OLD REPUBLIC CONTRACTORS INSURANCE GROUP

RegREVIEW℠

November 2020

New Jersey Mandates COVID-19 Protocols for all Employers

New Jersey Governor Philip Murphy has signed an Executive Order mandating COVID-19 safety and health requirements for all private and public employers, effective November 5, 2020.

The order requires employers to implement the following protocols:

- All individuals on the worksite maintain at least six feet of distance from one another to the maximum extent possible;
- Employees, customers, visitors, and other individuals entering the worksite wear a face mask on the premises;
- Provide hand sanitizer or sanitizing wipes to employees, customers, and visitors at no cost to them;
- Ensure employees practice regular hand hygiene;
- Routinely clean and disinfect all high-touch areas in accordance with New Jersey Department of Health (DOH) and Centers for Disease Control and Prevention (CDC) guidelines;
- Conduct daily health checks before each shift;
- Immediately separate and send home employees who appear to have COVID-19 symptoms, as defined by the CDC, upon arrival at work or who become sick during the day;
- Promptly notify all employees of any known exposure to COVID-19 at the worksite;
- Clean and disinfect the worksite in accordance with CDC guidelines when an employee at the site has been diagnosed with COVID-19; and
- Continue to follow guidelines and directives issued by the New Jersey DOH, the CDC, and OSHA, as applicable, for maintaining a clean, safe, and healthy work environment.

Compliance and safety training for employers and employees, as well as notices and informational materials, are forthcoming from New Jersey's Department of Labor and Workforce Development.

Employers who do not follow the safety standards can be subject to fines and penalties and potential worksite closure by the New Jersey DOH.

This material is intended to be a broad overview of the subject matter and is provided for informational purposes only. Old Republic Contractors Insurance Group, Inc. does not endorse or recommend any products or services nor does it make any representation or warranty regarding the accuracy or completeness of the information. Old Republic Contractors Insurance Group, Inc. shall have no liability or responsibility to any person or entity with respect to any loss, action or inaction alleged to be caused directly or indirectly as a result of the information contained herein.

OSHA Announces Over $480K in COVID-19 Violations

OSHA has cited nearly 40 establishments for COVID-19-related violations, with proposed penalties totaling $484,069, since the start of the pandemic. OSHA inspections have resulted in citations for failures to:

- Implement a written respiratory protection program;
- Provide a medical evaluation, respirator fit test, training on the proper use of a respirator, and personal protective equipment (PPE);
- Report an injury or illness on OSHA recordkeeping forms; and
- Comply with the General Duty Clause of the Occupational Safety and Health (OSH) Act of 1970.

Employers may refer to OSHA's guidance documents detailing proactive measures that can be taken to protect employees from COVID-19, such as physical distancing measures and the use of physical barriers, face shields, and face coverings when employees are unable to physically distance at least 6 feet from each other. OSHA reminds employers that they also are required to maintain injury and illness logs.

OSHA Confirms N95 Respirators Effectively Protect Against COVID-19 Exposure

In a newly published FAQ, OSHA confirms N95 respirators effectively protect wearers from COVID-19 exposure. If worn correctly, they will filter out at least 95 percent of very small (0.3 microns) particles from the air.

OSHA issued the FAQ to address false claims stating that N95s do not capture particles as small as the virus that causes COVID-19, which is approximately 0.1 microns in size. The FAQ describes how respirators work to filter particles and discusses the National Institute for Occupational Safety and Health's (NIOSH) testing process.

OSHA notes that employers and workers must remember that the respirator only provides the expected protection when used correctly. When respirators are required, they must be used as part of a comprehensive, written respiratory protection program that meets the requirements of OSHA's Respiratory Protection standard. The program should include medical evaluations, training, and fit testing.

OSHA Updates FAQs for COVID-19-Related Reporting Requirements

OSHA posted two new frequently asked questions on its COVID-19 FAQ webpage to clear up confusion about when and how to report fatalities and in-patient hospitalizations related to COVID-19.

Work-related deaths due to COVID-19

The Agency says that work-related, confirmed deaths of COVID-19 are reportable to OSHA if they occur within 30 days of the work-related exposure to the SARS-CoV-2 virus. The employer must report the fatality to OSHA within eight hours of knowing both that the employee has died and that the cause of death was a work-related case of COVID-19. In practical terms, if an employer learns that an employee died within 30 days of a work-related incident and later determines the cause of death was a work-related case of COVID-19, the case must be reported to OSHA within eight hours of that determination.

