Workplace Safety Compliance & Best Practices

COVID-19

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Kate McMahon
OSHA • Workplace Safety Group
Conn Maciel Carey LLP
Kate McMahon is Partner in the OSHA/Workplace Safety Practice Group at Conn Maciel Carey, where she focuses her practice in the areas of OSHA and environmental law:

- Represents industry stakeholders in all aspects of OSHA chemical and other rulemakings – pre-rule RFIs; OIRA; notice & comment; hearings; post-rule litigation

- Defends her clients in state and federal administrative and federal court litigation related to OSHA citations and EPA NOVs alleging violations of the Occupational Safety and Health Act and/or environmental statutes.

- Provides regulatory compliance counselling as well as assists her clients in the development of best practices and health and safety management tools to protect her clients’ workforces.
Agenda

❖ OSHA Ranking of Workplace Risk and Infection Control

❖ Exposure Control and Response (Requirements and Best Practices)

❖ COVID-19 Workplace Cases
  ❑ Leaving the Workplace
  ❑ Reentering the Workplace

❖ OSHA Recordkeeping and Reporting of COVID-19 cases

❖ OSHA Enforcement Updates
OSHA/CDC Risk Exposure
Workplace Categories
OSHA Guidance
Risk Exposures for COVID-19

• Issued official guidance on preparing workplaces for COVID-19 on March 9, 2020
• Largely follows CDC’s guidance
• Divides jobs into risk exposure levels
• Provides steps employers can take to reduce workers’ risk of exposure
• Specifies what employers should do to protect workers based on the exposure level of their job
Very high

- Healthcare / lab workers performing aerosol-generating procedures or handling specimens from known/suspected COVID-19 patients
- Morgue workers performing autopsies on bodies of known/suspected COVID-19 patients

High

- Healthcare, support, and medical transport exposed to known/suspected COVID-19 patients
- Mortuary workers involved in preparing bodies of known/suspected COVID-19 patients

Medium

- Those that require frequent and/or close contact (w/in 6 ft.) of people who may be infected w/ COVID-19 patients, but who are not known or suspected COVID-19 patients
- Where there is on-going community transmission, workers in this category may have contact w/ the general public

Lower

- No required contact w/ people known/suspected of being infected w/ COVID-19, nor frequent close contact (w/in 6 ft.) of general public
Exposure Response and Control
Protective Measures to Consider

• **Engineering controls** (e.g., high-efficiency air filters, increasing ventilation rates, installing physical barriers such as sneeze guards, etc.)

• **Admin. controls** (e.g., require sick workers to stay home, virtual meetings, implement telework if feasible, job rotations/staggered shifts, etc.)

• **Safe work practices** (procedures to reduce duration, frequency, or intensity of exposures; e.g., requiring regular hand washing)

• **Personal Protective Equipment** (e.g., face shields, respiratory protection, gloves, gowns, etc.)
Protections to Consider

• Implement COVID-19 Exposure Control Plan / Response Plan
• Implement engineering and administrative controls
• Physical changes and policies to maximize social distancing
• Signage/communication for employees/guests re: hygiene practices
• ID and require sick employees/guests to stay out of the workplace
• Temp. PPE Hazard Assessment (consider gloves, gowns, respirators)
• Limit workforce / staggered and rotating shifts
• Provide adequate supply alcohol-based hand sanitizer, cleaning supplies, and hand soap
• Enhance workplace housekeeping program
• Discourage use of other workers’ phones, desks, offices, tools and equipment
Written Exposure Control Plan

• Overall plan to address a significant hazard (like your Lockout/Tagout Program or Haz/Com Program)

• Should be tailored to your specific site

• OSHA asks for and likes them & many states are even requiring them (although no firm requirement from MD, DC, or VA)

• Effective communication tool so your employees know you care
Social Distancing

• Signage and communication
• Hall monitors
• Modify/move workstations
• Stagger shifts/breaks/meals
• Reconfigure breakrooms/add new areas
• One-way halls/pathways
• What about maintenance department?
If employers are planning to do any diagnostic testing on workers, they must follow CDC guidance and regulatory requirements including:

