NOW + NEXT

APRIL 30, 2020

NP

Preparing to safely reopen: Employers should consider various OSHA safety regulations and OSHA hierarchy of controls

By Rachel Conn, Benjamin Kim, Maritza Martin, and Jeff Tanenbaum

As states and local jurisdictions around the country look to reopen, some sooner than later, employers should review their safety plans and protocols to keep employees and others safe and make them feel safe. While COVID-19 continues to be a health and safety risk, and until there is a widely available and effective vaccine, however, there may be another "new normal" that is not likely to be a full return to "business as usual."

Before reopening facilities, employers must consider a variety of difficult safety, health, legal, and practical issues. The actual reopening date for employers will vary because governmental authorization and/or public health guidance likely will come in phases and vary by city, county, state, and region. Regardless, employers will need to comply with all applicable local, state, and federal laws and orders, but they also should carefully consider local, state, regional, federal, and international (i.e., World Health Organization) public health guidance.

Under federal and state occupational safety and health laws (collectively, OSHA), employers have a duty to provide a safe workplace for all employees. While this does not mean a *perfectly* safe workplace with no hazards at all, it does mean a workplace in which employers identify hazards and eliminate them, if possible, and if not, mitigate or control them to the extent feasible, while meeting all applicable OSHA regulations. Beyond the general duty to provide a safe workplace, some of the more likely applicable OSHA regulations will include respiratory protection, personal protective equipment (PPE), hazard communication, in some states injury and illness prevention programs (IIPPs) and, in California, the aerosol transmissible diseases (ATD) standard. Employers also should monitor public health guidance, which is fluid, as well as pending and future efforts by unions and others to enact more specific COVID-19 OSHA regulations.

Safe reopening considerations

To the extent that they have not done so already, employers should consider developing written communicable illness response plans (CIRPs) with disease-specific attachments. This will best allow employers to plan for, respond to, and recover from future communicable illness outbreaks, including any resurgence of COVID-19, which many health experts believe will happen in the fall

or winter of this year. Specifically, for reopening after COVID-19, CIRPs should address a number of the issues described below.

Generally, in complying with duties under OSHA, employers must follow a "hierarchy of controls." After analyzing the workplace to identify potential health and safety hazards (i.e, a "hazard analysis"), employers must first attempt to eliminate the hazard. If that is not possible, as currently may be the case with COVID-19, then employers should implement feasible engineering and administrative controls before resorting to PPE. With respect to COVID-19, most experts believe that some level of social distancing will remain in place long after workplaces reopen. Employers should keep this in mind when evaluating which controls to implement and how such controls will permit employees to maintain social distancing and follow other health and safety protocols while at work.

Below is a non-exhaustive list of considerations for employers. These considerations (and others) will need to account for localized and specific issues for each facility, office, or operation of even the same employer. Some of the examples on the list below may not be appropriate for every employment situation, and some may be more effective than others. National, regional, and local public health guidance also may dictate or recommend certain measures more than others.

Again, these measures cannot ensure complete protection from COVID-19, which is not the standard under OSHA regulations. The more safety measures an employer can implement, however, the more the employer can mitigate potential exposure to COVID-19 and can increase confidence in employees that the work environment is safe for return. Communication and training—particularly in advance of workers actually returning to an office, facility, or plant—will be particularly important. Employers also should consider how these protocols can, should, or must be applied to contractors, vendors, and visitors from the general public.

Engineering controls

Engineering controls involve implementing a physical change to the workplace to reduce or eliminate a hazard. They often take the longest to plan and execute, and thus, as a practical matter, employers should typically plan for these first. For COVID-19, employers should consider what engineering controls can be feasibly implemented.

Some engineering controls to consider
— Rearranging work areas (such as cubicles) as well as common areas (such as break rooms) to allow for social distancing.
— Use of physical barriers, such as Plexiglas shields, between work areas or customer and employee interface points.
— Modification of HVAC systems or implementation of air purification systems.
— Implementation of automatic doors (handle-less entry), and handle-less faucets and soap dispensers. Before COVID-19, these may have been considered higher-cost luxuries when building workspaces, but they can help prevent diseases from spreading, especially for COVID-19, which appears to spread more easily than other communicable illnesses.
— Measures or physical barricades to prevent the sharing of food, utensils, napkins, etc.

Administrative controls

Administrative controls are safety procedures, policies, rules, supervision, and training that seek to reduce exposure to hazards. COVID-19 has impacted all sectors of the economy, but administrative controls will vary depending on the employer and its operations. The following are examples of administrative controls and the logistical issues associated with implementing them.

Developing a written CIRP
— This program should be applicable to any communicable illness reasonably transmissible in the workplace. It can be used for any future outbreaks, with disease specific-attachments.
— Our prior alert, "[COVID-19: Occupational safety and health update,](#)" details the main components of a written communicable illness program.

Encourage social distancing
— This might mean, for the time being, eliminating in-person meetings and handshaking.
— Training employees regarding proper coughing and sneezing and handwashing protocols may be important.

