Making Work Safe and Accessible During a Pandemic

BY JOSH CUNNINGHAM

The COVID-19 pandemic has brought workplace safety to the forefront for employers across the country. A virus outbreak can wreak havoc in a workplace putting employees’ health at risk and potentially leading to costly disruptions in business operations.

While the pandemic has forced many businesses to move employees to full-time teleworking, only 31% to 37% of all jobs can feasibly be performed remotely, according to an analysis from the Bureau of Labor Statistics. This leaves nearly two-thirds of all jobs having to be performed onsite. For these workers, a safe workspace is critical to their health and financial security. This is particularly true for workers with underlying medical conditions who may experience more severe illness if infected with COVID-19, including many workers with disabilities.

Policymakers play a critical role in ensuring workplaces are safe and that high-risk workers can remain engaged in the workforce. Local, state and federal governments have issued various rules and guidance around social distancing, sanitation and personal protective equipment. Other protections, including paid sick leave and workers’ compensation, aim to support workers after becoming infected.

CDC COVID-19 Risk Guidance

COVID-19 poses a higher risk to some individuals than to others. The Centers for Disease Control and Prevention (CDC) released guidance on which individuals are at heightened risk of severe illness from COVID-19, including hospitalization, admission into intensive care or death. People with intellectual and developmental disabilities are three times more likely to die from COVID-19 compared to those without the conditions, according to a report by The New York Times. In addition, CDC data shows that Black and Hispanic Americans have been disproportionately infected with COVID-19 as a percentage of the overall population. Age is a key risk factor as well, with 80% of all COVID-19 deaths occurring among those who are 65 years old and older.

About This Series

This is the third in a series of four reports from NCSL to explore how the COVID-19 pandemic is impacting access to employment opportunities for people with disabilities. The series will address some of the most significant employment policy issues affecting people with disabilities as Americans adapt to the many challenges COVID-19 presents. This report examines the critical task of safely returning workers to the workplace. States can help employers navigate complex public health guidance while ensuring workplaces are safe and accessible for workers at varying health risk levels. The final report of the series will look at state and federal policy actions on apprenticeships and workforce development.
Tiers of Risk

Older Americans and people with certain existing medical conditions like severe obesity, type-2 diabetes and sickle cell disease are included in the highest tier of risk—officially termed an “increased risk of severe illness”. The CDC identifies a second tier of risk for those who “might be at an increased risk for severe illness” with conditions like asthma, high blood pressure and type-1 diabetes. A third tier of risk identifies populations who “may need extra precautions.” This includes people with disabilities, pregnant mothers, individuals with substance abuse disorder and people experiencing homelessness. Age and medical conditions are not the only factors that play a role in determining a person’s risk of severe illness due to COVID-19. The CDC further identifies racial and ethnic minority groups as being at an increased risk of severe illness due to racial discrimination and disparities in access to health care, employment, education and housing.

Impact on Workplace Accommodations

The pandemic and concerns about worker health and safety are transforming the way disability rights and protections are applied to workers. State and federal policymakers are recognizing that employers must provide reasonable accommodations to workers with disabilities, including high-risk workers, that reduce the risk of exposure to COVID-19 on the job.

The obligation to provide reasonable accommodations does not interfere with employers following public health advice from federal and state public health agencies. For example, an employer may require its employees to wear protective gear like masks or latex gloves. Perhaps an employee has a latex allergy and cannot wear the required gloves. The ADA requires that the employer provides a reasonable accommodation through an interactive discussion with the employee, absent any undue hardship on the operation of the business. That could include a different glove material or perhaps an alternative job assignment that does not require protective gloves. However, if an employer determines that no accommodation can eliminate a direct threat to the health or safety of the employee or others, then other accommodations must be considered such as whether working remotely or a leave of absence is possible. An employer may only bar an employee from the workplace if, after going through all these steps, it is concluded that the employee poses significant risk of substantial harm to himself or others that cannot be reduced or eliminated by reasonable accommodation.

Prior to the pandemic, a medical condition like diabetes may have necessitated a simple accommodation such as a short break to test blood levels. But in the era of COVID-19, diabetes and other high-risk illnesses may substantially affect an employee’s ability to perform in the workplace without necessary safety accommodations. In these cases, the Americans with Disabilities Act (ADA) may entitle such workers to additional reasonable accommodations such as telework (if possible) and additional protective gear.

Luckily, research has consistently shown that in most cases workplace accommodations are relatively inexpensive. The U.S. Department of Labor’s Job Accommodation Network (JAN) recently published results from its annual employer survey about the cost of workplace accommodations. Employers reported that 56% of workplace accommodations carried no added cost. The remaining accommodations provided had an average cost of $500. These results have held consistent for several years.

