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INSIGHT

Employer Risk Management in the Age of Coronavirus

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Authors: Ian A. Stewart, Jana S. Farmer

During a pandemic, transmission of infectious disease can be anticipated not only in health care settings but also in many types of workplaces. Given the likelihood of potential COVID-19 exposure across numerous industries, every employer should understand the obligations for workplace safety imposed on them by federal and state occupational health and safety laws, and develop an infectious disease preparedness and response plan that addresses the levels of risk associated with work sites and the job tasks workers perform at those sites.

Employers that plan for and respond to these risks may experience fewer worker illnesses, lower absenteeism, less business disruption, fewer workers' compensation claims and better defenses to potential litigation arising from alleged negligent exposure to COVID-19.

Finally, all organizations should be aware of the risks of civil liability for exposing members of the general public, as well as their family members, to COVID-19 and should establish reasonable protocols and procedures to minimize such risks, as discussed in detail below. The first such lawsuit was filed on April 6, 2020, in Illinois state court against Walmart by the family of an employee who died after contracting COVID-19 at work. The complaint alleges that Walmart failed to follow relevant guidelines for maintaining safe workplaces and hired new workers without properly screening them for symptoms of COVID-19.

Obligations on Employers to Ensure Workplace Safety

COVID-19 is now considered a "recordable illness" under the Occupational Safety and Health Act, and so many coronavirus-related complaints have been received by the Occupational Safety and Health Administration (OSHA) that it has stopped sending letters requiring a response from employers. OSHA is instead opting to send notification letters directing employers who have received a complaint to OSHA guidance and resources on addressing COVID-19 workplace safety. Many of the 28 OSHA-approved state agencies have likewise fielded numerous complaints. Oregon OSHA, for example, which typically receives about 40 complaints a week, had by early April 2020 received at

Attorneys

Jana S. Farmer

Ian A. Stewart

Services

Cannabis Law

Complex Tort & General Casualty

Employment & Labor

Risk Analysis & Mitigation

Offices

Los Angeles

White Plains

least 2,206 verified complaints related to the coronavirus in the preceding two weeks.

OSHA's General Duty Clause

All employers are required by OSHA's General Duty Clause to provide each worker with employment "free from recognized hazards that are causing or are likely to cause death or serious physical harm." Employers have a non-delegable duty to recognize and control hazards in the workplace. This includes a duty to protect employees from inhalation exposures that can result in injury, illness or death.

COVID-19 is a harmful exposure if there is an increased risk of infection at the workplace. In that event, employers must implement engineering controls where feasible and administrative controls where practicable, or provide respiratory protection where engineering and administrative controls cannot protect employees. Details on these controls are discussed below.

The General Duty Clause also may obligate an employer to inquire into the details of an employee's illness and mandate that exposed employees stay away from the workplace. The Equal Employment Opportunity Commission (EEOC) has classified COVID-19 as a "direct threat," meaning that it presents "a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation." This classification lessens certain restrictions of the Americans with Disabilities Act and other related statutes. Employers may therefore generally ask an employee if he or she is experiencing symptoms consistent with COVID-19 and may measure an employee's body temperature. The employer should nevertheless submit any such inquiry consistently and without subjective discrimination.

Recordable and Reportable Illnesses

Employers may be liable for failing to file incident reports and properly record summaries of employees affected by COVID-19. Pursuant to OSHA recordkeeping requirements (29 CFR part 1904), covered employers must record certain work-related injuries and illnesses on an OSHA 300 log. OSHA has the general authority to request that an employer produce OSHA form 300 logs and form 300A summaries at any time without cause.

To determine whether an employer must record an employee's diagnosed case of COVID-19, OSHA recommends verifying that it is a confirmed case of COVID-19, that the case is work-related and that the case involves one or more of the general recording criteria set forth in 29 CFR 1904.7 (e.g., medical treatment beyond first aid, days away from work).

An employer's reporting obligation to OSHA is narrower than the duty to record. Employers must report work-related fatalities within eight hours and work-related inpatient hospitalizations within 24 hours.

What Is a "Confirmed Case" of COVID-19?

The CDC defines a "confirmed case" of COVID-19 to include a laboratory-confirmed case rather than simply a person under investigation (PUI) or a presumptive positive case of COVID-19. OSHA's recording requirement only applies to a laboratory-confirmed case.

When Is an Exposure to COVID-19 “Work-Related?”

An employee who is infected by COVID-19 at work will be considered to have a work-related illness. “Contagious diseases such as tuberculosis, brucellosis, hepatitis A, or plague are considered work-related if the employee is infected at work.” See 29 CFR 1904.5(b)(2).

