CLIENT ALERT: OSHA Issues Revised Guidance on "Mitigating and Preventing the Spread of COVID-19 in the Workplace" in Response to Executive Order

On January 21, 2021, President Biden issued an Executive Order in which he instructed federal regulators to reduce the risk of workers contracting COVID-19 in the workplace. Specifically, President Biden directed the Secretary of Labor, acting through the Assistant Secretary of Labor for Occupational Safety and Health to: (a) issue revised guidance to employers on workplace safety during the COVID-19 pandemic; (b) consider whether any emergency temporary standards on COVID-19, including with respect to masks in the workplace, are necessary and, if so, to issue such standards by March 15, 2021; (c) review the enforcement efforts of the Occupational Safety and Health Administration ("OSHA"); (d) launch a national program to focus OSHA enforcement efforts related to COVID-19 on violations that put the largest number of workers at serious risk or are contrary to anti-retaliation principles; and (e) coordinate with relevant offices and agencies to conduct a multilingual outreach campaign to inform workers and their representatives of their rights under applicable law.

In response to the Executive Order, OSHA issued guidance on January 29, 2021 titled, "Protecting Workers: Guidance on Mitigating and Preventing the Spread of COVID-19 in the Workplace" (the "guidance"). The guidance includes detailed recommendations for an employer COVID-19 prevention program. Notably, the guidance is not a standard or regulation; it creates no new legal obligations and there is no OSHA standard specific to COVID-19. However, as employers have a duty under the General Duty Clause of the Occupational Safety and Health Act (the "Act") "to provide a safe and healthful workplace that is free from recognized hazards that can cause serious physical harm or death," the guidance provides an outline of best practices for employers who have returned or plan to return employees to the workplace. A few notable highlights of the guidance include the following:

- **"Essential Elements" of an Effective, Coronavirus Prevention Plan**. In a press release announcing the guidance, the Department of Labor summarized the "essential" actions or elements the guidance recommends for employer prevention policies:
    - Conduct a hazard assessment;
    - Identify control measures to limit the spread of the virus;
    - Adopt policies for employee absences that don't punish workers as a way to encourage potentially infected workers to remain home;
    - Ensure that coronavirus policies and procedures are communicated to both English and non-English speaking workers; and
    - Implement protections from retaliation for workers who raise coronavirus-related

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concerns.

- **Protective Face Coverings**. In addition to explicitly endorsing the use of masks to decrease the risk of transmission, the guidance recommends that employers provide their workers with masks at no cost to the worker, specifies that masks should be provided more frequently if operations cause a workers' mask to become wet and soiled, and states that employers "must" discuss the possibility of reasonable accommodation for workers who are unable to wear a mask. The guidance also recommends that employers require other individuals at the workplace (e.g., visitors, customers, non-employees) to wear a face covering unless they are under the age of two or are actively consuming food or beverages on site.
- **Anti-Retaliation and an Anonymous Reporting Process.** As noted by the guidance, Section 11(c) of the Act prohibits discharging or in any other way discriminating against an employee for engaging in various occupational safety and health activities. As an example, the guidance suggests that an employee "raising a reasonable concern about infection control related to COVID-19 to the employer, the employer's agent, other employees, a government agency, or to the public, such as through print, online, social, or any other media," or "voluntarily providing and wearing their own personal protective equipment, such as a respirator, face shield, gloves, or surgical mask" has engaged in protected activity under the Act. The guidance also recommends that employers consider using a hotline or other method that allows workers to voice their concerns anonymously.
- **Changes to the Physical Work Environment and Supporting Telework**. In addition to providing detailed recommendations regarding cleaning and hygiene practices and education for workers with respect to these practices, the guidance recommends employers implement physical distancing between workers or erect barriers when distancing is not possible, improve ventilation systems, and provide additional personal protective equipment. The guidance also recommends that employers support workers' efforts to stay home if they are particularly at risk for the coronavirus or if they may have been infected by permitting them to telework if possible, allowing the worker to use paid leave, or adopting other, non-punitive practices with respect to workplace absences.
- **Recording and Reporting COVID-19 Infections and Deaths**. The guidance states that employers are responsible for recording work-related cases of COVID-19 illness on their Form 300 logs if the following requirements are met: (1) the case is a confirmed case of COVID-19; (2) the case is work-related (as defined by 29 CFR 1904.5); and (3) the case involves one or more relevant recording criteria (set forth in 29 CFR 1904.7) (e.g., medical treatment, days away from work). Employers should also report outbreaks to health departments as required and support their contact tracing efforts.
- **Vaccine Program**. The guidance recommends that employers make a COVID-19 vaccine or vaccine series available at no cost to all eligible employees, and to provide information and training to employees on the benefits and safety of COVID-19 vaccinations. The guidance also instructs employers not to distinguish between workers who are vaccinated and those who are not and that any vaccinated workers continue to follow protective measures, such as wearing a

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face covering and remaining physically distant.

For the reasons noted above and because it is possible that OSHA will incorporate some of the elements in the guidance into an emergency temporary standard, employers should consult with counsel about further developments from OSHA and the ways in which elements from the guidance can be incorporated into their own coronavirus prevention program(s).

The foregoing is an overview of the OSHA guidance as of the date of this publication. Employers should be mindful that these issues remain fluid and should ensure that decisions are made based on the most up-to-date information available. Employers with questions about OSHA, reporting requirements, or enforcement actions should consult with their MBJ attorney.

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