



PART 3 – KEEPING EMPLOYEES SAFE AND COMPLYING WITH SAFETY MANDATES WHEN RETURNING TO WORK

Phase 1 of the Commonwealth's four-phase reopening plan, which allows for certain industries to open subject to strict safety requirements, is under way. In the previous alerts of this series, we discussed the process for selecting and calling back furloughed and laid-off workers. This alert will address how to keep employees safe and comply with current safety mandates now that they are returning to their place of work.

What do I need to do to reopen?

- Review **the four-phase reopening plan** to determine which phase under which your business falls.
- Review the **Mandatory Safety Standards for Workplaces**.
- Implement the required safety standards.
- Establish a COVID-19 **Control Plan**.
- Post **Worker Reopening Posters** throughout the workspace.
- Train managers and employees on the COVID-19 Control Plan and document the training.
- Post your **Compliance Attestation Poster**.

Each Town/City's Board of Health where a business's facility is located is also charged with enforcing compliance with the reopening plan. Businesses that fail to comply with the mandatory safety standards may be subject to fines and possible business closures.

What if parts of my business fall under different phases?

You may only open those parts of your business that fall under the current phase. It may also be beneficial to initiate a dialogue with your City or Town Board of Health in advance of opening to reassure them regarding partial reopening.

How does OSHA's General Duty Clause fit within the Commonwealth's requirements?

Under OSHA's General Duty Clause, employers are required to provide their employees with a place of employment that is "free from recognized hazards that are causing or are likely to cause death or serious physical harm." The courts have interpreted OSHA's General Duty Clause to mean that an employer has a legal obligation to provide a workplace free of conditions or activities that either the employer or industry recognizes as hazardous and that can cause, or are likely to cause, death or serious physical harm to employees when there is a feasible method to abate the hazard.

In preparing your COVID-19 Control Plan you should review and implement OSHA's recommended best practices. OSHA has issued **guidance for specific worker groups and their employers**. In conjunction with OSHA, the CDC also prepared **work-specific guidance**.

If an employee tests positive for COVID-19, do I need to report it to OSHA?

In a May 19, 2020 revised enforcement guidance, OSHA has taken the position that COVID-19 is a recordable illness under OSHA's recordkeeping requirements. A covered employer is responsible for recording cases of COVID-19, if:

- The case is a confirmed case of COVID-19;
- The case is work-related; and
- The case involves one or more of the general recording criteria, which includes missed days or medical aid beyond first aid.

Employers with 10 or fewer employees and certain employers in low hazard industries do not need to record work-related cases of COVID-19 illnesses unless it results in a fatality or the employee is hospitalized as an in-patient or suffers amputation or loss of an eye.

OSHA has recognized that determining work-relatedness is difficult and it will evaluate the reasonableness of the employer's determination using the following criteria:

- **The reasonableness of the employer's investigation into work-relatedness.** Small employers, in particular, are not expected to undertake extensive medical inquiries. It is sufficient in most circumstances for the employer, when it learns of an employee's COVID-19 illness: (1) to ask the employee how he believes to have contracted the illness; (2) while respecting employee privacy, discuss with the employee his work and out-of-work activities that may have led to the illness; and (3) review the employee's work environment for potential exposure to the virus, including whether any other employees contracted COVID-19.
- **The evidence available to the employer.** Evidence that a COVID-19 illness was work-related should be considered based on the information reasonably available to the employer at the time it made its work-relatedness determination. If the employer later learns more information related to an employee's COVID-19 illness, that information should be considered in determining whether an employer made a reasonable work-relatedness determination.
- **The evidence that a COVID-19 illness was contracted at work.** OSHA recognizes that while there is no "ready formula," certain types of evidence may weigh in favor of or against work-relatedness. For instance, OSHA's guidance noted that COVID-19 illnesses are likely work-related when:
 - There are several cases of COVID-19 illnesses that developed among workers who worked closely together and there is no alternative explanation;
 - An employee's COVID-19 illness was contracted shortly after lengthy, close exposure to a particular customer or coworker who has a confirmed case of COVID-19 and there is no alternative explanation; or
 - An employee has the COVID-19 illness and his job duties include having frequent, close exposure to the general public in a locality with ongoing community transmission of COVID-19 and there is no alternative explanation.
- **The evidence that a COVID-19 illness was not contracted at work.** OSHA's guidance also noted that COVID-19 illnesses are likely not work-related when:
 - An employee with COVID-19 is the only worker to contract COVID-19 in her vicinity and her job duties do not include having frequent contact with the general public, regardless of the rate of community spread; or
 - An employee with COVID-19 closely and frequently associates with someone (e.g., a family member, significant other or close friend) outside of the workplace who: (1) has COVID-19; (2) is not a coworker; and (3) exposes the employee during the period in which the individual is likely infectious.

When determining whether an employee's COVID-19 illness is work-related, an employer should give due weight to any evidence of causation, pertaining to the employee's COVID-19 illness provided by medical providers, public health authorities, or the employee herself. OSHA's guidance concludes that in situations where an "employer cannot determine whether it is more likely than not that exposure in the workplace played a causal role with respect to a particular case of COVID-19, the employer does not need to record that COVID-19 illness."

What do I do if an employee complains about a workplace condition or has questions regarding an employer's compliance with the mandatory safety standards?

If you receive an employee complaint – listen. Ask for and assess any suggestions the employee may have for improving safety. Review your plan to ensure you are compliant and have implemented the current best practices. Above all else, do not retaliate against the employee for stepping forward. Any adverse action against the employee for reporting workplace safety concerns may subject the employer to legal liability.

Where can an employee report a safety or health complaint?

Employees who believe their employer is not following safety or health standards can file a complaint with OSHA. The Massachusetts Attorney General is taking and investigating complaints of unsafe working conditions related to COVID-19, such as a lack of social distancing, personal protective equipment (PPE), hygiene protocols, or cleaning and disinfection. Reports regarding workplace safety can also be made to the local Board of Health where the business is located.



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