

Labor & Employment Alert

March 15, 2020

OSHA Strategies for Dealing with COVID-19 in the Workplace

Installment 2 of the MHTL COVID-19 Client Alert

Last week, the coronavirus disease 2019 (COVID-19) was designated as a global pandemic. It continues to disrupt our workplace communities and our community at large. To assist employers in continuing to plan for and respond to COVID-19, the U.S. Department of Labor issued guidance on COVID-19 and the Occupational Safety and Health Act (OSHA), the Fair Labor Standards Act (FLSA), and the Family and Medical Leave Act (FMLA). This edition of the Client Alert will focus on the OSHA guidance. We will issue subsequent Client Alerts which will cover the FLSA and the FMLA guidance.

COVID-19 and OSHA¹

Employer obligations with respect to COVID-19 start with OSHA's General Duty Clause which requires employers to provide their employees with a workplace free from recognized hazards likely to cause death or serious physical harm. 29 U.S.C. §654(a)(1) (section 5(a)(1)). In order to determine employer obligations during the COVID-19 outbreak, OSHA has established the Occupational Risk Pyramid which divides job tasks into 4 risk exposure levels: Very High, High, Medium, and Lower Risk (Caution).

¹Massachusetts is under federal OSHA jurisdiction which covers most private sector workers within the Commonwealth. State and local government workers are not covered by federal OSHA. However, Massachusetts public employees have at least the same level of protection provided under the federal OSH Act, including standards and provisions of the General Duty Clause pursuant to MGL c. 149, §6 ½(b). Accordingly, while the enforcing agency differs, private and public employees in Massachusetts have the protections outlined in this Client Alert.

Labor & Employment Alert
March 15, 2020

Occupational Risk Pyramid for COVID-19



OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION

The level of risk depends on industry type, need for contact within 6 feet of people exposed or infected with COVID-19, and requirement for repeated or extended contact with people exposed or infected with COVID-19. While OSHA’s position is that most American workers fall in the Lower Risk (Caution) or Medium risk levels, it has developed guidance for employers: “Steps All Employers Can Take to Reduce Worker’s Risk of Exposure to SARS-CoV-2 [aka COVID-19]”.

Steps All Employers Can Take to Reduce Workers’ Risk of Exposure to COVID-19

These are the basic steps every employer should take to reduce the risk of exposure to COVID-19 in the workplace.

STEP 1: Develop an Infectious Disease Preparedness and Response Plan

Infections Disease Preparedness and Response Plans should address:

- Where and how workers might be exposed to COVID-19, including the general public, customers and co-workers;

Labor & Employment Alert

March 15, 2020

- Risk factors at home and in community settings, including workers' individual risk factors such as older age, presence of other medical conditions,² and being exposed to a family member with COVID-19;
- Contingency plans for situations that may arise as a result of a COVID-19 outbreak, such as:
 - Increased rates of absenteeism;
 - Need for social distancing, staggered work shifts, downsizing operations, delivering services remotely;
 - Options for conducting essential operations with a reduced workforce, including cross-training workers across different jobs to continue operations or deliver surge service.

STEP 2: Prepare to Implement Basic Infection Prevention Measures

For most employers, protecting workers will depend on implementing good hygiene and infection control practices, including:

- Promote frequent and thorough hand washing by providing workers, customers, and visitors with a place to wash their hands with soap and running water, or alternatively, alcohol-based hand rubs containing at least 60% alcohol;
- Encourage workers to stay home if they are sick;
- Encourage respiratory etiquette, including covering coughs and sneezes, and providing tissues and trash receptacles;
- Explore whether the physical distance can be increased among employees and between employees and others with flexible worksites (*e.g.*, telecommuting), and/or flexible work hours (*e.g.*, staggered shifts);
- Discourage workers from using other workers' telephones, desks, offices, or other work tools and equipment;

² Employers need to be mindful of disability discrimination laws regarding questioning workers about underlying medical conditions and/or taking action based on the existence or perceived existence of such conditions. Under the Americans with Disabilities Act and the Massachusetts anti-discrimination law, employers are generally precluded from asking disability-related questions or from taking action based on an individual's disability unless such disability poses a direct threat or is job-related and consistent with business necessity. It is important for employers to seek legal advice before making any such inquiries or taking any action.

Labor & Employment Alert

March 15, 2020

- Maintain regular housekeeping practices, including routine cleaning and disinfecting of surfaces and equipment.

STEP 3: Develop Policies and Procedures for Prompt Identification and Isolation of Sick People, if Appropriate

Policies and procedures that may assist in protecting workers by promptly identifying potentially infectious individuals include:

- Encourage employees to self-monitor for signs and symptoms of COVID-19 if they suspect exposure;
- Develop policies and procedures for employees to report when they are sick or experiencing symptoms of COVID-19;
- If appropriate, develop policies and procedures for immediately isolating people who display symptoms of COVID-19 and for limiting the spread of COVID-19 by providing individuals with face masks.

