OSHA Investigations and Employer Responses to the Pandemic

By Kathleen Davidson and Brooke Moschetto


Davidson


Moschetto

Imagine, you receive a call from a panicked client. The Occupational Safety and Health Administration ("OSHA") was performing a routine inspection and requested a copy of the non-healthcare employer's "COVID-19 Program." Would you know what that means for your non-healthcare employer clients? In such a situation, OSHA seeks the non-healthcare employer's policies and procedures for protecting workers from COVID-19. Healthcare employers are required to have a written plan for their pandemic response if they are covered by the OSHA COVID-19 Healthcare ETS issued in June 2021 ("Healthcare ETS"). However, employers not covered by the Healthcare ETS are not required by OSHA to have a written plan for their pandemic response; yet, they are still being asked to provide such documentation during an OSHA investigation.

Employers have a duty to furnish to each worker "employment and place of employment, which are free from recognized hazards that are causing or are likely to cause death or serious physical harm" pursuant to Section 5(a)(1) of the Occupational Safety and Health Act of 1970. Throughout the pandemic, this duty has included the duty to take steps to mitigate and prevent the spread of COVID-19 in the workplace. On January 29, 2021, OSHA published "Protecting Workers: Guidance on Mitigating and preventing the Spread of COVID-19 in the Workplace" ("OSHA Guidance") to help employers protect their workplace. The OSHA Guidance was updated on June 10, 2021, and a summary of the changes was added on August 13, 2021. In addition, employers have been expected to follow CDC guidance and state and local mandates. In accordance with the duty to keep workers safe from known harms, many employers prepared formal memos to employees regarding their pandemic policies. However, even those employers that did not prepare written "programs" likely did much more than they initially realize. While it is of course best practice to have any programs or policies in writing, provided that there was no OSHA requirement to have a written plan, OSHA should accept a written summary detailing what steps were taken by the employer to mitigate and prevent the spread of COVID-19 in the workplace.

Employers should retain their records regarding pandemic messaging. If they did not have a written program, it is useful to be able to show OSHA the emails or memos that went out to employees regarding worker safety. If no such documents were prepared, employers should memorialize the oral directives that were provided to employees. It is easier for employers to review and memorialize steps they previously took now, rather than in the midst of an OSHA investigation.

Most employers did some combination of the following:

- Designated a coordinator to review and advise employees on CDC guidance, public health guidance, and NH executive orders;
- Allowed remote work where possible;
- Informed employees of the Families First Corona Response Act and hung notice with their other labor posters;
- Implemented screening policies, including routine temperature checks and self-certifications that the employees were not experiencing COVID-19 symptoms;
- Required symptomatic employees to either quarantine for a period of time or to provide proof of a negative PCR test;
- Required employees that had been exposed to a positive case to quarantine and test negative before returning to work;
- Encouraged or required vaccination;
- Required masks for employees in the workplace;
- Installed plastic partitions to separate employees from each other or from the public;
- Marked the ground and moved work stations so people stayed six feet apart;
- Installed upgraded ventilation systems;
- Conducted meetings outside and created outdoor break areas when practical; and
- Implemented enhanced cleaning requirements.

Employers that relied on their legal counsel to provide updates may be able to obtain copies of such communications from counsel. Attorneys can help their employer clients prepare for such audits by giving them a heads up that they should start compiling this information and make sure it is not deleted during routine file purging. Also, attorneys can remind the client of what measures they had recommended at different points in the pandemic.

Employers should reference the OSHA Guidance to ensure they have captured all measures taken that should be memorialized, and to determine if there are additional steps that should be taken to ensure worker safety,

The OSHA Guidance contains some requirements that may not be on most employers' radars. Many employers are not aware that they are supposed to record and report to OSHA COVID-19 infections and/or deaths if the case is confirmed and work-related as defined by 29 CFR 1904.5. This regulation is the same as for other workplace illness and injuries. Notably, unlike the cold and flu, which do not have to be re-

