

OSHA obligations in the COVID-19 era

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Companies face enormous pressures in the era of the novel coronavirus, including the need to provide safe working conditions for employees. Before the emergence of SARS-CoV-2, the virus that causes COVID-19, employers may have been confident that they were following guidance from the Occupational Safety and Health Administration (OSHA), but now—given rapidly changing conditions—they may be uncertain how to proceed, particularly when each day seems to bring new guidance or new restrictions on business activities.

This Alert provides a very brief overview of requirements under the Occupational Safety and Health Act (OSH Act), in relation to COVID-19, and identifies a handful of significant resources, focusing on guidance from OSHA and the Centers for Disease Control and Prevention (CDC). The Alert also highlights some of the workplace safety issues that have arisen during the coronavirus outbreak. While this information may be helpful in framing an employer's response to ensure compliance with OSHA obligations, it is not a substitute for legal advice about an employer's specific situation.

Rules and Resources

The OSH Act covers most private sector employers and their workers, as well as some public sector workers. Under the General Duty Clause of the OSH Act, employers are required to provide each employee a place of employment that is “free from recognized hazards that are causing or are likely to cause death or serious physical harm.” Employers must comply with specific standards when those standards apply to their operations. There is no specific OSHA standard focused only on COVID-19, but certain OSHA standards could apply, depending on the context. For example, workers might need to use gloves, eye and face protection, and necessary respiratory protection, as outlined in Personal Protective Equipment (PPE) standards.

Some states have OSHA-approved state plans, which may have more stringent requirements than the federal plan. For example, in California, COVID-19 is covered by the Aerosol Transmissible Diseases (ATD) standard. This standard, which sets forth the requirements for protecting employees from diseases and pathogens transmitted by aerosols, applies in certain contexts, such as healthcare settings.

Information about how to respond to the pandemic is also posted on OSHA's website. On March 9, 2020, OSHA published a guidance document for preparing workplaces for COVID-19.

Employers should also refer to information from the CDC that is relevant to workplaces. The CDC's COVID-19 website includes Interim Guidance for Businesses and Employers in non-healthcare settings, including airlines and ships.

Some OSHA-Related Issues Raised by COVID-19

Assessing New Hazards

In fulfilling their obligation to provide a safe workplace for employees, employers need to assess potential hazards in the workplace. Given the current pandemic, OSHA emphasizes that this responsibility includes considering whether workers may encounter someone infected with COVID-19 in the course of their duties, and if they will be exposed to environments or materials contaminated with the virus.

In its guidance on COVID-19, OSHA divided job tasks into four risk exposure levels: very high, high, medium, and lower risk. “The level of risk depends in part on the industry type, need for contact within 6 feet of people known to be, or suspected of being, infected with SARS-CoV-2, or requirement for repeated or extended contact with persons known to be, or suspected of being, infected with SARS-CoV-2.” (Guidance, at 18.)

Implementing Strategies to Protect Workers

OSHA’s guidance document, published on March 9, sets forth various control strategies for protecting workers in all risk categories. OSHA emphasizes the range of controls that could be implemented under the “hierarchy of controls” framework, which, in order of effectiveness, include engineering controls (isolating employees from work-related hazards), administrative controls (e.g., changes in work policies or procedures), safe work practices, and PPE. The guidance then provides specific examples of control measures for each category of risk. Strategies for workers in high and very high risk categories include a range of measures. Engineering controls, such as placing patients in isolation rooms in healthcare settings, are important for workers at this level of risk. For PPE recommendations, OSHA notes that most workers at high or very high risk would need a number of PPE items, including gloves, a gown, a face shield or goggles, and either a face mask or respirator. For workers in the “lower exposure (caution)” risk category, employers could follow the guidance provided to all employers to reduce risk of exposure. At this point in time, most employers are generally familiar with those guidelines, which include implementing basic infection prevention measures; developing policies and procedures for promptly identifying and isolating sick people; and communicating workplace flexibilities and protections, such as encouraging sick people to stay home.

