Reopening the Workplace Virtual Conference: Navigating the New Reality of COVID-19

Health, Privacy and Employer Liability Issues

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1

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Presented By

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2

2

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Workplace Safety Considerations

- Applicable law and standards
  - OSHA and CDC Guidance
  - State and local law
- Safety protocols every employer should consider
  - Continuation of telework if possible
  - Sick employees should not come to work
  - Travel restrictions
  - Hand washing/hand sanitizer use is mandatory
  - Social/physical distancing strategies in the workplace
  - Cleaning protocols (high touch surfaces)
  - PPE
  - Employee and visitor health screening
  - Establish a COVID-19 exposure response protocol BEFORE employees return

3

3

OSHA Considerations

- There is no specific OSHA standard covering COVID-19
- General Duty Clause, Section 5(a)(1)
- OSHA's PPE standards
- Retaliation prohibited, Section 11(c)
- Is COVID-19 a recordable injury?

4

4

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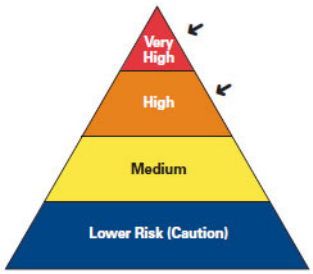
OSHA Risk Classifications

- OSHA Guidance on Preparing Workplaces for COVID-19
- Steps all employers can take to reduce works' risk of exposure to COVID-19
- Classifying Worker Exposure to COVID-19
  - Low, Medium, High or Very High



5

5

CDC Guidance for Employer Safeguards for the Ongoing Monitoring of Employees

- Encourage employees who are sick to stay home;
- Establish routine, daily employee health checks;
- Monitor absenteeism and having flexible time off policies;
- Have an action plan if a staff member gets COVID-19;
- Create and test emergency communication channels for employees; and
- Establish communication with state and local health authorities.

6

6

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Considerations for Spatial Changes

- Partitions or sneeze guards between employees and others that may directly interact with the public;
- Separating employees who work in adjacent cubicle spaces;
- Removing every other chair in break areas and lunchrooms;
- Adding partitions to tables where employees congregate during breaks;
- Requiring employees to walk in designated one-way lanes in hallways and corridors to avoid “head-on” pedestrian traffic;
- Converting communal restrooms to single-seat bathrooms to avoid close contact between users;
- Utilizing HVAC contractors to increase the number of air changes in your workplace;
- Providing hand sanitizer stations outside each restroom and each door that is commonly touched or used.

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Health Screening of Employees

- Current EEOC Guidance
  - Temperature screening and health questions permitted
  - Health information must remain confidential
- Self-screening/certification versus employer-administered screening
- Screening questions
  - Temperature (100.4 or above)
  - COVID-19 exposure or diagnosis/positive test or awaiting test results
  - COVID-19 symptoms (fever; chills; cough; difficulty breathing/shortness of breath)
- Effectiveness of health screening
  - Should be used in conjunction with other safety protocols

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COVID-19 Exposure Protocols

- Response triggers
  - Employee or someone in workplace has COVID-19 symptoms, exposure, has been tested or positive test or diagnosis
- Steps to take when you receive notice of possible COVID-19 exposure in the workplace
  - Investigation (who had close contact with infected person?)
  - Quarantine
    - 14 days for exposure but no symptoms or confirmed positive test
    - For confirmed positive test look to guidance from health care provider
  - Cleaning
  - Notice

Accommodation and Discrimination Issues

- ADA requires accommodation of disabilities
  - Cannot require disclosure of health information
  - Must engage in interactive process if requested
  - During pandemic conditions, telework or leave may be a required accommodation for those with underlying health issues

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Accommodation and Discrimination Issues (cont.)

- CDC "at risk" categories
  - People 65 years and older:
  - People with chronic lung disease or moderate to severe asthma
  - People who have serious heart conditions
  - People who are immunocompromised
  - Many conditions can cause a person to be immunocompromised, including cancer treatment, smoking, bone marrow or organ transplantation, immune deficiencies, poorly controlled HIV or AIDS, and prolonged use of corticosteroids and other immune weakening medications
  - People with severe obesity (body mass index [BMI] of 40 or higher)
  - People with diabetes
  - People with chronic kidney disease undergoing dialysis
  - People with liver disease

11

11

Accommodation and Discrimination Issues (cont.)

- ADEA and ADA prohibit discrimination against individuals in age-protected category (40 or older) and individuals with disabilities
- Those with health issues and in 65 and over categories generally cannot be REQUIRED to stay home if others are coming to work—they should be given the choice
  - You cannot exclude an employee solely because of your concern that the employee is in a higher risk category (unless direct threat established)
  - Be careful when taking adverse actions against employees in protected categories

12

12

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Mitigating Liability Risks for COVID-19 Workplace Exposure

- Workers' compensation
  - Exclusive remedy in most cases (if exposure was at work)
  - Waiver generally not possible
  - Does not apply to visitors, customers, vendors, contractors
  - Gross negligence or reckless conduct may result in tort liability outside workers' compensation
- States considering legislation pertaining to immunity/liability of employers
- Waivers may not be effective for employees, but consider signed policy acknowledgements
- Arbitration agreements
- Be mindful of whistleblowers/retaliation claims
- Best defense: Documented adherence to safety protocols

13

13

Strategies to Consider:

- Documented health certifications
- Written COVID-19 policies including exposure response protocols
- Confidential reporting mechanism for employees to report COVID-19 exposure or related concerns
- Documented acknowledgement of safety protocols
- Supervisory training on COVID-19 issues
- Dealing with uncooperative employees
  - Scared tor return
  - Don't want to observe safety protocols

14

14

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Additional Resources

EEOC Pandemic Guidance

- https://www.eeoc.gov/laws/guidance/pandemic-preparedness-workplace-and-americans-disabilities-act
- https://www.eeoc.gov/coronavirus

OSHA Pandemic Guidance

- https://www.osha.gov/Publications/OSHA3990.pdf
- https://www.osha.gov/SLTC/COVID-19/

Federal COVID-19 Unemployment Guidance

- https://www.dol.gov/newsroom/releases/eta/eta20200410

FFCRA Guidance from USDOL

- https://www.dol.gov/agencies/whd/pandemic/ffcra-questions
- https://www.dol.gov/sites/dolgov/files/WHD/posters/FFCRA_Poster_WH1422_Non-Federal.pdf

CDC General Business Frequently Asked Questions

- https://www.cdc.gov/coronavirus/2019-ncov/community/general-business-faq.html

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