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OSHA's Guidance for Reopening Non-Essential Businesses

Continuing its recent trend of issuing workplace guidance regarding the COVID-19 pandemic, the Occupational Safety and Health Administration (OSHA) has released a detailed guidance document for reopening non-essential businesses.

The June 18, 2020 Guidance on Returning to Work document contains recommendations that “are intended to assist employers in providing a safe and healthful workplace.” It also contains “descriptions of mandatory safety and health standards” and reminds employers of their general duty to provide a hazard-free work environment pursuant to Section 5 of the Occupational Safety and Health Act of 1970.

According to OSHA, this guidance supplements the U.S. Department of Labor and U.S. Department of Health and Human Services' previously developed Guidance on Preparing Workplaces for COVID-19 and the White House's Guidelines for Opening Up America Again. Reopening non-essential businesses should also “align with the lifting of stay-at-home or shelter-in-place orders and other specific requirements of the Federal Government and state, local, tribal, and/or territorial (SLTT) governments across the United States, as well as with public health recommendations from the Centers for Disease Control and Prevention (CDC) and other federal requirements or guidelines.”

Planning for Reopening

The June 18, 2020 guidance document emphasizes employers' need to develop and implement reopening strategies for (a) basic hygiene, (b) social distancing, (c) identification and isolation of sick employees, (d) workplace controls and flexibilities, and (e) employee training. Employers should implement these strategies during all phases of reopening under the Guidelines for Opening up America Again. For example:

- **Phase 1:** Employers should consider making telework available, limit the number of people who return to the workplace in order to maintain strict

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social distancing practices, limit non-essential business travel, and make accommodations for workers at higher risk of severe illness and workers with household members at higher risk of severe illness.

- **Phase 2:** Employers should continue to make telework available, maintain moderate to strict social distancing practices in the workplace, and accommodate vulnerable employees as recommended in Phase 1. Non-essential business travel can resume.
- **Phase 3:** Employers can resume unrestricted staffing of work sites.

OSHA cautions that changing outbreaks in each community will directly affect workers' exposure risks to COVID-19 and recommends that employers develop and implement policies and procedures that address preventing, monitoring for, and responding to any emergence or resurgence of COVID-19 in the workplace or community.

Based on evolving conditions, OSHA recommends that employers' reopening plans address various "guiding principles." These guiding principles are examples of what should be incorporated in an employer's reopening plan, and OSHA clarifies that they are neither an exhaustive list of actions an employer should take, nor should each example be interpreted as necessary for every employer. Additionally, OSHA stresses that whatever steps the employer takes, they should be sure to communicate the measures to employees and provide employees a point of contact for any questions or concerns. The guiding principles include:

- **Hazard Assessment:** Employers should perform a hazard assessment, which involves identifying areas of occupational exposure across job tasks and categories. Employers should also consider, among other things, internal (coworker) and external (customer, visitor, etc.) exposures. It is also important to consider current outbreak conditions in the community.
- **Hygiene:** Employers should develop practices for (a) hand hygiene, (b) respiratory etiquette, and (c) cleaning and disinfection. This includes providing soap, water, paper towels, and hand sanitizer (with at least 60 percent alcohol) for workers, customers, and visitors. Employers should encourage frequent and proper handwashing (for at least 20 seconds) and frequent use of hand sanitizer when handwashing is infeasible.

Employers should also identify high-traffic areas that could become contaminated, as well as surfaces or items that are shared or frequently touched, and target them for enhanced cleaning and disinfection using EPA-registered disinfectants and adherence to CDC guidance for controlling the spread of COVID-19.

- **Social Distancing:** Employers should adopt practices that maximize social distancing to the extent feasible, using six feet of distance as a general rule (which may change based on changes in community transmission and other criteria). The guidance recommends (a) imposing business occupancy limits, (b) using floor markings in high traffic/high use areas to designate six foot spacing, and (c) posting other signage to remind workers to maintain social distancing and direct traffic in congested or tight areas.
- **Identification and Isolation of Sick Employees:** Employers should adopt policies and practices to identify and isolate sick employees. This includes practices for worker self-monitoring or

screening and isolating and excluding from the workplace any employees with signs or symptoms of COVID-19.

