



Human Resources Update and Vaccine-Related Issues COVID-19 and OSHA



Topics for Discussion

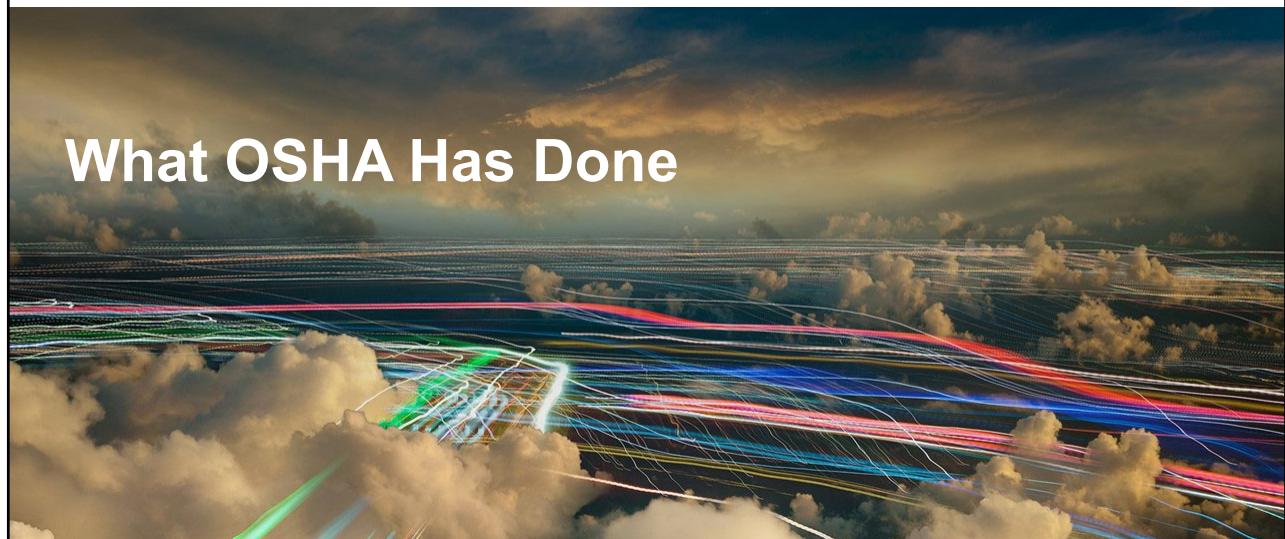
- OHSA COVID-19 Overview
 - What OSHA Has Done Related to COVID-19
 - What OSHA Has NOT Done Related to COVID-19
- Hot-Button Issues
 - Responding to Workplace COVID-19 Cases
 - CDC Recommendations for Businesses
 - OSHA General Duty Clause
 - Recording and Recordkeeping
- Vaccines
 - Timeline
 - Potential Action/Inaction from OSHA
 - Employer Vaccine Considerations



**What has OSHA been up to?
OSHA COVID-19 Overview**



What OSHA Has Done



Guidance for Preparing Workplaces for COVID-19

- In March 2020, OSHA published “**Guidance for Preparing Workplaces for COVID-19**” with information intended to prevent the spread of COVID-19 in the workplace.
- In the Guidance, OSHA emphasized the applicability of the General Duty Clause, which requires employers to provide a workplace free from recognized hazards likely to cause death or serious harm and recommended employers take the following steps:
 - Develop an infection disease preparedness and response plan;
 - Implement basic infection prevention measures;
 - Develop policies and procedures for prompt identification and isolation of sick people; and
 - Develop, implement, and communicate about workplace flexibilities and protections appropriate for each business.



5

OSHA Interim Enforcement Response Plan

- On April 13, 2020, OSHA issued an **Interim Enforcement Response Plan** outlining the Agency’s handling of COVID-19 related complaints, referrals, and severe illness reports.
- Fatalities and imminent danger exposures related to COVID-19 will be prioritized for inspections, with special attention given to health care organizations and first responders.
- All other formal complaints from employees engaged in medium- or lower-exposure risk tasks and complaints from non-health care and non-emergency response establishments generally will be processed through the non-formal complaint process.



