 470, we withdraw Opinion 2014-2 and reexamine the question it addressed.

We note that Rule 7.1(h) and Section 470 regulate two different activities – Rule 7.1(h) is intended to regulate all advertising by New York admitted lawyers, regardless of their physical location, while Section 470 is directed at a subset of New York-admitted lawyers who reside outside the state. Although these rules serve different purposes, both require a lawyer to maintain an office for the practice of law. In addition, the policy rationales behind both rules are similar. We therefore see no reason to interpret the phrase "law office" as used in Rule 7.1(h) differently from how courts interpret the term "office for the transaction of law business" in Section 470, especially given that the required offices serve a similar function and the same state judiciary that interpreted Section 470 to require a physical law office also adopted the Rules. We therefore conclude that any "law office" listed on attorney advertising in accordance with Rule 7.1(h) must qualify as a law office under Section 470.

We express no opinion on whether the VLO described in this Opinion meets the minimum standards for a "law office" in New York. That is a question of law beyond our jurisdiction and must be interpreted in accordance with the growing body of case law on the topic. We note, however, that a VLO as described in this Opinion includes a physical facility at which a lawyer may meet with clients and receive service of process. As discussed below, assuming the VLO qualifies under Section 470, it may be identified as a lawyer's "principal law office" under Rule 7.1(h).

<sup>&</sup>lt;sup>9</sup> Critics of Section 470 maintained that requiring New York lawyers to maintain a physical office within the state constrains a client's ability to choose counsel and makes legal services less affordable. In its decision certifying the question to the New York Court of Appeals concerning whether the statute required lawyers to maintain a physical office, the Second Circuit noted, "it appears that Section 470 discriminates against nonresident attorneys with respect to their fundamental right to practice law in the state and, by virtue of that fact, its limitations on non-resident attorneys implicate the Privileges and Immunities Clause." 748 F.3d 464, 469 (2d Cir. 2014). Also, on January 18, 2019, the New York State Bar Association's House of Delegates passed a resolution calling for the repeal of Judiciary Law 470. In the event Section 470 is amended or repealed, we may revisit this Opinion once again.

<sup>10</sup> Id. at 22

<sup>&</sup>lt;sup>11</sup> The state bar's Opinion 1025, cited above, similarly anticipated that the courts would not require that out-of-state lawyers admitted to practice law in New York maintain a physical law office in the state.

<sup>&</sup>lt;sup>12</sup> NYSBA Ethics Op. 756 (noting that "[t]he requirement of a street address in lawyer advertising . . . serves the same purposes as Judiciary Law § 470," such as "to ensure that attorneys practicing in this state are amenable to contact by their clients, adversaries and other interested parties" and to facilitate "personal service or delivery of legal papers and other correspondence").

<sup>&</sup>lt;sup>13</sup> E.g., Lichtenstein v. Emerson, 251 A.D.2d 64 (1st Dep't 1998); Rosenstein v. Ernstoff, 176 A.D. 2d 686 (1st Dep't 1991); Matter of Haas, 237 A.D.2d 729 (3d Dep't 1997); Chupak v. Gomez, No. 151348/14, 2016 N.Y. Slip Op. 30051(U) (Sup. Ct. N.Y. Cty. Jan. 8, 2016).

# c. Using a VLO Address as a Principal Office Address Is Consistent with the Policies Underlying Rule 7.1(h)

Ethics opinions discussing Rule 7.1(h) identify several purposes served by the principal office address requirement, including that: (1) disclosure of a physical address "should facilitate a prospective client's ability to make an intelligent selection of a lawyer"; (2) a physical location enables members of the public or clients to meet with the lawyer, contact the lawyer by mail, and serve legal papers; and (3) the absence of an address "could be misleading by suggesting a physical proximity to the recipient that does not in fact exist" or "the ability to serve in jurisdictions in which the advertising firm or lawyer is not qualified to practice." <sup>14</sup>

Each of these purposes can be advanced by the use of a VLO. First, the fact that a lawyer uses a VLO may itself be a relevant factor in selecting or rejecting a particular lawyer. For example, a prospective client who understands that the lawyer's address is a VLO may conclude that the lawyer can provide greater value due to lower overhead and other efficiencies. In addition, clients who are technologically savvy and who themselves may use similar facilities for their own businesses may be more comfortable with a lawyer who understands how those business models work. On the other hand, use of a VLO may be less appealing to clients who prefer their lawyers to work in more traditional office environments.

Second, the VLO – as defined herein – provides a physical location for clients or members of the public to contact, meet with or serve legal papers on the lawyer. In view of the saturation of our society with mobile devices enabling voice and electronic communications as well as the numerous other communication options that emerging technologies have made available, the concern that a client might not be able to contact a lawyer simply because the lawyer does not have a traditional brick-and-mortar law office is less compelling than in the past. In fact, a lawyer who uses a VLO may be at least as accessible as a lawyer who rents a dedicated physical office space. Imposing an inflexible requirement on lawyers to maintain a traditional brick-and-mortar office does not necessarily provide enhanced protection to clients or the public. As detailed above, however, we recognize that a VLO must still adhere to the relevant legal requirements for law offices.<sup>15</sup>

Third, the use of a VLO address in advertising is not inherently misleading. Given the prevalence of alternative work arrangements (telecommuting, work-sharing, office-sharing, etc.), the general public would not necessarily assume that a physical street address is equivalent to a traditional, single-purpose, brick-and-mortar office. Nor would one reasonably assume that a lawyer is always present and available to meet at the address provided in the lawyer's advertising. As discussed further below, however, all lawyers (including those using VLOs) should take care not to mislead the public as to the nature of their office arrangements, accessibility, or availability for meetings.

<sup>14</sup> NYSBA Ethics Op. 756

<sup>15 §</sup>I.b., supra.

