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OSHA Guidance on Preparing to Return to Work Includes Recommendations for White Collar Businesses

Insights for Employers Alert | 7 min read
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The Occupational Health and Safety Act (the OHS) was signed into law in 1970 and established the Occupational Health and Safety Administration (OSHA), as part of the U.S. Department of Labor.[1] Under the so-called "general duties" provision in Section 5(a)(1) of the OHS, all employers are required to "furnish to each of his employees 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 to his employees."[2]

Notwithstanding the general mandate that OSHA regulate work place environments that pose a risk of death and serious harm, the agency and its state law counterparts have taken a proactive approach to regulating white collar environment risks manifested in both the long and short term. Indoor air quality (IAQ), an issue very pertinent to COVID-19, is a good example. Technically, the jurisdictional lines on this issue gave primary regulatory authority over this issue to the Environmental Protection Agency (EPA). However, in the case of in-office tobacco use, OSHA provided preliminary guidance and California ultimately banned such use in the state; [3] and sister states later followed its lead. IAQ violations such as this are matters that state-level occupational safety agencies continue to enforce.

Nevertheless, before the current health crisis, a business suite in a large office building was not a work environment associated with hazards that could result in death and serious physical injury. States like California first provided "guidance" on back to work policies. Now, OSHA has also published guidelines—which are not regulations—in their "Guidance on Preparing Workplaces for COVID-19" ("*Guidance*").[4]

From a risk management perspective, since the *Guidance* is general, a failure to follow any given suggestion may not be admissible as a violation of the standard of care. In fact, for decades the courts have not agreed as to when or whether proof of an actual OSHA regulatory violation constitutes evidence of negligence or supports an instruction of negligence per se.[5] Yet OHS plainly states that the law should not to be deemed to enlarge or diminish common law duties or liabilities of employers to employees as to work place safety.[6]

However, guidance often matures into regulation. In any event, the *Guidance* is valuable in formulating a plan to re-open an office. The *Guidance* divides work place environments into a pyramid of four distinct risk categories: Very High, High, Medium, and Lower Risk (Caution).[7] The lowest category excludes general interaction with the public within a six foot perimeter, as well as persons known or suspected to have been infected with the virus.[8] Exposure to the public—including offices that regularly interact with clients, vendors, and other third parties—are common in many office settings. However, not all white collar environments fit within the confines of the lowest risk category. In fact, the average office likely falls within the Medium category, and the *Guidance* is clear that different risk levels require a proportionate response.[9]

Below, we outline three major takeaways from OSHA's recent pronouncement.

1. Recommended Standards for Reopening of All Businesses

Preparedness and Response Plan

The *Guidance* recommends that each business have a defined response plan requiring dedicated personnel to closely monitor the safety of the workplace. Additionally, the plan should actively monitor both internal office practices and the most current publicly available information from the Centers for Disease Control and Prevention (CDC) and other sources concerning the disease, best practices, and changes in local risk conditions.

The plan should also include active monitoring of employee wellness, including risk factors such as age and preexisting conditions. While such inquiries may have been deemed intrusions on privacy in the past, open lines of communication are now recommended as an essential element of monitoring. Special accommodations for higher risk members of the workforce are also recommended. Finally, it is recommended that the organization have a contingency plan to quickly change directions in the event of new outbreaks, including measures that would close the facility or reduce the workforce in the location.[10]

Infection Prevention Measures and "List N"

Most of the measures in this category—such as maintaining high levels of sanitation and discouraging sharing of office equipment—are already well known in the public domain. However, to maintain a sanitary workplace, OSHA recommends using EPA-approved products. To determine which products are touted to sufficiently disinfect, and those the EPA has confirmed genuinely perform well in test trials, the EPA has published List N, an approved product list that is continually developing, but may not be common knowledge amongst employers. On their website, the EPA not only identifies recommended and approved products, but also contains instructions on their proper application.[11]

Illness Identification, Workplace Flexibility, and Administrative Controls

Recommendations in this area are extensive and, in some areas, potentially overly broad, because it addresses both high and low risk businesses. The basic recommendations are that the employer have the capacity to identify an ill employee quickly and not second guess the concerns of an employee who perceives a health problem by requiring medical proof of illness.