Worker Protections Post-Exposure

While many employers are taking extraordinary precautions to protect workers, it is impossible to eliminate the risk of contracting COVID-19 at the workplace. If an employee does contract the virus, policymakers have provided additional protections that target employment and financial security. Simply being in close contact with an infected individual can result in a required absence from work lasting 7-10 days or more, according to CDC guidance. In cases of severe illness, an absence from work can last weeks or even months. Workers experiencing these extended work absences may not have adequate paid leave through their employer to maintain their income. The federal Families First Coronavirus Response Act (FFCRA) re-
quired certain employers to provide up to two weeks of paid sick leave to employees who were sick, needed to quarantine or self-isolate, care for a sick or quarantined family member, or care for a child whose school had closed. Employers were eligible for a tax credit as a full reimbursement of the sick leave paid under the program. The FFCRA expired at the end of 2020 meaning workers are no longer entitled to paid leave. The Consolidated Appropriations Act, 2021, extended the tax credit for employers providing such paid leave, but shifted the mandated benefit to a voluntary one.

In addition to the federal paid sick leave benefit, workers may be eligible for workers’ compensation benefits if they contracted the virus while performing their job. This varies from state to state, however, with some states explicitly prohibiting community spread diseases from being compensable and others giving a rebuttable presumption of compensability to certain essential workers. If covered under workers’ compensation, an infected worker may be eligible for partial wage benefits and free health treatment for the duration of their illness.

Federal Actions

With the exception of the paid family leave program in the FFCRA, federal actions relating to workplace safety and accommodations have primarily come from regulatory and administrative actions. While several bills have been introduced in Congress relating to workplace safety and accommodations, none have advanced through the legislative process.

President Joe Biden signed an executive order, Protecting Worker Health and Safety, requiring the U.S. Department of Labor to review and update federal workplace safety guidance relating to COVID-19. The president also published a national strategy to confront the COVID-19 pandemic.
The Equal Employment Opportunity Commission (EEOC) published a frequently asked questions resource providing guidance about how the ADA, Rehabilitation Act and other federal disability-related policies apply to COVID-19 and the workplace. The FAQ resource covers topics including:

- Disability-related inquiries and medical exams.
- Confidentiality of medical information.
- Hiring and onboarding.
- Reasonable Accommodations.
- Safely returning to the workplace.
- Workplace Vaccine Mandates.

The EEOC guidance provides realistic scenarios to help employers navigate the various federal requirements. For example, an employer can ask an employee if they have tested positive for COVID-19 but cannot ask if a family member has tested positive as this information is protected by the Genetic Information Nondiscrimination Act. The guidance also emphasizes that employers may not discriminate against employees or job applicants because the CDC has deemed them at an increased risk of severe illness, including workers with disabilities. However, the EEOC and ADA do allow employers to prohibit an employee diagnosed with COVID-19 from coming to the workplace due to the threat the virus poses to others.

The EEOC further addresses workplace accommodations for workers at increased risk of severe illness. In these situations, employers follow the standard ADA process for providing an accommodation. An employer is permitted to seek medical documentation indicating the need for an accommodation and has flexibility in the specific accommodation provided. Employers are not required to provide accommodations that create an undue hardship. The EEOC notes that teleworking may be a reasonable accommodation, but workers seeking an accommodation are not automatically entitled to a telework option. Ultimately, the employer has the authority to decide whether telework is a viable accommodation for a given position.

Simply being at increased risk of COVID-19 does not entitle a worker to reasonable accommodation. JAN released an FAQ resource expanding upon the EEOC’s guidance on workplace accommodations. JAN notes that to be eligible for a reasonable accommodation under the ADA, an employee must have an actual or record of a disability as defined in the ADA Amendments Act. A worker must meet the ADA definition of disability before an employer becomes legally obligated to provide a reasonable accommodation relating to COVID-19.

The Occupational Safety and Health Administration and CDC have both released non-binding recommendations for keeping employees and customers safer. These suggestions include social distancing policies, employee health screenings, personal protective equipment and sanitation guidelines, among other health and safety issues.

**State Actions**

**WORKPLACE SAFETY**

While much of the federal workplace safety guidance remains voluntary, states can mandate the guidance and add stricter requirements. States have largely accomplished this through governors’ executive orders.

- Washington Governor Jay Inslee issued the nation’s first COVID-19 state emergency order in February 2020 and has since issued several other proclamations. In April 2020, Inslee issued a proclamation relating to high-risk workers. The order prevents all employers, public or private, from failing to provide reasonable accommodations to high-risk workers, as defined by the CDC, that protect them from risk of exposure to the COVID-19 disease on the job. If a safe workspace is not feasible, qualifying workers are permitted to exhaust all available accrued leave without adverse employment action.

- Minnesota Governor Tim Walz issued an executive order in May 2020 reaffirming an employer’s obligation to provide reasonable accommodations to qualified workers with disabilities, including provid-
ing protective gear. The order also specifies that workers have the right to refuse to work under conditions that they, in good faith, reasonably believe present an imminent danger of death or serious physical harm.

- Massachusetts Attorney General Maura Healey in April 2020 issued guidance, Rights of Disabled Persons to Accommodations During COVID-19 Crisis, laying out reasonable accommodations that may be needed during the pandemic.

