In the midst of the COVID-19 global pandemic, employers and employees may be eager to return to work in their traditional workplaces. Employers are cautioned to consider the myriad of federal and state requirements and guidance that may apply to their workplaces, and the potential risk of lawsuits from aggrieved employees and their families, before welcoming back employees and visitors. This article outlines guidance issued by the federal Occupational Safety and Health Administration (OSHA) and the Centers for Disease Control and Prevention (CDC), as well as state standards that have been issued or are forthcoming, such as the temporary standards issued by Virginia and expected to be issued by Oregon.

**OSHA Guidance**

OSHA has posted on its website multiple guidance documents and resources for employers that recommend measures that employers can take to address potential
risks in their workplaces and identify enforceable OSHA standards that may apply to those risks. While the guidance creates no new legal obligations and is not binding on employers, OSHA may still consider the guidance when investigating workplaces to ensure that OSHA standards are met; when penalizing businesses and employers where the standards are not met; and when evaluating compliance with the OSH Act’s General Duty Clause. In addition, workers across the country have filed lawsuits alleging violations of OSHA standards and common law torts resulting in their exposure to COVID-19.

**OSHA Requirements**

The OSH Act’s General Duty Clause, Section 5(a)(1), requires employers to provide their employees a workplace free from recognized hazards likely to cause death or serious physical harm. OSHA standards for personal protective equipment (PPE), sanitation and hazard communication may be relevant. Employer requirements are set forth in greater detail here. In addition, employers have an obligation to keep records of work-related injuries, illnesses, and fatalities. In certain situations, COVID-19 may be a recordable illness. Employers are also required to report work-related COVID-19 illnesses that result in a worker fatality (within 8 hours) or an employee’s in-patient hospitalization, amputation, or loss of an eye (within 24 hours); employers are expected to perform a reasonable determination of whether a COVID-19 illness is “work related,” as further explained herein. See additional information about employer recordkeeping and reporting requirements here.

**OSHA Guidance on Returning to Work**

Although the federal government declined to adopt an emergency temporary standard (ETS) for COVID-19, OSHA issued Guidance on Returning to Work for non-essential businesses in June 2020. The Guidance builds off of the U.S. Department of Labor and U.S. Department of Health and Human Services’ Guidance on Preparing Workplaces for COVID-19 and the White House’s Guidelines for Opening up America Again. Employers may want to consider using OSHA’s Guidance on Returning to Work to develop internal strategies and policies to prepare employees for returning to work once stay-at-home or shelter-in-place restrictions are lifted.

**Phases for Re-Opening**

OSHA follows the White House Guidelines for Opening up America Again, which outline phases for re-opening non-essential workplaces:

- Phase 1: Businesses should make telework available where possible. Accommodations for employees who return to the workplace should be made wherever possible, including:
  - Limiting the number of people in the workplace to maintain strict social distancing;
  - Making accommodations, if feasible, for employees at higher risk (i.e., employees with pre-existing, serious conditions, and elderly employees);
Considering extending special accommodations to employees with household members at higher risk; and

Limiting non-essential business travel.

• Phase 2: Businesses should continue to make telework available where possible, but non-essential business travel may resume. Consider additional relaxed restrictions, including:
  ◦ Easing limits on the number of people in the workplace while maintaining moderate to strict social distancing practices; and
  ◦ Accommodating vulnerable workers as described in Phase 1.

• Phase 3: Businesses may resume unrestricted staffing of work sites.

**OSHA’s Guiding Principles**

For each of these phases, employers should consider implementing, and requiring employees to follow, the Guiding Principles in OSHA’s Guidance on Returning to Work. The principles correspond with the CDC recommendations for preventing the spread of COVID-19. Employers should also note that many of these principles are aligned with enforceable OSHA standards.

  • Hazard assessment
    ◦ Employers should conduct a hazard assessment. The assessment should take into consideration worker exposure from job tasks, including interactions with the general public.