6

Good Faith Compliance Efforts

- On April 16, 2020, OSHA issued interim guidance to OSHA Compliance Safety and Health Officers (“CSHO”) inspecting workplaces to consider the employer’s good faith efforts to comply with safety and health standards during the pandemic.
- OSHA will take employers’ good faith attempts to comply into “strong consideration” when determining whether to issue a citation, including whether the employer:
 - Explored all options to comply with applicable standards (e.g., use of virtual training or remote communication strategies);
 - Implemented interim alternative protections, such as engineering or administrative controls; and
 - Rescheduled required annual activity as soon as possible.



7

Informal Guidance Regarding Face Coverings

- On June 10, 2020, OSHA issued informal guidance in the form of frequently asked questions and answers regarding the use of face coverings, such as cloth face masks, in the workplace.
- OSHA was careful to clarify that cloth face coverings are not considered personal protective equipment (PPE) and therefore, employers are not required to provide them to workers. However, OSHA recommend that employers encourage their workers to wear face coverings at work as a method of source control and instructed that face coverings are not intended to replace or substitute for social distancing measures.
- If an employer determines that cloth face masks actually present or exacerbate a workplace hazard (i.e. the cloth face mask becomes saturated with chemicals used on the production floor), employers should consider whether PPE like face shields or plastic partitions are appropriate.



8

What OSHA Has NOT Done



OSHA Receiving Flack

- OSHA has all but said that it will not be implementing a federal COVID-19 standard.
 - According to U.S. Secretary of Labor Eugene Scalia, in light of the General Duty Clause, OSHA's industry-specific safety recommendations go far enough: "We believe we already possess the enforcement authority we need ... and that our current approach is the best means to protect workers and give employers guidance and confidence in the steps to be taken to provide a safe workplace and satisfy their obligations."
- Labor unions have criticized OSHA and some states are moving to implement their own OSHA standards in the absence of federal regulation.

Labor Unions

- Labor unions have derided OSHA for its failure to implement a national OSHA standard related to the COVID-19 pandemic.
- According to Deborah Berkowitz, worker health and safety program director at the National Employment Law Project, “[t]he federal agency that usually is responsible for protecting workers from dangerous conditions at work has totally abdicated its responsibility ... It's completely missing in action.”
- On May 18, 2020, the AFL-CIO filed suit alleging that “the COVID-19 global pandemic caused by the novel coronavirus has produced exactly the type of workplace catastrophe that Congress intended an emergency temporary standard to address.”
- The D.C. Court of Appeals struck down the lawsuit and ruled:
 - “In light of the unprecedented nature of the COVID-19 pandemic, as well as the regulatory tools that OSHA has at its disposal to ensure that employers are maintaining hazard-free work environments, OSHA reasonably determined that an ETS is not necessary at this time.”



11

Union Organizing

- Labor unions are capitalizing on the economic uncertainty and the fear of employees during the pandemic to bolster their declining membership.
- Unions are increasingly demanding:
 - Stricter safety precautions
 - Hazard pay
 - Job security in the form of employment guarantees
 - Work schedule accommodations
 - Relaxed attendance policies
 - Increased employer sponsored sick leave
 - Right to information regarding positive COVID-19 infections
 - Health insurance guarantees during COVID-19 related absences
- Employers should be ready to address these concerns, and following recommendations from the CDC and OSHA could pre-empt these concerns.



12

Eliminate Risk of Union Organizing

- Train Supervisors to Recognize and Respond to Union Organizing
- Educate Employees on Negatives of Unionization
- Practice Positive Employee Relations
- Be Proactive and Develop a Labor Relations Response Plan
- Don't forget about Protected Concerted Activity (PCA) under the National Labor Relations Act (NLRA)



13

States Stepping In

- Realizing that OSHA is unlikely to promulgate federal OSHA standards, some states are stepping in.
- Virginia has adopted the first-in-the-nation workplace standards for COVID-19.
- Virginia's standards require employers to:
 - Mandate social distancing measures;
 - Require face coverings for employees in customer-facing positions and when social distancing is not possible;
 - Regularly clean high-contact surfaces; and
 - Notify employees within 24 hours when another employee tests positive for COVID-19.
- Other states, such as Oregon and California, are also in the process of creating their own standards.



