

COVID-19:

What Employers Need To Know Heading Into 2021

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PPP LOAN UPDATES

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NEW LAW

- U.S. Senate and House on 12/21/20, approved H.R. 133, the “Consolidated Appropriations Act, 2021”
- President Trump signed on 12/27/20
- The portions of the law providing for the continuation of PPP loans is called the “Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act”

NEW LAW (cont.)

- Gives new life to the PPP by extending the program (had expired 8/8/20) and creating an option for a “second draw” for PPP borrowers
- New PPP loans available between enactment 3/31/21
- SBA issued its rules on 1/6/21
- SBA issued application forms on 1/8/21
- SBA portal for loan applications is open, with first dibs for certain borrowers
- Check with your lender for when their application portal will open

PPP FORGIVENESS

- Forgiveness has been underway for first round of PPP loans
- Your lender has 60 days to process your forgiveness application and send to SBA
- Then SBA has 90 days to process
- Whole process could be about 5 months
- Many instances of lenders and SBA acting faster
- New law provides for a streamlined loan forgiveness process for loans of \$150,000 or less

PPP FORGIVENESS (cont.)

- Do not engage in any “change of ownership” transactions before forgiveness is final
- Defined as transfer of 20% or more of ownership interest in borrower, or sale of 50% or more of borrower’s assets
- Doing so without prior consent of lender and/or SBA would be a default and thus jeopardize forgiveness

PPP LOAN NECESSITY QUESTIONNAIRES

- SBA is requiring all PPP borrowers with loans \$2 million or more to fill out questionnaires as part of forgiveness process
- Among other things, questionnaires look into how borrower actually fared after receiving the loan
- Contrary to CARES Act, which only required certification that uncertainty made the loan necessary to support ongoing operations

PPP LOAN NECESSITY QUESTIONNAIRES (cont.)

- Seems to, after the fact, require borrower to have been able to predict the future on how they would fare
- Unlikely such info alone could be successfully used to deny forgiveness
- Lender will notify borrower when to fill out questionnaire

DEDUCTIBILITY OF EXPENSES

- Original CARES Act was clear that forgiven PPP funds are not “income”
- But, was silent on expense/deductibility side
- Question arose about deductibility of expenses that forgiven PPP loan funds were used to pay
- Not allowing deductions would undermine CARES Act and the PPP money being “tax free”

DEDUCTIBILITY OF EXPENSES

(cont.)

- IRS took position that borrower could not take deductions for expenses they paid with forgiven PPP funds
- This was a controversial position, despite push-back from many
- **GOOD NEWS!** - the new law overturns the IRS's position and clarifies that deductions are allowable for expenses paid with forgiven PPP funds
- Retroactive back to date of enactment of original CARES Act

NEW PPP LOANS

- If you did not get a first round PPP loan, they will now be available again for first time PPP borrowers
 - This time, certain nonprofits are eligible such as trade associations
- If you did take a first round PPP loan, new law provides for “Second Draw PPP Loans”

NEW PPP LOANS (cont.)

- Over \$284 billion for forgivable PPP loans
- Set-asides:
 - \$15 billion for PPP loans issued by community development financial institutions (CDFIs) and minority depository intuitions (MDIs)
 - \$15 billion for PPP loans issued by certain small depository institutions
 - \$35 billion for first-time PPP borrowers, \$15 billion of which for smaller, first-time borrowers with 10 or fewer employees, or loans less than \$250,000 in low-income areas
 - \$25 billion for second draw PPP loans for smaller borrowers with 10 or fewer employees, or loans less than \$250,000 in low-income areas

FIRST TIME PPP BORROWERS

- Those who did not get a first round PPP loan – much of the same rules apply
- Maximum loan is still \$10 million

FIRST TIME PPP BORROWERS

(cont.)

- Eligible:
 - Businesses with 500 or fewer employees that are eligible for other SBA 7(a) loans
 - Sole proprietors, independent contractors, and eligible self-employed individuals
 - Not-for-profits, including churches
 - Accommodation and food services operations (NAICS codes starting with 72) with fewer than 500 employees per physical location
 - Certain 501(c)(6) business leagues, such as trade associations and chambers of commerce
 - Certain news organizations

SECOND DRAW PPP LOANS

- Basic eligibility requirements:
 - Must employ **less than 300 employees** (first round was 500) (w/same exception for accommodations and food service industry)
 - SBA “affiliation” rules continue to apply
 - Must have already used (or intend to use) the full amount of money granted in their first round of PPP funding
 - ***Must demonstrate at least a 25% reduction in gross receipts during the first, second, third or fourth quarter of 2020 relative to the same quarter of 2019*** (or, if borrower was not in business in 2019, a 25% reduction in Q2, 3 or 4 of 2020 compared to Q1 2020)

SECOND DRAW PPP LOANS (cont.)

- Basic eligibility requirements:
 - Like first round, will be required to certify that “current economic uncertainty makes this loan request necessary to support the ongoing operations of the applicant”
 - Maximum loan amount of \$2 million
 - May only receive one PPP second draw loan

SECOND DRAW PPP LOANS (cont.)

