COVID-19 In the Workplace: Next Steps to Reopening

Adele L. Abrams, Esq., CMSP

Law Office of Adele L. Abrams PC

www.safety-law.com

COVID-19: What We Know

- Respiratory disease, now worldwide pandemic – many area lockdowns still in effect but more than half the US states preparing to reopen
- 4/16/20 US Govt issued guidelines: Opening Up America Again but defers to state govt and counties as to when to reopen sectors
  - 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) –asymptomatic issues?
- 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

COVID-19: Symptoms

- May 2020: Updated list of symptoms –
  - Cough
  - Shortness of breath – difficulty breathing
  - OR … at least two of the following symptoms:
    - Fever
    - Chills
    - Repeated shaking from chills
    - Muscle pain
    - Headache
    - Sore throat
    - NEW loss of taste or smell
  - Emergency warning signs requiring immediate medical attention:
    - Trouble breathing
    - Persistent pain or pressure in the chest
    - New confusion or inability to be awakened
    - Bluish lips or face
    - This list is NOT all-inclusive

Congress: HR 6559

- Every Worker Protection Act of 2020: would require OSHA to issue a ETS (within 7 days) based on CDC guidance to protect ALL workers from exposure to COVID-19 in the workplace (OSHA rejected AFL-CIO 4/28 call for ETS)
  - Would require all workplaces to implement infectious disease exposure control plans
  - OSHA would have to issue permanent infectious disease standard within 2 years
- Forbids employers from retaliating against workers for reporting infection control problems to employer, public authority, media, or on social media, or because workers use their own higher level PPE if employer does not provide it
- Protects public sector employees in the 24 federal OSHA states where they are not covered
- Gives OSHA citation discretion over PPE in health care and other covered employers if there is good-faith effort to purchase and alternative methods of protection are offered
- Requires CDC/NIOSH to track and investigate COVID-19 infections and make recommendations on needed actions to protect workers

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 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.

Federal OSHA & COVID-19

- 4/16/20: OSHA Memo to Regional Admin/State Plans urging "discretion in enforcement when considering an employer's 'good faith' efforts during C-19 pandemic
  - During inspection, CSHO will assess efforts to comply with standards requiring annual or recurring audits, reviews, training or assessments
  - Where compliance was not possible, CSHO will assess AND document what ER did to ensure workers were not exposed to hazards from tasks, processes or equipment for which they were not prepared/trained – e.g., virtual training or remote communication
  - Will consider use of eng/admin controls, and efforts to reschedule the activity ASAP
  - If no effort to comply demonstrated, a citation may be issued
  - To ensure corrective actions are taken once normal activities resume, OSHA will develop a monitoring inspection program randomly sampling cases where citations were deferred
  - In effect until further notice, but is time limited to current crisis

"Enforcement Discretion" Situations

- Examples of enforcement deferral situations:
  - Annual Audiograms
  - Annual PSM Requirements
  - HazWaste Operations Training
  - Respirator Fit Testing and Training (annual only – not initial)
  - Maritime Crane Testing & Certification
  - Medical Evaluations to wear a respirator (must reschedule spirometry test once suspension is lifted per ACOEM)
- https://www.osha.gov/memos/2020-04-16/discretion-enforcement-when-considering-employers-good-faith-efforts-during

OSHA Enforcement Response

- OSHA 4/13/20 guidance to area offices on enforcement procedures, hazard alert letters, accident investigation & complaint triage: https://www.osha.gov/memos/2020-04-13/interim-enforcement-response-plan-coronavirus-disease-2019-covid-19
- For COVID complaints, OSHA will process those from “non-healthcare and non-EMR” as a non-formal complaint and use FOM procedures
- If employer has a severe injury report, must still notify OSHA within 8 hr (fatal) or 24 hr (hospitalization, amputation, eye loss) but most will be handled through RRI – fatalities prioritized
- Memo assigns risk levels to workplaces:
  - High/very high exposure: hospitals/emergency response facilities/nursing homes/laboratories/medical transport
  - Medium exposure: those with frequent or close contact (w/in 6’) of people who may be infected (contact with general public)
  - Lower exposure: those not requiring contact with people known or suspected to be infected, no frequent close contact with general public, coworkers

Additional OSHA Information

- Enforcement Guidance on Use of Respiratory Protection Equip certified by other countries (4/3/20)
- Enforcement Guidance for Resp. Protection & N95 Shortage – re: using past expiration date, reusing allowed (4/3/20)
- Memo expanding temp guidance on Resp. Protection fit testing to all industries (4/8/20 – earlier memo in March only applied to healthcare sectors)
- 3/10/20: 35-page "Guidance on Preparing Workplaces for COVID-19" published (developed in collaboration with CDC): https://www.osha.gov/Publications/OSHA3990.pdf
  - 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 Employer 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 Employer 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

