OSHA in the Time of COVID-19: A Call for Enforceable Standards for the Sake of Employees *and* Employers

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Through the spring and summer of 2020, following the outbreak of COVID-19, the Occupational Safety and Health Administration (OSHA) published guidelines and other directions for employer operations during the crisis. OSHA provided and revised robust guidance to employers for navigating their obligations during the pandemic and for ensuring workplace safety. These guidelines looked to ensure clean work environments and to minimize the risk of contraction through the encouragement of social distancing, the provision of personal protective equipment (PPE), and more. This guidance was *voluntary,* though, and accompanied enforcement memoranda merely interpreting existing statutes and declaring OSHA policies.[1] At the same time, OSHA declined to create either a permanent standard or an Emergency Temporary Standard (ETS) for workplace safety related to the coronavirus, both of which would have granted it the ability to enforce its policies and inform employers of their obligations. In its "Guidance on Preparing Workplaces for COVID-19," OSHA even warns that, "[t]his guidance is not a standard or regulation, and it creates no new legal obligations."[2] Other agencies made similar temporary changes to their policies and enforcement standards, such as the U.S. Equal Employment Opportunity Commission's (EEOC's) temporary allowance of employers to take their employees' temperatures, an act previously barred as a medical exam.[3]

Since the virus first began to spread in the United States, OSHA has faced criticism for its decision not to introduce new standards and for its broader failure to provide for employers and employees during the crisis. Observers noted that, as late as June 2020, three months after the president declared a national emergency, OSHA had received over 4,000 complaints related to the virus and issued only one citation.[4] On the employee side, criticism may have been expressed most pointedly through an American Federation of Labor and Congress of Industrial Organization (AFL-CIO) suit against the agency based in part on OSHA's refusal to issue an ETS related to COVID-19 and on the grounds that guidelines alone offered inadequate worker protections against the virus.[5] The U.S. Court of Appeals for the District of Columbia Circuit ultimately rejected the lawsuit, noting that it was OSHA's decision whether or not to issue an ETS, but the action echoed broader criticism of OSHA's approach to the pandemic.

While the AFL-CIO suit was filed to protect *employee* rights, the introduction of new and enforceable standards could potentially still be of benefit to *employers* as a source of clarity regarding their duties as they face new sources of liability, both from the COVID-19 pandemic and as industries restructure to move forward following the country's closure and partial reopening. Though OSHA had issued a single citation as of June, employers have been discovering that the pandemic still created significant potential and frequently *realized* liability for businesses even in the agency's absence.[6] OSHA's establishment of authoritative standards would better enable these employers to resume operations with more focus on safe operations and efficiency and less on the minutiae of costly overcompliance and avoidance of litigation.

Guidance Through Enforcement

OSHA wrote of itself that, "[w]ith the Occupational Safety and Health Act of 1970, Congress created the Occupational Safety and Health Administration (OSHA) to ensure safe and healthful working conditions for working men and women by setting and enforcing standards."[7] OSHA has since introduced new standards to evolve with the employment context it governs. Creating and *enforcing* such standards must continue to be ongoing processes for the agency to remain responsive to emergent challenges. In the absence of specific COVID-19 standards, any OSHA-related enforcement action against an employer would have to be based on other existing standards or under the Act's catch-all General Duty Clause.

The Act's General Duty Clause, Section 5(a)(1), requires employers to provide their employees with a workplace free from recognized hazards likely to cause death or serious physical harm. It grants OSHA flexibility in ensuring employee protection but does little to narrow the corresponding expectations of employers, even with the limited benefit of non-enforceable guidelines and interpretations.[8] The resulting gap in specific enforceability is one of certainty and understanding, *not* liability. For employers struggling to adjust to the still developing "new normal," OSHA's establishment of a baseline for what constitutes an adequate response to the crisis, even in retrospect; a safe reopening; or an effective plan for future prevention would allow employers to more efficiently allocate resources to promoting safety, and to operate with greater confidence about where and how they may be subject to legal risk.

There is no guarantee that a seemingly unenforceable and potentially overambitious early guideline will not be treated as a standard, should a claim result in litigation and go to trial. At the same time, there is similarly no guarantee that compliance with such a guideline will be enough to allow an employer to avoid liability. OSHA needs to adapt the Act to the crisis. States began to recognize this formally back in June, beginning with Virginia's decision to draft and pass its own temporary emergency standard for COVID-19, citing OSHA's silence.[9]

The Wrong Tools for the Job

OSHA's new guidelines and directives are helpful but introduce potentially costly new employer considerations without providing controlling standards. Even at the state level, OSHA's specific standards are useful for establishing the "floor" for safety and health by ensuring some predictability and uniformity across potentially conflicting state rules. At the federal level, OSHA standards on COVID-19 would clarify what employers owe and what employees deserve.

