May 28, 2021

New Jersey Executive Orders 242 and 243 Reduce COVID-19 Workplace Restrictions

In an effort to support New Jersey businesses open to the public in advance of the Memorial Day weekend and summer business season, New Jersey Governor Phil Murphy signed Executive Order (EO) 242 on May 24. Two days later, on May 26, the governor signed EO 243 to address gaps and concerns in EO 242 relating to businesses and workplaces not open to the public. These orders jointly relax and rescind several COVID-19-related restrictions placed on New Jersey businesses and enable employers to move closer to pre-COVID-19 work capacity and business operations.

Executive Order 242

Pursuant to EO 242, effective Friday, May 28:

- Fully vaccinated individuals are no longer required to wear masks or maintain 6-foot social distancing in indoor public spaces.
- Restaurants, bars, and other food and beverage establishments are no longer required to space tables 6 feet apart, and patrons are allowed to order and consume food and beverages while standing.
- Retail establishments, personal-care services, health clubs, recreational and entertainment businesses, casinos, and racetracks may operate at full capacity with no indoor or outdoor occupancy limitations.
- Sports and entertainment venues with fixed-seating capacities of 1,000 or greater may operate their outdoor spaces at full capacity with no occupancy limitation and may operate their indoor spaces at 30% capacity.
- Indoor and outdoor dance floors, valet parking, and communal play areas in indoor malls are permitted to open.

EO 242 also provides that, effective Friday, June 4:

- Occupancy limitations are rescinded for indoor gatherings, including political activities, weddings, funerals, memorial services, commercial gatherings, gatherings in private residences, performances at indoor entertainment centers, catered events, and athletic practices and competitions.
- Sports and entertainment venues with fixed-seating capacities of 1,000 or greater may operate their indoor spaces at full capacity with no occupancy limitation.

EO 242 defines indoor public spaces as employer worksites that open their indoor spaces to the public for the purposes of sale of goods, attendance at an event or activity, or provision of services. The order also sets forth that it does not apply to healthcare settings, long-term care facilities, correctional facilities, homeless shelters, any form of public transportation

(including planes, buses, and trains), public-facing state offices, child care centers/facilities, youth summer camps, schools, or "employers who do not open their indoor spaces to the public, including warehousing and manufacturing facilities." In all of those settings, masks and social distancing are still required.

The provisions relating to employers who do not open their indoor spaces to the public spurred confusion and objections from many private New Jersey businesses. As a result, on May 26, Governor Murphy signed EO 243, which modified EO 242 with regard to workplaces not open to the public.

Executive Order 243

Pursuant to EO 243, effective June 4, workplaces not open to the public:

- are not mandated to require employees to wear face masks or socially distance at the worksite, provided employees provide proof that they are fully vaccinated; and

- are permitted to allow customers, visitors, and other authorized individuals to enter the worksite without a mask and without practicing social distancing, regardless of their vaccination status.

Employees who are not fully vaccinated or cannot prove vaccination must still wear masks and practice social distancing.

While not as well publicized, but perhaps more important for many office-based businesses, EO 243 also rescinds paragraphs 10 and 11 of EO 107, which required employers to accommodate remote/teleworking work arrangements and to reduce on-site staff to the minimal number necessary to ensure essential functions of the business continued. The restrictions of EO 107 have impaired office-based businesses from returning to office settings at full capacity and, in some instances, impacted productivity. With the lifting of these restrictions, office-based businesses can require employees to return to the office and need only accommodate remote/teleworking work arrangements where an accommodation request is supported by medical documentation.

While EOs 242 and 243 relax the mask and social-distancing rules for employers, both orders permit employers to implement stricter protocols, including mandating masks and social distancing. EOs 242 and 243 also state that individuals who choose to continue to wear masks or socially distance shall not be discriminated or retaliated against in any way. Employers must continue other COVID-19 protocols mandated by EO 192 (*e.g.,* daily health and temperature checks, routine cleaning and disinfecting, separation of employees with COVID-19 and notification to exposed employees).

Takeaways

Employers must determine whether to change their current mask and social-distancing policies based on a number of factors, including whether their business is open to the public and the percentage of employees who are fully vaccinated. Employers wishing to move away from remote/teleworking work arrangements and bring staff back into the office may do so pursuant to EO 243, provided they continue to comply with other COVID-19 orders that remain in effect.

While EO 243 permits employers to seek proof of vaccination status from employees without violating HIPAA or other privacy laws, EO 242 presents concerns regarding the role of employers with businesses open to the public where vaccination status of customers and patrons is not discernible. As it currently stands, Governor Murphy expects the public to behave on the "honor system" and continue to wear masks and social distance if they have not been fully vaccinated. This poses certain risks to businesses open to the public with regard to safeguarding employees from COVID-19 exposure.

Since concerns and necessary decisions are inherently part of this ever-changing landscape, employers should consult with experienced employment counsel before modifying their current COVID-19 protocols.

For more Day Pitney alerts and articles related to the impact of COVID-19, as well as information from other reliable sources, please visit our COVID-19 Resource Center.

COVID-19 DISCLAIMER: As you are aware, as a result of the COVID-19 pandemic, things are changing quickly and the effect, enforceability and interpretation of laws may be affected by future events. The material set forth in this document is not an unequivocal statement of law, but instead represents our best interpretation of where things stand as of the date of first publication. We have not attempted to address the potential impacts of all local, state and federal orders that may have been issued in response to the COVID-19 pandemic.

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