- Testing must be job related and consistent with business necessity
- May require a qualified health care worker to conduct the tests
- Employer must ensure that the tests are accurate and reliable
  - Employers should still require that employees observe infection control practices
  - Employers who are testing and recording must keep the records for one year and maintain confidentiality
Health Screening Procedures

• Employers must:
  – Conduct testing in a non-discriminatory manner
  – Maintain the confidentiality of test results
  – Determine whether time related to testing is compensable under federal and state wage and hour laws
  – Have protocols in place for employees who refuse testing
  – Use consent/acknowledgement forms
  – Establish protocols for notifying employees of results
COVID-19 Testing

• Employers can require employees to participate in testing even if they do not exhibit symptoms

• Beware of false of negatives

• Negative test also does not mean employee will not be infected later, so keep following guidance from public health authorities

• BREAKING - EEOC Guidance this week – Employers may NOT require an anti-body test as a return-to-work condition
Sanitizing & Disinfecting

• Enhanced daily cleaning
  – Focus on high touch point areas
  – Common areas (tasting room, breakrooms, restrooms)
  – Shared equipment (PITs, LOTO locks, taps, tanks, kettles, vessels, etc.)

• Regular deep cleaning
  – Weekly or bi-weekly
  – In response to confirmed case
  – Third party professional service

• Develop checklist and maintain logs

• Check state & local guidance re: disinfecting & cleaning
OSHA Face Covering, Mask, and Respirator Guidance

• Face covering (cloth mask/bandanas) – not considered PPE and employer technically does not have to pay for them under 1910.132

• Surgical/dental mask – not PPE if being used only as source control (i.e. not to protect workers against splashes and sprays)

• However, OSHA has expressed that Sec. 5(a)(1) of the OSH Act may require employers to provide and pay for such masks, as they are intended as a feasible means of abatement in a control plan

• So, we recommend employers provide and pay for masks
Face Coverings & Masks

• Employers should require use of face covering in the workplace

• Neither OSHA nor CDC recommend or require employees in medium- or low risk workplaces wear respirators

• Loose-fitting masks w/ no filtering medium (e.g., cloth masks or other face coverings) are not respirators and also not PPE

• Employee who declines to wear it w/out medical or other protected reason should not be permitted to work and may be disciplined

• Employees may be permitted to use their own face covering
Requiring Employees to Wear Masks

• What if an employer has distributed face coverings, but an employee fails to bring their face covering to work?
  – Because face coverings are considered protective equipment, the employee should not be permitted to work on-site until s/he is able to obtain a face covering

• What if employees want to use their own face coverings?
  – Must make sure the coverings meet the CDC’s requirements and that they clean them correctly
  – Employers should provide employees a reimbursement or subsidy for material and cleaning costs
  – Must be work appropriate and cannot feature offensive images or content
What if an employee declines to wear a face covering for non-medical reasons?

- Employee objections should be evaluated in light of all of the relevant circumstances such as:
  - Religious grounds with pre-existing dress requirements
    - The employer should engage in the interactive process required by Title VII and similar state and local provisions
  - Bias concerns where people of color are wrongly suspected of criminal intent and activity
    - Employers should source face covering that more clearly look like protective masks and post notices about the face coverings requirement
Many employees are bringing their own personal masks into the workplace – many of which are considered respirators under 1910.134, such as N95 masks.

- If respirators are required in the workplace, an employer will have significant additional regulatory obligations, including fit tests, medical evaluations, training, and the development of a written respiratory protection program.

- If respiratory protection is not otherwise required for work tasks, employers should not require such use for COVID-19 reasons, unless you are prepared.

- Employers should, however, allow employees to voluntarily wear N95 facemasks or similar filtering facemasks. The only regulatory burden that the employer faces by allowing employees to voluntarily use N95 or similar filtering facemasks is to provide the employee Appendix D of 1910.134.
Responding to COVID-19 Cases
Responding to Confirmed Cases
Contact Trace & Clean

• Immediately isolate the employee, remove him/her from the workplace, and direct the employee to self-quarantine

• Start contact tracing to identify any other employees or visitors who had close contact w/ the infected employee

• Notify those who may had had potential close contact with the COVID-19 infected individual, maintaining confidentiality

• Those w/ close contact (w/in 6’ for more than a few min.), should be isolated, removed, and directed to self-quarantine

• Those w/ minimal contact and no symptoms may remain at work w/ preventive actions (hygiene, masks, monitoring for symptoms)

• Conduct deep cleaning and disinfecting of any area(s) where the employee worked or contacted (using EPA-approved chemicals)
Returning COVID+ Employees to Work

An employee who **had symptoms** can return to work under either a symptom-based strategy or test-based strategy.

