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Signaling More Aggressive Enforcement Going Forward, OSHA Issues "Stronger" COVID-19 Guidance For Workplaces

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*By: **Robert S. Nichols** and **Caroline Melo***

Just eight days after President Biden ordered OSHA to publish "revised guidance to employers on workplace safety during the COVID-19 pandemic," the agency complied this past Friday, January 29, with the release of a 12-page document which the Department of Labor described in a press release as "stronger worker safety guidance."

The document entitled "Protecting Workers: Guidance on Mitigating and Preventing the Spread of COVID-19 in the Workplace" to a large extent reiterates previous CDC guidance but also offers new insights into OSHA's view of what employers actually need to do.

While OSHA recognizes in the guidance that the contents are "not a standard or regulation" and the document "creates no new legal obligations," the agency also expressly reminds employers that they are obligated to comply, not only with specific OSHA standards, but also the Occupational Safety and Health Act's "General Duty Clause" which mandates that employers "provide their workers with a workplace free from recognized hazards that are causing or likely to cause death or serious physical harm."

As a practical matter, while the guidance is not explicitly legally binding, employers should not be surprised if OSHA compliance officers conducting inspections look to this publication in assessing what a reasonable employer does to provide a workplace compliant with the General Duty Clause.

Additionally, President Biden has ordered the agency to consider whether "any emergency temporary standards on COVID-19" are necessary and issue any such standards by March 15.

It would be reasonable for employers to expect that some of the provisions of this guidance will find themselves into any mandatory standards that OSHA issues on or before March 15.

As a result, prudent employers should give careful consideration to this agency document.

Call for "COVID-19 Prevention Program"

Significantly, the new guidance advises employers to adopt a "COVID-19 prevention program" to address a variety of issues including, for example, assignment of a "workplace coordinator" to be "responsible for COVID-19 issues on the employer's behalf."

That prevention program, according to the guidance, should also incorporate a "hazard assessment" to identify COVID-19 concerns in the workplace and adopt preventative measures.

Further, the agency advises the program include consideration of "protections for workers at higher risk for severe illness," providing for reasonable modifications such as perhaps work from home or assignment to a less densely occupied facility or office.

According to the OSHA guidance, the employer's program should provide for a system of communicating with employees about the pandemic, including adoption of a COVID-19 education and training program.

Not surprisingly, OSHA cautions employers to keep employees home when they are diagnosed with the virus, show symptoms, or have been exposed, for periods of time consistent with CDC guidance.

Interestingly, OSHA also recommends that the employer's program include making "a COVID-19 vaccine or vaccination series available at no cost to all eligible employees." Since members of the public are not to be charged any out-of-pocket cost to receive the vaccine, it is unclear what OSHA intends with this language. What, however, is clear from the guidance is that OSHA expects employers to proactively provide "information and training" to employees on the "benefits and safety of vaccinations."

Moreover, OSHA warns that employers are well advised not to distinguish between workers who are vaccinated and those who are not. For instance, vaccinated workers should not be excused from wearing masks given the uncertainty as to whether those persons can still transmit the virus.

Some other notable admonitions by the agency in the guidance include:

- Recognize that wearing a mask is not a substitute for maintaining proper social distancing (6 feet or more).
- When workers have to work within 6 feet of each other because of factors such as the placement of workstations, install solid barriers such as plexiglass shields.
- Provide appropriate face coverings to employees at no cost and be sure those face coverings are either surgical masks or cloth coverings composed of least two layers.
- Create "an anonymous process for workers to voice concerns about COVID-19-related hazards" and take other steps to protect employees against retaliation for speaking out about safety and health concerns.
- Carefully examine facility ventilation systems to determine any necessary improvements or changes.
- Place posters in work areas encouraging employees to engage in hand hygiene and physical distancing.

- Exercise caution to not unnecessarily require a COVID-19 negative test result or a doctor's note as a prerequisite to return to work because of the significant delays that requirement may cause for both employers and employees.

- Recognize that workers may test positive for three months or more after recovering from COVID-19 symptoms, but, at the same time, not represent a risk of infection to others if allowed to work.

Bear in mind that this new guidance comes from a new administration determined to deliver tougher OSHA enforcement. Employers should expect larger fines and more damning press releases when found to have committed workplace safety violations.

While the contents of this new guidance are, again, not binding regulations, the contents plainly signal what OSHA now regards as appropriate measures to provide a reasonably safe workplace and may be predictive, at least in part, as to what will be found in binding emergency regulations that may be issued on or prior to March 15.