

March 24, 2020

## **ENFORCEMENT OF NEW YORK GOVERNOR ANDREW CUOMO'S MARCH 20, 2020 EXECUTIVE ORDER RESTRICTING NON-ESSENTIAL BUSINESS ACTIVITY**

To Our Clients and Friends:

On March 20, 2020, New York Governor Andrew Cuomo signed an executive order (Executive Order No. 202.8) requiring businesses—with the exception of those providing “essential” services—to keep 100 percent of their workforce at home, effectively shuttering any non-essential business whose workforce cannot work from home. The executive order took effect on Sunday, March 22, 2020, at 8 p.m., and will last until April 19, 2020.

The New York State Empire State Development Corporation (“ESD”) has prepared [guidance](#) available online, which is intended to assist businesses in determining whether or not the services they provide qualify as “essential” and are therefore exempted from in-person workforce restrictions. Through ESD’s website, businesses impacted by the executive order may now review [frequently asked questions](#), which include detailed health-related best practices and guidelines for employers, and may submit their [COVID-19-related questions](#) directly to ESD. ESD has also provided additional resources for businesses impacted by the Governor’s order on its website, which include a [resource guide](#) to the U.S. Small Business Administration’s low-interest federal disaster loan program.

A prior client alert providing an overview of the executive order’s in-person workforce restrictions and ESD’s guidance on essential businesses exempt from the order may be accessed [here](#).

### **Attorney General Urges Employees to File Complaints Against Employers Violating Governor Cuomo’s Executive Order.**

In a press release issued this Saturday, March 21, New York Attorney General Letitia James urged employees who believe their employers to be acting in violation of Governor Cuomo’s executive order to file a complaint with the New York State Office of the Attorney General’s Labor Bureau. The Attorney General further announced that her office “is closely monitoring the treatment of employees across the state.” ESD has also provided a link to the Attorney General’s press release on its website.

Businesses that violate the executive order’s in-person workplace restrictions face stiff penalties. Specifically, the executive order decrees that any violation shall be punishable as set forth in Public Health Law Section 12. Section 12 imposes “a civil penalty . . . not to exceed two thousand dollars for every . . . violation.” While the current law includes higher penalties for subsequent or more serious violations, an amended version of Section 12—which goes into effect on April 1—limits all penalties to \$2,000 per violation. *See* Pub. Health L. § 12-1. The amended law also authorizes the Health

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Commissioner to initiate court proceedings to recover that penalty and to release or compromise a penalty imposed. *See* Pub. Health L. §§ 12-2, 12-4. The Commissioner may request that the Attorney General bring an action for an injunction against a violating party. *See* Pub. Health L. § 12-5.

The additional penalties currently in effect include: (i) a maximum fine of \$5,000 for any repeated violations, within a year of the first, that pose a serious threat to individuals' health and safety and (ii) a maximum fine of \$10,000 for any violation that causes serious physical harm to any patient(s). *See* Pub. Health L. § 12-1. Section 12 was not drafted originally to enforce the Governor's executive order. As the reference to "patients" suggests, the penalties under the Public Health Law are typically applied to discrete violations of laws concerning the provision of medical services (*e.g.*, violations of controlled substances laws). Accordingly, the precise contours of how fines will be assessed pursuant to the executive order is unclear, but it is clear that the New York State Office of the Attorney General will be closely following these issues.

## **Violations of the Executive Order Are Subject to Penalties.**

It is not clear that under Section 12 a business will be able to avoid liability by pleading a good-faith mistake or similar defense. Section 12 does *not* limit the imposition of penalties to only "intentional," "knowing," "willful," "reckless," and/or "negligent" violations—instead, *any* violation can result in a penalty, based on Section 12's plain text. One trial court has suggested the contrary by suggesting that a penalty under Section 12 is unwarranted if the underlying regulation that led to the violation was unclear (as one could argue is the case with the executive order's "essential business" exception), *see Mauceri v. Chassin*, 156 Misc. 2d 802, 804 (Sup. Ct. Albany Cty. 1993) (finding that the "record simply does not support imposing a fine against the plaintiff under section 12 of the Public Health Law in view of the uncertainty prior to this opinion as to whether [the relevant regulation] applied to her"). However, the trial court provided no analysis on that point, and other courts may well take a different approach.

In assessing whether Section 12 imposes penalties irrespective of *mens rea*, a court is likely to consider Public Health Law Section 12-B, which the legislature created to impose separate penalties for *willful* violations. Under Section 12-B, if an individual willfully violates the Public Health Law the penalty is a maximum fine of \$2,000 and/or imprisonment of up to a year. Courts typically interpret statutory provisions with reference to other similar provisions, especially when those provisions are part of the same law. Consequently, courts will likely read Section 12-B together with Section 12, suggesting that while the former was meant to penalize "willful" violations, the latter imposes strict-liability penalties.

Given the absence of a textual *mens rea* requirement in Section 12 and the inclusion of such a provision in Section 12-B, it is unlikely that a court will read any *mens rea* requirement into Section 12. Businesses that fail to comply with the executive order will likely be subject to strict liability for any such violations.

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Gibson Dunn is continuing to monitor the impact of Governor Cuomo's March 20, 2020 executive order restricting non-essential business activity. Additional developments can be expected to follow in the coming days and weeks.

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*Gibson Dunn's lawyers are available to assist with any questions you may have regarding developments related to the COVID-19 outbreak. For additional information, please contact any member of the firm's **Coronavirus (COVID-19) Response Team**.*

*Gibson Dunn lawyers regularly counsel clients on the issues raised by this pandemic, and we are working with many of our clients on their response to COVID-19. Please also feel free to contact the Gibson Dunn lawyer with whom you usually work, any member of the firm's **Public Policy Group**, or the authors:*

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