STEP 4: Develop, Implement, and Communicate about Workplace Flexibilities and Protections

Similar to suggestions issued by the CDC, OSHA suggests employers exercise flexibility in developing and administering various workplace policies. It is important to keep in mind that this guidance is advisory in nature and it is not a standard or a regulation. With that said, it is important for employers to be aware that OSHA has issued this guidance in the context of the General Duty Clause and employers would be wise to consider the feasibility of these suggestions from both a financial and operational perspective. Specifically, the OSHA guidance suggests the following:

- Actively encourage sick employees to stay home;
- Ensure sick leave policies are flexible;
- If you have temporary or contract workers, talk with the companies that provide those workers about the importance of sick employees staying home and encourage them to develop non-punitive sick leave policies;

Labor & Employment Alert

March 15, 2020

- Do not require a healthcare provider's note for employees who are sick with acute respiratory illness to return to work since health care providers may be extremely busy and not able to provide timely documentation;
- Maintain flexible policies that permit employees to stay home to care for a sick family member and be aware that more employees than usual may need to stay home to care for sick children or other sick family members;³
- Be aware of workers' concerns about pay, leave, safety, and health;
- Work with insurance companies providing health benefits and state and local health agencies to provide information to workers about medical care related to the COVID-19 outbreak.

STEP 5: Implement Workplace Controls: Engineering Controls, Administrative Controls, Safe Work Practices, and PPE

Workplace controls are protection measures designed to control workplace hazards. OSHA uses a "hierarchy of controls" from the most effective to the least effective: *engineering controls*, *administrative controls*, *safe work practices*, and *PPE* (personal protective equipment).

Engineering Controls

Engineering controls reduce exposure to hazards without relying on worker behavior and include:

- Installing high-efficiency air filters;
- Increasing ventilation rates in the work environment;
- Installing physical barriers, such as clear plastic sneeze guards;
- Installing a drive-through window for customer service.

³ Of course, under the MA Earned Sick Time Act, employees are entitled to use sick time to care for a family member. Additionally, for employers subject to the FMLA, employees are entitled to take family leave to care for a family member with a serious health condition. In most cases, it is likely that COVID-19 would meet the definition of a serious health condition in that it is either an illness that involves inpatient care in a hospital or a period of incapacity of more than 3 consecutive days and treatment 2 or more times by a health care provider within 30 days of the incapacity.

Labor & Employment Alert
March 15, 2020

Administrative Controls

Administrative controls are typically changes in work policy or procedures to reduce or minimize exposure to a hazard and require action by the worker or employer, and include:

- Encouraging sick workers to stay at home;
- Minimizing contact among workers, clients, and customers by replacing face-to-face meetings with virtual communications and implementing telework if feasible;
- Establishing alternating days or extra shifts that reduce the total number of employees in a facility at a given time, allowing them to maintain distance from one another while maintaining a full onsite work week;
- Discontinuing nonessential travel to locations with ongoing COVID-19 outbreaks;
- Developing emergency communications plans, including a forum for answering workers' concerns and internet-based communications, if feasible;
- Providing workers with up-to-date education and training on COVID-19 risk factors and protective behaviors;
- Training workers who need to use protective clothing and equipment.

Labor & Employment Alert

March 15, 2020

Safe Work Practices

Safe work practices are types of administrative controls used to reduce the duration, frequency, or intensity of exposure to COVID-19, and include:

- Promoting personal hygiene that includes infection protection measures, such as providing tissues, no-touch trash cans, hand soap, alcohol-based hand rubs containing at least 60% alcohol, disinfectants, and disposable towels for workers to clean their work surfaces;
- Requiring regular hand washing or use of alcohol-based hand rubs;
- Posting handwashing signs in restrooms.

Personal Protective Equipment (PPE)

While OSHA's position is that engineering and administrative controls are more effective than PPE in minimizing exposure to COVID-19, PPE may also be needed to prevent certain exposures. PPE should not take the place of other prevention strategies, but rather used along with them to minimize exposure risk. Examples of PPE include:

- Gloves;
- Goggles;
- Face shields;
- Face masks;
- Respiratory protection.

PPE is often specific to occupations or job tasks and certain jobs require respirators. ***With respect to COVID-19, workers who work within 6 feet of patients known to be, or suspected of being, infected with COVID-19, are required to use respirators.***

For more information regarding when PPE and respirators are required and the OSHA standards applicable to such requirements, OSHA has Personal Protective Equipment (PPE) standards (in general industry, 29 CFR 1910 Subpart 1), which require using gloves, eye and face protection, and respiratory protection.

https://www.osha.gov/lawsregs/regulations/standardnumber/1910#1910_Subpart_I.

Additionally, where respirators are necessary to protect workers or where employers require

Labor & Employment Alert

March 15, 2020

respirator use, employers must implement a comprehensive respiratory protection program in accordance with the Respiratory Protection standard (29 CFR 1910.134)

<https://www.osha.gov/laws-regs/regulations/standardnumber/1910/1910.134>

STEP 6: Follow Existing OSHA Standards

There is no specific OSHA standard covering COVID-19, but employers need to be guided by the General Duty Clause, and, where applicable, OSHA's PPE standards discussed above.

