

OSHA Guidance Touches on More Than Masks, Distancing

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Recently, the Occupational Safety and Health Administration (OSHA) issued guidance titled “Protecting Workers: Guidance on Mitigating and Preventing the Spread of COVID-19 in the Workplace.” The new guidance, which is advisory, addresses not only some of the more commonplace safety practices but also other employment policies and practices not as readily associated with workplace safety.

As you are updating or implementing new policies related to topics such as vaccines, COVID-19-related leave, and antiretaliation policies, you should include in your analysis the impact of the guidance on your policies and their potential impact on workplace safety.

How We Got Here

On January 21, President Joe Biden issued an Executive Order (EO) on “Protecting Worker Health and Safety” directing the Assistant Secretary of Labor for Occupational Safety and Health to issue science-based guidance for employers to assist in protecting workers from COVID-19. In response, OSHA issued its updated guidance for employers.

Notably, the updated guidance is “advisory in nature, informational in content, and intended to assist employers in providing a safe and healthful workplace.” It doesn’t create new standards, regulations, or legal obligations.

Under OSHA’s General Duty Clause, however, employers are required to “provide workers with a workplace free from hazards that are causing or likely to cause death or serious physical harm.” The more employers are able to implement policies and practices in line with the guidance provided, the more protection they may have against COVID-related violations of the General Duty Clause.

Importantly, the new guidelines touch on more than the best mask and social distancing practices. They touch on complicated COVID-related employment issues, such as leave policies, vaccines, and antiretaliation. You need to be aware that your policies and practices related to such issues may be taken into account when evaluating overall workplace safety.

Guidance Highlights

Much of OSHA's recent COVID-19 guidance involves practices that are now commonplace: maintaining social distance, wearing face coverings, practicing good hygiene, and disinfecting regularly. The new guidance also recommends additional practices, however, to help maximize the effectiveness of employers' current procedures. For example, the new guidance focuses on:

- Hazard assessments to pinpoint employees' specific safety needs;
- Ensuring employee input into needed procedures because they are often in the best place to point out hazards specific to their own working conditions;
- Ensuring safety procedures are communicated effectively—meaning they are widely available in formats employees understand (i.e., American Sign Language, non-English spoken languages);
- Appointment of an individual "point-person" to be responsible for COVID-19 on the employer's behalf;
- Adoption of policies that reduce negative impacts on employees missing work due to COVID-19; and
- Implementation of protections that reassure employees they won't be retaliated against if they raise questions or concerns with workplace safety procedures.

The guidance provides 16 enumerated elements for the "most effective" workplace COVID-19 prevention programs. In addition to addressing safety protocols such as isolating employees with symptoms at work, cleaning and disinfection practices, training, screening and testing, and recording and reporting cases, the best practices include items less routinely associated with workplace safety, namely vaccines and absence policies.

COVID-19 Vaccines and the Workplace

Since the roll-out of the vaccines, many employers have been evaluating the best way to encourage or even mandate their workforce to get vaccinated. Although the Equal Employment Opportunity Commission (EEOC) has clarified it will allow mandatory vaccine policies (subject to exceptions for medical and religious objections), many have worried about the risks of requiring vaccines under other federal and various state laws. In fact, many have questioned whether requiring a vaccine could present potential workplace safety issues itself, given the emergency use authorization status.

The new guidance doesn't recommend, or even address, mandatory vaccination. It does, however, encourage employers both to offer the vaccine to employees at no cost and to provide "information and training on the benefits and safety of vaccinations."

Additionally, the guidance states that once employees begin receiving the vaccine, you shouldn't treat employees who are vaccinated differently than employees who aren't. On its face, the suggestion addresses the fact that research hasn't shown whether and to what extent vaccinated people can still transmit COVID-19. Therefore, while vaccinated employees may be at less risk of catching COVID-19, they should still follow masking and distancing rules to slow the spread to others.

Many employers, however, are encouraging vaccinations by implementing rules that vaccines are required to enter certain workspaces or events. You should be wary of such incentives under the guidance unless still requiring all other safety measures, such as masks and distancing, even where all are vaccinated.

Paid Sick Leave for COVID-19 Quarantining

Another hot topic addressed in the guidance is absence and paid leave policies. The guidance encourages employers to "ensure that absence policies are non-punitive" and to allow employees to use paid sick leave to encourage sick and exposed individuals to quarantine to reduce the risk of transmission.

Policies that encourage workers to come to work with symptoms out of fear of termination or loss of pay are potential workplace safety hazards. This is important in the wake of the expiration of the Families First Coronavirus Response Act (FFCRA). The FFCRA, which required 2 weeks of paid leave for certain individuals testing positive or under isolation orders, expired on December 31, 2020. Employees no longer have a right to the leave.

The Consolidated Appropriations Act (CAA), however, extended the employer tax credits for FFCRA-qualifying leave voluntarily provided by employers through March 31, 2021. In fact, the OSHA guidance specifically references the extended tax credit when encouraging employers to implement paid sick leave policies covering COVID-related absences.

So, while leave is no longer required under the FFCRA, employers that chose to forgo paid leave for employees absent due to COVID-19 may have more of an uphill battle to defend the safety of their workplace should OSHA question it. And, at least until March 31, 2021, the cost of providing the leave may provide little defense.

Antiretaliation Policies Under OSHA

Finally, the guidance reminds employers that OSHA prohibits discharging or discriminating against employees who voice concerns about workplace safety, including COVID-19-related

hazards. The guidance encourages setting up a clear procedure for raising concerns, including appointing a point-person and/or using a hotline or other anonymous reporting system.

The guidance doesn't excuse employees from job duties due to general concerns with contracting COVID-19. You should be careful when disciplining or terminating an employee, however, if she has voiced reasonable concerns over certain practices or lack of safety measures related to the virus.

Comments one may construe as excuses to get out of work could potentially be protected action under OSHA, and disciplinary action could put you in hot water. You should carefully evaluate such decisions and seek guidance if there's any possibility the employee could claim a termination was retaliatory.

Bottom Line

Many employers keep OSHA and general HR policies separate in their minds for many reasons. COVID-19 has touched every aspect of life, however, and has essentially eliminated the distinction in many ways.

As you reevaluate policies in the new year, updating them to conform to the changing landscape of a new administration, new COVID-related laws and guidance, and the availability of a vaccine, you need to be aware that each policy and practice affecting employees may be evaluated as a factor of workplace safety. The new guidelines make that very clear. You should seek guidance when implementing new policies to eliminate unintended consequences or potential vulnerabilities as much as possible.

It should also be noted that President Biden also directed the assistant secretary to, on or before March 15, 2021, issue any necessary emergency temporary standard (ETS). He further ordered the assistant secretary to launch a national program to focus OSHA efforts on violations that put the largest number of workers at serious risk for contracting COVID-19, or that are contrary to antiretaliation principles. If and when the standards and programs are implemented, we will once again highlight the important points and direct you to any updated guidance.