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Worker Safety in the Age of COVID **More Important Than Ever**

David Schek
President Leaststaff- Work Comp Solutions
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The COVID-19 vaccine is welcome news to employers, but until enough workers, have been vaccinated, it will continue to be a occupational health and safety issue for employers who look to staffing companies for their needs. The new administration has also brought in a new team at the Department of Labor including a Deputy Assistant Secretary of Labor for Occupational Safety and Health (OSHA) that is busy issuing new COVID guidance for employers. Protecting Workers: Guidance on Mitigating and Preventing the Spread of COVID-19 in the Workplace includes conducting a hazard assessment of the workplace, identifying control measures to contain the virus, and preventing retaliation against workers who raise concerns that rules are not being followed.

According to the DOL website, OSHA guidance will be updated over time to reflect changes in science and best practices. According to the OSHA website (www.osha.gov), on March 12, the administration issued a directive--DIR 2021-01(CPL-03)--titled National Emphasis Program – Coronavirus Disease 2019 (COVID-19). The abstract states that its focus is on workers who operate in high hazard industries where COVID can become prevalent. As it is, most staffing companies should already address these issues, but the NEP also protects workers from retaliation for reporting potential safety violations by distributing anti-retaliation information during inspections and outreach opportunities. Regardless of whether your workers are in an OSHA state, protecting workers from retaliation and ensuring they understand their rights is essential to staffing firms' safety plan or Injury and Illness Prevention Plan (IIPP).

States are also issuing guidance. For example, California, the Department of Industrial Relations approved COVID-19 Emergency Temporary Standards (ETS) effective November 30, 2020. California's Division of Occupational Safety and Health otherwise known as Cal/OSHA will be enforcing the standards. Up until February 21, 2021, Cal/OSHA was only citing employers for violations. Now it is issuing monetary penalties for employers who violate the ETS. According to the Cal/OSHA website, the ETS requires that “to develop a written COVID-19 prevention program or ensure its elements are included in the existing IIPP. California staffing agencies should check out Cal/OSHA's website for the latest information (<https://www.dir.ca.gov/dosh/coronavirus/>). California, along with at least a dozen other states, has an OSHA approved state plan. That means it covers,

private, state and local workplaces. Other states, such as Texas, are Federal OSHA states. Staffing agencies should check either the approved state plans for guidance or if the workers are in a federal OSHA state, check out www.osha.gov/.

Like all work hazards, COVID protection needs to be taken into consideration as much as any injury or illness likely to affect temporary workers. In vulnerable industries such as health care, hospitality, and warehousing, failure to meet safety standards can lead to “super spreader” situations.

If the illness is definitely work related, your workers' comp coverage covers your temporary workers. Failure to heed or meet required safety standards can increase the number of claims, if you have a higher than usual rate of illness. Staffing agencies can be challenged in other ways.

As it stands, “essential personnel,” unless they can work from home, have to report to work. Those essential personnel at greatest risk are more likely to get sick and expose others. In these situations, temporary workers will need to fill the void on the front lines.

The American Staffing Association (ASA) provides some useful and sensible guidance for workers, especially when sharing spaces with other employees. These safety plans or road maps include:

- Eliminating access to such things as coffee stations and water fountains where employees are likely to be touching the same surface
- Space tables in a cafeteria at safe distances to spread employees out. In addition try to do lunch breaks in shifts. Surfaces such as tables should be sanitized frequently.
- Requiring personal protection equipment (e.g. face coverings and/or face shields) be worn at all times and provide it when necessary. Do temperature checks when employees arrive for work. Instruct employees to wash their hands frequently and place hand sanitizer in locations where deemed necessary.
- Redesigning work spaces so employees can safely distance in offices, manufacturing, and food service environments. In some work environments, it is advised to put employees in separate groups, so if someone gets ill, it's easier to trace the people that employee came into contact with.
- Monitoring work places to ensure that employees are following the safety protocols just as you would in any other situation where worker safety is concerned.
- Reminding employees of the safety protocols with the use of posters and computer monitors throughout the work environment. In addition to English, these safety instructions, company requirements, and state and county requirements should be in multiple languages to ensure a diverse work force is able to follow them.¹

With prevention being the key, employers need to clearly spell out guidance and make sure its' being followed. Fewer work-related illnesses means fewer claims, especially if extensive hospitalization is required.

