Employment Law Update: The Four Classifications of Potential Risk on OSHA's Occupational Risk Pyramid; Additional Guidance for Employers of Critical Infrastructure Workers

Client Alert

4.15.20

By: Joel Clymer

The development of a COVID-19 response plan is critical to an employer's effective response to the pandemic. The Occupational Safety & Health Administration (OSHA) has provided specific and comprehensive recommendations to employers based upon its employees' potential risk of exposure to the virus. These recommendations are set forth in OSHA's Occupational Risk Pyramid for COVID-19, which classifies jobs according to their respective levels of exposure risk.

Additionally, on April 8, 2020, OSHA published additional guidance for employers of critical infrastructure workers, which supplements OSHA's **March 9, 2020 guidance** to employers on reducing the community spread of COVID-19 in the workplace.

OSHA's COVID-19 Occupational Risk Pyramid

The COVID-19 Occupational Risk Pyramid identifies four classifications of potential risk - Low Risk, Medium Risk, High Risk, and Very High Risk. These classifications are based on the type of industry, the need for contact within 6 feet of individuals with confirmed or suspected COVID-19, and other pertinent factors. OSHA then provides recommendations for changes to an employer's existing workplace controls based on where a particular job falls on the Risk Pyramid.

Workplace controls are organized into four broad categories:

- **Engineering Controls:** These controls involve an employer’s attempt to isolate employees with confirmed or suspected COVID-19. By reducing exposure to hazards without relying on worker behavior, they can provide the most cost-effective solution to implement. Within the context of COVID-19, such controls include installing high-efficiency air filters, increasing ventilation rates in the work environment, installing physical barriers such as clear plastic sneeze guards, and installing a drive-through window for customer service.

- **Administrative Controls:** These controls require some action by the employer and employee and typically require changes in work policy or procedures to reduce or minimize exposure to a hazard. They include such measures as requiring sick workers to remain home and establishing alternating days or extra shifts that reduce the total number of employees in a facility at a given time.
- **Safe Work Practices:** These are types of administrative controls that include procedures for safe and proper work used to reduce the duration, frequency, or intensity of exposure to the virus. They include providing resources at the workplace to promote effective personal hygiene (e.g., alcohol-based hand rubs, no-touch trash cans, hand soap, etc.) and requiring employees to use those resources.
- **Personal Protective Equipment:** OSHA recommends the use of Personal Protective Equipment (PPE) in addition to engineering controls where necessary and available to prevent the spread of the virus in the workplace. For certain employers, PPE is required due to the high risk of exposure to individuals with confirmed or suspected COVID-19.

Recommendations for Jobs with Low Risk of Exposure

Low Risk jobs do not require contact with individuals with confirmed or suspected COVID-19. These jobs require minimal occupational contact with the general public and other coworkers. Consequently, OSHA does not recommend any additional engineering and administrative controls beyond remaining abreast of new and developing updates on the pandemic and maintaining effective communication with employees. OSHA further does not recommend PPE for employees in the Low Risk category beyond that necessary to complete their job duties.

Recommendations for Jobs with Medium Risk of Exposure

Medium Risk jobs require frequent and/or close contact with individuals who may be infected with COVID-19 but who are not confirmed or suspected to have COVID-19. Employees in this category may have frequent contact with travelers returning from international locations with widespread COVID-19 transmission. In areas where there is ongoing community transmission, workers in this category may have contact with the general public (e.g., schools, high-population-density work environments, some high-volume retail settings).

OSHA recommends that employers implement additional engineering controls for jobs in the Medium Risk category, including installing physical barriers such as clear plastic sneeze guards, where feasible. It is also recommended that employers implement additional administrative controls such as:

- Offering face masks to sick employees and customers to contain respiratory secretions until they can leave the workplace (i.e., for medical evaluation/care or to return home). In the event of a shortage of masks, OSHA recommends the use of reusable face shields that can be decontaminated.
- Keeping customers informed about symptoms of COVID-19 and asking sick customers to minimize contact with workers until healthy again by, for instance, posting signs about COVID-19 in stores where sick customers may visit (e.g., pharmacies).
- Where appropriate, limiting customers' and the general public's access to the worksite, or restricting access to only certain workplace areas.

- Implementing strategies to minimize face-to-face contact via drive-through windows, phone-based communication, and telework (the U.S. Department of Labor's guidance to employers allowing employees to telework was covered in our **March 26, 2020 Client Alert.**
- Communicating the availability of medical screening or other worker health resources (e.g., on-site nurse and telemedicine services).

OSHA recommends that employers select required PPE based upon the relative risk of exposure and work task. OSHA provides that Medium Risk jobs may require some combination of gloves, a gown, a face mask, and/or a face shield or goggles.

Recommendations for Jobs with High or Very High Risk of Exposure

These jobs exist in workplaces on the frontlines of the national effort to combat the pandemic.