- **Symptom-based strategy**: at least 3 days since recovery (resolution of fever w/out use of fever-reducing medications and improvement in respiratory symptoms); and at least 10 days since symptoms 1st appeared

- **Test-based strategy**: resolution of symptoms AND negative results of an Authorized COVID-19 molecular assay test from at least 2 consecutive respiratory specimens collected 24+ hours apart

An employee who **did not have symptoms** can return to work under either time-based strategy or a test-based strategy.

- **Time-based strategy**: 10 days since 1st positive COVID-19 diagnostic test

- **Test-based strategy**: negative results of COVID-19 molecular assay test from at least 2 consecutive respiratory specimens collected 24+ hours apart
OSHA Log Recording and Reporting COVID-19 Cases
FAQ: Is a confirmed COVID-19 diagnosis of one of my employees recordable on my 300 Log?

- Although OSHA’s recordkeeping rule exempts cold/flu, OSHA has explicitly stated that COVID-19 can be a recordable illness.

- Employers only have to record a COVID-19 case if:
  - It is a **confirmed case** of COVID-19 (at least 1 respiratory specimen that tested positive for SARS-CoV-2 virus).
  - It results in 1 or more **general recording criteria** (treatment beyond 1st aid; days away; etc.).
  - It is determined to be **work-related** as defined by 1904.5

**Recording workplace exposures to COVID-19**

OSHA recordkeeping requirements at 29 CFR Part 1904 mandate covered employers record certain work-related injuries and illnesses on their OSHA 300 log.

While 29 CFR 1904.5(b)(2)(viii) exempts recording of the common cold and flu, **COVID-19 is a recordable illness** when a worker is infected on the job.
Healthcare, emergency responders, and correctional facilities must follow typical work-relatedness analysis (i.e., assess on a case-by-case basis whether it is more likely than not that an exposure in the workplace caused the illness).

Other employers need not even assess work-relatedness unless:

1. There is objective evidence of work-relatedness (e.g., a cluster among those who work closely together with no other explanation); and

2. Evidence is reasonably available to the employer (e.g., info given by employees, or employer learns of it in the ordinary course).
Work-Relatedness Guidance (May 19)

• ALL EMPLOYERS must undertake a case-by-case work-relatedness analysis of whether it is *more likely than not that an exposure in the workplace caused the illness*

• Employers are “not expected to undertake extensive medical inquiries, given employee privacy concerns.” It will be sufficient in most cases for employers to:
  
  – Ask the employee how he believes he contracted the COVID-19 illness
  
  – Discuss w/ the employee his work and out-of-work activities that may have led to the COVID-19 illness; and
  
  – Review the employee’s work environment for potential exposures
Work-Relatedness Guidance (May 19)

• OSHA also ID’d types of evidence that weighs in favor of work-relatedness; i.e., COVID-19 illnesses “are likely work-related” if:
  – Several cases among workers w/ close contact, *and no alternative explanation*
  – Illness contracted shortly after lengthy, close exposure to another confirmed case, *and no alternative explanation*
  – Job duties include frequent, close exposure to the general public in an area w/ ongoing community transmission, *and no alternative explanation*

• OSHA also ID’d evidence that a COVID-19 case likely is NOT work-related:
  – Only 1 worker in a general vicinity in the workplace contracts COVID-19
  – Job duties do not include frequent contact w/ general public
  – Outside the workplace, the infected employee associated closely and frequently w/ a non-coworker who has COVID-19
FAQ: Same question, but reporting to OSHA?