On the Legislative Front

Given the fact that doctors and nurses and other health care workers are likely to come into contact with COVID on a regular basis, it is usually assumed that if they contract COVID it was through work. Some states are taking the initiative and introducing legislation to provide extra workers' comp protections. Again, in California, bills have already been signed into law and introduced this year creating a rebuttable presumption for infectious diseases for health care workers who provide direct patient care. It is assumed that COVID would fall under this presumption. This means that if a claim is

denied, the defense must prove that the worker did not contract it at work. In a health care environment this is very difficult to disprove. All the more reason to follow all safety measures, especially those directly related to COVID.

Workers outside the health care field are not necessarily provided this protection. Those claims can be more easily denied, especially if the individual could just as likely have contracted COVID from another source such as a family get together. These are questions that need to be asked during the investigation of a claim, especially given the incubation period. COVID claims are more likely to be accepted if there is an outbreak in a workplace. Regardless of the original source, once it enters the workplace and spreads, it can be plausibly be argued that the worker contracted the virus during the course of employment.

Another California bill signed into law by the governor last year, AB 685, may have implications for staffing companies. It requires that the State Department of Health make publicly available information that allows the tracking of COVID cases and outbreaks in both the worksite and the industry. Workplace is the operative term, and employers are opposed to specific workplaces being named. The fate of this legislation is uncertain, but specifically named workplaces could open them to liability and lawyers encouraging workers comp claims.

The National Council on Compensation Insurance (NCCI) has a comprehensive list of proposed legislation and regulatory changes in every state. It is updated regularly www.ncci.com.

As for insurance, staffing companies should be aware that California legislators have also introduced bills related to different kinds of insurance. One bill would require a disability insurance policy that covers medical and surgical benefits to cover health care service costs related to the testing for COVID or any future pandemic diseases. This would only apply when the governor declares a pandemic to be a public health emergency. This also extends to a service or item related to immunization against COVID or other pandemics.

The vaccines present another challenge for staffing firms. They were fast-tracked under an Emergency Use Authorization (EUA), so they're not licensed. According to the Centers for Disease Control (CDC), because testing has not been completed by the Food and Drug Administration, the FDA cannot mandate vaccination. But whether a state or local government or employer may require it is determined by applicable laws in a particular state.² Even if an employer can require a worker to get the vaccine. There are exemptions under the Equal Employment Opportunity Commission (EEOC) such as religious objections and medical exemptions.

As some employment experts have pointed out, it gets “complicated” and can depend on what kind of job the worker is doing. Staffing firms should be aware of any COVID-related legislation and regulations in states where they place workers and review when and under what circumstances they can require the vaccine. As joint employers, the staffing firm and the host employer are responsible for getting workers vaccinated. As with every other aspect of safety, it needs to be clear who will provide the vaccine and under what circumstances.

If staffing firms wish to encourage their employers to get vaccinations, they can arrange an on-site clinic with a health care provider. Employers must contact the health department in their local jurisdiction for guidance. This will make the process easy and workers might be more willing to get it. There are still restrictions in some states on which groups take precedence—individuals 65 and over, children with preexisting health conditions, etc. However, President Biden has announced that he wants

the vaccine to be available to everyone regardless of status by May.

Impact on Rates

Staffing firms expected a increase in workers' comp rates, but most are reporting that has not been the case. There could be a few reasons for this.

Because of lock-downs and layoffs, it stands to reason there are fewer employees thus smaller payrolls and fewer claims. It is likely that in certain industries such as health care, there will be more illness claims filed due to COVID. Experts say there is no question that there have been serious COVID-related-claims, but fewer non-COVID claims will make up the difference in COVID—primarily lost time from work--losses.³ Until the data are available, there is no way to know what COVID-related losses will be. California's the Department of Insurance starting January, 2021, recommended that premiums related to the coverage of COVID-related claims be separately collected and accounted for, so as not to distort pure premium rates.⁴ Depending on the workers' comp program, a staffing firm has, the losses may vary.

Another change has to do with experience rating. For example, the Workers' Compensation Rating Bureau of California (WCIRB) issued, and the Department of Insurance has approved, a change that states *“claims directly arising from a diagnosis of COVID-19 with an accident date on or after December 1, 2019 to be excluded from the experience rating calculations of individual employers. Since the occurrence or non-occurrence of COVID-19 workers’ compensation claims incurred by an employer are unlikely to be a strong predictor of that employer’s future workers’ compensation claim costs, the inclusion of such claims in an experience modification calculation would not meet the intended goal of experience rating.”*⁵ (For more information, go to www.wcrib.com)

As for states where the insurance departments have designated NCCI as the licensed workers' comp rating and statistical organization, a circular was released stating that COVID-19 claims filed in August 2020 and later will be excluded from both experience and merit ratings.⁶ So far, 33 states have approved the filing. NCCI also issued a circular that allows employers to exclude monies from payroll for workers being paid for not working. So far, 36 states have approved the filing.

