

COVID-19 REOPENING – CDC & PENNSYLVANIA

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HOW SHOULD COMPANIES INTERPRET THE GUIDANCE?

The CDC and — as of May 26, 2020 — most states, notably Pennsylvania and New Jersey in the Northeast, have issued plans regarding the reopening of construction projects. On April 16, the White House issued a guideline titled OPENING UP AMERICA AGAIN aimed at implementation on May 1, 2020. On April 24, 2020, the Governor of Pennsylvania announced that construction projects could reopen, with certain conditions, beginning May 1, 2020. Most states have chosen to follow the CDC guidelines with minor adjustments. The state of Pennsylvania, while following CDC, has also issued specific requirements.

This paper reviews some of the key components of guidance issued by the CDC and the state of Pennsylvania and attempts to determine to what extent companies should consider the failure to follow these guidelines as exposing them to potential OSHA citations and/or liability.

THE GUIDELINES ISSUED BY CDC INCLUDE THE FOLLOWING:

Develop and implement appropriate policies in accordance with Federal, State, and local regulations and guidance, and informed by industry best practices regarding:

- Social distancing and protective equipment
- Temperature checks
- Sanitation
- Use and disinfection of common and high-traffic areas
- Business travel
- Monitor workforce for indicative symptoms. Do not allow symptomatic people to physically return to work until cleared by a medical provider
- Develop and implement policies and procedures for workforce contact tracing following employee COVID-19 positive test
- Continue to **encourage telework** whenever possible and feasible with business operations
- If possible, **return to work in phases**
- **Close common areas** where personnel are likely to congregate and interact or enforce strict social distancing protocols
- **Minimize non-essential travel** and adhere to CDC guidelines regarding isolation following travel
- Strongly **consider special accommodations** for personnel who are members of a **vulnerable population**

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CDC further stated: “These guidelines should be used in conjunction with the state and local guidelines or orders issued for your jurisdiction.”

The Pennsylvania document, GUIDANCE FOR BUSINESSES IN THE CONSTRUCTION INDUSTRY PERMITTED TO OPERATE DURING THE COVID-19 DISASTER EMERGENCY, states that: “All construction businesses authorized to conduct in-person operations in the Commonwealth *must adhere to requirements of this guidance* [emphasis added], as well as all applicable business and building safety orders issued by the Secretary of Health.”

THE PENNSYLVANIA KEY COMPONENTS FOR CONSTRUCTION EMPLOYERS INCLUDE:

- Identify a “**Pandemic Safety Officer**” for each project or worksite or, if overseeing a large-scale construction project, identify a Pandemic Safety Officer for each contractor at the site. The primary responsibility of the Pandemic Safety Officer will be to convey, implement, and enforce the social distancing and other requirements of this guidance for the protection of employees, suppliers, and other personnel at the site
- Follow all applicable provisions of the Order of the Secretary of Health providing for business safety measures, issued April 15, 2020, including but not limited to provisions requiring that every person present at a worksite wear masks/face coverings, and provisions requiring the establishment of protocols for execution upon discovery that the business has been exposed to a person who is a probable or confirmed case of COVID-19
- Follow all applicable provisions of the Order of the Secretary of Health providing for building safety measures, issued April 5, 2020
- **Follow other applicable Department of Health (DOH) and Centers for Disease Control and Prevention (CDC) guidance**
- Require social distancing (6-foot minimum distance between workers) unless the safety of the public or workers require deviation (e.g. drywalling, team lifting)
- Provide hand wash stations at appropriate locations on the site such as building entrances, break areas, food truck areas, offices, trailers, and job site egress areas
- Implement cleaning or sanitizing protocols at all construction sites and projects. Identify and regularly clean and disinfect areas that are at high risk for transmission (requirements are to clean common areas and regularly trafficked spaces periodically)
- Ensure all gatherings are limited to no more than 10 people, maintaining 6-foot social distancing, when required to meet, even when conducted outside
- Use virtual meetings and disseminate information electronically to the extent feasible
- Stagger shifts, breaks, work areas and/or stacking of trades where feasible to minimize workers on site

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- Limit tool sharing and sanitize tools if they must be shared
- **Employ jobsite screening based on CDC guidance to determine if employees should work. Prohibit any employees with any symptoms of COVID-19 from working.** Encourage sick employees to stay home
- Prohibit unnecessary visitors to any project or worksite and limit supplier deliveries
- Limit access to enclosed spaces to the extent feasible
- Ensure workers are traveling to and from the jobsite separately. Wherever possible, employees should not share a vehicle

Note the requirement to name a Pandemic Safety Officer who would be in charge of carrying out the COVID-19 safety procedures set forth in the guidance document. No roles or responsibilities were provided, however, HazTek has developed an appropriate set of specific roles and responsibilities which will meet the intent of the Pennsylvania requirements.

Prior to the Pennsylvania directive on April 24, in the directive titled ORDER OF THE SECRETARY OF THE PENNSYLVANIA DEPARTMENT OF HEALTH DIRECTING PUBLIC HEALTH SAFETY MEASURES FOR BUSINESSES PERMITTED TO MAINTAIN IN-PERSON OPERATIONS ACCORDINGLY (issued on April 15, 2020, to protect the public from the spread of COVID-19), the Pennsylvania Secretary of Health issued requirements including the following regarding temperature checking of employees:

- *Implement temperature screening before an employee enters the business, prior to the start of each shift or, for employees who do not work shifts, before the employee starts work, and send employees home that have an elevated temperature or fever of 100.4 degrees Fahrenheit or higher. Ensure employees practice social distancing while waiting to have temperatures screened*

This requirement for temperature screening is in alignment with the CDC guidelines issued on April 16 by the White House, which are referred to in the Pennsylvania order of April 15, and the guidance directive of April 24, which are cited above. Therefore, it appears there is no ambiguity with respect to the requirement for temperature screening, as well as the other elements of COVID-19 safety measures, as issued by the state of Pennsylvania.