- Borrowers who previously applied for and returned a PPP loan can apply again for the difference between (1) the loan amount they retained, and (2) the amount they could now qualify to obtain

SECOND DRAW PPP LOANS (cont.)

- For the reduction in gross receipts eligibility requirement:
 - “Gross receipts” includes all revenue in whatever form received or accrued (in accordance with your accounting method) from whatever source, including from the sales of products or services, interest, dividends, rents, royalties, fees, or commissions, reduced by returns and allowances – forgiven first-draw PPP loans are NOT included in 2020 gross receipts

SECOND DRAW PPP LOANS (cont.)

- For the reduction in gross receipts eligibility requirement:
 - Loans of \$150,000 or less – borrower simply certifies that it experienced the reduction; will have to submit documentation with forgiveness application

SECOND DRAW PPP LOANS (cont.)

- For the reduction in gross receipts eligibility requirement: (cont.)
 - Loans over \$150,000 – borrower must submit proof of meeting the gross receipts reduction requirement with the loan application:
 - Tax returns/forms, or quarterly financial statements or bank statements
 - If your 2020 annual numbers are down 25% or more from 2019, you can simply provide annual tax returns (no need for quarterly info)

SECOND DRAW PPP LOANS (cont.)

- Excluded from eligibility:
 - Publicly traded companies
 - Businesses controlled, directly or indirectly, by the president, vice president, head of executive departments, and members of Congress (or their spouses)
 - Businesses created in or organized under the laws of China or Hong Kong
 - Businesses having “significant operations in China or Hong Kong”
 - Businesses that are more than 20% owned by businesses in China or Hong Kong, or with a Board member who is a resident of China

SECOND DRAW PPP LOANS (cont.)

- Amount of PPP loan:
 - Like first round, eligible businesses may also receive up to 2.5 times their average monthly payroll costs using either (your choice):
 - Year 2020, or
 - Precise 12-month lookback period, or
 - Year 2019
 - Borrowers in the restaurant and hospitality industries are eligible for up to 3.5 times their average payroll costs
 - But, capped at \$2,000,000

FORGIVABLE USES OF PPP FUNDS

- The new law expands the allowable expenses and forgivable uses for PPP funding
- In original CARES Act, forgivable expenses include:
 - Payroll expenses (including benefits) – capped at \$100k annualized per employee
 - Mortgage interest
 - Rent
 - Utilities

FORGIVABLE USES OF PPP FUNDS (cont.)

- Now, under the new law, forgivable expenses also include:
 - Software, cloud computing, human resources, and accounting needs
 - Costs related to property damage due to public disturbances that occurred during 2020 and were not covered by insurance
 - Supplier costs that are essential to the borrower's operations
 - PPE and adaptive investments that help borrower comply with COVID-19 health and safety guidelines

FORGIVABLE USES OF PPP FUNDS (cont.)

- The 60/40 cost allocation between payroll and nonpayroll costs in order to receive full forgiveness will continue to apply
 - Must spend at least 60% of the PPP funds on payroll costs for full forgiveness

COVERED PERIOD

- PPP borrowers will be provided the option to choose between an 8-week covered period and a 24-week covered period (time period in which to spend PPP funds on forgivable expenses)

OSHA UPDATE

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ENFORCEMENT ACTIVITY

Summary Data for Federal and State Programs - Enforcement

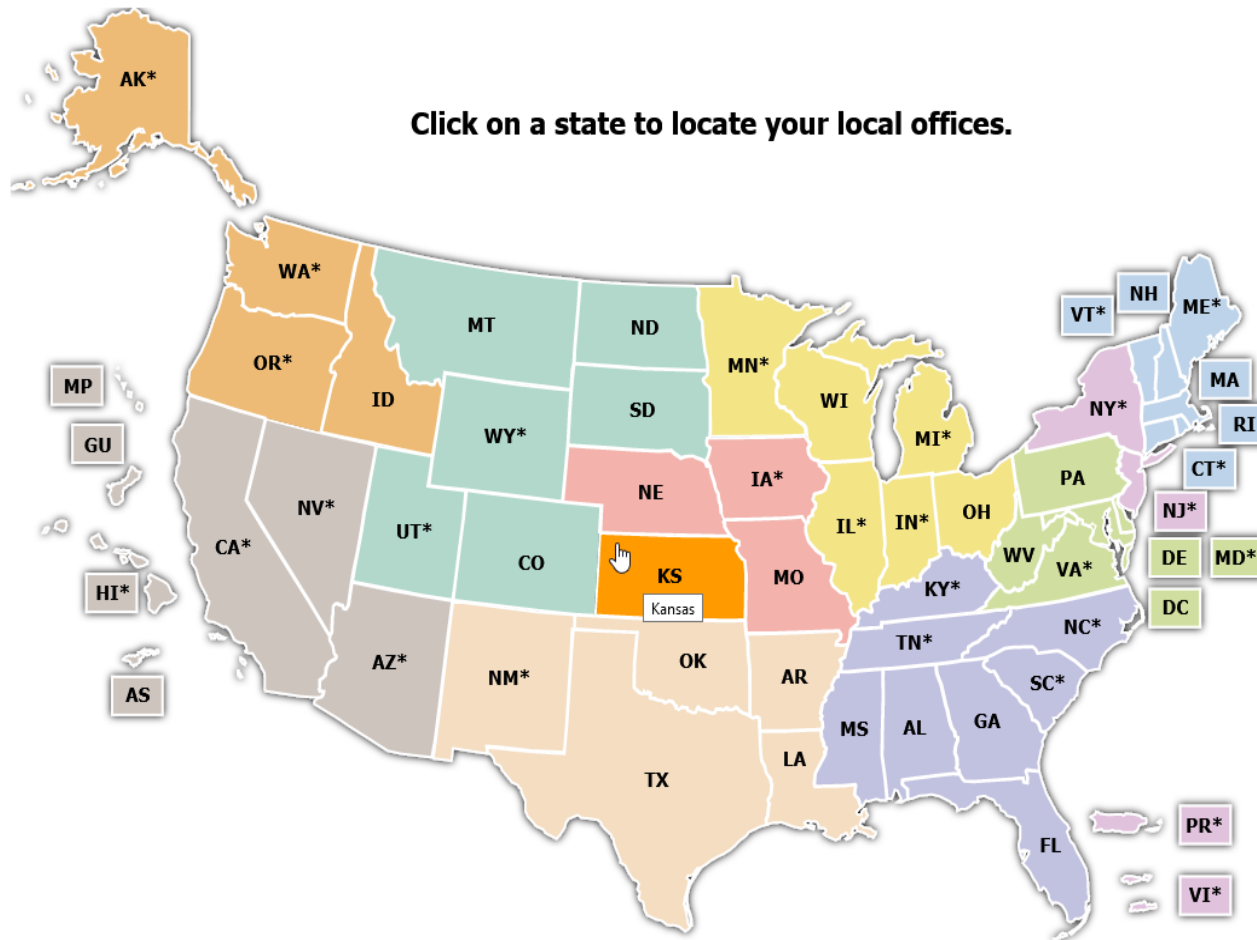
Complaints, Referrals and Closed Cases (totals to date)

