

COVID-19 OSHA Follow-Up: Agency Updates and Additional Recommended Employer Practices

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Highlights

- The fast-moving developments in response to the novel coronavirus (COVID-19) require employers to remain diligent with following published federal guidance. Federal guidance, including recent updates, impacts industry standards and employers' corresponding duties of care to protect their employees in the workplace.
- Employer adherence to published guidance and implementation of safety policies and procedures serve the dual purpose of protecting employees and employers.
- This Holland & Knight alert addresses some recent Occupational Safety and Health Administration (OSHA) updates, and discusses additional steps employers may take to avoid liability and limit their legal exposure to future claims.

Following the outbreak of novel coronavirus (COVID-19), federal agencies published new and revised guidance that address employers' obligations to protect the health and safety of their employees (which may also include workers such as temporary, leased and seasonal workers) in the workplace. The Centers for Disease Control and Prevention (CDC) and the U.S. Department of Labor (DOL) published COVID-19 guidance. In addition, the Occupational Safety and Health Administration (OSHA) has also published guidance and subsequently updated its guidance after observing and considering real-world logistical implications.

OSHA recently published updated guidance designed to alleviate administrative burdens on employers. In particular, OSHA relaxed employer recording obligations to give, in part, employers the opportunity to develop and implement effective workplace safety policies related to COVID-19. Employers should take proactive steps to mitigate workplace hazards and safety concerns. This Holland & Knight alert addresses OSHA's recent updates and some of the non-exhaustive steps employers can implement that will, in turn, help employers reduce liability exposure in the event of worker lawsuits arising from COVID-19.

OSHA's April 2020 Revised Recording Guidance: Reallocating Employer Resources to Employee Safety

Following the COVID-19 outbreak, OSHA released initial guidance in March 2020 requiring employers to record all "work-related" COVID-19 worker illnesses as that term is defined under 29 C.F.R. Part 1904. Employers subsequently faced significant implementation challenges, particularly with discerning whether an employee's COVID-19 illness was "work-related." Making this complicated determination created confusion and inconsistent outcomes among employers and prompted the following question: How are employers, especially those not in the medical field, able to determine whether a virus transmission occurred in or out of the workplace for purposes of meeting the work-related requirement?

In response, [OSHA revised its guidance](#) on April 10, 2020, to clarify that, in areas with community transmission of COVID-19, OSHA would not require employers (with the exception of healthcare, correctional institutions, firefighters and law enforcement) to record COVID-19 illnesses occurring in the workplace unless: 1) clear and objective evidence

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existed to establish that the worker's COVID-19 illness was work-related (e.g., 20 employees attend a conference, then 10 employees are diagnosed with COVID-19 in a short time frame and no other reasonable explanation exists), and 2) that evidence was reasonably available to the employer. Under this standard, the default for employers is that they will not have to record COVID-19 illnesses on their OSHA 300 Logs.

Although OSHA's relaxing of employers' obligations to record COVID-19 illnesses on their OSHA 300 Logs is a welcomed development for employers, OSHA has encouraged employers to establish, review, revise and update their workplace safety policies and procedures and also to add COVID-19 protocols to their existing policies or implement a COVID-19 workplace policy

Recommended Steps for Employers to Protect Employees

1. Employers Should Establish and Implement COVID-19 Workplace Policies

OSHA issued the above COVID-19 300 Log recording clarification April 10, 2020 to, in part, help employers focus their response efforts on developing and implementing effective COVID-19 safety policies. As recommended by OSHA, employers should take this opportunity to establish and implement a COVID-19 workplace safety policy. Doing so will, first and foremost, protect the safety of employees and it will also lessen potential exposure to future liability stemming from workplace hazards and unsafe conditions related to COVID-19.

Implementing a COVID-19 workplace policy is 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."

The amorphous "duty of care" imposed on employers for workplace safety is created and shaped by several factors, including but not limited to industry standards, case law and published regulatory guidance.

Not surprisingly, no case law or OSHA administrative decisions have been issued yet that define or articulate an employer's duty of care with respect to COVID-19 workplace safety obligations. As such, the absence of case law and judicial guidance in this unprecedented pandemic environment has led some employers to ask: What is an employer's legal obligation or what duty of care does an employer owe its employees to protect them from COVID-19 in the workplace? Relatedly, how does an employer meet its standard of care? The answer depends, in large part, on the applicable duty of care. An employer's adherence to federal 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 a good first step employers can take to ensure compliance.

The CDC, DOL, and OSHA, among other agencies, have released guidance for employers on how to handle COVID-19. Temperature checks, physical distancing, use of personal protective equipment (PPE) and many other recommendations have been issued to assist employers in keeping the workplace and employees safe. While agency guidance is exceedingly helpful to employers looking to identify and satisfy their duty of care, employers are cautioned and advised to be keenly aware that the COVID-19 pandemic has created a fluid situation, and the guidance has and continues to change.

