Plan Now for Bringing Back Your Work Force

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Part I - OSHA Guidance on COVID-19 Lowers Risk and Helps Point the Way Back to Work

As hard as it may be at times to believe this, the day will soon come when your business will be able to start returning to something closer to pre-pandemic operations. What we’ll be getting back to is a new “normal,” one in which infection control and risk mitigation are the keys to operating safely and with confidence that a second spike in the spread of COVID-19 isn’t going to send us back home.

By thinking through the protocols and accountabilities best suited to your workplace now, you will be able to assure your employees, clients, and customers that their safety is paramount, you will be ready to progress as quickly as possible through the upcoming stages of reopening our economy, and you will control your liability exposure to employees and third parties.

In this three-part alert series, we provide information and guidance on the legal principles that should govern your planning and decision-making for reopening your business or, if you have been operating remotely over the last six weeks, the return of your workforce to the workplace. In this first alert, we explain why OSHA’s recent Guidance on Preparing Workforces for COVID-19 (Publication 3990-
03), together with CDC guidelines, comprise the best authority for how to approach what’s next. In particular, we’ll explore how OSHA’s risk assessment rubric should inform your planning. In our second alert, we’ll cover how to create and implement an Infectious Disease Preparedness and Response Plan (or amend any existing plan). In our third alert, we’ll explain how following these steps will allow you both to ramp up in compliance with OSHA along with varying rates at which states and cities relax restrictions, and to put your business in the best position to avoid liability for however long the pandemic impacts the workplace.

**BASIS FOR OSHA’S AUTHORITY**

The Occupational Safety and Health Act regulates employee safety in most of the private sector. The core provision of the OSH Act is what’s called the General Duty Clause, which obligates employers to provide their employees with a workplace free from recognized hazards likely to cause death or serious physical harm. While there are many risk- and industry-specific safety standards enforced by OSHA – for example, machine guarding or blood-borne pathogens – there is no standard specifically for respiratory diseases. As a result, the General Duty Clause governs the COVID-19 and other pandemic situations, and is the source of OSHA’s authority to issue its recent Guidance on COVID-19.

Employers should also be aware that there are two specific OSHA safety standards that may be relevant in the context of the coronavirus: PPE Standards, which govern the use of gloves, eye, and face protection, and respiratory protection; and blood-borne pathogen standards, which OSHA views as providing a framework for controlling the risk of exposure to the coronavirus from respiratory secretions. We will have more about these standards in our second alert.

**OSHA’S HIERARCHY OF RISK**

OSHA classifies all work into four categories of risk: very high, high, medium, and low. Examples in the COVID-19 context are:

- **VERY HIGH**: jobs with high potential for exposure to known or suspected sources of COVID-19 during certain procedures (e.g., medical, lab, or postmortem tasks involving direct exposure to bodily fluids or tissue).

- **HIGH**: jobs with high potential for exposure to known or suspected sources of COVID-19 (e.g., health care, medical transport).

- **MEDIUM**: jobs that require frequent or close contact with people who may be infected, but who are not known or suspected COVID-19 patients (e.g., travel, schools, high-volume retail).

- **LOW**: jobs that do not require contact with people known to be, or suspected of being, infected with COVID-19, nor frequent close contact with the general public (e.g., office jobs with minimal public contact and safe coworker distancing).

**OSHA’S CONTROLS FOR HEALTH AND SAFETY**
OSHA also specifies types of controls in all risk categories:

- **Engineering:** examples would be process design, facility design, workspace design, HVAC
- **Administrative:** most typically this means policies, procedures, training
- **Personal protective equipment (PPE):** for COVID-19, this means masks, gloves, readily available hand sanitizer, and the like
- **Safe work practices:** this control applies only in the context of HIGH and VERY HIGH risk occupations. An example would be infection control in health care facilities. But it could also mean hand-washing and social distancing in all workplaces, regardless of the risk level.

Most workers have a low exposure risk, and that risk may be addressed using primarily administrative controls that all businesses can and should implement. However, depending on the exposure risk to your employees, your business may need to implement industry-specific controls.

**THE ROLE OF CDC GUIDELINES**

As noted above, OSHA has not issued specific directives on infection control practices for respiratory diseases. For those, employers should consult the relevant [CDC Guidelines](https://www.cdc.gov). In particular, the set of guidelines grouped under [Prevent Getting Sick](https://www.cdc.gov) provides the kinds of now well-known steps employers should require of their employees.

At the same time, OSHA has created several lists of recommended steps to reduce the risk of exposure. The first is directed at all employers:

**Ten Steps to Reduce Exposure** *(Publication 3994)*

1. Encourage workers to stay home if sick.
2. Encourage respiratory etiquette, including covering coughs and sneezes.
3. Provide a place to wash hands or access alcohol-based hand rubs containing at least 60% alcohol.
4. Limit worksite access to only essential workers, if possible.
5. Establish flexible worksites (e.g., telecommuting) and flexible work hours (e.g., staggered shifts), if feasible.
6. Discourage workers from using other workers’ phones, desks, or other work tools and equipment.
7. Regularly clean and disinfect surfaces, equipment, and other elements of the work environment.
8. Use Environmental Protection Agency (EPA)-approved cleaning chemicals with
label claims against the coronavirus.

9. Follow the manufacturer’s instructions for use of all cleaning and disinfection products.

10. Encourage workers to report any safety and health concerns.

Others are industry-specific: retail; construction; manufacturing; and package delivery. All of these, where relevant to your place of business, should be reviewed for incorporation into your plan.

THE CRITICAL ROLE OF COMMUNICATION

We will cover this issue in much more detail in our second alert. For now, employers should be thinking about how they will ensure that employees, vendors, customers, and others will understand exactly what you expect of them, and what they can expect from you, in the fight to prevent the spread of the coronavirus.

WHAT’S NEXT

In our next alert we will explain why a Preparedness and Response Plan that comports with OSHA Guidance is the best approach for employers, and we’ll explain how to create such a plan. We recognize that each industry has specific risks and challenges, and that even within industries each business is unique. Responses to COVID-19 will necessarily reflect these differences. Pierce Atwood can help you prepare a plan that is tailored to your particular needs while affording you the benefits of compliance with OSHA’s view of workplace safety.

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