| Date | Federal Summary | | | State Summary | | |
|------------|-----------------|-----------|--------|---------------|-----------|--------|
| | Complaints | Referrals | Closed | Complaints | Referrals | Closed |
| 1/10/2021 | 12,435 | 1,892 | 12,099 | 40,916 | 5,947 | 33,505 |
| 1/07/2021 | 12,368 | 1,883 | 12,042 | 40,698 | 5,913 | 33,304 |
| 1/06/2021 | 12,315 | 1,874 | 11,977 | 40,559 | 5,865 | 33,142 |
| 1/05/2021 | 12,251 | 1,867 | 11,908 | 40,402 | 5,842 | 32,976 |
| 1/04/2021 | 12,195 | 1,860 | 11,844 | 40,264 | 5,806 | 32,735 |
| 1/03/2021 | 12,120 | 1,840 | 11,767 | 40,127 | 5,780 | 32,619 |
| 12/30/2020 | 12,083 | 1,832 | 11,730 | 39,937 | 5,765 | 32,451 |
| 12/29/2020 | 12,035 | 1,828 | 11,681 | 39,720 | 5,734 | 32,230 |
| 12/28/2020 | 11,995 | 1,816 | 11,617 | 39,527 | 5,675 | 31,982 |
| 12/27/2020 | 11,942 | 1,805 | 11,551 | 39,445 | 5,616 | 31,865 |
| 12/22/2020 | 11,903 | 1,794 | 11,477 | 38,934 | 5,573 | 31,466 |
| 12/21/2020 | 11,848 | 1,776 | 11,373 | 38,637 | 5,553 | 31,233 |
| 12/20/2020 | 11,789 | 1,753 | 11,303 | 38,524 | 5,505 | 31,140 |
| 12/17/2020 | 11,751 | 1,726 | 11,250 | 38,194 | 5,469 | 30,925 |
| 12/16/2020 | 11,688 | 1,710 | 11,181 | 37,999 | 5,454 | 30,743 |
| 12/15/2020 | 11,643 | 1,682 | 11,117 | 37,702 | 5,410 | 30,537 |
| 12/14/2020 | 11,559 | 1,671 | 11,057 | 37,450 | 5,381 | 30,240 |
| 12/13/2020 | 11,504 | 1,632 | 10,998 | 37,300 | 5,321 | 30,082 |
| 12/10/2020 | 11,436 | 1,592 | 10,915 | 37,032 | 5,324 | 29,842 |

NOTE: The data above includes all valid complaints and referrals received since February 1, 2020

NUMBERS BY REGION

OSHA Offices by State



Find Office By State

Select a State

OSHA Regional Offices

- Region 1: Boston
- Region 2: New York
- Region 3: Philadelphia
- Region 4: Atlanta
- Region 5: Chicago
- Region 6: Dallas
- Region 7: Kansas City
- Region 8: Denver
- Region 9: San Francisco
- Region 10: Seattle

