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COVID-19:
New Employer Challenges

Mark A. Lies II
Adam R. Young
233 South Wacker Drive, Suite 8000
Chicago, Illinois  60606
(312) 460-5000
Mark’s practice focuses on Occupational Safety and Health Law and related employment law and personal injury litigation. He graduated from the University of Notre Dame in 1968 and DePaul University School of Law in 1974. He was a Commissioned Officer in the U.S. Navy and is a Vietnam Veteran.
Adam’s practice focuses on workplace safety law, COVID-19 pandemic counseling, the defense of OSHA and state agency inspections, and OSHA litigation.

Adam is an accomplished trial lawyer on labor and employment matters. He has successfully represented clients at trials before the Occupational Safety and Health Review Commission and numerous federal and state courts.
Identify potential legal liabilities
• Potential use of “General Duty” clause for a “recognized hazard” to employee safety and health
• Reliance upon CDC, NIOSH as authority
• Potential liability for citations and monetary penalties
• OSHA has issued guidance recommending
  – screening of employees (fever, coughing difficult breathing)
  – use of facemasks or face coverings (masks, bandanas, scarves, handkerchiefs)
  – social distancing, six feet or more where feasible
• OSHA Whistleblower
  – OSHA whistleblower protection, Section 11(c)
  – Employees not required to work if imminent danger
• OSHA recordkeeping guidance
  – Reporting of COVID-19 diagnosis
  – Recording of COVID-19 infection
• Multi-employer worksite
  – Potential liability for controlling employers
• Conduct “hazard assessment” for potential exposures (e.g., occupational activities involving potential exposures – e.g., travel, healthcare transportation)

• Develop an action plan:
  – hazard identification
  – hazard prevention procedures
  – employee training
  – medical monitoring surveillance
  – recordkeeping (OSHA 300 Log, etc.)
Social Distancing Protocols
Considerations for Reconfiguring Workspaces
– Ability to maintain at least six foot distance
– Workstation paths (e.g., one-way aisles and floor markers to facilitate social distancing)
– Redesign of production lines (e.g. to increase space between employees)
– Use of physical barriers (e.g., plexiglass, etc.)
– Repurposing conference rooms, lunch rooms, and other communal spaces to allow for more distance
– Limiting in-person meetings
– Posters, training
Social Distancing Protocols

Considerations for Reconfiguring Schedules

– Reconfigure work schedules and/or shifts to limit the number of employees physically present in a specific office, facility, plant, or other work location at any one time

– Staggering of meal periods and rest breaks to the extent consistent with applicable law; consider requiring employees to eat at their work stations

– Implementation of full-time and/or part-time work-from-home arrangements for positions where it is feasible for employees to work from home, either full-time or a number of days each week
Prevention tips for your workforce

• Practice good hygiene (cover coughs, avoid close contact with those who are sick, avoid touching your eyes, nose, and mouth, wash hands with soap and water). Wash hands with soap and water or sanitizer (60%+ alcohol).

• Frequently clean and disinfect surfaces with household cleaning spray or wipe

• Facemasks
  – CDC recommends that all people wear a facemask or face covering
  – Facemasks or face coverings required in Illinois by Executive Order (with medical exceptions)
  – Facemasks or face coverings cannot create safety or health hazard (visibility, cleanliness, disposal)

• Respirators
  – N95, P100
  – Determine whether voluntary (Appendix D) or mandatory (require medical evaluation, respiratory protection program)
Other Health and Safety Protocols

• Cleaning Considerations
  – Perform deep workplace cleaning prior to reopening
  – Consider implementation of more frequent or robust routine cleaning
  – Develop protocol around cleaning work stations
  – Coordinate with landlords and building management
    ▪ Adequate cleaning of common areas
    ▪ Social distancing protocols in common areas
    ▪ Notification protocols in event of COVID-19 positive test in building
  – Consider temporarily removing shared items (e.g., staplers, three-hole punchers, and other office supplies; coffee mugs; etc.)
  – Develop a protocol for shared tools and other items (e.g., leave it for the other employee to pick up rather than handing it off in person, cleaning tools before each use, etc.)
Other Health and Safety Protocols

• Cleaning Considerations Continued
  – Develop a protocol for locker areas; ask employees to leave items at home or in cars to the extent possible. Consider whether uniforms and PPEs can put on/off at home or in the car (note: potential wage hour issues)
  – Stock the workplace with hand sanitizer, facial tissue, and sufficient cleaning supplies
  – Reminders about proper hygiene, handwashing, coughing and sneezing etiquette
  – Ensure adequate ventilation
  – Consider increased cleaning of high traffic areas, common areas, office equipment (e.g., copiers, keyboards, printers, etc.) and periodic deep cleaning of office, facility, plant, and/or other work locations by a professional cleaning service
Other Health and Safety Protocols

