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RegREVIEW℠

August 2020

CVSA Sets Dates for Rescheduled Roadcheck

The Commercial Vehicle Safety Alliance (CVSA) rescheduled its International Roadcheck for September 9-11.

The annual event was postponed in March until further notice due to the COVID-19 pandemic. It was initially slated for early May.

The three-day enforcement campaign will result in a high volume of roadside inspections throughout North America. Law enforcement will perform driver and commercial motor vehicle inspections at weigh or inspection sites and fixed locations and through roving mobile patrols. Officers will check for compliance with motor carrier safety regulations, and those vehicles or drivers found with a critical inspection violation will be placed out of service.

Each year, CVSA's event emphasizes a specific area of safety compliance. This year's focus is on the driver requirements component of a roadside inspection. Areas include:

- Driver's age
- Driver's licensing requirements
- Driver physical qualifications
- Sickness or fatigue
- Alcohol, drugs, and other substances
- Driver's record of duty status (U.S., Canada, or Mexico)

For more information on International Roadcheck, visit roadcheck.org.

Study Finds Service Industry Workers have Elevated Risk of Hearing Loss

New research from the National Institute for Occupational Safety and Health (NIOSH) estimates that a large number of noise-exposed workers within the service industry have an elevated risk of hearing loss, including some in professions traditionally viewed as low risk. Data show that overall, 16% of workers across all industries experienced occupational-related hearing loss, compared with 17% in the service sector. Audiograms for 1.9 million noise-exposed workers from 2006 to 2015 were studied, including audiograms for nearly 160,000 service industry workers.

The study found several sub-sectors of the service industry exceeded the overall occurrence of hearing loss by significant percentages, and many had high risks for hearing loss. For example, workers in Administration of Urban Planning and Community and Rural Development had the highest occurrences of hearing loss at 50%,

and workers in Solid Waste Combustors and Incinerators had more than double the risk, the highest of any sub-sector.

The study also showed that some sub-sectors traditionally viewed as low risks, such as professional and technical services and schools, had higher than expected occurrences of hearing loss. For example, Custom Computer Programming Services had occurrences of 35%, and Elementary and Secondary Schools, 26%.

Employers in the service industry may consider monitoring noise levels in the workplace to ensure their employees are not exposed to 85 decibels or more over an 8-hour period. For general, occupational hearing loss prevention, NIOSH recommends employers remove noise at its source or reduce it to a safe level. When noise cannot be reduced to safe levels, employers should implement a hearing conservation program.

Top 10 Costliest Injuries Revealed in 2020 Liberty Mutual Workplace Safety Index

The most disabling workplace injuries amounted to nearly $53 billion in direct U.S. workers' compensation costs, according to the 2020 Liberty Mutual Workplace Safety Index. This translates into more than a billion dollars a week spent by businesses on the most disabling injuries.

Employers may consider conducting training or refresher training for employees based on the top 10 list, ergonomic assessments, and/or job hazard analyses to help mitigate the potential for injuries.

Injury	Cost (billions $)
Overexertion involving outside sources (handling objects)	$13.98
Falls on same level	$10.84
Struck by object or equipment	$6.12
Falls to lower level	$5.71
Other exertions or bodily reactions	$4.69
Vehicle crashes	$3.56
Slip or trip without fall	$2.06
Repetitive motion involving microtasks	$2.05
Struck against object or equipment	$2.00
Caught in or compressed by equipment or objects	$1.92

The Liberty Mutual Workplace Safety Index is based on information from Liberty Mutual, the U.S. Bureau of Labor Statistics (BLS), and the National Academy of Social Insurance. BLS injury data are analyzed to determine which events caused employees to miss more than five days of work, and then ranks those events by total workers' compensation costs.

How Does COVID-19 Affect Pay While Working from Home?

You've allowed your employees to telework during the COVID-19 emergency. Now that your employees are no longer at the worksite, ever wonder how you determine their hours of compensable work? Do you have to pay my employees for hours you did not authorize them to work? Do you have to pay them for hours worked even when they do not report those hours?

These and other questions have surfaced during the pandemic. So, let's get to the answers.

Work performed away from the primary worksite, including work performed at employees' homes, is treated the same as work performed at the primary worksite for purposes of compensability. Therefore, you must pay your employees for all hours of telework actually performed away from the primary worksite, including overtime work, in accordance with the FLSA, provided that you knew or had reason to believe the work was performed.

This is true even of hours of telework that you did not authorize. You also must pay your employees for unreported hours of telework that you know or have reason to believe had been performed.

