Morgan Lewis viewpoint
hospital industry

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# Ebola May Be Bad Enough, But There Is OSHA, Too

*Although most hospitals likely will never encounter a true case of Ebola, that does not mean they are immune to its harms. With nurses and other clinicians clamoring for adequate workplace protections, hospitals must decide whether they have the resources to comply with CDC guidelines. If not, they must decide what to do to mitigate their risk of an OSHA enforcement action.*

It goes without saying that every hospital wants to protect its workers from Ebola. Yet, exactly how much protection can each hospital offer? According to one survey, only 6% of U.S. hospitals are well prepared to receive a patient with Ebola. This is not unexpected, given that most hospitals continue to operate on very thin margins and that full compliance with Centers for Disease Control and Prevention (CDC) guidance would be costly. Although the disconnect between CDC expectations and hospital practices is understandable, what does that mean with regard to the Occupational Safety and Health Administration (OSHA)? What exposure to OSHA enforcement does a hospital have if it has not completely complied with CDC guidelines, even in the absence of an actual Ebola patient presenting to the hospital? In short, the hospital's risk profile depends on how reasonable its actions are, even if they are less than ideal.

## OSHA Takes a Position

On its newly released website dedicated to Ebola, OSHA has stated that it has jurisdiction to pursue hospitals that do not meet safety standards for infection control. Indeed, OSHA actually references CDC guidelines as the "authoritative source of information" for the protection of healthcare workers who potentially have contact with Ebola patients. OSHA's description of the applicable safety standards consists of a mixture of OSHA standards pertaining to bloodborne pathogens, personal protective equipment, and respirators and CDC Ebola-specific guidelines. There can be no mistake, therefore, that the gold standard is compliance with the CDC requirements, including correctly using adequate personal protective equipment and similar measures, no matter what the expense may be.

## Implications of Deviations from CDC Guidelines

Although it may be a laudable goal to adhere strictly to the CDC guidelines, not all hospitals will have sufficient resources to do so. Indeed, since the guidelines keep changing, a hospital may be in compliance one day and out of compliance the next. Given these practicalities, a hospital may reasonably decide that it will not perfectly adhere to the guidelines (or simply cannot comply with the guidelines).

 

When making such a decision, the hospital should keep in mind that the general duty under OSHA is to provide a safe workplace.[1] The question therefore is: If an Ebola patient were admitted at the hospital, are the safety measures that are in place reasonably likely to protect employees from infection? Do the employees have adequate equipment, well-crafted policies, and training, such that contagion is reasonably unlikely? If the answer to these questions is yes, then, as a matter of enforcement discretion, OSHA would be unlikely to pursue a hospital. Moreover, some would argue that the CDC guidelines are not binding requirements on hospitals and, even less so, standards to which OSHA can mandate compliance.

### Proving That Reasonable Measures Have Been Taken

As most hospitals presumably do not want to be caught unaware by an unannounced OSHA inspection, a hospital may decide that it should take certain precautionary steps to build its case that it has been reasonable in its response to the potential risk. For instance, a hospital can document that it did a risk-assessment analysis, which shows the risks specific to its organization and the mitigation steps taken. It can also outline the CDC recommendations that it has chosen **not** to follow and document why those steps were either unnecessary or impractical. Most importantly, to ensure employee morale and to avoid whistleblowers, communication with employees is key. Employees need to understand that the employer is concerned and has taken proactive steps to protect them.

## Our Author

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Jonathan L. Snare is a partner in Morgan Lewis's Labor and Employment Practice. He regularly advises on workplace safety and health issues that involve enforcement, compliance, workplace investigations, and emergency response matters. He has assisted a wide variety of clients (including healthcare employers) on OSHA compliance and enforcement matters, including the OSHA Bloodborne Pathogen standard, the respirator standard, and the Personal Protective Equipment (PPE) standard. Prior to joining Morgan Lewis, Mr. Snare worked for more than five years in several roles for the U.S. Department of Labor (DOL). Most recently, he served as the DOL's deputy solicitor of labor. In that role, he counseled the secretary of labor and oversaw one of the largest legal departments in the U.S. government. Before that, Mr. Snare was acting assistant secretary for OSHA, where he was responsible for leading a staff of approximately 2,200 safety and health professionals and support personnel. He also served as deputy assistant secretary for OSHA and senior adviser to the solicitor of labor. During his tenure at DOL, Mr. Snare was involved in a number of OSHA policy and regulatory matters. Mr. Snare has testified before congressional committees on occupational safety and health issues, mine safety and health issues, and agency budgets. He has also conducted briefings and negotiations with members of Congress and congressional staff on a wide variety of DOL topics and issues.

1. For more information, see our November 4, 2014 LawFlash, "Employers: How Prepared Are You for Ebola?," available at http://www.morganlewis.com/pubs/LEPG_EmployersHowPreparedAreYouforEbola_04nov14.

 

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Andrew Ruskin is a partner in Morgan Lewis's Healthcare Practice. Mr. Ruskin's practice focuses on providing counsel on healthcare regulatory matters to hospitals and other healthcare service providers. He regularly advises on Medicare and Medicaid coverage, reimbursement, and compliance issues affecting these entities. These issues include claims and cost report submission and appeals, graduate medical education reimbursement, provider-based status, and joint venture structuring. In connection with these issues, Mr. Ruskin frequently advocates his clients' positions to the CMS. Additionally, Mr. Ruskin has appeared before a number of tribunals established to adjudicate Medicare and Medicaid appeals, such as the Provider Reimbursement Review Board.

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## Our Practice

Morgan Lewis offers healthcare providers and suppliers of all types sophisticated, integrated, and cost-effective counsel covering all of their unique needs—in business and finance (including transactions and joint ventures); federal, state, and local regulation; coverage and reimbursement; fraud and abuse and compliance counseling; intellectual property; antitrust; litigation; public policy advocacy; real estate; and labor and employment issues.

Our team includes some of the most respected healthcare law practitioners in the United States and a number of former senior U.S. government officials. Leveraging our lawyers' intimate knowledge of the inner workings of the government's executive branch, as well as the regulatory agencies most critical to healthcare businesses, we bring special insight and savvy to the complex challenges and opportunities that our healthcare industry clients confront in the post-healthcare reform era.

Morgan Lewis also offers an occupational safety and health law practice, which includes lawyers who have experience in OSHA and state plan compliance work and litigation throughout the United States and its territories. We work with OSHA personnel in area, regional, and national offices in connection with litigation matters, voluntary programs, and industry initiatives.

 

Our practice goes beyond OSHA to include consultation on broad and highly sophisticated workplace health and safety issues, including the intersection of occupational health and safety issues with employment, tort, insurance, workers' compensation, environmental, criminal, and transactional law issues.

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