

Practical steps to address COVID-19 workplace safety liability

As Oregon slowly, albeit uneasily, moves through reopening phases, employers and employees are becoming increasingly concerned about health and safety in the workplace. Since the pandemic took hold in March, Oregon OSHA has received 5,500 workplace complaints related to COVID-19 safety issues. If an employee tests positive for the virus, an employer may face claims alleging it failed to follow proper cleaning and sterilizing protocols, failed to implement or enforce physical distancing guidelines, failed to provide mandatory personal protective equipment or require its use, ignored employee complaints or symptoms, or continued operations after a COVID-19 workplace exposure.

There are, however, practical steps that employers can take to mitigate potential liability. While no action can guarantee a complaint or lawsuit will not be brought, with proper precautions in place, the viability of any such action will decrease substantially.

Stay up to date with pandemic guidance

It is not enough for an employer to craft one-time pandemic safety protocols and expect compliance. Guidance from the Oregon Health Authority, Oregon OSHA and the CDC regarding pandemic safety measures is based on ever-changing medical science surrounding COVID-19 transmission. As medical scientists learn more about the virus, the guidance from government agencies changes – sometimes dramatically.

To the extent possible, employers should designate a specific employee



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or work group to keep the organization current on pandemic guidance. When implementing safety measures or pandemic protocols, employers should document the basis for the protocols and the guidance being relied upon. These safety measures and protocols should be periodically updated to reflect changes in guidance. An employer's ability to provide support for pandemic-related protocols or actions in the face of governmental scrutiny is a key step in limiting liability. That is, "We took this action on this date based on this guidance."

Ensure compliance with filing requirements

In most situations, workers' compensation acts as an exclusive remedy for workplace injuries regardless of fault. If an employee is injured in the course or scope of work, whether due to his or her own fault or the negligence of the employer, the employee is allowed to seek only workers' compensation benefits and may not file a lawsuit against the employer. Exposure to COVID-19 or contraction of it in the workplace is no exception.

It's key to remember that employees who invoke the workers' compensation process are protected from discrimina-

tion for seeking benefits regardless of the claim's merit. While employers and employees often have different opinions on whether a claim should be considered compensable, in most instances, that determination comes down to a medical question that requires expert medical opinion.

If an employer is notified that an employee believes he or she contracted COVID-19 at work, the employer should accept notice of a potential workers' compensation claim and report the injury to its workers' compensation carrier within five days. As discrimination is defined broadly, employers should carefully consider any action that may negatively affect an employee's term of employment while the claim is active and be mindful to comply with claim processing requests from the workers' compensation insurer.

Listen to employees and document complaints

Employers may be subject to private lawsuits by employees who claim they were subject to retaliation for complaining about unsafe work environments. This can be the case regardless whether the workplace is unsafe. That is, even if the workplace is in compliance with COVID-19 safety measures, employers should be careful not to discriminate against employees who perceive a failure to comply with health and safety standards.

This has been a sticking point for OSHA, which has consistently underlined throughout the pandemic that retaliation against employees who re-

port COVID-19-related unsafe working conditions is prohibited.

The best approach to mitigating OSHA whistleblower claims is to keep an open dialogue with employees regarding any employee-initiated health and safety concerns and the actions the employer has taken to address those concerns. It is important to document all conversations with employees regarding workplace safety issues. If a whistleblower claim is brought, the employer will be in a good position if it is able to show that an employee's safety concerns were addressed appropriately and other, non safety related issues reasonably explain any employment affecting the employee.

In many ways, COVID-19 presents a minefield of legal issues for employers. To the extent that employers can point to specific government guidance to support COVID-19-related employment actions, potential liability can be greatly reduced. To ensure compliance with ever-changing pandemic guidance, employers should include legal review of plans and procedures to ensure they are spotting potential liability issues before they arise.

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