Confusion arises, however, where an employee shows signs or symptoms of COVID-19 while working but the exposure to the virus may have occurred outside the workplace. In many instances, it may be difficult or impossible to determine the source of exposure. This is particularly problematic with COVID-19 due to the long latency period between exposure and initial symptoms. This will be a fact-specific determination performed on a case-by-case basis. Factors may include the extent and timing of the potential work-related exposure, and whether more than one employee within the workplace has a confirmed case of COVID-19.

Other OSHA Regulations

There are certain other OSHA regulations that apply to all employers and that may be applicable to protect employees from COVID-19 exposure in the workplace. This includes the requirement that all employers have an injury and illness prevention program (IIPP) to protect employees from workplace hazards, a mandatory requirement that all employers provide access to washing facilities and the general duty of all employers to conduct a hazard assessment to determine the potential necessity of use of personal protection equipment (PPE).

In the context of COVID-19, this also may include a duty to protect workers from exposure to hazardous chemicals used for cleaning and disinfection. Employers that use hazardous chemicals must comply with OSHA's Hazard Communication Standard, 29 CFR 1910.1200.

OSHA's blood-borne pathogens standard, 29 CFR 1910.1030, applies to occupational exposure to human blood and other potentially infectious materials. Although this typically does not include respiratory secretions that may transmit the coronavirus, certain provisions of the standard offer a framework that may help control some sources of the virus.

Some of the 28 OSHA-approved state plans also may have certain requirements that are more stringent than federal OSHA requirements. California's Aerosol Transmissible Diseases (ATD) Standard, for example, requires protection for workers exposed to airborne infectious diseases such as COVID-19. See, Title 8, California Code of Regulations §5199. The ATD Standard applies to hospitals and other medical facilities, certain laboratories and public health services, correctional facilities, homeless shelters and certain other locations.

Elements of an Infectious Disease and Response Plan

Every employer should develop an infectious disease preparedness and response plan to confront the pandemic. Considerations include where and how workers might be exposed – including from the general public, customers and coworkers – as well as workers' individual risk factors such as advanced age, underlying medical conditions and pregnancy. The plan should address contingencies for increased rates of absenteeism, the

need for social distancing and other administrative controls, options for conducting essential operations with a reduced workforce (such as cross-training workers across different jobs) and handling interrupted supply chains or delayed deliveries. The employer also should consider developing policies and procedures for prompt identification and isolation of sick people.

Classifying Worker Exposure to COVID-19

Worker risk of occupational exposure to coronavirus may vary from “very high” to “low” risk, depending on industry type and the need for close contact with infected individuals. OSHA advises that most American workers will likely fall in the lower or medium exposure risk levels.

Jobs with “very high” exposure risk include health care workers who perform aerosol-generating procedures on COVID-19 patients, health care or laboratory personnel who handle specimens from COVID-19 patients and morgue workers who perform autopsies on COVID-19 patients. “High” exposure risk jobs include health care staff who are exposed to and transport COVID-19 patients. “Medium” exposure risk jobs include those that require frequent or close contact with people who may be infected with coronavirus, including contact with the general public. This category includes workers in grocery stores, hardware stores and other businesses that are deemed essential services open to the general public during the pandemic. “Lower” exposure risk jobs are those that do not require frequent or close contact with the general public or with coworkers.

In its Guidance on Preparing Workplaces for COVID-19, OSHA provides recommendations for implementing workplace control measures and use of PPE depending on the job risk classification.

Risk Communication

A primary means by which employers may improve worker safety during a pandemic is through clear and consistent communication. According to OSHA, clear communication promotes confidence in the employer’s ability to protect workers and reduces absenteeism. Workers who believe that their employer provides a safe and healthy workplace are more likely to report for work during a pandemic.

Good workplace communication during a pandemic includes ensuring that workers understand which job activities may put them at risk for exposure, social distancing strategies, what options may be available for working remotely, good hygiene and appropriate disinfection procedures, what PPE is available and how to use it properly, what medical services may be available and where to direct questions. Workers with job-related exposure to infections who voluntarily disclose personal health risks should be considered for job accommodations or additional protective measures such as the use of PPE.

Implementing Workplace Control Measures

Employers may modify the work environment or change work practices. Engineering controls involve isolating employees from work-related hazards. This may include installing high-efficiency air filters, increasing ventilation rates, installing physical barriers such as plastic sneeze guards, installing a drive-through window for customer service or use of specialized negative-pressure ventilation in some settings.

