ADA, Worker's Comp, General Liability, and OSHA – Key Operational Issues to Consider in Operating or Reopening Your Business

The COVID-19 pandemic poses significant issues for operating any business, chiefly employee and customer safety. All businesses should be assessing their logistics to ensure that people interact as safely as possible. At a minimum, most businesses can adapt to current social distancing rules and require customers to wear masks and stay six feet apart (as is the current public health order in many places, including LA County.) But what if your business cannot do so? What if your business is on the frontline of the health care response? What happens when the lockdowns end and non-essential businesses reopen?

Compliance is a hazardous pathway in good times, but in these times it has become ultra-difficult. Surely, addressing local public health orders takes precedence, but there are additional compliance challenges, especially when public health orders are relaxed, under the various Occupational Safety and Health Administration (OSHA) and related regulations requiring safe workplaces and consumer interactions. This communication tries to outline the major issues to monitor as we move through the next six months.

OSHA

Are there 'special' OSHA regulations related to Covid-19? The short answer is yes, if there is an identified risk and related mitigation step that you can take to ensure worker safety, OSHA regulations require that you should take that step. OSHA has existing requirements that most frontline healthcare companies are well familiar with (blood born pathogen plans, hazardous materials plans, and the like). OSHA has gone further and has issued specific guidance for Covid-19 risks and mitigations. This guidance is available at:

https://www.osha.gov/Publications/OSHA3990.pdf ("OSHA Guidance")

In summary, OSHA acknowledges that this publication is only 'guidance,' but cites its General Duty clause to encourage employers to follow the OSHA Guidance:

The General Duty Clause, Section 5(a)(1) of the Occupational Safety and Health (OSH) Act of 1970, 29 USC 654(a)(1), which requires employers to furnish to each worker "employment and a place of employment, which are free from recognized hazards that are causing or are likely to cause death or serious physical harm." See: www.osha.gov/laws-regs/oshact/completeoshact.

Even though this is merely 'guidance,' we recommend strongly that you treat this as a rule. So how do you comply? The OSHA Guidance encourages employers to make a fact and logistics-dependent assessment of their places of business to stratify the risk of Covid-19 exposure as either low, medium, or high risk areas. Then, for each level of risk, there are specific mitigations that are recommended.

We recommend that you make such a risk assessment, and document (i) your assessment, (ii) your conclusions about the stratification of risks in your operations, and (iii) the mitigation steps you have taken to meet the identified risks. Such contemporary documentation will serve as valuable evidence later should one of your workers or customers contract the virus and try to point the finger at your operations, or if regulators come in.

ADA

What if one of your employees claims they have an underlying condition or other higher-than-normal risk for

contracting the virus? Are you required to follow the American with Disabilities Act and try to accommodate the employee in some fashion? Again, depending on the circumstances, the short answer may well be “yes.”

The Equal Employment Opportunity Commission has issued Covid-specific guidance as well:

https://www.eeoc.gov/facts/pandemic_flu.html

The basics are that where an employee establishes a legitimate, higher-than-normal risk for severe illness from exposure to the virus, then the regulations would likely consider such an employee ‘disabled’ from work in the normal course. At that point, the regulations mandate the employer to engage in the process of assessing how the work can be modified to accommodate the employee to see if there is a reasonable accommodation that would allow the employee to continue the work. Again, the key recommendation here is that whenever you confront this request for an accommodation, you carefully document everything: (i) the evidence the employee presents of the potential for severe illness, (ii) the logistics of how work is accomplished in the normal course, (iii) potential accommodations to reduce the risk of exposure to the virus by the employee in the workplace, (iv) the costs and burdens placed on the employer in making the accommodation, and (v) the conclusions about the reasonableness of the accommodations.

Worker’s Compensation

Nationally, and specifically in California, there are legislative initiatives to alleviate the burden on workers in frontline virus response roles to prove workplace exposure to the virus if they contract Covid-19. For instance, these new laws would automatically qualify ER nurses for worker’s compensation benefits in the event an ER nurse contracted Covid-19.

The laws probably will not have an impact on businesses that are not providing care to Covid-19 patients, but these changes need to be monitored. Given community spread, it would be difficult for workers at other businesses to successfully qualify for worker’s compensation benefits on occasion of contracting Covid-19.

General Liability

As we are seeing from the federal response to the meat-packing facility outbreaks of Covid-19, employers of all sorts are concerned about liability in the event they take all OSHA-mandated mitigations to keep workers safe, but a Covid-19 outbreak nevertheless occurs. Employers are legitimately concerned that employees might bring lawsuits, and there is uncertainty about whether worker’s compensation insurance would respond to these claims. There are additional concerns about others at a facility who are not necessarily covered by worker’s compensation programs (consultants, temporary workers, customers) also suing over contracting the disease. It is a truly a daunting proposition for some businesses, think restaurants, as to how they would survive an outbreak that was pinpointed at their facility, given potential liabilities.

There are discussions that the federal government (and many state governments) may issue broad legislation addressing liabilities of businesses for disease allegedly contracted at their facilities. In order to encourage a return to economic activity, there is substantial justification for reducing or eliminating liabilities that might arise under traditional tort law and other regulations for disease exposure. The insurance industry is leading these efforts, and you should monitor how these liability issues are eventually addressed.

Conclusion

While the threat is new, the regulatory landscape is not. There are common sense approaches to keeping your workplace as safe as reasonably possible. We urge everyone to take the time and make the assessments and implement the mitigations that make sense for your business. The Covid-19 pandemic has simply posed a new safety threat that all employers need to assess and address, just as we have been forced to confront other safety hazards. We think that the biggest challenge is going to be addressing complacency if, as predicted, the virus substantially ebbs in the Summer months only to return with a vengeance in this Fall.

In the meantime, if you have questions specific to your business about how the regulatory landscape impacts your

operations in this time of Corona, the lawyers of Nelson Hardiman remain available to answer your questions.

For more COVID-19 related legal updates, please consider subscribing to our COVID-19 Task Force Newsletter.

For questions regarding this article, please contact:

Author: Rob Fuller, Partner
Email: rfuller@nelsonhardiman.com

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