## d. Use of a VLO Address Is Consistent with the Evolution of Modern Law Practice

Courts and enforcement authorities increasingly recognize that the economic and technological conditions of modern law practice justify some flexibility in practice arrangements. One example involves an attorney who was a member in good standing of the D.C. bar and was employed by a D.C. law firm, but resided in Cambridge, Massachusetts. He when the attorney applied to renew her membership in the Maryland bar, she identified the address of her D.C. law office as her "principal office." The attorney's mail and phone calls went to the D.C. office. She met with clients in the D.C. office. However, she spent most of her time working from home in Cambridge or from an office space in Boston. The Chair of the Disciplinary and Admissions Committee of the District Court of Maryland denied her application, based on a Maryland rule that required her to be "a member in good standing of the highest court of any state (or the District of Columbia) in which [she] maintains [her] principal law office . . . ." The District Court disagreed and granted the attorney's application to renew her membership in the Maryland Bar. The court concluded that her D.C. office met the requirements of Maryland's "principal law office" rule, even though she was physically located in Massachusetts when performing many legal tasks. Said the court:

In recent years, the concept of a "principal law office" has evolved somewhat as a result of significant advances in technology which provide an attorney with the flexibility to carry out a variety of activities at different locations and under varying circumstances. The term does not necessarily mean continuous physical presence but, at a minimum, it requires some physical presence sufficient to assure accountability of the attorney to clients and to the court. <sup>19</sup>

Several years ago, New Jersey studied whether to permit VLOs, and in 2013 changed its rules to allow them. These developments are instructive. Prior to 2013, a New Jersey court rule required that "a New Jersey attorney maintain a *bona fide* office for the practice of law." N.J. Ethics Op. 718 interpreted the "*bona fide* office" requirement to mean a fixed specific full-time physical location where "clients are met, files are kept, the telephone is answered, mail is received and the attorney or a responsible person acting on the attorney's behalf can be reached in person and by telephone during normal business hours to answer questions posed by the courts, clients or adversaries and to ensure that competent advice from the attorney can be obtained within a reasonable period of time." By contrast, a VLO "refers to a type of time-

<sup>&</sup>lt;sup>16</sup> In re Application of Carlton, 708 F. Supp. 2d 524 (D. Md. 2010).

<sup>17</sup> Id. at 525

<sup>18</sup> Id. at 524-25

<sup>19</sup> Id. at 526

<sup>&</sup>lt;sup>20</sup> N.J. Eth. Op. 718, N.J. Eth. Op. 41, 2010 WL 1829019, at \*1 (2010) ("N.J. Ethics Op. 718") (quoting former R. 1:21-1(a)).

<sup>&</sup>lt;sup>21</sup> Id.

share arrangement whereby one leases the right to reserve space in an office building on an hourly or daily basis."<sup>22</sup> The opinion continued:

[A]n attorney's use of a "virtual office" is by appointment only. The office building ordinarily has a receptionist with a list of all lessees who directs visitors to the appropriate room at the appointed time. Depending on the terms of the lease, the receptionist may also receive and forward mail addressed to lessees or receive and forward telephone calls to lessees.<sup>23</sup>

N.J. Op. 718 concluded that such an office was not a "bona fide office" because, inter alia, "the attorney generally is not present during normal business hours but will only be present when he or she has reserved the space" and "the receptionist at a 'virtual office' does not qualify as a 'responsible person acting on the attorney's behalf' who can 'answer questions posed by the courts, clients or adversaries."<sup>24</sup>

In the wake of N.J. Op. 718, the Court amended Rule 1:21-1(a) to eliminate the *bona fide* office requirement and to permit the use of a VLO. Rule 1:21-1(a) now provides:

An attorney need not maintain a fixed physical location for the practice of law, but must structure his or her practice in such a manner as to assure, as set forth in RPC 1.4, prompt and reliable communication with and accessibility by clients, other counsel, and judicial and administrative tribunals before which the attorney may practice, provided that an attorney must designate one or more fixed physical locations where client files and the attorney's business and financial records may be inspected on short notice by duly authorized regulatory authorities, where mail or hand-deliveries may be made and promptly received, and where process may be served on the attorney for all actions, including disciplinary actions, that may arise out of the practice of law and activities related thereto.<sup>25</sup>

In contrast to New Jersey's former *bona fide* office rule, New York's Rule 7.1(h) merely requires a lawyer to designate a "principal law office address" in advertising – a requirement that has been expanded to mean a "physical street address" through the interpretation of various ethics opinions. Rule 7.1(h) does not, in our view, impose a requirement to maintain a "bona fide" office as that term was formerly used in New Jersey although, as detailed above, the "law office" must meet the minimum standards as defined by New York law. To engraft a more burdensome "bona fide office" requirement onto New York Rule 7.1(h) via an interpretation of "physical street address" (which is itself an interpretation of Rule 7.1(h)) is not justified. Such a requirement would unnecessarily burden busy solo practitioners who spend most days in court and may have no full-time support staff.

<sup>&</sup>lt;sup>22</sup> Id.

<sup>&</sup>lt;sup>23</sup> Id.

<sup>24</sup> Id.

<sup>&</sup>lt;sup>25</sup> The amended New Jersey rule can be found at: <a href="https://www.njcourts.gov/attorneys/assets/rules/r1-21.pdf">https://www.njcourts.gov/attorneys/assets/rules/r1-21.pdf</a> (last visited February 21, 2019).

Finally, economic conditions in the legal world and technological developments weigh against interpreting the Rules to create obstacles to the use of VLOs as long as the interests of clients, the courts, and the legal system are protected. Economic conditions and technological advances justify giving lawyers flexibility. Online research eliminates the need for a physical library. By using an Internet connection, a laptop computer, a mobile phone, and other devices, a lawyer can communicate easily with colleagues, clients, and adversaries from any location, at any time. An interpretation of the Rules should ideally accommodate these technological developments.<sup>26</sup>

# II. Is a New York Lawyer Permitted to Use the Street Address of a VLO on Letterhead, Business Cards and the Law Firm Website?

A related question is whether the lawyer may use the VLO address on her letterhead, business cards and law firm website. As noted above, NYSBA Ethics Op. 964 concluded that business cards and letterhead do not need to list a physical street address, unless they are used for advertising purposes. Even when business cards and letterhead are not used for advertising purposes, however, they must not be deceptive or misleading. <sup>27</sup> As with all attorney communications, any information contained on an attorney's website, letterhead and business cards must be truthful.

As discussed above, in our view the use of a VLO address is not inherently misleading. Accordingly, we conclude that a lawyer may use a VLO address on letterhead and business cards, so long as the use is not misleading under the circumstances. The same conclusion applies to the law firm website.

### III. Additional Ethical Considerations When Using a VLO

Although we believe that the use of VLOs is permissible in appropriate circumstances, we recognize that they carry with them certain challenges that may not be present in a traditional law firm office. Attorneys who elect to use VLOs should be mindful of these challenges and should not allow them to become obstacles to fulfilling their ethical obligations. We believe that attorneys should pay particular attention to the following ethical concerns when using a VLO.<sup>28</sup>

<sup>&</sup>lt;sup>26</sup> See generally Jordana Hausman, Who's Afraid of the Virtual Lawyers? The Role of Legal Ethics in the Growth and Regulation of Virtual Law Offices, 25 Geo. J. Legal Eth. 575 (Summer 2012).

<sup>&</sup>lt;sup>27</sup> Rule 8.4(c) (providing that a "lawyer or law firm shall not . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation").

