April Chapter Meeting

Webinar
Topic: COVID-19 Round Table with Courtney Malveaux
Send Questions in WebEx Chat

Send directly to Courtney Malveaux
Agenda Overview

- Old Business
  - 2020-2021 Chapter Elections

- New Business
  - COVID-19 Round Table with Courtney Malveaux
2020-2021 Chapter Elections
2020-2021 Chapter Elections

- President – Angel Bright
- President Elect – Vacant
- VP of Programs – Jonathan Gobble
- Secretary – Ashley Heien
- Treasurer – Gary Barger

- Election Slate
- Elections at May Meeting
2020-2021 Chapter Elections

- President Elect
  - Serve as the Chairperson for the Annual Safety School
  - Represent the Chapter at the ROC Meetings
  - Transition to the President position after 1-year term

- Contact a Chapter Officer if interested
COVID-19 Round Table
COVID-19 Round Table

Courtney Malveaux
• Attorney at Law, Jackson Lewis PC
• Past Virginia Commissioner of Labor
Important information for today’s webinar:
No phone dial-in is needed. All audio will come through your computer speakers or headphones connected to your computer audio.
All attendees are in Listen Only mode for the duration of the presentation. Please submit questions via the Q&A box on the webinar control panel.

Courtney Malveaux
Courtney.Malveaux@jacksonlewis.com
804-212-2862
• Recording and reporting requirements
• Best practices to prevent spread
• Changes in OSHA enforcement
• OSHA guidance on use of respirators and personal protective equipment
OSHA Recordkeeping and Reporting Requirements for COVID-19 Cases
Is a case of an employee confirmed positive for COVID-19 recordable?

- It depends.

OSHA excludes the flu and common cold as a work-related illness, but as of now OSHA has held COVID-19 is not excluded.

COVID-19 can be a recordable illness if a worker is infected as a result of performing their work-related duties. However, employers are only responsible for recording cases of COVID-19 if all of the following are met:

- The case is a confirmed case of COVID-19 (not a presumptive case);
- 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 (e.g. medical treatment beyond first-aid, days away from work).
OSHA Recordkeeping and Reporting Requirements

• For correctional, emergency response and law enforcement personnel:
  • Must make determination whether work-related

• For all other employers, **no need to make “work-related” determination to record unless**:
  • (1) There is objective evidence that a COVID-19 case may be work-related; and
  • (2) The evidence was reasonably available to the employer

• Returns focus to **good hygiene practices**
Can COVID-19 be Considered a Privacy Case on the OSHA Log?

- Technically, no. It does not meet OSHA’s specific definition of privacy cases, though there is a strong argument that it should.

- Exception: The employee voluntarily requests to have his/her name left off the OSHA 300 log.

- Identity of the employee is medical confidential information, disclosure of the employee’s identity to anyone other pursuant to federal, state requirements is an ADA violation (i.e., disclosing employee name to OSHA for a reportable case is not a violation).
Recordkeeping COVID-19 Cases: Hypotheticals

- Must an employer record if an employee shows symptoms of COVID-19?
- Must an employer record if an employee with a confirmed case of COVID-19 works at home?
- Must an employer record if an employee with a confirmed case of COVID-19 is examined by a physician, is sent home and takes over-the-counter medication?
- Must an employer record if it does not know how the employee contracted COVID-19?
• Employers must **report** cases of COVID-19 to OSHA within 24 hours if:
  • Contracted due to performing work-related duties.
  • Inpatient hospitalization for treatment or care.

• Employers must **report** cases of COVID-19 to OSHA within 8 hours if:
  • Contracted due to performing work-related duties.
  • Fatality.
OSHA Reporting Requirements: Hypotheticals

• Must an employer report an inpatient hospitalization of someone who has COVID-19 symptoms but does not take a test?

• Must an employer report a case of COVID-19 if the employee is examined in a hospital Emergency Room and then sent home?

• Must an employer report if it does not know how the employee contracted COVID-19?
• Rapid Response Investigation initiated:
  • OSHA sends a letter.
  • Non-Mandatory Appendix.
  • Recommend providing a written letter in lieu of the non-mandatory appendix.
  • Provide steps the company has taken to address COVID-19 and all measures put in place to reduce potential exposure.

