

# LABOR AND EMPLOYMENT

# ALERT

OCTOBER 29, 2020

## New Jersey Executive Order Sets Health and Safety Standards for Employers

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In response to businesses increasingly opening their doors to in-person employees and customers, the Governor of New Jersey has expanded the application of previously issued Executive Orders to address the anticipated new wave of Covid-19. On October 28, 2020, New Jersey Governor Phil Murphy issued Executive Order No. 192, which sets forth health and safety standards for all businesses, non-profits, and governmental or educational entities. The protocols are set to take effect on November 5, 2020.

➤ *Executive Order No. 192, Governor Phil Murphy*  
<https://nj.gov/infobank/eo/056murphy/pdf/EO-192.pdf>

Along with expanding workplace and business health and safety standards, the Executive Order directs the Department of Labor and Workforce Development (“NJLDR”) to address worker complaints by establishing an online complaint form and developing an investigation and inspection protocol for complaints. As outlined below, the Executive Order also addresses workplace safety standards for Covid-19 that have yet to be addressed by the U.S. Occupational Safety and Health Administration (“OSHA”).

### OVERALL PROVISIONS

Pursuant to the Executive Order, New Jersey employers whose employees or customers are present at the workplace must take the following steps:

- Require individuals to stand six feet apart to the maximum extent possible, or install physical barriers if distancing is not possible, and to wear masks;

- Require employees, customers, and anyone else in the workplace to wear masks while on the premises, except for individuals under two years old or if impracticable (ex: when eating, drinking, or providing a service that prevents wearing a mask)<sup>1</sup>;
- Conduct daily health screenings of employees, such as visual employee symptom checks, temperature checks, self-assessment checklists, or health questionnaires;
- Provide masks and sanitization products;
- Ensure that employees practice regular hand washing and are provided adequate time to do so;
- Routinely clean and disinfect high-contact surfaces, such as safety equipment, restrooms, doorknobs, and handrails; and
- Send home employees who appear to have symptoms of Covid-19, in compliance with State and federal sick leave laws, and notify employees of any known exposure to the virus.

Employers of health care workers and essential workers are exempted from these requirements to the extent they interfere with the workers’ duties.

### ADDITIONAL DETAILS

The Executive Order anticipates these new protocols will require training for employers and employees;

<sup>1</sup> This section is inapplicable to schools with in-person instruction, whose standards are governed by Executive Order No. 175.

however, the Executive Order does not provide any timeline for when this training will be available with NJDOL support.

Employers can prevent employees or customers who decline to wear a facemask from entering the workplace, unless such denial would violate State or federal law. At the same time, employers must be cognizant of their obligations under the ADA and the more restrictive New Jersey Law Against Discrimination to avoid discriminating against employees who may have a disability that prevents them from being able to wear a mask. Employers have a continued duty to reasonably accommodate those employees under applicable law. Additionally, employers must maintain and safeguard employee medical information obtained under this Executive Order, such as when conducting health screening or contact tracing, pursuant to the ADA's standards.

One other wrinkle in the Executive Order is Section 1.g, which specifies that employers must follow the requirements of federal leave laws<sup>2</sup> and the New Jersey Earned Sick Leave Law ("ESLL") when sending home employees who develop Covid-19 symptoms while at work. Employers should take note of the voluminous ESLL regulations promulgated by the NJDOL that became effective earlier this year. Accordingly, if employees are sent home under the Executive Order, employers should refer to the ESLL regulations on compensating such employees and/or whether paid sick leave is available to cover the absence.

Notably, Executive Order 192 leaves in place previously issued Executive Orders governing specific business sectors and essential workers. Employers must comply with previously issued Executive Orders where they are consistent with Order No. 192, and with prior

Orders to the extent they are inconsistent with Paragraph 1 of Order No. 192, unless otherwise specified.<sup>3</sup>

The Executive Order sets forth a process for the State to receive complaints, investigate, and penalize employers who fail to follow these protocols. Penalties could be as drastic as business closure or fines of up to \$1,000.

#### KEY QUESTIONS

Executive Order 192 raises important questions that are not addressed in the Order, such as:

- What constitutes a good faith compliance effort;
- How "impracticability" will be determined under the Order;
- The scope and breadth of NJDOL investigations and inspections and the rights of employers and businesses subjected to the same;
- Whether an employer's failure to implement these standards at a worksite will allow an employee to pursue claims outside the workers' compensation arena for work-related Covid-19 cases; and,
- Whether OSHA will find that New Jersey employers who fail to implement these standards have violated the general duty clause to provide a workplace "free from recognized hazards that are causing or are likely to cause death or serious physical harm."<sup>4</sup> ◆

<sup>2</sup> This is a reference to leave available under the Emergency Paid Sick Leave Act and Emergency Family and Medical Leave Expansion Act, prominent parts of the Families First Coronavirus Response Act, covered at length in our earlier client alert – <http://www.schnader.com/wp-content/uploads/2020/04/COVID-19-The-Department-of-Labor-Issues-FFCRA-Regulations.pdf>.

<sup>3</sup> The prior Executive Orders govern the following industries: 122 - Essential Retail Business and Industries; 125 - NJ TRANSIT, Private Carriers, and Restaurants; 142 - Non-Essential Retail; 147 - State Parks and Forests, as well as county parks; 149 - Child Care Services; 155 - Institutions of Higher Education; 157 - Indoor Recreational Facilities; 165 - Additional restrictions on NJ TRANSIT and Private Carriers; 175 - New Jersey's Schools; 181 - Gyms and Indoor Amusement and Water Parks; and 183 - Indoor Dining.

<sup>4</sup> See our earlier client alert addressing issues involving Covid-19 as a work-related injury under OSHA – <https://www.schnader.com/blog/determining-whether-covid-19-illnesses-are-work-related/>.

*This Alert is based on information available at the time of publishing. It is subject to change. Business leaders should consult with counsel and refer to government websites and publications for the most up-to-date information.*

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