

EMPLOYER COVID PROTOCOL

— NATIONAL CONCRETE BURIAL VAULT ASSOCIATION —

In this newsletter: Know your rights as an employer when it comes to COVID protocol.

Written by [Poul Lemasters, NCBVA Legal Counsel](#) | February 25, 2022

IS IT 2022 OR 2020 TOO?

WHAT EMPLOYERS SHOULD KNOW ABOUT COVID PROTOCOL...NOW!

Currently, it may seem like employers have made it through COVID. After all, at the time of writing this article, most states are lifting mask mandates, and it is starting to look like business as usual. But is it? Can employers abandon everything and stay safe? The short answer. No. The longer answer - because of the pandemic, businesses will never be the same, and everyone will have some level of protocol that will most likely always be in place, whether it is through what will always be COVID-19 or until the next pandemic. Now, the really long answer . . . keep reading.



SUPREME COURT RULING

Yes, the Supreme Court did recently rule on the issue and ultimately found against the **OSHA Emergency Temporary Standard**. What does that mean exactly? OSHA has the oversight to regulate on any safety issue that affects employees. Typically, if OSHA wants to adopt new standards, such as workplace standards, it will consult with other agencies and other interested parties through a published comment period. During this period, anyone can submit comments, including the general



public. In some cases, there may even be hearings on the issue. Ultimately, after the close of all comments and any public hearings, OSHA will publish the final standard as well as an effective date.

However, in very limited circumstances, OSHA can preclude this process and issue an **Emergency Temporary Standard (ETS)**. This is done when OSHA believes there is an extreme likelihood of danger to employees - such as a pandemic. Under an ETS, the standard is effective immediately and will also serve as the basis for a permanent standard once it goes through the process identified above.

In November, OSHA issued an ETS that stated, among other things, that employers with at least 100 employees would have to require vaccination of employees or require unvaccinated employees to undergo weekly testing and wear a facemask at work. This standard was issued to go into effect by all those covered on January 4, 2022. The ETS was challenged in the 6th US Circuit Court, and ultimately the issue was heard before the Supreme Court.

The Court, in a 6-3 decision, stayed the ETS indefinitely, meaning it is no longer in effect. The Court based its reason on several factors, but primarily it was due to the facts that the ETS exceeded the workplace authority and focused too much on healthcare; as well as the fact that the ETS did not target any employer specifically, and therefore was overbroad. For example, the rule focused on 100 employees, but did not consider things such as workplace environment like an office versus a plant setting.

Does this mean the ETS is over - for good? Probably, but OSHA has authority to issue a new ETS if it deems it necessary. And, OSHA has stated that this ETS may be used for a permanent standard, although due to dropping cases this may not occur either.

DID SOMEONE SAY "GENERAL DUTY CLAUSE"?

Then is OSHA now out of it and powerless? Nope. OSHA has a General Duty Clause that encompasses anything that is not specifically identified under a standard. In this case, while OSHA may not have a standard or ETS on how to handle COVID or vaccines, there is still authority for OSHA to regulate employee safety. Basically, the General Duty Clause states that an employer is liable for injury under the General Duty Clause if:

- 1) The employer failed to keep the workplace free from hazard;
- 2) The hazard was recognized;
- 3) The hazard was causing or likely to cause harm; and
- 4) There was a method to correct or prevent the hazard.

Under the General Duty Clause, employers are - and will remain - in a position to provide safeguards from COVID. In a recent case handled by me, I have seen a healthcare provider be cited by OSHA for failing to provide a safe workplace with COVID protocols. The business denied the claims and was able to defend its position, but the business still had to answer the complaint and prepare a defense. The issue is how varied the methods are to prevent the hazard, so it can be difficult to prove you are doing enough. **For employers, it is important to**

continue to offer any and all safety methods that are available including PPE, and access to vaccines and boosters. As a business, you may still mandate and can always recommend.

WHAT ABOUT VACCINE MANDATES?

Keep in mind that while the Federal mandate was stayed, there are various state levels of mandates and anti-mandates. As of the time of this article, the following states have some type of mandate in place: California, Colorado, Connecticut, Delaware, DC, Hawaii, Illinois, Massachusetts, Maryland, Mississippi, Minnesota, Nevada, New Jersey, New Mexico, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, Vermont, and Washington. At the same time, the following states either limit the vaccine mandate: Arizona, Florida, Iowa, Tennessee, and Utah; or completely ban a vaccine mandate: Arkansas, Georgia, Indiana, Montana, and Texas. It is important to continue to follow your state guidelines when it comes to any vaccine policy you institute.

