COVID-19 & Infectious Disease Control In the Workplace

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Overview

- In 2015, OSHA completed SBREFA panel for its Infectious Disease rulemaking – SER panel provided input on draft rule
- Initiative now at "long term agenda" stage in Trump Administration and does not appear on 12-month plan
  - House Education & Workforce Cmte called for emergency standard in wake of CoronaVirus (COVID-19)
  - Next step will be issuance of proposed rule for public comment
  - As a "major rule" would trigger Trump E.O. "One in, two out"
- AFL-CIO previously requested expedition of rulemaking due to Ebola crisis but did not occur ...
- Until rule is promulgated, OSHA can enforce via GDC and reference guidance on prevention of I.D. spread
- 3/10/20 – OSHA issued guidance on preparing workplaces for COVID-19 (imputation of knowledge?)

COVID-19: What We Know

- Respiratory disease, now in 150+ countries – some area lockdowns in effect
  - Symptoms may be mild or deadly: fever, cough, shortness of breath, with symptoms appearing in 2-14 days after exposure
  - Virus is spread person-to-person (6 foot distance) or through respiratory droplets in sneezes and coughs or by touching objects with virus (then touching your T-zone)
- Employers must update existing infectious disease plans to address COVID-19 – specific exposure risks, sources of exposure, community transmission, unique characteristics (compared with “flu”)
  - If no current plan, need to anticipate failures from lack of continuity planning, expecting workers to “fill in” where not adequately trained and address
- OSHA guidance based on traditional infection prevention and industrial hygiene practices

Federal OSHA & COVID-19

- 3/10/20: 35-page “Guidance on Preparing Workplaces for COVID-19” published (developed in collaboration with CDC)
  - OSHA also has COVID-19 info page: https://www.osha.gov/SLTC/covid-19/
  - CDC Guidance: www.cdc.gov/coronavirus/2019-ncov
  - Guide contains info on safe work practices, appropriate PPE based on risk level of exposure
- OSHA is actively reviewing and responding to complaints by workers concerning protections
- Whistleblowers have protections under both Section 11(c) of OSH act and 1904.36 (prohibits retaliation against workers reporting injury/illness)
  - Some health care workers may also have whistleblower protections under HHS rules

Federal OSHA Guidance

- OSHA advises some workers may be at heightened risk due to interacting with travelers from abroad:
  - Healthcare
  - Deathcare
  - Laboratories
  - Airline Operations
  - Border Protection
  - Solid Waste and Wastewater Management
  - Those who must travel for business where virus is spreading

HR 6139: COVID-19 Health Care Worker Protection Act of 2020

- Introduced 3/9/20 by Rep. Scott (D-VA) and Rep. Shalala (D-FL) to protect healthcare workers
  - Follows up on 3/5/20 letter from House to Labor Sec. Scalia – because DOL offered no OSHA plan in response
- Would require OSHA to issue a Emergency Temporary Standard to ensure health care facilities implement comprehensive infectious disease exposure control plans
- OSHA can issue a ETS if workers are exposed to “grave danger” from new hazards.

OSHA Standards & COVID-19

- General Duty Clause (Section 5(a)(1) of OSH Act)
- 29 CFR 1910.132 (general PPE), 1910.133 (eye/face), 1910.134 (respiratory protection), 1910.138 (hand protection)
- 29 CFR 1910.141 (sanitation)
- 29 CFR 1910.1020 (medical records access)
- 29 CFR 1910.1030 (Bloodborne Pathogens)
- 29 CFR 1910.1200 (HazCom Standard, related to use of hazardous chemicals for cleaning and disinfection, including common sanitizers and sterilizers)
- 29 CFR 1910.1450 (hazard chemicals in laboratories)
  - *29 CFR 1910.1904 (Recordkeeping and Injury/Illness Reporting) – includes severe injury reporting requirements with mandated $5000+ penalty and also whistleblower protections*

General Duty Clause (GDC)

- Section 5(a)(1) of the Act requires that "Each employer shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees."
- Necessary elements to prove a violation of the general duty clause:

  ► The employer failed to keep the workplace free of a hazard to which employees of that employer were exposed;

  ► The hazard was recognized;

  ► The hazard was causing or was likely to cause death or serious physical harm; and

  ► There was a feasible and useful method to correct the hazard.
- A general duty citation must involve both the presence of a serious hazard and exposure of the cited employer's **own** employees.

