OSHA Puts Healthcare Employers In Its Crosshairs During COVID-19 Pandemic

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The Occupational Safety and Health Administration recently issued interim guidance to its area offices on how to handle COVID-19 related complaints, indicating that employers in “high risk” industries such as hospitals and nursing care facilities are directly in the agency’s crosshairs. What do healthcare employers need to know about this increased scrutiny and what can you do to stay on the right side of the law?

Recent Data Paints A Dramatic Picture

OSHA recently posted data pertaining to COVID-19-related complaints and inspections that highlights this increased scrutiny. Of note, from April 1 to April 29, 2020, the agency initiated 113 investigations against hospitals and nursing care facilities. This is a 60% increase compared to the same time period in 2019, which hovered around 71 investigations. While OSHA’s database does not provide a specific breakdown of COVID-19-related investigations, one does not have to strain the imagination to conclude the uptick is related, at least in part, to the current pandemic.

Moreover, COVID-19-related complaints against hospitals and nursing homes have skyrocketed over the past 10 days. Since April 20, there have been 6,085 complaints filed against companies operating in the healthcare industry. By comparison, the retail sector – the industry with second highest number of complaints – sits at 1,748. These numbers, however, do not include complaints filed with state-based occupational safety agencies, so the picture is somewhat incomplete.
As states begin to relax their stay-at-home orders and employers slowly reopen their doors, we can only expect to see the amount of OSHA complaints and investigations to continue rising over the coming weeks.

**OSHA’s Safety Standards During Pandemics**

The first thing you should do to ensure you stay in OSHA’s good graces is maintain a good understanding of the agency’s standards. While federal OSHA does not have any workplace safety rules specifically designed for pandemics, it does require employers to provide their employees with appropriate personal protective equipment (PPE) to prevent occupational exposure to COVID-19.

Under OSHA’s “General Duty Clause,” employers are also required to mitigate any recognized hazards that are causing or likely to cause death or serious physical harm. To prove a violation under the General Duty Clause, OSHA must establish the following: (1) the employer failed to keep the workplace free of a hazard to which its employees were exposed; (2) the hazard was recognized; (3) the hazard was causing or was likely to cause death or serious physical harm; and (4) there was a feasible and useful method to correct the hazard. The last element is usually where the safety battles are fought.

Additionally, there are 22 state-wide occupational safety and health plans covering both private sector and public workers. These State Plans are required to have standards and enforcement programs that are at least as effective as OSHA’s program, and some may have more stringent requirements. For example, the California Division of Occupational Safety and Health’s standard is specifically aimed at preventing worker illness from infectious diseases that can be transmitted by inhaling air that contains viruses (including the coronavirus), bacteria or other disease-causing organisms. This Cal/OSHA standard is mandatory for certain healthcare employers in California, such as hospitals and nursing care facilities.

There is also a patchwork of workplace safety orders being issued by state governors as businesses begin to reopen. Some of these orders have been framed as guidelines, others more mandatory in nature carrying the threat of fines and legal enforcement. Kentucky OSHA, for example, is shutting down employers for failing to adhere to Governor Beshear’s Executive Orders regarding essential businesses and social distancing.

**What Does This Mean For Healthcare Employers?**

Healthcare employers would be well served to review and monitor your social distancing and PPE policies to ensure compliance with OSHA and state-based requirements. This, of course, means you need to make sure your employees comply with the golden rule: keep a safe distance of at least six feet. This may require closing common areas where employees frequently gather (kitchens, breakrooms, etc.) and implementing a single-user restroom policy. When social distancing cannot be maintained, you may need to utilize barriers or PPE.
Lastly, OSHA’s PPE requirement goes beyond identifying and providing appropriate PPE for your employees. You must train your employees on how to use and properly care for PPE, as well as when to notify their supervisor when it becomes worn or damaged and needs to be replaced.

What Should Employers Do?

As you begin the process of reopening, you should familiarize yourself with our alert: 5 Steps To Reopen Your Workplace, According To CDC’s Latest Guidance. You should also keep handy our 4-Step Plan For Handling Confirmed COVID-19 Cases When Your Business Reopens in the event you learn of a positive case at your workplace. For a more thorough analysis of the many issues you may encounter from a labor and employment perspective, we recommend you review our FP BEYOND THE CURVE: Post-Pandemic Back-To-Business FAQs For Employers and our FP Resource Center For Employers.

Conclusion

Fisher Phillips is happy to assist you with the development or review of your PPE and social distancing policies to ensure compliance with OSHA and state-based safety requirements. We will continue to monitor the rapidly developing COVID-19 situation and provide updates as appropriate. Make sure you are subscribed to Fisher Phillips’ Alert System to get the most up-to-date information. For further information, contact your Fisher Phillips attorney, any attorney in our Healthcare Practice Group, or any member of our Post-Pandemic Strategy Group Roster.

This Legal Alert provides an overview of a specific developing situation. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.