• Other Safety Considerations
  – Provide safety training and communications
  – Consider temporarily switching to disposable items where possible (kitchen ware, desk blotters, etc.)
  – Limit unnecessary mail
    ▪ Consider prohibiting employees from receiving personal mail at the workplace
  – Consider temporarily closing any cafeteria or, instead, selling only pre-packaged foods
  – Consider temporarily stopping any fresh meal delivery (or avoid shared food items, shared utensils)
Rules for Visitors and Other Workers in the Workplace

• Determine how and in what respects the above Return to Work Plan will apply to temporary workers, staffing agency workers, independent contractors, vendors, clients, customers, delivery workers, visitors, and others when they are in the workplace
  – Consider joint employer issues
  – Consider independent contractor classification issues
  – Work with staffing agencies on protocols

• Consider limiting visitors to the workplace

• Require any visitors to complete a questionnaire before entering an office, facility, or other work location
Develop Plan to Quickly Respond to any COVID-19 Diagnosis, Symptom Reports, or Exposure

• Make sure employees know to notify the company of COVID-19 diagnosis, symptoms, exposure (and how)
• Develop a protocol in the event of a report of confirmed or possible COVID-19
  – Send home if symptoms or positive test result
  – CDC guidance currently permits essential workers with potential exposure to remain in the workplace if certain steps are taken
• Identity a point person or task force to oversee the response
Positive or Suspected COVID-19 Cases

- Notifications
- Contact Tracing
- Informing exposed employees
- Informing vendors, customers, clients
- Disinfection / Santizing
“Anyone can have mild to severe symptoms.

• People with COVID-19 have had a wide range of symptoms reported – ranging from mild symptoms to severe illness. Symptoms may appear **2-14 days after exposure to the virus.** People with these symptoms may have COVID-19:
  
  • Fever or chills
  • Cough
  • Shortness of breath or difficulty breathing
  • Fatigue
  • Muscle or body aches
  • Diarrhea
  • Headache
  • New Loss of Taste or Smell
  • Congestion or Runny Nose
  • Nausea or Vomiting
  • Sore Throat

• This list does not include all possible symptoms. CDC will continue to update this list as we learn more about COVID-19.”
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CDC Return to Work Criteria – Symptomatic Employees

• 1). Symptom-based strategy
  • Persons with COVID-19 who have symptoms and were directed to care for themselves at home may discontinue isolation under the following conditions:
    • At least 10 days have passed since symptoms first appeared and
    • At least 24 hours have passed since last fever without the use of fever-reducing medications and
    • Symptoms (e.g., cough, shortness of breath) have improved

• 2). Test-based strategy Previous recommendations for a test-based strategy remain applicable; however, a test-based strategy is contingent on the availability of ample testing supplies and laboratory capacity as well as convenient access to testing.
  • Persons who have COVID-19 who have symptoms and were directed to care for themselves at home may discontinue isolation under the following conditions:
    • Resolution of fever without the use of fever-reducing medications and
    • Improvement in symptoms (e.g., cough, shortness of breath), and
    • Negative results of an FDA Emergency Use Authorized COVID-19 molecular assay for detection of SARS-CoV-2 RNA from at least two consecutive respiratory specimens collected ≥24 hours apart (total of two negative specimens)*. See Interim Guidelines for Collecting, Handling, and Testing Clinical Specimens from Persons for Coronavirus Disease 2019 (COVID-19). Of note, there have been reports of prolonged detection of RNA without direct correlation to viral culture.
Return to Work – Positive Test, But Asymptomatic Employees

• 1). Time-based strategy
  • Persons with laboratory-confirmed COVID-19 who have not had any symptoms and were directed to care for themselves at home may discontinue isolation under the following conditions:
  • At least 10 days have passed since the date of their first positive COVID-19 diagnostic test assuming they have not subsequently developed symptoms since their positive test. If they develop symptoms, then the symptom-based or test-based strategy should be used. Note, because symptoms cannot be used to gauge where these individuals are in the course of their illness, it is possible that the duration of viral shedding could be longer or shorter than 10 days after their first positive test.

