THE EFFECT OF THE PANDEMIC ON EMPLOYEE ISSUES

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The COVID-19 pandemic has certainly shaped and influenced the area of labor and employment law in fundamental ways. While the current state of the pandemic may have relaxed some of the safety-based controls, accommodation measures, and related issues, the general concepts will remain as long as the pandemic continues to expose employees to work-related issues concerning COVID-19. Thus, this paper examines the current state of employment law in various areas based on the current state of the pandemic. However, we also explore ways in which the pandemic will have lasting impacts on employment law even when COVID-19 is no longer a work-related issue.

I. The Obligation to Provide a Safe Work Environment

A. Legal Issues

The concept of COVID-19 being a workplace safety issue introduced many employers in office settings and other "low risk" environments to an agency that they may have experienced minimal previous interactions with, namely, the Occupational Safety and Health Administration ("OSHA"). OSHA impacts both the ongoing obligations for employers while COVID-19 remains a public health issue and also has broader implications with future issues concerning employee health at work.

The Occupational Safety and Health Act ("OSH Act") sets forth two duties for employers. Each employer shall (1) "furnish to each of his employees' employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees" (also known as the General Duty Clause), and (2) "comply with occupational safety and health standards promulgated under this Act" 29 U.S.C.655(a).

Thus, as with the case of COVID-19, OSHA relies on the General Duty Clause for its enforcement authority if there is no specific standard already in place. *Workers Rights,* OSHA Publication, https://www.osha.gov/sites/default/files/publications/osha3021.pdf.

1. The Current Landscape and OSHA obligations.

On January 25, 2022, OSHA withdrew its vaccine Emergency Temporary Standard ("ETS") in light of the U.S. Supreme Court's decision to halt OSHA's enforcement of the standard. Nonetheless, OSHA has indicated that it will continue to protect workers via the COVID-19 National Emphasis Program ("NEP") and the General Duty Clause. *See Statement from Secretary of Labor Marty Walsh on Supreme Court Ruling*, OSHA National News Release, January 13, 2022, https://www.osha.gov/news/newsreleases/national/01132022.

a. The General Duty Clause.

Regarding the General Duty Clause, OSHA continues to rely on guidance on its website as to the recommend practices for confronting COVID-19. While this guidance is not legally binding, it does inform the employer community as to what could be appropriate means to address (or abate) the recognized hazards of COVID-19 under the General Duty Clause.

To prove a violation of the general duty clause, the Secretary of Labor must prove by a preponderance of the evidence that: (1) the employer failed to render its workplace free of a hazard to an employee; (2) the condition or activity is recognized as a hazard; (3) the hazard is causing or

is likely to cause death or serious physical harm; and (4) feasible means exist to eliminate or materially reduce the hazard.

Unlike Section 5(a)(2), which mandates compliance with specific OSHA standards, the General Duty clause, Section 5(a)(1), specifically limits an employer's duty to protecting its own employees. In fact, OSHA's Field Operations Manual emphasizes that "the Section 5(a)(1) hazard must be [to] the employees of the cited employer" and "[a]n employer who may have created, contributed to, and/or controlled the hazard normally shall not be cited for a Section 5(a)(1) violation if his own employees are not exposed to the hazard." FOM, 4-III-B-5.

An employer must provide both "employment" and "a place of employment" free from recognized hazards. A "place of employment" need not be employer-owned or employer-controlled space. Rather, any workplace where at least one of the employer's employees is working will be considered a place of employment. Thus, "place of employment" is not a stationary space—it follows employees as they conduct their duties. For example, in *Clarkson Construction Co. v. OSHRC*, the Tenth Circuit found that an employer was properly cited under the general duty clause when one of its employees was killed by a truck while working on the shoulder of a public highway. 531 F.2d 451 (10th Cir. 1976). The fact that the employee was working in a public space was irrelevant because the employer had control of the area and was responsible for providing its employees a safe "place of employment."

Possibly the most litigated aspect of general duty clause citations is whether the cited condition constitutes a "recognized hazard." The "recognition" requirement serves to ensure that cited employers at least have constructive knowledge of the existence of specific hazardous conditions.

In addressing what constitutes a "recognized hazard," courts have looked to legislative intent, noting that Congress changed the wording from "readily apparent hazards" in an earlier bill to "recognized hazards" in the final bill. *See American Smelting & Refining Co. v. OSHRC*, 501 F.2d 504, 511 (8th Cir. 1974). Such a change indicates that the general duty clause applies to dangers that are recognizable but not necessarily detectable by the senses. Thus, the term "recognized hazards" applies not only to hazards detectable through the senses, but also to hazards only detectable through instrumentation.

Recognition of a hazard can be established either objectively or subjectively. A hazard is considered recognized if it is: (1) common knowledge in the employer's industry; (2) known by the employer; and/or (3) common sense. As to COVID-19, OSHA quickly labeled the pandemic as a safety issue, forcing employers to essentially recognize the hazard.

To establish a Section 5(a)(1) violation, the Secretary must specify the particular steps the employer should have taken to avoid the citation and demonstrate the feasibility and utility of those measures. *See National Realty & Construction Co. v. OSHRC*, 489 F.2d 1257, 1268 (D.C. Cir. 1973). Accordingly, the Secretary bears the burden of showing: (1) the steps the employer should have taken; (2) the feasibility of those steps; and (3) the utility of those measures.

The Commission has held that a feasible abatement measure is one that will eliminate or materially reduce the hazard. *Arcadian Corp*., 20 OSHC 2001 (2005). To show that a proposed safety measure will materially reduce a hazard, at the outset, the Secretary must introduce evidence

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