  • Hygiene
    ◦ Under OSHA’s sanitation standard, 29 C.F.R. § 1910.141, employers must maintain a hygienic workplace environment. Employers may implement strict basic hygiene requirements for employees and visitors by increasing availability of hand-washing stations or providing hand sanitizer with at least 60% alcohol. Employees and guests should be encouraged to wash hands frequently. High trafficked areas should be identified and disinfected frequently.

  • Social distancing
    ◦ Employers should create workplace accommodations that allow for and encourage social distancing. For example, tape can be placed on floors to mark six feet between individuals, and signs may be posted to remind individuals to socially distance. Employers may also consider using plexiglass to separate employees, visitors, and the general public where possible.

  • Identification and isolation of sick employees
    ◦ Employers should consider asking employees to evaluate themselves for
COVID-19 exposures and symptoms. A safety protocol could be established that allows employees to stay isolated if immediate departure is not possible. In addition, employers should work with state, local, tribal, and/or territorial governments to determine local and regional requirements for contact tracing and whether to issue notifications beyond OSHA’s recordkeeping requirements related to cases and potential exposures.

- Return to work after illness or exposure
  - Employers are encouraged to mandate that employees follow CDC guidance for discontinuing self-isolation and returning to work after illness, or discontinuing self-quarantine and monitoring COVID-19 symptoms after exposure. Employees who have been exposed to someone with COVID-19 should also be encouraged to follow CDC guidance to self-monitor for symptoms.

- Controls
  - To maintain a safe workplace that is in compliance with the General Duty Clause, employers may need to create physical barriers between workers and provide increased ventilation for respiratory protection. These guidelines are enforceable under the General Duty Clause and the respiratory protection standard, 29 C.F.R. § 1910.134. In addition, employers may require the use of appropriate face coverings or PPE, which is enforceable under 29 C.F.R. § 1910.132.

- Workplace flexibilities
  - Employers should periodically evaluate existing policies for sick leave and telework so that exposure risks in the workplace can be minimized. The policies and any revisions should be communicated to workers.

- Employee training
  - Employers should implement training for employees on the signs, symptoms, and risk factors associated with COVID-19 and how to prevent spread at work, so that they may be able to check body temperatures, inquire about symptoms, and teach people to report symptoms without waiting to be asked. Employers may also provide training on PPE and face coverings. For example, cloth face coverings are not considered PPE because they protect other people from the wearer’s respiratory secretions, rather than protecting the wearer.

- Anti-retaliation
  - Employers and employees should understand that under section 11(c) of the OSH Act, workers have legal rights to a safe and healthful work environment, to raise workplace safety and health concerns, and to seek an OSHA inspection. They should also understand that retaliation for raising concerns about workplace safety and health is prohibited.
CDC Guidance

The CDC provides guidance on returning to work that is consistent with the OSHA Guidance on Returning to Work. Employers should be familiar with CDC guidance for COVID-19 and visit the CDC website periodically, as guidance is frequently updated. OSHA’s COVID-19 enforcement guidance also directs Compliance Safety and Health Officers to refer to CDC guidance when preparing for and performing inspections.

State Requirements

Many states have federal OSHA-approved State Plans in place that are operated by the individual state rather than federal OSHA. There are currently 22 State Plans covering both private sector and state and local government workers, and there are six State Plans covering only state and local government workers. In many State Plan states, the government has adopted or is considering adopting additional requirements that apply to COVID-19 exposure in the workplace, such as the temporary standards adopted by Virginia and expected to be adopted by Oregon.