Classifying the Risk of Worker Exposure in Your Workplace

OSHA recommends that all employers, irrespective of risk of exposure in their workplace, take **STEPS 1-6** described above. Next, OSHA suggests that employers classify their risk of worker exposure to COVID-19 based on the Occupational Risk Pyramid pictured above.

Lower Risk (Caution):

Workers have minimal contact with the public and other coworkers. These jobs do not require contact with people known to be, or suspected of being, infected with COVID-19; and do not require frequent close contact with, *i.e.* within 6 feet of, the general public.

For Lower Risk workers, employers should follow the guidance for the **STEPS 1-6** set out above.

Medium Risk:

Workers have frequent and/or close contact with, *i.e.* within 6 feet of, other people who may be infected but who are not known or suspected COVID-19 patients. Examples include workers who have contact with international travelers or workers who have contact with the general public, such as school workers, high population-density work environments, and high-volume retail settings.

For Medium Risk workers, employers should follow the guidance for **STEPS 1-6** set out above +

Labor & Employment Alert

March 15, 2020

Engineering Controls – Install physical barriers, such as clear plastic sneeze guards, where feasible.

Administrative Controls –

- Consider offering face masks to ill employees and customers to contain respiratory secretions until they are able to leave the workplace.
- Keep customers informed about COVID-19 symptoms and ask sick customers to minimize contact with workers until healthy again, such as by posting signs or sending automated messages.
- Where feasible, limit customers' and the public's access to the worksite, or restrict access to certain areas.
- Consider strategies to minimize face-to-face contact, *e.g.* drive-through windows, phone-based communication, telework.
- Communicate the availability of medical screening or other worker health resources.

PPE – Workers may need to wear some combination of gloves, a gown, a face mask, and/or a face shield or goggles. PPE ensembles for Medium Risk workers will vary by work task, the results of the employer's hazard assessment, and the types of exposures workers have on the job.

High and Very High Risk:

High Risk workers are those with high potential for exposure to known or suspected sources of COVID-19. Very High Risk workers are those with high potential for exposure to known or suspected sources of COVID-19 during specific, medical, postmortem, or laboratory procedures that involve aerosol generation or specimen/collection handling.

For High and Very High Risk workers, employers should follow the guidance for **STEPS 1-6** set out above +

Labor & Employment Alert

March 15, 2020

Engineering Controls – In healthcare facilities:

- Ensure appropriate air-handling systems are installed and maintained;
- Isolate patients with known or suspected COVID-19;
- Use isolation facilities to perform aerosol-generating procedures on patients or bodies with known or suspected COVID-19;
- Use special precautions when handling specimens from known or suspected COVID-19 patients.

Administrative Controls – In healthcare facilities:

- Develop and implement policies that reduce exposure, such as grouping COVID-19 patients when single rooms are not available;
- Post signs requesting patients and family members to immediately report symptoms of respiratory illness on arrival and use disposable face masks;
- Consider offering enhanced medical monitoring of workers during COVID-19 outbreaks;
- Provide all workers with job-specific education and training on preventing transmission of COVID-19;
- Ensure that psychological and behavioral support is available to address employee stress.

Safe Work Practices –

- Provide emergency responders and other essential personnel who may be exposed while working away from fixed facilities with alcohol-based hand rubs containing at least 60% alcohol.

PPE – Most workers at high or very high exposure risk likely need to wear gloves, a gown, a face shield or goggles, and either a face mask or respirator, depending on their job tasks and exposure risks. Workers in laboratories or morgue facilities may require additional protection such as medical/surgical gowns, fluid-resistant coveralls, aprons, or other disposable or reusable protective clothing.

Labor & Employment Alert

March 15, 2020

OSHA and COVID-19 Take-Aways

With respect to developing and implementing your COVID-19 preparedness and response plan, it is not a one-size fits all proposition. Rather, the elements of your plan and the specific controls you introduce will largely depend on the nature of your business and the level of interaction among employees and between employees and members of the public such as customers, clients, patients, vendors, and students. As outlined above, the important things are that you:

- (1) Review: Steps All Employers Can Take to Reduce Workers' Risk of Exposure to COVID-19 recommended by OSHA;
- (2) Classify the risk of worker exposure in your workplace; and
- (3) Implement the steps and workplace controls that are applicable to your particular work environment.

For more information, the full OSHA guidance can be found at:

<https://www.osha.gov/Publications/OSHA3990.pdf>. Also please make sure to check state and local safety rules and those pertaining to specific industries.

Additionally, bear in mind that OSHA is not the only legal consideration. With respect to COVID-19, there are other laws that come into play such as the Americans with Disabilities Act, federal and state anti-discrimination laws, the FLSA, the FMLA, and the National Labor Relations Act. Accordingly, it is prudent to seek legal advice when developing or implementing policies to ensure compliance with all competing legal considerations.

Labor & Employment Alert

March 15, 2020

This Client Alert was written by Nan O'Neill, and reviewed by others in the MHTL Coronavirus Working Group including Kier Wachterhauser, Mike MacCaro, Arthur Murphy, and Katherine Hesse. If you have any questions regarding this Client Alert, please contact Nan O'Neill, or the attorney responsible for your account, or call (617) 479-5000.

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