Many of the workplace-related problems that COVID-19 has introduced fall outside the range of what OSHA's current standards cover. One example of the existing regulatory limits is the challenge of trying to shape current standards for influenza prevention and safety to address COVID-19, a threat of a vastly different level. The two illnesses were frequently compared before COVID-19 peaked, and the former long remained a reference point for discussing and responding to the latter. Despite that practice, there are several key differences between the illnesses that have made it difficult to address COVID-19 and enforce guidance on the basis of existing standards.

First, unlike COVID-19, both influenza and the common cold are, under 29 C.F.R. § 1904.5(b)(2), exempt from injury and illness recording and reporting requirements otherwise imposed by 29 C.F.R. § 1904.5, which generally require reporting in certain circumstances.[10] Absent a 29 C.F.R. § 1904.5(b)(2) exemption, *qualifying* injuries and death need to be reported so long as they are work-related.[11]

In contrast to influenza, COVID-19 remains nominally covered as a nonexempt illness, immediately limiting the value of influenza prevention rules. Yet OSHA only added to the exceptionalism of COVID-19 by exercising discretion in enforcing those recording requirements, albeit not through the introduction of full standards. On April 10, 2020, it relaxed otherwise applicable recordkeeping requirements of its regulations to recognize the difficulty of determining work-relatedness, stating that it would not enforce the reporting requirement of § 1904.5 without objective evidence of work-relatedness that was reasonably available to the employer, with the stated purpose of allowing employers to focus on ensuring good hygiene practices.[12] OSHA followed this on May 19, 2020, reinforcing and clarifying its April statement and detailing criteria for its appraisal of employers' efforts to evaluate whether an employer has made sufficient effort to determine whether a worker's contraction of the virus was work-related.[13] The AFL-CIO ultimately filed its suit on the grounds that relaxing requirements did not serve the purpose of protecting workers and that OSHA was thus obliged to issue a temporary standard.

Not only has OSHA already distinguished between COVID-19 and influenza for purposes of enforcement, but the former represents a much greater health and liability risk, further challenging the adequacy of current enforcement tools and supporting the suggestion that the virus warrants temporary or permanent standards both to protect employees and to guide their employers through the corresponding risks. The CDC estimates that, in the United States, there were 39 million to 56 million influenza illnesses and 24,000 to 62,000 influenza deaths between October 1, 2019, and April 4, 2020.[14] According to Johns Hopkins, while there were only 5.8 million confirmed cases of COVID-19 by August 27, 2020, there were already 180,249 recorded deaths.[15]The two illnesses represent dramatically different kinds and levels of threats, and OSHA cannot reasonably expect to cover both with the same or similar enforcement tools. This problem extends to other existing OSHA standards as well.

The challenge of addressing COVID-19 using existing tools, such as those available for illnesses such as influenza, illustrates the inadequacy of current standards. Specificity would obviously benefit employees but employers stand to gain as well. Clarity in recording and reporting obligations would help to relieve the costs of record creation and retention, as well as of investigation of prior incidents for work-relatedness and insurance that they were handled properly. Furthermore, even as the country adjusts or relaxes its quarantine practices over time, any case of contraction that can potentially point back to one's employer represents potential significant liability.

Liability in Ambiguity

Determining the extent of potential liability in the absence of standards will continue to be difficult, given the spread and continued lethality of the virus. As early as March and April 2020, employers had started to face potential liability and very definite lawsuits, despite their apparent efforts to balance continuation of operations with providing adequate support and protection for their employees. Conflicting state-level efforts to manage liability, such as the presumption of Kentucky and Illinois that essential workers caught the illness through their work, ultimately blocked by a temporary restraining order on April 28, 2020, only add to employer confusion and cost.[16]

One of the earliest suits to draw attention was a negligence and wrongful death suit filed in Cook County Circuit Court in Illinois against Wal-Mart by the family of an employee who died of COVID-19.[17] In the complaint, the plaintiff alleges that multiple employees exhibited signs and symptoms of COVID-19, that the decedent and other employees contracted the illness at Wal-Mart, and that the company failed to adequately protect its employees against said contraction, specifically citing OSHA's "Guidance on Preparing Workplaces for COVID-19."[18]

