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Insights

U.S. COVID-19: OSHA ISSUES GUIDANCE ADDRESSING MITIGATION AND PREVENTION OF COVID-19 IN THE WORKPLACE

Feb 02, 2021

SUMMARY

As part of President Biden's first executive actions, on January 21, 2021, the president ordered the federal Occupational Safety and Health Administration ("OSHA") to issue new science-based guidance to protect workers and enhance workplace health and safety during the Covid-19 pandemic. In compliance with this executive order, on January 29, 2021, OSHA issued new guidance to help employers better identify risks of being exposed to and/or contracting COVID-19 and to ascertain appropriate control measures employers can implement to address those risks. The guidance, titled "Protecting Workers: Guidance on Mitigating and Preventing the Spread of COVID-19 in the Workplace," ("Guidance") contains advisory recommendations and reinforces already existing mandatory safety and health standards. This Alert provides an overview of this new federal Guidance and highlights important considerations for employers.

LEGAL OBLIGATIONS OF EMPLOYERS IN RESPONDING TO COVID-19

Throughout the Covid-19 pandemic, OSHA has referenced and leveraged the Occupational Safety and Health Act (the "Act") and existing safety and health regulations to describe an employer's legal obligations to protect workers from hazards associated with Covid-19. OSHA has further used these same laws and regulations for enforcement. Some of the specific regulations OSHA has commonly referenced as applicable to protecting workers from infection include regulations concerning personal protective equipment ("PPE"), respiratory protection, protection from bloodborne pathogens, and employee access to medical and exposure records. Additionally, OSHA often references the Act's General Duty Clause, which states that employers must provide a place of employment that is "free from recognized hazards that are causing or are likely to cause death or serious physical harm."

While federal OSHA has not yet issued any new regulations to expressly address the COVID-19 pandemic, it has issued guidance—including the new Guidance—to expound on what employers

should do to protect employees from Covid-19 hazards. Though OSHA's Guidance is only "advisory" and does not constitute a new law or legal obligation, at a minimum OSHA is recommending steps that it expects employers to take in order to protect worker health and safety. Furthermore, this Guidance may potentially preview the types of new regulations that the new Biden administration intends to promulgate in the near future.

COVID-19 PREVENTION PROGRAM KEY ELEMENTS

Recognizing that there are a number of potential hazards related to COVID-19, OSHA issued the recent Guidance to emphasize and remind employers of their legal obligation to provide a safe and healthy workplace. To that end, OSHA recommends employers develop and implement a COVID-19 Prevention Program. According to OSHA, a COVID-19 Prevention Program is the *most effective* method of mitigating the spread of COVID-19 in the workplace. Although not an exhaustive list (see Guidance for all recommended elements), key elements for developing and implementing a COVID-19 Prevention Program, as identified by OSHA, include:

1. ENGAGE WORKERS IN DEVELOPMENT AND IMPLEMENTATION

OSHA emphasizes the importance of engaging workers at each step of the COVID-19 Prevention Program process, citing increased effectiveness as workers are the people who are most often familiar with workplace conditions. The designation of a workplace coordinator responsible for COVID-19 issues is an important first step.

2. CONDUCT A HAZARD ASSESSMENT AND IDENTIFY MEASURES THAT WILL LIMIT THE SPREAD

Employers should conduct a hazard assessment that classifies the risk of worker exposure to COVID-19. The classification should be based upon the extent of contact with potentially infected individuals. OSHA provides workplace examples of the varying degrees of exposure and the severity of the risk.

Based upon the hazard assessment, the employer should identify and implement control measures. When identifying control measures to address workplace COVID-19 hazards, employers should use OSHA's hierarchy of controls (eliminating controls, engineering controls, workplace administrative polices, and PPE). These potential controls include: separating and sending home potentially infected people; social distancing; installing physical barriers; using face coverings; improving ventilation per ASHRAE guidelines; using applicable PPE; providing supplies for good hygiene practices; performing enhanced routine cleaning as well as greater enhanced cleaning after people with suspected or confirmed COVID-19 have been in the facility; and following state or local guidance for screening and viral testing in the workplace.

3. CONSIDER THE NEEDS OF EMPLOYEES

The OSHA Guidance highlights how employers can and in some instances must address specific needs of their employees in order to create a more effective COVID-19 Prevention Program. For instance, those employees with a higher risk of severe illness may need greater protection, and under the Americans with Disabilities Act, employers may be required to provide "reasonable accommodations" for employees with disabilities. Moreover, in order to meet OSHA training standards, all COVID-19 trainings and communications must be accessible and in a language all employees will understand.

To further meet the COVID-19-related needs of employees and to reduce the risk of sick employees in the workplace, OSHA suggests adopting non-punitive absence policies and allowing flexible work arrangements (telework, work in isolated areas, use of paid sick leave). Under the Families First Coronavirus Response Act ("FFCRA"), certain employers that provide employees with paid leave for reasons related to COVID-19 may be eligible for full reimbursement through tax credits. Read more about FFRCA on the BCLP Blog.

Furthermore, employees should be encouraged to express their COVID-19 concerns. OSHA suggests employers set up an anonymous process, such as a hotline, to reduce obstacles employees face when voicing their concerns. Employees should know to whom and how to address concerns and that they will not be subject to retaliation. Under Section 11(c) of the Act, it is a violation to retaliate against an employee for voicing a COVID-19 concern or for protecting themselves against COVID-19 with their own PPE.

4. INCLUDE VACCINE PLANNING

OSHA encourages employers to make a COVID-19 vaccine available to eligible employees at no cost, but cautions employers to refrain from changing workplace policies for those employees who are already vaccinated because, as the CDC explains, there is no current evidence COVID-19 vaccines prevent transmission. Employees should be trained on the benefits and safety of vaccines.

5. RECORD AND REPORT COVID-19 INFECTIONS AND DEATHS

Employers are obligated to report work-related cases of COVID-19 on their Form 300 logs if those cases otherwise meet recording requirements in the regulations (the case is confirmed, work-related, and involves relevant recording criteria). Similarly, employers are responsible for reporting work-related COVID-19 fatalities and hospitalizations to OSHA.

CONCLUSION

Creating a successful COVID-19 Prevention Program is an important step to maintaining a workplace free from hazards and it may be used by an employer to demonstrate compliance with the General Duty Clause. The most effective programs will engage employees in the hazard assessment process, implement strong COVID-19 hazard controls, incorporate strategies for

effective communication, and provide a non-punitive absence policy. But a successful Prevention Program is only one step. All of OSHA's standards applicable to protecting worker health and safety remain in place, including, among other things, regulations concerning PPE, respiratory protection, protection from bloodborne pathogens, and employee access to medical and exposure records.

We will continue to provide insights on COVID-19 issues in the future. If you have questions specific to your company's situation, please contact any of the authors identified under Meet the Team or your BCLP relationship attorney.

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