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Employer's OSHA-Related Obligations Concerning Coronavirus

Unfortunately, many of the regulations governing employers' obligations to their employees provide little guidance on how to navigate a global health pandemic like coronavirus. This is particularly true for regulations issued by the Occupational Safety and Health Administration (OSHA), which are the primary source of an employer's obligations to provide a safe working environment, but are ill-suited to address the current health crisis. To provide clarity on the obligations of employers relating to Coronavirus, OSHA recently created a COVID-19 Resource Webpage, with links to several guidance documents. OSHA's new guidance, as well as some of the regulations that should be at the forefront of employer's minds in responding to the coronavirus pandemic, are summarized below:

Recordkeeping and Reporting Requirements

OSHA requires that covered employers record certain work-related injuries and illnesses in the OSHA 300 log.[1] While, in the past, OSHA has exempted influenza and the common cold from this requirement, OSHA has stated that employers are responsible for recording cases of coronavirus on the OSHA 300 log where each of the following conditions are satisfied:

1. The case is considered "confirmed" under Center for Disease Control standards.
2. The case is "work-related," which is satisfied where "an event or exposure in the work environment either caused or contributed to the resulting condition." [2]
3. The illness meets the general recording criteria,[3] which requires, among other things, that an injury or illness result in "death, days away from work, restricted work or transfer to another job, medical treatment beyond first aid, or loss of consciousness." Additionally, the general recording criteria is met if it involves a significant illness diagnosed by a physician or other licensed health care professional.[4]

Employers must also notify OSHA—or their state occupational safety and health program—of certain serious work-related incidents.[5] In particular, employers must notify OSHA

- within eight hours after the death of any employee as a result of a work-related incident (a fatality is reportable if it occurs within 30 days of the work-related incident).

- within 24 hours after the in-patient hospitalization of one or more employees as a result of a work-related incident. (Hospitalization is reportable if it occurs within 24 hours of the work-related incident.)

Given the nature of coronavirus infection, the obligation to record cases on the OSHA 300 log or report directly to OSHA under these standards will likely hinge on the issue of "work-relatedness." In the past, OSHA has taken the position that this question generally requires employers to determine whether "it is more likely than not" that work events or exposures were a cause of the injury or illness. However, as the number of people infected with coronavirus continues to rise—and instances of community transmission become more prevalent—the distinction between an infection caused by "exposure in the work environment" and non-work-related transmission will become less and less clear. In making this determination, employers should remain mindful of the exceptions to work-relatedness, which include scenarios where "[t]he injury or illness involves signs or symptoms that surface at work but result solely from a non-work-related event or exposure that occurs outside the work environment."[6]

For employers utilizing remote work arrangements, "[i]njuries and illnesses that occur while an employee is working at home, including work in a home office, will be considered work-related if the injury or illness occurs while the employee is performing work for pay or compensation in the home, and the injury or illness is directly related to the performance of work rather than to the general home environment or setting."[7] As a result, an employer may be obligated to record the fact that an employee contracted coronavirus while working from home on the OSHA 300 log. However, it is unlikely that contraction of the virus would be "directly related to the performance of work" where an employee has no face-to-face interaction as part of their workday.

Ultimately, given the difficulty associated with determining the location and cause of an employee's exposure to COVID-19, employers should document their efforts to determine whether exposure is work-related. Given the unprecedented and uncertain nature of the current health crisis, OSHA may be inclined to show leniency towards employers with proof of a good-faith effort at compliance.

Personal Protective Equipment (PPE)

OSHA's Guidance on Preparing Workplaces for COVID-19 [8] indicates that engineering controls, such as high-efficiency air filters and increased ventilation rates—as well as administrative controls, such as encouraging sick workers to stay home and telework—are most effective in minimizing exposure to coronavirus. In addition, OSHA has indicated that PPE may be required, depending upon "risk assessments for workers, and information on PPE effectiveness in preventing the spread of COVID-19."