It's unknown how long these exemptions will last.

In addition to California, Massachusetts, Michigan, Delaware, Wisconsin, New York, Pennsylvania, and Minnesota all have their own rating bureaus with different rules. Staffing agencies should check the rating bureaus in the states where they place workers to check for updates.

COVID has also changed the conditions of employment. Stay at home orders in many states have led to an increase in employees working from home or telecommuting. Depending on the industry, an entire office can be closed, and all employees, regardless of job description or title work from home. WCIRB has issued a new employee classification 8871 clerical telecommuter employees—Not Otherwise Classified. Other state jurisdictions already have classification 8871, and it is defined as employees that do more than 50 percent of their work duties from home or some other workspace not at their employer's place of business. WCIRB adopted this classification January 2021, so as of yet, there is no loss or payroll data available for classification 8871.⁷

COVID is the hot safety topic now, but worker safety, especially in high-risk industries cannot be ignored. The lack of or incomplete safety programs and/or poor enforcement will be costly as more workers are likely to get injured. It makes no difference which industry your staffing firm covers whether lower X-Mod employees such as medical staff to riskier industrial codes, your firm needs to determine exactly what the client needs to make the right fit. The wrong employee in the wrong job can jeopardize your safety record, especially if the training is not appropriate.

Given the current environment, more temporary employees may be needed to fill essential, but high risk jobs. This is especially true of employers such as Amazon and meat processing and packaging plants. A solid safety program is essential to keep workers' comp down regardless of whether you use a Professional Employer Organization, a direct carrier or a state fund.

The elements for a strong safety program will vary by industry but all should include:

- Researching a host employer's safety record. Review safety logs, recent incidents and any work safety violations for which the employer has been cited by either Federal OSHA or a state agency such as Cal/OSHA. Placing your temporary employee in a company with a poor safety record increases the chance of injury and implications for your workers' comp program.
- Checking that the host employer has a safety program in place as detailed as your own. An Illness and Injury Prevention Plan (IIPP) is a good start. It should include penalties for violations that discourage ignoring safety protocols. Depending on the job, there should also be a plan and tools for emergencies. Examples of emergencies include employees getting trapped or crushed by machinery and inadvertent exposure to chemicals and fires. There should be automatic shutoffs within easy reach, fire extinguishers and eye washing stations. The host employer should have a plan for dangerous, onsite situations such as a live shooter on the property or in the building.
- Ensuring your employee is the right fit for the job. This means getting a specific job description outlining the duties the employee will be performing including duties prone to injury, such as heavy lifting.
- Visiting a client site. Make sure that all safety protocols are met. This includes items such as emergency exits, eye washing stations, med kits, and proper ventilation and climate controls. Check that all safety equipment, such as personal protective equipment, works properly.
- Checking ergonomics and inspecting work spaces. A job with long hours at a work station, engaging in a repetitive motion or sitting at a desk all day requires ergonomically appropriate chairs, desks and computers. Check for clutter in the workspace including hallways that may be jammed with boxes and filing cabinets that could pose tripping hazards. Check that step downs and blind corners are marked, especially in restaurants where your employees might be carrying heavy trays.
- Making sure your there is a process your employee can use to report safety violations without fear of retaliation.

Some of the most serious and expensive injuries involve shoulders, knees and backs, all of which can lead to temporary, permanent or partial disability for the injured worker. It also means a long, drawn out and expensive claim for your staffing firm. Just one of these claims can damage your safety record and cause your workers' comp costs to jump, even it it happens in a low risk category.

COVID—it is hoped—will eventually become an unpleasant memory, but it doesn't mean similar work related challenges won't pop up. Play it safe.

End Notes

1. American Staffing Association, Safely Back to Work Best Practice Protocols, July 2020.
2. COVID Workplace Vaccination Program, Centers for Disease Control, March 16, 2021
3. NCCI, Responding to the Impact of COVID-19 on Workers' Compensation, Bill Donnell, January 14, 2021.
4. State of California Department of California, Proposed Decision and Order, January 1, 2021
Workers' Compensation Claims Cost Benchmark And Advisory Pure Premium Rates
5. Workers Compensation Insurance Rating Bureau of California, Learning Center, Frequently Asked Questions. Also see: Filings and Plans, 2021 USRP and ERP Changes Quick Reference Guide.
6. National Council on Compensation Insurance, Circular, Item Filing Announcement, July 10, 2020.
7. Workers' Compensation Rating Bureau of California, COVID Education, New: Classification 8871 *Clerical Telecommuter Employees* (VIDEO)