General Duty Clause

- Recognition of a hazard can be established on the basis of **employer recognition, industry recognition,** or **“common-sense” recognition**.
- Evidence of employer recognition may consist of written or oral statements made by the employer or other management or supervisory personnel.
- Employer awareness of a hazard may also be demonstrated by a review of company memorandums, safety work rules that specifically identify a hazard, operations manuals, standard operating procedures, collective bargaining agreements, prior accidents/incidents, near misses known to the employer, injury and illness reports, or workers' compensation data.
- Employee complaints or grievances and safety committee reports to supervisory personnel may establish recognition of the hazard.
- An employer’s own corrective actions may serve as the basis for establishing employer recognition of the hazard if the employer did not adequately continue or maintain the corrective action.

General Duty Clause

- A hazard is recognized if the employer's relevant industry is aware of its existence.
  - Recognition by an industry other than the industry to which the employer belongs is generally insufficient to prove this element of a Section 5(a)(1) violation.
- Although evidence of recognition by an employer's similar operations within an industry is preferred, evidence that the employer's overall industry recognizes the hazard may be sufficient.
  - Even if there is a specific standard, industry recognition that the standard does not sufficiently protect workers may be basis for GDC citation (*Fiberdome* PELs case)

Hierarchy of Controls

- **Engineering:** high-efficiency air filters, increase ventilation rates, install physical barriers, drive-through customer service options, negative pressure ventilation where needed for aerosol generating procedures
- **Administrative**: Sick leave policies, replace in-person meetings with web-based, telework, discontinue non-essential travel, alternate days or shifts to reduce # of workers present at any time, emergency communication plans, education/training, safe work practices
- **PPE**: Last resort, must be properly rated, mandated use requires medical eval and fit test, worker training, PPE selected based on hazard to worker, must be consistently worn, regularly inspected, maintained and replaced
  - PPE must be provided at the employer's expense!

CalOSHA & COVID-19

- Cal/OSHA's regulations require protection for workers exposed to airborne infectious diseases such as COVID-19 - ***California Code, Title 8, Subtitle 5199***
- The agency issued interim guidance that provides employers and workers in health care settings with vital information for preventing exposure to the virus
- CalOSHA advises employers and employees to review their own health and safety procedures as well as the recommendations and standards detailed by the agency on its page
- https://www.dir.ca.gov/dosh/Coronavirus-info.html
- CalOSHA has jurisdiction over mines too (dual with MSHA)

CalOSHA Requirements

- Aerosol Transmissible Diseases (ATD) standard contains requirements for protecting employees from diseases and pathogens transmitted by aerosols
  - COVID-19 is an airborne infectious disease covered by the ATD standard.
- CalOSHA's ATD Standard applies to:
  - Hospitals, skilled nursing facilities, clinics, medical offices, outpatient medical facilities, home health care, long-term health care facilities, hospices, medical outreach services, medical transport and emergency medical services
  - Certain laboratories, public health services and police services that are reasonably anticipated to expose employees to an aerosol transmissible disease.
  - Correctional facilities, homeless shelters, and drug treatment programs.
- Any other locations when Cal/OSHA informs employers in writing that they must comply with the ATD Standard.

CalOSHA ATD Rule

- CalOSHA's ATD standard requires covered employers to protect employees from airborne infectious diseases & COVID-19 through effective:
  - Written ATD exposure control plan and procedures
  - Training
  - Engineering and work practice controls
  - Personal protective equipment
  - Medical services (including vaccination and infection determination and treatment)
  - Laboratory operation requirements
- The requirements are less stringent where exposure to airborne infectious diseases are limited

Future OSHA Infectious Disease Rule?

- Workplaces where measures “might be necessary” include:
  - health care,
  - emergency response,
  - correctional facilities,
  - homeless shelters,
  - drug treatment programs, and
  - “occupational settings where employees can be at increased risk of exposure to potentially infectious people”
- OSHA LTA notes: A standard could also apply to laboratories, which handle materials that may be a source of pathogens, and to pathologists, coroners’ offices, medical examiners and mortuaries.

Whistleblower Protections

- Section 11(c) and implementing regulations permit work refusal where there is a good faith belief re: imminent danger of injury/illness without remedial measures taken, and the concern is communicated to employer (some exceptions) and situation is not resolved or there is insufficient time to eliminate danger through complaint to OSHA
- If worker refuses to work because standards are not being followed by employer, and is retaliated against, protected under Sec. 11(c)
- What about co-workers of sick employee?
- What about ADA “Direct Threat to Safety” affirmative defense as applied to health care workers?

What About MSHA ?