• Not likely that OSHA will conduct on-site inspection.
Best Practices to Prevent Spread of COVID-19
Best Practices to Prevent Spread of COVID-19

• OSHA’s recommendations include:

  • Developing and implementing an infectious disease and preparedness response plan that considers employees’ risk of exposure and incorporates recommendations from federal, state, local, tribal, and other territorial health agencies;

  • Implementing good hygiene and infection control practices, including, in part, the frequent promotion of hand washing, requirement of employees to stay home when they are sick, reminders on respiratory etiquette, and routine cleaning and disinfecting procedures;

  • Developing and implementing procedures for identifying and isolating potentially infectious individuals (e.g., customers, vendors, employees, and so on);
Best Practices to Prevent Spread of COVID-19

• Actively communicating with employees about the company’s infectious disease and preparedness response plan and related procedures; and

• Implementing appropriate controls, which should take into consideration OSHA’s “hierarchy of controls” (i.e., framework for managing hazards in which the most optimum control method is viewed to be the removal of a hazard in lieu of controlling it by other means) and the potential for exposure to COVID-19.
# Best Practices to Prevent Spread of COVID-19

<table>
<thead>
<tr>
<th>Administrative Controls</th>
<th>Engineering Controls</th>
<th>Personal Protective Equipment</th>
</tr>
</thead>
</table>
| • “Flexible policies” that permit employees to stay home when needed because they are sick or to take care of a sick family member. | • High efficiency air filters  
• Physical barriers, such as sneeze guards  
• Negative pressure in ventilation | • Gloves – not latex  
• Eye and face protection  
• Respiratory protection |
| • Minimizing worker contact through use of remote work and virtual communications. | | |
| • Staggered schedules | | |
| • Social distancing | | |
| • Clean and disinfect regularly | | |
| • Encourage good hygiene practices | | |
Can an employee claim the work environment is unsafe due to COVID-19 and refuse to work?

Under the OSH Act, an employee’s right to refuse to do a task is protected if all of the following conditions are met:

- The employee has asked the employer to eliminate the danger, and the employer failed to do so.
- The employee refused to work in "good faith." This means that the employee must genuinely believe that an imminent danger exists.
- A reasonable person would agree that there is a real danger of death or serious injury.
- There isn't enough time, due to the urgency of the hazard, to get it corrected through regular enforcement channels, such as requesting an OSHA inspection.
Changes to OSHA Enforcement
• The General Duty Clause:
  • “It shall be the duty of every employer to furnish to each of his employees safe employment and a place of employment which is free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees…”
  • OSHA’s COVID-19 Guideline requires employees to implement policies that would result in “prompt identification and isolation of potentially infected individuals.”
  • OSHA may take determine that failure to develop and implement measures identified in its guidance constitutes a violation of the General Duty Clause.
Changes to OSHA Enforcement

• Other guidance:
  • Guidance from industry partners
  • State/local guidance
  • Additional OSHA guidance
How is OSHA being affected by COVID-19?

- High volume of COVID-19 complaints
  - Federal OSHA has a team at the national office that is vetting complaints
- Agency avoiding placing CSHOs in harm’s way
How is OSHA responding to these pressures?

- Fewer onsite inspections
- Fewer programmed inspections
- More “no inspections”
- Outreach to employers by telephone/fax
- Employers must reply in writing and post response
- Responding in person to fatalities/catastrophes
Respirators and PPE
## Exposure Assessment for COVID-19

<table>
<thead>
<tr>
<th>Risk Level</th>
<th>Examples of Workers in this Risk Level Category</th>
<th>OSHA Recommended Precautions</th>
</tr>
</thead>
</table>
| Very High  | • Healthcare workers that perform aerosol-generating procedures (e.g., intubation, cough induction, and dental procedures and exams)  
• Healthcare or laboratory workers collecting specimens  
• Morgue workers performing autopsies | **Recommended Engineering Controls:**  
• Air-handling systems  
• Airborne infection isolation rooms  
• Special precautions to handle specimens  
**Recommended Administrative Controls:**  
• Exposure prevention procedures  
• Posted signs requesting reporting on symptoms  
• Enhanced medical screen offerings to employees  
• Job-specific education and training on prevention of transmission of COVID-19  
• Provide employees with gloves, a gown, a face shield or goggles, and either a face mask or a respirator, depending on their job tasks and exposure risks |
### Exposure Assessment for COVID-19