<sup>&</sup>lt;sup>28</sup> Other ethics opinions from outside New York State highlight the broad range of ethics issues that may be raised by the use of VLOs and other nontraditional office arrangements. See, e.g., Pennsylvania Bar Committee on Legal Ethics and Professional Responsibility Formal Opinion 2010-200 ("Pa. Ethics Op. 2010-200") (applying the following rules to Pennsylvania lawyers who maintain virtual law offices: Pa. Rules 1.4 (Communication), 1.14 (Clients with Diminished Capacity), 1.6 (Confidentiality of Information), 1.18 (Duties to Prospective Clients), 5.1 (Responsibilities of Partners, Managers, and Supervisory Lawyers), 7.1 (Communications Concerning a Lawyer's Services), 7.2 (Advertising) and 7.5 (Firm Names and Letterheads)); California State Bar Standing Committee on Professional Responsibility and Conduct Formal Opinion 2012-184 ("Cal. Ethics Op. 2012-184"), 2012 WL 3182985 (applying the following California rules to VLOs: Cal. Rules 1-100, 1-300 (unauthorized practice of law), 3-100 (Confidentiality), 3-110 (Competence), 3-310 (Conflicts), and 3-500 (Communication)); North Carolina State

### a. Supervision of Subordinate Lawyers and Nonlawyers

Under Rules 5.1 and 5.3, law firms and lawyers are responsible for supervising the conduct of subordinate lawyers and nonlawyers and ensuring that their conduct complies with the Rules. These obligations apply to attorneys who use VLOs.<sup>29</sup> Given the differences between a VLO and a traditional law office, however, it may be more challenging for lawyers who use VLOs to comply with their supervisory obligations. As explained in Cal. Op. 2012-184, "supervision [in the context of a VLO] can be a challenge if Attorney and her various subordinate attorneys and employees operate out of several different physical locations." Furthermore, as a practical matter, lawyers have less control over the conduct of VLO personnel than they would over their own direct employees in a conventional physical law firm office. Thus, lawyers who use VLOs may need to take additional precautions to ensure that they are fulfilling their supervisory obligations. Notwithstanding the differences between VLOs and traditional law firms, the "[a]ttorney must take reasonable measures to ascertain that everyone under her supervision is complying with the Rules of Professional Conduct, including the duties of confidentiality and competence." <sup>31</sup>

### b. Confidentiality

Rule 1.6(a) prohibits a lawyer from "knowingly revealing confidential information," absent informed consent or other exception. In addition, Rule 1.6(c) provides that a "lawyer shall exercise reasonable care to prevent the lawyer's employees, associates and others whose services are utilized by the lawyer from disclosing or using confidential information of a client." As observed in NYSBA Op. 794 (2006):

[I]n opinions addressing office sharing among separate law firms or lawyers in solo practice ... [w]e and others have found that, depending on the facts and circumstances of a particular situation, [the confidentiality Rules] may prevent lawyers who practice separately but share office space from representing clients with differing interests. Under these opinions, with appropriate safeguards, and assuming that the arrangement is not misleading to prospective and actual clients, the sharing of merely the same leasehold, a library, an electronic research account, restrooms, a central phone system with individual lines, or a common receptionist is not sufficient, alone or in combination, to merge lawyers

Bar Formal Ethics Opinion 2005-10 "Virtual Law Practice and Unbundled Legal Services" ("N.C. Ethics Op. 2005-10") (approved January 2006), 2006 WL 980309, at \*1 (identifying "key concerns"); Illinois State Bar Opinion 12-09 "Unauthorized Practice of Law; Multijurisdictional Practice; Law Firms," 2012 WL 979607, at \*3 ("The advent of the virtual law office, or online legal practice, has raised several ethical challenges" which "should be analyzed under the framework of the Rules of Professional Conduct.") (citation omitted). Issues arising under statutes, regulations, court rules and other laws and rules may also need to be considered.

<sup>&</sup>lt;sup>29</sup> Cal. Op. 2012-184, 2012 WL 3182985, at \*7 (noting that "in all law offices, including this hypothetical VLO, attorneys have a duty to supervise subordinate attorneys, and non-attorney employees or agents").

<sup>&</sup>lt;sup>30</sup> *Id.* 

<sup>31</sup> Id. at \*7.

in separate practices into one. Acceptance of these organizations presupposes, however, that the confidences and secrets of the clients of each separate practice will not be shared or appear to be subject to sharing with lawyers working on a conflicting matter.<sup>32</sup>

A lawyer who uses the shared services and office space of a VLO to perform legal services and to meet with clients, witnesses, or other third parties must take reasonable steps to ensure that she does not expose or put the client's confidential information at risk. This should include, as appropriate, training and educating staff at the VLO on these obligations.<sup>33</sup>

#### c. Communication

Rule 1.4 requires lawyers to communicate with clients and keep them apprised of the status of their legal matters. Lawyers who use VLOs must be particularly mindful of these ethical obligations, given that the lawyers may frequently be away from the physical location that serves as their business address. Lawyers who use VLOs should also take steps to ensure that they are available to meet with and communicate with their clients and respond promptly to their requests for information.

### d. Personal Delivery and Acceptance of Service

Finally, because a significant concern underlying Section 470 and Rule 7.1(h) is the availability of an address for purposes of personal delivery and acceptance of service of process, a lawyer using the VLO's services also should provide for personal delivery and acceptance of service. This can be done either by: (i) identifying an agent for these purposes or (ii) arranging for the VLO to accept service of process on the attorney's behalf. Where a VLO is authorized to accept service of process, the attorney must ensure that the VLO communicates with the attorney concerning the receipt of any materials with sufficient promptness to meet all professional and ethical requirements.

### **CONCLUSION**

A New York lawyer may designate the street address of a VLO as the "principal law office address" for the purposes of Rule 7.1(h) provided the VLO qualifies as an office for the transaction of law business under the Judiciary Law. In addition, the lawyer may use the VLO address on business cards, letterhead and law firm website. A New York lawyer who uses a VLO must also comply with all other ethical obligations, including duties under Rules 1.4, 1.6, 5.1, 5.3, 7.1(a), 7.1(h), 7.5(a)(4), 8.4(a) and 8.4(c).

<sup>&</sup>lt;sup>32</sup> See also NYSBA Ethics Op. 939 (2012) (independent lawyers sharing office space may share computer for client-related information if they exercise reasonable care to assure that confidential information is not disclosed).

<sup>&</sup>lt;sup>33</sup> Rule 5.3(a) (requiring lawyers to supervise the work on nonlawyers).