Complaints and Referrals by Region (totals to date)

| OSHA Region | | | | | | | | | | |
|-------------|-------|-------|-------|-------|-------|-------|-----|-----|-----|-----|
| Date | 1 | 2 | 3 | 4 | 5 | 6 | 7 | 8 | 9 | 10 |
| 1/10/2021 | 2,050 | 1,892 | 1,471 | 2,525 | 3,098 | 1,361 | 741 | 838 | 150 | 201 |
| 1/07/2021 | 2,030 | 1,887 | 1,469 | 2,506 | 3,085 | 1,352 | 737 | 837 | 149 | 199 |
| 1/06/2021 | 2,024 | 1,884 | 1,461 | 2,493 | 3,076 | 1,330 | 737 | 836 | 149 | 199 |
| 1/05/2021 | 2,014 | 1,872 | 1,450 | 2,483 | 3,062 | 1,324 | 736 | 832 | 147 | 198 |
| 1/04/2021 | 2,009 | 1,864 | 1,445 | 2,467 | 3,057 | 1,312 | 733 | 825 | 146 | 197 |
| 1/03/2021 | 1,996 | 1,848 | 1,425 | 2,446 | 3,047 | 1,309 | 730 | 819 | 145 | 195 |
| 12/30/2020 | 1,989 | 1,844 | 1,421 | 2,434 | 3,042 | 1,305 | 726 | 816 | 145 | 193 |
| 12/29/2020 | 1,981 | 1,836 | 1,411 | 2,426 | 3,035 | 1,300 | 724 | 812 | 145 | 193 |
| 12/28/2020 | 1,975 | 1,828 | 1,409 | 2,420 | 3,022 | 1,293 | 721 | 805 | 145 | 193 |
| 12/27/2020 | 1,963 | 1,825 | 1,398 | 2,409 | 3,011 | 1,287 | 720 | 798 | 143 | 193 |
| 12/22/2020 | 1,953 | 1,819 | 1,397 | 2,398 | 3,002 | 1,280 | 719 | 793 | 143 | 193 |
| 12/21/2020 | 1,947 | 1,812 | 1,390 | 2,377 | 2,990 | 1,278 | 714 | 780 | 143 | 193 |
| 12/20/2020 | 1,935 | 1,808 | 1,382 | 2,368 | 2,969 | 1,274 | 714 | 758 | 143 | 191 |
| 12/17/2020 | 1,933 | 1,800 | 1,377 | 2,357 | 2,957 | 1,271 | 712 | 741 | 140 | 189 |
| 12/16/2020 | 1,929 | 1,773 | 1,372 | 2,337 | 2,946 | 1,264 | 710 | 743 | 140 | 184 |
| 12/15/2020 | 1,922 | 1,768 | 1,368 | 2,316 | 2,929 | 1,255 | 708 | 741 | 137 | 181 |
| 12/14/2020 | 1,917 | 1,764 | 1,355 | 2,296 | 2,897 | 1,245 | 703 | 739 | 133 | 181 |
| 12/13/2020 | 1,911 | 1,747 | 1,336 | 2,268 | 2,889 | 1,241 | 703 | 730 | 133 | 178 |
| 12/10/2020 | 1,888 | 1,742 | 1,322 | 2,240 | 2,871 | 1,238 | 702 | 722 | 131 | 178 |

Inspections by Region (totals to date)

| Date | OSHA Region | | | | | | | | | |
|------------|-------------|-----|----|-----|-----|-----|----|----|----|----|
| | 1 | 2 | 3 | 4 | 5 | 6 | 7 | 8 | 9 | 10 |
| 1/10/2021 | 122 | 374 | 67 | 197 | 383 | 147 | 88 | 35 | 37 | 30 |
| 1/07/2021 | 122 | 374 | 66 | 196 | 381 | 145 | 88 | 35 | 37 | 30 |
| 1/06/2021 | 122 | 373 | 65 | 197 | 381 | 145 | 88 | 35 | 37 | 30 |
| 1/05/2021 | 122 | 372 | 63 | 197 | 378 | 141 | 88 | 33 | 37 | 30 |
| 1/04/2021 | 121 | 372 | 62 | 194 | 378 | 141 | 88 | 32 | 37 | 30 |
| 1/03/2021 | 120 | 372 | 63 | 193 | 375 | 140 | 88 | 32 | 37 | 30 |
| 12/30/2020 | 119 | 372 | 63 | 193 | 375 | 140 | 88 | 30 | 36 | 27 |
| 12/29/2020 | 119 | 371 | 63 | 192 | 375 | 140 | 88 | 30 | 36 | 26 |
| 12/28/2020 | 118 | 371 | 63 | 191 | 373 | 140 | 88 | 30 | 36 | 26 |
| 12/27/2020 | 117 | 370 | 63 | 191 | 371 | 135 | 88 | 30 | 36 | 26 |
| 12/22/2020 | 117 | 370 | 62 | 190 | 369 | 135 | 88 | 29 | 36 | 26 |
| 12/21/2020 | 117 | 366 | 60 | 189 | 366 | 135 | 88 | 29 | 36 | 26 |
| 12/20/2020 | 117 | 364 | 58 | 188 | 360 | 134 | 88 | 29 | 36 | 26 |
| 12/17/2020 | 117 | 364 | 58 | 187 | 360 | 133 | 86 | 29 | 36 | 26 |
| 12/16/2020 | 117 | 361 | 58 | 186 | 358 | 132 | 84 | 29 | 36 | 25 |
| 12/15/2020 | 115 | 361 | 58 | 185 | 357 | 129 | 83 | 28 | 36 | 25 |
| 12/14/2020 | 115 | 361 | 58 | 185 | 354 | 129 | 82 | 27 | 36 | 25 |
| 12/13/2020 | 114 | 360 | 57 | 185 | 353 | 129 | 81 | 27 | 36 | 21 |
| 12/10/2020 | 114 | 358 | 55 | 183 | 351 | 128 | 80 | 26 | 36 | 21 |

