Coronavirus: OSHA Law and Employment Law Issues

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1001 G Street NW, Ste. 500 W,
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www.khlaw.com

Presented by:
Manesh K. Rath
Partner
rath@khlaw.com

John Gustafson
Associate
gustafson@khlaw.com

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Manesh Rath is a partner in Keller and Heckman’s litigation and OSHA practice groups. He has been the lead amicus counsel on several cases before the U.S. Supreme Court including Staub v. Proctor Hospital and Vance v. Ball State University.

Mr. Rath is a co-author of three books in the fields of wage/hour law, labor and employment law, and OSHA law. He has been quoted or interviewed in The Wall Street Journal, Bloomberg, Smart Money magazine, Entrepreneur magazine, on "PBS's Nightly Business Report," and C-SPAN.

Mr. Rath currently serves on the Board of Advisors for the National Federation of Independent Business (NFIB) Small Business Legal Center. He served on the Society For Human Resources (SHRM) Special Expertise Panel for Safety and Health law for several years.

He was voted by readers to Smart CEO Magazine's Readers' Choice List of Legal Elite; by fellow members to The Best Lawyers in America 2016, 2017 and 2018; selected by Super Lawyers 2016 – 2017, 2017 – 2018; and by corporate counsel as the 2017 Lexology winner of the Client Choice Award.
John B. Gustafson primarily practices environmental law. He counsels clients on regulatory compliance and enforcement and litigates related matters.

Specifically, Mr. Gustafson assists clients with issues arising under FIFRA, TSCA, the OSH Act, and California Proposition 65. He has litigated at trial and appellate levels, participated in EPA and CDPR enforcement negotiations and arbitrations, and appealed standards developed by private standards development organizations. He variously assists clients with B-to-B contracting conflicts, advertising disputes, and labor and employment issues.
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with Manesh Rath

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TOPICS TO BE DISCUSSED

- PPE and Hygiene Workplace Rules
- What employers can and can’t do with telework and sending workers home
- Medical testing issues under the ADA, HIPAA, and OSHA laws
- Use of leave and New House of Representatives Bill for Paid FMLA
- Fitness for return to duty
- Other critical steps employers must consider
**Are There Any Personal Protective Equipment or Hygiene Workplace Rules That Can Be Implemented?**

- OSHA issued Guidance on March 9:
  - Workers within six feet of patients known to be COVID-19 positive:
    - N-95 respirators, PAPRs, or SARs where aerosolizing is expected; face shields
    - Primarily health care and emergency response
  - For other worksites, PPE is not called for
  - Good personal hygiene and infection control practices:
    - Handwashing with soap or 60% alcohol hand sanitizer
    - Send workers home
    - “At Risk” = follow CDC guidelines
ARE THERE ANY WORKPLACE RULES THAT CAN BE IMPLEMENTED?

- Government bans on gatherings of certain sizes = remote working mandated
  - Governments generally prohibiting assemblies of more than ten people
  - CDC’s March 15 revisions recommend cancelling mass gatherings, 250+ people or 10+ people for organizations that serve higher risk populations
WHAT ADMINISTRATIVE CONTROLS IS OSHA PROPOSING?

- OSHA recommends in its March 9 Guidance:
  - General Duty Clause
  - Send sick workers home (this should include other high-risk workers)
  - Separating production lines and running them on alternate shifts
    - CDC recommends six feet of separation
    - If it’s possible, extend a line to spread workers
    - If two lines are side-by-side, run them on alternating shifts
    - For workers in modular arrangements, permit alternating shifts
  - Discontinue non-essential travel
  - Regular handwashing and handwashing after PPE removal
Does OSHA Consider a COVID-19 Positive to Be Recordable?

- OSHA Guidelines: Recordable 1904 event if:
  1. Confirmed case
  2. Work-related
     - If the exposure is known to have occurred outside of work, it is not recordable.
     - If there is a known case of COVID-19 in the workplace, then the next case, if of unknown causation, is presumed to be work-related.
  3. One or more recordable criteria (treatment, days away from work)
Does OSHA Consider COVID-19 As Covered Under the Bloodborne Pathogens Standard?

- In its March 9 Guidance:
  - OSHA acknowledges that COVID-19 is not covered under BBP
  - It is not transmitted in the same manner as BBP
  - BBP standard “offers a framework” that may help employers develop appropriate practices and procedures
    - Universal precautions: PPE to include respirators in healthcare
Can Employers Send Workers Home? What Kind of Leave Would This Be?

- Employers may require use of paid leave
- Some employers have granted additional “crisis leave”
- Employers may require unpaid leave once paid leave is exhausted
- For how long should an employee be sent home?
WHAT ABOUT TELEWORK?

- Telework may be permitted for those who can perform work remotely
  - Rely on existing telework policy or establish policy for time entry, maintaining production, use of corporate, personal equipment
  - FLSA: Responding to correspondence during off-hours is compensable time, remind staff to record all time
- Encourage employees to inform employer of symptoms
- Send home employees with symptoms or who fit CDC “high risk” category
Bill – Families First Coronavirus Act (HR 6201)

Proposes that employers under 500 employees must:

• Give FMLA leave to employees if they’ve been employed for 30 days or more
• Provide 80 hours paid sick leave:
  – For employees who must be at home for a COVID-19 diagnosis; to care for someone with COVID-19 symptoms
  – To comply with a recommendation or order by a public official
  – To care for a school child whose school is closed

House passed it. Senate did not pass it.
Can An Employer Take Employee’s Temperature Readings When They Arrive?

- Temperature readings = “medical exam” under the ADA, HIPAA, and OSHA laws
- OSHA’s March 9 Guidance: “prompt identification and isolation of potentially infectious individuals” as a “critical step” in protecting workers
- Recorded temperature data = subject to HIPAA Medical Privacy Rule
  - Should be done by healthcare provider
  - Supervisors should not possess temperature data
If a worker is out for COVID-19 symptoms, how do I determine fitness for return to duty?

- CDC has not issued guidance on this question
- CDC has provided 14 days as the elimination period for persons with symptoms or who are in the CDC high risk category
- Studies are still being conducted
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Keller and Heckman LLP
1001 G Street NW
Suite 500 West
Washington, DC 20001

(202) 434-4182
rath@khlaw.com

Manesh Rath
Partner
rath@khlaw.com
202-434-4182

John B. Gustafson
Associate
gustafson@khlaw.com
202-434-4204