### **ATTACHMENT 19**

### **CONGRESS**\*GOV

# H.R.6364 - Securing and Enabling Commerce Using Remote and Electronic Notarization Act of 2020

116th Congress (2019-2020)

Summary(1) Text(1) Actions(3) Titles(2) Amendments(0) Cosponsors(82) Committees(2) Related Bills(1)

There is one version of the bill.

Text available as: XML/HTML (31KB) | XML/HTML (new window) | TXT | PDF (PDF provides a complete and accurate display of this

Shown Here:

text.) ?

Introduced in House (03/23/2020)

116TH CONGRESS 2D Session

H. R. 6364

To authorize and establish minimum standards for electronic and remote notarizations that occur in or affect interstate commerce, to require any Federal court located in a State to recognize notarizations performed by a notary public commissioned by another State when the notarization occurs in or affects interstate commerce, and to require any State to recognize notarizations performed by a notary public commissioned by another State when the notarization occurs in or affects interstate commerce or when the notarization was performed under or relates to a public act, record, or judicial proceeding of the State in which the notary public was commissioned.

### IN THE HOUSE OF REPRESENTATIVES

March 23, 2020

Mr. Reschenthaler (for himself and Ms. Dean) introduced the following bill; which was referred to the Committee on Energy and Commerce, and in addition to the Committee on the Judiciary, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned

### A BILL

To authorize and establish minimum standards for electronic and remote notarizations that occur in or affect interstate commerce, to require any Federal court located in a State to recognize notarizations performed by a notary public commissioned by another State when the notarization occurs in or affects interstate commerce, and to require any State to recognize

notarizations performed by a notary public commissioned by another State when the notarization occurs in or affects interstate commerce or when the notarization was performed under or relates to a public act, record, or judicial proceeding of the State in which the notary public was commissioned.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

### SECTION 1. SHORT TITLE.

This Act may be cited as the "Securing and Enabling Commerce Using Remote and Electronic Notarization Act of 2020".

### SEC. 2. DEFINITIONS.

In this Act:

- (1) COMMISSIONED.—The term "commissioned", with respect to a notary public, includes a notary public who is appointed and licensed.
- (2) ELECTRONIC; ELECTRONIC RECORD; ELECTRONIC SIGNATURE; INFORMATION; PERSON; RECORD.—The terms "electronic", "electronic record", "electronic signature", "information", "person", and "record" have the meanings given those terms in section 106 of the Electronic Signatures in Global and National Commerce Act (15 U.S.C. 7006).
  - (3) LAW.—The term "law" includes any statute, regulation, or rule.
  - (4) NOTARIZATION.—The term "notarization" includes any act—
  - (A) that a notary public may perform under Federal law, including this Act, or under the laws of the State in which the notary public is commissioned, without regard to whether the notary public performs the act—
    - (i) with respect to a tangible or electronic record; or
    - (ii) in an individual, official, or representative capacity; and
  - (B) in which an individual making a statement or executing a record is not in the physical presence of a notary public but is able to communicate with the notary public simultaneously by sight and sound through an electronic device or process at the time of the act.
- (5) REQUIREMENT.—The term "requirement" includes a duty, a standard of care, and a prohibition.
- (6) SIMULTANEOUSLY.—The term "simultaneously", with respect to a communication between parties—
  - (A) means that each party communicates substantially simultaneously and without unreasonable interruption or disconnection; and
  - (B) includes a reasonably short delay that is inherent in, or common with respect to, the method used for the communication.
- (7) STAMP OR SEAL OF OFFICE.—The term "stamp or seal of office" means an image that—
  - (A) contains information as specified under the law of the State in which a notary public is commissioned;

- (B) a notary public uses to authenticate the notarization of a record; and
- (C) may consist of—
- (i) a physical image or impression affixed to or embossed on a tangible record; or
- (ii) an electronic image attached to, or logically associated with, an electronic record.
- (8) STATE.—The term "State"—
  - (A) means—
    - (i) any State of the United States;
    - (ii) the District of Columbia;
    - (iii) the Commonwealth of Puerto Rico;
    - (iv) any territory or possession of the United States; and
    - (v) any federally recognized Indian tribe; and
- (B) includes any executive, legislative, or judicial agency, court, department, board, office, clerk, recorder, register, commission, authority, institution, instrumentality, county, municipality, or other political subdivision of an entity described in any of clauses (i) through (v) of subparagraph (A).

# SEC. 3. AUTHORIZATION TO PERFORM AND MINIMUM STANDARDS FOR ELECTRONIC NOTARIZATION.

A notary public commissioned under the laws of a State may perform a notarization that occurs in or affects interstate commerce with respect to an electronic record, if—

- (1)\_(A) a stamp or seal of office is attached to or logically associated with the electronic record; or
- (B) the electronic signature of the notary public, and all other information required to be included under other applicable law, is attached to or logically associated with the signature or record; and
- (2) the stamp or seal of office, electronic signature, or other information described in paragraph (1) is securely bound to the electronic record in a manner that is capable of independent verification and renders any subsequent change or modification to the electronic record evident.

# SEC. 4. AUTHORIZATION TO PERFORM AND MINIMUM STANDARDS FOR REMOTE NOTARIZATION.

- (a) REQUIREMENTS OF REMOTE NOTARIZATION.—A notary public commissioned under the laws of a State may perform a notarization that occurs in or affects interstate commerce for an individual not in the physical presence of the notary public, if—
  - (1) the individual and the notary public are able to communicate simultaneously by sight and sound through an electronic device or process at the time of the notarization;
    - (2) the notary public—
      - (A) has reasonably identified the individual through—
        - (i) personal knowledge of the individual;

- (ii) not fewer than 2 distinct types of processes or services through which a third person provides a means to verify the identity of the individual through a review of public or private data sources; or
  - (iii) oath or affirmation of a credible witness who—
  - (I)\_(aa) is in the physical presence of the notary public or the individual; or
  - (bb) is able to communicate with the notary public and the individual simultaneously by sight and sound through an electronic device or process at the time of the notarization;
    - (II) has personal knowledge of the individual; and
  - (III) has been reasonably identified by the notary public under clause (i) or (ii); and
- (B) either directly or through an agent—
- (i) creates an audio and visual recording of the performance of the notarization; and
  - (ii) retains the recording created under clause (i)—
  - (I) as a notarial record during the term of the notary public's office, including renewals of that term, unless a law of the State requires a different period of retention; and
  - (II) if any laws of the State govern the content, retention, security, use, effect, and disclosure of that recording and any information contained in the recording, in accordance with those laws; and
- (3) with respect to an individual physically located outside the geographic boundaries of a State or other location subject to the jurisdiction of the United States at the time of the notarization—
  - (A) the record—
  - (i) is intended for filing with, or relates to a matter before, a court, governmental entity, public official, or other entity subject to the jurisdiction of the United States; or
  - (ii) involves property located in the territorial jurisdiction of the United States or a transaction substantially connected to the United States; and
  - (B) the notary public has no actual knowledge that the act of making the statement or signing the record is prohibited by the laws of the jurisdiction in which the individual is physically located.
- (b) Personal Appearance Satisfied.—If a State or Federal law requires an individual to appear personally before or be in the physical presence of a notary public at the time of a notarization that occurs in or affects interstate commerce, that requirement is satisfied if the individual and the notary public are not in the physical presence of each other but can communicate simultaneously by sight and sound through an electronic device or process at the time of the notarization.