14

COVID-19 Liability Protections

- On Aug. 5, 2020, Republican attorneys general from 22 states submitted a letter to Senate leaders in support of the national COVID-19 civil liability protections proposed in the SAFE TO WORK Act, S. 4317, introduced by Senate Republicans on July 27, 2020.
- The law, if enacted, would impose strict nationwide limitations on coronavirus-related tort liability.
- Several states, including Georgia, have passed their own COVID-19 liability protection laws.
- Under the Georgia law, businesses are provided with strong protections against tort claims related to COVID-19. In order to avail themselves of these protections, however, businesses will have to provide the requisite notices and signage.



15



What you need to know.

Hot Button Issues



Workplace COVID-19 Cases



Step 1: Send the infected employee home IMMEDIATELY

- **Advise** the infected employee to contact their health care provider.
- **Ask** the infected employee about:
 1. When they began noticing COVID-19 Symptoms;
 2. The date and location of the test;
 3. The date the test results were received;
 4. Any instructions provided by a health care provider in connection with the test results; and
 5. Ask the employee to identify all individuals with whom he/she was in close proximity to before the onset of COVID-19 symptoms.
- **Follow** current CDC recommendations regarding when infected and exposed employees can return to work.

Step 2: Conduct contact tracing and notify employees.

- **Ask** the infected employee to identify all employees and other third parties with whom he/she was in close proximity to during the 48-hour period before symptoms began.
- **Notify** those workers that a coworker with whom they were in close proximity in the preceding fourteen days tested positive for COVID-19, and they may have been exposed.
- **Do not** disclose the infected employee's identity to his or her coworkers because this may violate the Americans with Disabilities Act.



19

Step 2: Continued.

- **Issue** a general announcement to all other employees who worked in the office with the following information:
 - The company learned on [date] that an employee in the [location] has tested positive/has been diagnosed with COVID-19.
 - Do not identify the infected employee by name, but you may identify the area/department where he or she worked and the date(s).
 - State that all employees who worked in close proximity (within 6 feet and for 15 minutes or more) have been notified of the confirmed COVID-19 case.
 - Summarize housekeeping, cleaning, and disinfecting measures that have been or will be taken.
 - Instruct employees to self-monitor for symptoms. Advise that if any employee develops symptoms, they should not come to work and should notify [designated Company contact] and contact their medical provider.
 - List local and state public health authorities for additional guidance.



20

Step 3: Take appropriate housekeeping measures to clean and disinfect workplace.

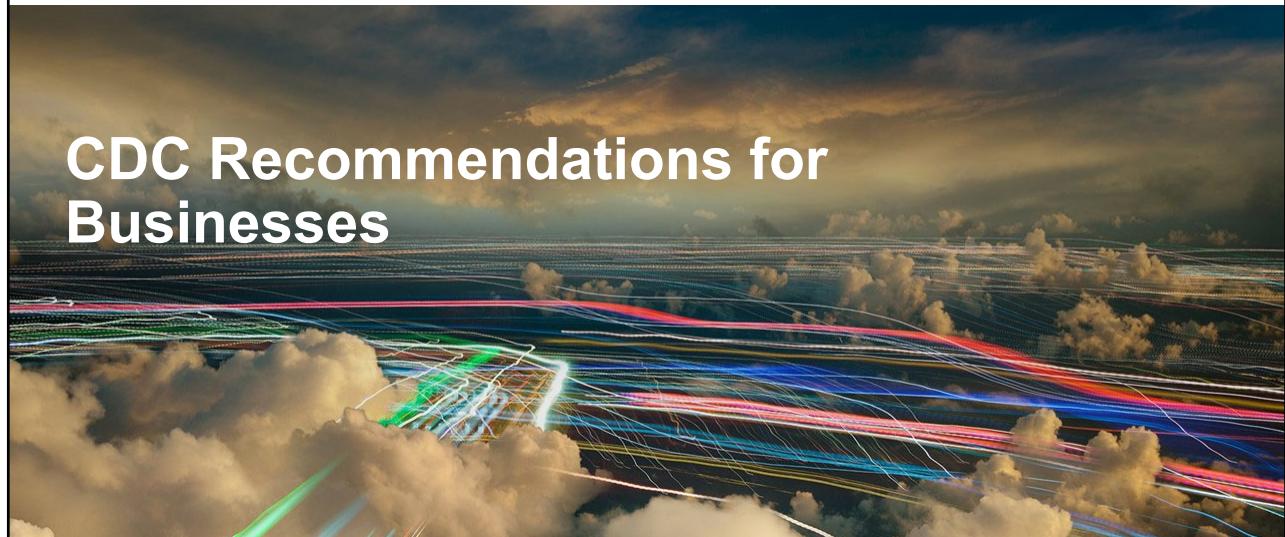
- Close off the areas used by the infected worker. Where feasible, open outside doors and windows and use ventilating fans to increase air circulation, and to minimize further exposure, wait at least 24 hours or as long as practical before beginning cleaning and disinfection.
- Clean and disinfect all areas such as offices, bathrooms, common areas, and shared electronic equipment that was or could have been used by the infected employee, focusing on frequently touched surfaces.



