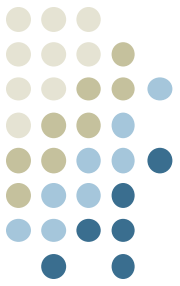


2021: COVID & OSHA

Presented By:
Matthew Horn
SmithAmundsen LLC

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www.saLAWus.com

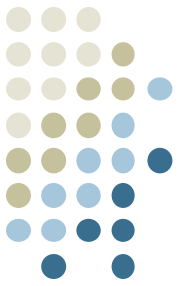


● **Matthew Horn, Partner & Chair**

- As chair of the OSHA Practice Group, Matt oversees a team ensuring that clients in all industries are in compliance with the applicable OSHA regulations
- When OSHA issues arise, Matt and his team represent clients at all stages, from the initiation of an inspection through the litigation of citations.
- Matt's goal with an OSHA inspection is to avoid the issuance of citations altogether, but when citations are issued, he has the experience, knowledge, and credibility needed to resolve them in the best way possible

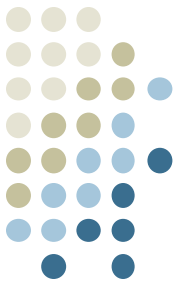


OSHA UNDER BIDEN- Leadership



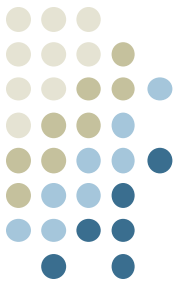
- Boston Mayor and former union leader Marty Walsh tapped to lead the Department of Labor, putting him in charge of OSHA
- Walsh backed by major unions across the country
- Expected to pursue a pro-union agenda and implement rules making it easier for employees to unionize

OSHA UNDER BIDEN- Expectations



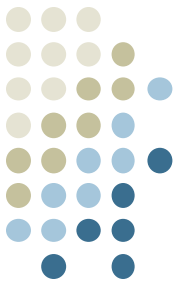
- Expect a continuation of the trajectory of OSHA under Obama:
 - more regulation, inspections, and citations, and
 - increased fines and repeat and willful citations
- Expect rules enacted by Obama but rescinded by Trump to surface again
 - i.e. rule requiring employers with more than 250 employees to electronically submit their 300 logs, as well as their 301s (in addition to the already-required information from their 300As)

OSHA UNDER BIDEN- New COVID Guidance



- OSHA issued updated guidance *recommending* that all employers adopt a formal COVID-19 prevention plan, incorporating the following activities and elements:
 - Conducting a hazard assessment relating to COVID-19 exposure;
 - Identifying control measures to limit the spread of COVID-19 (such as distancing, masks, barriers, work-from-home, staggered shifts, etc.);
 - Adopting policies that encourage sick workers to stay home and not come into work;
 - Communicating and training employees on the policies and procedures implemented (in their native languages); and
 - Implementing protections from retaliation for workers who raise COVID-19 related concerns and issues.

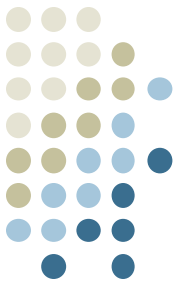
OSHA UNDER BIDEN- New COVID Guidance



- Guidance advises employers to continue to require all employees -- even those who have been vaccinated -- to comply with all control measures, including wearing masks and social distancing
 - “There is no evidence that COVID-19 vaccines prevent transmission of the virus from person-to-person.”
- Plan for masks for the foreseeable future--likely through 2021
 - “We've loosened up the mitigations that we've put on businesses and on people across the state. Masks though, that will stay in place for some time now.”

-JB Pritzker on March 15, 2021

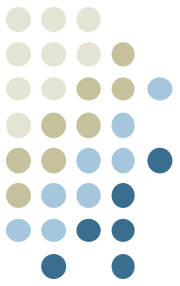
OSHA UNDER BIDEN- New Nat'l Emphasis Program



- OSHA recently launched a new national emphasis program focusing enforcement efforts on industries and employers most impacted by COVID-19
- Put primary emphasis on inspecting workplaces where there have been COVID-19 related fatalities, serious illnesses, outbreaks, and employee complaints