Detailed Data for Federal Program

Complaints by Selected Essential Industry (totals to date)

| Date | Healthcare | Retail Trade | Grocery Stores* | Construction | General Warehousing and Storage | Restaurants and Other Eating Places | Automotive Repair |
|------------|------------|--------------|-----------------|--------------|---------------------------------|-------------------------------------|-------------------|
| 1/10/2021 | 2,865 | 1,507 | 210 | 380 | 246 | 754 | 99 |
| 1/07/2021 | 2,854 | 1,497 | 209 | 378 | 245 | 745 | 98 |
| 1/06/2021 | 2,844 | 1,493 | 207 | 376 | 243 | 742 | 98 |
| 1/05/2021 | 2,830 | 1,481 | 205 | 369 | 243 | 737 | 96 |
| 1/04/2021 | 2,820 | 1,468 | 204 | 368 | 242 | 728 | 96 |
| 1/03/2021 | 2,805 | 1,458 | 202 | 366 | 240 | 720 | 96 |
| 12/30/2020 | 2,800 | 1,454 | 202 | 365 | 238 | 718 | 96 |
| 12/29/2020 | 2,787 | 1,448 | 202 | 365 | 237 | 714 | 95 |
| 12/28/2020 | 2,781 | 1,442 | 202 | 365 | 236 | 712 | 95 |
| 12/27/2020 | 2,769 | 1,430 | 201 | 364 | 235 | 711 | 95 |
| 12/22/2020 | 2,763 | 1,421 | 200 | 362 | 235 | 707 | 95 |
| 12/21/2020 | 2,757 | 1,414 | 199 | 360 | 233 | 705 | 94 |
| 12/20/2020 | 2,749 | 1,404 | 198 | 356 | 232 | 703 | 94 |
| 12/17/2020 | 2,742 | 1,399 | 197 | 355 | 230 | 702 | 93 |
| 12/16/2020 | 2,726 | 1,390 | 195 | 350 | 228 | 700 | 93 |
| 12/15/2020 | 2,720 | 1,380 | 195 | 349 | 227 | 698 | 92 |
| 12/14/2020 | 2,707 | 1,367 | 193 | 346 | 224 | 690 | 89 |
| 12/13/2020 | 2,697 | 1,355 | 192 | 344 | 223 | 690 | 89 |
| 12/10/2020 | 2,680 | 1,347 | 191 | 342 | 220 | 688 | 88 |

**Start of COVID pandemic (February 2020)
through December 31, 2020**

**Federal OSHA Total proposed penalties issued
= \$3,930,381**

CITATIONS ISSUED UNDER THE FOLLOWING STANDARDS

1. Respiratory protection standard (29 CFR 1910.134)
 - a) Written respiratory protection program
 - b) Medical evaluation/fit test/training
2. Reporting Illness/Fatality (29 CFR 1904)
3. Recording Illness/Fatality (29 CFR 1904)
4. General Duty Clause (§5(a)(1) of the OSH Act)

GENERAL DUTY CLAUSE

“Each employer shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.”

29 U.S.C. § 654(a)

GENERAL DUTY CLAUSE (cont.)