You are not, however, required to pay your employees for unreported hours of telework that you have no reason to believe had been performed, i.e., where you neither knew nor should have known about the unreported hours. In most cases, you may satisfy your obligation to pay your teleworking employee by providing reasonable time-reporting procedures and compensating that employee for all reported hours.

Document, document, document!

What if you allow employees to begin work, take several hours in the middle of the workday (for example, to care for their children), and then return to work, do you have to pay them for all of the hours between starting work and finishing work?

No! All-time between the performance of the first and last principal activities of a workday is generally paid work time. However, applying this guidance to teleworking arrangements would discourage needed flexibility during the COVID-19 emergency. As such, if you allow employees to telework with flexible hours during the COVID-19 emergency, you need not count as hours worked all the time between an employee's first and last principal activities in a workday.

If, for example, you and Emma Employee agree to a telework schedule of 7–9 a.m., 11:30–3 p.m., and 7–9 p.m. on weekdays. This allows Emma, for instance, to help care for her children whose summer programs are closed, reserving for work times when there are fewer distractions. Of course, you must compensate Emma for all hours actually worked — 7.5 hours — that day, but not all 14 hours between Emma's first principal activity at 7 a.m. and last at 9 p.m.

Got other questions? Let us know! Subscribers have the option of posing questions to our regulatory experts on a variety of employment law issues.

If You're Requiring Returning Employees to Test Negative, Please Pause

This morning, Emma Employee was exhibiting symptoms of COVID-19. You did the right thing and sent her home. Now you wonder when she can return to work, because she is great at her job, and you really need her. As part of this consideration, you wonder if you can require Emma to have a negative test result before returning to work. After all, you want to make sure the nasty little virus stays out of your facility.

Such a mandate is so last week!

On July 20, the CDC indicated (in non-scientific, employment-law-nerd speak) that, while an individual might still have the virus inside them for up to 12 weeks, it is not replicating, so the individual is not contagious. It just takes some weeks for the body to get rid of the non-active virus particles. This is referred to as "shedding" (for any of you who will go on to read more about the science).

Now, the CDC indicates that persons with mild to moderate COVID-19 remain infectious no longer than 10 days after symptom onset. Persons with more severe to critical illness or severe immunocompromise likely remain infectious no longer than 20 days after symptom onset.

These new findings support relying on a symptom-based, rather than test-based strategy for ending isolation of these individuals. This way, if they are no longer infectious, they are not kept unnecessarily isolated and excluded from work or other responsibilities.

Maybe Emma can return to work sooner than expected.

Given all this, the current evidence shows that most employees with COVID-19 symptoms may return to work when they meet the following criteria:

- Ten days have passed since symptoms first appeared,
- They have no fever for at least 24 hours without the use of fever-reducing medications, and
- Other symptoms have improved.

Some employees with severe illness may be contagious beyond 10 days and should not return to work until 20 days after symptom onset, in consultation with infection control experts.

Employees who never develop symptoms may return to work 10 days after the date of their first positive COVID test. Again, a negative test results might not be very effective, so mandating them would be counterproductive.

Employees who have been exposed should continue to quarantine for 14 days from the date of exposure.

Some good news is that six months after the emergence of the virus, there have been no confirmed cases of reinfection.

The learning curve remains as we see continue to see change at the speed of science. Stay tuned!

Virginia Adopts Emergency Temporary Workplace Safety Standards for COVID-19

On July 15, Virginia Governor Ralph Northam announced the adoption of statewide emergency temporary workplace safety standards in response to COVID-19. According to the Virginia Department of Labor and Industry (DOLI), the Emergency Temporary Standard (ETS) will take immediate effect upon publication in a newspaper of general circulation, published in the City of Richmond, Virginia. DOLI says it anticipates that publication of the ETS will occur during the week of July 27, 2020. The standard will remain in effect for six months and can be made permanent through the process defined in state law.

The standard requires all employers in Virginia to mandate social distancing measures and face coverings for employees in customer-facing positions and when social distancing is not possible, provide frequent access to hand washing or hand sanitizer, and regularly clean high-contact surfaces.

In addition, new standards require all employees be notified within 24 hours if a coworker tests positive for the virus. Employees who are known or suspected to be positive for COVID-19 cannot return to work for 10 days or until they receive two consecutive negative tests.

The emergency temporary standards (ETS), infectious disease preparedness and response plan templates, and training guidance will be posted on the Virginia Department of Labor and Industry website as they become available.

Covered employers will be given 60 days from the effective date of the ETS to develop and train employees on their Infectious disease preparedness and response plan, and 30 days to train employees on the standard.