- MSHA advises mine operators to adhere to CDC guidelines
- MSHA will continue its essential functions, including mandatory inspections, accident investigations, and hazard complaints
- MSHA has suspended EFS and small mine services, and “walk & talks”
  - If mines are limiting production or closing operations – let MSHA know so they can adjust inspector assignments
- MSHA will permit extensions on certain certifications but company must work with its district office to ensure certifications are conducted in a timely manner once the Emergency Declaration is lifted:
  - Annual refresher training (Part 46 and Part 48)
  - Certified person sampling (coal 70/71/90.202)
  - Certified person, maintenance & calibration (coal 70/71/90.203)
  - Likely to extend deadline on annual audiometric testing (get permission)
  - NO extension on new miner training – must still be complete before work at mines
  - Make sure to DOCUMENT any discussions of extensions with District Office to make sure there is concurrence on new “due date”

MSHA & COVID-19

- Internal guidance under development re:
  - inspection protocols,
  - use of separate vehicles to travel within mines,
  - minimizing group meetings, and
  - postponement of health sampling (distancing considerations)
- Inspectors will remain a safe “distance from miners while performing inspections”
- Due to 103A, cannot refuse entry to mine
  - COVID-19 can raise difficult questions about where the inspector has traveled recently, any symptoms observed while on site – get District Office involved ASAP!
- Remember to document Task Training under Part 46/48 if workers are assigned to new jobs as a result of workforce shrinkage due to illness!

Dormitory Living on Worksites

- Often arise in Oil, Gas and Mining industries on remote work areas – “mancamps”
- No formal OSHA/MSHA guidance but Singapore Ministry of Manpower (MOM) recommends:
  - Increase cleaning of premises
  - Regularly monitor residents closely for fever and respiratory symptoms
  - Remind residents about “good hygiene” practices
  - Suspend all mass activities to minimize risk of infection
  - Stagger usage of common facilities, to minimize interactions
  - Workers being monitored or on quarantine should be separated, and arrangements for food, etc. made to minimize social contact and need to lease premises (other than med care)

DOT & Drug Tests

- 3/23/20 DOT guidance to clarify concerns about mandated drug/alcohol tests
- DOT-regulated employers: must comply with applicable DOT training and testing, but DOT recognizes compliance may not be possible due to unavailability of BATs, MROs, SAPs – make reasonable effort to locate necessary resources, consider mobile collection services if fixed sites not available
- If unable to conduct drug/alc tests or training, document why test not completed and if test can be completed later, follow modal regulations (www.transportation.gov/odapc/agencies)
- If unable to conduct DOT tests due to unavailability of testing resources, without a “negative” pre-employment test, employer cannot permit prospective or current EE to perform any DOT “safety-sensitive” functions (in case of FAA, cannot hire individual at all)

DOT Guidance

- If employee expresses health risk concern about collection/test process, review DOT requirements to determine whether flexibilities allow for collection/testing later
- It is employer's responsibility to evaluate circumstances of EE refusal to test per 49 CFR 40.355(i) – DOT says "be sensitive" to employees who are afraid to go to clinics
- Employers should revisit backup plans for collectors, collection sites, BATs, MROs, etc.

PPE Requirements

- Under 1910 Subpart I, the employer must perform a hazard assessment to select appropriate personal protective equipment for the hazards that are present, or likely to be present, including foreseeable emergencies.
- Paragraph (d) of 1910.132 is a “general requirements” performance-oriented provision which simply requires employers to use their awareness of workplace hazards to enable them to select the appropriate PPE for the work being performed.
- Paragraph (d) clearly indicates that the employer is accountable both for the quality of the hazard assessment and for the adequacy for the PPE selected.
- The hazard assessment must be in the form of a written certification as described in 29 CFR 1910.132(d)(2).
  - 1910.133 also requires eye and face protection
- The employer must include procedures for selecting respirators in the written respiratory protection program as described in 29 CFR 1910.134(c).
- Hospital employees who are trained to the First Responder Operations Level must be trained to know how to properly select and use the proper PPE that is provided to them.

Respiratory Protection

- OSHA standard (1910.134) requires employers to establish or maintain a respiratory protection program to protect their respirator-wearing employees.
  - Preferred practice is to use engineering controls to reduce contaminant emissions at their source.
  - There are operations where this type of control is not technologically or economically feasible.
- **Airborne (or respiratory) hazards** may result from either an oxygen deficient atmosphere or breathing air contaminated with toxic particles, vapors, gases, fumes or mists.
  - Proper selection and use of a respirator depend upon an initial determination of the concentration of the hazard or hazards present in the workplace.

