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Established 1844

## Disciplining Unsafe Employees & OSHA Update

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## Overview

**Disciplining Employees**

- Workplace Violence
- Violating COVID-19 protocols

**OSHA Update**

- COVID-19 Considerations
- Biden Administration Goals

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## Disciplining Employees for Safety Violations

<b>Workplace Violence (NIOSH)</b>  • “Violent acts (including physical assaults and threats of assaults) directed toward persons at work or on duty.”	<b>General Duty Clause (OSHA, Section 5(a)(1))</b>  • An employer is required to furnish a workplace free from recognized hazards that are causing or likely to cause death or physical harm to employees...
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## OSHA General Duty Clause: Elements of Proof

- The employer failed to keep the workplace free of a hazard to which employees were exposed
- The hazard was recognized
- The hazard was causing or likely to cause death or serious physical harm
- There was a feasible and useful method to correct the hazard



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## OSHA Anti-Retaliation



Section 11(c)(1): "No person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding or because of the exercise by such employee on behalf of himself or others of any right afforded by this Act."

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## Intentional Torts

RC 2745.01



(A) In an action brought against an employer by an employee, or by the dependent survivors of a deceased employee, for damages resulting from an intentional tort committed by the employer during the course of employment, the employer shall not be liable unless the plaintiff proves that the employer committed the tortious act with the intent to injure another or with the belief that the injury was substantially certain to occur.

(B) As used in this section, "substantially certain" means that an employer acts with deliberate intent to cause an employee to suffer an injury, a disease, a condition, or death.

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**Duty to Furnish Safe Place of Employment**

"No employer shall require, permit, or suffer any employee to go or be in any employment or place of employment which is not safe, and no such employer shall fail to furnish, provide, and use safety devices and safeguards, or fail to obey and follow orders or to adopt and use methods and processes reasonably adequate to render such employment and place of employment safe. No employer shall fail to do every other thing reasonably necessary to protect the life, health, safety, and welfare of such employees or frequenters. No such employer or other person shall construct, occupy, or maintain any place of employment that is not safe."

O.R.C. 4101.12

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**Best Practices**

- Work Rules and Safety Rules
- Consider a Safety Committee
- Complaint Investigation Procedures

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**High Risk Industries for Workplace Violence**

Correctional Facilities (prisons, detention centers, jails)
Health care and social service settings
Late night retail (convenience stores; liquor stores; gas stations)

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## Workers' Compensation & COVID-19

- Does COVID-19 constitute an occupational disease claim?
  - Contracted in the course of employment (requires diagnosis)
  - Disease is peculiar to claimant's employment (as opposed to employment generally)
  - Employment has a hazard or risk of contracting the disease to a greater degree or in a different manner than the general public

R.C. 4123.90 "...No employer shall discharge, demote, reassign, or take any punitive action against any employee because the employee filed a claim or instituted, pursued or testified in any proceedings under the workers' compensation act for an injury or occupational disease which occurred in the course of and arising out of his employment with that employer."

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## Discipline Issues in Era of COVID-19

1. **Attendance policies:** no entitlement to time off without appropriate evidence that absence is related to COVID-19
2. **COVID-19 protocols:** employers have the right to enforce and discipline employees who fail to adhere to such protocols (or risk OSHA citation!)
3. **Vaccinations:** mask v. no mask; proof of vaccination v. honor code

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## OSHA's (Current) Position on Masks



"The Centers for Disease Control (CDC) has issued new guidance related to recommended precautions for people who are fully vaccinated ... OSHA is reviewing the recent CDC guidance and will update our materials ... Until those updates are complete, please refer to the **CDC guidance** for information ..."

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## Recent Changes in CDC Guidance

May 13, 2021 CDC states that **fully vaccinated people no longer need to wear a mask or physically distance in any setting** unless required by federal, state or local laws or business rules

CDC previously stated asymptomatic fully vaccinated people were not required to quarantine, test or be restricted from work after exposure to COVID-19 positive person

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## OSHA January 29, 2021 Guidance

Employers should implement COVID-19 prevention programs that include:

- Assigning workplace COVID-19 coordinator
- Thorough hazard assessments
- Risk mitigation measures
- Protections for high-risk employees
- Effective communication system
- Training and education
- Encouraging employees to stay home when sick
- Minimizing economic impact of quarantine through policies
- Isolating symptomatic employees
- Enhanced cleaning and disinfecting
- Providing screening and testing guidance
- Recording and reporting COVID-19 cases
- Implementing non-retaliation provisions
- No cost vaccines and vaccine-related education
- Equal treatment of vaccinated employees (except new quarantine limitations)
- Following CDC isolation and quarantine guidance
- Social distancing
- Barrier installation
- Furnishing and requiring face coverings
- Improving ventilation
- Available PPE to supplement protection
- Providing supplies necessary for good hygiene
- Cleaning and disinfecting frequently

