

Coronavirus

APRIL 21, 2020

For more information,
contact:

Jim Vines
+1 404 572 4822
+1 202 383 8921
jvines@kslaw.com

Nicholas Howell
+1 404 572 2750
nhowell@kslaw.com

John Armsby (Gardner)
+1 404 572 2760
[garsby@kslaw.com](mailto:garmsby@kslaw.com)

King & Spalding

Atlanta
1180 Peachtree Street, NE
Atlanta, Georgia 30309-3521
Tel: +1 404 572 4600

Washington, D.C.
1700 Pennsylvania Avenue,
NW
Washington, D.C. 20006-
4707
Tel: +1 202 737 0500

COVID-19: OSHA Standards and CDC Recommendations for Employers to Consider Before Reopening Workplaces

With certain public health officials, including Dr. Anthony Fauci, cautiously optimistic the COVID-19 curve is beginning to flatten, government leaders and employers are beginning to turn their attention to the steps necessary for workers to return to work amidst the ongoing COVID-19 pandemic.

The United States Department of Labor's Occupational Safety and Health Administration ("OSHA") is the federal agency tasked with ensuring safe and healthful working conditions. While OSHA has not issued any formal guidance detailing what steps employers should take before allowing employees to return to work, it recently issued an Interim Enforcement Response Plan for Coronavirus Disease 2019—an enforcement memorandum summarizing the agency's approach to investigating workplace complaints related to COVID-19.

In that document, released April 13, OSHA outlines the standards it believes are most applicable to the challenges presented by COVID-19, and it discusses application of the General Duty Clause, referencing specifically to recommendations made by the Centers for Disease Control and Prevention ("CDC") for employers to follow. In the absence of formal agency guidance or an emergency temporary standard, these documents provide helpful starting points for employers to consider before reopening workplaces.

OSHA GUIDANCE

In its Interim Enforcement Response Plan for Coronavirus Disease 2019, OSHA emphasized that certain of its standards may apply to COVID-19 and employers "depending on the circumstances of the case," including the following:

- Recording and Reporting Occupational Injuries and Illness (29 C.F.R. § 1904);
- Protective Personal Equipment (29 C.F.R. § 1910.132);



- Eye and Face Protection (29 C.F.R. § 1910.133);
- Respiratory Protection (29 C.F.R. § 1910.134);
- Sanitation (29 C.F.R. § 141);
- Specification for Accident Prevention Signs and Tags (29 C.F.R. § 1910.145);
- Access to Employee Exposure and Medical Records (29 C.F.R. § 1910.1020); and
- General Duty Clause of the OSH Act (Section 5(a)(1)).

We are experienced in developing hazard response plans interpreting and applying these standards. If you have questions regarding which of these standards may apply to you and your organization, please contact us.

OSHA'S GENERAL DUTY CLAUSE

For many employers, OSHA's General Duty Clause—and its undefined parameters within the specific context of COVID-19—raises the most questions about what steps are necessary and feasible to take to protect workers.

Under the General Duty Clause, employers are required to furnish 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 employees. According to OSHA's Interim Enforcement Response Plan, there are four required elements for finding a violation of the General Duty Clause: (1) the employer failed to keep the workplace free of a hazard to which employees of that employer were exposed; (2) the hazard was recognized; (3) the hazard was causing or was likely to cause death or serious physical harm; and (4) there was a feasible and useful method to correct the hazard.

For investigation of complaints that an employer violated the General Duty Clause, OSHA's Interim Enforcement Response Plan promotes the use and implementation of CDC recommendations for determining whether a hazard was recognized and whether feasible methods exist to protect against the hazard.

CDC RECOMMENDATIONS

A majority of the CDC's guidance covers healthcare providers, but the CDC has also issued specific guidance for other workplace settings such as schools and universities, childcare programs, airports and airlines, public transit, ridesharing services, and delivery services. In addition to this industry-specific guidance, the CDC has also issued general guidance for all employers, guidance for permitting certain critical infrastructure employees to return to work after an exposure to COVID-19, and guidance for the use of respirators in non-healthcare settings. Below is a high-level overview of the CDC's recommendations in these areas.