Work-related hospitalizations due to COVID-19

In the same way, employers must report an in-patient hospitalization to OSHA if the hospitalization occurs within 24 hours of the work-related incident. For confirmed cases of COVID-19 that resulted from work-related exposure to the SARS-CoV-2 virus, that means an employer would only have to report the case to OSHA if the employee was hospitalized within 24 hours of that exposure.

How to report a fatality or severe injury to OSHA

Employers may report a work-related fatality or an in-patient hospitalization, amputation, or loss of an eye in one of the following ways:

- Call the nearest OSHA office;
- Call the OSHA 24-hour hotline (1-800-321-OSHA [6742]); or
- By completing OSHA's online form.

Note that all employers are covered under the severe injury and fatality reporting requirements found in 29 CFR 1904.39, even employers who are not covered under the routine recordkeeping requirements of Part 1904.

Michigan Issues Emergency COVID-19 Rules

The Michigan Occupational Safety and Health Administration (MIOSHA) has issued emergency rules clarifying the safety requirements employers must follow to protect their employees from COVID-19. The emergency rules implement workplace safeguards for all Michigan businesses and include specific requirements for industries, including manufacturing, construction, retail, health care, exercise facilities, restaurants, and bars.

Among other requirements, businesses resuming in-person work must:

- have a written COVID-19 preparedness and response plan, and
- provide thorough training to their employees that covers:

- workplace infection-control practices,
- proper use of personal protection equipment (PPE),
- steps workers must take to notify the business of any symptoms of COVID-19 or a suspected or confirmed diagnosis of COVID-19, and
- how to report unsafe working conditions.

Employers should coordinate these requirements with the Emergency Order issued by the Michigan Department of Health and Human Services, restricting gathering sizes, requiring face coverings in public spaces and childcare facilities, placing capacity limitations on stores, bars, and other public venues, and providing safer workplaces. The rules took effect on October 14 and will remain in effect for six months.

Employee Where Art Thou? CDC Change May Lead to More Employee Absences

On October 21, the Centers for Disease Control and Prevention (CDC — is anyone not familiar with this acronym?) changed how it views what constitutes "close contact" with someone infected with COVID-19. Instead of involving a continuous 15-minute period of being within six feet of an infected individual, those 15 minutes are a cumulative total, as long as the encounters took place within 24 hours.

Picture, if you will, Emma Employee and Cody Coworker passing each other in the hallway, at the coffee station, or briefly discussing work anywhere (even outside of work), and they spend only four minutes at each encounter. But they have five such encounters during the day. If Emma tests positive, Cody has had a close contact. This is true even if they were both wearing a mask or other facial covering.

Why does this matter?

The CDC rules for quarantine apply if someone has been in close contact with someone who tested positive. This means that Cody would need to quarantine for 14 days because he has been exposed to someone who tested positive – such as Emma.

These encounters aren't restricted to the workplace. Employees have lives, and if Cody had a close contact outside of work, he would still need to quarantine. Parents, siblings, children, friends, neighbors all can involve such contacts.

Remember the Families First Coronavirus Response Act (FFCRA)? Employers subject to this law (those with fewer than 500 employees) may see an increase in requests for emergency paid sick leave since being subject to a quarantine order is one of the qualifying reasons for this paid sick leave. Currently, the FFCRA is effective only until December 31, 2020. If, however, Congress puts together a COVID-19 aid package, it could include an extension.

Simply getting the work done with fewer employees is challenging enough, particularly if you have employees who have specialized skills. With many areas seeing a surge in cases, many employers may see a resulting surge in absences.

With this in mind, you may want to revise any applicable policy to help ensure that employees stay apart six feet *at all times* and enforce it. Strong communication of such a change can also help get the message across.

New Rule Makes H-1B Employees Harder to Hire

On the heels of a regulation "Strengthening Wage Protections for the Temporary and Permanent Employment of Certain Aliens in the United States," on October 8, the Department of Homeland Security published the "Strengthening of the H-1B Nonimmigrant Visa Classification." The result of these rules will increase the challenge employers have in hiring qualified talent requiring specialized knowledge. The new rules could result in 1/3 of H-1B petitions being denied.

