

Blog Post

Employers: Duty to Provide Safe Workplace Extends Beyond Four Walls

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Consider this in the era of COVID-19: how does an employer comply with its duty to provide employees a safe workplace when the workplace is not one controlled by the employer?

We have [blogged before](#) about the need to have a COVID-19 Safety Plan in place in order to both minimize the spread of the virus and potential liability. Dozens of whistleblower actions have been filed by employees complaining workplace safety procedures are inadequate. These whistleblower actions cover more than just the employer's premises; they also cover the premises of clients and vendors when an employee is sent there to perform work.

Under the Occupational Safety and Health Act (OSHA), employers have a legal obligation to ensure that their employees work under safe conditions free from hazards. The obligation to provide a safe workplace extends beyond the four walls of the employer; it extends to when an employee is meeting off-site with a client or vendor, or working off-site at a client's or vendor's facilities.

With the continued reopening of the economy, this responsibility and associated risk of liability is becoming more prevalent. OSHA reports that nearly 30,000 complaints related to COVID-19 have been filed under federal and state OSHA programs since

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Feb. 1, 2020, and multiple lawsuits have been filed under various theories. These complaints include allegations that employers are not adequately protecting their employees from the virus when the employees perform work at a client's or vendor's premises. The increased reporting has been so drastic that OSHA issued a press release "reminding employers that it is illegal to retaliate against workers because they report unsafe and unhealthy working conditions during the coronavirus."

So what can employers do? How can employers control the health and safety policies and procedures of their clients and vendors? What steps can employers take to mitigate the risk that they will be subject to liability for the conduct of others?

Fortunately, there are a number of steps employers can take to reduce their liability when an employee is sent to perform work at a client's or vendor's facilities, including:

1. Inquire as to what health screening measures the client or vendor has in place for individuals who enter its facilities;
2. Inquire into what personal protective equipment (PPE) requirements the client or vendor has implemented in its facilities;
3. Develop a protocol for the client or vendor to notify you in the event of a confirmed or suspected case of COVID-19 in the facility;
4. Obtain from the client or vendor representations and warranties that it has appropriate workers' compensation and general liability insurance and require a certificate of coverage;
5. Consider entering into an agreement with the client or vendor that clearly states that it is the client's or vendor's obligation to ensure that it is operating a safe workplace for individuals who perform work at its facilities; and
6. Consider entering into an indemnity provision, where the client or vendor will indemnify you

from liability should your employee contract COVID-19 on the client's or vendor's premises.

Of course, employers should consult legal counsel in connection with drafting representations, warranties, contracts, or indemnification provisions.

In addition, regardless of how an employer handles health and safety concerns with its clients or vendors, the employer should have an effective and open line of communication with its employees regarding the safety measures implemented for their protection. Employers should consider implementing a reporting procedure for the employee to report to the employer any unsafe work condition (s)he may experience while meeting with a client or vendor or performing work at the client's or vendor's premises.

Finally, employers can potentially further mitigate potential liability by:

1. Screening employee assignments to determine whether the work is urgent or an emergency or if it can be performed remotely, before requiring an employee to work at a client's or vendor's site;
2. Provide employees with information regarding COVID-19, how it spreads, and the risk of exposure;
3. Provide employees with training on social distancing and proper hygiene etiquette;
4. Provide employees with access to tissues, hand sanitizer, and disinfectants (e.g., wipes) so that employees can wipe down any frequently touched surfaces at the client's or vendor's premises; and
5. Provide employees with cloth face coverings and other PPE.

These measures may also help reduce potential exposure where local laws have recently been enacted expanding employers' responsibility to

provide safe work environments in light of the virus. Just last month, Virginia became the first state in the nation to implement workplace safety and health standards for COVID-19. (OSHA has made recommendations but has not issued mandatory standards.) The Virginia law closely tracks OSHA guidance, requiring employers to assess workplaces and jobs for the risk of exposure to COVID-19; create policies and procedures for dealing with employees who have symptoms or test positive; establish physical distancing and cleaning protocols, and in many instances, implement an infectious disease preparedness and response plan. For our tips on preparing such a plan, see our [prior blog](#).

Some municipalities also have implemented safety laws. For example, in Philadelphia, recently enacted Bill No. 200328 requires employers to “comply with all aspects of public health orders addressing safe workplace practices to mitigate risks” related to COVID-19. Pursuant to this bill, employers are prohibited from taking any adverse action against an employee who refuses to work in conditions that do not comply with specified safety guidelines. The bill provides for a private right of action, and potential damages including reinstatement, back pay, compensatory damages, and liquidated damages “of \$100 to \$1000 on behalf of the City for each day in which a violation occurs.”

Similarly, in Chicago, Bill SO2020-2343, among other things: (i) prevents employers from retaliating against employees for complying with public health orders relating to COVID-19 or for following COVID-19-related quarantine instructions from a treating health care provider; (ii) provides for a private right of action; and (iii) provides damages, inclusive of liquidated damages “equal to three times the full amount of wages that would have been owed had the retaliatory action not taken place.”

Just as with OSHA, these bills extend an employer’s obligations to places where it sends its employees to perform work. Thus, it is crucial that employers are

aware of their responsibilities regarding off-site work, and seek legal counsel to determine what steps are appropriate for it to take to reduce off-site liability.

This information is intended to inform firm clients and friends about legal developments, including recent decisions of various courts and administrative bodies. Nothing in this Practice Update should be construed as legal advice or a legal opinion, and readers should not act upon the information contained in this Practice Update without seeking the advice of legal counsel. Prior results do not guarantee a similar outcome.