

Checklist Part II: OSHA and Safety Issues Regarding COVID-19 When Returning to Work

By Matthew Thomas Deffebach and Mini Kapoor

As more employers re-open or are in the process of re-opening for business, they are following the current guidance for preventing the spread of coronavirus infection in the workplace by, among others, ensuring good hygiene practices, requiring social distancing, and screening employees for the COVID-19 illness. While implementing these safe workplace practices, employers should consider some helpful strategies to avoid claims down the road alleging that they failed to provide a safe workplace.

Significantly, during the current pandemic, thousands of coronavirus-related complaints have been filed with OSHA just during the period when only essential businesses were allowed to operate. With numerous employees returning to work now in non-essential businesses, it is expected that OSHA will be bombarded with additional complaints where employees allege that the safety controls being used by their employers are inadequate to protect them from COVID-19 exposure.

Moreover, some employees or their estates may attempt to by-pass the workers' compensation exclusive remedy scheme and turn to litigation claiming that a COVID-19 exposure was due to an employer's willful/gross negligence in failing to provide a safe workplace.

In order to navigate both potential OSHA proceedings and the threat of civil lawsuits, employers may find the following checklist helpful to review before employees return to the workplace. Of course, every workplace is different and specific measures will depend on the variables unique to each employer. Accordingly, employers should work in consultation with legal counsel on the best approach for their operations. The items discussed below are in addition to those recommended in our first [checklist](#) for returning to work, which addressed safety and other employment issues.

- ✓ **Conduct or update workplace assessments to understand when employees could be reasonably exposed to the hazard of COVID-19.** OSHA considers most employees to be in the "low" to "medium" risk category as to exposure to COVID-19, which we addressed in our previous [alert](#). An employer may find it helpful to conduct an attorney-client privileged assessment as to what aspects of a particular job position might increase the exposure risk to employees when at work. For example, in an office setting, many job functions may only have the risk of exposure when an employee is around co-workers in nearby cubicles or in areas where there could be gatherings of co-workers (common areas, entrances, etc.).
- ✓ **Based on these assessments, review the recommended safety controls and document why suggested controls may not be feasible and why alternative methods provide adequate protection.** In the absence of a specific COVID-19 standard, OSHA is likely to rely upon the general duty clause to cite violations related to coronavirus infection in the workplace. The general duty clause requires employers to provide their employees a workplace "free from recognized hazards." Employers should note that this duty has certain limitations, including that it is subject to availability of feasible means for abatement of the hazards. In the case of coronavirus infections, while it may be easy to ask that employers should do all the things recommended by the CDC and OSHA, some measures may not be feasible for every workplace. In such cases, the employers should, to the extent possible, document efforts made to adhere to the guidance and the alternative controls implemented to provide adequate protection from the spread of coronavirus infection. For example, while it may not be feasible for employees to always be six feet away from other employees or third-persons in the workplace, it might be feasible to ensure that all

employees are adequately trained on good hygiene and sanitation practices, while also implementing controls to stagger work shifts or otherwise reduce the number of employees working together at the same time. Employers' efforts to control the spread of infection including all engineering, administrative, and PPE controls explored and/or implemented in the workplace should be clearly documented. Such information could be helpful in countering a general duty clause violation and in defending the employer's duty of care in any civil litigation.