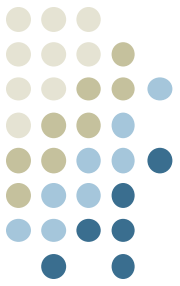
OSHA UNDER BIDEN-

New Nat'l Emphasis Program

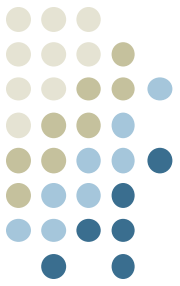


- Secondly, the program requires OSHA to compile a list of employers to inspect based on industry and employer 300A data
- Will include employers in healthcare, meat processing, food handling and processing, warehousing and storage, agriculture, construction, and manufacturing with elevated illness rates according to the employer's individual 300A data
- Also gives OSHA Area Offices “broad discretion” in determining who to put on or take off the list

OSHA UNDER BIDEN- COVID Standards

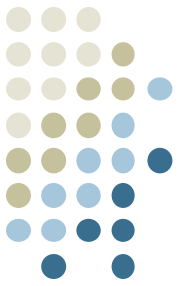


- OSHA may still issue COVID-related Standards *despite* missing 3/15 deadline
- Could mirror those implemented by CalOSHA:
 - If no “outbreak,” provide exposed employees with no-cost testing during work hours;
 - Can get testing offsite, but has to be paid time
 - If an “outbreak,” provide ALL employees with weekly, no-cost testing during work hours
 - “Outbreak” is 3 or more cases in a 14 day period;
 - 20 or more cases in a 30 day period is a “major outbreak”
 - Triggers additional requirements

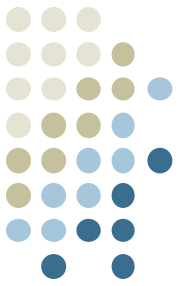


COVID-19: IL, CDC, & OSHA GUIDANCE

The Three Absolutes



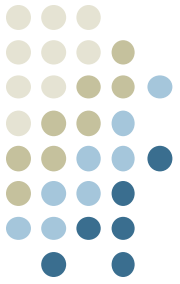
- 1) Comply with all local, state and/or federal orders. Read the FINE PRINT
- 2) Identify and implement applicable CDC & OSHA guidelines/standards
- 3) Prepare and implement a COVID Plan



What if I Don't?

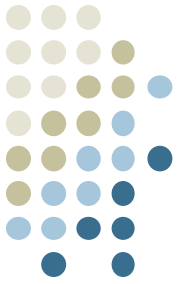
- Employees get sick
- Claims by employees
- Claims by anyone who contracts COVID from employees
- OSHA inspections and citations
- Negative publicity

IL Order-“Restoring Illinois”



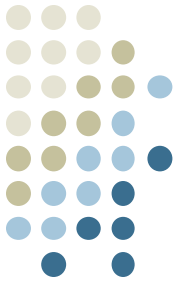
- Guidance generally provides:
 - Allow employees to work from home when possible;
 - Ensure employees adhere to distancing, and when not possible, provide and require them to wear masks;
 - Ensure visitors practice distancing, and when not possible, encourage masks;
 - Post all IDPH guidance regarding worker safety;

CDC & OSHA Guidance

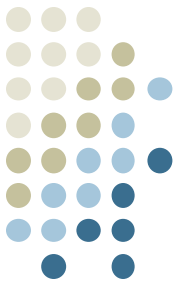


- Human Resources:
 - Implement flexible sick leave and supportive policies
 - Protect employees at higher risk
 - 65 or older
 - Immunocompromised
 - Employees with heart problems, diabetes, asthma, HIV, liver disease, kidney problems, obesity etc.
 - Communicate supportive policies
 - Limit travel for work
 - Limit meetings

CDC & OSHA Guidance



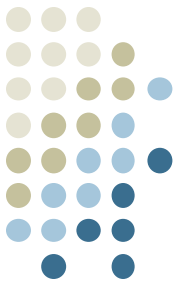
- Operations:
 - Conduct COVID hazard assessment and implement necessary engineer and administrative controls
 - Educate employees how to protect themselves
 - Conduct daily health checks
 - Screening questions
 - Temperature checks (thermal cameras, etc.)
 - Require sick employees to stay home
 - Make employees that get sick at work leave



CDC & OSHA Guidance

- Policies for distancing
 - Stagger shifts, reduce capacity, etc.
- Implement engineering controls
 - Physical barriers—plexiglass, etc.
 - Proper ventilation and ventilation systems
 - Personal protective equipment
- Implement administrative controls
 - Face masks
- Routine cleaning and sanitizing
 - Make wipes and cleaning supplies readily available