Virginia


Virginia’s ETS requires many of the OSHA Guiding Principles discussed above. It applies to every employer, employee, and place of employment that is under Virginia Occupational Safety and Health (VOSH) jurisdiction. It sets requirements based on four exposure risk levels – either for hazards present in the workplace or job tasks – lower, medium, high, and very high. Lower exposure risk is for workers who can maintain at least six feet social distance. Medium exposure risk is for places of employment where workers cannot maintain six feet social distance but are in workplaces without known or suspected sources of COVID-19, including, for example, workers in the restaurant and commercial transportation industries, correctional facilities, and meat and poultry processing facilities. Workers who face high exposure risk are those in industries where there is a high potential for employee exposure to COVID-19 and social distancing is not possible: for example, mortuary services, medical and dental, and medical transport. Finally, very high exposure risk is for places of employment with high potential for employee exposure to known or suspected sources of COVID-19 (e.g., lab samples) or persons known or suspected to be infected with COVID-19, including, but not limited to, during specific medical, postmortem, or laboratory procedures with specimens from affected individuals.

All employers are required to assess workplace hazards and job tasks for potential exposure to COVID-19, and to classify each job task according to potential exposure hazards for “very high,” “high,” “medium,” or “lower” risk levels. Employers must inform employees of methods to self-monitor for signs and symptoms of the virus,
and develop and implement policies for employees to report COVID-19 symptoms. Employers should not rely on antibody testing to determine whether an employee may return to work; employees are not required to report to work if they are known or suspected to be infected with COVID-19. Employers must ensure that sick leave policies are flexible, to the extent feasible and consistent with public health guidance, and ensure that employees are aware of these policies. Subcontractors should also be made aware of employer policies and not be allowed to work if COVID-19 infection is suspected or known. Employers should establish a system for receiving reports of positive tests so that the employer may notify employees who may have been exposed, while keeping confidential the identity of the employee known to be infected. Finally, employers must ensure employee access to their own COVID-19 related exposure and medical records.

In addition, all but “lower” level exposure risk businesses must take additional steps, for example, train workers on the hazards and characteristics of COVID-19 and the requirements of the standard and safe and health work practices, assess the workplace, and provide PPE where appropriate.

If an employer’s workplace hazards or job tasks are classified as very high, high, or medium with 11 or more employees, the employer must prepare and implement a written Infectious Disease Preparedness and Response Plan. The plan must name a designated person who is responsible for administering the plan and is knowledgeable in infection control principles and practices, as applied to the workplace. The plan must provide for employee involvement in development and implementation, and must address the COVID-19 risk associated with the workplace and the hazards employees are exposed to in the workplace. Engineering and administrative controls must be in the plan, as well as contingency plans for outbreak situations that consider, for example, increased employee absenteeism, increased control measures, cross-training employees due to a reduced workforce, and disruptions in supply chains. Businesses with very high, high, and medium exposure risks must develop their plans and train employees within 60 days.

Oregon

Oregon Occupational Safety and Health (Oregon OSHA) issued a draft “COVID-19 Temporary Standard” earlier this month, with requirements similar to federal OSHA’s Guidance on Returning to Work. Oregon’s draft ETS proposes COVID-19 requirements for all workplaces, with stricter requirements for “workplaces at heightened risk” and “workplaces at exceptional risk.” The draft ETS is open for comment until September 7, and is expected to go into effect soon thereafter.

Under the draft standard, all workplaces would, for example, be required to ensure social distancing, COVID-19 appropriate face coverings, strict sanitation of high-contact surfaces, employee information and training on COVID-19, and medical removal for affected employees. Employers responsible for building operations would have to ensure that building layouts allow for appropriate social distancing.

“Workplaces at heightened risk” would include those where workers perform job functions within six feet of others, for periods of more than 15 minutes, and must touch or use tools to touch the hands or face of another person. This provision
might apply to hairdressers, massage therapists, and tattoo artists. Employers at these workplaces would also have to conduct a COVID-19 exposure risk assessment that considers employee risk of exposure given certain risk elements including, for example, the frequency that close person-to-person work activities must occur, and the social distancing, face covering, and sanitation measures that will be developed or provided in order to minimize risk. Employers would have to document these measures and the exposure risk assessment. Employers would have to also provide enhanced, COVID-19 specific training to employees.