Over the past several years, H-1B visas have been increasingly harder to obtain. When employers complained, the U.S. Citizenship and Immigration Services (USCIS) backed down but instead took a regulatory route to adopt the barriers. The latest rules do the following:

- Revise the regulatory definition of and standards for a ''specialty occupation," focusing on the relationship between the required degree field(s) and the duties of the position, as opposed to any degree. Many specific degrees are, however, not yet available.
- Add definitions for ''worksite'' and ''third-party worksite'';
- Revise the definition of ''United States employer'' and removing the term "contractor";
- Clarify how the USCIS will determine whether there is an ''employer-employee relationship'' between the petitioner and the beneficiary;
- Require corroborating evidence of work in a specialty occupation;
- Limit the validity period for third-party placement petitions to a maximum of 1 year, down from the current three-year period;
- Provide a written explanation when the petition is approved with an earlier validity period end date than requested;
- Amend the general itinerary provision to clarify it does not apply to H-1B petitions; and
- Codify USCIS' H-1B site visit authority, including the potential consequences of refusing a site visit.

The changes, which become effective December 7, are said to be in response to the economic crisis caused by the COVID-19 public health emergency and the impact on the wages and working conditions of similarly employed U.S. workers.

The rules are interim final rules, but interested parties may comment on them between November 9 and December, and the USCIS will need to review the comments. To submit a comment, go to www.regulations.gov, and look for DHS Docket No. USCIS-2020-0018.

A companion rule from the U.S. Department of Labor will also increase the wages required to be paid for H-1B visa employees as well as H-1B1, E-3, and PERM eligibility. Those changes became effective immediately. Many expect the rules to be challenged, arguing they go too far.

BLS: Employer-reported Injury, Illness Rate Unchanged in 2019

In 2019, private industry employers reported 2.8 million nonfatal workplace injuries and illnesses, unchanged from 2018 and 2017, according to the recently released Bureau of Labor Statistics (BLS) Employer-Reported Workplace Injuries and Illnesses report.

The incidence rate for total recordable cases (TRC) in the private industry remained at 2.8 cases per 100 full-time equivalent (FTE) workers, unchanged from 2018. The incidence rates for days away from work (DAFW) cases and days of a job transfer and restriction only (DJTR) also remained the same.

Report highlights include:

- Within the private industry, there were 888,220 injuries or illnesses that caused employees to miss at least one day of work in 2019.
- Manufacturing was the only private industry sector where the TRC rate had a statistically significant change. It decreased from 3.4 in 2018 to 3.3 cases per 100 FTE workers in 2019.
- Injuries and illnesses to manufacturing workers resulted in 32,470 DAFW cases of sprains, strains, or tears (28.0 percent); 16,790 cases of soreness or pain (14.5 percent); and 15,380 cases involving cuts, lacerations, or punctures (13.3 percent).

The median number of days away from work in private industry in 2019 was 8 days, the same as in 2018.

Circuit Court Upholds OSHA Citations in PSM Case

In a recent ruling, the 10th circuit upheld OSHA citations in a process safety management (PSM) case, stating that boilers can be a part of a covered process, even though they do not contain hazardous chemicals. The court determined that boilers can be interconnected to a covered process — so if the boiler explodes, a PSM violation can occur. In this instance, the boiler was connected to two other parts of a refinery that did contain highly hazardous chemicals.

Background

After a boiler exploded at a refinery, OSHA cited its owner for violating §1910.119, which creates a standard for process safety management (PSM) of highly hazardous chemicals. The Occupational Safety and Health Review Commission (OSHRC) upheld the violations. The refinery argued that §1910.119 does not apply to the boiler that exploded as it does not contain highly hazardous chemicals.

In its ruling, the court noted that the regulation defines "process" as "any activity involving a highly hazardous chemical," and that the phrase "any activity involving" is broad enough to mean vessels need only be part of any activity that involves a highly hazardous chemical. In this case, the boiler was interconnected by a pipeline to two parts of the refinery that did contain highly hazardous chemicals.

The 10th circuit covers Oklahoma, Kansas, New Mexico, Colorado, Wyoming, and Utah, as well as those portions of the Yellowstone National Park extending into Montana and Idaho.

Poor Call-Out Procedure Communication Leads to FMLA Case

Stefany was injured at work and, logically, filed for workers' compensation. She was offered an alternative position, but, because of her injury, she could not drive. The drive was 45 minutes each way, and the workday began at 4:00 a.m. when public transportation was not available. Given her restrictions, she instead called out sick and believed her absences were excused. The employer was aware of her driving limitations.

