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Insights

Workplace Safety and COVID-19: OSHA's Interim Enforcement Guidance and What It Means for Employers

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The Occupational Safety and Health Administration (OSHA) of the U.S. Department of Labor (DOL) works to enforce the federal Occupational Safety and Health Act of 1970 (OSH Act). Congress enacted the OSH Act to ensure employers provide safe and healthful working conditions for employees. OSHA is tasked with setting and enforcing standards and provides training, education, outreach, and assistance.

During the COVID-19 crisis, OSHA compliance is especially important, as is understanding how OSHA's interim enforcement guidance applies to employers.

Employer Obligations under OSHA Standards

The provisions of the OSH Act require employers to provide a safe workplace free from recognized hazards that are currently causing, or are likely to result in, death or serious physical harm to employees. To ensure that employees have a safe workplace, employers must provide their employees with adequate personal protective equipment and training. Additionally, as part of OSHA's oversight and enforcement efforts, covered employers must record every new case of work-related injury, illness, or fatality of covered employees.[1]

OSHA Compliance during the COVID-19 Crisis

I. Recording requirement for COVID-19

Top of mind for every employer is maximizing worker safety and managing compliance obligations in the unprecedented time of COVID-19. OSHA issued interim enforcement guidance which classifies COVID-19 as a recordable disease. The guidance specifically explains that employers must report COVID-19 cases if:

(1) the case is a confirmed case of COVID-19, as defined by Centers for Disease Control and Prevent (CDC)[2];
(2) the case is work-related; and
(3) the case involves one or more of the general recording criteria set for in the OSH Act.[3]

A recordable disease is considered work-related if "an event or exposure in the work environment either caused or contributed to the resulting condition or significantly aggravated a pre-existing injury or illness."[4]

Further, the general recording criteria is met if the injury or illness results in death, days away from work, restricted work or transfer to another job, loss of consciousness, or a significant injury or illness diagnosed by a physician or other licensed health care professional.[5]

Due to the varying availability of testing for COVID-19, some cities and/or states may only be testing certain individuals such as the elderly, vulnerable individuals, or individuals who are symptomatic. Even if testing is done, results may not be immediate. These circumstances create challenges for employers in fulfilling their reporting obligations under the OSH Act because they may not be aware of the recordable event.

On April, 13, 2020, OSHA issued interim enforcement guidance recognizing and addressing this issue and adapting the standard that an employer is not required to submit a report to OSHA until after it learns of a reportable fatality, in-patient hospitalization, amputation, or loss of an eye that was a result of a work-related incident.[6] Once an employer has learned of the reportable event, it must report within the following time frames: 8 hours for a fatality and 24 hours for an in-patient hospitalization, an amputation, or loss of an eye. If a fatality occurs within 30 days after the work-related incident, employers must report the fatality to OSHA within 8 hours of being made aware of the fatality.

II. Preventing Exposures from Hazards in the Workplace

Under the OSH Act, employers also must prevent exposure to hazards in the workplace. With COVID-19, this can be difficult because of the uncertainty regarding disease transmission, incubation periods, and asymptomatic transmission, which creates difficulty in tracing its spread. OSHA has affirmed that "the healthcare industry, emergency response organizations (e.g., emergency medical, firefighting, and law enforcement services), and correctional institutions" are able to and must "continue to make work-relatedness determinations pursuant to 29 C.F.R. § 1904."

OSHA recognizes, however, that employers in other industries may not be able to make such determinations. Specifically, OSHA will not enforce 29 C.F.R. § 1904 to require employers outside of those industries to make the same work-relatedness determinations, except where: (1) there is objective evidence that a COVID-19 case may be work related;[7] and (2) the evidence was reasonably available to the employer.[8] These employers should instead focus their efforts on implementing good hygiene practices in their workplaces, and mitigating COVID-19's effects.

Preparing for and Responding to an OSHA Enforcement Action

In addition to keeping workplace safety at the forefront of every employer's mind, employers should prepare for and plan to respond to OSHA enforcement actions, as such actions are likely to increase significantly. During the COVID-19 public health emergency, if an employer receives a complaint, the compliance safety and health officer (CSHO) from OSHA will notify the employer of the "alleged hazard(s) or violation(s) by telephone, fax, email, or by letter."[9]

To prevent further spread of COVID-19, inspections are limited to high and very high exposure risk jobs, such as hospital workers and emergency responders. For medium or lower exposure risk jobs, the CSHO will conduct investigations informally over telephone/fax to expedite employers' attention to alleged hazards.