In addition, some states have created specific health and safety guidelines for employers to follow. Virginia categorizes professions into four tiers of risk based on the level of exposure those in each profession are expected to experience. For example, a lab technician handling COVID-19 test samples would likely be categorized as “very high” risk, while someone working remotely would fall into the “lower” risk tier. State occupational safety and health regulations are tailored to each category.

California created an employer handbook outlining safety and health precautions to protect workers during the COVID-19 pandemic. The state published additional guidance tailored to 39 separate industries.

**PAID SICK LEAVE**

Prior to the pandemic, 13 states had mandated private-sector employers provide paid sick leave benefits to employees. In response to the 2020 COVID-19 outbreak, New York enacted legislation requiring large employers to provide 14 days of paid sick leave to any employee placed under a quarantine or isolation order. Mid-size employers must provide at least five days of paid sick leave. Small employers are not required to offer paid leave but must maintain a worker’s employment status for the duration of their quarantine.

Colorado also enacted legislation requiring employers to provide at least one hour of paid sick leave for every 30 hours worked. The bill also expanded upon the paid sick leave requirement in the FFCRA by applying it to businesses of all sizes. In addition to the legislative response, the governor signed an executive order guarantying up to four days of paid sick leave to workers in select industries who test positive for COVID-19. The executive order expired in July 2020.

**WORKERS’ COMPENSATION**

Worker's compensation emerged as a tool to protect workers infected with COVID-19 at the workplace. 17 states granted certain workers a rebuttable presumption of coverage under state workers’ compensation laws. This means that for eligible workers, a positive COVID-19 diagnosis is presumed to have occurred in the course of their employment and therefore qualifies for coverage under their employer’s workers’ compensation insurance policy. Rather than having to prove the infection occurred at the workplace, the burden is on the employer to prove that it did not. Workers’ compensation coverage brings a number of worker benefits including job protection, replacement wages for time missed and free medical treatment and rehabilitation.

In many cases, state presumption policies were limited to workers with high levels of exposure like frontline medical workers and first responders. Vermont provided a presumption to all essential workers as defined in the state emergency orders. California took it a step further with an executive order providing a presumption of coverage to all workers not working remotely and who test positive for COVID-19.
State Spotlight

Like many states, Illinois responded to the COVID-19 pandemic by looking for ways to protect workers with high exposure to the virus at the workplace. One approach Illinois pursued sought to provide a rebuttable workers’ compensation coverage presumption to workers defined as “essential” under the state’s COVID-19 emergency order. In April 2020, the Illinois Workers’ Compensation Commission adopted an emergency rule change granting the rebuttable presumption to all essential workers. At the time, Illinois was the first state to extend this coverage to such a broad range of workers.

This administrative action prompted a swift legal challenge from two organizations representing industries directly impacted by the rule change—the Illinois Retail Merchants Association and the Illinois Manufacturer’s Association. Retail and manufacturing industries employ large numbers of essential workers. They argued the rebuttable presumption policy created a substantial burden on employers because COVID-19 is highly contagious, making it difficult to establish whether an infection occurred at the workplace or not. A flood of workers’ compensation claims could lead to increases in the workers compensation insurance premiums that employers are required to pay. The state withdrew the rule change following an injunction from a state court over concerns that such a change required legislative approval.

Following the legal setback, the state legislature stepped in and enacted a bill in June 2020 providing a rebuttable presumption to essential workers. The legislation also grants line-of-duty death benefits to certain first responders who die of COVID-19. To ease concerns from businesses about spikes in workers’ compensation rates, the legislation prevents COVID-19 claims from being used to affect an employer’s insurance experience rating.

The long-term impact of rebuttable presumption policies like Illinois’ is yet to be known. To date, 90% of COVID-19 claims nationally have been small-dollar claims with negligible impact on the overall workers’ compensation system, according to the Claims Journal. The National Council of Compensation Insurers notes that the full impact COVID-19 will have on workers’ compensation will largely depend on the number of COVID-19 claims that result in permanent disability requiring large wage benefit payouts.

What Lies Ahead

The uncertainty surrounding COVID-19 since it emerged in late 2019 continues to present major challenges to policymakers seeking to minimize the medical and financial pain felt by Americans everywhere. Keeping the economy afloat and managing the spread of COVID-19 depends heavily on the ability to provide safe workplaces that accommodate all workers, including those with increased risk of severe illness from the virus. Policymakers at the state and federal levels continue exploring ways to keep employment accessible to all who seek it regardless of health or disability. As state legislatures convene for their 2021 legislative sessions, issues such as preventing COVID-19 from entering the workplace and protecting workers after they have contracted the virus remain a top priority. Uncertainty about further federal action and the expiration of many federal relief programs leaves states as a key lifeline in the push to keep workplaces operating.
The State Exchange on Employment & Disability (SEED), an initiative funded by the U.S. Department of Labor’s Office of Disability Employment Policy (ODEP), assists states in developing effective and inclusive workforce policies that promote disability employment. Recognizing that every state is unique, SEED offers policy options and resources states can tailor to meet their needs and goals. To this end, SEED partners with leading intermediary organizations that serve as trusted sources of information to state and local policymakers.

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