“Workplaces at exceptional risk” would include those where at least one of the following tasks occurs: (A) direct patient care in a healthcare setting; (B) aerosol-generating healthcare or postmortem procedures; (C) emergency first responder activities; (D) handling, packaging, cleaning, processing, or transporting of “contaminated materials” as defined in the standard; or (E) handling, packaging, cleaning, processing, or transporting human remains or human tissue specimens or laboratory cultures collected from an individual suspected or known to have COVID-19. In addition to the requirements described for all workplaces and for heightened risk workplaces, employers of workplaces at exceptional risk would also have to establish an Infection Control Plan specific to the type of work performed. The plan would have to, for example, identify the job assignments requiring the use of PPE and include a description of the specific hazard control measures that the employer has installed, implemented, or developed to minimize employee exposure to COVID-19. Notably, the plan would have a “description of the face covering requirements to be implemented in the facility, . . . and the method of informing individuals entering the work setting that face coverings are required.” In addition, the plan would have to explain the employer’s system to communicate to employees, and other employers in multi-employer worksites, any known or suspected exposures. Finally, the plan would have to outline the procedures that the employer will use to provide training, appropriate PPE, and face coverings.

Executive Orders

Executive orders have been issued in Massachusetts, Michigan, Nevada, and Washington for enforceable COVID-19 guidelines for returning to work. In the absence of enforceable federal emergency standards for returning to work, it is likely that other states will follow suit.

Legal Consequences

OSHA Enforcement

Employers that fail to adequately address COVID-19 risks may face enforcement actions by OSHA, which has discretion to investigate and issue penalties. OSHA has issued an updated enforcement response plan for COVID-19. The plan provides that OSHA will prioritize workplace inspections for COVID-19 related deaths and imminent danger exposures, as well as for workplaces that are high-risk for exposures (like hospitals and healthcare centers that treat COVID-19 patients), and workplaces that have high numbers of employee complaints or known COVID-19 cases. OSHA may cite employers for violations of the specific standards described
above, as well as the General Duty Clause.

OSHA uses a “reasonableness” standard for determining whether a COVID-19 related illness is work related, as further explained here. Employers should conduct their own investigation into work-relatedness, based on the information reasonably available to the employer at that time. For example, an employer may ask how the employee believes they contracted COVID-19. Then, they should inquire about work and outside-of-work activities – but inquiring with sensitivity to respect the employee’s privacy. If the employer reasonably believes that the employee’s illness was contracted at or because of their presence at the workplace, the employer should review the work environment for potential exposure. If applicable, the employer should maintain records of the inquiry and the employee’s illness – and recovery or prognosis. Except as required for OSHA recordkeeping, the employer must maintain all information about employee illness as a confidential medical record in compliance with the Americans with Disabilities Act (ADA), as emphasized in Equal Employment Opportunity Commission (EEOC) guidance on COVID-19.

**Lawsuits**

Employers across the country have already faced lawsuits for COVID-19 illnesses and injuries from employees alleging violations of OSHA standards, and common law torts. For example, employees at a meat processing facility brought a lawsuit claiming fraudulent misrepresentation and gross negligence. They alleged that employers refused to grant sick leave to employees that exhibited COVID-19 symptoms or tested positive for the virus. Restaurant service employers have faced state court orders requiring that they provide employees sanitation equipment and PPE; employee wellness checks and accurate temperature checks; and contact tracing. State court orders have required employers to inform employees when another employee tests positive or is symptomatic. And employees of a fulfillment center and distribution company recently brought a lawsuit claiming that their employer failed to protect the health and safety of employees at the fulfillment center, in violation of state labor law.

**Conclusion**

Employers should take OSHA guidance into careful consideration, and implement all recommended measures that are appropriate and reasonable for their workplaces. Employers should mandate COVID-19 prevention training for all employees and maintain disinfected, safe workplaces. All employers – even those with workplaces where it is possible to socially distance – should implement COVID-19 preparedness and response measures, with commitments to anti-retaliation, training, and engineering and administrative controls, and workplace flexibility where possible.

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