- **General Interim Guidance:** The CDC's general interim guidance recommends referencing OSHA requirements for information on how to protect workers from potential exposures. It also recommends educating employees about the CDC's recommendations for how to protect themselves at work and at home, including the recommendation for cloth face coverings be worn in public. Other recommendations include:
 - Employers should not require a positive COVID-19 test result or a healthcare provider's note for employees who are sick to validate their illness, qualify for sick leave, or to return to work.
 - Employees who appear to have COVID-19 symptoms should be immediately separated and sent home. If an employee is confirmed to have a COVID-19 infection, then the employer should: (1) inform fellow employees of the possible exposure, while maintaining confidentiality of the identity of the infected employee as required under the Americans with Disabilities Act ("ADA"); and (2) follow the CDC's cleaning and disinfection recommendations.
 - For employees who have had exposure to COVID-19, employers should instruct the employee on how to proceed based on the CDC's guidance for community-related exposure. Note, however, that the guidance for



community-related exposure does not apply to critical infrastructure workers, healthcare workers, or those exposed while traveling. Individuals in those categories are subject to separate guidance.

- Critical Infrastructure Employees:** The CDC recommends that employers permit critical infrastructure workers to return to work following potential exposure to COVID-19, provided the workers remain asymptomatic and additional precautions are taken. The employee should wear a face mask at all times in the workplace for 14 days after his or her last exposure. Employers can either issue facemasks or “approve” employees’ supplied cloth face coverings in the event of shortages. The guidance does not specify whether the option to approve personally-supplied coverings means that an employer can do so by simply permitting their use as a general rule or if the employer should approve individual masks. Other than the CDC’s general guidance for cloth face coverings, there are no apparent standards by which an employer that is otherwise inexperienced with the use of personal protective equipment (“PPE”) could evaluate cloth face coverings, so the more reasonable interpretation of this language is that the employer approves only the use of such masks, not the individual masks. The employer should also measure the potentially-exposed employee’s temperature and assess symptoms prior to starting work, ideally before entering the facility. The employee should maintain six-feet social distancing “as work duties permit in the workplace.” The guidance does not address the appropriate steps to take if social distancing is not feasible. There is no strict definition of a “critical infrastructure worker,” but the CDC suggests that it includes hazardous material responders, janitorial and other custodial staff, and workers, including contracted vendors, in food and agriculture, critical manufacturing, informational technology, transportation, energy and government facilities. Healthcare workers are generally not included, as they are covered under a separate guidance document. The CDC also suggests consulting classification guidance from the Department of Homeland Security Cybersecurity & Infrastructure Security Agency (DHS-CISA), available here.
- Respirators for Non-Healthcare Businesses:** The CDC recommends that non-healthcare workplaces in which filtering facepiece respirators (“FFRs”) are ordinarily used (e.g., factories or construction sites) should implement strategies to reduce reliance on PPE, particularly FFRs, as much as possible. The CDC’s recommended strategies include, among other things, making operational adjustments to reduce the need for FFRs, using “qualitative” rather than “quantitative” methods to fit-test workers for FFRs, extending the schedule for disposal and replacement of PPE, using FFRs beyond their manufacturer-designated shelf life for training and fit-testing, and using respirators approved under standards established in other countries that are similar to NIOSH.

ABOUT KING & SPALDING

Celebrating more than 130 years of service, King & Spalding is an international law firm that represents a broad array of clients, including half of the Fortune Global 100, with 1,100 lawyers in 21 offices in the United States, Europe, the Middle East and Asia. The firm has handled matters in over 160 countries on six continents and is consistently recognized for the results it obtains, uncompromising commitment to quality, and dedication to understanding the business and culture of its clients.

This alert provides a general summary of recent legal developments. It is not intended to be and should not be relied upon as legal advice. In some jurisdictions, this may be considered “Attorney Advertising.” View our Privacy Notice.

ABU DHABI	BRUSSELS	DUBAI	HOUSTON	MOSCOW	RIYADH	SINGAPORE
ATLANTA	CHARLOTTE	FRANKFURT	LONDON	NEW YORK	SAN FRANCISCO	TOKYO
AUSTIN	CHICAGO	GENEVA	LOS ANGELES	PARIS	SILICON VALLEY	WASHINGTON, D.C.
