



ACCNJ LEGAL & INSURANCE UPDATE

Political Speech in the Workplace

With the election only a day away we wanted to refer members to the Bulletin issued on October 14 addressing the timely topic of political speech in the workplace. The Bulletin discusses key legal concepts that impact an employer's right to limit political expression at work. A copy of the Bulletin can be accessed here: [Bulletin-99-2020 "Establishing Workplace Boundaries for Political Speech During the Election"](#).

Of course, feel free to reach out with any questions and most important ...**don't forget to vote!**

Governor Murphy Issues Executive Order 192 to Protect NJ's Workforce

- On October 29, ACCNJ issued an Alert on [Executive Order 192](#), which imposes mandatory health and safety protocols for all industries in the private and public sectors. The new safety protocols go into effect at **6:00am Thursday, November 5**. Executive Order 192 performs three primary functions: (1) establishing minimum safety protocols applicable to all industries; (2) providing enforcement mechanisms for those protocols; and (3) authorizing the Commissioner of the Department of Labor and Workforce Development (DOLWD) to establish compliance and safety training. Below, we have outlined various components of EO 192 and conclude with a discussion on how it interacts with EO 142 (which established safety protocols for construction sites).

A. Overview of Executive Order 192

1. Minimum Safety Requirements. All employers who require or permit their employees to be physically present at a worksite must abide by the minimum safety requirements in EO 192. Key themes include:

- **Social Distancing.** Requiring 6 feet of separation to the maximum extent possible. If 6 feet of separation is not feasible, physical barriers should be installed between workstations.
- **Facemasks.** All employees on a worksite must wear a facemask. Notable exceptions include when it is impractical (i.e., eating, drinking), and when employees are situated at their workstation and more than 6 feet apart from other employees. EO 192 also addresses the need to provide reasonable accommodations under the ADA and NJ Law Against Discrimination (NJLAD); however, unlike previous executive orders, EO 192 expressly permits employers to now ask for medical documentation supporting an accommodation request. The facemask rules also apply to customers and visitors but requesting supporting medical documentation from a customer or visitor is still prohibited.
- **Providing Facemasks and Sanitizing Materials.** Employers bear the costs of providing facemasks to employees and sanitization materials for all persons on a worksite. Sanitization materials include hand sanitizers with at least 60% alcohol or sanitizing wipes approved by the US EPA.
- **Hand Hygiene.** Employers must ensure employees have access to adequate handwashing facilities and should provide "break time for repeated handwashing throughout the workday." Requiring employees to wear gloves is permissible, but not mandatory.
- **Screening.** Prior to each shift, employers must conduct daily health checks of employees (i.e.,

temperature screening, visual assessments or self-assessment checklists/questionnaires). All screening must be consistent with confidentiality requirements under applicable laws (i.e., the ADA and NJLAD) and guidance from the EEOC and NJ Division on Civil Rights.

Less novel, and somewhat obvious requirements include sending home sick employees, notifying other employees of known exposures (subject to confidentiality requirements), routinely cleaning and disinfecting high-touch areas, and following guidelines and directives issued by NJ DOH, CDC and OSHA.

2. Enforcement. The executive order authorizes the Commissioner of the DOLWD, in consultation with the Commissioner of the DOH, to establish mechanisms for receiving, investigating and resolving complaints of noncompliance. EO 192 indicates employers will be provided an opportunity to correct alleged or confirmed deficiencies. The process eventually established by the DOLWD and DOH may include workplace inspections, interviews and subpoenaing information. Notably, EO 192 expressly states it does not create a private right of action (see §14). This would prevent an employee, customer or visitor from bringing a personal injury and/or employment claim based solely on a violation of EO 192.

3. Compliance and Safety Training. The executive order also authorizes DOLWD to develop and provide compliance and safety training to employees and employers. This includes securing funding, establishing partnerships to administer the program, and developing informational materials on worker rights and employer obligations. The executive order is silent on whether training will be mandatory or how frequently it will/should occur.

B. Application to the Construction Industry

As we indicated in last week's Alert, EO 192 supplements the rules for construction sites previously established by EO 142. It does not replace them and EO 142 should still be followed. If EO 192 and 142 have inconsistent rules, then 142 should be followed. There are **two notable exceptions where EO 192 overrides EO 142**:

(1) EO 192 rescinded a provision in EO 142 that limited worksite meetings, inductions and workgroups to 10 people or fewer. In doing so, it appears larger groups are now allowed (assuming of course the activity can still be conducted in compliance with social distancing and other safety requirements).

(2) Employers can now require an employee to produce medical documentation in order to verify whether the employee has a legitimate disability that prevents him/her from wearing a facemask. This was previously not permitted under EO 142.

In addition, the following list highlights examples of where EO 192 added (or expanded) a protocol not already required by EO 142. **These procedures supplement EO 142 protocols and should be implemented to the extent you are not already doing so:**

- Providing sanitization materials, such as hand sanitizers (with at least 60% alcohol) or EPA-approved wipes. Previously, this was only required if running water was not available for handwashing.
- Conducting daily health screenings of employees prior to each shift, such as temperature screenings, visual assessments, self-assessment checklists and/or health questionnaires. We read the executive order's use of the words "**and/or**" as allowing an employer to decide which technique is appropriate (and not requiring the use of all of them).
- Separating and sending home employees with symptoms of COVID and notifying other employees of known exposures (subject to confidentiality requirements and CDC guidance). In addition, employers must follow applicable leave laws when employees miss time for the foregoing reason.
- Finally, an additional facemask exception was added for situations when wearing one would be impractical (i.e., eating and drinking).

ACCNJ encourages all members with questions on EO 192 or any other COVID-related inquiries to reach out to us. A copy of the executive order can be found here: [EO 192](#)

With an unemployment tax hike looming, relief could be on the way for NJ employers

New Jersey's Unemployment Trust Fund (UTF) is in dire shape in the wake of the pandemic. The UTF is estimated to have experienced a deficit that will require a **[\\$919 million increase in the employer's share of unemployment payroll taxes come July](#)**. An employer's contribution is dictated by the employer's experience rating and the overall health of the fund (sometimes referred to as the reserve ratio). Right now, both factors are setting the stage for significant tax obligations for all New Jersey employers. The Office of Legislative Services estimates the employers' unemployment payroll taxes will increase, on average, from 0.7% of payroll to 1.1%.

Luckily, it looks like relief is on the way. On October 29, the Senate and Assembly passed [S. 3011](#). The bill would phase in the increased unemployment payroll tax through July 2023. In addition, layoffs during the state of emergency will not count against an employer's experience rating.

Employers are currently in the second-lowest fee structure ([Column B on the Experience Rating Tax Table](#)). Without the bill, employers would jump to the highest fee structure (Column E) next summer. Instead, the bill proposes a jump to Column C in 2022, Column D in 2023, and Column E in 2024. In each instance, if the health of the fund warrants a better assessment, then a lower column will be used.

The Legislature passed a similar bill in the aftermath of the Great Recession. By all accounts, the measure helped soften the blow to employers and [deficits were largely remedied by 2013/14](#). Hopefully S. 3011 can replicate that result.

ACCNJ has supported the bill's advancement throughout the legislative process in Trenton. Please see [B-104-2020](#) for reference. ACCNJ's Government Affairs team will continue to monitor the progress of S. 3011.

ACCNJ'S LEGAL & INSURANCE WEBINAR SERIES

ACCNJ's Legal and Insurance Webinar Series returns on **Tuesday, November 24**, with a discussion on bankruptcy considerations for construction contractors. The webinar will be presented by the law firm of Peckar & Abramson. We look forward to seeing you there!

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