During an investigation, employers must ensure they are prepared to address the complaint and the specific alleged hazard(s) or violation(s). After the employer is notified of the specifics of the complaint by phone, email, fax, or letter, the employer must respond within five days. The response must be in writing and identify any problems found and the corrective actions that are being taken or planned. If the response is adequate, OSHA usually will not proceed to an inspection.[10]

If an inspection is warranted, its components will likely include: an opening conference, a review of employer records, an inspection of the worksite, employee interviews, and a closing conference. During the COVID-19 crisis, OSHA is limiting on-site and in-person interactions as much as possible. Therefore, employers should ensure that documents relating to OSHA recordable events are easily accessible and transmittable electronically. Given the expedited nature of COVID-19, employers should ensure they are responding quickly and completely to any requests from the CSHO handling the investigation.

Further, OSHA's guidance states that inspectors should pay attention to the following when doing a COVID-19 inspection: (1) determine whether the employer has a written pandemic plan; (2) review the facility's procedures for hazard assessment and protocols for PPE use with suspected or confirmed COVID-19 patients; (3) determine whether the workplace has handled specimens or evaluated, cared for, or treated suspected or confirmed COVID-19 patients; (4) review medical records related to worker exposure incident(s), OSHA-required recordkeeping and any COVID-19 related exposures or infections; (5) review the respiratory protection program and any modified respirator policies related to COVID-19; (6) review employee training records; (7) review efforts made by the employer to obtain or provide PPE; and (8) determine if the employer has considered or implemented a hierarchy for worker protection controls. Healthcare facilities have additional steps to consider.

An OSHA inspection at any time may be challenging and stressful for employers. Of course, the current pandemic only makes matters worse. Employers do not, and should not, have to handle the process alone. Instead, employers should consult legal counsel so that they have the help and guidance of an experienced party devoted to answering questions and assisting throughout an OSHA inspection and any associated enforcement action.

State Occupational Safety and Health Standards

In addition to federal OSHA compliance obligations, employers must comply with any state occupational safety and health standards. Each state may have its own OSHA State Plan.[11] Depending on the state, the approach to COVID-19 may vary.

For example, the Governor of Indiana's Executive Order, Executive Order 20-22, requiring Hoosiers to stay at home, enables the Indiana Occupational Safety and Health Administration (IOSHA) to enforce noncompliance with the Executive Order.[12] With these enforcement powers, IOSHA has investigated nearly 1,000 complaints to date. On the other hand, Illinois has not issued additional COVID-19 related measures or guidance under Illinois OSHA. However, some other states such as Michigan, have issued COVID-19 specific guidance to both workers and employers that must be followed.

An employer with employees in multiple states should seek guidance from experienced legal counsel to ensure compliance with each state's OSHA requirements.

Takeaways for Employers

Employers must ensure they are providing a safe workplace free from hazards, which can be difficult when considering the uncertainty of COVID-19, as well as the changing guidance from the DOL and OSHA. Further, employers must refrain from retaliating against workers who report OSHA violations. Additionally, while employers may be hesitant to report a potential OSHA-recordable event, it is important to keep in mind the following: (1) reporting is required in certain circumstances; (2) failing to report may have additional adverse consequences; and, (3) submitting a report does not constitute an admission of fault for the employer or the employee, nor does it indicate that an OSHA standard was violated or that an employee is eligible for workers'

compensation or other benefits.

OSHA issues will become even more relevant as states begin to reopen non-essential businesses and workers return to the workplace. For considerations on creating a safe workplace during COVID-19, please review the **Planning Considerations for Employers**, a previous article published by the Employment Law Team at Krieg DeVault LLP.

If you have any questions about complying with OSHA guidelines or preparing your workplace to reopen, please contact **Shelley M. Jackson**, **Elizabeth M. Roberson**, **Matthew D. Neumann**, or your regular Krieg DeVault LLP attorney.

Disclaimer. The contents of this article should not be construed as legal advice or a legal opinion on any specific facts or circumstances. The contents are intended for general informational purposes only, and you are urged to consult with counsel concerning your situation and specific legal questions you may have.

[1] 29 C.F.R. § 1904.4(a).
[2] https://www.cdc.gov/coronavirus/2019-ncov/php/reporting-pui.html
[3] https://www.osha.gov/memos/2020-04-10/enforcement-guidance-recording-cases-coronavirus-disease-2019-covid-19
[4] 29 C.F.R. § 1904.5(a).
[5] 29 C.F.R. § 1904.7(b).
[6] https://www.osha.gov/memos/2020-04-13/interim-enforcement-response-plan-coronavirus-disease-2019-covid-19
[7] "This could include, for example, a number of cases developing among workers who work closely together without an alternative explanation." Id.
[8] "[E]xamples of reasonably available evidence include information given to the employer by employees, as well as information that an employer learns regarding its employees' health and safety in the course of managing its business and employees." Id.
[9] https://www.osha.gov/enforcement/directives/cpl-02-00-163/chapter-9
[10] https://www.osha.gov/as/opa/worker/handling.html
[11] https://www.osha.gov/stateplans/
[12] https://www.in.gov/gov/files/Executive%20Order%2020-22%20Extension%20of%20Stay%20at%20Home.pdf