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Fed/OSHA issues first wave of new COVID-19 guidance under the Biden administration

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On January 29, 2020, in response to President Biden's [executive order](#) directing the federal Occupational Safety and Health Administration (Fed/OSHA) to revise guidance to employers on workplace safety during the COVID-19 pandemic, Fed/OSHA issued its [Protecting Workers: Guidance on Mitigating and Preventing the Spread of COVID-19 in the Workplace](#). This new guidance is intended for most workplaces "outside of health care" and includes an outline for a 16 element COVID-19 Prevention Program as well as "additional detail on key measures for limiting the spread." This appears to be just the first of many steps by Fed/OSHA under the new administration to combat COVID-19. In addition, while under the executive order, Fed/OSHA has until March 15 to consider implementing a COVID-19 emergency standard, all signs indicate that Fed/OSHA will likely move forward with such a regulation.

While this latest step is merely guidance, nothing prevents Fed/OSHA from using it as a basis for a citation under the Occupational Safety and Health Act's General Duty Clause, Section 5(a)(1), which requires employers to provide a workplace that is "free from recognized hazards that are causing or likely to cause death or serious physical harm." Employers will likely have implemented some of the elements outlined in Fed/OSHA's recommended program; however, buried within the guidance are elements employers likely have not previously addressed. Below is an outline of these elements, including highlights of key areas that employers may not have previously considered.

COVID-19 Prevention Program

1: *Assign a workplace coordinator.* Designate a single point of contact who will be responsible for the employer's COVID-19 issues.

2: *Identify where and how workers might be exposed to COVID-19 at work.* Per Fed/OSHA, this recommendation includes conducting a thorough hazard assessment "to identify potential workplace hazards related to COVID-19."

3: *Identify a combination of measures that will limit the spread of COVID-19 in the workplace, in line with the principles of the [hierarchy of controls](#),* including engineering controls, workplace administrative policies, personal protective equipment (PPE), and other measures, where

appropriate. **This includes installing physical barriers when physical distancing cannot be maintained.**

4: *Consider protections for workers at higher risk for severe illness through supportive policies and practices.* Citing Centers for Disease Control and Prevention (CDC) guidance on people who are at increased risk for severe illness from a COVID-19 infection, **Fed/OSHA instructs employers to consider reasonable modifications for older workers and those at higher risk for severe illness from COVID-19. It also reminded employers that workers with disabilities might be legally entitled to reasonable accommodations to protect them from the risks of COVID-19.**

5: *Establish a system for communicating effectively with workers and in a language they understand.* Employers are encouraged to provide means for workers to report when they are experiencing COVID-19 symptoms, when they have been exposed to COVID-19 cases, and when they observe COVID-19 hazards in the workplace **without fear of reprisal from the employer.**

6: *Educate and train workers on employer's COVID-19 policies and procedures using accessible formats and in a language they understand.* **This includes some means of tracking which workers have been informed and when.**

7: *Instruct workers who are infected or potentially infected to stay home and isolate or quarantine.* **Attendance policies must be non-punitive.**

8: *Minimize the negative impact of quarantine and isolation on workers,* including allowing workers to telework or work in isolated areas. If those are not possible, workers should be allowed to use paid sick leave, if available, or **implementation of paid leave policies should be considered.**

9: *Immediately isolating workers who show symptoms at work.*

10: *Performing enhanced cleaning and disinfection after people with suspected or confirmed COVID-19 have been in the facility.* OSHA suggests following the [CDC guidelines](#) if someone is suspected or confirmed to have COVID-19 in a workplace and OSHA standards in [29 CFR 1910.1200](#) and [1910.132](#), [133](#), and [138](#) for hazard communication and PPE appropriate for exposure to cleaning chemicals.

11: *Providing guidance on screening and testing.* Employers should follow state or local guidance and priorities for screening and viral testing in workplaces. **Employers should inform workers of employer testing requirements, if any, and availability of testing options.**

12: *Recording and reporting COVID-19 infections and deaths to OSHA.* Employers should also report outbreaks to health departments as required.

13: *Implementing protections from retaliation and **setting up an anonymous process** for workers to voice concerns about COVID-19-related hazards.*

14: **Making a COVID-19 vaccine or vaccination series available at no cost to all eligible employees. Employers should also provide information and training on the benefits and safety of vaccinations.**

15: **Not distinguishing between workers who are vaccinated and those who are not. Consistent with [CDC guidance](#), workers who are vaccinated must continue to follow protective measures.**

16: *All of OSHA's standards that apply to protecting workers from infection remain in place.*

Fed/OSHA also provided additional guidance on key measures for limiting the spread of COVID-19. Highlights from this guidance are outlined below:

1. *Eliminating the hazard by separating and sending home infected or potentially infected people from the workplace.* Most employers will follow a symptom-based strategy for identifying, separating, and sending home workers. However, there are certain circumstances where employers may consider a [COVID-19 test-based strategy](#). **While CDC continues to endorse quarantining for 14 days, it does recognize that local public health departments may consider other options.** Employers may also consider permitting critical infrastructure workers to continue to work in limited instances when it is necessary to preserve the function of critical infrastructure workplaces.
2. *Implement physical distancing in all communal work areas.*
3. *Installing barriers where physical distancing cannot be maintained.* **At fixed workstations where workers are not able to remain at least six feet away from other people, transparent shields or other solid barriers should be installed to separate workers from other people.**
4. *Suppressing the spread of the hazard using face coverings.* **Employers should provide all workers with face coverings, unless their work task requires a respirator, at no cost.** Employers must discuss the possibility of "reasonable accommodation" for any workers who are unable to wear or have difficulty wearing certain types of face coverings due to a disability.
5. *Improving ventilation.* Employers should review and follow the recommendations released by the [CDC](#) and American Association of Heating, Refrigerating and Air-conditioning Engineers ([ASHRAE](#)).
6. *Use personal protective equipment when necessary.* **Even if PPE is not required under Fed/OSHA, some workers might have a legal right to PPE as a "reasonable accommodation" under the Americans with Disabilities Act, or other workers may want to use it if they are still concerned about their personal safety. Under such circumstances, PPE use should be encouraged (note from authors—the voluntary use of respirators by workers triggers the requirement that employers provide workers with [Appendix D](#) of the Respiratory Protection Program).**
7. *Provide the supplies necessary for good hygiene practices.*
8. *Perform routine cleaning and disinfection.*

The new guidance also contemplates that Fed/OSHA and OSHA-approved state plans will work together to address workplace issues relating to COVID-19. To date, California, Michigan, Oregon, Washington, and Virginia have passed state-specific OSH regulations. In fact, the Fed/OSHA guidance for a COVID-19 Prevention Plan tracks closely to the Cal/OSHA COVID-19 emergency regulations. This alignment with Cal/OSHA could signal that Fed/OSHA is planning on adopting a COVID-19 strategy similar to Cal/OSHA, which has been known for its aggressive enforcement throughout the pandemic.

Steps for employers to take now

Although this new Fed/OSHA guidance is not a standard or regulation, employers should now update their COVID-19 policies to reflect the guidance above and continue to track guidance from Fed/OSHA and CDC. As Fed/OSHA issues new industry-specific guidance and potentially augments this new guidance with the emergency temporary standard, employers will need to be prepared to quickly address these new requirements. Employers should also brace for a new Fed/OSHA that will likely take a more aggressive enforcement approach than that of the previous administration.

This summary is just part of the overlapping web of issues facing businesses as a result of the COVID-19 pandemic. Our Nixon Peabody team will continue to provide [updates](#) on other issues facing employers and solutions to assist them in navigating these turbulent times.

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