• 2). Test-based strategy  A test-based strategy is contingent on the availability of ample testing supplies and laboratory capacity as well as convenient access to testing.
  • Persons with laboratory-confirmed COVID-19 who have not had any symptoms and were directed to care for themselves at home may discontinue isolation under the following conditions:
  • Negative results of an FDA Emergency Use Authorized COVID-19 molecular assay for detection of SARS-CoV-2 RNA from at least two consecutive respiratory specimens collected ≥24 hours apart (total of two negative specimens)*. See Interim Guidelines for Collecting, Handling, and Testing Clinical Specimens from Persons for Coronavirus Disease 2019 (COVID-19). Note, because of the absence of symptoms, it is not possible to gauge where these individuals are in the course of their illness. There have been reports of prolonged detection of RNA without direct correlation to viral culture.
CDC Screening Recommendations

“Screening employees is an optional strategy that employers may use. Performing screening or health checks will not be completely effective because asymptomatic individuals or individuals with mild non-specific symptoms may not realize they are infected and may pass through screening. Screening and health checks are not a replacement for other protective measures such as social distancing…

• Although there are many different symptoms that may be associated with COVID-19, you may not want to treat every employee with a single non-specific symptom (e.g., a headache) as a suspect case of COVID-19 and send them home until they meet criteria for discontinuation of isolation. Consider focusing the screening questions on “new” or “unexpected” symptoms (e.g., a chronic cough would not be a positive screen). Consider including these symptoms:
  – Fever or feeling feverish (chills, sweating)
  – New cough
  – Difficulty breathing
  – Sore throat
  – Muscle aches or body aches
  – Vomiting or diarrhea
  – New loss of taste or smell
Screening Requirements and Recommendations

State screening examples:

• CO -- requires daily temperature checks and monitor symptoms, logging all results. If not practicable, then employees may complete self-assessment at home prior to coming to worksite. Employers should refer symptomatic employees to the CDPHE Symptom Tracker.”

• IL -- employers should have a wellness screening program that screens employees for COVID-19 symptoms twice per shift. Employers should conduct in-person screening of employees upon entry into workplace to verify no presence of COVID-19 symptoms; employers should also conduct mid-shift screening to verify presence of COVID-19 symptoms (in person preferred/recommended, though virtual is permitted)

• TN -- All businesses shall screen daily all employees with symptom checks. Employees with symptoms or a temperature of 100.4 F or greater must leave premises.
Travel Isolation Requirements

• State 14-day isolation requirements
• Updated according to COVID-19 metrics; vary by state/city
• Typically include exceptions and procedures for business travel
### OSHA Recordkeeping

- Duty to record occupational injury or illness on OSHA 300 log within seven calendar days
- Partially exempt establishments (do not have to maintain OSHA Logs), retail examples:
  - 4431 Electronics and Appliance Stores
  - 4461 Health and Personal Care Stores
  - 4471 Gasoline Stations
  - 4481 Clothing Stores
  - 4482 Shoe Stores
  - 4483 Jewelry, Luggage, and Leather Goods Stores
  - 4511 Sporting Goods, Hobby, and Musical Instrument Stores
  - 4512 Book, Periodical, and Music Stores
  - 7721 Full Service Restaurants
  - 7222 Limited-Service Eating Places
OSHA Recordkeeping

• Injury/illness must result in a recording criteria
  – Death.
  – Days away from work.
  – Restricted work or transfer to another job.
  – Medical treatment beyond first aid.
  – Loss of consciousness.
  – A significant injury or illness diagnosed by a physician or other licensed health care professional.

• Injury/illness must be work-related
  – an event or exposure in the work environment either caused or contributed to the resulting condition or significantly aggravated a pre-existing injury or illness.
OSHA Reporting

• Duty to report to OSHA (by phone or online) certain injuries or illnesses that occurred as a result of a work-related incident

  – Resulted in death of the employee within 30 days of workplace exposure
  – Resulted in amputation, loss of an eye, or in-patient hospitalization for medical treatment within 24 hours of workplace exposure

• Duty applies to all employers

• Duty triggered by employer knowledge of work-relatedness and knowledge of death, in-patient hospitalization
COVID-19 and Work-Relatedness

• Difficult in determining work-relatedness of COVID-19 illness
  – Widespread community transmission

• Effect of numerous safety and health procedures that the Employer has implemented to control and minimize the risk of possible infection in the workplace

• CDC / OSHA precautions effectively reduce and control the possible risk that the COVID-19 virus will be present and/or transmitted to an employee
  – Screening, social distancing, face masks, Plexiglas / barriers, hygiene, sanitation

• CDC recommendations for Community Related Exposure
  – “Close contact” defined as < 6 feet, 15 minutes or more of exposure
  – Facemask or barrier prevents “close contact”
COVID-19 and Work-Relatedness

• Transmission not immediately apparent
  – Symptoms may appear 2-14 days after exposure to the virus.

