

OSHA Lays Out Road Map For 3-Stage Reopening Plan

By **Kevin Stawicki**

Law360 (June 18, 2020, 5:51 PM EDT) -- The U.S. Department of Labor's Occupational Safety and Health Administration on Thursday issued a blueprint on how nonessential businesses should reopen amid the coronavirus pandemic, answering questions that ran the gamut from testing and temperature checks to the risk of litigation.

The new OSHA guidance outlines three phases of reopening, first encouraging continued telework and special accommodations for employees with higher risks of illness, then easing restrictions on who is permitted at the workplace and finally eliminating restrictions in phase three.

Employers' failure to develop and implement policies to take care of workers' safety and health based on local conditions "will directly affect workers' exposure risks," the agency said.

"Such a resurgence could lead to increases in infected and sick employees, the increased need for contact tracing of individuals who visited a workplace, enhanced cleaning and disinfection practices or even a temporary closure of the business," the agency said.

In addition to reiterating basic elements of reopening such as conducting assessments of hazards that increase risk of occupational exposure, isolating sick workers and maintaining proper hygiene and social distancing, the agency also answered a series of questions employers have raised about their responsibilities to workers.

Worksite testing, temperature checks and health screening are allowed if done with transparency and confidentiality and without retaliation, the agency said, adding that even if a worker tested negative for the virus they may still be a hazard to colleagues and that maintaining proper hygiene and distancing is still paramount.

But the agency stressed that employees should conduct their own temperature checks at home instead of when they arrive at work and that companies should be generous with their sick leave policies to encourage employees to stay at home when they have symptoms.

If companies decide to do their own screenings and record the results, they may have to adhere to the Access to Employee Exposure and Medical Records, which would require keeping those records on file, and ensure they're not violating other standards such as the blood-borne pathogens standard, the agency said.

"The message to the nonessential businesses is that they need to track the local and state requirements in their jurisdiction," said Morgan Lewis & Bockius LLP partner Jonathan Snare, who was OSHA's deputy assistant secretary from 2004 to 2006. "That's probably different from the essential businesses that have been operating on the basis of the federal government in an executive order saying they need to continue to operate."

The new guidelines come as the agency has been under fire by some lawmakers, workers' advocates and unions that say the workplace safety watchdog is dropping the ball on workers by only administering nonbinding guidelines.

Principal Deputy Assistant Secretary of Labor for Occupational Safety and Health Loren Sweatt said during a congressional hearing in May that the agency had issued one citation related to the COVID-19 pandemic, saying it is a challenge to build cases that will withstand court scrutiny. Safety advocates have said the agency's actions only demonstrate its loose enforcement approach.

The agency has also faced litigation that sought to force it to issue an emergency safety rule requiring employers to protect workers from COVID-19. Last week, the D.C. Circuit tossed an AFL-CIO lawsuit seeking to do just that, citing "considerable deference" the court owes the agency.

--Additional reporting by Braden Campbell. Editing by Stephen Berg.