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OSHA Issues New Guidance on Protecting Workers During COVID-19

Human Resources & Employment

On January 21, 2021, President Biden issued an “Executive Order on Protecting Worker Health and Safety.” The [Order](#), issued on the first full day of the new Biden Administration, was one of many directly addressing COVID-19. The Order stated that the federal government must take “swift action to reduce the risk that workers may contract COVID-19 in the workplace” and gave the Assistant Secretary of Labor, acting through the Occupational Safety and Health Act (OSHA), two weeks to provide revised guidance to employers on workplace safety.

In the Order, the Assistant Secretary of Labor was directed to “identify short-, medium-, and long-term changes that could be made to better protect workers and ensure equity in enforcement,” and to “launch a national program to focus OSHA enforcement efforts related to COVID-19 on violations that put the largest number of workers at serious risk or are contrary to anti-retaliation principles.” The Order also asked the federal Department of Labor (DOL) 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.”

It remains to be seen whether the DOL will publish emergency temporary standards. However, on January 29, 2021, OSHA issued new guidance on “Protecting Workers: Guidance on Mitigating and Preventing the Spread of COVID-19 in the Workplace.” The guidance is not law and creates no new legal obligations. Yet employers are required under OSHA to provide their workers with a workplace free from recognized hazards that are causing or likely to cause death or serious physical harm. The guidance is intended to assist employers in recognizing those hazards. More specific OSHA requirements, including protecting workers from infection, respiration hazards and bloodborne pathogens, remain in effect.

What Does the Guidance Say About Returning to Work?

Employers want to understand how their employees can return to work safely. Citing to CDC guidance, the guidance embraces the following safety measures at work:

- Social distancing (at least 6 feet)
- Frequent handwashing and hygiene around sneezing and coughing
- Daily monitoring of COVID-19 symptoms
- Mask wearing (two layers of a tightly woven breathable fabric)

While none of the above guidance is surprising (and perhaps even seared into our brains by now), OSHA provides a couple of additional ideas employers should consider:

1. Develop a COVID-19 Prevention Program

The guidance says that implementing a “COVID-19 Prevention Program” is the “most effective way to mitigate the spread of COVID-19 at work.” In addition to reiterating CDC guidance on health screenings, hygiene, social distancing, masking and sanitation, OSHA suggests a host of ideas to encourage safe employee behavior, including:

- Assigning a workplace coordinator responsible for handling COVID-19 issues
- Considering protections for workers at higher risk for severe illness through supportive policies and practices (including older adults)
- Establishing a system for communicating effectively with workers in a language they understand (and without fear of retaliation)
- Ensuring that COVID-19-related absences are non-punitive so that employees infected or potentially infected know to stay home and isolate/quarantine
- Providing flexible work arrangements such as telework and working in isolated areas to minimize the negative impact of quarantine and isolation on workers through flexible work policies
- Permitting the use of paid sick leave for COVID-19-related leave (note that certain jurisdictions, such as Chicago, have paid sick leave laws that may apply depending on the situation)
- Providing guidance on screening and viral testing, following state or local guidance and priorities for testing and screening in the workplace
- Making a COVID-19 vaccine or vaccination series available at no cost to all eligible employees
- Not distinguishing between workers who are vaccinated and those who are not (more on this below)

Simply put, similar to guidance provided by the DOL regarding the Families First Coronavirus Response Act, the government is asking employers to be flexible in these unprecedented times.

2. Implement Physical Distancing in All Communal Work Areas

The office will look different so long as COVID-19 is still around. The guidance recommends that employers make efforts to limit the number of people in one place at any given time. Workspaces should be at least six feet apart, workers should be at least six feet from customers, and social norms such as handshaking and crowded happy hours should be prohibited. In addition to increasing the physical space between workers in the office, the guidance also suggests that teleworking, flexible/staggered work hours, and flexible meeting and travel options should be considered to limit crowds at work.

Importantly, the guidance adopts the position of the CDC regarding mask wearing and social distancing for employees who have been vaccinated: Workers who are vaccinated “must continue to follow protective measures, such as wearing a face covering and remaining physically distant, because at this time, there is not evidence that COVID-19 vaccines prevent transmission of the virus from person-to-person.”

3. Provide Masks to Employees

Citing the critical role masks play in suppressing the spread of COVID-19, the guidance suggests that employers should provide face coverings to workers at no cost. Employers are also reminded of their obligation to consider requests for reasonable accommodations for workers.

Additionally, while certain PPE, such as face shields, are not required across all industries, the guidance states that employers should encourage and support the voluntary use of PPE where an employee is concerned for their personal safety.

4. Continue to Follow CDC Guidance

The guidance provides that workers who have or are likely to have COVID-19 should be isolated “until they meet CDC guidelines for exiting isolation.” As of now, those guidelines require isolation for:

- At least 10 days since symptoms first appeared, and
- At least 24 hours with no fever without fever-reducing medication, and
- Improvement of other symptoms of COVID-19 (loss of taste and smell may persist for weeks or months and need not delay the end of isolation).

Regarding workers who have been exposed to COVID-19, the guidance requires that employees isolate for 14 days after last contact, watching for symptoms.

Regarding testing, the guidance also states that the CDC “does NOT recommend that employers use antibody tests to determine which workers can work. Antibody tests check a blood sample for **past infection** for SARS-CoV-2 and are not very reliable.”

Speaking of past infections, the guidance also notes that workers who have recovered from COVID-19 should only be tested for the virus if they develop new symptoms, as they may continue to test positive for three months or more without being contagious to others.

What Does the Guidance Say About Recording and Reporting COVID-19 Illness?

The guidance also notes that employers are obligated to record work-related COVID-19 illness on their Form 300 logs if the following requirements are met:

- The case is a confirmed case of COVID-19;
- The case is work-related (as defined by 29 CFR 1904.5); and
- The case involves one or more relevant recording criteria (set forth in 29 CFR 1904.7).

Additionally, the guidance suggests that employers report any outbreaks to their health departments as required and to support their state's contact tracing efforts.

What Are Some Practical Takeaways for Employers?

OSHA's guidance, and its heavy citation of CDC guidance, serves as a reminder that employers must integrate current health recommendations into workplace protocol. To maintain a safe workplace for employees, employers should do the following:

- Develop a COVID-19 Prevention Program, engaging workers (and, if applicable, union representatives) in its development. Such a program will help employees understand best practices, increase confidence among employees that the workplace is safe, and reduce liability if somebody does get sick.
- Train Human Resources professionals and company supervisors to approach COVID-19-related requests with care. Ensure that they provide information in the languages your employees speak. When handling requests to work remotely, alter/shift hours or wear additional protective gear, they should consider each on a case-by-case basis. The guidance even suggests that age, by itself, could justify a reasonable accommodation (due to COVID-19 affecting older people more severely).
- Train Human Resources professionals and company supervisors not to retaliate against workers for staying home due to illness or raising safety concerns.
- Budget for the new workplace. When workers do return to the office, employers should be prepared with masks, barriers and other tools that reduce the spread of COVID-19.

If you have questions about any of the issues discussed in this article, please contact any of the attorneys in the [Human Resources and Employment Law Practice](#) at Gould & Ratner for further guidance.