#### SEC. 5. RECOGNITION OF NOTARIZATIONS IN FEDERAL COURT.

Each court of the United States shall recognize any notarization performed by a notary public commissioned under the laws of a State other than the State in which the court is located if—

- (1) the notarization occurs in or affects interstate commerce; and
- (2) (A) a stamp or seal of office is affixed or embossed on a tangible record; or
- (B) in the case of an electronic record—
- (i) a stamp or seal of office is attached to or logically associated with the electronic record; or
- (ii) the electronic signature of the notary public, and all other information required to be included under other applicable law, is attached to or logically associated with the electronic record.

# SEC. 6. RECOGNITION BY STATE OF NOTARIZATIONS PERFORMED UNDER AUTHORITY OF ANOTHER STATE.

Each State shall recognize as having the same effect under the laws of that State as if performed by a notary public of that State any notarization performed by a notary public commissioned under the laws of any other State if—

- (1)\_(A) the notarization was performed under or relates to a public act, record, or judicial proceeding of the State in which the notary public is commissioned; or
  - (B) the notarization occurs in or affects interstate commerce; and
  - (2) (A) a stamp or seal of office is affixed or embossed on a tangible record; or
  - (B) in the case of an electronic record—
  - (i) a stamp or seal of office is attached to or logically associated with the electronic record; or
  - (ii) the electronic signature of the notary public, and all other information required to be included by other applicable law, is attached to or logically associated with the electronic record.

### SEC. 7. ELECTRONIC AND REMOTE NOTARIZATION NOT REQUIRED.

Nothing in this Act may be construed to require a notary public commissioned under the laws of a State to perform a notarization—

- (1) with respect to an electronic record;
- (2) for an individual not in the physical presence of the notary public; or
- (3) using a technology that the notary public has not selected.

# SEC. 8. RIGHTS OF AGGRIEVED PERSONS NOT AFFECTED; STATE LAWS ON THE PRACTICE OF LAW NOT AFFECTED.

- (a) IN GENERAL.—The validity and recognition of a notarization under this Act may not be construed to prevent an aggrieved person from seeking to invalidate a record or transaction that is the subject of a notarization or from seeking other remedies based on State or Federal law other than this Act for any reason not addressed in this Act, including on the basis—
  - (1) that a person did not, with present intent to authenticate or adopt a record—
    - (A) execute or adopt on the record a tangible symbol; or
    - (B) attach to or logically associate with the record an electronic signature;

- (2) that an individual was incompetent, lacked authority or capacity to execute the record, or did not knowingly and voluntarily execute a record; or
- (3) of fraud, forgery, mistake, misrepresentation, impersonation, duress, undue influence, or other invalidating cause.
- (b) RULE OF CONSTRUCTION.—Nothing in this Act may be construed to affect a State law governing, authorizing, or prohibiting the practice of law.

#### SEC. 9. EXCEPTION TO PREEMPTION.

A State law shall not be affected by a provision of section 3 or 4 of this Act to the extent that the law—

- (1) constitutes an enactment or adoption of the Revised Uniform Law on Notarial Acts, as approved and recommended for enactment in all States by the National Conference of Commissioners on Uniform State Laws in 2018, except that a modification to such Act enacted by a State shall be preempted to the extent the modification is inconsistent with this Act or would not be permitted under paragraph (2); or
- (2) specifies additional or alternative procedures or requirements for the performance of notarizations with respect to electronic records or for individuals not in the physical presence of a notary public at the time of the notarization, if those additional or alternative procedures or requirements—
  - (A) are consistent with this Act; and
  - (B) do not accord greater legal effect to the implementation or application of a specific technology or technical specification for performing those notarizations.

# SEC. 10. VALIDITY OF NOTARIZATIONS; STANDARD OF CARE; SPECIAL NOTARIAL COMMISSIONS; SAVINGS CLAUSE.

- (a) VALIDITY NOT AFFECTED.—The failure of a notary public to meet a requirement specified in this Act shall not invalidate or impair the recognition of a notarization performed by the notary public.
- (b) RULE OF CONSTRUCTION.—This Act may not be construed to create a public or private cause of action or remedy.
- (c) STATE STANDARDS OF CARE; AUTHORITY OF STATE COMMISSIONING OFFICIALS.—Nothing in this Act may be construed to prevent a State, or a commissioning official of a State, from—
  - (1) adopting a requirement in this Act as a duty or standard of care under the laws of that State or sanctioning a notary public for breach of such a duty or standard of care;
  - (2) establishing requirements and qualifications for denying, refusing to renew, revoking, suspending, or imposing a condition on a commission as a notary public; or
  - (3) creating or designating a class or type of commission, or requiring an endorsement or other authorization to be received by a notary public, as a condition on the authority to perform notarial acts with respect to electronic records or for individuals not in the physical presence of the notary public.
- (d) SPECIAL COMMISSIONS CREATED BY A STATE.—A notary public commissioned under the laws of a State may not perform a notarization under section 3 or 4 of this Act if—

- (1) the State has enacted a law that creates or designates a class or type of commission, or requires an endorsement or other authorization to be received by a notary public, as a condition on the authority to perform notarial acts with respect to electronic records or for individuals not in the physical presence of the notary public; and
- (2) the commission of the notary public is not of the class or type or the notary public has not received the endorsement or other authorization.
- (e) SAVINGS CLAUSE.—This Act shall not affect the validity of a notarization performed before the date of enactment of this Act.

#### SEC. 11. SEVERABILITY.

If any provision of this Act or the application of such a provision to any person or circumstance is held to be invalid or unconstitutional, the remainder of this Act and the application of the provisions of this Act to other persons or circumstances shall not be affected by that holding.



## S.3533 - Securing and Enabling Commerce Using Remote and Electronic Notarization Act of 2020

116th Congress (2019-2020)

Summary(1) Text(1) Actions(1) Titles(2) Amendments(0) Cosponsors(5) Committees(1) Related Bills(1)

There is one version of the bill.