Administrative controls require action by the worker or employer and typically involve changes in work policy or procedures to reduce or minimize exposure. This includes identifying a workplace coordinator and minimizing contact among workers through such options as remote work, altering shifts and cross-training employees across different jobs and tasks.

Personal Protective Equipment

Although engineering and administrative controls are considered more effective in minimizing exposure to COVID-19, PPE also may be needed in some workplace settings. PPE should not take the place of other prevention strategies. PPE may include gloves, goggles, face shields, facemasks and respiratory protection. All types of PPE must be selected based on the hazard to the worker, properly fitted, properly worn, regularly inspected, and properly removed, cleaned, stored or disposed. The employer should follow OSHA's personal protective equipment standards, 29 CFR 1910 Subpart 1.

Surgical Masks versus Respirators

As the COVID-19 pandemic unfolds, there has been much confusion over what constitutes proper respiratory protection in various settings. The difference between respirator and non-respirator facemasks is discussed below.

Surgical and other non-respirator facemasks are often used by workers to protect themselves against splashes and sprays containing infectious agents. They also may be placed on sick individuals to prevent the spread of respiratory infections by large droplets. They can be used by almost anyone regardless of training and should be properly disposed after use.

Non-respirator facemasks do not protect persons from airborne infectious disease, however, and cannot be relied on for novel pathogens. They do not prevent inhalation of virus particles because they do not seal to the person's face and are not tested to the filtration efficiencies of respirators.

Respirators include various types of filtering facepieces. They are used by workers to prevent inhalation of small particles, including airborne transmissible infectious agents. To be effective, the proper filter material should be used (N95 or better) and must fit tightly to prevent air leaks. Respirators may require training, fit testing and proper cleaning. Employers that provide respirators to their employees must establish a respiratory protection program that is compliant with OSHA's respiratory protection standards, 29 CFR 1910.134.

Possible Liability Lawsuits Arising from Exposure to COVID-19

Aside from employment-related considerations, businesses may face liability claims from members of the general public claiming to have been exposed to COVID-19 while on their premises and/or due to interactions with their employees or volunteer staff. Such claims may include allegations of exposure resulting in bodily injury and property damage as well as claims of failure to implement an appropriate plan in response to the global health crisis and associated risks. It should be noted that due to the high level of contagiousness of COVID-19, not only visitors but also members of their families may file such general liability claims.

As not only organizations but also their insurance policies will be the target of such claims, it is advisable for organizations to consult with and follow the recommendations of their insurance carriers and examine together the organization's practices regarding access to any premises and direct contact between employees/volunteers and members of general public. While anyone may allege exposure to COVID-19 due to the actions or omissions of an organization, the key to defending against such allegation will be demonstrating that the organization took reasonable precautionary measures.

Organizations also may encounter situations when members of the general public voluntarily expose themselves to risk, including ignoring the social distancing recommendations and advice to stay indoors. While one may expect that the doctrine of assumption of risk will bar recovery of such individuals against an organization, this is not always the case. Many states, including New York, have abolished the doctrine of assumption of risk (with limited exceptions) and instead look at the parties' comparative fault when it comes to establishing a defendant's liability and exposure. Practically speaking, this means that an organization may be sued by an individual that may have acted unreasonably and exposed themselves to risk by their own actions. For example, sports organizations may be sued for failure to prevent public access and group gatherings at their facilities, which results in COVID-19 exposure, even when the organization did not invite such a gathering or access. It is advisable, therefore, that organizations closely follow state and federal guidance and place appropriate limitations on gatherings at their facilities and other social contact.

Dr. Anthony Fauci, director of the National Institute of Allergy and Infectious Diseases (NIAID), recently warned the United States about the possibility a "COVID-19 second wave" might occur later this year after the current phase of the pandemic recedes. Organizations must therefore remain vigilant even when the shelter-at-home and similar orders are lifted. It is a best practice to monitor and follow the guidelines established by the Centers for Disease Control and Prevention even after the first wave of COVID-19 pandemic subsides.

The Price of Complacency

Many workplaces that traditionally have had few recordable or reportable work-related illnesses must now educate themselves on their obligations under federal and state health and safety laws or face expensive fines from regulators and greater exposure to workers' compensation claims and liability lawsuits.

By preparing an infectious disease preparedness and response plan, the employer will engage in the necessary exercise of creating clear lines of communication, identifying where and how workers might be exposed, and implementing workplace controls. Performed properly, this exercise should result in better workplace morale, lower absenteeism, less business disruption and liability defenses if needed.

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