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Workplace Safety During the Pandemic: What Employers May Not Know About Their OSHA Obligations

Whether they have remained open during the COVID-19 pandemic or sought to reopen after pandemic-related closures, employers have had to monitor the constantly evolving and often confusing guidance from the Occupational Safety and Health Administration (OSHA), the Centers for Disease Control and Prevention (CDC) and other federal and state entities. OSHA has recently fined numerous employers for their failure to comply with the Occupational Safety and Health Act, thrusting into the spotlight employers' obligations, including those relating to the wearing of masks, record keeping, recording workplace COVID-19 infections, and reporting work-related inpatient hospitalizations and deaths.

Masks

Masks have become a part of everyday life given CDC recommendations and state and local orders, yet employers often are unaware of or misunderstand their obligations when employees wear masks. The applicable OSHA obligations associated with different types of masks are summarized below.

- *Face coverings or face masks*. Commercially produced or homemade non-respirator face coverings or masks made of cloth are intended to protect against COVID-19 transmission by reducing the spread of ***large*** respiratory droplets emitted when the wearer talks, sneezes or coughs. The CDC refers to these cloth face coverings or masks as source control barriers. OSHA has made clear that cloth face coverings are not considered personal protective equipment (PPE), and accordingly OSHA's PPE Standard does not apply. Although this means employers do not have any obligation to provide cloth face coverings to employees, or to train employees on their use, care, disposal or limitations, it is important to note that many state and local orders and guidelines do impose such requirements.
- *Surgical masks*. Employers' obligations with respect to surgical masks depend on the intended use. When "used to protect workers against splashes and sprays (i.e., droplets) containing potentially infectious materials" (such as in healthcare or first responder roles), surgical masks are considered PPE. In such cases, OSHA's PPE Standard requires employers to provide them to employees at no cost; to ensure they are used; and to train workers on their use, care, disposal and limitations. When surgical masks are worn in a capacity similar to cloth face coverings, OSHA does not consider them to be PPE and therefore they are not subject to the PPE Standard.
- *Respirators*. Respirators, such as N95 or similar masks, are used to help prevent employees from inhaling ***small*** particles, including virus-infected airborne particles. OSHA regulations, CDC rules, and state and local mask mandates or recommendations generally do not require employers to provide respirators unless a specific respiratory hazard exists in the workplace. In the context of COVID-19, a specific respiratory hazard may be present where employees are required to be in close contact with someone who is suspected of having or confirmed to have COVID-19, such as in healthcare environments. When employees are required to use N95 respirators due to the existence of respiratory hazards, such use is subject to OSHA's PPE Standard as well as its Respiratory Protection Standard. OSHA's Respiratory Protection Standard imposes significant obligations on employers, including that they implement a respiratory protection program and conduct medical evaluations and fit tests for all employees required to use respirators. Employers that permit employees to use respirators ***voluntarily*** also are subject to certain lesser requirements under OSHA's Respiratory Protection Standard, including that they must provide employees with the information contained in Appendix D of the

Respiratory Protection Standard. As a best practice, employers should be able to demonstrate that they have done so, including by having employees sign Appendix D and retaining the signed document in employees' personnel files.

Record Keeping Relating to Employee Health Screenings and Temperature Checks

Another potential trap for unwary employers is the requirement that OSHA-covered employers retain employee medical records. As part of their workplace safety measures, and in compliance with numerous state and local orders, many employers have implemented health-screening procedures that include temperature checks for all individuals entering the workplace.

OSHA has indicated that it is permissible for employers to conduct health screenings that include temperature checks. If employers create records of the results of any health-screening measures and/or temperature checks, such records may qualify as medical records under OSHA's Access to Employee Exposure and Medical Records Standard, which requires employers to retain medical records for the duration of the employee's employment plus 30 years and to follow confidentiality requirements. Because they are not required to make a record of employees' temperatures, employers should consider whether it makes sense to create records of any health screenings and/or temperature checks given the potential additional burdens imposed by doing so, or rather to simply review and respond to health-screening results in real time without tracking or recording the data.

OSHA Recording and Reporting Obligations

Employers also have struggled with deciding whether to ***record*** COVID-19 cases in their workplace on their OSHA 300 logs given the difficulty in determining whether such cases are actually work related. In May, OSHA issued guidance for employers grappling with making such determinations, which we previously covered here. Note that employers that are very small or in certain low-hazard industries are partially exempt from OSHA's record-keeping requirements.

In addition to recording requirements, employers (including those partially exempt from OSHA's record-keeping requirements) also may have an obligation to ***report*** to OSHA (by telephone or through its website), within certain time frames, any work-related inpatient hospitalizations or fatalities caused by COVID-19.

OSHA regulations require employers to report to OSHA any inpatient hospitalization of an employee resulting from a work-related incident (i.e., event or exposure) if the inpatient hospitalization occurs within 24 hours of the work-related incident or, in the case of a fatality, the fatality occurs within 30 days of the work-related incident. Although OSHA has released conflicting guidance on this issue, most recently, on September 30, it published a new series of answers to its "COVID-19 Frequently Asked Questions," clarifying that the work-related "incident," which triggers an employer's reporting obligation, is an employee's ***exposure to COVID-19 in the workplace***. This new guidance means that most employee inpatient hospitalizations, even if they arise from work-related exposures, will not be reportable. For example, if two employees are exposed to COVID-19 in the workplace on Monday and are admitted to the hospital on Tuesday and Wednesday, respectively, only the case of the first employee admitted to the hospital would be reportable to OSHA (assuming the employer determines the infection was work related) because the second employee's inpatient hospitalization did not occur within 24 hours of the exposure on Monday. Note, however, that if either employee dies within 30 days of that person's exposure, such fatality would be reportable.

It is important that employers keep their reporting requirements in mind because of the short time periods within which they must make such reports to OSHA. Employers are required to report employees' inpatient hospitalizations resulting from work-related COVID-19 exposures within ***24 hours*** and fatalities resulting from work-related COVID-19 exposures within ***8 hours***.

Key Takeaways

The COVID-19 pandemic has presented employers with challenges and obligations many have never previously had to face, including the workplace safety mandates imposed by OSHA regulations. Although this may be uncharted territory for many employers, compliance is critical as the pandemic continues. Employers implementing or revising safety policies and procedures should consult with counsel to ensure compliance with applicable OSHA, CDC, and state and local guidance.

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COVID-19 DISCLAIMER: As you are aware, as a result of the COVID-19 pandemic, things are changing quickly and the effect, enforceability and interpretation of laws may be affected by future events. The material set forth in this document is not an unequivocal statement of law, but instead represents our best interpretation of where things stand as of the date of first publication. We have not attempted to address the potential impacts of all local, state and federal orders that may have been issued in response to the COVID-19 pandemic.

Authors



Francine Esposito
Partner

Parsippany, NJ | (973) 966-8275

fesposito@daypitney.com



James M. Leva
Partner

Parsippany, NJ | (973) 966-8416

Stamford, CT | (973) 966-8416

jleva@daypitney.com