Employers should ask employees to evaluate themselves for signs/symptoms of COVID-19 before coming to work and direct them to stay home if they feel ill. Employers should also establish protocols for people who become ill in the workplace. These protocols should include details about how and where a sick person will be isolated (in the event they are unable to leave immediately) while awaiting transportation from the workplace, to their home or to a health care facility, and cleaning and disinfecting spaces the ill person has occupied to prevent exposure to other workers, customers, or visitors.

Employers should also be aware of any existing obligations to collaborate with SLTT health officials for contact tracing and notification of COVID-19 cases.

- **Return to Work after Illness or Exposure:** Employers should follow CDC guidance for discontinuing self-isolation and returning to work after illness, or discontinuing self-quarantine/monitoring after exposure, as appropriate for the workplace. Employers should also ensure that workers who have been exposed to someone with COVID-19 routinely self-monitor for symptoms or receive other symptom monitoring, including signs and/or symptoms of potential illness, at work, in accordance with CDC guidance.
- **Controls:** Employers should select and implement an appropriate blend of (a) engineering controls (e.g., physical barriers/shields to separate workers, enhanced ventilation); (b) administrative controls (e.g., staggering work shifts, limiting breakroom capacity, practicing social distancing, replacing in-person meetings with video/teleconferencing, ensuring workers wear appropriate face coverings such as cloth face masks to contain respiratory secretions); (c) safe work practices; and (d) providing and ensuring workers use appropriate personal protective equipment (PPE) as identified through hazard assessments and in accordance with OSHA standards (and OSHA and CDC guidance on the use of PPE).
- **Workplace Flexibilities:** Employers should evaluate existing policies and, if necessary, consider new policies that facilitate appropriate use of telework, sick or other types of leave, and other options that help minimize workers' exposure risk. Employers should also communicate about these workplace flexibilities and ensure that workers understand how to make use of available options (e.g., fatigue management).
- **Training:** Employers should ensure that employees are trained on (a) the signs, symptoms and risk factors associated with COVID-19; (b) where, how, and to what sources of SARS-coV-2 employees might be exposed in the workplace; and (c) how to prevent the spread to SARS-CoV-2 at work.

Employers should ensure that workers' training covers site-specific measures and discusses how workers can protect themselves. The training should be language- and literacy-level appropriate. Workers should also be trained on the use of face coverings in the workplace, including instances when the face coverings themselves may cause a hazard. If PPE is required, employers must ensure that workers receive appropriate training as required by OSHA standards for PPE.

- **Anti-Retaliation:** Employers should ensure that employees understand (a) their right to a safe and healthful work environment, (b) their right to raise workplace safety and health concerns (and who to contact raise such concerns), (c) that they may request an OSHA inspection, and (d) that retaliation for raising such concerns is prohibited. Supervisors should also be familiarized with workplace flexibilities and other human resources policies.

OSHA refers employers to the inter-agency Guidance on Preparing Workplaces for COVID-19 and the OSHA COVID-19 webpage for additional information to assist them in developing and implementing reopening strategies.

Applicable OSHA Standards and Required Protections in the Workplace

The June 18, 2020 guidance emphasizes that all of OSHA's standards which apply to protecting workers from infection remain in place as employers and workers return to work. OSHA specifically directs employers to the following requirements and standards as non-essential businesses begin to reopen:

- Standards for PPE (29 CFR 1910.132)
- Respiratory Protection (29 CFR 1019.134)
- Sanitation (29 CFR 1910.141)

OSHA also emphasizes that its general industry rules for hazard and exposure assessment, implementation programs, workplace controls, training, and recordkeeping, as well as prohibitions on retaliation, are applicable to protecting workers from occupational exposure to COVID-19.