OSHA Guidance to Workers

- You can discontinue home isolation if you check with your health care provider or state government – check “essential activities” and if you were hospitalized, follow discharge instructions from physician
  - Employers should be flexible since many patients do not require medical attention to recover and may not be able to provide a doctor’s note before returning – this strains facilities
- If a worker believes they were exposed to or infected with COVID-19, OSHA says:
  - Stay home: do not leave except to get medical care and do not visit public areas
  - Stay in touch with your doctor: Call before seeking medical care but get care if you feel worse or think it’s an emergency
  - Notify your supervisor: Employer can take actions to keep others in the workplace healthy and may be able to offer schedule and leave flexibility
  - Avoid public transportation: Try to avoid public transit, buses, ride-sharing or taxis
  - Call 911 in case of medical emergency (put facemask on before help arrives)

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
  - 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 **& in high-risk sector** (health/deathcare, emergency responders, laboratories) – otherwise assume community transmission
    - 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))

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!

CDC Guidance for "Critical Infrastructure" Workers Exposed

- Pre-screen: ER should measure EE's temperature and assess symptoms prior to starting work (before entering facility)
- Regular Monitoring: As long as no temp or symptoms, EE should self-monitor under sup'v of ER's occupational health program
- Wear a Mask: EE should wear face mask at all times in the workplace for 14 days after last exposure (ER can issue or approve EE-supplied face covering)
- Social Distance: EE should stay 6 feet away from others "as work duties permit"
- Disinfect & Clean Work Spaces: ER should routinely clean all areas such as offices, bathrooms, common areas, shared equipment
- If worker becomes sick during day, send home immediately and clean their workspace.
- Info on persons having contact with ill worker (during time of symptoms and 2 days prior) should be compiled – others at facility within 6' during this time should be considered exposed

Guidance: Meat/Poultry Processing

- Multiple COVID-19 outbreaks in meat/poultry processing facilities – NOT exposed through meat products but work environments can contribute to exposures such as: processing line, busy areas with close contact, long duration of contact, and practices such as ride-sharing vans and shuttles, carpools and public transport
- Recommendations:
  - Have qualified workplace coordinator responsible for assessment/control planning
  - Consider appropriate role for testing and workplace contact tracing of positive workers, using CDC guidance
  - Controls:
    - engineering controls (6 feet apart if possible) and changes in production practices, physical barriers, use physical markings and signs, consult with HVAC engineer to ensure adequate ventilation but minimize use of fans that can blow from worker to worker
    - implement appropriate cleaning, sanitation and disinfecting to reduce exposures – handwashing stations, sanitizers, add clock in/out stations to avoid crowding, use tents outside for break and lunch areas, avoid overflow in training and conference rooms

Construction Best Practices

- Create at least 6’ between workers, staging or staggering crews to prevent spread
- If you work in healthcare facilities, instruct workers in Infection Control Risk Assessment (CPWR has program)
- 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 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.

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
  - 30 day statute of limitations to file under Sec. 11C, but 36 states allow wrongful discharge claims under state common law exceptions to "employment at will"
- OSHA is reviewing and responding to complaints by workers concerning protections but see 4/13/20 Inspection & Investigation procedures (triage approach)
  - Over 3,000 COVID hazard complaints to Fed OSHA, around 400 whistleblower complaints so far
- Whistleblowers have protections under both Section 11(c) of OSH act and 1904.36 (prohibits retaliation against workers reporting injury/illness)
  - 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!

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.

OSHA & Fit Testing

- In 3/14/20 guidance, OSHA said field offices have discretion not to cite employers (now expanded across all industries) 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

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.
  - ***WHAT ABOUT CLOTH MASKS????***
- 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.

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 COVID (as of 4/23/2020): https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws

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 (except critical infrastructure)
  - 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

SAFER Coalition

- NSC along with other safety organizations& Fortune 500 companies formed task force to guide employers through process of safely resuming work operations
  - For info: safer@nsc.org and visit www.nsc.org/coronavirus
- SAFER will:
  - Issue recommendations and develop guidance for employers of all sizes
  - Identify complexities in reengaging workers, contractors, partnering with HR, legal, labor, healthcare and worker's comp providers
  - Develop general and sector-specific playbooks to help US businesses align worker safety with business objectives

Questions???

Adele L. Abrams, Esq., CMSP
Law Office of Adele L. Abrams PC
301-595-3520
safetylawyer@gmail.com