

Workplace safety in the time of COVID-19

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MARCH 1, 2021

COVID-19 changed everything about retail workplace health and safety by adding infectious disease management to the already substantial list of compliance issues. This article will focus on the current state of federal, state and local COVID-19 regulations as we begin 2021.

WHAT RULES RULE? COMPLIANCE LANDSCAPE COMPLICATED BY OSHA, CDC, STATE REGULATION

America's response to COVID-19 has been marked by inconsistent and constantly evolving federal, state and local requirements. To ensure compliant workplace safety programs, it is vital for retail employers to recognize which legal obligations govern their businesses.

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Throughout the pandemic, the first point of reference has been the Centers for Disease Control (CDC) guidance. This focal point is appropriate as the CDC guidance informs the requirements imposed by state and local authorities. However, unless incorporated through federal, state or local regulation, CDC guidance is just that — guidance. It does not have the force of law, although it will likely set the standard of care for negligence tort claims related to COVID-19.

With respect to day-to-day compliance, retail employers must monitor whether state or local regulators have adopted CDC guidance through legally enforceable executive orders or rulemaking. Almost all states have issued executive orders on COVID-19; and in some states, localities can issue orders that can be more restrictive than the state requirements. These state and local requirements have the force of law and are enforced through the state and local police authority.

The federal Occupational Safety and Health Administration (OSHA) has issued a number of industry-specific guidance

documents, including retail-specific guidance¹ for workers and employers. This guidance largely follows CDC recommendations, including physical barriers to separate workers from members of the general public, promotion of self-checkout kiosks to minimize worker interaction with customers and effective disinfection protocols.

OSHA has not been hesitant to use its enforcement authority to cite employers for alleged violations related to COVID-19. As of December 24, 2020,² OSHA had issued citations arising from 294 inspections for violations relating to coronavirus exposure, resulting in proposed penalties totaling over \$3.4M.

The agency has largely used the general duty clause for enforcement under the theory that an employer's failure to follow OSHA guidance created recognized hazards likely to cause death or serious bodily harm. In some cases, OSHA has issued general duty clause citations related to alleged COVID-19 hazards prior to the time period when OSHA had issued any industry-specific guidance at all.

So far, the retail industry has largely escaped OSHA's COVID-related enforcement activity, with most citations being issued to nursing homes and other medical and health care facilities and the foodservice and meatpacking industries.

Some state-plan states — those states that administer safety and health regulations at the state level — have adopted infectious disease Emergency Temporary Standards (ETSs) to address COVID-19. Virginia led the way, adopting its program in July, with Michigan, California and other states following thereafter. These standards have the force of law, and the departments of labor in these states have been aggressively conducting investigations and issuing penalties for noncompliance.

Some of these ETSs provide a safe-harbor for employers who comply with CDC guidance, allowing employers to follow CDC standards that are equally protective rather than the specifics of the state ETS. However, not all states have such safe harbors, so retail employers must review and comply with the specific details of the relevant standards in the states where they operate to avoid potential penalties.

OSHA RECORDKEEPING AND REPORTING

One of the most challenging COVID-19 legal issues has been compliance with OSHA's recordkeeping and reporting requirements. Many retail employers are exempt or partially exempt from the obligation to log work-related injuries and illnesses, but all employers are required to report any work-related fatality within 8 hours or in-patient hospitalization within 24 hours (with slight differences in some state-plan OSHA states).

Determining whether a worker's COVID-19 infection is "work-related" is immensely difficult, as no layperson can determine with certainty how any employee was infected, particularly given the reality of asymptomatic transmission.

At the start of the pandemic, OSHA took the position that only certain high-risk employers had to record or report COVID-19 illnesses. In May, the agency updated its guidance and required all employers subject to its recordkeeping requirements to investigate COVID-19 infections among employees and record them if it appeared "more likely than not" that workplace exposure caused the infection.

Relevant factors include evidence of clusters of infection at the workplace, the employee's working conditions and whether the employee engaged in any out-of-work activities that could have caused infection. This necessarily requires that employers contact trace positive cases in the workplace and obtain information from employees regarding their off-work possible sources of infection.

This latter analysis can be fraught as many employees are reluctant to share personal life information with their employers. However, a failure to pursue these lines of questioning can leave employers with no defenses to an alleged failure to record or report COVID-19 cases.

The decision to record a COVID-19 case is consequential beyond OSHA compliance, as reporting or recording a case could be deemed an admission by the employer that the employee contracted COVID-19 at work. That admission can impair an employer's defense to workers' compensation or tort claims, making it more difficult to defend on causation, which would ordinarily be the employer's most effective defense in an alleged occupational disease case.

LOOKING AHEAD

Workplace safety regulations related to COVID-19 will continue to expand and evolve in 2021. President Joe Biden has signaled that his Department of Labor will promulgate a permanent OSHA standard for infectious disease prevention, likely preceded by a federal ETS.

The vaccine rollout is also likely to breed new requirements. Retail employers will not get any relief soon from the burden of compliance with constantly evolving federal, state and local requirements related to COVID-19.

Notes

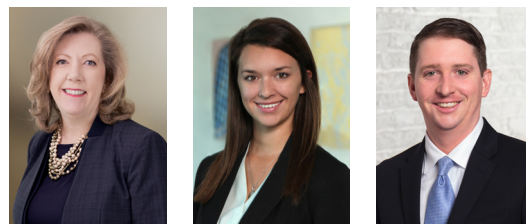
¹ <http://bit.ly/3jCMLDY>

² <http://bit.ly/3jC1fny>

This article was published on Westlaw Today on March 1, 2021.

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