- ✓ **Conduct additional hazard assessments and assess obligations for employees being asked to perform medical-type functions, such as taking temperatures or administering diagnostic or antibody testing.** Ideally, employers can rely on local health authorities, medical professionals, or outsourced medical vendors for taking employees' temperatures or submitting to COVID-19 testing. However, if this is not feasible and if an employer takes on these functions, those employees involved in medical-type examinations should be assessed for additional hazards and provided the necessary PPE. Regarding PPE, employers should ensure they are complying with the requirements of OSHA's PPE standard. Employers should carefully comply with OSHA's bloodborne pathogen standard if it will be asking its own employees to administer finger-prick or any other antibody tests where there could be the potential for exposure to blood or other infectious materials.
- ✓ **Review the OSHA PPE Standard.** When an employer provides PPE, it has certain duties under the PPE standard to train its employees, including on how to properly don, doff, adjust, and wear PPE, its limitations, and the proper care, maintenance, useful life, and disposal of the PPE. While cloth masks and even paper surgical masks do not protect the employees wearing them and do not constitute a form of PPE against respiratory hazards, they are still a safe work practice (administrative) control and, in turn, employers should likewise ensure the same training is provided as with PPE so that employees fully understand how to use and take care of them.
- ✓ **If employees bring their own N-95 respirators to work, provide them Appendix D.** When N-95 respirators are necessary to protect workers (and are readily available) or where employers require respirator use, employers must ensure compliance with the PPE standard and in addition, implement a comprehensive respiratory protection program in accordance with the Respiratory Protection standard (29 CFR 1910.134). In addition, if an employee voluntarily wears or requests to wear the N95 or other respirator to work, the employer must provide the employee with a copy of the mandatory Appendix D of OSHA's Respiratory Protection Standard or the equivalent state OSHA agency document.
- ✓ **Ensure that employees understand the limitations of cloth face masks and non-respirators.** Employers that require employees to wear cloth, surgical or dust masks should adequately inform the employees that while such masks may help contain the spread of COVID-19 in the workplace as per CDC guidance, they are not PPE subject to OSHA standards. Thus, as part of the training referenced above, employees should be informed that wearing these masks will not protect them from potentially breathing in harmful particles that could expose employees to COVID-19.
- ✓ **Prepare an audit-plan to assess the effectiveness of the safety controls.** Regardless of the type of controls implemented by an employer to reduce COVID-19 exposure in the workplace, any defense of these controls will be bolstered by an employer's ability to demonstrate that it set up a process to audit them and review their effectiveness. It can be particularly helpful when employees are encouraged to offer feedback, whether informally or formally (such as through safety committees), as to the effectiveness of the controls and other suggestions or recommendations.

- ✓ **Review if changes in workplace configuration require updating emergency action plans.** Many employers under OSHA's regulations are required to develop plans for safely exiting and otherwise responding to emergencies in the workplace. If an employer has made physical changes to its workspace to increase social distancing, such as moving cubicles or implementing temporary one-way traffic patterns, it should ensure that it also updates its emergency response plans that were based on the previous office layout and traffic patterns. Moreover, employers must ensure that exit doors are not blocked by any changes and that employees can safely leave their work environment in the event of an emergency.
- ✓ **Avoid workplace configuration changes that are dependent on the improper use of extension cords.** In redesigning workplaces, employers may move desks, computers and other equipment to non-traditional areas and without sufficient electrical outlets. While individuals might turn to extension cords at home to address such challenges, OSHA has specific rules on when such cords can be used at the workplace. For example, the OSHA regulations generally prevent employers from running extension cords through doorways, windows, or similar openings, among other prohibited uses.
- ✓ **Enforce controls that are dependent on employee compliance.** Many safe-work practice controls are dependent on employee compliance, whether maintaining social-distancing, wearing a mask or maintaining clean work surfaces. Accordingly, in order for an employer to defend the effectiveness of these controls, it must be prepared to demonstrate that it responded to known instances of non-compliance. While this could lead to formal discipline in certain egregious or repeated violations, in many instances this could simply require managers and supervisors to correct observed violations (and keep some record of doing so).
- ✓ **Address and document the approach to remote work.** Many state return-to-work executive orders encourage employers to continue to allow remote working to the extent possible. As one of the best controls to avoid workplace COVID-19 exposure is to have employees avoid the workplace, employers should determine if the nature of their operations allow employees to continue to work remotely or if there are legitimate obstacles to teleworking. Either way, appropriate documentation of the employer's position could be helpful. If employers can allow remote working, then documented communications to employees could be used to defend against OSHA or other claims. In other words, it would seem difficult for an employee to assert a claim that COVID-19 exposure was caused by an employer if the employer instructed the employee that he/she did not have to be physically present in the office. By contrast, if remote work is not an option, it would be prudent to document the reasons why so that the employer can defend against claims that it failed to utilize this potential safety control.
- ✓ **Train managers and supervisors to ensure complaints are handled appropriately.** It may be prudent to remind employees that avenues exist for lodging safety-related complaints in the workplace to avoid employees first turning to OSHA before allowing an employer to address a concern internally. Even without such a reminder, it is expected that employees will be raising more safety concerns and managers and supervisors should be trained to ensure that complaints are handled appropriately. For example, a manager might assume that complaints by employees, such as claims of co-workers wearing masks improperly, are not significant matters. However, if employees are complaining over fear that the workplace is unsafe, human resources should be fully informed of all such complaints to avoid situations where employees allege that adverse actions (e.g., suspensions, terminations, and similar actions) were

carried out in retaliation for having complained about a safety issue. Employers should familiarize managers and supervisors with OSHA's protections for whistleblowers.