Employers are advised to keep current and remain up-to-date with OSHA guidance (as well as the guidance of other federal agencies listed above).

The content of a workplace COVID-19 safety policy will likely vary by employer. Ideally, workplace policies will be a pandemic preparedness plan as recommended by the CDC. If not an explicit pandemic preparedness plan, an employer's COVID-19 safety policy may address such things as physical distancing, teleworking, amending sick leave policies, alternating shifts, personal hygiene, use of PPE, hazard control and any other related policies an employer may consider for the purpose of reducing employee exposure to COVID-19. Before adopting these policies, employers

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should consult federal guidance to ascertain whether such policies are expected by OSHA, the CDC and/or the DOL.

When federal guidance, including specific OSHA standards and regulations, do not address a particular employer COVID-19 concern, [OSHA's guidance](#) of April 13, 2020, makes clear that OSHA considers the following three elements of the General Duty Clause to discern whether the employer violated the duty of care: 1) the employer failed to keep the workplace free of COVID-19, 2) COVID-19 in the workplace was recognized, and 3) there was a feasible and useful method to correct the COVID-19 exposure. OSHA will also consider the employer's "good faith" efforts to mitigate the hazards in light of COVID-19 pandemic conditions and related challenges with implementing safety measures in the workplace.

When implementing safety policies, employers are cautioned to enforce their policies consistently and without bias to avoid worker discrimination claims.

2. Employers Should Train Employees On and Enforce Workplace Safety Policies

An employer's obligations do not end with merely creating a written COVID-19 workplace safety policy. Employers must also ensure that they adequately train employees on workplace safety policies and procedures. Training can range from posting signs or sending e-mails that address proper hand washing or more complicated policies, such as demonstrating the use of PPE or other in-person trainings for employees.

Having a clear, written policy coupled with training can serve two important purposes: 1) to clearly establish that all employees are notified about and trained on workplace safety, including as it relates to COVID-19, and 2) to protect the employer from potential liability. Employers that can substantiate the existence of well-reasoned and effective workplace safety policies generally have a stronger chance of successfully defending against legal claims than those who do not have such policies.

Also important to policy effectiveness is an employer's consistent and even-handed enforcement of its established workplace safety policies. OSHA has cited employers for violating their duty of care when failing to enforce or discipline employees consistently with and in accordance with the employers' written policies. Workplace safety policies are less effective if employees are permitted to breach the workplace policies without ramifications. One of the threshold questions OSHA asks employers is: Did you discipline employees who broke your safety policies? With this in mind, employers must have policies in place to discipline employees who fail to adhere to workplace safety policies and procedures. Discipline should be consistent with the employer's disciplinary policy.

3. Retain Relevant COVID-19 Documentation

Along with implementing and enforcing workplace safety policies and procedures, employers may protect themselves from future claims and litigation by implementing an official document retention policy. Document retention is one of the best tools that an employer has to defend itself in litigation; it can make the difference between successfully defending or losing the case. Accordingly, employers should consider what types of documents to preserve and for how long.

Importantly, when employers base their written policies on official CDC, OSHA or DOL guidance they would be prudent to save and preserve the written guidance on which they based their workplace policies. As noted above, federal written guidance is frequently fluctuating due to the nature of the ever-changing COVID-19 environment. There is no guarantee that dated publications will remain on government websites. By saving the documents on which the employer based its workplace policies, the employer can later produce documentary evidence to support and substantiate its decision-making and support its case for meeting the applicable standard of care. Employers should strive to have their written policies – and documentation – be as current as possible.

The length of time that documents should be preserved may vary, but it is important for employers to keep in mind the

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statutes of limitations for actions in tort and contract in their respective jurisdictions. As a baseline consideration, an employer policy that fails to preserve documentation for the length of time a lawsuit may be brought is likely ineffective at protecting employers in litigation. For example, if an employer document retention policy preserves employee PPE training records for only one year (in a jurisdiction with a three-year statute of limitations for tort actions), the employer may find itself fighting an uphill battle in litigation to prove that employees were adequately trained on proper PPE use at any given time.

Next Steps

Employers should review their current policies that address workplace safety, including COVID-19 related concerns, and document preservation. For more information or assistance developing the described policies, please contact the authors or another member of Holland & Knight's [OSHA and Workplace Safety Team](#).

DISCLAIMER: Please note that the situation surrounding COVID-19 is evolving and that the subject matter discussed in these publications may change on a daily basis. Please contact your responsible Holland & Knight lawyer or the authors of this alert for timely advice.

Information contained in this alert is for the general education and knowledge of our readers. It is not designed to be, and should not be used as, the sole source of information when analyzing and resolving a legal problem. Moreover, the laws of each jurisdiction are different and are constantly changing. If you have specific questions regarding a particular fact situation, we urge you to consult competent legal counsel.



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