21



CDC Recommendations for Businesses



Prevent and Reduce Transmission Among Employees

- Actively encourage sick employees to stay home:
- Consider conducting daily in-person or virtual health checks.
- Because OSHA requires a safe and healthy workplace, identify where and how employees might be exposed to COVID-19 at work.
- Separate sick employees.
- Take action if an employee is suspected or confirmed to have a COVID-19 infection
- Educate employees about steps they can take to protect themselves at work and at home.



23

Maintain Healthy Business Operations

- Implement flexible sick leave and supportive policies practices.
- Protect employees at a higher risk for severe illness through supportive policies and practices.
- Assess essential functions of the business.
- Establish policies and practices for social distancing.



24

Maintain a Healthy Work Environment

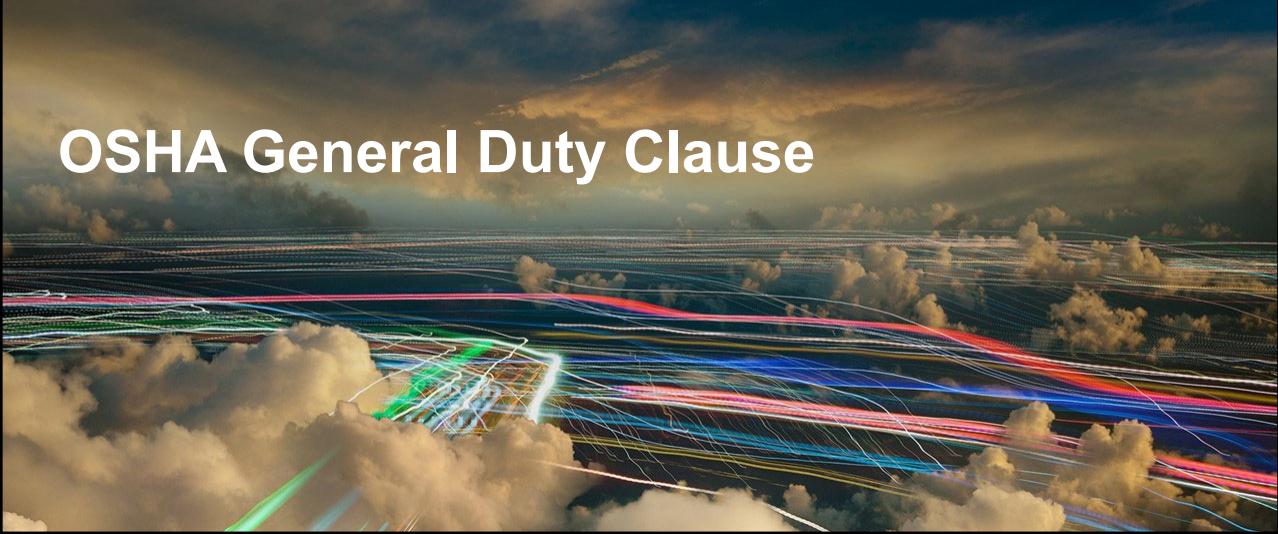
- Consider improving the engineering controls using the building ventilation system.
- Give employees, customers, and visitors what they need to clean their hands and cover their coughs and sneezes.
- Perform routine cleaning.
- Limit travel and advise employees that if they must travel to take additional precautions and preparations.
- Minimize risk to employees when planning meetings and gatherings.



