

Employee Relations LAW JOURNAL

New Employer Obligations in the Age of COVID-19: Safety Policies, PPE, and Deep Cleaning

David J. Santeusanio, Howard Sokol, and Matthew W. Sloane

This article addresses practical considerations and obligations for employers when establishing safety plans to reopen the workplace.

The COVID-19 pandemic has altered the reality of workplace safety and corresponding industry standards. Employers face dramatically different workplace challenges and resulting new obligations regarding safety precautions and worker protections. Throughout the pandemic, federal agencies such as the Occupational Safety and Health Administration (“OSHA”) and the Centers for Disease Control and Prevention (“CDC”) have provided guidance concerning workplace safety.

This article addresses practical considerations and obligations for employers when establishing safety plans to reopen the workplace, including following federal, state, and local laws, regulations and guidance covering employee use of personal protective equipment (“PPE”) and deep cleaning the workspace.

OSHA AND CDC GUIDANCE CONCERNING COVID-19 WORKPLACE SAFETY POLICIES

OSHA has advised that employers should focus their response efforts on developing and implementing effective COVID-19 safety policies for the workplace. OSHA requires employers’ safety policies to cover the

David J. Santeusanio is a partner in the Boston office of Holland & Knight LLP. Howard Sokol is a partner in the firm’s New York office. Matthew W. Sloane is an associate in the firm’s Boston office. The authors may be contacted at david.santeusanio@hklaw.com, howard.sokol@hklaw.com, and matthew.sloane@hklaw.com, respectively.

work environment, defined as the “establishment and other locations where one or more employees are working or are present as a condition of their employment.”

OSHA’s broad definition of the workplace includes an employee’s home, including if an employee is working from home during COVID-19. Further, the employer’s obligation in implementing a COVID-19 work environment safety policy remains consistent with an employer’s duty of care under OSHA’s General Duty Clause to “furnish to each of its employees . . . a place of employment which [is] free from recognized hazards that [cause] or are likely to cause death or serious physical harm to its employees,” given that there are no specific COVID-19 OSHA standards.

COVERED WORKERS WHOM EMPLOYERS ARE REQUIRED TO PROTECT

Under OSHA’s standards, employers are responsible for providing a safe work environment even if workers are employed by, for example, a third-party subcontractor or are independent contractors. Employers should therefore consider reviewing agreements with temporary staffing agencies, subcontractors, independent contractors, and other third-party vendors to ensure updates to workplace safety plans are updated consistently in response to COVID-19.

OBLIGATIONS TO EMPLOYEES WHEN WORKING FROM HOME

OSHA has historically made clear that employers have limited responsibilities when it comes to protecting employees at home. OSHA draws a clear distinction between home offices and other home-based employment, such as home manufacturing. OSHA has stated that it will not hold employers liable for an employee’s home office and will not inspect home offices. OSHA will, however, inspect an employee’s home-based manufacturing operation if OSHA receives a complaint that indicates there is a risk for physical harm. The employer may be liable for risks caused by materials or equipment that the employer provides or otherwise requires to be used as part of the employee’s home-based manufacturing operations. OSHA has not weighed in or offered further guidance on the work-from-home issue during COVID-19.

ALTHOUGH THE DUTY OF CARE RELATIVE TO COVID-19 REMAINS UNCLEAR, CERTAIN STEPS SHOULD BE TAKEN

OSHA’s “duty of care” requirement for workplace safety is created and shaped by several factors, including industry standards, case law

and published regulatory guidance. To date, no court decision or OSHA administrative decisions have been issued that define or articulate an employer's duty of care with respect to COVID-19 workplace safety obligations. An employer's adherence to government guidance is a key factor that OSHA considers when assessing whether the employer has fulfilled its duty of care, or its "good faith" efforts to comply with the OSHA standards and guidance, and therefore is an effective step that employers can take to ensure compliance.