• Same analysis for work-relatedness applies

• Reporting only required where there is a death or in-patient hospitalization

• Hospitalization is reportable only if the employee is formally admitted to the in-patient service of the hospital for treatment *within 24 hours of the work-related exposure* that caused the illness (extremely unlikely)

• Fatality is reportable only if it occurs within 30 days of the work-related exposure (possible)
COVID-19 OSHA Recordkeeping Flow Chart

Use this flow chart to assess whether to record an employee’s COVID-19 illness on the OSHA 300 Log.

Is this a “confirmed” case of COVID-19 (i.e., at least 1 respiratory specimen tested positive for SARS-CoV-2)?

- **YES**
  - Does the case involve any of the following general recording criteria:
    1. Death;
    2a. Days away from work (including quarantine while asymptomatic);
    2b. Licensed healthcare professional recommended days away;
    3a. Restricted from performing a job function normally done at least once per week or from working a full workday;
    3b. Licensed healthcare professional recommended a job restriction;
    3c. Permanent or Temporary transfer to another job;
    4. Medical treatment beyond first aid; and/or
    5. Loss of consciousness?

- **YES**
  - Is there reasonably available evidence of potential work-relatedness (i.e., provided by the employee or learned in the normal course of managing the business)?

- **NO**
  - Not Recordable

- **NO**
  - Not Recordable

Do the employee’s job duties include having frequent close exposure to the general public in an area with ongoing community transmission?

- **NO**
  - Not Recordable

- **YES**
  - Was the illness contracted shortly after a lengthy, close exposure to a particular customer or coworker who has a confirmed case of COVID-19?

- **NO**
  - Not Recordable

- **YES**
  - Have several employees who work closely together contracted COVID-19?

- **NO**
  - Not Recordable

- **YES**
  - Is there any alternative (non-workplace) explanation for the confirmed case (e.g., resides or closely associated with someone who tested positive, takes public transportation, shops or socializes in an area with on-going community spread)?

See CMC’s COVID-19 Work-Relatedness Questionnaire

Is there any alternative (non-workplace) explanation for the confirmed case (e.g., resides or closely associated with someone who tested positive, takes public transportation, shops or socializes in an area with on-going community spread)?

- **YES**
  - Not Recordable

- **NO**
  - Record on the OSHA 300 Log and complete a 301 Report

NOTE: Employers w/ 10 or fewer employees or in designated low-hazard industries (see Appendix A of 29 C.F.R. 1904) are exempt from keeping OSHA injury and illness records. Regardless, all employers must meet reporting obligations under 29 C.F.R. 1904.39.
OSHA Enforcement Landscape

*in the time of the*

COVID-19 Pandemic
## OSHA COVID-19 Enforcement Update

### Summary Data for Federal and State Programs - Enforcement

#### Complaints, Referrals and Closed Cases (totals to date)

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<th>State Summary</th>
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**17,192 Employee Complaints** (addressed by Phone/Fax or RRI)

### Inspections by Region (totals to date)

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<td>112</td>
<td>21</td>
<td>16</td>
<td>5</td>
<td>8</td>
</tr>
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**432 Enforcement Inspections** (1 reporting citation issued so far)
General Duty Clause

- OSHA lists the General Duty Clause as a relevant standard that may apply to preventing occupational exposure to COVID-19
- Sec. 5(a)(1) of the OSH Act (the General Duty Clause):
  “Each employer shall furnish 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.”
- 4 elements necessary to prove a violation:
  1. Hazard exists in the workplace;
  2. Employer or its industry “recognizes” the hazard;
  3. Hazard is like to cause death or serious injury; and
  4. Feasible means exist to eliminate/reduce the hazard
April 13, 2020 Interim Enforcement Response Plan for COVID-19

- Relaxed enforcement posture (focus on compliance assistance)
- Enforcement focused on very high risk level industries/workplaces
- Fatalities / imminent danger related to COVID-19 prioritized for inspections
- Reports of COVID-19 hazards everywhere else addressed by NOAHs and RRI Requests
- OSHA was publicly flogged by worker safety activists, unions, and the media for the initial relaxed enforcement strategy
May 19, 2020 Updated Interim COVID-19 Enforcement Response Plan

• Increased enforcement inspections at workplaces across all industries (purportedly b/c non-critical businesses reopening)

• New framework for handling inspections:

  1. In geographic areas where community spread of COVID-19 has significantly decreased and for low- and medium-risk exposure level workplaces, OSHA will return to its normal inspection planning policy (prior to the COVID-19 health crises) as follows:

     • COVID-19 complaints and cases will be prioritized

     • RRI and phone/fax will continue to be used as historically done

     • Life-critical unprogrammed activities (e.g., falls, struck-by, caught-in/between, or electrocutions) will result in on-site inspections
New framework for handling inspections:

2. In geographic areas experiencing either sustained elevated community transmission or a resurgence in community transmission of COVID-19 or at high- and very high-exposure risk workplaces, OSHA will exercise its discretion in deciding whether to initiate an on-site inspection or conduct non-formal phone/fax investigation.

- Fatalities and imminent danger exposure related to COVID-19 prioritized for on-site inspection.
- Employer-reported hospitalizations will be handled using a RRI in most cases.
Enforcement Discretion Policy

• April 16, 2020 – New OSHA Enforcement Memo, providing relief from enforcement for employers in all industries

• If employer is unable to comply w/ standard that requires annual/recurring duty (e.g., audit, training, assessment, inspection, or testing) b/c of COVID-19, AND employer made good faith attempts to comply, OSHA “shall take such efforts into strong consideration in determining whether to cite a violation”

• BUT where employer cannot demonstrate any effort to comply, or why complying would be more hazardous, citations may issue

• OSHA also expects employers to make good faith attempts to return to compliance as soon as normal operations resume
Enforcement Discretion Policy –
Types of Compliance Obligations Covered

• Annex A of memo is a non-exhaustive list of examples of situations where enforcement discretion will be considered:
  1. Annual Audiograms
  2. Annual Hazardous Waste Operations Training
  3. Annual Respirator Fit Testing and Training
  4. Crane Operator Re-Certification or Re-Licensing Examinations
  5. Periodic Medical Evaluation for Respirator Use
  6. Process Safety Management requirements:
     ▪ Process Hazard Analysis Revalidations
     ▪ Annual review and certification of Operating Procedures
     ▪ Periodic Refresher Operator Training
     ▪ BUT NOT, Mechanical Integrity
To assess whether employer was unable to comply, OSHA will look for documentation of efforts to comply, e.g.:

- Contracts/invoices that show training or audit service had been timely scheduled before the outbreak
- Communications w/ vendors re: cancellation b/c of the pandemic
- Efforts to explore other options to comply (e.g., virtual training)

In assessing employers’ good faith efforts to address the hazard, OSHA will look for documentation of:

- Good faith efforts to implement interim alternative protections (e.g., engineering or administrative controls not normally used in the normal course of day-to-day operations before the pandemic)
- Other efforts to address the hazard associated with the compliance obligation (e.g., additional training or audits, reduced throughput)
Conn Maciel Carey
COVID-19 Task Force Resources
Check out our blogs:

the OSHA DEFENSE report

the EMPLOYER DEFENSE Report
OSHA's 2019 in Review and 2020 Forecast
Thursday, January 23rd

OSHA Settlement Tips and Strategies
Tuesday, February 25th

Strategies for Responding to Whistleblower Complaints
Wednesday, March 25th

Annual Cal/OSHA Update
Thursday, April 16th

E-Recordkeeping and Injury Reporting Update
Wednesday, May 20th

OSHA's PPE Standards - Top 5 Risks and Mistakes
Tuesday, June 16th

What You Need to Know About OSHA's General Duty Clause
Thursday, July 23rd

Employee Discipline - OSHA and Labor & Employment Issues
Wednesday, August 19th

Privileged Audits and Investigations and OSHA's Self-Audit Policy
Tuesday, September 22nd

Impact of the Election on OSHA
Thursday, October 22nd

Updates about OSHA's PSM Standard and EPA's RMP Rule
Tuesday, November 17th

Impact of America's Aging Workforce on OSHA and Employment Law
Wednesday, December 16th
Contact Information

Kathryn M. McMahon
Partner, OSHA • Workplace Safety Group
Conn Maciel Carey LLP
Washington, D.C.
202.909.2733
kmcmahon@connmaciel.com