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Legal Issues in the Wake of COVID-19

Presented by Jackson Lewis P.C.



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Legal Issues in the Wake of COVID-19

The impact of COVID-19 on Workplace Health and Safety and Transportation Rules and Regulations

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- Rules and regulations around workplace health and safety and transportation are changing weekly, sometimes more often.
- Guidance documents were issued by OSHA as recently as April 10 and April 14, 2020, concerning how employers are to handle a variety of situations related to COVID-19 and how OSHA will enforce a variety of issues related to COVID-19
- The FMCSA issued guidance and expanded the prior emergency declaration as recently as April 9, 2020.
- Almost all federal and state agencies are revisiting and revising rules and regulations on a weekly, if not more frequent basis.
- It is imperative that employers monitor the agencies that apply to their workplace and remain current with what rule, guidance and enforcement changes apply to them and their workplaces.

FMCSA Regulations

- FMCSA has relaxed a number of rules applicable to motor carriers and drivers providing direct assistance to relief efforts related to COVID-19.
- The most recent order is dated April 9, 2020, and extended Emergency Declaration 2020-002 under 40 CFR § 390.25
- This extension continues the relief from Parts 390 through 399 of the Federal Motor Carrier Safety Regulations.
- Direct assistance means transportation and other relief services provided by a motor carrier or its driver(s) incident to the immediate restoration of essential services (such as medical care) or essential supplies (such as food and fuel) related to COVID-19 outbreaks during the emergency.

FSCMA Regulations

Specifically, the items covered by essential services and essential supplies includes the following:

1. Medical supplies and equipment related to the testing, diagnosis and treatment of COVID-19;
2. Supplies and equipment necessary for community safety, sanitation, and prevention of community transmission of COVID-19 such as masks, gloves, hand sanitizer, soap and disinfectants;
3. Food, paper products and other groceries for emergency restocking of distribution centers or stores;
4. Immediate precursor raw materials -- such as paper, plastic or alcohol -- that are required and to be used for the manufacture of items in categories (1), (2), or (3);
5. Fuel;

FSCMA Regulations

Specifically, the items covered by essential services and essential supplies includes the following:

6. Liquefied gases to be used in refrigeration or cooling systems;
7. Equipment, supplies and persons necessary to establish and manage temporary housing, quarantine, and isolation facilities related to COVID-19;
8. Persons designated by Federal, State or local authorities for medical, isolation, or quarantine purposes; and
9. Persons necessary to provide other medical or emergency services, the supply of which may be affected by the COVID-19 response.

Exceptions to the relief afforded

1. Compliance with applicable speed limits and other traffic restrictions;
2. Allowing a driver to drive when the driver's ability or alertness is so impaired or so likely to become impaired as to make the driver unsafe to start or continue operation;
3. Drivers who informs a carrier that he/she needs immediate rest shall be given at least ten consecutive hours before the driver is required to return to service;
4. Reporting recordable crashes within 24 hours;
5. Drug and alcohol use and testing requirements, though there is some relief for random drug tests when availability is impacted;

Exceptions to the relief afforded

6. Motor carriers or drivers subject to an out-of-service order are not eligible for the relief granted by this declaration until they have met the applicable conditions for its rescission and the order has been rescinded by FMCSA in writing;
7. Upon termination of direct assistance to emergency relief efforts related to the COVID-19 outbreaks, the motor carrier and driver are subject to the requirements of 49 CFR Parts 390 through 399, except that a driver may return empty to the motor carrier's terminal or the driver's normal work reporting location without complying with Parts 390 through 399; and
8. When a driver is moving from emergency relief efforts to normal operations a 10-hour break is required when the total time a driver operates conducting emergency relief efforts, or a combination of emergency relief and normal operations equals 14 hours.

Workplace Health and Safety (OSHA) regulations

- There is no OSHA regulation specific to COVID-19.
- OSHA relies on the General Duty Clause (Section 5(a)(1) of the OSH Act) in most cases related to COVID-19.
- The General Duty Clause requires an employer to furnish each of its employees a workplace that is free from recognized hazards that are causing or likely to cause death or serious physical harm.
- OSHA views COVID-19 as a recognized hazard and obligates employers to protect employees from the recognized hazard.

Workplace Health and Safety (OSHA) regulations

OSHA has issued a multitude of guidance documents, enforcement directives, and medical information, much of it in conjunction with the CDC.

- The first was issued March 9, 2020.
- There have been at least 17 separate and unique items published by OSHA since that date.
- The guidance and enforcement instructions are changing rapidly and, in fact, changed both Friday and Monday.
- Some of these materials are not all that helpful and do not offer the sort of detail employers seek.
- Much of the guidance refers to CDC guidance, another agency that is routinely updating and changing its advice.