OSHA AND CDC GUIDANCE ON SAFETY PROTOCOLS

OSHA and the CDC have released guidance to businesses on how to handle COVID-19. The contents of a workplace safety policy vary by employer. OSHA has identified the following non-exhaustive list of practical COVID-19 safety considerations for employers to consider: physical distancing, telework, amending sick leave policies, alternating shifts, personal hygiene, use of PPE, hazard control and deep cleaning protocols. In addition, the CDC has recommended the following non-exhaustive list of safety protocols for all employers in response to COVID-19:

- *Social Distancing*: Employers should implement policies to practice social distancing when possible. This includes staying 6 feet apart and avoiding "large gatherings," which is not defined by the CDC. (With this and other safety protocols, employers should consult relevant federal, state, and local guidance, which may be more restrictive than CDC guidance.)
- *Implement Flexible Sick Leave Policies*: Employers should ensure that sick leave policies are flexible and consistent with public health guidance. Policies should also permit employees to stay home to care for a sick family member. Those employers that do not currently offer sick leave should consider implementing non-punitive "emergency sick leave" policies.
- *Institute an Employee Training Program to Educate Employees About Reducing the Spread of COVID-19*: CDC guidance states that employers should set clear expectations with their employees when it comes to illness and personal hygiene. Employees should stay home if they are sick, should wash their hands with soap and water for at least 20 seconds, should use hand sanitizer with at least 60 percent alcohol if soap and water is not available and should avoid touching their eyes, nose and mouth with unwashed hands.

OSHA and CDC guidance is helpful in implementing safety policies for COVID-19 (and thus meeting their duty of care to their workers). Because

federal agency guidance will undoubtedly continue to evolve, employers are cautioned and advised to regularly monitor agency guidance.

EMPLOYEE USE OF PPE

PPE has become commonplace in most workspaces in response to COVID-19. Employers are under an obligation from OSHA to properly train employees on proper PPE use. The CDC recommends¹ that any time an individual is in public (including the workplace if interacting with other individuals), the individual should wear cloth face coverings in public settings where other social distancing measures are difficult to maintain. The CDC still recommends that the public use cloth face coverings and not surgical masks or N95 respirators, which should be reserved for healthcare workers and other medical first responders.

The CDC has provided guidance concerning PPE use generally and for healthcare industry and essential workers specifically. This guidance includes identifying proper face masks and other PPE along with safely optimizing PPE usage.

OSHA identifies PPE requirements based on the degree of risk of COVID-19 exposure that an employee may face in the workplace. OSHA divides employees into the following four risk categories with corresponding PPE recommendations:

- *Very High Exposure Risk:* Workers in this category are those with high potential for exposure to COVID-19 during specific medical, laboratory or postmortem procedures. Workers include healthcare workers, healthcare or laboratory personnel collecting or handling COVID-19 specimens, and morgue workers performing autopsies on COVID-19 patients. OSHA states that workers in this risk category likely need to wear gloves, a gown, a face shield or goggles and either a face mask or a respirator. Workers who interact with known or suspected COVID-19 patients should wear a respirator.
- *High Exposure Risk:* Workers in this category are those with high potential for exposure to known or suspected sources of COVID-19. Workers include healthcare delivery and support staff, medical transport workers (such as ambulance operators) and mortuary workers preparing deceased COVID-19 patients for burial. OSHA recommends the same PPE use for this category as those in the very high exposure risk category.
- *Moderate Exposure Risk:* Workers in this category include those that require frequent and/or close contact with the general public in areas with community transmission of COVID-19. Retail outlets, restaurants and other public businesses fall

within this category. OSHA recommends that workers in this category wear some combination of gloves, a mask, gown and/or a face shield or goggles. Increased exposure to the general public and other individuals necessitates greater use of PPE.

- *Low Exposure Risk (Caution)*: Workers in this category have minimal to no contact with the general public or other coworkers. Individuals that telework fall within this category. OSHA does not recommend PPE use for those in the low exposure risk category.

Employers must also comply with applicable state and local requirements. For example, while OSHA does not explicitly require use of masks for retail and restaurant workers, many states have now required such protection. New York² and Massachusetts³ now require the use of masks at all times inside grocery stores, pharmacies and other retail stores. Other states such as California and Florida do not have such statewide orders, but some local authorities have ordered the use of PPE. OSHA and many states, including New York,⁴ require employers to provide PPE to the workforce at the employer's expense.

DEEP CLEANING PROTOCOLS

Deep cleaning the workplace should be one of the first tasks that an employer undertakes when reopening a workplace. The CDC has published guidance⁵ to assist employers in this regard.