Travel Quarantine Orders can Result in FFCRA Leave

Several states have issued travel advisories that mandate a quarantine period if travelers are coming into the particular state from outside areas that have high COVID-19 infection rates. Why does this matter to employers? Because one of the reasons employees may take emergency paid sick leave under the Families First Coronavirus Response Act (FFCRA) is if they are subject to a quarantine/isolation order. Employees in those states that have travel advisories that include quarantine orders for travel to hot spots are, therefore, entitled to take the paid leave.

As of July 16, states that have travel advisories with quarantine requirements include New York, New Jersey, Texas, Rhode Island, Connecticut, Maine, Hawaii, and Texas, but these provisions have been known to change as the situation in the U.S. evolves.

Such state travel advisories often change the list of what other states are included as the hot spots change. On July 14, for example, New Jersey added Minnesota, New Mexico, Ohio, and Wisconsin to its list of high-risk areas.

Some advisories indicate that anyone returning from travel to states that have a significant degree of community-wide spread of COVID-19 are subject to the quarantine order. High-risk states are often defined as any state that has a positive test rate higher than 10 per 100,000 residents, or higher than a 10 percent

test positivity rate over a seven-day rolling average. So, the numbers matter.

The details of a particular advisory are also worth noting. In New York, for example, employees will forgo their paid sick leave benefits from New York's COVID-19 paid sick leave law if they engage in non-essential travel to high-risk states.

Some advisories may indicate that if someone is returning from certain, less-risky areas that do not have a significant degree of spread, they need not quarantine as long as they can provide a negative test result.

Violations of some of these advisories can include fines and jail terms. Some fines are up to $1,000, and some jail terms are up to 180 days. The FFCRA does not generally cover the time an employee spends in jail.

While employers may put into place such travel-related quarantine requirements, the orders need to be promulgated by a government in order to qualify for FFCRA leave.

Employers, therefore, need to keep an eye on the myriad of state travel advisories and their details, including which states are high-risk. This is an ever-changing situation, which can make compliance with the FFCRA a bit more challenging.

The Great Workplace Mask Debate

The CDC, OSHA, EEOC, and other agencies have chimed in on the uses of masks in the workplace. Some members of the public are also rather vocal about their views on the subject outside the workplace. Where does that leave employers? Are they required to mandate mask use of all employees? What are the possible repercussions if they don't?

Public health agencies continue to indicate that the wearing of masks can be a strong deterrent of spreading COVID-19, along with social distancing and enhanced cleaning (of both people and surfaces). In workplaces where employee jobs are such that distancing can be challenging, masks can play an even more prominent role in curbing the infection rate.

To further complicate matters, some jobs are not performed at a particular workplace, but rather are done out "in the field." Work may be often done at a customer's site, for example. In those situations, employees may have the risk of community exposure, which employers may have a more significant challenge in controlling.

While OSHA does not explicitly mandate that employees wear masks, employers need to provide work and a workplace free from recognized hazards. COVID-19 is a recognized hazard. OSHA has seen an increase in employee complaints regarding workplace safety from COVID-19. Therefore, if employers fail to institute steps to protect employees, including mask requirements, employees could claim that the workplace is not safe.

Even if you do require all employees to wear masks, there's a chance that at least one employee will ask to be excused from the requirement, likely citing a condition that makes mask-wearing unhealthy. This is generally seen as a request for a reasonable accommodation under the Americans with Disabilities Act (ADA) triggering your obligation to engage in an interactive process with the employee.

As part of this process, you may request reasonable medical documentation from the employee of the limitation/condition. Hopefully, the employee won't show you a mask exemption card, as the U.S. Department of Justice has indicated that such cards are fraudulent. If the employee does not provide medical documentation, the action could be seen as closing down the interactive process, which could risk the employee losing his or her ADA protections.

Reasonable accommodation from mask-wearing might involve having the employee work in a separated location or perhaps offering a face shield or the option of working from home. No one-size-fits-all solution is applicable; the situation needs to be addressed on its own merits.

Therefore, employers need to evaluate the risks of not mandating the use of masks, keeping in mind state and local mask orders, as they may increase to help stem the surge of infections in certain areas. Employers also need to keep an eye on the ever-changing science as research continues. A workplace mask mandate could be met with dislike, as the U.S. is not a mask-wearing culture. Some cultures don't wear shoes, but in America, business generally requires shoes. In some cases, it's might be a matter of perspective, but safety must be considered.

Federal Court Shoots Down Parts of the FFCRA Regulations

Just when we all started getting used to (well, sort of) the regulations implementing the Families First Coronavirus Response Act (FFCRA), the courts have begun to change them. In April, we talked about some members of Congress taking issue regarding some of the new FFCRA regulations. Citing some of those Congressional concerns, at least one federal court moved to vacate some provisions, and the judge agreed. Keep in mind that this ruling applies only to the southern district of New York at this time. Should the ruling be appealed, it could have greater reach.

