

2-4-21 - A Minute About COVID-19 and Safety January 29th Guidance Document

As I am sure we all suspected, the new administration has taken an accelerated and aggressive approach with regards to safety in the workplace. On January 21, 2021 President Biden issued an “Executive Order on Protecting Worker Health and Safety.” In this Executive Order, the President stated that it is the policy of his administration to ensure the health and safety of workers as a national priority and a moral imperative. He further stated that the federal government must move quickly to reduce the risk that workers may contract COVID – 19 in the workplace. In Section 2 of the Executive Order, he stated that the Assistant Secretary of Labor shall issue, within 2 weeks of the date of the Executive Order, revised guidance to employers on workplace safety during the COVID – 19 pandemic. He also required that the Assistant Secretary of Labor consider whether any emergency temporary standards on COVID – 19 are necessary, and if it is determined that such standards are necessary, they shall be issued by March 15, 2021.

The guidance document referred to in the Executive Order was issued on January 29th and is 13 pages long and goes into quite a bit of detail. I will not go into the detail covered by the guidance document but just touch upon some of the high points. This guidance document can be found on the OSHA website at www.osha.gov under Coronavirus resources. OSHA states that employers should implement COVID – 19 prevention programs. Your program should be developed by: (1) conducting a hazard assessment; (2) identifying a combination of measures that limit the spread of COVID – 19 in the workplace; (3) adopting measures to ensure that workers who are infected or potentially infected are separated and sent home from the workplace; and (4) implementing protections from retaliation for workers who raise COVID – 19 related concerns.

While OSHA uses the word “should,” employers who are concerned for the well-being of their employees and who wish to avoid an OSHA General Duty Clause citation need to adopt a COVID – 19 Prevention Program. As I have stated before, the current pandemic is a textbook example of Congress’s intention when it drafted Section 5(a)(1) of the Occupational Safety and Health Act of 1970. I make this comment for 2 reasons. First, unlike some areas in which OSHA has been successfully challenged for applying the General Duty Clause, such as with heat illness prevention, the COVID-19 “recognized hazard” has existed for less than one year. So, the defense available to employers to a General Duty Clause citation that the General Duty Clause may not be used by OSHA as a substitute for specific rulemaking very likely will not apply to the pandemic. OSHA has issued this guidance document and may well, with the urging of President Biden, issue an Emergency Temporary Standard within the next six weeks. The second reason for my statement is that OSHA has communicated its finding that the pandemic is a “recognized hazard” which is “causing or likely to cause death or serious physical harm to employees” which are the elements necessary to invoke General Duty Clause. Again, whether you agree with the “science” that the pandemic meets this definition, I submit that none of you want to be in a position of having to defend yourself from a General Duty Clause citation because you do not have a pandemic prevention plan for your workforce.

Presuming that you have developed the required pandemic protection program, I want to direct your attention to the OSHA website and the coronavirus resources available thereon. The guidance document identifies 15 steps for employers to take to respond to COVID – 19. Review those 15 elements and identify those that apply to your business and your employees and, if you have not done so already, develop your COVID – 19 prevention program and be sure you include those elements that apply to your company. But, please remember that developing the program is only 50% of what you need to accomplish. After you have the program, you need to communicate it to all your employees, remind them that you will be enforcing all the components of your program, and then you MUST enforce it. And you need to ensure that ALL your employees are abiding by the requirements of your program.

Let us take a look at those 15 elements, which can be found under the subheading “The Roles of Employers and Workers in Responding to COVID – 19.” The initial step identified by OSHA is that “the most effective COVID – 19 prevention programs engage workers and their representatives in the program’s development and implementation of every step, and include the following elements:” The following is an outline of the fifteen elements:

1. Assign a workplace coordinator to be responsible for COVID – 19 issues on your behalf. I feel that this could be your corporate safety director, if he/she has been sufficiently trained on COVID – 19 issues.