Determine What Needs to Be Cleaned

The CDC makes a clear distinction between cleaning surfaces with soap and water and applying disinfectant. Some surfaces need to be cleaned only with soap and water. The CDC states that, as an example, surfaces and objects that are not frequently touched need only to be cleaned and need not be disinfected. The CDC warns businesses not to apply disinfectant on items used by children, especially any items that children might put in their mouths. Items that have been disinfected can be toxic to children if swallowed. This is important to consider for restaurants and other businesses that have specific areas for children.

Under current CDC guidance, if a business has been closed and unoccupied for seven days or more, cleaning with soap and water is all that is required. COVID-19, as currently understood, cannot survive on surfaces longer than seven days. Even though the CDC does not require disinfectant for businesses closed more than seven days, businesses should still consult state and local health authority guidance.

Determine What Needs to Be Disinfected

CDC recommends disinfectant for hard, non-porous surfaces that are frequently touched by multiple individuals. The CDC recommends that these surfaces be, at a minimum, disinfected daily. Examples of these surfaces include tables, doorknobs, light switches, countertops, handles, desks, phones, keyboards, toilets, faucets and sinks, gas pump handles, touch screens, and ATMs. The U.S. Environmental Protection Agency (“EPA”) also has a list of disinfectants approved to protect against COVID-19.⁶ OSHA also recommends that businesses consult the EPA list of disinfectants before applying in the workplace.

Maintain Routine Cleanings Once Reopened

Businesses should ensure that they have a routine cleaning and disinfecting plan in place when reopening. Effective routine maintenance is designed to reduce the risk of exposure to COVID-19 for workers and customers. Although the CDC recommends that frequently touched surfaces be disinfected at least daily, businesses should consider more frequent cleaning and disinfecting. For example, the CDC recommends that certain surfaces and objects in public spaces, such as shopping carts and point-of-sale keypads, should be cleaned and disinfected after each use to mitigate exposure to COVID-19.

CONCLUSION

The COVID-19 pandemic has altered the reality of workplace safety and corresponding industry standards. Employers face dramatically different workplace challenges and resulting new obligations regarding safety precautions and worker protections.

Employers should address a number of practical considerations and obligations when establishing safety plans to reopen the workplace, including following federal, state and local laws, regulations and guidance covering employee use of PPE and deep cleaning the workspace.

NOTES

1. Centers for Disease Control and Prevention, “Recommendation Regarding the Use of Cloth Face Coverings, Especially in Areas of Significant Community-Based Transmission,” available at <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/cloth-face-cover.html>.
2. New York State Department of Health, “Interim Guidance on Executive Order 202.16 Requiring Face Coverings for Public and Private Employees Interacting with the Public

New Employer Obligations in the Age of COVID-19

During the COVID-19 Outbreak,” *available at https://coronavirus.health.ny.gov/system/files/documents/2020/04/dob_covid19_eo20216employeefacecovering_041420.pdf*.

3. Office of the Governor, “Order Requiring Face Coverings in Public Places Where Social Distancing Is Not Possible,” *available at <https://www.mass.gov/doc/may-1-2020-masks-and-face-coverings/download>*.

4. New York State Department of Health, “Interim Guidance on Executive Order 202.16 Requiring Face Coverings for Public and Private Employees Interacting with the Public During the COVID-19 Outbreak,” *supra* n. 2.

5. Centers for Disease Control and Prevention, “Reopening Guidance for Cleaning and Disinfecting Public Spaces, Workplaces, Businesses, Schools, and Homes,” *available at <https://www.cdc.gov/coronavirus/2019-ncov/community/reopen-guidance.html>*.

6. U.S. Environmental Protection Agency, “List N: Disinfectants for Use Against SARS-CoV-2,” *available at <https://www.epa.gov/pesticide-registration/list-n-disinfectants-use-against-sars-cov-2>*.

Copyright © 2020 CCH Incorporated. All Rights Reserved. Reprinted from *Employee Relations Law Journal*, Autumn 2020, Volume 46, Number 2, pages 72–78, with permission from Wolters Kluwer, New York, NY, 1-800-638-8437, www.WoltersKluwerLR.com