In the case, the State of New York argued that the U.S. Department of Labor (DOL) overstepped its authority in interpreting the FFCRA with its regulations. Specifically, NY found flaws regarding four areas:

- Employees may be denied FFCRA leave if the employer – for any reason – does not have work for the employee. This imposed a new "work availability" requirement, even though the law did not contain such a restriction. The result is that employees are entitled to the leave even if the employer does not have work available, such as during a furlough.
- FFCRA leave may be denied to a health care provider, but the regulations broadened the definition of a health care provider. It was supposed to reflect the definition found in the FMLA but included many others, such as a cashier at a hospital gift shop. The result is that more employees are entitled to the FFCRA leave.
- Intermittent FFCRA leave is allowed only when the employer agrees to it. The statute didn't talk about intermittent leave, so the DOL decided to address it. The court indicated that employees may take intermittent FFCRA leave except where doing so would put others at risk. The result is that employees

may take FFCRA leave intermittently without employer agreement, but this could be restricted where employees report to a worksite, as opposed to working from home.

- Employees may take FFCRA leave if they provide documentation before leave. Again, this provision was not in the law, but the regulations added it. The result is that employees need not provide documentation as a precondition of taking FFCRA leave. The documentation may be provided after leave begins.

By limiting the availability of paid sick leave, N.Y. argued, the final FFCRA regulations likely will cause more people to become infected with coronavirus since fewer employees will stay home when potentially infected.

On August 3, 2020, the court, therefore, vacated the related provisions of the FFCRA regulations — at least for areas governed by the Southern District of New York.

The court did throw the DOL a bone, as it acknowledged that the agency labored under considerable pressure in promulgating the final FFCRA regulations. The COVID-19 crisis required public and private entities alike to act decisively and swiftly in the face of massive uncertainty, and often with grave consequence. "But as much as this moment calls for flexibility and ingenuity, it also calls for renewed attention to the guardrails of our government. Here, DOL jumped the rail."

Bill Would Help Protect Employers from COVID-19-related Liabilities

The pandemic has already caused its fair share of damage. Employers have been dealing with additional challenges in the form of lawsuits under federal laws such as OSHA and related state plans, the Fair Labor Standards Act (FLSA), the Age Discrimination in Employment Act (ADEA), the Worker Adjustment and Retraining Notification Act (WARN), Title VII of the Civil Rights Act (Title VII), Title II of the Genetic Information Nondiscrimination Act (GINA), and Title I of the Americans with Disabilities Act (ADA).

These laws generally provide protections and rights for employees, but employers have had distractions with many unexpected considerations. Given this, and the desire to stem the negative economic impact of the virus, a bill (S 4317) was introduced in Congress that would provide a safe harbor for employers under these laws. The bill is known as "Safeguarding America's Frontline Employees To Offer Work Opportunities Required to Kickstart the Economy Act" or the "SAFE TO WORK Act.

Generally, employers would not be subject to any enforcement proceeding or liability under any provision of these federal employment laws if the employer:

- Was relying on and generally following applicable government standards and guidance;
- Knew of the obligation under the relevant provision; and
- Attempted to satisfy any such obligation by:
    - Exploring options to comply with such obligations and with the applicable government standards and guidance (such as through the use of virtual training or remote communication strategies);

- Implementing interim alternative protections or procedures; or
- Following guidance issued by the relevant agency with jurisdiction with respect to any exemptions from such obligation.

Employers conducting testing for coronavirus at the workplace would also not be liable for any action or personal injury directly resulting from such testing, except for those personal injuries caused by the gross negligence or intentional misconduct of the employer or other person.

Interestingly, neither the FMLA nor the FFCRA are included in the bill. The FFCRA was enacted solely as a result of the pandemic, and related claims have been mounting.

Employees could prevail in a case if they could prove by clear and convincing evidence that:

- The employer was not making reasonable efforts in light of all the circumstances to comply with the applicable government standards and guidance in effect at the time of the actual, alleged, feared, or potential for exposure to coronavirus;
- The employer engaged in gross negligence or willful misconduct that caused an actual exposure to coronavirus; and
- The actual exposure to coronavirus caused the personal injury of the employee.

In any case, should this bill become law, employers would have even more reason to keep an eye on the government guidance regarding the virus and keeping employees safe, such as those from the CDC.

The bill was introduced on July 27 and was referred to the Committee on the Judiciary. It has a long way to go before it can become law. While some bills can fast track to enactment, the fate of this one is yet to be seen.