The company used an outside administrator to handle its workers' compensation and requests for leave, but these were handled by two separate departments. Stefany, however, didn't realize that she had to talk to both departments separately — one for workers comp and one for other leave — because the process was not well communicated.

When she learned about the dual call requirement, she made the additional call and requested family medical leave, but on that same day, Stefany was terminated due to excessive absences. She sued.

One of the particulars the court looked at is, if the situation involves workers' comp, employees may be offered light duty, and if the employee turns down the light-duty, she could risk losing workers' comp benefits but would still be entitled to FMLA leave.

Stefany called out every day and provided medical information supporting the leave. She was confused about having to make two separate calls. When talking to HR about the situation, she was told to call a particular number to request leave. This information, however, may not have been as clear as it could have been.

The court ruled that there were issues regarding whether the company's policy and procedures for requesting leave were ambiguous. The case was allowed to proceed.

In addition to the call-out procedure confusion issue, the court also found that the company failed to engage in the interactive process under the Americans with Disabilities Act (ADA). After Stefany indicated she wanted to work but could not, the company did not engage in an interactive process to discuss the situation and look at potential effective reasonable accommodations.

Clear, concise communication to Stefany and all employees could have helped avoid this case. When in doubt, overcommunicate. Make checklists outline all steps employees are expected to take, include graphics, communicate in multiple methods, test the information, ask for input. While this seems to be a lot of work, it's likely cheaper than a court case.

Hazelett v. Wal-Mart Stores, Inc., 9 th Circuit Court of Appeals, No. 19-16628, October 6, 2020.

OSHA Issues Temporary Enforcement Guidance for Respiratory Standard

OSHA has issued temporary guidance to its inspectors for enforcing initial and annual fit-testing requirements of the respiratory protection standard.

It applies only to fit-testing of NIOSH-approved tight-fitting powered air-purifying respirators (PAPRs) used by healthcare personnel or other workers performing job tasks with high or very high occupational exposure risk to COVID-19.

OSHA says it will, on a case-by-case basis, exercise enforcement discretion when considering issuing citations under §1910.134(d) and (f) in cases where the employer has made an effort to protect personnel against COVID-19 by:

- Providing NIOSH-approved tight-fitting PAPRs using a high efficiency (HE) particulate cartridge or filter when initial and/or annual fit-testing is infeasible due to shortages of N95, N99, N100, R95, R99, R100, P95, P99, and P100 respirators and/or fit-testing supplies;
- Monitoring fit-testing supplies and making good faith efforts to obtain them;
- Implementing engineering controls, work practices, and/or administrative controls that reduce the need for respiratory protection; and
- Maintaining a fully-compliant respiratory protection program, other than fit-testing requirements, including ensuring:
  - personnel are informed of new policies and trained on new procedures;
  - employees receive required medical evaluations;
  - batteries and filters for PAPRs provide positive pressure throughout the entire shift or procedure; and
  - employees wearing tight-fitting PAPRs maintain neatly trimmed facial hair that does not compromise the seal of the respirator or interfere with valve function.

The guidance takes effect immediately and will remain in effect until further notice. It is intended to be time-limited to the current public health crisis.

OSHRC Reduces Machine Guarding Violation from Willful to Serious

In a recent case, the Occupational Safety and Health Review Commission (OSHRC) dropped a company's willful violation down to a serious violation, reducing the original penalty from $49,000 to $3,500.

Background

In 2012, an operator was injured while operating a lathe. To prevent a reoccurrence, the company reprogrammed its lathes so that the machines stop but do not power off between production cycles, and the operators must manually push a button to initiate the next cycle.

In April 2014, OSHA conducted an inspection of the company's facility in response to an employee complaint and issued a willful citation alleging a violation of §1910.212 for failing to provide adequate machine guarding.

At issue

OSHA said the violation was willful because the company had a heightened awareness of the cited standard's requirement to guard against moving parts due to (1) a prior citation and its means of abatement (installing guards); (2) warnings given to operators and posted on the machines; and (3) the 2012 accident involving the lathe operator.

OSHRC, however, ruled it was not willful because the company reasonably believed it had eliminated exposure to moving parts when it reprogrammed the machine. The violation was recharacterized as serious, and the original penalty was reduced from $49,000 to $3,500.