Return to Work after Having COVID (healthcare and non)



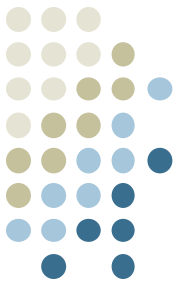
- If have COVID symptoms:
 - 10 days since symptoms first appeared;
 - 24 hours with no fever without medication; and
 - Other symptoms improving.
- If no symptoms and positive test only:
 - 10 days have passed since date of positive test and still no symptoms
- If a bad case of COVID and immunocompromised, then consult with doctors before return to work

Return to Work After Exposed to COVID (healthcare)



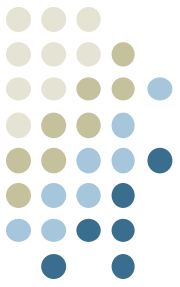
- Employee has *prolonged close contact* to COVID, then quarantine for 14 days
 - Prolonged close contact = 6 feet for 15 minutes or more OR had contact with excretions or secretions; and
 - Employee not wearing a respirator or face mask...
 - Employee not wearing eye protection if COVID case had no face mask on...
 - Employee not wearing all PPE if aerosol procedure
- No need to quarantine if vaccinated or had COVID w/in last three months

Return to Work After Exposed to COVID (healthcare)

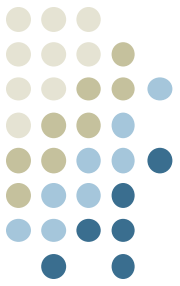


- Exception for critical staffing shortages
 - Only rely on this exception if ABSOLUTELY necessary and staffing shortage would materially impact facility or patient treatment
 - Can implement “shortened quarantine” or no quarantine procedures as needed
 - CDC and Illinois *permitting* shortened quarantine periods but ensure county is too.....and be careful!
 - Option 1: end quarantine after day 10 (i.e. day 11) if no symptoms
 - Option 2: end quarantine after 7 days (i.e. day 8) if no symptoms AND a negative test after day 5 (i.e. day 6)

Return to Work After Exposed to COVID (non-healthcare)



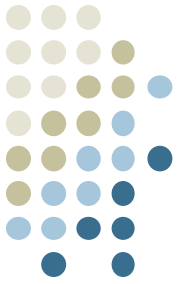
- If employee has been *in close contact* to someone with COVID, then best to quarantine for 14 days
 - Close contact = 6 feet for 15 minutes or more OR had physical contact with them
 - CDC and Illinois *permitting* shortened quarantine periods but ensure county is too.....and be careful!
 - Option 1: end quarantine after day 10 (i.e. day 11) if no symptoms
 - Option 2: end quarantine after 7 days (i.e. day 8) if no symptoms AND a negative test after day 5 (i.e. day 6)



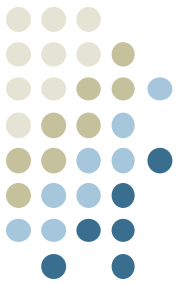
COVID PLAN

- Adopt a COVID-19 plan and train on it
- Elements of a Plan (not including HR policies):
 - If COVID, no work until 10 days since onset and no fever
 - If COVID at work, send home and sanitize
 - Evaluate workers for COVID-19 -- if signs, must leave
 - Take temperature or inquire as to fever
 - Ask questions each day re. exposure, symptoms
 - Document and act on temperature and answers
 - If exposed to someone with COVID, then quarantine

COVID PLAN

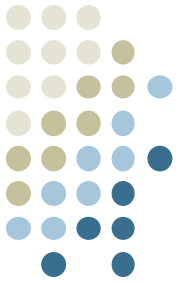


- Elements of a Plan (cont'd):
 - Distance and spread workers out
 - Stagger start times, designate traffic on stairs, etc.
 - Install plexiglass and other barriers
 - Provide and require masks if not able to distance
 - Make soap, sanitizer, and wipes readily available
 - Have bathrooms routinely cleaned and sanitized
 - Do not meet in large groups
 - Eliminate communal water jugs, coffee stations, and distance break areas

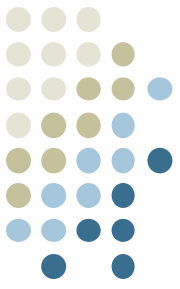


OSHA ENFORCEMENT OF COVID PROTECTIONS

Current OSHA Activities



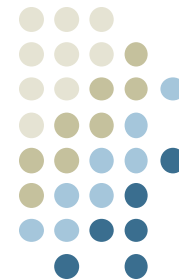
- OSHA is overwhelmed with calls and complaints regarding COVID
- OSHA offices closed and all OSHA employees “working from home” ...but slowly opening back up
- OSHA generally allowing employers to “self-report” if no fatality or doing remote inspection if fatality
 - A lot of COVID fatality inspections
 - Why? Because employees passing away outside of work is now the employer’s problem.....