Text available as: XML/HTML (30KB) | XML/HTML (new window) (25KB) | TXT (19KB) | PDF (325KB) (PDF provides a complete and accurate display of this text.) ?

Shown Here:

Introduced in Senate (03/18/2020)

116TH CONGRESS 2D Session S. 3533

To authorize and establish minimum standards for electronic and remote notarizations that occur in or affect interstate commerce, to require any Federal court located in a State to recognize notarizations performed by a notary public commissioned by another State when the notarization occurs in or affects interstate commerce, and to require any State to recognize notarizations performed by a notary public commissioned by another State when the notarization occurs in or affects interstate commerce or when the notarization was performed under or relates to a public act, record, or judicial proceeding of the State in which the notary public was commissioned.

#### IN THE SENATE OF THE UNITED STATES

March 18, 2020

Mr. Cramer introduced the following bill; which was read twice and referred to the Committee on the Judiciary

### A BILL

To authorize and establish minimum standards for electronic and remote notarizations that occur in or affect interstate commerce, to require any Federal court located in a State to recognize notarizations performed by a notary public commissioned by another State when the notarization occurs in or affects interstate commerce, and to require any State to recognize notarizations performed by a notary public commissioned by another State when the notarization occurs in or affects interstate commerce or when the notarization was performed under or relates to a public act, record, or judicial proceeding of the State in which the notary public was commissioned.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Securing and Enabling Commerce Using Remote and Electronic Notarization Act of 2020".

#### SEC. 2. DEFINITIONS.

In this Act:

- (1) COMMISSIONED.—The term "commissioned", with respect to a notary public, includes a notary public who is appointed and licensed.
- (2) ELECTRONIC; ELECTRONIC RECORD; ELECTRONIC SIGNATURE; INFORMATION; PERSON; RECORD.—The terms "electronic", "electronic record", "electronic signature", "information", "person", and "record" have the meanings given those terms in section 106 of the Electronic Signatures in Global and National Commerce Act (15 U.S.C. 7006).
  - (3) LAW.—The term "law" includes any statute, regulation, or rule.
  - (4) NOTARIZATION.—The term "notarization" includes any act—
  - (A) that a notary public may perform under Federal law, including this Act, or under the laws of the State in which the notary public is commissioned, without regard to whether the notary public performs the act—
    - (i) with respect to a tangible or electronic record; or
    - (ii) in an individual, official, or representative capacity; and
  - (B) in which an individual making a statement or executing a record is not in the physical presence of a notary public but is able to communicate with the notary public simultaneously by sight and sound through an electronic device or process at the time of the act.
- (5) REQUIREMENT.—The term "requirement" includes a duty, a standard of care, and a prohibition.
- (6) SIMULTANEOUSLY.—The term "simultaneously", with respect to a communication between parties—
  - (A) means that each party communicates substantially simultaneously and without unreasonable interruption or disconnection; and
  - (B) includes a reasonably short delay that is inherent in, or common with respect to, the method used for the communication.
- (7) STAMP OR SEAL OF OFFICE.—The term "stamp or seal of office" means an image that—
  - (A) contains information as specified under the law of the State in which a notary public is commissioned;
    - (B) a notary public uses to authenticate the notarization of a record; and
    - (C) may consist of—
      - (i) a physical image or impression affixed to or embossed on a tangible record; or
    - (ii) an electronic image attached to, or logically associated with, an electronic record.
  - (8) STATE.—The term "State"—
    - (A) means—
      - (i) any State of the United States;
      - (ii) the District of Columbia;

- (iii) the Commonwealth of Puerto Rico;
- (iv) any territory or possession of the United States; and
- (v) any federally recognized Indian tribe; and
- (B) includes any executive, legislative, or judicial agency, court, department, board, office, clerk, recorder, register, commission, authority, institution, instrumentality, county, municipality, or other political subdivision of an entity described in any of clauses (i) through (v) of subparagraph (A).

### SEC. 3. AUTHORIZATION TO PERFORM AND MINIMUM STANDARDS FOR ELECTRONIC NOTARIZATION.

A notary public commissioned under the laws of a State may perform a notarization that occurs in or affects interstate commerce with respect to an electronic record, if—

- (1)\_(A) a stamp or seal of office is attached to or logically associated with the electronic record; or
- (B) the electronic signature of the notary public, and all other information required to be included under other applicable law, is attached to or logically associated with the signature or record; and
- (2) the stamp or seal of office, electronic signature, or other information described in paragraph (1) is securely bound to the electronic record in a manner that is capable of independent verification and renders any subsequent change or modification to the electronic record evident.

### SEC. 4. AUTHORIZATION TO PERFORM AND MINIMUM STANDARDS FOR REMOTE NOTARIZATION.

- (a) REQUIREMENTS OF REMOTE NOTARIZATION.—A notary public commissioned under the laws of a State may perform a notarization that occurs in or affects interstate commerce for an individual not in the physical presence of the notary public, if—
  - (1) the individual and the notary public are able to communicate simultaneously by sight and sound through an electronic device or process at the time of the notarization;
    - (2) the notary public—
      - (A) has reasonably identified the individual through—
        - (i) personal knowledge of the individual;
      - (ii) not fewer than 2 distinct types of processes or services through which a third person provides a means to verify the identity of the individual through a review of public or private data sources; or
        - (iii) oath or affirmation of a credible witness who—
          - (I) (aa) is in the physical presence of the notary public or the individual; or
        - (bb) is able to communicate with the notary public and the individual simultaneously by sight and sound through an electronic device or process at the time of the notarization;
          - (II) has personal knowledge of the individual; and
        - (III) has been reasonably identified by the notary public under clause (i) or (ii); and
      - (B) either directly or through an agent—
        - (i) creates an audio and visual recording of the performance of the notarization; and
        - (ii) retains the recording created under clause (i)—

- (I) as a notarial record during the term of the notary public's office, including renewals of that term, unless a law of the State requires a different period of retention; and
- (II) if any laws of the State govern the content, retention, security, use, effect, and disclosure of that recording and any information contained in the recording, in accordance with those laws; and
- (3) with respect to an individual physically located outside the geographic boundaries of a State or other location subject to the jurisdiction of the United States at the time of the notarization

#### (A) the record—

- (i) is intended for filing with, or relates to a matter before, a court, governmental entity, public official, or other entity subject to the jurisdiction of the United States; or
- (ii) involves property located in the territorial jurisdiction of the United States or a transaction substantially connected to the United States; and
- (B) the notary public has no actual knowledge that the act of making the statement or signing the record is prohibited by the laws of the jurisdiction in which the individual is physically located.
- (b) Personal Appearance Satisfied.—If a State or Federal law requires an individual to appear personally before or be in the physical presence of a notary public at the time of a notarization that occurs in or affects interstate commerce, that requirement is satisfied if the individual and the notary public are not in the physical presence of each other but can communicate simultaneously by sight and sound through an electronic device or process at the time of the notarization.