Workplace Health and Safety (OSHA) regulations

- A risk pyramid was developed to help guide employers and contains four levels, low, medium, high and very high.
- <https://www.osha.gov/Publications/OSHA3993.pdf>



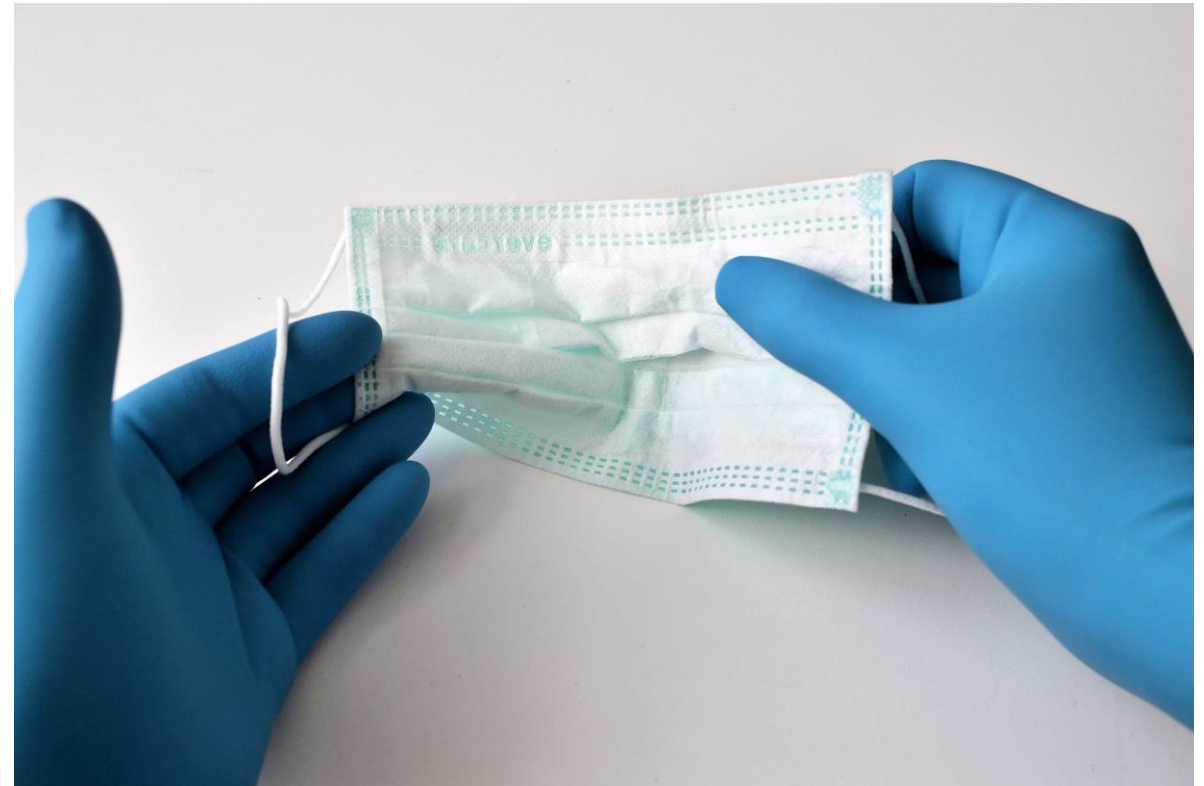
The four exposure risk levels represent probable distribution of risk.

OSHA Guidance for Employers and Workers

1. Frequent washing of hands with soap and water for at least 20 seconds.
2. When soap and running water are unavailable, use an alcohol-based hand rub with at least 60% alcohol.
3. Avoid touching your eyes, nose, or mouth.
4. Practice good respiratory etiquette, including covering coughs and sneezes.
5. Avoid close contact with people who are sick.
6. Stay home if sick.
7. Recognize personal risk factors. According to U.S. Centers for Disease Control and Prevention (CDC), certain people, including older adults and those with underlying conditions such as heart or lung disease or diabetes, are at higher risk for developing more serious complications from COVID-19.

OSHA Guidance for Employers and Workers

- OSHA requires use of gloves, eye and face protection, and respiratory protection when the job hazards warrant.
- Refer to the risk pyramid to determine if warranted.



OSHA Guidance for Employers and Workers

Generally speaking, OSHA recommends engineering and administrative controls as being more effective than PPE.

- High efficiency air filters;
- Increased ventilation;
- Physical barriers (sneeze guards);
- Drive-through windows;
- Encouraging sick workers stay home;
- Minimizing contact between workers, clients, and customers; and
- Shift splitting or alternating to allow employees to maintain distance.

OSHA Guidance for Employers and Workers

- If PPE is to be utilized, particularly if it is to be mandated, you must train your employees how to use it, maintain it, and inspect that equipment.
- PPE programs may trigger additional programs, such as a respiratory protection program.
- For the vast majority of employers, respiratory protection beyond a cloth mask is not required.

OSHA Guidance for Employers and Workers

- OSHA has issued a number of documents focusing on the issue of N95 respirators and steps employers can take to maximize the supply, including using them only when needed, reusing them, and allowing use of respirators that do not meet the US standards.
- OSHA was, until April 10, 2020, requiring employers document on their 300 logs cases of work-related COVID-19 that met normal recordkeeping criteria (illness that required more than first aid, caused days away from work, etc.).
- On April 10, 2020, OSHA issued revised instruction recognizing the difficulty in ascertaining whether a case is work-related or not exempted employers (other than healthcare, emergency response, and correctional institutions) from recordkeeping requirements unless there is objective evidence a case is work-related and the evidence is readily available to the employer.

OSHA Guidance for Employers and Workers

- OSHA sent a reminder memo that retaliating against employees who express concern about the safety of their workplace is prohibited by Section 11(c) of the OSH Act.
- There have been thousands of complaints filed with various state and federal OSHA offices since March 1, 2020, related to COVID-19.
- There will be tens of thousands of complaints filed before the pandemic is over, many of which relate to social distancing practices, PPE, and sanitation.

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Thank **you.**