

Managing Workplace Safety in the COVID-19 Era

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The workplace safety framework in the United States is difficult to navigate at its best. Since the beginning of the COVID-19 global health emergency, employers have faced increasingly complex challenges involving inconsistent and conflicting guidance regarding workplace safety regulations and best practices. Since taking office in January 2021, the Biden administration has initiated the process of clarifying rules and advice to employers regarding COVID-19 safety measures.

Employers with operations in the U.S. should monitor these developments, with particular attention to the Occupational Safety and Health Administration (“OSHA”) and the feasibility of COVID-19 liability waivers.

I. Occupational Health & Safety

On January 21, 2021, President Biden signed his Executive Order on Protecting Worker Health and Safety, which directed OSHA to issue revised COVID-19 guidance. In response, OSHA issued its latest COVID-19 guidance, “Protecting Workers: Guidance on Mitigating the Spread of COVID-19 in the Workplace” on January 29, 2021. This new guidance highlights the use of COVID-19 prevention programs as “the most effective way” to slow the spread of COVID-19 in the workplace and explains these programs should include the following elements:

1. Assignment of a workplace coordinator who will be responsible for COVID-19 issues on the employer's behalf.
2. Identification of where and how workers might be exposed to COVID-19 at work.
3. Identification of a combination of measures that will limit the spread of COVID-19 in the workplace, in line with the principles of the hierarchy of controls.
4. Consideration of protections for workers at higher risk for severe illness through supportive policies and practices.
5. Establishment of a system for communicating effectively with workers and in a language they understand.
6. Educate and train workers on your COVID-19 policies and procedures using accessible formats and in a language they understand.

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7. Instruct workers who are infected or potentially infected to stay home and isolate or quarantine to prevent or reduce the risk of transmission of COVID-19.
8. Minimize the negative impact of quarantine and isolation on workers.
9. Isolating workers who show symptoms at work.
10. Performing enhanced cleaning and disinfection after people with suspected or confirmed COVID-19 have been in the facility.
11. Providing guidance on screening and testing.
12. Recording and reporting COVID-19 infections and deaths.
13. Implementing protections from retaliation and setting up an anonymous process for workers to voice concerns about COVID-19-related hazards.
14. Making a COVID-19 vaccine or vaccination series available at no cost to all eligible employees.
15. Not distinguishing between workers who are vaccinated and those who are not.
16. Application of other relevant OSHA Standards, including PPE requirements, respiratory protection, sanitation, protection from blood-borne pathogens, requirements for employee access to medical and exposure records, and OSHA's General Duty Clause (requiring employers to provide a safe and healthful workplace free from recognized hazards that can cause serious physical harm or death).

OSHA's January 29 guidance also contains recommendations for employers to limit the spread of COVID-19 in the workplace, including:

- Isolating workers who have or likely have COVID-19 consistent with [CDC guidelines](#);
- Quarantining workers who have been exposed to COVID-19 consistent with [CDC guidelines](#);
- Implementing physical distancing and barriers in work areas;
- Using face coverings;
- Improving ventilation;
- Using PPE as necessary;
- Providing supplies for good hygiene practices; and
- Performing routine cleaning and disinfection.

Employers who have been following OSHA and other federal and state agency COVID-19 safety guidance will find OSHA's new guidance largely unsurprising, as it largely incorporates previous guidance and best practices.

Notably, OSHA's most recent guidance includes best practices surrounding vaccinations. Besides providing vaccinations to workers at no cost, OSHA recommends that employers provide resources and information regarding the "benefits and safety of vaccinations" and advises that employees who have been vaccinated "must continue to follow protective measures."

II. Employer Waivers of COVID-Related Liability

For a number of reasons, including concern about the unequal bargaining power between employers and employees, many states limit or prohibit employer enforcement of waivers of claims related to workplace injuries. These limitations and prohibitions also apply when workers are potentially exposed to COVID-19 in the workplace.

Likewise, employers should remember that their duty to maintain a safe work environment cannot be waived by employees. The Occupational Safety and Health Act of 1970 (“OSH Act”) requires employers to maintain working conditions free from known dangers. OSHA has identified COVID-19 contracted in the workplace as a reportable injury. Under OSHA’s guidelines, employers are required to make a reasonable and good faith inquiry to determine whether it is “more likely than not” that workplace exposure was causally related to cases of COVID-19. This means that regardless of any waiver, an employer may have to take responsibility for cases of COVID-19 in the workplace.

Generally, a state’s worker’s compensation laws provide employees’ exclusive remedy for injuries or illness arising from or occurring because of their employment, including injuries and illnesses that stem from an employer’s negligence. Whether COVID-19 is considered an “occupational disease” subject to worker’s compensation varies by state, and individual state laws may make distinctions based on the date of contraction of COVID-19, the worker’s role and other factors. Traditionally, state worker’s compensation agencies require workers to show that their injury or illness occurred within the course and scope of their employment and there was a particular risk based on the work conditions that exceeded the risk to the general public.

However, in response to the COVID-19 public health emergency, several states have passed laws or issued guidance providing that certain types of employees (particularly essential workers) who contract COVID-19 within specific timeframes are presumed to have caught the illness through the course of their employment. Courts have also recently entertained claims alleging that employers intentionally failed to take steps to keep workers safe from COVID-19 and thus, the worker can sue the employer directly notwithstanding workers’ compensation laws.

State and federal lawmakers have made efforts to shield employers from liability stemming from their employees or customers contracting COVID-19. In 2020, Senate Republicans proposed a bill to shield employers from liability for COVID-19 exposure, unless the employee could prove “by clear and convincing evidence” that the employer was the source of the exposure, had not made reasonable efforts to comply with applicable laws or guidelines, and engaged in gross negligence or willful misconduct. However, the proposed legislation would not preempt state worker’s compensation laws. To date, the proposal has not been enacted. Several states, including Georgia, Kansas, Louisiana, Mississippi, North Carolina, Ohio, Oklahoma, Tennessee, Utah and Wyoming, have enacted COVID-19 liability shields, which offer varying protections to employers.

III. Practical Considerations

While the new OSHA guidance generally incorporates previous guidance and best practices, employers should take care to review and comply with the safety guidelines. Given the addition of information related to vaccinations, employers should incorporate OSHA’s vaccine guidance into their COVID-19 response. Employers should also review the [U.S. Equal Employment Opportunity Commission’s guidance on vaccinations](#) and

confer with counsel before rolling out vaccination programs.

OSHA guidance is not a standard or regulation, and does not directly create legal obligations for employers. However, in the case of an OSHA investigation, OSHA's inspectors will rely on this guidance when determining whether to issue an employer a citation. Failure to follow OSHA guidance could also be used as evidence of wrong doing in a civil suit. Employers should also note that OSHA will likely issue new legal obligations related to COVID-19 soon. President Biden's executive order also ordered OSHA to "consider whether any emergency temporary standards on COVID-19, including with respect to masks in the workplace, are necessary, and if such standards are determined to be necessary, issue them by March 15, 2021." We expect OSHA to issue emergency temporary standards to this effect.

Some employers have been asking workers to sign COVID-19 liability waivers as a deterrent to bringing claims. However, given their doubtful enforceability, employers should consider the message sent to employees, regulators, and the public about the company's priorities if such waivers are required. Particularly given the remaining liability under worker's compensation laws and the OSH Act, employers would be better served by foregoing COVID-19 liability waivers and focusing efforts on workplace safety compliance and messaging.