The above referenced guidance is still pertinent. However, because the number of people infected with COVID-19 has increased dramatically since March 9, the following has occurred:

- **Changing CDC guidance.** The CDC updated its guidance for businesses. Key changes, as of March 21, include updated cleaning and disinfection guidance; updated best practices for conducting social distancing; and updated strategies and recommendations that can be implemented for responding to COVID-19.
- **Business closures.** The calculation of what constitutes a lower risk activity has changed, at least in some locations. In its guidance, OSHA defined “lower exposure risk (caution)” jobs as those “that do not require contact with people known to be, or suspected of being, infected with SARS-CoV-2 nor frequent close contact with (i.e., within 6 feet of) the general public.” Since the publication of that guidance on March 9, even these types of jobs have become subject to orders requiring some businesses to close. For example, New York ordered the in-office personnel functions of non-essential businesses to close; Pennsylvania ordered the closure of physical locations of “non-life-sustaining businesses”; and California issued a stay at home order.
- **PPE.** On March 14, 2020, OSHA issued “Temporary Enforcement Guidance - Healthcare Respiratory Protection Annual Fit-Testing for N95 Filtering Facepieces During the COVID-19 Outbreak.” Because of supply shortages of N95 filtering facepiece respirators, the Department of Labor was directed to increase the availability of general use respirators for emergency use by healthcare personnel in healthcare facilities. OSHA provided temporary guidance regarding annual fit-testing for this equipment.
- **New types of work.** Some companies are moving quickly into new areas to address urgent needs, such as

converting manufacturing processes to produce critical items that are suddenly in short supply. Employers should be sure that they are complying with their OSH Act obligations when undertaking these new initiatives.

Implementing New Cleaning Protocols

Employers should consider the need for disinfecting workplaces. The CDC recommends that, if a sick employee is suspected or confirmed to have COVID-19, employers should follow the CDC cleaning and disinfection recommendations. Note that there is different guidance for facilities that house people overnight and those that do not. The CDC provides practical guidance for conducting disinfection.

Employers may be using new cleaning agents in the fight against the SARS-CoV-2 virus. If so, they need to provide proper PPE and training for using those substances. The CDC notes these OSHA obligations: “Employers must ensure workers are trained on the hazards of the cleaning chemicals used in the workplace in accordance with OSHA’s Hazard Communication standard (29 CFR 1910.1200e).”

Adjusting to Changing Staffing Patterns

An employer running an essential business might schedule workers in shifts to help minimize the potential for employees to infect other employees. These changing patterns could introduce health and safety issues unrelated to the coronavirus itself. For example, employees could be taking on new or different duties because of different staffing plans and might need appropriate training in safety and health measures before assuming new responsibilities. Another scenario that could unfold is one in which fewer workers are on the job because of illnesses in the workforce, and these employees become fatigued, which itself is a risk factor for injuries. The employer needs to maintain vigilance about assessing hazards and addressing risks in operations generally, not just the pressing needs of managing the coronavirus.

Determining How to Respond When an Employee Refuses to Work

Some employees may refuse to work because they believe it would not be safe to do so, given risks from the coronavirus. The right to refuse to work is protected if all of the following conditions are met: (1) the employee asks the employer to eliminate the danger, and the employer fails to do so; (2) the employee’s refusal to work was made in “good faith,” based on a genuine belief that imminent danger exists; (3) the refusal was reasonable, *i.e.*, a reasonable person would agree about the danger; and (4) there is a sense of urgency, *i.e.*, there is no time to have the problem corrected through regular enforcement channels. Employers should proceed with caution in refusal to work situations because of COVID-19 concerns. Taking adverse action against an employee who refuse to work could result in a legal claim.

Complying with Record-Keeping and Reporting Obligations

COVID-19 falls into the category of reportable illnesses, but only for covered employers where the diagnosis is confirmed, the case is work-related, and the case involves one or more of the established recording criteria. OSHA publishes specific guidance about reporting COVID-19 cases and general guidance about record-keeping and reporting.

Responding to an Enforcement Action

OSHA could issue citations based on alleged violations of the general duty clause or specific standards. In a news release about its guidance document, OSHA noted that it is reviewing and responding to complaints about workplace protection from the novel coronavirus. Legal counsel can help an employer decide how to proceed. Prompt action is required because a Notice of Intent to Contest a citation must be filed within 15 working days.

The Ever-Changing Situation

The steps that employers should take to comply with their OSHA obligations have been changing on a rapid basis as the pandemic spreads. Policies and protocols at one point in time could become outdated within a matter of days—or even hours. This Alert included links to CDC and OSHA resources. Those sites should be consulted directly because they are updated on a regular basis and will reflect changing guidance. It is also important to contact counsel for advice on particular settings or with specific questions about ensuring that practices are in compliance with applicable OSHA standards.

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