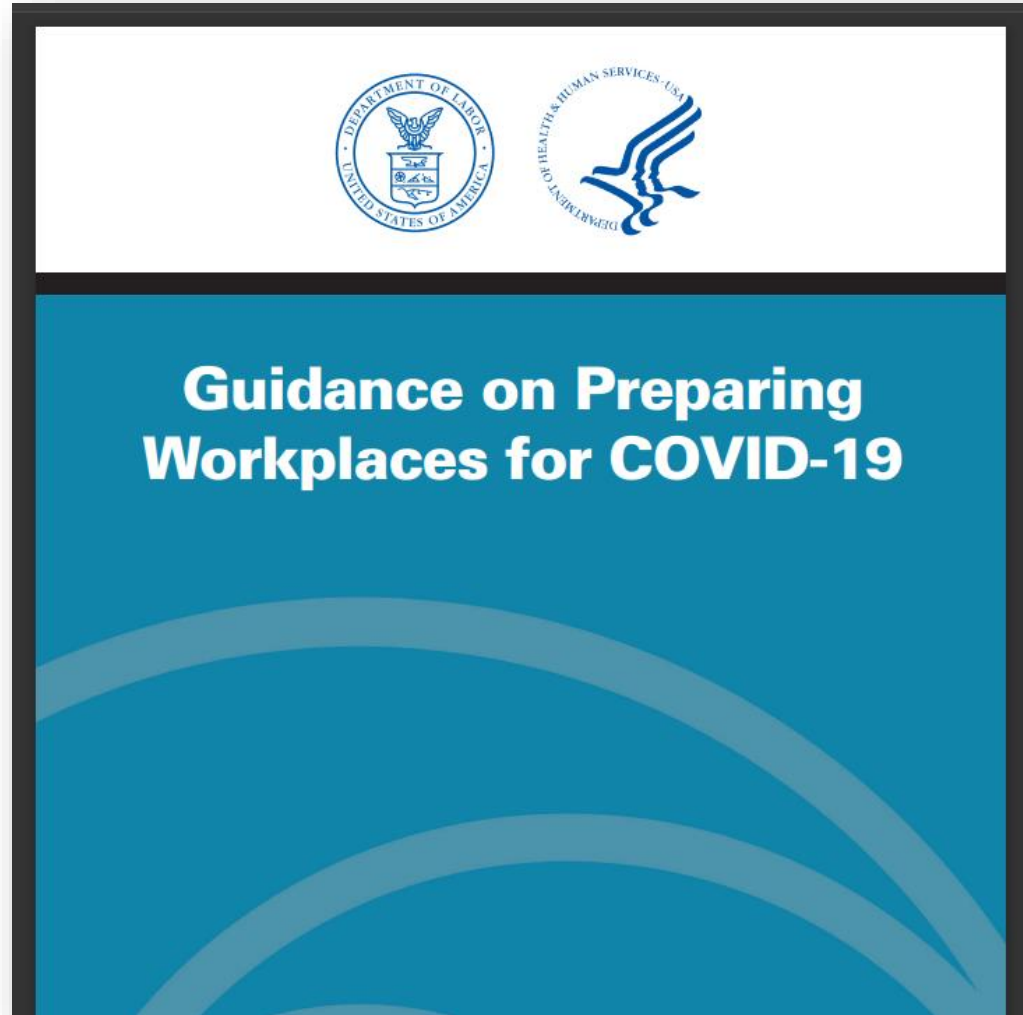
- Catch-all safety requirement
- Used by OSHA in the absence of any particular OSHA standard

GENERAL DUTY CLAUSE (cont.)

1. An activity or condition in the employer's workplace **presented a hazard** to an employee;
2. Either the employer or the industry **recognized** the condition or activity as a hazard;
3. The hazard was likely to or actually caused **death or serious physical harm**; and
4. A feasible **means to eliminate** or materially reduce the hazard existed.

SeaWorld of Florida, LLC v. Perez, 748 F.3d 1202, 1207 (D.C. Cir. 2014)

OSHA GUIDANCE



OSHA RECOMMENDED STEPS

- Hierarchy of Controls
 - Engineering Controls
 - Administrative Controls
 - Personal Protective Equipment (PPE)

ADMINISTRATIVE CONTROLS

- Require employees to self-monitor for symptoms and stay home if symptomatic
- Employees to maintain 6 feet of physical distance where possible

ADMINISTRATIVE CONTROLS (cont.)

- Divide staff/crews into groups and maintain groups through duration of project
- Assign employees to dedicated shifts for duration of project
- Limit number of visitors to the jobsite
- Screen visitors before granting access to jobsite

ADMINISTRATIVE CONTROLS (cont.)

- Coordinate site deliveries to minimize contact
- Require delivery personnel to remain in vehicles
- Prohibit sharing of crew cab trucks and vehicles
- Establish a maximum capacity for work trailer
- Stagger breaks and lunches to preclude large groups from gathering
- Conduct safety meetings virtually, via Zoom, telephone or other means

GOAL: Eliminate chokepoints!

PPE & OTHER SAFETY MEASURES

- Temperature checks as employees arrive on site
- Wear a face covering when employees cannot maintain six feet of physical distance
- Provide individual water bottles in lieu of shared cooler
- Limit sharing of tools and equipment
- Clean tools before and after use with alcohol based wipes

PPE & OTHER SAFETY MEASURES (cont.)

- Provide running water or alcohol based hand sanitizer
- If running water available, provide soap and paper towels
- Provide lined trash receptacles
- Train employees in respiratory etiquette (face touching, cover sneezes and coughs)

PPE & OTHER SAFETY MEASURES (cont.)

- Disinfect high touch surfaces at start and end of each shift, and periodically throughout shift
- Clean jobsite trailers and lunch tables at least once per day
- Provide PPE (gloves) to employees charged with cleaning jobsite and changing trash

PPE & OTHER SAFETY MEASURES (cont.)

- Clean portable toilets regularly, at least twice per week
- Deep cleaning of areas where confirmed COVID-positive employee has worked
- Provide hand sanitizer at locations throughout jobsite

ENFORCEMENT

You must ensure site management is
ENFORCING the plan **IN THE**
FIELD!

Be proactive.

STATE OSHA PROGRAMS

- State OSHA programs with Temporary Emergency Standards
 - Michigan
 - Virginia
 - Oregon
 - California

COVID-19 and Stimulus Law Updates for Employers

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COVID-19 RELATED LEAVE REQUESTS

- Required paid leave under the FFCRA ended on 12/31/20
 - Emergency paid sick leave (up to 80 hours)
 - Expanded family and medical leave (up to 12 weeks)

COVID-19 RELATED LEAVE REQUESTS (cont.)