As to whether guidance documents issued by the CDC are requirements, i.e. mandatory, there is room for some debate. It appears that the CDC issued their plans as guidance to the states, to be considered in development of their plans. However, in the absence of state plans, what is the duty of employers to implement the CDC-issued guidance?

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The CDC reopening document is not in and of itself a regulation in the usual sense. It can be inferred that it was not issued as a regulation since the process of promulgating and putting into effect a law would have required considerable debate and a lengthy process, which in the face of this crisis would not have been productive. In fact, there has been some push by members of Congress to establish emergency regulations, however, none have been successful to date.

Beyond CDC and state guidance, OSHA and the legal system may play a role in determining what obligations employers face in protecting their workers from contracting COVID-19.

OSHA'S GENERAL DUTY CLAUSE

Enforcement of worker protection standards for private industry companies falls to the Occupational Health & Safety Administration (OSHA). Without a specific legal standard on which to compel employers to take actions to protect employees who have the potential for exposure to the coronavirus, what enforcement actions can OSHA take?

There are a number of standards which could be applied as it relates to COVID-19:

- General Duty Clause (Section 5(a)(1) of OSH Act)
- 29 CFR 1910.132 (General PPE)
- 29 CFR 1910.133 (Eye/Face)
- 29 CFR 1910.134 (Respiratory Protection)
- 29 CFR 1910.138 (Hand Protection)
- 29 CFR 1910.141 (Sanitation)
- 29 CFR 1910.1020 (Medical Records Access)
- 29 CFR 1910.1030 (Bloodborne Pathogens)
- 29 CFR 1910.1200 (HazCom standard, related to use of hazardous chemicals for cleaning and disinfection, including common sanitizers and sterilizers)
- 29 CFR 1910.1904 (Recordkeeping and Injury/Illness Reporting) – includes severe injury reporting requirements with mandated \$5000+ penalty and also whistleblower protections
- Section 5(a)(1) of the Act (General Duty Clause – GDC) requires that “Each employer shall furnish to each of his employees 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 to his employees.”

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Necessary elements to prove a violation of the general duty clause include:

- The employer failed to keep the workplace free of a hazard to which employees of that employer were exposed
- The hazard was recognized
- The hazard was causing or was likely to cause death or serious physical harm
- There was a feasible and useful method to correct the hazard

A GDC citation must involve both the presence of a serious hazard and exposure of the cited employer's own employees. **A citation of the GDC can be invoked through the following:**

- Recognition of a hazard can be established on the basis of employer recognition, industry recognition, or "common-sense" recognition
- Evidence of employer recognition may consist of written or oral statements made by the employer or other management or supervisory personnel
- Employer awareness of a hazard may also be demonstrated by a review of company memorandums, safety work rules that specifically identify a hazard, operations manuals, standard operating procedures, collective bargaining agreements, prior accidents/incidents, near misses known to the employer, injury and illness reports, or workers' compensation data
- Employee complaints or grievances and safety committee reports to supervisory personnel may establish recognition of the hazard
- An employer's own corrective actions may serve as the basis for establishing employer recognition of the hazard if the employer did not adequately continue or maintain the corrective action [1]

LEGAL SYSTEM

Beyond the possibility of an OSHA citation for failure to protect employees from infection by the coronavirus, there is the possibility of civil action for negligence by failing to administer the "standard of care." Standard of care refers to the degree of attentiveness, caution, and prudence that a reasonable person in the circumstances would exercise. It is a standard used to determine a legal duty and whether such duty was fulfilled.

Failure to meet the standard is negligence, and the person who fails to meet the standard is liable for any damages caused by such negligence. In tort law, the standard of care is the only degree of prudence and caution required of an individual (in this case the employer) who is under a duty of care. Duty of care is the responsibility or legal obligation of a person or organization to avoid acts or omissions that which could be reasonably foreseen to injure or harm other people. This means that employers must anticipate risks and take care to prevent workers from coming to harm.

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Standard of care is only relevant when a duty of care has been established. The OSH Act should be sufficient to establish, legally, that the employer is under a duty of care to protect its workers. The standard of care speaks to what is reasonable in the circumstances. The standard is not subject to a precise definition and is judged on a case-by-case basis.

It has been established that an employer's obligation is to not merely provide a safe system of work but it is also an employer's obligation to "establish, maintain and enforce such a system..."[2]

The CDC even acknowledges in its plan for reopening that their guidelines were "informed by industry best practices..." Therefore, it seems reasonable that the CDC and other state guidance documents have established the standard of care for employers with which there is a duty to care (i.e. protect) employees from being infected by the coronavirus.

Sources:

[1] Construction in Crisis, A CURT Response, March 31, 2020

[2] <https://www.keypointlaw.com.au/keynotes/employers-duty-care-how-far-does-it-go/>

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Note: This document and its contents do not constitute legal advice. It is the author's interpretation of the current guidance issued by the CDC and the state of Pennsylvania, and the potential for those guidelines to be considered as a standard of care for the protection of employees. Consult an attorney for actual legal advice regarding individual cases.

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