

COVID-19: ARE YOUR WORKPLACE SAFETY COMPLIANCE POLICIES MEDIUM-RARE OR WELL-DONE?

NEW OSHA GUIDANCE AND CONGRESSIONAL PROBE INTO MEATPACKING INDUSTRY INDICATE SHIFT IN WORKPLACE SAFETY ENFORCEMENT

Date: 17 February 2021

U.S. Labor, Employment, and Workplace Safety Alert

By: David C. Rybicki, Barry M. Hartman, Leann M. Walsh, Nancy C. Iheanacho, Avery R. Miller

On 21 January 2021, President Biden issued an executive order directing the Occupational Safety and Health Administration (OSHA) Assistant Secretary of Labor for Occupational Safety and Health to issue new guidance for employers in an effort to assure more stringent worker safety standards to better protect workers from COVID-19.¹ While some existing OSHA standards, such as those for personal protective equipment² and respiratory protection,³ could be applied in a way to help protect workers from exposure to COVID-19, OSHA has not yet issued a rule that specifically addresses how to control hazards posed by COVID-19. The executive order also requires OSHA to consider whether any emergency temporary standard on COVID-19 is needed and, if so, to issue it by 15 March 2021. This new guidance is likely the groundwork for more robust enforcement of, and investigations into, COVID-19 workplace safety.

The new guidance, issued on 29 January 2021, focuses on mitigating and preventing the spread of COVID-19 in the workplace and provides insights into OSHA's enforcement priorities.⁴ While the guidance does not create new legal obligations or formal agency regulations—i.e., employers are not legally obligated to comply—it may signal what a reasonable employer must do to maintain a workplace compliant with the general duty clause: “free from recognized hazards that are causing or are likely to cause death or serious physical harm” to employees.⁵ The guidance identifies measures that OSHA workplace inspectors will look for and indicates that a fulsome hazard assessment will be the foundational evidence of an employer's compliance with its general duty obligations.

The new guidance tracks with previously issued recommendations from the Centers for Disease Control and Prevention about workplace safety measures relating to COVID-19. However, the following measures are of note in the new OSHA guidance:

- Assignment of a workplace coordinator.
- Identification of where and how workers may be exposed at work, including conducting a hazard assessment.
- Identification of a combination of measures that will limit the spread of COVID-19 in the workplace in accordance with the principles of the hierarchy of controls.

- Communications with workers in a language they understand.
- Retaliation protections.
- Making the COVID-19 vaccine available at no cost to employees and not distinguishing between vaccinated and nonvaccinated workers.

From a practical standpoint, employers should carefully assess how they are evaluating potential COVID-19 threats in their workplace. Demonstrating that an employer has thoughtfully considered and documented the exposure risks from the employee's perspective will be an important factor for an inspector to consider during an inspection. Indeed, the failure to undertake an appropriate workplace hazard assessment may well be seen by an inspector as a failure to provide a safe workplace, especially if there has been a COVID-19 infection traced to that workplace.

PROBE INTO PRIOR OSHA ENFORCEMENT IN MEATPACKING INDUSTRY

Following closely on the heels of the executive order calling for stronger COVID-19 guidance from OSHA, a congressional probe was launched into the agency's lack of enforcement in the meatpacking industry, where COVID-19 infections have been widely reported. On 1 February 2021, Rep. James E. Clyburn (D-SC), Chair of the House Select Subcommittee on the Coronavirus Crisis (Select Subcommittee), launched an investigation into workplace safety at three of the nation's largest meat producers—Tyson Foods, Smithfield Foods, and JBS USA.⁶ The Select Subcommittee has requested extensive information from the targets of its investigation, including details regarding employee complaints, illnesses and deaths, plant closures, safety measures, and other disclosures with respect to how each company has modified its facilities in response to COVID-19.⁷ Chairman Clyburn also demanded that OSHA produce information about what the Select Subcommittee described as “ineffectual” enforcement of safety standards under the Trump administration, stating that OSHA failed in its mission to protect vulnerable meatpacking workers during the pandemic.⁸ It is likely that a future congressional investigation will evaluate a company based on its compliance with the new OSHA guidance.