25



OSHA General Duty Clause



General Duty Clause

- **The General Duty Clause**, Section 5(a)(1) of the Occupational Safety and Health (OSH) Act of 1970, 29 USC 654(a)(1), requires employers to furnish to each worker “employment and a place of employment, which are free from recognized hazards that are causing or are likely to cause death or serious physical harm.”
- In its “Guidance on Preparing Workplaces for COVID-19” OSHA specifically noted that the General Duty Clause is applicable to COVID-19.



27

The General Duty Clause Applies

- Employers can be cited for violation of the General Duty Clause if a recognized serious hazard exists in their workplace and the employer does not take reasonable steps to prevent or abate the hazard. The General Duty Clause is used only where there is no standard that applies to the particular hazard.
- The following elements are necessary to prove a violation of the General Duty Clause:
 - The employer failed to keep the workplace free of a hazard to which employees of that employer were exposed;
 - The hazard was recognized;
 - The hazard was causing or was likely to cause death or serious physical harm; and
 - There was a feasible and useful method to correct the hazard.



28

General Duty Clause- Citations

- **Smithfield Packaged Meats Corporation – \$13,494 Proposed Penalty**
- On September 8, 2020, OSHA issued Smithfield Packaged Meats Corporation in Sioux Falls, South Dakota, a Serious Violation under the General Duty Clause for failure to “develop or implement timely and effective measures to mitigate exposures” to COVID-19.
- Approximately 1,294 employees tested positive, 43 employees were hospitalized, and 4 employees died of COVID-related complications.
- Recommended abatement measures included pro-active social distancing measures; the use of barriers between work stations, breakrooms, and other common areas; staggering shifts and breaks; requiring the use of face coverings; and screening employees for COVID symptoms.



29

General Duty Clause – Citations

- **JBS Foods, Inc. - \$15,615 Proposed Penalty**
- On September 11, 2020, following a coronavirus-related inspection, OSHA cited JBS Foods, Inc. for a violation of the general duty clause for failing to provide a workplace free from recognized hazards that can cause death or serious harm.
- OSHA noted that “employers need to take appropriate actions to protect their workers from coronavirus.”
- The agency also noted that there has been published guidance, which details pro-active measures employers can take.



30

General Duty Clause- Takeaways

- The recommended abatement measures can be adapted to many different workplaces.
- OSHA will be scrutinizing whether employers in various industries have implemented similar measures appropriate to the known COVID exposure risk given the particular industry, working conditions in the facility at issue, and public health developments in the surrounding community.
- Employers should follow OSHA guidance to avoid General Duty Clause violations.



31



Recording and Recordkeeping

A wide-angle photograph of a landscape at dusk or dawn. The sky is filled with dramatic, colorful clouds in shades of orange, yellow, and blue. In the foreground, there are large, fluffy white clouds. Overlaid on the scene are numerous thin, glowing lines of various colors (red, blue, green, yellow) that appear to be light trails from aircraft or perhaps a digital representation of data flow. The overall effect is futuristic and dynamic.

COVID-19 Recordkeeping and Reporting

- On May 19, 2020, OSHA issued updated enforcement guidance for recording COVID-19 cases rescinding prior enforcement guidance.
- Under OSHA's recordkeeping requirements, COVID-19 is a recordable illness, and employers are responsible for recording cases of COVID-19 if:
 - The case is a **confirmed case** of COVID-19, as defined by the Centers for Disease Control and Prevention (CDC) as an individual from whom at least one sample tested positive for SARS-CoV-2, the virus that causes COVID-19;
 - The case is **work-related** as defined by 29 CFR § 1904.5; and
 - The case involves one or more of the general recording criteria set forth in 29 CFR § 1904.7 (death, days away from work, restricted work or transfer, loss of consciousness, significant injury).