To assist employers in selecting appropriate PPE and other controls, OSHA's guidance classifies employees as "low risk," "medium risk," "high risk" and "very high risk" based on industry type and potential for exposure to people known to be, or suspected of being, infected with COVID-19. According to OSHA, "very high risk" and "high risk" employees generally include medical, laboratory, morgue and mortuary workers with high potential for exposure to known or suspected sources of COVID-19. [9] "Medium risk" workers include those who "require frequent and/or close contact with (i.e., within six feet of)" members of the public in areas where there is "ongoing community

transmission" of COVID-19.[10] Lastly, "low exposure" jobs are "those that do not require contact with people known to be, or suspected of being, infected with COVID-19 nor frequent close contact with (i.e., within six feet of) the general public."[11] Based on these classifications, OSHA has listed the types of controls and PPE—including gloves, goggles, face shields, face masks, and respiratory protection—that may be appropriate, while stressing that PPE must be selected based on the employer's hazard assessment of the particular types of exposures workers have on the job.[12]

With respect to the requirement of a hazard assessment, OSHA regulations require that PPE be selected based on the employer's assessment of hazards in the workplace, and that each employee be provided and required to use the PPE that will provide protection from the hazards identified.[13] OSHA's guidance recommends that employers check the OSHA and CDC websites regularly for updates about recommended PPE to reduce the risk of exposure to coronavirus, and has reminded employers that all PPE must be:

- selected based upon the hazard to the worker;
- properly fitted and periodically refitted, as applicable;
- consistently and properly worn when required;
- regularly inspected, maintained and replaced, as necessary; and
- properly removed, cleaned and stored or disposed of, as applicable, to avoid contamination of self, others or the environment.

OSHA's guidance also reminds employers that, "where respirators may be necessary to protect workers or where employers require respirator use, employers must implement a comprehensive respiratory protection program in accordance with the Respiratory Protection standard." Under this standard, employees required to use respirators must undergo a medical evaluation, and employers must develop procedures for fit-testing, cleaning, disinfecting, storing, inspecting, repairing, discarding and otherwise maintaining respirators, as well as a protocol for training and educating employees in the proper use of respiratory protection. [14] Employers must therefore ensure that they have an OSHA-compliant respiratory protection program in place before mandating respirator use to protect employees from coronavirus exposure.

However, the requirements for respirator use by healthcare employers was recently relaxed by OSHA in response to President Trump' directive to the U.S. Department of Labor to increase the availability of general use respirators for use by healthcare personnel. As a result of that directive, OSHA has issued temporary enforcement guidance providing healthcare employers increased discretion in selecting and fit-testing respiratory protection. To preserve N95 filtering face pieces respirators, OSHA has encouraged employers to provide employees with another respirator of equal or higher protection (such as N99 or N100 filtering face pieces, or reusable elastomeric respirators with appropriate filters or cartridges). OSHA has also provided that healthcare employers may change the method of fit testing of respirators from a destructive method (i.e., quantitative) to a non-destructive method (i.e., qualitative). Finally, OSHA has granted its inspectors "discretion enforcement" concerning the requirement for annual fit-testing of respirators—essentially indicating that this standard will not be enforced during the life of the enforcement guidance, which is effecting until withdrawn.

Hazard Communication (HAZCOM)

While employers may be using new or different cleaning or disinfection agents in response to coronavirus, OSHA has clarified that employers must ensure that the use of such chemicals is covered by their HAZCOM policy. In particular, employers must ensure that containers of hazardous chemicals are appropriately labeled, and that employees are trained and provided information on the hazardous chemicals present in the workplace, including the measures that employees can take to protect themselves from such chemicals.[15] Maryland employers must also ensure that there is an up-to-date chemical information list in the workplace, including the names of all hazardous chemicals present (including those used for sanitation), as well as where in the workplace such chemicals are stored.[16]

OSHA's General Duty Clause

While OSHA has not issued mandatory guidance or regulations specifically concerning coronavirus, OSHA's catch-all "general duty clause" requires employers to provide "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." 29 U.S.C. § 654. To assist employers in satisfying this obligation in responding to the coronavirus, OSHA recommends that employers develop an infectious disease preparedness and response plan, develop policies and procedures for prompt identification and isolation of sick people, and implement workplace controls (including engineering controls, administrative controls and PPE discussed above). OSHA also recommends that employers implement more basic and practical measures to protect employees, such as promoting frequent hand washing, remote work, flexible work hours to increase social distancing, and flexible sick leave and paid time off policies. OSHA's specific recommendations regarding these policies is available in the Guidance on Preparing Workplaces for COVID-19, cited above.