Another early case was filed against Smithfield Foods by its plant workers, in the U.S. District Court for the Western District of Missouri.[19] The workers alleged that Smithfield provided them

with inadequate protective equipment, that the business practiced inadequate social distancing, that workers did not have opportunities to wash their hands, that workers were discouraged from taking sick leave, that there was no plan for testing employees, and that workers were incentivized with bonuses to work while sick. Despite these allegations, Smithfield denied awareness of any confirmed diagnoses and asserted that it was following OSHA requirements and CDC guidance. The court ultimately granted Smithfield's motion to dismiss, albeit pursuant chiefly to the primary-jurisdiction doctrine, to allow OSHA "to consider the issues raised by this case."[20]

Compliance is difficult without *enforceable*, explicit guidance to direct conduct. In its absence, cases such as those against Wal-Mart, Smithfield, and other employers will continue to burden already taxed courts and test businesses' ability to adhere to conflicting sources of standards and accurately predict expectations.

Uncertain Future

How best to balance the sometimes-competing priorities of worker protection with employer enablement has already become a divisive issue. Finding that equilibrium has led to debate over matters such as whether the law should provide businesses with immunity before or after introducing enforceable workplace standards.[21] By the summer of 2020, eight states had passed laws granting certain businesses some degree of protection against civil suits for claims related to COVID-19, and several more were advancing comparable bills or had signed executive orders to similar effect.[22] While immunity would best shield employers against civil liability, even standards alone would offer businesses greater certainty as to their obligations going forward. Notwithstanding, the fact that parties remain divided on the question of how the country needs to approach the legal fallout from the virus suggests that employers may have to face yet more uncertainty in understanding their duties as political platforms shift and different candidates take office.

At the presidential level, Former Vice President Biden has already advocated for harsher, specifically enforceable standards. He noted as well that said standards should not be limited in applicability to healthcare providers.[23] In contrast, albeit with similar advocacy for substantive change, President Trump claimed in April that he wanted to "take liability away from these companies" in order to facilitate their opening.[24] While Trump's statement focuses on limiting liability, neither candidate has suggested that the government should be silent on or soft in addressing the current ambiguity. Addressing it through full permanent or even temporary standards will provide employers with the greatest stability as they continue to normalize operations and political platforms provoke changes in guidelines and interpretation. Constantly updating guidance is, beyond being unenforceable, unstable.

The Devil You Know

Currently, even months after the pandemic's height, businesses face a daunting task in attempting to reopen and resume operations not just safely but profitably. That task has been complicated significantly by the overabundance of liability left in the absence of enforceable and broadly applicable OSHA health and safety standards, to which employers should be able to ensure they adhere in operating their businesses.

While mandating future crisis plans or requiring other proactive steps from businesses may introduce costs for employers, it will also make explicit what it is these companies need to do to limit their liability as the country continues to recover from the pandemic. Cautious overcompliance is likely to manifest less as excess benefit to employees and more as expensive but potentially unimpactful concern for uncertain regulations and still shifting guidance. OSHA should do employees and employers a favor and implement clear and enforceable COVID-19 standards. ⊙

Endnotes

[1]Occupational Safety & Health Administration, *Enforcement Memos*, https://www.osha.gov/enforcementmemos (last visited June 24, 2020).

[2]Occupational Safety & Health Administration, *Guidance on Preparing Workplaces for COVID-19*, https://www.osha.gov/Publications/OSHA3990.pdf (last visited June 24, 2020).

[3]Jennifer Carsen, *Walmart Sued in Illinois Court Over Employee's COVID-19 Death* (April 14, 2020), https://www.hrdive.com/news/walmart-sued-illinois-court-employees-death-from-coronavirus/575895/.

[4]Eli Rosenberg, *Virginia Poised to Create First Pandemic Workplace Safety Mandates in Nation, as Trump Labor Agency Sits on Sidelines*, The Washington Post (June 24, 2020), https://www.washingtonpost.com/business/2020/06/24/virginia-safety-rules-covid/ (last visited June 24, 2020).

[5]Petition for Writ of Mandamus & Request for Expedited Briefing & Disposition, *In re: Am. Fed'n of Labor and Cong. of Indus. Org.*, No. 19-1158 (D.C. Cir. May 18, 2020).

[6]Eli Rosenberg, *Virginia Poised to Create First Pandemic Workplace Safety Mandates in Nation, as Trump Labor Agency Sits on Sidelines*, The Washington Post (June 24, 2020), https://www.washingtonpost.com/business/2020/06/24/virginia-safety-rules-covid/.