Employer Frequently Asked Questions

As part of the June 18, 2020 guidance, OSHA addresses a series of employer frequently asked questions (FAQs). These FAQs address the following key topics:

- **On-Site COVID-19 Testing:** Employers may conduct on-site testing for COVID-19 so long as testing is done in a transparent and non-retaliatory manner. However, employers should not presume that individuals who test negative present no hazard to others in the workplace. A negative test or tests does not mean that employers should alleviate basic hygiene measures, social distancing requirements, workplace controls and flexibilities, or employee training. Employers should continue with precautions to mitigate the risk of spread and exposure to the virus.
- **On-Site Temperature and Health Screening:** Employers may conduct on-site (or require at-home) temperature and health screening so long as the screenings are applied in a transparent and non-retaliatory manner. A lack of fever should not be interpreted as a negative COVID-19 diagnosis, and employers should continue with precautions even if employees are reporting good health.

OSHA cautions that temperature screening alone has limited utility. According to OSHA, the best screening protocol is to have employees take their temperatures at home and have a policy regarding self-monitoring for symptoms that prohibits workers from coming to work if ill. While this approach has some disadvantages, including that employees may be dishonest or may not even

have a thermometer, employers who conduct on-site temperature screening run the risk of employees bunching up while waiting for testing at work. Employers must also ensure that those performing the testing wear PPE, and that any documented results conform to applicable record-keeping requirements (see below discussion).

- **Record-Keeping Requirements for COVID-19 Testing and Health Screening:** If recorded, results of a health screen or temperature check may qualify as medical records under the Access to Employee Exposure Medical Records (AEEMR) standard. Temperature records do not qualify as medical records under the AEEMR standard unless they are made or maintained by a physician, nurse, technician, or other health care personnel. If these results qualify as such, the employer must retain these records for the duration of the employee's employment plus 30 years and follow applicable confidentiality requirements.

Any personnel administering COVID-19 tests, in-person temperature checks, or other in-person health screening must be protected from exposure to sources of COVID-19, including asymptomatic and pre-symptomatic workers. Protection should follow a hierarchy of controls, including engineering and administrative controls, safe work practices, and use of PPE.

- **Additional Guidance:** OSHA recommends reviewing guidance from the U.S. Equal Employment Opportunity Commission (EEOC) regarding What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws, as well as the Summary of the Major Laws of the Department of Labor webpage.
- **Return to Work Post-Recovery:** OSHA defers to CDC guidance regarding discontinuation of isolation for people with COVID-19, which may be adapted by state and local health departments.
- **Personal Protective Equipment:** Employers must conduct a hazard assessment in accordance with OSHA's PPE Standard, if applicable, to determine PPE requirements for their unique work site. Employers must use PPE if necessary. If PPE is necessary but unavailable, the work tasks must discontinue unless the employer can identify an acceptable alternative means to accomplish what needs to get done.

OSHA is concerned with PPE supply levels and encourages employers to modify work and worker interactions to reduce the need for PPE, such as delaying PPE-required work tasks until the pandemic subsides. OSHA further confirms that cloth face coverings are not PPE but may be worn (and are encouraged to be worn) in the workplace as an administrative control. OSHA encourages employers to review CDC guidance on conserving PPE in non-healthcare sectors.

Altogether, it is essential for employers to document their practices during the ongoing pandemic. One approach is to create a COVID-19 policy that (a) describes the employer's efforts to assess hazards, (b) sets forth the protocols that have been implemented, and (c) outlines what is expected of employees. Employers can also develop a companion management playbook that expands on the employee COVID-19 policy and provides leaders within the organization with tools to implement the plan.

Michael Best has engaged with OSHA in a number of high-profile COVID-19-related investigations and stands ready to help employers navigate return-to-work issues during the pandemic. Please contact your Michael Best attorney with any questions.

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