33

COVID-19 Recordkeeping and Reporting

- In the May 2020 guidance, OSHA states that it will resume enforcement of the work-related determination. However, it will exercise enforcement discretion to assess employers' compliance efforts.
- In determining whether an employer has made a reasonable determination of work-relatedness, OSHA will consider the following factors:
 - The reasonableness of the employer's investigation into work-relatedness.
 - The evidence available to the employer.
 - The evidence that a COVID-19 illness was contracted at work.
- **If an employer makes a reasonable and good faith inquiry considering the factors above and cannot determine whether the COVID-19 exposure more likely than not happened in the workplace, the employer is not required to record the COVID-19 case.**



34



The vaccine is coming; then what? **COVID-19 Vaccine**



The Vaccine is On The Way

- According to the World Health Organization, as of August 25, 2020, 173 potential vaccines are currently being developed across the world and 31 have advanced to human testing.



OSHA May Not Mandate But Employers Can

- OSHA has not yet indicated its stance on the COVID-19 vaccine.
- However, there is precedent for allowing **employers** to mandate that employees obtain the COVID-19 vaccine once available.
- During the H1N1 Influenza pandemic, in a Standards Interpretation, OSHA indicated that it would not mandate that employees receive the vaccine.
- However, OSHA specifically noted that employers — subject to certain restrictions — could mandate that employees receive the H1N1 vaccine.



37

Employer Restrictions: Religious Accommodation

- Under Title VII of the Civil Rights Act, an employee may request a religious accommodation from a workplace requirement.
- In order to obtain the accommodation, the employee must have a “sincerely held religious belief”.
- Personal anti-vaccination positions generally will not support the legal requirements of establishing a sincerely held religious belief.
- Even if the employee can establish a sincerely held religious belief, the employer may deny an accommodation if it places an “undue hardship” on the employer.
- The undue hardship inquiry requires consideration of the harm to the employer, its employees, and third-parties, some federal courts have held that an employee refusing a flu vaccine is one such undue hardship.



38

Employer Restrictions: Medical Accommodations

- Under the American's with Disabilities Act (ADA), an employee may request a medical accommodation from a vaccine.
- In order to obtain the accommodation, an employee must establish a covered disability.
- Currently, there is a split amongst circuits regarding whether vaccination sensitivity constitutes a covered disability — this should be addressed on a case-by-case basis.
- Unlike with other disabilities, the EEOC had identified COVID-19 as a “direct threat” to employees under the ADA, which allows for more probing disability related questions and requests for medical documentation.



39

Bloodborne Pathogens Standard

- While it is highly unlikely that OSHA will require employers to provide COVID-19 vaccines to employees once available, there is precedent under the Bloodborn Pathogens Standard.
- The Bloodborn Pathogens Standard requires that employers provide, free of charge, hepatitis B vaccines to all potentially affected employees.
- Under the standard, employees must receive the vaccine unless they have already received a complete series of injections, antibody testing shows that they are immune, the vaccine is not given for medical reasons, or the employee opts out.
- For an employee to opt out, they must sign a declaration form stating that they understand the risk of not getting vaccinated but may still receive it at any time.



40

Locations

Counsel to innovative companies and brands around the world

We help leaders create, expand, and protect the value of their companies and most prized assets by bringing an equal balance of business acumen, technical skill, and creative thinking to the opportunities and challenges they face.



Anchorage
Atlanta
Augusta
Beijing
Charlotte
Dallas
Denver

Houston
Los Angeles
New York
Raleigh
San Diego
San Francisco
Seattle

Shanghai
Silicon Valley
Stockholm
Tokyo
Walnut Creek
Washington DC
Winston-Salem



www.kilpatricktownsend.com
© 2020 Kilpatrick Townsend & Stockton LLP