- Tax credits extended for paid sick leave and expanded family and medical leave voluntarily provided to employees between January 1 - March 31, 2021
- Voluntarily provided FFCRA paid leave must follow the FFCRA reasons and documentation to obtain tax credits

REASONS FOR LEAVE UNDER FFCRA

1. Quarantine/Isolation Order
 - Employee is subject to a Federal, State, or local quarantine or isolation order related to COVID-19
 - Normally issued by a local health department if employee or household member tests positive

REASONS FOR LEAVE UNDER FFCRA (cont.)

2. Health-Care Provider Advised Self-Quarantine due to COVID-19
 - Employee can obtain a note from physician if employee tests positive or is exposed as a close contact at home, work or other location

REASONS FOR LEAVE UNDER FFCRA (cont.)

3. COVID-19 Symptoms
 - Employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis
 - Cannot claim quarantine unless seeking diagnosis

REASONS FOR LEAVE UNDER FFCRA (cont.)

4. Care for Others

- Employee is caring for an individual who is subject to a quarantine or isolation order or whose healthcare provider has advised the individual to self-quarantine due to concerns related to COVID-19

REASONS FOR LEAVE UNDER FFCRA (cont.)

5. School/Childcare Closure

- Employee is caring for son or daughter whose school or place of care has been closed, or whose childcare provider is unavailable because of COVID-19
- Paid leave is not available for an employee whose child's school provides a choice between in-person and remote learning, and the employee chooses remote learning
- Additional 10 weeks of paid leave available under the Extended Family and Medical Leave Act of the FFCRA for employees who have been employed for 30 days or more

REASONS FOR LEAVE UNDER FFCRA (cont.)

6. Similar Conditions
 - Employee is experiencing a “substantially similar condition” as specified by the Secretary of Health and Human Services
 - Not defined

PAID LEAVE REQUIRED

- If, and only if, the employee is unable to work (or telework) for one of the covered reasons
- If there is no work for the employee due to lack of work or the business is closed for any reason, including a stay at home or other local, state or federal order, paid leave does not apply

DURATION OF LEAVE

- Full-time employees – up to 80 hours (10 workdays)
- Part-time employees – pro-rated based on the average number of hours they work

DURATION OF LEAVE (cont.)

- Paid leave only available for the time period required by the qualifying reason
 - Ex. If employee is quarantined for 7 days based on an exposure, the employee cannot take additional paid sick leave beyond the 7 quarantine days required by the local health department or physician

DURATION OF LEAVE (cont.)

- Maximum of 80 hours per individual employee regardless of number of qualifying reasons for leave
- Paid sick leave usage follows employee and counts against entitlement even if employee is employed at new employer

PAY RATE

- Paid sick leave under reasons (1), (2), and (3) above = regular rate up to \$511 per day
- Paid sick leave under reasons (4), (5), and (6) above must be compensated at 2/3 of the rate they would otherwise receive, capped at \$200 per day and \$2,000 in the aggregate
- Employer must continue to pay employer's portion of health insurance benefits

DOCUMENTATION

- Documentation required for employer to claim tax credit
 - Employee's name
 - Date leave is requested
 - Written support for reason for leave, including the name of the physician or governmental body ordering quarantine/isolation
 - Statement that employee is unable to work or telework for such reason

DOCUMENTATION (cont.)

- Documentation required for employer to claim tax credit (cont.)
 - Documentation for childcare leave must also include:
 - Name and age of child
 - Name of school/childcare that has closed/unavailable
 - Statement that no other person will be providing care during the hours leave is requested
 - If the child is over 14 years old, a statement that special circumstances exist requiring the employee to provide care

DOCUMENTATION (cont.)

- Documentation required for employer to claim tax credit (cont.)
 - Sample forms available on request
- Documentation must be kept for 4 years

RETALIATION PROHIBITED

- Employers are prohibited from disciplining, discharging, discriminating, or retaliating against an employee who takes leave under the FFCRA
- Future claims?

TAX CREDIT

- Tax credit equal to 100% of the mandated paid sick leave wages (including health benefits and employer's share of Medicare)
- Claim tax credit by reducing payroll tax deposits each quarter or submitting Form 7200 if tax deposits are not sufficient to cover the credit
- Many payroll processing companies are submitting the proper forms for employers

TESTING

- Legal Requirements/Implications
 - Americans with Disabilities Act
 - Medical Exam
 - Temperature
 - COVID-19 testing can be required
 - » Antibody testing prohibited
 - State/Local/CDC
 - Ohio permits employer required testing
 - Ohio Department of Health does not require negative test to return to work

POSITIVE CASE

- Legal Requirements/Implications
 - State/Local/CDC
 - Isolation
 - Cleaning
 - Notification of Health Department
 - Contact Tracing

CONTRACT TRACING

- Legal Requirements/Implications
 - State/Local/CDC
 - 6/15/48 Rule
 - Updated Guidance: combined 15 minutes
- Practical Issues
 - Employee cooperation
 - Outside of work contact
 - Client involvement

RETURN TO WORK GUIDELINES

- CDC recently changed the quarantine/isolation rules to reduce the quarantine/isolation period
- Positive COVID-19 tests return to work 10 days after symptom onset, or
- If the employee is asymptomatic, after the COVID-19 test was performed (not the date the results were received) as long as the following criteria are met:
 - At least 24 hours with no fever without fever-reducing medication
 - Other symptoms of COVID-19 are improving (** Loss of taste and smell may persist for weeks or months after recovery and need not delay the end of isolation)

RETURN TO WORK GUIDELINES (cont.)