Section 11(c) of OSH Act

Finally, although not mentioned in OSHA's recent guidance, employers should proceed carefully in responding to employee complaints that the employer has taken insufficient steps to protect employees from the coronavirus, or employee's raising concerns about coming to work for fear of contracting the coronavirus. Section 11(c) of the Occupational Safety and Health Act ("OSH Act") prohibits employers from retaliating against employees for exercising rights guaranteed under the OSH Act, which, according to OSHA, includes communicating with management about occupational safety or health matters, and asking questions or expressing concerns about workplace safety.

Notably, OSHA regulations provide that "an employer would not ordinarily be in violation of section 11(c) by taking action to discipline an employee for refusing to perform normal job activities because of alleged safety or health hazards."[17] Thus, an employee will typically not be engaged in protected activity under the OSH Act when refusing to work because of fear of contracting coronavirus.

However, OSHA has left open the possibility that refusal to perform an assigned task could amount to protected activity under limited circumstances where an employee's only choice is between not performing an assigned task or subjecting him or herself to serious injury or death arising from a workplace hazard.[18] Under such circumstances, an employee's refusal to perform assigned tasks may be protected if:

1. the employee unsuccessfully attempted to have his or her employer correct the dangerous condition, where possible;
2. the condition is one that a "reasonable person" would conclude posed a real danger of death or serious injury; and
3. there was insufficient time to eliminate the danger through normal enforcement channels, i.e., reporting the condition to OSHA or a state occupational safety and health program.

While this standard creates a high bar—and is arguably ill-suited to scenarios where an employee refuses to be present in the workplace for fear of contracting an infectious disease—an employee disciplined/terminated for refusal to work during the coronavirus outbreak could claim that refusal to work was protected under the OSH Act. In fact, some attorneys generally representing employees are suggesting exactly that when asked whether an employee may refuse to work because of fear of contracting coronavirus. It is therefore imperative that employer's work with employees to address Coronavirus-related concerns, and ensure that employees are not subject to any adverse employment actions for discussing such concerns with management.

Takeaways

Employers should continue to work collaboratively with employees to address health concerns, and should monitor OSHA's COVID-19 Resource Webpage for further guidance. Employers should also be assessing the hazards to their workforce on an ongoing basis, and ensuring the implementation of OSHA-compliant controls and policies, including the use of appropriate PPE. Finally, the unfortunate reality is that many employees are likely to test positive for coronavirus in the ensuing months, and barring additional guidance from OSHA, employers should be analyzing whether such cases are "work-related," and therefore reportable under OSHA's recordkeeping requirements.

As always, the attorneys in Miles & Stockbridge's labor and employment practice are available to assist employers in navigating the uncertainty created by the coronavirus.

[1] 29 C.F.R. 1904.29; 29 CFR 1904.4.
[2] 29 C.F.R. 1904.5(a).
[3] 29 C.F.R. 1904.7(a)
[4] *Id.*
[5] 29 C.F.R. 1904.39(a).
[6] 29 C.F.R. 1904.5(b)(2).
[7] 29 C.F.R. 1904.5(b)(7) (emphasis added).
[8] Osha.gov/Publications/OSHA3990.pdf.
[9] *Id.* at 19.
[10] *Id.* at 20.
[11] *Id.*
[12] *Id.* at 20-25.

[13] 29 C.F.R. 1910.132(d)(1).
[14] 29 C.F.R. 1910.134.
[15] 29 C.F.R. 1910.1200.
[16] § 5-405 of the Md. Code, Labor and Employment Article; COMAR § 09.12.33.02.
[17] 29 C.F.R. 1977.12(b)(1).
[18] 29 C.F.R. 1977.12(b)(2).

This alert was written by Jeffrey Johnson, a lawyer in the Labor, Employment, Benefits & Immigration practice group at Miles & Stockbridge.

Jeffrey T. Johnson
410 385-3816