OSHA Actions re. COVID

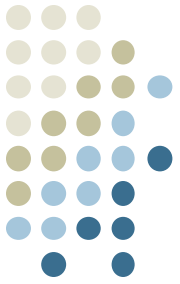
- If employer can prove followed CDC and OSHA guidance, then no citations
- If cannot prove that, then citations and likely a press release, negative attention, and claims
- Since OSHA *currently* has no COVID Standards, usually issue citations under general duty clause, but also, recording/reporting, PPE, respiratory protection*, etc.
 - *If requiring respirators, need to have RPP!

OSHA Recording



- OSHA has indicated that it will require employers to record and report employee COVID-19 cases in certain circumstances:
 - 1) an employee has a confirmed case of COVID-19;
 - 2) the case is work-related; and
 - 3) the case involves one or more of the general recording or reporting criteria (i.e. medical treatment beyond first aid, days away from work, hospitalization, death, etc.)
- In order for a case to be work-related, employee has to be infected at work—not enough that he/she contracts the disease outside of work and displays symptoms at work

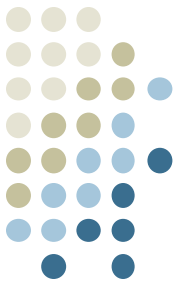
OSHA Recording—Cont'd



- OSHA guidance saying recordable if employer makes a *reasonable determination* case is work-related
- How does an employer make that determination?
 - Through discussions with employee;
 - Review of any objective evidence available—i.e. facility layout, evaluating exposures, texts and emails with other employees; and/or
 - Questionnaire that should be filled out by employees with confirmed COVID cases inquiring as to employees' exposure to COVID in and *outside* of the workplace

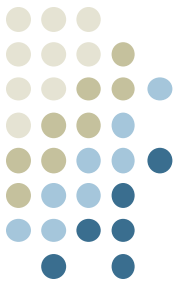
*we have a form we can send you

COVID and OSHA Retaliation Claims



- For a retaliation claim, employee must show:
 - He/she engaged in protected activity (i.e. raising any safety concern or refusing to perform any job function for fear of safety)
 - Suffered employment termination; and
 - Causal link between the two established

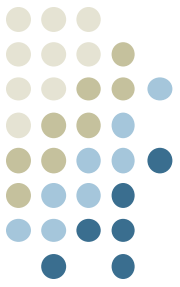
Retaliation Claims— Protected Activity



- Protected activity could include:
 - 1) Calling OSHA;
 - 2) Refusing to work due to safety/COVID concerns;
 - 3) Reporting alleged unsafe work environment to management;
 - 4) Complaining about alleged work related injury or illness; and/or
 - 5) Testifying in any internal or OSHA investigation

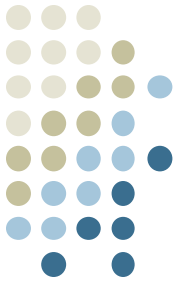
Retaliation & COVID-19

Considerations...



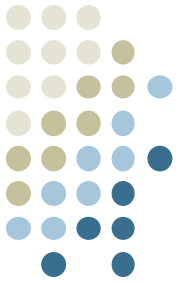
- Do NOT terminate due to raising COVID concerns/issues, rather focus on the employee's behavior/conduct
- Refusal to work solely due to FEAR (particularly unsubstantiated fear that is not rooted in any specific and real safety hazard) can be considered “job abandonment”

COVID Moving Forward



- Get fully compliant, written procedures in place
- Get employees vaccinated
- Keep adhering to CDC and OSHA guidance for protective measures
 - Distancing, masks, respirators, PPE, etc.
- Plan for the “next COVID”
 - Start building PPE reserves now!
 - OSHA will be looking at this in the future

Thank You!



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