- Close contacts (within 6 feet for 15 total minutes in a 24 hour period) may return to work:
 - After day 10 if they do not get tested for COVID-19
 - After day 7 if they receive a negative COVID-19 test result (test must occur on day 5 or later)
- Critical Infrastructure employers are not required to quarantine all employees exposed at work (depending on the circumstances)

- **Critical Infrastructure**

- Close contacts may continue working if they remain asymptomatic and additional precautions implemented as a last resort to continue operations

- Pre-screen temperature and assess symptoms
 - Continue self-monitoring
 - Wear a mask for 14 days
 - Social distancing if possible
 - Disinfect and clean surfaces routinely

COVID-19 VACCINE

- Employment laws implicated:
 - Americans with Disabilities Act (ADA)
 - The Genetic Information Nondiscrimination Act (GINA)
 - Title VII of the Civil Rights Act of 1964
- Safety/liability issues
 - OSHA
 - State workers compensation laws



ADA

- Prohibits an employer from requiring medical exam or asking questions related to a medical condition/disability unless the exam or questions are both “job-related and consistent with business necessity”
 - Asking if an employee received the vaccine is not a medical question as long as the employer does not ask why or why not?
 - Asking for documentation of receiving the vaccine is permissible

- Implementing a mandatory vaccine policy is permissible if:
 - Employer can establish that an unvaccinated employee would pose a direct threat due to a “significant risk of substantial harm to the health and safety of the individual or others that cannot be eliminated by reasonable accommodation”

- Direct threat analysis requires an individualized assessment of:
 - The duration of risk
 - The nature and severity of the potential harm
 - The likelihood that the potential harm will occur and the imminence of the potential harm

ADA (cont.)

- Reasonable accommodations may be required if employee's disability prevents them from being vaccinated, unless doing so would be an undue hardship on the employer
- Undue hardship
 - Remote work
 - Transfer to different position
- Interactive process
 - Document

TITLE VII

- Protects employees with sincere religious beliefs that prevent them from being vaccinated
- Undue hardship analysis is less stringent than the ADA – under Title VII undue hardship is considered to be any accommodation that imposes more than a de minimus cost or burden on the employer

OSHA

- Protects employees under Section 11(c) (whistleblower rights) from retaliation if the employee refuses a vaccination because of a reasonable belief that he or she has a medical condition that creates a real danger of serious illness or death

WORKERS COMPENSATION

- Adverse reactions to the COVID-19 vaccine will likely be covered as a workers compensation injury if the employer has a mandatory vaccine policy or offers the vaccine at the workplace

MANDATORY VACCINE POLICY

- Consider risks/availability
- Create policy
- Establish process to consider exceptions
- Contact legal counsel

UNEMPLOYMENT

- Federal Pandemic Unemployment Assistance program for individuals unable to work due to COVID-19 was extended beginning December 26, 2020 until March 14, 2021

UNEMPLOYMENT (cont.)

- To be covered, employees must be:
 - Ineligible for or have exhausted regular unemployment under state law
 - Certify that he/she is capable of and available to work but unable because he/she:
 - Was diagnosed with COVID-19
 - Has a member of his/her household diagnosed with COVID-19
 - Was providing care to family member with COVID-19

UNEMPLOYMENT (cont.)

- Certify that he/she is capable of and available to work but unable because he/she: (cont.)
 - Has primary caregiving responsibility for a child who is unable to attend school due to COVID-19
 - Was under quarantine order or advised to quarantine by health care provider
 - Has become a breadwinner after the head of household died from COVID-19
 - Had to quit work as a direct result of COVID-19
 - Has a work location closed as a result of COVID-19 public health emergency

ADDITIONAL UNEMPLOYMENT PROVISIONS INCLUDED IN THE STIMULUS

- FPUA benefits capped at 50 weeks including any weeks the individuals received benefits under any federal or state law
- FPUA provides additional \$300 per week and additional week of benefits if state law requires a waiting week

ADDITIONAL UNEMPLOYMENT PROVISIONS INCLUDED IN THE STIMULUS

(cont.)

- Extends and phases out the Pandemic Unemployment Assistance (PUA) to March 14 (after which no new applicants) through April 5, 2021
- Extends and phases out the Pandemic Emergency Unemployment Compensation (PEUC), which provides additional weeks when state unemployment runs out, to March 14 (after which no new applications) through April 5, 2021

ADDITIONAL UNEMPLOYMENT PROVISIONS INCLUDED IN THE STIMULUS

(cont.)

- Requires documentation of employment, rather than the self-certification that is currently in use and requires states to verify applicant identity
- Requires states to have a place to report when someone turns down a job and must notify claimants of the requirement to accept suitable work

CONSOLIDATED APPROPRIATIONS ACT, 2021 (12/21/20)

- Employee retention tax credit has been extended until July 1, 2021
- Full deduction for business meals (instead of 50%) for the next two years -- intended to bolster restaurant patronage

QUESTIONS?