• Early data from New York
  – 75% of COVID-19 case are not essential workers
  – Probability of COVID-19 transmission from a single “close contact” estimated at 10%

• “Alternative explanation” of household, community source or any COVID-19 case

• Duty to make a reasonable a good-faith inquiry into work-relatedness

• Recording duty only attaches if medical professional confirms COVID-19 diagnosis (typically with testing results)
COVID-19 and Work-Relatedness

• Did employee have “close contact” at work?
  – If didn’t have close contact, not recordable
  – if no suspected/diagnosed COVID-19 case, not recordable

• Do you know from whom you acquired COVID-19?
  – If know that acquired from outside of work, not recordable

• If had “close contact” with known/suspected COVID-19 case at work, limited inquiry into out-of-work activities (Y/N)
  – Close contact outside of work
  – Gatherings
  – Public accommodations
  – Personal service
Legality of Mandatory Virology Testing

EEOC permits testing of employees, applicants

- A.6. May an employer administer a COVID-19 test (a test to detect the presence of the COVID-19 virus) before permitting employees to enter the workplace? (4/23/20)

- The ADA requires that any mandatory medical test of employees be “job related and consistent with business necessity.” Applying this standard to the current circumstances of the COVID-19 pandemic, employers may take steps to determine if employees entering the workplace have COVID-19 because an individual with the virus will pose a direct threat to the health of others. Therefore an employer may choose to administer COVID-19 testing to employees before they enter the workplace to determine if they have the virus.
Legality of Mandatory Antibody Testing

• Note that virology testing is lawful as to “employees entering the workplace have COVID-19 because an individual with the virus will pose a direct threat to the health of others.

• Antibody tests do not show whether the individual has the virus or poses a direct threat

• CDC’s guidance provides that “Antibody test results should not be used to determine if someone can return to work.”
Accommodations for employees who object to testing?

1. Objections on basis of claimed disability
   – direct threat
   – interactive process
   – reasonable accommodations?

2. Objections on basis of religion
   – Undue hardship to employer
   – reasonable accommodations?
Testing Records

- Where to store COVID-19 testing data
  - ADA requires separate medical file, not the employee’s personnel file
- Record retention rules
  - Medical records must be kept 30 years per DOL regulations
Responding to OSHA Communications

- Rapid Response Investigation (RRI)
- Employee Complaint Letters
- Avoiding Admissions of Civil or Criminal Liability (waiver of Fifth Amendment rights) in Responses
General Recommendations

• Be Truthful
• Keep Responses Simple and Short
• Answer the Question Asked
• Avoid Speculation
• Seek Advice from Experienced OSHA Counsel
RE: OSHA Activity No.

Dear

This letter is to follow up the conversation we had on UNKNOWN in reference to the employee injury that occurred on May 08, 2017 at your worksite. As we discussed, there are some important steps you should be taking to ensure the safety of your workers and avoid the need for an OSHA inspection. In most cases, a serious injury indicates the presence of workplace hazards that threaten the health and safety of other workers. OSHA is very concerned that additional employees at your worksite are at risk of being injured. As we discussed, it is in everyone's interest that you conduct a thorough investigation to determine the reasons for the work related incident, to identify hazards related to the incident and to implement corrective actions.

Please complete each of the following by May 16, 2017:

• Conduct an incident investigation. (See Non-Mandatory Investigative Tool — Attachment A)

• Provide OSHA with written, signed documentation of findings from the investigation

• Provide OSHA with written, signed abatement certification documenting action taken to correct hazards related to the incident.

• Document findings and send corrective actions to (225) 298-5457 or oshabatonrougedol.gov

• Post a copy of this letter in a conspicuous place where all affected employees will have notice or near the location where the incident occurred.

• Fax or email a copy of the signed Certificate of Posting (Attachment B) to (225) 298-5457 or oshabatonrougedol.gov
If you have a problem meeting this deadline or have any further questions, please call me.

If we do not receive the investigation results, abatement verification and certificate of posting by May 16, 2017, your worksite may be considered for an on-site inspection.

The goal of your incident investigation will be to identify both the immediate and the underlying causes of the incident. To assist you in conducting an investigation, I have attached a guide for your use, to ensure your employees are protected from future injuries. Additional resources are available at OSHA's Safety and Health Topics website at https://www.osha.gov/dosp/products/topics/incidentinvestigation/index.html to assist you with conducting an Incident Investigation.