Respiratory Protection Programs

- Whenever respirators are required to be worn, OSHA requires employers to develop and implement a written respirator protection program.
- The program must be tailored to the specific conditions of the workplace and include worksite-specific procedures governing the selection, use, and care of respirators.
- The program must be updated as often as necessary to reflect changes in workplace conditions and respirator use.
- The program must be administered by one qualified individual to ensure that the program is maintained and there is continuous oversight.

Respiratory Protection Selection

- Criteria to be considered include:
  - Nature of the hazard, and the physical and chemical properties of the air contaminant;
  - Concentrations of contaminants;
  - Relevant permissible exposure limit or other occupational exposure limit;
  - Nature of the work operation or process;
  - Time period the respirator is worn;
  - Work activities and physical/psychological stress;
  - Fit testing; and
  - Physical characteristics, functional capabilities and limitations of respirators.

Respirators – Medical Issues

- Persons assigned to tasks that require the use of a respirator must be physically able to perform the work while using the respirator.
- Employers have the responsibility of ensuring that employees are medically fit to tolerate the physical and psychological stress.
- Employees must be medically evaluated and found eligible to wear the respirator selected for their use prior to fit testing or first-time use of the respirator in the workplace.
- Medical eligibility is to be determined by a physician or other licensed health care professional.
- A medical questionnaire (1910.134, Appendix C) must be used to perform the medical evaluation of workers.
- Fit testing (qualitative or quantitative) is required annually.

OSHA & Fit Testing

- In 3/14/20 guidance, OSHA said field offices have discretion not to cite employer for annual fit testing violations if:
  - Make good faith effort to comply
  - Use only NIOSH-certified respirators
  - Implement the strategies recommended by CDC/OSHA for N95 respirators
  - Perform INITIAL fit tests for each employee & DO conduct test if changes in conditions could affect respirator fit
  - Explain that suspension of annual tests is to preserve supplies
  - Remind workers to notify mgmt. if integrity or fit of respirator is compromised
- OSHA recommends healthcare personnel who provide direct care use N99 or N100 filtering facepieces, reusable elastomeric respirators with appropriate filters and cartridges, or PAPRs
- OSHA recommends just using quantitative fit testing for N95 to preserve supplies

Annual Employee Training

- Employee training must include a discussion of why the use of the respirator is necessary, identification of the hazards involved, the extent of employee exposures to those hazards, and the potential health effects of such exposures.
- Information regarding the consequences of improper fit, usage, or maintenance on respirator effectiveness must also be provided.
- Employees must also be provided with an explanation of the limitations and capabilities of the respirator selected for employee use.
- Employees must also know how to use the respirator effectively in emergency situations.
- Training must include the procedures for inspecting the respirator, donning and removing it, checking the fit and respirator seal, and actually wearing the respirator, as well as identification and management of problems and where to obtain replacement equipment.
- Instructions must be given to respirator users regarding the proper procedures for maintenance and storage of respirators.
- The training program must also provide employees with medical information so they can recognize the signs and symptoms of medical conditions (e.g., shortness of breath, dizziness) that may limit or prevent the effective use of respirators.

Recordkeeping

- 1910.134 requires the employer to establish and retain written information regarding medical evaluations, fit testing, and the respirator program.
- The employer must retain a medical evaluation record for each employee subject to medical evaluation. This record is to include the result of the medical questionnaire and, if applicable, a copy of the physician's written opinion and recommendations, including the results of relevant medical examinations and tests.
- Records of medical evaluations must be retained and made available as required by 29 CFR 1910.1020, OSHA's Access to Employee Exposure and Medical Records rule.
- Fit test records must be retained for respirator users until the next fit test is administered.

Voluntary Use of Respirators

- Some employees may choose to wear respiratory protection (e.g., N95 masks) even where not required by law.
- OSHA requires such employees to be provided with the information in 1910.134, Appendix D.
  - Read and heed all instructions provided by the manufacturer on use, maintenance, cleaning and care.
  - Choose respirators certified for use to protect against the contaminant of concern.
  - Do not wear the respirator into atmospheres containing contaminants for which the respirator is not designed to protect against.
  - Employees must keep track of their respirators so that they do not mistakenly use someone else's respirator.

