



COVID-19 and Return to Work: Workplace Enforcement and Employer Liability

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OVERVIEW

- OSHA
- CDC Standards
- EEOC
- DOL



OSHA: New Guidance

- Employee Complaints (General Duty Clause)
- Duty to Report
- Renewing Inspections



OSHA

■ General Duty Clause

- Employer must provide a workplace free from recognized hazards
- Likely to cause death or serious harm to employees
- When there is a feasible method to abate the hazard



OSHA: Recording and Reporting

COVID is REPORTABLE

- Exempt:
 - Fewer than 10 employees
 - List of Exempt Industries
 - Professional/Office Services
 - Retail, Manufacturing, Public Places



OSHA: Record and Report

- Case must be confirmed by testing
- Case must be work-related
- Result was:
 - Death
 - Missed work
 - Need to transfer to another job or modified duty
 - Medical treatment beyond first aid
 - Loss of consciousness



OSHA: Recording and Reporting

- Report work-related fatalities to OSHA within eight (8) hours
- Work-related in-patient hospitalizations, amputations, or losses of an eye within twenty-four (24) hours.



OSHA: Reporting Enforcement Discretion

- Work-relatedness Complications
- Reasonableness of Employer's Investigation
- Evidence Available to Employer
- Evidence that was Contracted at Work



OSHA: Enforcement of General Duty

- Complaint letter: Must be posted
- Time stated for Response by Employer
- Remediation
- Practical Enforcement Guidance

OSHA: Investigations

- Prioritized
 - Worker Complaints
 - Report Statistics
- Virtual then On-Site
- LOOKING TO:
 - Identify Hazards
 - Provide Abatement Assistance
 - Confirm Abatement



OSHA and the CDC

- ADMINISTRATIVE CONTROLS
- ENGINEERING CONTROLS
- DISINFECTING THE WORKPLACE
- MONITORING WORKERS

Administrative Controls

- Scheduling: Who comes in and When
- Low Office Capacity
- Avoid Public Transportation
- Telecommuting



Administrative Controls

- Sharing Office Equipment
- Limit Visitors
- Control Deliveries
- Eliminate Travel



Engineering Controls

- Office Congregating
 - Personal space zone around work stations
 - Lunch and Breaks: Bring Food
 - Use of Common Areas
 - One-Way Traffic
 - Use of Facilities
 - Elevator Use



Workplace Disinfection

- Document daily disinfecting procedures
- Sanitize Common Areas After Use
- Disinfection of Offices and Personal Spaces



PPE

- Face Coverings, Gloves
- Hand Sanitizer
- Physical Barriers: Face and Desk Shields
- EXECUTIVE ORDER TODAY: May exclude customers who refuse to wear masks



Employee Monitoring

- Take Temperatures
- Testing
- Send home sick employees
- Monitor symptoms in the workplace
- Trace the workplace source

CDC: Employee Education

- Err on the side of TMI
- Office Coordinator
 - Symptoms and when to stay home
 - Contingency Plans
 - Leave Policies
 - Coughing and Sneezing Etiquette
 - Routine cleaning (provide supplies)
 - Literature available to distribute

EEOC: Employee Medical Testing

- Usually prohibited
- COVID-19 Direct Threat designation
 - MAY TEST UPON ENTRY
- May ask about symptoms
- Be careful about underlying/pre-existing

EEOC: Employee Medical Testing

- May survey employees
- CANNOT make people stay home due to underlying condition
- CAN send home with symptoms
 - May request doctor note before return
- Maintain medical information separately
- HIPAA protected- Confidential

EEOC, Civil Rights, and the Human Rights Law

- EEOC notices: Enforcement and Right to Sue Letters
- NYS Division of Human Rights
- NYS DOL complaint form on line
- NYC Commission on Human Rights

Employee Accommodations

- Can ask for more than could before about health of employee
- Do not need to share info
- CDC guidance updated daily
- Laws being enforced: EEOC, NYSDHR, ADA

EEOC and the ADA

■ 2 PRIMARY ISSUES:

- UNDERLYING ILLNESS DISCRIMINATION
- FAILURE TO ACCOMMODATE

Accommodation/Telework Bias

- Do not decide a particular group of people should be the ones to stay home if it is not a business-related grouping
 - EG Age, asthmatics, etc

Do not decide a particular group of people should be the ones to telework/be otherwise accommodated if it is not a business-related grouping

Make sure everyone is given the same opportunities and accommodations as everyone else in that title/job function

Telework: Accommodations

- Agreement applies to home
 - Screens, chairs, etc.

New accommodations may be required:
Fear of returning to work/Anxiety

Engage in Interactive Dialogue
LOWERED UNDUE HARDSHIP STANDARD

Telework: Workers Compensation

- Is still a “workplace injury”
- Must still report
- Other WC issue re: COVID:
 - WCL 21-a: Pay without accepting liability
 - Intentional Act Exception

Telework Timekeeping

- Keep Track of Time
- Must Pay Salaried Workers
- Make sure they have Equipment

QUESTIONS ? ? ? ?

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