After correcting any immediate hazards, small and medium-sized businesses may be interested in requesting free, confidential assistance from the On-Site Consultation Program. Consultants from a state agency or university will work with you to identify workplace hazards, provide advice on compliance with OSHA standards, and assist you in establishing a safety and health management program. These services are separate from enforcement and do not result in penalties or citations. To find out more information about OSHA's On-Site Consultation Program, please visit the programs website at https://www.osha.gov/desp/smallbusiness/consult.html or call [State Consultation Office Contact Information] to reach your local On-Site Consultation office. Also, please find a copy of the OSHA pamphlet, "FREE Safety and Health Consultation Services" for your use in English or Spanish.

Please note that it is against the law for employers to retaliate or discriminate in any way against an employee for raising safety and health issues or for exercising their rights under the OSHA law. This includes the right to report a work-related injury or illness to their employer, or to contact OSHA. More information about the Whistleblower Protection Program can be found at http://www.whistleblowers.gov/.

If you have any questions, please call me at (225) 298-5458 or email me at oshabatonrouge@dol.gov. Your support and interest in the safety and health of your employees is appreciated.

Sincerely

Dorinda Folse
Area Director

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Inspection Management

• Increased enforcement and penalties make inspection management more critical than ever.

• The most effective defenses are developed Before and During an OSHA inspection, not after the inspection
  – Why?

• Inspection Plan – Basic Blocking Tackling
  1) Point person and backup/weekend person (Murphy’s Law is that accidents will happen during the night shift and on weekends).
  2) Relevant written OSHA policies and logs should be readily available.
     ✓ Keep copy in easily accessible binder
        - Update annually or as otherwise required
Inspection Management

• When OSHA Arrives:
  – Politely receive the compliance officer.
  – Show compliance officer to conference room/empty office.
  – Inspection Focus
    ▪ Determine why OSHA is inspecting
    ▪ Types of inspections:
      1) Fatality/catastrophe
      2) Employee complaint
      3) Programmed
         - Local National emphasis program
         - Wall to wall inspection
Inspection Management

• When OSHA Arrives:
  – Immediately notify the point person.
  – Point person takes control of the inspection is responsible for all communications with Compliance Officer and shadows Compliance Officer throughout inspection.
  – First impression is important.

• Two Keys to Successful Inspection Management
  1) Focus
  2) Control
Inspection Management

OSHA rights during inspection

• To access worksite if have underlying legal basis
• Right to request documents that Employer required to maintain
• Right to conduct walkthrough inspection, area should be limited to hazard that is basis for inspection
• Right to conduct employee interviews but employee can decline and employee not required to provide reason’
• No right to require employee to sign statement, tape record interview or photograph employee without employee consent
Inspection Management

• The Reason OSHA is Inspecting Drives the Scope of the Inspection
• Once You Determine the Scope, Control Inspection by Limiting it to Only Those Items Within the Scope

Example: Employee is injured by a forklift and Employer is required to report injury to OSHA. OSHA has a legal basis to conduct an on-site inspection but it should be limited to the area where the accident occurred and the hazards associated with the operation and maintenance of the forklift.
**Inspection Management**

- **Plain View Doctrine**
  - Compliance officer can issue citations for any violations in “plain view.”
  - If Compliance Officer doesn’t see it he/she can’t cite you for it.

- **Admissions**
  - Based on statements from managers, supervisors, foreman and leadmen that they were aware of hazard
  - Never admit to a violation ("I’ll check into that").
  - Never admit you don’t have something ("let me get back to you on that").
Inspection Management

• Immediately Correct Unsafe Conditions Identified by The Compliance Officer Without Admitting That The Condition Constitutes a Violation
  – May avoid the citation
  – May lessen the classification or penalty of a citation
  – OSHA must give employer credit for a “quick fix” of a potential hazard

• Employee Interviews
  – Non-Management Interviews
    ▪ Explain employee rights
    ▪ Conduct your own investigation
Inspection Management

– Management Interview
  ▪ Right To Counsel
  ▪ Binding Admissions
– Avoid the “casual” interview
– Remember: Everything is on the record. Do not engage in idle conversation concerning safety issues.

• Document Control Is Important
– No Such Thing As A “Safety Program”
  ▪ Ask Compliance Officer which specific program he/she is looking for.
– Only Provide OSHA with Documents That Are Within The Scope Of The Inspection.
– General Rule Of Thumb: Less Is More
Any Questions?
thank you

Mark A. Lies, II
email: mlies@seyfarth.com
phone: (312) 460-5877

Adam R. Young
email: ayoung@seyfarth.com
phone: (312) 460-5538