A Very High Risk of exposure exists for medical personnel and staff at hospitals and healthcare facilities involved in the treatment of individuals with confirmed COVID-19. This group also includes morgue workers performing autopsies on the bodies of individuals with confirmed or suspected COVID-19 infection at the time of death.

A High Risk of exposure exists in jobs and workplaces on the close fringes of the national effort to combat the virus, including healthcare delivery and support staff, medical transport workers that have moved individuals with confirmed or suspected COVID-19, and mortuary workers handling the bodies of individuals with confirmed or suspected COVID-19 infection.

For jobs within the High Risk and Very High Risk categories, OSHA recommends the following engineering controls:

- Installation and maintenance of the proper air-handling systems in healthcare facilities.
- Patients with confirmed or suspected COVID-19 should be placed in an airborne infection isolation room, if available.
- Isolation rooms should be utilized when performing aerosol-generating procedures (e.g., intravenous procedures) on patients with confirmed or suspected COVID-19 and autopsy suites should be used for post-mortem activities.
- Use of Biosafety Level 3 precautions when handling specimens taken from confirmed or suspected COVID-19 patients.

As for administrative controls, OSHA recommends that healthcare employers follow its existing guidance for identifying and isolating individuals with confirmed or suspected COVID-19, in addition to the following:

- Developing and implementing policies that reduce exposure, such as "cohorting" (i.e., grouping) COVID-19 patients when single rooms are not available.
- Posting signs requesting patients and family members to immediately report symptoms of respiratory illness on arrival at the healthcare facility, and the use of disposable face masks.
- Enhancing medical monitoring of workers during the pandemic.
- On-going employee education and training on preventing the transmission of COVID-19.

- Psychological and behavioral support to address employee stress.
- Providing emergency responders and other essential personnel who may be exposed while working away from fixed facilities with alcohol-based hand rubs containing at least 60% alcohol for decontamination in the field.

OSHA's PPE guidelines for employers on the High and Very High Risk end of the Occupational Risk Pyramid are extensive. OSHA requires all employers to supply employees working within these jobs with gloves, face shield or goggles, and either a face mask or a respirator, depending on their respective job tasks and exposure risks. Personnel working directly with COVID-19 patients must be supplied with respirators.

In response to the national shortage of N95 respirators, OSHA issued a March 14, 2020 memorandum to employers in the healthcare industry. To conserve N95 respirators, OSHA has temporarily relaxed its requirements for employers to conduct initial and ongoing fit testing for respirators. Employers can also provide employees with another respirator of equal or higher protection in certain situations.

On April 3, 2020, OSHA issued another memorandum encouraging employers to reassess their existing engineering controls to prioritize conservation of N95 respirators, including allowing the use of disposable N95 respirators under specific circumstances.

OSHA's Interim Guidance for Critical Infrastructure Workers

On April 8, 2020, OSHA issued **additional guidance** for employers managing critical infrastructure employees, allowing them to return to their jobs more quickly following exposure to individuals with confirmed or suspected COVID-19.

OSHA defines critical infrastructure workers as including personnel in 16 different sectors of work including:

- Federal, state and local law enforcement;
- 911 call center and Fusion Center employees;
- Hazardous material responders from the government and the private sector;
- Janitorial and other custodial staff; and
- Workers – including contracted vendors – in food agriculture, critical manufacturing, informational technology, transportation, energy and government facilities.

Although the CDC previously recommended that workers remain home for a 14-day period after exposure or potential exposure to COVID-19, this new interim guidance allows workers to return to work if they do not have symptoms and follow the proper precautions. These precautions include:

- Taking employee temperatures before the individual returns to work and regular monitoring afterward;
- Wearing facemasks at all times, and frequent cleaning of workspaces; and
- Adherence to social distancing practices on the job.

If a critical infrastructure employee falls ill on the job, they should be sent home immediately. Afterward, the employee's workspace should be thoroughly cleaned and disinfected. Additionally, any individuals known or suspected to have been in contact with the employee should be notified of potential exposure to the virus.

Employers should, however, be careful not to violate the ADA's confidentiality provisions by keeping the name of the infected employee confidential. Additional guidance to employers on the ADA's confidentiality provisions during the pandemic was covered in our **March 24, 2020** and **April 7, 2020** Client Alerts.

Finally, OSHA further recommends the following practices for critical infrastructure employees:

- Employees should not share headsets or other objects that are near an employee's mouth or nose;
- Employers should increase the frequency of cleaning commonly touched surfaces;
- Employees and employers should consider pilot-testing the use of face masks to ensure they do not interfere with work assignments;
- Employers should work with facility maintenance staff to increase air exchanges in rooms; and
- Breaks should be staggered to avoid congregation in break rooms, employees should practice social distancing during breaktime, and employees should not share food or utensils.

Related Attorneys

Joel Clymer

Partner

732.476.2514

Email