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Latest challenge for essential businesses in Pennsylvania: Immediate compliance with new workplace requirements mandated by the Department of Health



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On April 15, 2020, the Pennsylvania Department of Health issued an Order that mandates numerous workplace obligations on nearly all businesses permitted to maintain in-person operations in the Commonwealth. The Order became effective immediately upon its issuance, with enforcement scheduled to begin at 8:00 p.m. on April 19, 2020.

Even if not immediately applicable to businesses that have temporarily suspended operations or have been operating in a remote environment, such businesses nevertheless should heed the Order because the new requirements could remain in place when the Commonwealth turns to “reopening” all Pennsylvania businesses.

Overview

The new requirements, addressed in detail below, pertain to workplace mitigation, cleaning, social distancing, and workforce scheduling. The Order also places additional requirements on businesses that serve the public within a building or defined areas. Perhaps most notably, the Order requires all businesses with in-person operations in Pennsylvania – except for “health care providers,” which is undefined in the Order – to provide masks for all employees and to mandate that employees, and in some circumstances members of the public, wear masks while at the worksite. The Order also requires employers to develop a protocol for responding to situations where the business has been exposed to any person who is a “probable or confirmed case” of COVID-19 that must include, among other requirements, a 24-hour shutdown of the impacted areas, rigorous cleaning and disinfecting, mandatory worker temperature checks for an indeterminate time prior to entering the facility, and a robust notification procedure for all employees who came in close contact with the person who is a “probable or confirmed case.”

Implementation of these newly mandated protocols could prove to be challenging and costly for essential and life-sustaining businesses already facing financial constraints and/or personnel shortages during this turbulent time. Such challenges may be compounded by the absence of regulations or other guidance beyond the plain – and, in many key places, ambiguous – text of the Order.

Nevertheless, all covered employers operating in Pennsylvania must act immediately to ensure compliance with the Order given that it took effect on April 15, 2020, and enforcement is scheduled to begin on Sunday, April 19, 2020, at 8:00 p.m.

The remainder of this article details the new workplace requirements in three categories: protocols relating to mitigation, cleaning, and social distancing; protocols for responding to a probable or confirmed COVID-19 case; and additional requirements for businesses that serve the public.

Workplace mitigation, cleaning, and social distancing protocols

The Order requires all covered employers to comply with various workplace mitigation, cleaning, and social distancing protocols, including the following:

- **Provide employees with masks, and require employees to wear masks while on premises.** This may be the most notable requirement for many employers that have not already

implemented such a practice, as it places the obligation on employers to provide masks to all employees. Employees have the option to bring their own masks, subject to the employer's approval. The Order indicates that such masks must comply with the Department of Health's earlier-issued guidance on best practices for making, wearing, removing, and maintaining masks. Note that the mandate does not call specifically for N95 respirators or surgical masks, which are in high demand by the health care industry and widely reported to be in short supply. Additionally, the Order exempts from the mask-wearing mandate employees who are eating or drinking during break time. Although not addressed in the Order, employers should also be prepared for cases in which an employee seeks to be excused from the mask-wearing mandate due to medical reasons, as it may be viewed as a request for a workplace accommodation that triggers the employer's obligation to engage in an interactive process dialogue with the employee.

- **Establish protocols for addressing cases of exposure to a person who is “a probable or confirmed case of COVID-19.”** The Order sets forth several requirements for these mandatory protocols, which are addressed in more detail in the below section. The Order does not specify whether these protocols must be written; even if not required, however, we recommend establishing written protocols as a best practice in many cases. Significantly, the Order does not define its use of the term “probable,” which may present challenges to employers. For example, employers in all industries have been dealing with cases in which employees have reported experiencing symptoms associated with COVID-19 to varying degrees, ranging from insignificant to severe. In other cases, employees have reported being exposed to a family member or other third party who is either confirmed to have or suspected of having COVID-19, even though the employee has shown to be asymptomatic at that time. Employers are well advised to seek legal counsel in preparing for such scenarios which are not clearly addressed by the Order.
- **Stagger work shift times and break times for employees** when practicable. This is intended to minimize the size of groups entering or leaving the premises as well as controlling general occupancy and group size within common areas. This scheduling requirement may prove to be challenging in manufacturing and other workplaces where shift scheduling is particularly critical to maintaining smooth and efficient production and operations.
- **Limit persons and groups in common areas** (for example, break rooms, locker rooms, restrooms, meal areas, and training and conference rooms), and **provide sufficient space to**

allow for proper social distancing of at least six feet. The Order specifically instructs that, in break and meal rooms, seating should be arranged to have employees facing forward and not across from each other. Although not specifically prescribed by the Order, a similar seating or placement arrangement may be a best practice in all common areas where practicable.

