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Labor & Employment Alert

OSHA and COVID-19
Returning to a Safe Workplace

In the new reality of COVID-19, workplace safety and health presents a special challenge, not least because of the elusive nature of the infection. It seems to be everywhere and nowhere at once, and there is no definitive way to combat it or even detect it in the workplace—after all, it's not like measuring the height of a handrail. COVID-19 could be lurking in any employee, from the front desk to the back office, and from the mail room to the C-Suite. Fortunately, compliance with the OSH Act as it relates to COVID-19 is not as elusive as the infection itself.

WORKING IN THE PANDEMIC

OSHA does not have a specific standard on COVID-19. There have been several failed attempts at legislation to require it, and various business and labor commentators have called for a specific standard. However, OSHA has resisted those calls, opting instead to view COVID-19 through the lens of the "General Duty Clause" of the OSH Act.

The General Duty Clause states that each employer "shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees." Basically, this is a catchall provision in which OSHA can fit citations for conditions or practices it believes are unsafe but which are not addressed in any of the thousands of pages of specific standards that usually form the basis for citations.

For COVID-19 in most workplaces, the benchmark of compliance with the General Duty Clause is the phrase "feasible means to eliminate or materially reduce the hazard." For citations, the benchmark lies in the phrases "steps the employer should have taken to reduce the hazard" and the "feasibility and likely utility" of those steps—both as measured against what a "reasonably prudent employer" in the industry would do.

At bottom, most employers can avoid or defeat a COVID-19 citation by staying abreast of OSHA and CDC guidelines, being aware of what other responsible employers are doing, and using engineering and administrative controls, and personal protective equipment, accordingly. In view of OSHA's specific guidance for most settings, and its enforcement priorities for COVID-19, both of which are discussed further below, this is clearly feasible.

The first step is to prepare a written pandemic plan for combatting COVID-19 at each location. The clarity offered by the written plan itself, but also the process of preparing it, will yield confidence that the employer is doing all that reasonably can be done—which in this context is the definition of compliance.

GUIDANCE FOR SPECIFIC INDUSTRIES

OSHA issued instructions in March for all employers entitled "Guidance on Preparing Workplaces for COVID-19," which can be **downloaded here**. This is comprehensive and very useful, and if followed, will put any employer in good position to avoid or defeat a General Duty Clause citation. OSHA also has issued specific guidance for a number of industries and types of workplaces, including the following:

- Healthcare
- Dentistry
- Emergency response and public safety
- Postmortem care
- Manufacturing
- Meat and poultry processing
- Laboratories
- Airline operations
- Retail operations
- Border protection and transportation security
- Construction
- Correctional facility operations
- Solid waste and wastewater management
- Environmental services (*i.e.*, janitorial)
- In-home repair services
- Business travelers

Links to these specific industry guides can be **found here**. As might be expected, the volume and level of detail offered varies according the sensitivity of the industry from a safety and health standpoint, but they are all quite useful for employers, and the fact they are directed to specific types of workplaces can give added confidence to those employers that they are in line with what OSHA expects of them.

For instance, most of them describe the four levels of OSHA's familiar Occupational Risk Pyramid as they apply in the various work settings. They also often provide specific suggestions for engineering and administrative controls, and personal protective equipment, and give advice for employers facing PPE shortages. One of the most helpful things some of them do is to explain how cloth face masks relate to PPE, explaining the difference between those masks and the facepieces required by OSHA's PPE Standard. For instance, the construction industry guidance goes into some detail on this and also offers advice on selecting and using the cloth masks for employers who choose to use them. That guidance can be **found here**.

RECORDING AND REPORTING COVID-19 ILLNESSES

Aside from specific workplace safety protocols, employers are wondering whether and how to record and report COVID-19 cases that arise among their employees.

The first point on this is that many businesses are exempt from recording injuries and illnesses on the OSHA 300 Log. **Click here** for a list of exempt industries by NAICS code. In addition, employers with ten or fewer employees are exempt. However, even exempt businesses still must report work-related injuries and illnesses to OSHA if the other reporting criteria are met (for COVID-19, in-patient hospitalization or death). Hence, the "work-relatedness determination" discussed below still has to be done for *reporting* purposes even if the employer is exempt from *recording*.

OSHA previously had taken the position that most employers did NOT have to make a determination of "work-relatedness" for purposes of recording COVID-19 cases on the OSHA 300 Log—unless there was clear evidence available to the employer. "Most" in that context meant employers *other than* the healthcare industry, emergency response organizations, and correctional institutions. The practical upshot was most employers did not have to record COVID-19 cases at all.

As of May 26, OSHA reversed that position in a new guidance **available here**. Under the new rule, covered employers must make a determination on job-relatedness when any employee contracts COVID-19. However, in doing so, the employer is not required to prove it is NOT work-related to avoid recording it. Rather, an employer need only determine that it cannot show that it IS work-related (using a "more likely than not" standard). In doing this: OSHA has said:

> Employers, especially small employers, should not be expected to undertake extensive medical inquiries, given employee privacy concerns and most employers' lack of expertise in this area. It is sufficient in most circumstances for the employer ... (1) to ask the employee how he believes he contracted the COVID-19 illness; (2) while respecting employee privacy, discuss with the employee his work and out-of-work activities that may have led to the COVID-19 illness; and (3) review the employee's work environment for potential ... exposure.

OSHA further suggests that the review in Item (3) above should be informed by any other instances of COVID-19 in the same workplace. As a practical matter, this is not substantively different from the previous rule, it just requires the procedural step of doing the determination. It is important to document that process and assessment. Also, bear in mind that the other criteria for recordability also must be present (days away from work, and so forth), and if the criteria for *reportability* are present (hospitalization or fatality), OSHA must be notified.

OSHA ENFORCEMENT IN THE PANDEMIC

The specific onsite measures employers take, and their approach to recording and reporting, should be informed by OSHA's enforcement priorities in the pandemic. Initially, OSHA said it would focus on workplaces where COVID-19 exposure is high, such as hospitals, and would try to address other COVID-19 cases as Rapid Response Investigations (RRI). An RRI does NOT involve an onsite inspection by OSHA, at least initially, but begins with a letter alerting the employer of a concern and asking the employer to conduct and report on its own investigation.

OSHA updated this position on May 19 to adopt a dual approach. In areas where "community spread ... has significantly decreased," OSHA will return to the inspection policy used prior to the pandemic. However, in areas that are "experiencing sustained [or resurgent] elevated community transmission," OSHA may continue its earlier enforcement priorities. That is, use the RRI process as much as possible outside of "high risk" worksites, such as hospitals.

This updated guidance consists of a detailed internal memo on enforcement procedures and priorities and five attachments, which can be **downloaded here**. These materials are not directed to employers, but they provide a roadmap of what to expect from OSHA during the remainder of the COVID-19 crisis.

LENIENCY, NOT LICENSE

Finally, employers should be aware of the Executive Order issued by President Trump on May 19, which can be **downloaded here**. This states that federal enforcement agencies such as OSHA should "decline enforcement against persons and entities that have attempted in reasonable good faith to comply with applicable statutory and regulatory standards."

That is consistent with what OSHA has published regarding its enforcement priorities and expectations in the midst of the pandemic, discussed above. However, employers should bear in mind that neither the executive order nor OSHA's published enforcement priorities constitute license to shirk their duties relating to safety and health. Also, any "leniency" reflected in these orders and priorities generally applies to COVID-19 safety measures, not to other safety and health standards.

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