#### SEC. 5. RECOGNITION OF NOTARIZATIONS IN FEDERAL COURT.

Each court of the United States shall recognize any notarization performed by a notary public commissioned under the laws of a State other than the State in which the court is located if—

- (1) the notarization occurs in or affects interstate commerce; and
- (2) (A) a stamp or seal of office is affixed or embossed on a tangible record; or
- (B) in the case of an electronic record—
- (i) a stamp or seal of office is attached to or logically associated with the electronic record; or
- (ii) the electronic signature of the notary public, and all other information required to be included under other applicable law, is attached to or logically associated with the electronic record.

### SEC. 6. RECOGNITION BY STATE OF NOTARIZATIONS PERFORMED UNDER AUTHORITY OF ANOTHER STATE.

Each State shall recognize as having the same effect under the laws of that State as if performed by a notary public of that State any notarization performed by a notary public commissioned under the laws of any other State if—

- (1) (A) the notarization was performed under or relates to a public act, record, or judicial proceeding of the State in which the notary public is commissioned; or
  - (B) the notarization occurs in or affects interstate commerce; and
  - (2) (A) a stamp or seal of office is affixed or embossed on a tangible record; or
  - (B) in the case of an electronic record—

- (i) a stamp or seal of office is attached to or logically associated with the electronic record; or
- (ii) the electronic signature of the notary public, and all other information required to be included by other applicable law, is attached to or logically associated with the electronic record.

#### SEC. 7. ELECTRONIC AND REMOTE NOTARIZATION NOT REQUIRED.

Nothing in this Act may be construed to require a notary public commissioned under the laws of a State to perform a notarization—

- (1) with respect to an electronic record;
- (2) for an individual not in the physical presence of the notary public; or
- (3) using a technology that the notary public has not selected.

### SEC. 8. RIGHTS OF AGGRIEVED PERSONS NOT AFFECTED; STATE LAWS ON THE PRACTICE OF LAW NOT AFFECTED.

- (a) IN GENERAL.—The validity and recognition of a notarization under this Act may not be construed to prevent an aggrieved person from seeking to invalidate a record or transaction that is the subject of a notarization or from seeking other remedies based on State or Federal law other than this Act for any reason not addressed in this Act, including on the basis—
  - (1) that a person did not, with present intent to authenticate or adopt a record—
    - (A) execute or adopt on the record a tangible symbol; or
    - (B) attach to or logically associate with the record an electronic signature;
  - (2) that an individual was incompetent, lacked authority or capacity to execute the record, or did not knowingly and voluntarily execute a record; or
  - (3) of fraud, forgery, mistake, misrepresentation, impersonation, duress, undue influence, or other invalidating cause.
- (b) RULE OF CONSTRUCTION.—Nothing in this Act may be construed to affect a State law governing, authorizing, or prohibiting the practice of law.

#### SEC. 9. EXCEPTION TO PREEMPTION.

A State law shall not be affected by a provision of section 3 or 4 of this Act to the extent that the law—

- (1) constitutes an enactment or adoption of the Revised Uniform Law on Notarial Acts, as approved and recommended for enactment in all States by the National Conference of Commissioners on Uniform State Laws in 2018, except that a modification to such Act enacted by a State shall be preempted to the extent the modification is inconsistent with this Act or would not be permitted under paragraph (2); or
- (2) specifies additional or alternative procedures or requirements for the performance of notarizations with respect to electronic records or for individuals not in the physical presence of a notary public at the time of the notarization, if those additional or alternative procedures or requirements—
  - (A) are consistent with this Act; and
  - (B) do not accord greater legal effect to the implementation or application of a specific technology or technical specification for performing those notarizations.

### SEC. 10. VALIDITY OF NOTARIZATIONS; STANDARD OF CARE; SPECIAL NOTARIAL COMMISSIONS; SAVINGS CLAUSE.

(a) VALIDITY NOT AFFECTED.—The failure of a notary public to meet a requirement specified in this Act shall not invalidate or impair the recognition of a notarization performed by the notary

public.

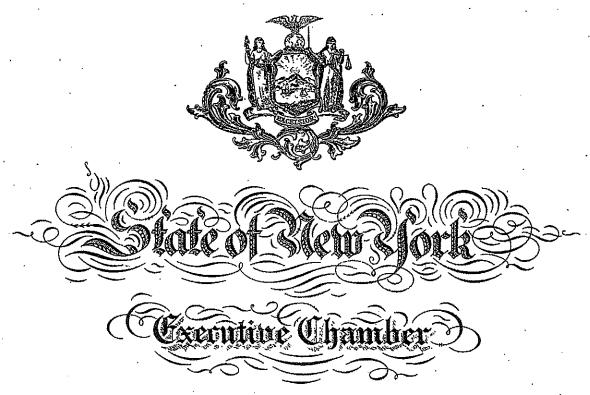
- (b) RULE OF CONSTRUCTION.—This Act may not be construed to create a public or private cause of action or remedy.
- (c) STATE STANDARDS OF CARE; AUTHORITY OF STATE COMMISSIONING OFFICIALS.

  —Nothing in this Act may be construed to prevent a State, or a commissioning official of a State, from
  - (1) adopting a requirement in this Act as a duty or standard of care under the laws of that State or sanctioning a notary public for breach of such a duty or standard of care;
  - (2) establishing requirements and qualifications for denying, refusing to renew, revoking, suspending, or imposing a condition on a commission as a notary public; or
  - (3) creating or designating a class or type of commission, or requiring an endorsement or other authorization to be received by a notary public, as a condition on the authority to perform notarial acts with respect to electronic records or for individuals not in the physical presence of the notary public.
- (d) Special Commissions Created By A State.—A notary public commissioned under the laws of a State may not perform a notarization under section 3 or 4 of this Act if—
  - (1) the State has enacted a law that creates or designates a class or type of commission, or requires an endorsement or other authorization to be received by a notary public, as a condition on the authority to perform notarial acts with respect to electronic records or for individuals not in the physical presence of the notary public; and
  - (2) the commission of the notary public is not of the class or type or the notary public has not received the endorsement or other authorization.
- (e) SAVINGS CLAUSE.—This Act shall not affect the validity of a notarization performed before the date of enactment of this Act.