Face covering
— Some jurisdictions strongly recommend, and even require, that individuals wear face masks any time they leave their home and/or are at work.
— Although cloth face masks are not PPE, employers should ask themselves if they are going to provide them. We discuss PPE best practices in our alert, "[COVID-19: Recommendations and requirements to use face coverings are on the rise, so are employer obligations.](#)"

Implement temperature and symptom checks
— The U.S. Equal Employment Opportunity Commission (EEOC) issued guidance stating that temperature screens may be appropriate under the Americans with Disabilities Act (ADA) because of the public health crisis caused by COVID-19, but it also declared them to be medical exams.
— Temperature screens and symptom checks for employees (and visitors/third parties) upon entry will require various steps to minimize potential legal risks regarding medical and other privacy laws as well as other employment laws.
— Proper training and safety protocols/protection need to be provided for those administering the temperature checks.
— "Temperature scanning" is a form of temperature screening that may also implicate the same privacy and medical information issues.

Diagnostic tests
— The EEOC issued [guidance](#) on April 23, 2020, that because an individual with COVID-19 poses a direct threat to the health of others, there is a business justification under the ADA to require such diagnostic tests, which are considered medical exams.
— Such diagnostic testing is typically more invasive and more uncomfortable for employees than temperature screens, and employers should consider how any diagnostic testing is administered before deciding how often they will require it and for whom.
— Employers also should consider that as a practical matter, and as the EEOC has warned,

diagnostic tests are not a fully effective screening tool. They only tell employers whether or not an employee has COVID-19 on the day of the test, but not whether that employee has COVID-19 the next day or contracted the virus on a midday lunch break away from the office building or facility. Availability of accurate and reliable testing also must play a factor in the decision to require them.

— Please also note that states, which generally can and often do follow federal guidance, also can create requirements more protective than federal law. Employers should review whether such testing also would be permissible under applicable state law.

Antibody testing

— Noticeably absent from the EEOC's current guidance is a similar statement regarding COVID-19 antibody testing. Until there is such guidance, employers will not have certainty regarding whether antibody testing has the same business justification as diagnostic testing. Also, employers should consider how the results from such testing can implicate other employment laws.

— Generally, with respect to any kind of testing, employers should continue to follow guidance from the U.S. Food and Drug Administration (FDA) and the Centers for Disease Control and Prevention (CDC), as well as other public health figures, regarding the accuracy and reliability of tests and use tests that have been validated by a reputable source. Employers also should ensure that the tests are administered in appropriate, confidential ways by trained professionals.

Continuing remote work protocols and procedures

— Employers should be prepared to explain why and how it is safe for employees to return to work, in advance of reopening. Still, they should expect it may take time to get employees to return, particularly since many employees may need to make atypical childcare arrangements.

— To reduce the sheer number of employees at work at any given time, and to encourage social distancing, an employer may consider continuing to allow certain segments of its workforce to continue working from home to the extent practicable.

Staggering shifts

— Employers may also want to consider having employees work in shifts or alternating days to minimize the number of people in one area.

— Staggering rest breaks and meal periods (yet still complying with any applicable wage and hour laws) may also permit employees to use break rooms without overcrowding.

An initial "deep clean" before opening a facility

— Increased disinfection and decontamination protocols (reminder that Safety Data Sheets (SDS) should be made available to employees for each product used for disinfecting and decontamination that contains hazardous substances).

— Ordering cleaning supplies in advance of reopening also may be prudent given that there may be shortages in supplies or delays in deliveries of such products.

Reducing shared equipment
— Employers should analyze whether employees must share equipment and whether such sharing can spread a disease like COVID-19.
— Another option is to provide cleaning/disinfecting wipes for use prior to each use of shared equipment.

PPE

Before requiring employees to wear PPE, employers need to identify the workplace hazards that require the use of PPE, and what PPE will be required. OSHA generally requires employers to provide any required PPE at no cost to workers.

Current CDC and OSHA guidance do not require respiratory PPE for most non-health-care workers and emergency responders unless employees are regularly working in close proximity (six feet) and have prolonged contact with active COVID-19 cases or those who are suspected of having COVID-19.

If a respirator is required, however, employers need a full respiratory protection program, which includes medical evaluations, fit testing, identification of the proper respirators to use, and employee training and documentation.

If employers do not require respirators but allow them to be worn voluntarily, they do not need a full respiratory protection program. Still, they must provide employees with Appendix D to the OSHA respiratory protection standard.

Employers also should consider whether they will provide or require gloves or eye protection. In some cases, providing PPE may make some job assignments more hazardous (e.g., wearing face coverings near certain equipment).

Contractors, vendors, and visitors

When reopening, employers should consider which of the controls adopted for employees should also be required of contractors, vendors, and visitors. This will help reduce the potential risks for employees as well as contractors, vendors, and general public visitors. Employers need to consider how they will make any such requirements known to such third-party individuals.

Employers also want to review contractor and vendor agreements to understand contractual obligations (including which party is responsible for the safety and health of workers and subcontractors) and how the considerations above can be implemented.

Lastly, employers should consult with counsel before requiring waivers for contractors, vendors, or visitors to ensure compliance with local law. Such waivers may be viewed as inconsistent with the duty to provide a safe workplace.

Planning, communication, training, and implementation of the above strategies in advance of reopening is just one part of a safety program. As is true for any policy and procedure, employers must also consider how such safety measures will be enforced and how safety complaints will be addressed.

The safety issues and considerations above also may affect various other employment issues, and thus, employers should consult with counsel before implementing them.

For more information on the content of this alert, please contact your Nixon Peabody attorney or:

— Rachel Conn, 415-984-8216, rconn@nixonpeabody.com

— Benjamin Kim, 213-629-6090, bkim@nixonpeabody.com

— Maritza Martin, 415-984-8350, mmartin@nixonpeabody.com

— Jeffrey Tanenbaum, 415-984-8450, jtanenbaum@nixonpeabody.com