- ✓ **Review the employee access and employer retention rules under OSHA's Access to Employee Exposure and Medical Records Standard in 1910.1020 regarding temperature logs, testing results, and other medical records employers are now keeping due to COVID-19 screenings.** Many employers already have or are in the process of implementing procedures for checking employees for temperatures and other health symptoms that may indicate exposure to COVID-19. Some may also be considering performing testing for the disease. In that regard, employers should note OSHA's standard for employee access to records generated as a result of such testing protocols. Employees have the right to examine and copy their own medical and exposure records and where such records are not available, OSHA allows employees to access records of other employees (with personal identifiers removed) with similar duties or working conditions that reasonably indicate the amount and nature of exposures the employee requesting the records may have had. This standard also requires employers to maintain certain employee medical records. To ensure compliance with this standard, employers should: (1) preserve and maintain accurate COVID-19-related medical and exposure records regarding each employee in confidential files; (2) inform employees of the existence, location, and availability of those medical and exposure records; and (3) make records available to employees, their designated representatives, and to OSHA, as required.
- ✓ **Ensure employees using cleaning supplies for office sanitation have received the necessary information/training under OSHA's Hazard Communication Standard in 1910.1200.** OSHA requires employers to provide employees with information and training on hazardous chemicals in their work area. Such information and training should cover the hazards such as flammability and carcinogenicity of chemicals introduced into the workplace, and chemical-specific information must always be available through labels and material safety data sheets. Applying this requirement to the coronavirus scenario, the OSHA/CDC recommendations include frequent cleaning/disinfecting of commonly touched surfaces and robust sanitation practices. If employers are now arming employees with disinfectants and other cleaning supplies and tasking employees to use them, all such employees must be trained on any hazards regarding the chemicals contained in these products and on what PPE or other precautions are necessary when using them.
- ✓ **Prepare for responding to OSHA complaint letters in a manner that avoids them being used against the employer as evidence in any related civil litigation.** According to the current OSHA enforcement guidance, as to non-healthcare facilities, OSHA may not conduct on-site inspections but engage instead in a non-formal procedure for investigating complaints by employees of unsafe workplace conditions. Employers at such facilities can expect to receive a letter from OSHA outlining the nature of the complaint and requesting the employer's response. The agency notes that inadequate responses could then be considered for an on-site inspection in accordance with OSHA's procedures. In addition, employers should be mindful that their response to OSHA is not only important for the OSHA inquiry but may also be discoverable in any related civil suit filed against the employer. Thus, it is advisable that employers work with counsel to carefully draft these response letters to avoid making statements that could be damaging or counter-productive if the letters are disclosed during discovery and used in civil litigation.

- ✓ **Prepare for a potential second surge of coronavirus infections.** Currently, it is unclear whether there will be a second surge of coronavirus infections. However, employers should prepare for that scenario. In particular, employers should consider a system to capture any gaps in the health and safety measures put in place during the current pandemic. To the extent feasible, steps should be taken to close these gaps such that they do not pose a threat to containing coronavirus infection in the workplace if there is a second surge of infections. In other words, employers should consider using lessons learned during the current pandemic to better contain the coronavirus infection and maintain a safer workplace the next time around.

For many employers, the process of reviewing these safety issues and preparing for them will involve coordinated efforts with legal, safety, and human resources teams. It may also be helpful to engage qualified consultants and vendors to ensure that these matters are appropriately addressed while also easing the burden on employers who are navigating numerous issues with returning employees to work.

Related Alerts:

- [Protecting Your Company from Coronavirus-related Premises Liability Claims](#)
- [Checklist for Return to Work \(or Reinstatement\) for Employees Impacted by COVID-19](#)
- [Federal OSHA's New COVID-19 Enforcement Guidance](#)
- [OSHA Relaxes Requirement for Work-related Assessment for COVID-19 Recordkeeping for Certain Employers](#)
- [CARES Act Relief Checklist: Considerations in Deciding What Relief is Right for Your Business](#)
- [Employers Providing Face Masks Should Review Their Health and Safety Obligations](#)
- [Relief for Employers and Workers under the CARES Act](#)
- [COVID-19 OSHA Guidance: Hazard Assessments at Workplaces Considered Essential Businesses Under Shelter in Place Orders](#)
- [COVID-19 Restructuring and the WARN Act](#)
- [FFCRA - Temporary Non-Enforcement - Employer Payroll Tax Credit](#)
- [Employment Issues under the Families First Coronavirus Act of 2020](#)
- [New York Enacts COVID-19 Sick Leave Act](#)
- [Employer Checklist for Responding to a Positive COVID-19 Test](#)
- [COVID-19 and Discrimination Issues](#)
- [COVID-19 and the American With Disabilities Act](#)
- [COVID-19 and OSHA](#)