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## OSHA National Emphasis Program (March 12, 2021)

- Augments complaints, referrals, and severe incident reports as source of inspections
- Targets specific industries where COVID-19 hazards are likely to occur
- Examples of targeted employers:
  - Physicians' offices, home healthcare providers, hospitals, nursing case facilities, group homes;
  - Meat processing facilities, grocery stores, discount department stores, restaurants;
  - Construction, food manufacturing, chemical and plastics manufacturing, transit systems.

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## National Emphasis Focus

Recordkeeping and reporting	Personal Protective Equipment	Respiratory protection	Sanitation
Accident prevention signage	Access to employee exposure records	Bloodborne pathogens	General duty clause

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## OSHA Emergency Temporary Standard (June 10, 2021)

- Limited to healthcare settings
- Requires an infection-control plan created with the input of non-managerial employees
  - Masks
  - COVID-19 screening
  - Paid time off for vaccination/time to recover
- Fully vaccinated employees are exempt from masking, social distancing and barrier requirements when in a “well-defined area” with “no reasonable expectation a person with suspected or confirmed COVID-19 will be present”

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## COVID-19 Recordkeeping Requirements

- Generally, injuries or exposures that happen at work are recorded on OSHA logs unless exception to recordability (like cold or flu) applies
- How do employers determine whether COVID-19 illnesses are “work related” when potential exposures occur both in and out of workplace?
- Employer must make a “reasonable determination of work relatedness”
- Does not include extensive medical inquiries
- Must conduct inquiry while respecting privacy concerns

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## Reasonable Inquiry

- Ask employee how employee believes he/she contracted illness
- Discuss work and out of work activities that may have led to illness
- Review work environment for potential exposure
- Are there other instances of workers contracting COVID-19 in work area/same department?
- Are there several COVID-19 positive employees who work closely without an alternative explanation?
- Did employee have symptoms shortly after lengthy, close exposure to COVID-19 positive customer or worker without an alternative explanation?
- Does employee have frequent close exposure to members of public in an area with high community transmission without an alternative explanation?

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## May 21, 2021 Change in Vaccine Related Recordkeeping Requirements

- Q: Are adverse reactions to the COVID-19 vaccine recordable on the OSHA recordkeeping log?
- A: OSHA does not wish to have any appearance of discouraging workers from receiving COVID-19 vaccination, and also does not want to disincentivize employers' vaccination efforts as a result, OSHA will not enforce 29 CFR 1904's recording requirements to require any employees to record worker's side effects for COVID-19 vaccination through May 2022.

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## OSHA Under Biden Administration

- Focus on anti-retaliation programs
  - Management commitment
  - System for listening to and resolving safety and compliance concerns
  - System for receiving and responding to retaliation reports
  - **Anti-retaliation training for employees and supervisors**
  - Program oversight
- Goal to double OSHA's inspection force to 1,500 by 2024
- Executive Order on Protecting Worker Health and Safety (January 2021)

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## Ohio Mask Mandates

- Ohio – Governor DeWine immediately adopted CDC guidance after previously rescinding most Ohio Health Department COVID-19 orders effective June 2, 2021.
- May 17, 2021 Ohio Department of Health Order conforms Ohio's health orders to new CDC guidance.
- Key Points:
  1. Businesses may continue to require masking and social distancing among vaccinated and unvaccinated individuals.
  2. Persons not fully vaccinated shall continue to wear a mask indoors and outdoors if unable to socially distance unless activities fall under existing exceptions.
  3. Regardless of vaccination status, each individual should perform daily health assessment and stay home if fever, cough, or other COVID-19 symptoms.
  4. No capacity limitations for outdoor facilities but restrictions unless all are fully vaccinated.
  5. Order in effect until 12:01 a.m. June 2, 2021.

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## Michigan Mask Mandates

Employers may allow fully vaccinated employees to not wear face coverings and social distance provided they have a policy deemed effective to ensure non-vaccinated individuals continue to follow these requirements.

Employers to keep a record of whether employees are fully vaccinated.

Self-screening protocols for those entering the workplace are still required but records need to be retained only for non-vaccinated workers or contractors.

Employers should continue to have and implement a written COVID-19 preparedness and response plan in accordance with the updated rules.

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## Questions?



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