It is also recommended that employers actively communicate with third-party vendors to ensure that those companies have robust companion policies to keep ill persons out of the workforce as a condition of doing business. The *Guidance* recommends that flexibility in scheduling and sensitivity to the needs of employees who may need to work remotely not merely be based on their own health needs, but those of family members too.[12] Again, the area of administrative controls largely consists of intuitively obvious risk management such as determining whether travel assignments are truly required, or if the same objectives can be obtained through alternate means. The main takeaway on administrative controls is that they be formalized and applied consistently as necessary for the risk category of the business.[13]

2. Engineering Controls

Recommended engineering controls vary by risk category. In the case of high risk operations, OSHA is only recommending that those facilities be monitored for air quality to avoid disease transmission through building ventilation systems. Does this mean a white collar business categorized as low or medium risk need not ask questions about air quality and the building ventilation systems?

This is an area where jurisdictional lines and industry standards could be better defined. The main guidance in this area from the EPA appears to defer to the leading domestic industry organization on ventilation systems, the American Society of Heating, Refrigerating and Air-Conditioning Engineers (ASHRAE).

ASHRAE recently published a white paper with its views and recommendations on minimizing risks on transmission of COVID-19 through ventilation systems in the *ASHRAE Journal*. The report makes no distinction between buildings according to the risks of the business's operations. Additionally, the report recommends buildings refrain from system shutdowns, which are often undertaken to minimize energy costs in order to maintain high levels of air circulation. Instead, ASHRAE recommends 24/7 operation of ventilation systems. Thus, it has recommended against demand controlled ventilation systems and the use of dampers that interfere with maximum ventilation. It also recommends installation and frequent replacement of high quality air filters within HVAC systems.[14]

Similarly, the Federation of European Ventilation and Air Conditioning Associations (REHVA) has taken an equally conservative view of the subject in its recent guidance. Again, no distinctions are drawn between offices and

hospital. However, its report notes that it is in fact possible for small airborne particles to be transmitted through ventilation systems based on studies it has reviewed.[15] Thus, such droplets were found during the investigation of filters after the 2002 – 2003 SARS outbreak; these results have been also found in buildings with infected patients during this outbreak.

REHVA recommends the same basic protocols as ASHRAE, but with some enhancements. It warns more vigorously against the use of recirculation systems unless they are necessary and operating without any leaks that could cause recirculation of contaminated air.[16] Moreover, they have identified office bathrooms with inadequate circulation and a failure to flush toilets as significant potential sources of virus transmission.[17]

In this area, a white collar employer would be well served to go beyond current OSHA guidance and ensure its facilities not only have adequate ventilation, but also adheres to safe practices relating to common bathrooms.

3. Reporting Requirements

The one area in which any employer can face regulatory consequences is reporting. OSHA has made it clear that employers must both report COVID-19-related complaints and known or suspected COVID-19 cases, so that it can carry out its mandate under Section 5(a)(1) of OSH to investigate and confirm potentially dangerous workplaces or working conditions. A recently published memo from OSHA serves as a guide for employer reporting with the requisite forms. An employer who fails to comply with these reporting requirements can suffer severe regulatory consequences, including the shutdown of its operations. Moreover, the liability risk could be catastrophic if an unreported "isolated case" leads to additional employee illnesses.

Conclusion

The current COVID-19 crisis has blurred the lines between what had traditionally been seen as hazardous and low risk occupations and workplaces. The OSHA *Guidance* on COVID-19 continues to differentiate between risk levels. However, in the current environment, all employers must take extra steps to ensure employee safety.

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[1] 29 U.S.C. § 651 et seq.
[2] 29 U.S.C. § 654.
[3] Cal. Labor Code § 6404.5.
[4] OSHA 3990-03 2020.
[5] See, cases collected at "Violation of OSHA Regulation as Affecting Tort Liability," 79 A.L.R.3d 962 (1980 and 2020 Supplement). By contrast, in California, a Cal-OSHA regulatory violation may be introduced into evidence in employer-employee litigation. Cal Labor Code § 6304.5.
[6] 29 USC §653(b)(4)
[7] *OSHA Preparatory Guidance* p. 18.

[8] *Id*. at p. 20.
[9] *Id*. at pp. 20-25.
[10] *Id*. at pp. 7-8
[11] *Id*. at p. 9.
[12] *Id*. at pp. 9-11.
[13] *Id*. at pp. 13-17.
[14] *Id.* at p. 73.
[15] *Id*. at p. 2.
[16] *Id*. at p. 7.
[17] *Id*. at p. 2, 7.

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