#### SEC. 11. SEVERABILITY.

If any provision of this Act or the application of such a provision to any person or circumstance is held to be invalid or unconstitutional, the remainder of this Act and the application of the provisions of this Act to other persons or circumstances shall not be affected by that holding.

### **ATTACHMENT 20**



No. 202.7

#### EXECUTIVE ORDER

#### Continuing Temporary Suspension and Modification of Laws Relating to the Disaster Emergency

WHEREAS, on March 7, 2020, I issued Executive Order Number 202, declaring a State disaster emergency for the entire State of New York;

WHEREAS, both travel-related cases and community contact transmission of COVID-19 have been documented in New York State and are expected to be continue;

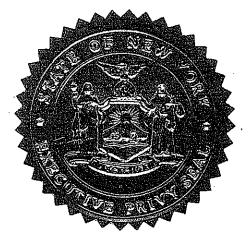
WHEREAS, in order to facilitate the most timely and effective response to the COVID 19 emergency disaster, it is critical for New York State to be able to act quickly to gather, coordinate, and deploy goods, services, professionals, and volunteers of all kinds; and

NOW, THEREFORE, I, Andrew M. Cuomo, Governor of the State of New York, by virtue of the authority vested in me by Section 29-a of Article 2-B of the Executive Law to temporarily suspend or modify any statute, local law, ordinance, order, rule, or regulation, or parts thereof, of any agency during a State disaster emergency, if compliance with such statute, local law, ordinance, order, rule, or regulation would prevent, hinder, or delay action necessary to cope with the disaster emergency or if necessary to assist or aid in coping with such disaster, I hereby temporarily suspend or modify, for the period from the date of this Executive Order through April 18, 2020 the following:

• The suspensions made to the Public Officer's Law, including provisions of Section 73 and Section 74, by Executive Order 202.6 are hereby modified to require that such suspensions and modifications shall only be valid with respect to a person hired for a nominal or no salary or in a volunteer capacity.

IN ADDITION, by virtue of the authority vested in me by Section 29-a of Article 2-B of the Executive Law to issue any directive during a disaster emergency necessary to cope with the disaster, I hereby issue the following directives for the period from the date of Executive Order through April 18, 2020:

- O The Notary may repeat the notarization of the original signed document as of the date of execution provided the Notary receives such original signed document together with the electronically notarized copy within thirty days after the date of execution.
- Effective March 21, 2020 at 8 p.m. and until further notice, all barbershops, hair salons, tattoo
  or piercing parlors and related personal care services will be closed to members of the public.
  This shall also include nail technicians, cosmetologists and estheticians, and the provision of
  electrolysis, laser hair removal services, as these services cannot be provided while maintaining
  social distance.
- The provisions of Executive Order 202.6 requiring in-person work environment restrictions are modified as follows: Effective March 21, 2020 at 8 p.m. and until further notice all businesses and not-for-profit entities in the state shall utilize, to the maximum extent possible, any telecommuting or work from home procedures that they can safely utilize. Each employer shall reduce the in-person workforce at any work locations by 75% no later than March 21 at 8 p.m. Any essential business or entity providing essential services or functions shall not be subject to the in-person restrictions.



GIVEN under my hand and the Privy Seal of the State

in the City of Albany the nineteenth day of

March in the year two thousand twenty.

BY THE GOVERNOR

Secretary to the Governor

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ROSSANA ROSADO SECRETARY OF STATE

REVISED: March 31, 2020

# GUIDANCE TO NOTARIES CONCERNING EXECUTIVE ORDER 202.7

#### **EXECUTIVE ORDER**

In response to the COVID-19 (Novel Coronavirus) public health emergency, on March 19, 2020 Governor Cuomo signed <a href="Executive Order 202.7">Executive Order 202.7</a>, which authorizes notary publics to officiate documents remotely. Specific procedures must be followed to remotely notarize a document. To help the public and notaries public understand the Executive Order, the Department has prepared this guidance.

#### WHAT IS ALLOWED?

The Executive Order allows a notary public to witness a document being signed, using audiovideo technology, and to then notarize the document.

#### WHAT IS REQUIRED?

To remotely notarize a document, the following conditions must be satisfied:

- 1. The person seeking the Notary's services, if not personally known to the Notary, must present a valid photo ID to the Notary during the video conference, not merely transmit it prior to or after:
- 2. The video conference must allow for direct interaction between the person and the Notary (e.g. no pre-recorded videos of the person signing);
- The person must affirmatively represent that he or she is physically situated in the State of New York:
- The person must transmit by fax or electronic means a legible copy of the signed document directly to the Notary on the same date it was signed;
- The Notary may notarize the transmitted copy of the document and transmit the same back to the person; and
- 6. The Notary may repeat the notarization of the original signed document as of the date of execution provided the Notary receives such original signed document together with the electronically notarized copy within thirty days after the date of execution.

#### **ADDITIONAL CONSIDERATIONS**

Notary publics using audio-video technology must continue to follow existing requirements for notarizations that were unaltered by the Executive Order. This includes, but is not limited to, placing the notary's expiration date and county where the notary is commissioned upon the document.

- > If the notary and signatory are in different counties, the notary should indicate on the document the county where each person is located.
- > An electronically transmitted document sent to the notary can be sent in any electronic format (e.g., PDF, JPEG, TIFF), provided it is a legible copy.
- > The notary must print and sign the document, in ink, and may not use an electronic signature to officiate the document.
- ➤ The signatory may use an electronic signature, provided the document can be signed electronically under the Electronic Signatures and Records Act (Article 3 of the State Technology Law). If the signer uses an electronic signature, the notary must witness the electronic signature being applied to the document, as required under Executive Order 202.7.
- > The Executive Order does not authorize other officials to administer oaths or to take acknowledgments, and only applies to notary publics commissioned by the Secretary of State's office.
- Following remote notarization, if the notary receives the original document within 30 days, the notary may notarize the document again (i.e., physically affixing a notary stamp and hand signing the document) using the original remote notary date.
- Additionally, when performing remote notarization pursuant to this Executive Order, the Department recommends the following best practices. (However, not following these two recommendations *will not* invalidate the act or be cause for discipline):
  - Keep a notary log of each remote notarization;
  - Indicate on the document that the notarization was made pursuant to Executive Order 202.7.

If you have questions regarding notary practices, please email them to the Department at: <a href="mailto:licensing@dos.ny.gov">licensing@dos.ny.gov</a> or contact (518) 474-4429. Call Center Representatives are available from 8:30am to 4:30pm Monday through Friday except on Legal Holidays.

#### **ALBANY OFFICE:**

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