- **Conduct meetings and training virtually** by telephone, Internet, or other remote means where practicable. **Limit any meetings that must be held in person** to the fewest number of employees possible, not to exceed 10 employees at one time, who must maintain a social distance of six feet.
- **Prohibit non-essential visitors** from entering the premises of the business.
- **Maintain pre-existing cleaning protocols, and clean and disinfect high-touch areas routinely** in spaces that are accessible to customers, tenants, or other individuals, in accordance with issued CDC guidelines.
- **Provide access to regular handwashing with soap, hand sanitizer, and disinfectant wipes, and ensure that all common areas are cleaned regularly,** including between shifts.
- **Make available sufficient and proper personnel to provide for internal enforcement,** including controlling access, maintaining order, and enforcing social distancing requirements, as well as ensuring the performance of all mandatory requirements effectively and in a manner that ensures the safety of the public and employees. Although not stated in such terms, this mandate seemingly places an affirmative obligation on employers to monitor and ensure compliance with these mandates by all employees.
- **Provide notice to employees of all required procedures and protocols.** The Order permits the notice to be provided orally or in writing; however, a best practice may be to provide the notice in writing as it will provide a record that the notice has been given and may provide the most efficient and effective means of delivering the notice, particularly in workplaces with large employee populations. Notably, the notice must be delivered to employees **“in their native or preferred language, as well as in English or by a methodology that allows them to understand.”** This may require some employers to provide notice in multiple spoken and written languages or, in some cases, other forms to employees who might have sight, hearing, or other communication impairments.

Protocols for exposure to a probable or confirmed case of COVID-19

As noted above, the Order requires all covered employers to establish a protocol for enforcement in cases where the business has been exposed to a person who is a probable or confirmed case of COVID-19. The protocols must include the following elements:

- Closing off areas visited by the person who is a probable or confirmed case of COVID-19, increasing air circulation, and waiting a minimum of 24 hours, or as long as practical, before cleaning and disinfection. The Order also provides that cleaning and disinfection should occur in all areas accessed by the ill person, including offices, bathrooms, break rooms, conference or training rooms, dining facilities, and other common areas, and to all equipment used by the ill person, including shared electronic equipment, tablets, touch screens, keyboards, mice, remote controls, and ATM machines, with particular focus being placed on frequently touched areas.
- Identifying employees that were in close contact with the person during the period beginning 48 hours before symptoms had onset to the time the person was isolated. Close contact is defined as “within about 6 feet for about 10 minutes.” The Order further provides that:
 - If the identified employee remains asymptomatic, the employee should adhere to the practices set out by the CDC in its April 8, 2020 Interim Guidance for Implementing Safety Practice for Critical Infrastructure Workers Who May Have Had Exposure to a Person with Suspected or Confirmed COVID-19.
 - If, on the other hand, the identified employee becomes ill during a work day, the employee should be sent home immediately. Consistent with the above measures, the employer should clean and disinfect surfaces in the employee’s workspace and other areas accessed by the employee, and identify other employees with whom the ill employee had close contact during the time the employee had symptoms and during the 48 hours prior to the onset of the symptoms.
- Promptly notifying employees who were identified as close contacts of any known exposure to COVID-19 at the business premises, consistent with applicable confidentiality laws.
- Requiring employees who have symptoms associated with COVID-19 to stay home and notify their supervisors or other appropriate personnel, such as Human Resources. The Order provides that sick employees also should follow CDC-recommended steps and not return to work until the

CDC criteria to discontinue home isolation are met, in consultation with a healthcare provider and state and local health departments.