If you do have a vaccine policy - mandate or recommendation - know that there are two main recognized objections that employers must allow - religious and medical. These objections fall under Title VII, which prohibits employment discrimination based on race, color, religion, sex, and national origin. Under Title VII, employers have an affirmative obligation to provide an accommodation for an employee who falls under any of these classifications.

Under the religious and medical accommodation, it is up to the employee to inform the employer of their reason, which simply can be that they have a religious or medical reason. It is not up to the employer to ask, but rather upon the employee to inform. **Upon notice, the employer can ask for details, but it is suggested that the employer ask if the employee has any suggested accommodations.** In the case of a vaccine, it could be distancing, masking, work from home, etc. Make the accommodation an interactive process and know that it can be modified at a later date.

COVID Protocol is Constantly Changing



- What just happened in the Supreme Court?
- Are employees required to vaccinate?
- Am I allowed to ask to vaccinate?
- What about OSHA?
- Can I just let anything happen, or am I still required to provide PPE?
- Someone just said General Duty Clause -what is that?
- Does workers compensation cover COVID-19?
- What do I do if an employee has COVID?
- Am I still paying for time-off due to COVID?
- Do I have to test employees?
- Can I even ask for a test or a vaccine record?
- Is there a religious exemption?



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IS COVID-19 COVERED UNDER WORKERS' COMP?

Now that you have the policy in place, are you done? If someone gets sick or makes a claim is there anything else? Perhaps. COVID-19 has been defined as an occupational disease, so it is coverable by workers' compensation. The question now facing courts is if a claim based on COVID is an exclusive remedy under workers' comp, or are other claims available?

There are also new cases being labeled as "Take Home Cases" where a family member has suffered from COVID, and the claim is that they were infected from a family member who got COVID at work and then brought it home. These cases typically do not fall under workers' comp, because that is only for employees - but the claims are being recognized under general negligence claims alleging that the employer did not follow local or CDC guidelines.

REGISTER FOR THE Q&A CALL

Thursday, March 10, at 2:00pm ET

CAN I ASK FOR VACCINATION RECORDS?

How does an employer track vaccine records? **First, you can ask for vaccination status.** Keep in mind that it is medical information, so if you keep it on record, then keep it in the employee's medical file that is confidential and locked. Consider using a form to track, similar to that used for Hepatitis B, which is a form approved and mandated by OSHA. [Members of NCBVA](#) can receive this sample form.



REPORTING COVID POSITIVE INFECTIONS

Lastly, what about reporting COVID positive infections? First and foremost, make sure that you stay current with local and CDC guidelines for COVID exposure and diagnosis. At the time of writing this article, many states were following guidelines based on whether someone was vaccinated versus unvaccinated.

- If vaccinated and exposed, you should wear a mask for 10 days and test on day 5, or if symptoms, test.
- If unvaccinated and exposed, stay home for 5 days from last exposure and test on day 5.
- If you have been diagnosed with COVID, then you quarantine for 5 days, unless you still have symptoms on day 5, at which time you should stay home until symptoms are gone and you feel better.

However, make sure you contact your local health department to see what current mandates are.

FOLLOW THE GUIDELINES AND BEST PRACTICES

As you can see, COVID is still an issue and continues to be an ever-changing maze, making it hard to find an exit. In fact, it appears there may not be an exit from the COVID maze! But, as a business, it is important that you continue to follow guidelines and best practices so you can not only protect your employees and customers - but also your business.



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WANT MORE?

CON CALL AND Q&A SESSION WITH OUR LEGAL COUNSEL

Want to ask a question related to **Employer COVID Protocol**? Join Poul Lemasters, NCBVA Legal Counsel, for a 30-minute NO-CHARGE Q&A session. Feel free to [submit a confidential question](#) in advance too, if you prefer.

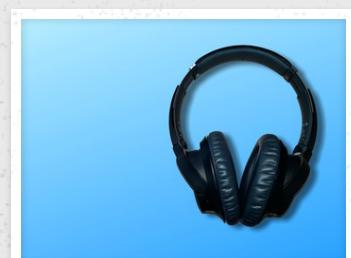


Thursday, March 10, at 2:00pm ET

Mark your calendar & [register](#). There is no charge to attend, but registration is required.

MISSED THE LAST CALL?

If you were unable to attend the December legal Q&A call on [How to Sell Your Business](#), visit the [members only page](#) to listen to the recording.



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QUESTIONS OR COMMENTS