This is yet another example of how the [recently convened 117th Congress](#) under unified Democratic control will be particularly aggressive in its oversight and investigation of industry and the private sector, including companies perceived to be complicit in or having benefitted from weak regulatory and enforcement policies under the Trump administration. Given the prominent media coverage of workplace safety practices at meat-processing facilities as a result of COVID-19, the Select Subcommittee may request committee interviews or formal hearings with executives from the target companies. We are likely to see activity in the Senate on this issue as well. Last year, Senators Elizabeth Warren (D-MA) and Corey Booker (D-NJ) sent a letter to OSHA regarding their “delayed and feckless response” to reports of COVID-19 infections at meatpacking facilities.⁹ Senator Warren was also joined by Senators Tim Kaine (D-VA), Bernie Sanders (I-VT), Tammy Baldwin (D-WI), Robert P. Casey Jr. (D-PA), and Tammy Duckworth (D-IL) in requesting an audit of OSHA's decreased enforcement activity during the pandemic.¹⁰ This inquiry could easily extend to other industries, especially if infection rates in identifiable industries increase. Further, unlike OSHA inspection results, which are generally not publicly reported unless violations are found, the results of a congressional investigation are just the opposite and could generate significant negative publicity.

WHAT YOU NEED TO KNOW WHEN CONGRESS COMES CALLING

President Biden campaigned on a message of hope for a national response to COVID-19. Moving forward, parallel agency and congressional investigations into workplace safety in particular industries are likely to continue. Proactive planning to avoid these investigations is prudent and far more cost effective than waiting for a knock on the door by either OSHA or a congressional committee. If you or your company receives a congressional letter, document demand, or subpoena, see our previous [client alert](#) with tips to help you understand and prepare for congressional investigations.

FOOTNOTES

¹ The White House, [Executive Order on Protecting Worker Health and Safety](#) (Jan. 21, 2021).

² 29 C.F.R. § 1910.132.

³ *Id.* § 1910.134.

⁴ Dep't of Lab., Occupational Safety & Health Admin., [Protecting Workers: Guidance on Mitigating and Preventing the Spread of COVID-19 in the Workplace](#) (Jan. 29, 2021).

⁵ This general duty requires employers to furnish to each worker “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.” Occupational Safety and Health (OSH) Act of 1970 § 5(a)(1), 29 U.S.C. § 654(a)(1).

⁶ Press Release, [Select Subcomm. on the Coronavirus Crisis, Select Subcommittee Launches Investigation Into Widespread Coronavirus Infections And Deaths In Meatpacking Plants](#) (Feb. 1, 2021).

⁷ *Id.*

⁸ *Id.*

⁹ Press Release, Elizabeth Warren, [Booker Press OSHA on Feckless Enforcement of Meatpacking Facilities with COVID-19 Outbreaks](#) (Sept. 22, 2020).

¹⁰ Press Release, Elizabeth Warren, Warren, [Colleagues Call for Inspector General Audit of OSHA's Inadequate Enforcement Amid Growing Worker Illnesses and Deaths During COVID-19 Pandemic](#) (May 28, 2020).

KEY CONTACTS



DAVID C. RYBICKI
PARTNER
WASHINGTON DC
+1.202.778.9370
DAVID.RYBICKI@KLGATES.COM



BARRY M. HARTMAN
PARTNER
WASHINGTON DC
+1.202.778.9338
BARRY.HARTMAN@KLGATES.COM



LEANN M. WALSH
PARTNER
RALEIGH
+1.919.743.7319
LEANN.WALSH@KLGATES.COM



NANCY C. IHEANACHO
ASSOCIATE
WASHINGTON DC
+1.202.778.9423
NANCY.IHEANACHO@KLGATES.COM



AVERY R. MILLER
ASSOCIATE
RALEIGH
+1.919.743.7327
AVERY.MILLER@KLGATES.COM

This publication/newsletter is for informational purposes and does not contain or convey legal advice. The information herein should not be used or relied upon in regard to any particular facts or circumstances without first consulting a lawyer. Any views expressed herein are those of the author(s) and not necessarily those of the law firm's clients.