[7] Occupational Safety & Health Administration, *About OSHA*, https://www.osha.gov/aboutosha (last visited June 24, 2020).

[8]29 U.S.C. § 654.

[9]Eli Rosenberg, *Virginia Poised to Create First Pandemic Workplace Safety Mandates in Nation, as Trump Labor Agency Sits on Sidelines*, The Washington Post (June 24, 2020), https://www.washingtonpost.com/business/2020/06/24/virginia-safety-rules-covid/, *About OSHA*, *supra* note 7.

[10]29 C.F.R. § 1904.5(b)(2).

[11]29 C.F.R. § 1904.5.

[12]Occupational Safety & Health Administration, *Guidance for Recording Cases of Coronavirus Disease 2019 (COVID-19)* (Apr. 10, 2020), https://www.osha.gov/memos/2020-04-10/enforcement-guidance-recording-cases-coronavirus-disease-2019-covid-19.

[13]Occupational Safety & Health Administration, *Guidance for Recording Cases of Coronavirus Disease 2019 (COVID-19)* (May 19, 2020), https://www.osha.gov/memos/2020-05-19/revised-enforcement-guidance-recording-cases-coronavirus-disease-2019-covid-19.

[14] Centers for Disease Control and Prevention, *2019-2020 U.S. Flu Season: Preliminary Burden Estimates* (Apr. 17, 2020), https://www.cdc.gov/flu/about/burden/preliminary-in-season-estimates.htm.

[15] Johns Hopkins University & Medicine, *COVID-19 Dashboard* (June 24, 2020), https://coronavirus.jhu.edu/map.html.

[16]Paul Davidson & Nicholas Wu, *Workers Face 'Uphill Battle' Proving Firms Liable if They Catch COVID-19 as Economy Reopens*,

USA Today (Apr. 28, 2020), https://www.usatoday.com/story/money/2020/04/28/coronavirus-can-you-sue-if-you-get-covid-19-work/3035422001/.

[17]Complaint, *Evans v. Walmart, Inc.*, No. 2020L003938 (Ill. Cir. Ct. Apr. 6, 2020).

[18]*Id.*

[19]*Rural Cmty. Workers All. et al. v. Smithfield Foods Inc. et al.*, 5:20-cv-06063 (W.D. Mo.).

[20]*Rural Cmty. Workers All. v. Smithfield Foods, Inc.,* 459 F. Supp. 3d 1228, 1240 (W.D. Mo. 2020) ("Primary jurisdiction is a common-law doctrine that is utilized to coordinate judicial and administrative decision making. ... The doctrine allows a district court to refer a matter to the appropriate administrative agency for ruling in the first instance, even when the matter is initially cognizable by the district court.") (quoting *Access Telecomms. v. Sw. Bell Tel. Co.,* 137 F.3d 605, 608 (8th Cir. 1998)).

[21]Y. Peter Kang, *Sens. Say Safety Regs Must Precede COVID-19 Biz Immunity,* Law360 (May 12, 2020), https://www.law360.com/articles/1272303/sens-say-safety-regs-must-precede-covid-19-biz-immunity.

[22]John Kruzel, *States, Companies Set up Their Own COVID-19 Legal Shields* (May 22, 2020), https://thehill.com/regulation/court-battles/499072-states-companies-set-up-their-own-covid-19-legal-shields; Jim Sams, *Four States Pass Laws Giving Businesses Immunity from COVID-19 Claims* (June 1, 2020), https://www.claimsjournal.com/news/national/2020/06/01/297332.html; Michael Tilley, *Executive Orders to Provide Liability Immunity for Businesses during COVID-19 Pandemic* (June 15, 2020), https://talkbusiness.net/2020/06/executive-orders-to-provide-liability-immunity-for-businesses-during-covid-19-pandemic/.

[23]Victoria Knight, *Biden Says OSHA Isn't Doing Enough To Protect Workers' From COVID-19*, Kaiser Health News (Apr. 23, 2020), https://khn.org/news/biden-says-osha-isnt-doing-enough-to-protect-workers-from-covid-19/.

[24]Paul Davidson & Nicholas Wu, *Workers Face 'Uphill Battle' Proving Firms Liable if They Catch COVID-19 as Economy Reopens*, USA Today (Apr. 28, 2020), https://www.usatoday.com/story/money/2020/04/28/coronavirus-can-you-sue-if-you-get-covid-19-work/3035422001/.