Construction/Mining Best Practices

- Create at least 6’ between workers, staging or staggering crews to prevent spread
- Hold meetings and toolbox talks outside
- Plan for office staff to work from home
- Ensure supervisors “walk the walk”
- One person in an elevator at a time
- Require handwashing before eating, drinking or use of tobacco products
- Provide soap/running water on all jobsites (or 60% alcohol sanitizer if not feasible)
- Clean & disinfect high-touch surfaces on jobsites and in offices – keyboards, copiers, phones, railings, door knobs, portable toilets, shared tools and mobile equipment

OSHA COVID-19 Guidance

- Develop infectious disease preparedness & response plan – stay abreast of govt guidance and incorp into workplace-specific plans
- Consider & address level of risk associated with worksites and tasks including routes of exposure (general public, customers, co-workers, travelers, health care setting, risk factors in community settings)
- Consider individual workers' risk factors (age, chronic medical conditions, pregnancy) and implement controls to address those risks (watch out for Title VI, ADA, ADEA)
- Consider how to address worker absenteeism, need to stagger workshifts, deliver services remotely or telework, cross-train workers across different jobs to reduce disruptions

OSHA COVID-19 Guidance

- Prepare to implement basic infection prevention measures:
  - promote frequent handwashing,
  - provide alcohol-based rubs,
  - encourage workers to stay home if sick,
  - encourage respiratory etiquette (cover coughs),
  - provide trash receptables for tissues, discourage workers from using each others' phones and work tools
  - maintain regular housekeeping practices, including cleaning and disinfecting surfaces, equipment and tools
  - develop policies to identify and isolate potentially infectious individuals, and restrict persons entering isolation areas
  - encourage workers to self-monitor, report if feeling sick, and stay home (flexible sick leave – don't require doctor's note!)
  - Work with insurance co. to provide worker benefits and info on medical care

Don't Forget Labor Law Issues!

- Americans with Disabilities Act (covers those disabled, regarded as disabled or associated with disabled persons, including persons who cannot shave or otherwise wear tight-fitting respirators)
- FMLA and state medical leave laws
- Title VII protection against discrimination based on national origin and religion
- HIPAA
- USERRA (service members' protections)
- EEOC Guidance on Reasonable Accommodations: https://www.eeoc.gov/employers/smallbusiness/checklists/manager_responsibilities_reasonable_accommodation.cfm

HR Issues & COVID-19

- Employee has “flu-like” symptoms:
  - State/federal law permits employers to require medical exams if necessary to determine if ability to work safely has been impaired or if worker poses “direct threat” under ADA
  - Because CDC advises workers stay home if have symptoms of COVID, you can require this and ask for doctor’s note clearing return to duty
  - Watch for mandated “stay home” orders for non-essential businesses
  - Watch for state/muni unique provisions against terminating workers for testing positive for COVID
- Employee has been exposed to COVID-positive person but has no symptoms:
  - CDC has required employees exposed to COVID-19 to conduct risk assessment & self-quarantine
  - Employer can ask workers to self-report if exposed to COVID-19 at home or during travel, and to stay home until clear they are not infected (14-day quarantine is recommended by CDC)

Other HR Issues

- Can employees under mandated quarantine be terminated for absenteeism:
  - Probably not – be careful because some states may prohibit employers from discharging workers for complying with mandated orders (public policy exception to employment at will)
  - If worker already exhausted all available leave, better practice is to put on unpaid leave (check for new legislation) pending resolution of quarantine orders
- Can employees be required to take FMLA leave while under quarantine or self-isolation:
  - Perhaps ... if worker is DIAGNOSED with COVID-19 (certifiable as serious health condition), then yes
  - If employee is sent home to self-quarantine but is not diagnosed, then it does not qualify for FMLA
  - Caring for family member? Same analysis

OSHA & MSHA Reporting

- If worker reports COVID-19 to employer as “work-related” illness, worker is covered by OSHA and MSHA anti-retaliation laws (Sec. 11C and 1904.36 for OSHA; Sec. 105C of Mine Act for MSHA worksites)
  - Employer can determine work-relatedness for OSHA recording purposes (but may be second-guessed)
  - If worker is hospitalized, and claims work-related, must notify OSHA within 24 hours (8 hours of work-related death) & for MSHA, must notify agency within 15 minutes of any death or injury/illness with potential to result in death (even those that may not be work related)
    - Can use online report or call local office
  - OSHA’s says to put on OSHA 300/301 logs IF all the following are met:
    - Confirmed case of COVID-19
    - Case is work-related as defined under 29 CFR 1904.5, and
    - Case involves one or more of general recording criteria (medical treatment beyond first aid, restricted duty, days away)
- MSHA says “illness or disease of miner” is reportable if it “may have resulted from work at a mine or for which an award of compensation is made” (30 CFR 50.2(f))

Questions???

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