2. Perform a thorough hazard assessment to identify potential workplace hazards related to COVID – 19.

3. Identify the measures that are going to be necessary for you to limit the spread of COVID – 19 following the established OSHA hierarchy of controls. This would entail: (1) eliminating the hazard; (2) employing engineering controls; (3) establishing workplace administrative policies; (4) employing PPE; and (5) prioritizing and controlling of the most to least effective ways to protect workers. OSHA expands on these procedures which I feel repeat many of the actions we have seen before. They are:

- A. Eliminate the hazard by separating and sending home infected or potentially infected people.
- B. Implement physical distancing in all communal work areas.
- C. Install barriers where physical distancing cannot be maintained.
- D. Use face coverings.
- E. Improved ventilation.
- F. Use applicable PPE to protect workers from exposure.
- G. Provide supplies necessary for good hygiene practices.
- H. Perform routine cleaning and disinfection.

The remaining actions stated in the guidance document include the following:

4. Consider protections for workers at higher risk for severe illness through supportive policies and practices.

5. Establish a system for communicating effectively with workers and in the language they understand.

6. Educate and train workers on your COVID – 19 policies and procedures again in the language they understand.

7. Instruct workers who are infected or potentially infected to stay at home and isolate or quarantine.

8. Minimize the negative impact of quarantine on isolated workers.

9. Isolate workers who show symptoms at work.

10. Perform an enhanced cleaning and disinfection after people with suspected or confirmed COVID – 19 have been in the facility.

11. Provide guidance on screening and testing.

12. Record reported COVID – 19 infections and deaths. This must be done under the recordkeeping procedures found in 29 CFR 1904.

13. Implement protections from retaliation and set up an anonymous process for workers to voice concerns about COVID – 19 related hazards.

14. Make a COVID – 19 vaccine or vaccination series available at no cost to all eligible employees.

15. Do not distinguish between workers who are vaccinated and those who are not.

This article does not permit me to go into the details necessary to supplement each of the points listed above. I urge you to go to the OSHA website and review the entire guidance document and determine which of the preceding 15 steps are necessary for your employees, whether they work at your office, construction work locations or manufacturing facilities. Based on my experience dealing with OSHA, if you are inspected, you will be judged on the effectiveness of your program in protecting your employees from COVID – 19 exposure. Remember, this document, including everything I have listed above and the supporting detail, has been posted on the OSHA website and therefore is available for review by your employees and their designated representatives. The message here is that you may well be measured by your employees by how you have addressed each of these 15 points at your company. If they feel that your compliance with this “guidance document” is “lacking,” they may well file an employee complaint with OSHA against your company. Which brings me to my last paragraph.

I have found that while many contractors have established pandemic prevention programs, not many contractors are making sufficient efforts to ensure that all aspects of their programs are being effectively implemented in their branch locations and/or on ALL jobsites. The same is true for manufacturers and distributors that operate from several locations. OSHA continues to receive employee complaints with regards to their employer's failure to have an effective pandemic prevention program. Such complaints may not be universal as to the company, but rather may be focused only on an individual location. Frequent complaints have been tied into the employer's failure to enforce the proper use of face coverings, maintaining social distancing, and the availability of handwashing and or sanitizing stations on individual jobsites. Now that the January 29, 2021 OSHA guidance document has been issued, your performance may be scrutinized by your employees for many of the additional elements stated in the guidance document. You need to ensure that all portions of your program are being effectively implemented at every job location. Whether you do this by in person audits or implementation reports from your various locations, be sure you keep a written record at your corporate headquarters that demonstrates the effectiveness of your pandemic protection program and your enforcement of it. Typically, employee complaints to OSHA in these situations result in either an informal complaint letter from the local area office of OSHA or a rapid response investigation. In both cases response time is usually limited to 5 business days. Do not forget that your response to OSHA will be passed by the complainant, and if he/she challenges any of the assertions you made in your response, you will most likely receive either a follow-up inquiry from the OSHA area office or a formal OSHA inspection.

The preceding comments may just be the "tip of the proverbial iceberg." Remember, President Biden's Executive Order is titled "Executive Order on Protecting Worker Health and Safety." While the Executive Order focuses much of its direction to protecting employees from COVID – 19, I believe we can expect to see an increase in OSHA's enforcement activities as well as the proposal of new standards and the issuance of final rules concerning those issues currently in a formal rulemaking process. We will attempt to keep you up to date on these matters as they develop as well as any new developments concerning COVID – 19 and OSHA.