<table>
<thead>
<tr>
<th>Risk Level</th>
<th>Examples of Workers in this Risk Level Category</th>
<th>OSHA Recommended Precautions</th>
</tr>
</thead>
</table>
| High       | • Healthcare workers and support staff  
• Medical transport workers  
• Mortuary workers involved in preparing bodies for burial or cremation | • **Recommended Engineering Controls:**  
• Air-handling systems  
• Airborne infection isolation rooms  
• Special precautions to handle specimens  
• **Recommended Administrative Controls:**  
• Exposure prevention procedures  
• Posted signs requesting reporting on symptoms  
• Enhanced medical screen offerings to employees  
• Job-specific education and training on prevention of transmission of COVID-19  
• Provide employees with gloves, a gown, a face shield or goggles, and either a face mask or a respirator, depending on their job tasks and exposure risks |
## Exposure Assessment for COVID-19

<table>
<thead>
<tr>
<th>Risk Level</th>
<th>Examples of Workers in this Risk Level Category</th>
<th>OSHA Recommended Precautions</th>
</tr>
</thead>
</table>
| **Medium** | • Workers having direct contact with the general public (e.g., schools, retailers, and high-population density work environments) | • **Recommended Engineering Controls:** Use physical barriers where feasible  
• **Recommended Administrative Controls:**  
  • Consider making face masks available (note: while OSHA recommends employers consider masks, we recommend eliminating public interaction and/or social distancing is preferable due to the shortage of N-95 masks for the healthcare industry, unless employees in this exposure group are interacting with known or confirmed individuals with COVID-19 in accordance with CDC guidelines) |
## Exposure Assessment for COVID-19

<table>
<thead>
<tr>
<th>Risk Level</th>
<th>Examples of Workers in this Risk Level Category</th>
<th>OSHA Recommended Precautions</th>
</tr>
</thead>
</table>
| **Medium (Cont.)**       | • Workers having direct contact with the general public (e.g., schools, retailers, and high-population density work environments) | • Post signs about symptoms of COVID-19 and precautions  
• Limit contact with individuals known or suspected of being COVID-19 infected to certain areas  
• Communicate medical screening and worker resources |
| **Lower Risk (Caution)** | • Workers who do not have contact with the general public                                                         | • **Recommended Engineering Controls:** None  
• **Recommended Administrative Controls:**  
  • Monitor public health communications on COVID-19 and ensure workers can access information |
Respirators: Voluntary Usage

• Surgical masks:
  • No OSHA requirements related to use of surgical masks.
  • No requirement to provide Appendix D.
  • Can be re-worn.
  • Recommend train employees on signs/symptoms related to COVID-19 and instructions for wearing surgical mask, including how to care and store the mask at end of each use.

• N95 filtering facepieces (Dust Mask):
  • Requires providing employee with Appendix D.
Respirators: Mandatory Usage

- **Surgical masks:**
  - No OSHA requirements related to use of surgical masks even if mandatory usage.

- **N95 filtering facepieces (Dust Mask):**
  - Requires:
    - Written program.
    - Fit testing
      - Pursuant to Presidential Order, Secretary of Labor Scalia issued temporary enforcement guidance regarding respirators.
      - Also addresses potential supply shortages of N95 and other filtering facepiece respirators.
      - “Appropriate respiratory protection is required for all healthcare personnel providing direct care” to patients with known or suspected COVID-19, but personnel are also required to conserve supplies.
    - Medical exam.
• If a tight fitting respirator is required by the employer:
  • No facial hair between the sealing surface of the facepiece and the face or that interferes with valve function.
    • Facial hair is allowed as long as it does not protrude under the respirator seal, or extend far enough to interfere with the device's valve function. Short mustaches, sideburns, and small goatees that are neatly trimmed so that no hair compromises the seal of the respirator usually do not present a hazard and, therefore, do not violate paragraph 1910.134(g)(1)(i).
    • OSHA does not recognize a religious exemption for facial hair and would expect an employer to accommodate with a loose fitting respirator.
Respirators: Fit Test Exception

• OSHA field offices are exercising enforcement discretion regarding its annual fit testing requirement
  • Make a good-faith effort to comply standard, 29 CFR § 1910.134;
• OSHA also recommends that employers provide respirators of equal or higher protection, such as:
  • N99 or N100 filtering facepieces.
  • Reusable elastomeric respirators with appropriate filters or cartridges.
  • Powered air purifying respirators (PAPR).
• Recommends employers change their method of fit testing “from a destructive method (i.e., quantitative) to a non-destructive method (i.e., qualitative).”
Thank you.

Courtney M. Malveaux, Esq.
804.212-2862
Courtney.Malveaux@jacksonlewis.com

Represents Employers In:
• OSHA Citations
• Regulatory and Employment Matters
• Government Affairs

Regulatory Background:
• Virginia Labor Commissioner
• VA Safety and Health Codes Board
• President, National Association of Government Labor Officials