OSHA *continued on page 36*

Overtime from page 30

tion. An employee qualifies for the administrative exemption if: (1) the employee is "compensated on a salary or fee basis at a rate of not less than $455 per week"; (2) the employee's "primary duty" is "office or non-manual work directly related to the management or general business operations of the employer or the employer's customers"; and (3) the employee's "primary duty includes the exercise of discretion and independent judgement with respect to matters of significance." 29 C.F.R. § 541.200(a). The USDOL found that the paralegals did not exercise discretion and independent judgment sufficient to qualify for the administrative exemption. Although a case-by-case analysis is required, federal courts generally find that employees who meet at least two or three of these factors are exercising discretion and independent judgement:

- Has authority to formulate, affect, interpret, or implement management policies or operating practices.
- Carries out major assignments in conducting business operations.
- Performs work that affects business operations to a substantial degree, even if the assignments are related to the operation of a particular segment of the business.
- Has authority to commit the employer in matters that have significant financial impact.
- May waive or deviate from established policies and procedures without prior approval.
- Has authority to negotiate and bind the company on significant matters.
- Provides consultation or expert advice to management.
- Is involved in planning long- or short-term business objectives.
- Investigates and resolves matters of significance on behalf of management.
- Represents the company in handling complaints, arbitrating disputes, or resolving grievances.

The USDOL considered that the ABA Code of Professional Responsibility requires that lawyers supervise work delegated to laypeople in concluding that paralegals would not have the amount of authority to exercise independent judgement on legal matters to bring them within the administrative exemption.

In most cases, paralegals will be considered non-exempt employees and must be paid minimum wage and overtime for any time worked over 40 hours in a workweek. Firms may pay paralegals on a salary basis but must still pay overtime when due. The USDOL leaves open the possibility that paralegals could be exempt under the professional exemption or as highly compensated, but those occasions will be rare, and firms should consult legal counsel before making that determination.

Beth A. Deragon is Of Counsel at the law firm of Pastori | Krans, PLLC. Beth can be reached at bderagon@pastorikrans.com.

Meredith M. Lasna is an attorney at Pastori | Krans, PLLC. She focuses on civil litigation and employment law at Pastori | Krans, PLLC in Concord, NH. She can be reached at mlasna@pastorikrans.com.

OSHA from page 31

ported, OSHA has COVID-19 categorized with tuberculosis, hepatitis and the plague, which do have to be reported if confirmed and work-related. See *OSHA Guidance* ¶ 9.

Prior to the COVID-19 pandemic, employers were required to pay for and fit-test employee respirators, including N95 masks, when employees were exposed to hazardous airborne material. If an employee chooses to wear a non-required respirator to protect against COVID-19, the employer does not have to provide or fit-test it. If an employer determines that PPE is necessary due to the high risk of exposure to COVID-19, such as in a healthcare setting, the employer then must require, provide and fit-test the *PPE. Id.* at ¶ 4.

Also, employers may not discriminate or retaliate against an employee who reports a work-related illness. In addition to notifying workers of their rights to a safe and healthful work environment, employers must ensure that workers know whom to contact with questions or concerns about workplace safety and health, and that there are prohibitions against retaliation for raising workplace safety and health concerns or engaging in other protected occupational safety and health activities. *Id.* at ¶ 10.

Ultimately, employers not covered under the Healthcare ETS are not required to have written policies and procedures related to their COVID-19 pandemic responses; nevertheless, non-healthcare employers may still be asked to produce such documents in the midst of an OSHA investigation. Therefore, employers should take time to compile any written policies and communications, and to memorialize any unwritten practices and communications related to the employer's response to the pandemic. In addition, employers should be mindful of the OSHA-required COVID-19 PPE and reporting regulations. It is important employers are prepared to provide evidence of their COVID-19 pandemic response in the event of an OSHA investigation.

Kathleen Davidson and Brooke Moschetto practice employment law at Pastori | Krans, PLLC in Concord, NH.

Jurisdiction from page 29

employment context. Use of a forum selection clause cannot be "unreasonable or unjust" and should be presented with the employment offer. The forum selection language should also include the phrases "arise out of," and be "in any way connected to" the employment relationship. Each phrase has a different meaning. The former is generally understood to invoke causal connection while the latter means simply "connected by reason of an established or discoverable connection."

`Like many employment matters, good planning will avoid headaches down the road. Defending an employment case can be challenging enough; defending it across the country is worse.