



CRISIS PRACTICE

Coronavirus

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What if Working Remotely or Social Distancing is Not Feasible?

OSHA Weighs In on Coronavirus Workplace Protections

The dramatic spread of the novel coronavirus—now commonly referred to as COVID-19—has raised troubling questions of shutdowns, cancellations, and alternative work arrangements for employers. Dealing with COVID-19, its implications on the workplace, and newly issued guidance from U.S. OSHA (OSHA) present particular challenges. For some industries like pharmaceutical developers, medical device manufacturers and sterilizers, and food and beverage manufacturers, remote working and recommended “social distancing” practices are not practicable. In those cases, addressing OSHA’s existing standards and newly issued COVID-19 Guidance may be especially challenging.

OSHA COVID-19 Guidance. OSHA, per its statutory charge to “assure safe and healthful working conditions,” issued “Guidance on Preparing Workplaces for COVID-19” to employers in response to the rapidly evolving COVID-19 threat on March 13, 2020. While the Guidance includes the typical disclaimer of not being a standard or regulation or creating any new regulation, its reference to the OSH Act’s General Duty clause indicates OSHA expects adherence to the Guidance and may follow up with enforcement.

OSHA’s guidance is based on “traditional infection prevention and industrial hygiene practices” and “focuses on the need for employers to implement engineering, administrative, and work practice controls and personal protective equipment (PPE), as well as considerations for doing so.” The Guidance encourages employers that have not already done so to, among other things: (1) develop an infectious disease preparedness and response plan; (2) prepare to implement basic infection prevention measures; (3) develop policies and procedures for prompt identification



and isolation of sick people; (4) develop, implement, and communicate about workplace flexibles and protections; and (5) follow existing OSHA standards.

OSHA's COVID-19 Guidance specifically mentions the "hierarchy of controls" to abate workplace hazards. Under this hierarchy, OSHA favors "engineering controls" (e.g. installing more powerful ventilation systems, negative pressure rooms) over "administrative controls" (e.g. travel restrictions, alterations to work schedules) over personal protective equipment, or PPE (e.g. wearing respirators, face masks).

COVID-19 Information on OSHA Website. In addition to publishing the Guidance, OSHA's website contains a COVID-19 information section (see [here](#)) describing OSHA's recent COVID-19 activity and summarizing existing OSHA standards the agency believes are triggered by the COVID-19 "hazard" in the workplace. To date, complaints from employees to the agency about whether companies are adequately protecting employees has prompted OSHA to contact at least 20 employers (with the number likely growing daily). In each case, OSHA has sent a letter outlining the complainant's concerns and requested information on what preventative measures the company is taking. To date, none of the complaints have led to an OSHA inspection—but those are likely coming. While the specific requirements employers face are less than clear, the OSHA COVID-19 web pages indicate employers need to consider the following compliance issues in addition to the points in the Guidance.

First, existing OSHA regulations exempt recording of the common cold and flu (29 C.F.R. § 1904.5(b)(2)(viii)). However, OSHA considers COVID-19 a recordable illness that must be tracked by employers. This tracking requirement could pose problems for employers who must determine if a worker is ill from COVID-19 as opposed to the flu or a cold. If it is determined an employee is infected with COVID-19, the employer must then determine whether the employee was infected on the job. Given the current testing capabilities and understanding of COVID-19, this will prove challenging.

Under OSHA's standards, employers with 10 or more employees must keep a log of every workplace injury or illness, including COVID-19, that requires medical treatment or keeps a worker away from work for at least one day. Given the quick rise and proliferation of this illness and new containment and social distancing efforts, failure to keep accurate records opens employers to citations and fines for under recording of COVID-19 cases.

Second, beyond tracking and recording, employers need to take precautions to protect employees from potential risks and infection from COVID-19. For example, under OSHA's Hazard Communication standard (29 C.F.R. § 1910.1200), employers must protect workers from exposure to hazardous chemicals used for cleaning and disinfection. Because many common sanitizers and sterilizers contain hazardous chemicals, employers' heightened efforts to clean the workplace may trigger reporting and notice obligations to employees about potential exposure to cleaning agents.

Also, if respirators are necessary to protect workers from airborne transmission, employers must implement a comprehensive respiratory protection program in accordance with the Respiratory Protection standard (29 C.F.R. § 1910.134). Per OSHA, the Bloodborne Pathogen standard (29 C.F.R. § 1910.1030), which typically applies to occupational exposure to human blood and other potentially infectious materials unassociated with respiratory secretions like COVID-19, offers a framework that may be helpful in controlling potential sources of the virus.

Third, at a minimum, OSHA is encouraging employers to follow guidance issued by the Centers of Disease Control and Prevention, which can be found [here](#). Theoretically, OSHA could cite an employer under the General Duty Clause for not adhering to CDC recommendations. Many employers have already instituted policies in line with CDC recommendations—including limiting overseas travel, canceling unnecessary employee meetings, and handing out bottles of hand sanitizer. But employers should be proactive and develop new health and safety plans to address their specific operational needs, workforce management, and compliance efforts.



On the state level, employers regulated by State Plan health and safety agencies (or “state OSHAs”) are required to comply with all U.S. OSHA standards plus any additional requirements imposed by their states. For instance, California’s Aerosol Transmissible Disease standard requires additional protections to prevent worker illness from infectious diseases that can be transmitted by inhaling air that contains bacteria, disease causing organisms, and viruses (like COVID-19). (See [here](#)).

Unfortunately, simply complying with the obvious facial obligations of OSHA standards or following CDC recommendations likely will not address many issues employers are likely to face. For example, what should employers do if employees ask to work from home beyond recommended timelines? Or what if employees refuse to work at customers’ facilities? What are employers’ obligations if employees object to working alongside employees returning from self-quarantine and exhibiting no symptoms? These questions may implicate additional employment laws, such as the Americans with Disabilities Act, and will require best efforts by employers to manage their obligations to provide a safe work environment while also meeting business operational needs.

King & Spalding’s experienced OSHA team can help develop reasonable and defensible approaches to these and other COVID-19 challenges and help employers prepare defensible responses to any COVID-19 related complaints from OSHA or State Plan OSHAs.

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