- The Order encourages employers “to implement liberal paid time off for employees who do not return to work as set forth above.” To that end, employers must remain mindful of any obligations to provide paid leave under their own paid time off policies and disability benefits plans. Paid sick leave might also be available under the federal Families First Coronavirus Response Act (FFCRA), local paid leave laws in the cities of Pittsburgh and Philadelphia, state workers’ compensation laws, and any other applicable federal, state, or local laws. Moreover, unpaid leaves of absence might be available under internal leave policies, as well as applicable federal, state, and local laws, including the Family and Medical Leave Act (FMLA) and the Americans with Disabilities Act (ADA).
- Implementing temperature screenings before an employee enters the business. Employees with “an elevated temperature or fever of 100.4 degrees Fahrenheit or higher” must be sent home and denied access to the facility. Employers must ensure that employees maintain proper social distancing while waiting for their temperature screening.
 - Also, although not addressed in the Order, employers also must be mindful of their obligations to the employees under applicable wage and hour laws during periods in which they are waiting for their temperature screenings.
- Making available sufficient and proper personnel to provide for internal enforcement of these protocols.

Again, such protocols will be necessary only in cases in which the business has been exposed to a person who is a probable or confirmed case of COVID-19. However, employers should prepare now for such cases as it could be only a matter of time given that the number of individuals who are potentially exposed to and/or subject to testing for COVID-19 may increase with the passage of time.

Also, as stated, the Order does not specify whether this mandatory protocol must be written. However, we believe that preparation of a written protocol is a best practice in many cases.

Additional requirements for businesses that serve the public within a building or defined area

The Order also places additional requirements on those businesses that serve the public within a building or defined area (other than health care providers), which include, as may be applicable:

- Limiting occupancy to no greater than 50 percent of levels designated under the applicable certificate of occupancy, where practicable.
- Maintaining social distancing of at least six feet at check-out and counter lines.
- Placing proper signage “throughout each site” to mandate proper social distancing of both customers and employees.
- Requiring all customers to wear masks while on premises, subject to limited exceptions stated in the Order. Businesses are authorized to deny entry to individuals not wearing masks, unless the business is providing medication, medical supplies or food. In such cases, however, the business must provide an alternative method of pick-up or delivery.
- Encouraging use of online ordering and delivery or pick-up options.
- Altering hours of business to provide for sufficient time to properly clean and/or restock supplies, depending on the size and number of employees.
- Designating a specific time for high-risk and elderly persons to use the business at least once every week “if there is a continuing in-person customer-facing component.”
- Installing shields or other barriers at registers and check-out areas, closing or staggering check-out and waiting lines, and taking other measures to ensure proper social distancing of at least six feet among employees and customers.
- Using every other register or fewer and, after every hour, rotating customers and employees to the previously closed registers. The previously open registers and the surrounding areas, including credit card machines, must be cleaned following each rotation.
- Scheduling handwashing breaks for employees at least every hour.
- Assigning an employee to wipe down carts and handbaskets before they become available to each customer entering the premises.

For the various reasons noted above, the Order may impose numerous challenges to employers as they maintain in-person operations in Pennsylvania. At a minimum, the Order requires employers to establish protocols and provide employees, and, in certain circumstances, customers, with notice. As stated above,

even if not required under the Order, businesses and employers may be well advised to prepare those required protocols and notices in writing. And, given some of the ambiguities and uncertainties left unaddressed by the Order, employers and businesses should seek the assistance of legal counsel in creating protocols and notices to ensure compliance with the Order.

Conclusion

As many essential and life-sustaining businesses in Pennsylvania are quickly learning, a good-faith effort to comply with the Department of Health's latest Order requires an exercise of good business judgment filling in various aspects of the Order that are not detailed, such as the meaning of a "probable" COVID-19 case or the duration for implementing the responsive protocols (including temperature scans) when the business is exposed to a person who has a probable or confirmed case. Those Pennsylvania businesses with current in-person operations are already commonly asking how they can comply with the Order. And Pennsylvania businesses that have suspended in-person operations are, while making plans now to reopen in the future, asking whether the latest Order foreshadows future requirements for all businesses.

We are closely monitoring developments relating to this Order and any similar government action taken to address the ongoing COVID-19 pandemic. To that end, Reed Smith has prepared a Coronavirus (COVID-19) Resource Center that is updated frequently as the situation evolves, and we are prepared to assist you and your business with any questions or concerns that might arise.

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