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UPDATE ON COVID-RELATED HEALTH AND SAFETY REQUIREMENTS

July 7, 2020

PA SUPREME COURT UPHOLDS DISASTER DECLARATION

On July 1, 2020, the Pennsylvania Supreme Court issued an order upholding Governor Wolf's Disaster Declaration. The Pennsylvania Legislature attempted to terminate the Disaster Declaration in June when it passed House Resolution 836, a concurrent resolution of both the House and Senate which directed the Governor to issue an Executive Order ending the Proclamation Declaring a Disaster Emergency issued on May 6, 2020. The Legislation sought to enforce HR 836 in the Pennsylvania Commonwealth Court.

On June 12, 2020, in response to the resolution, the Governor filed a "King's Bench" application in the Pennsylvania Supreme Court requesting that the Court declare HR 836 invalid. The Supreme Court accepted the case and, on July 1, 2020, issued an Opinion finding HR 836 invalid. As a result of the Court's Opinion, the Disaster Proclamation remains in place in Pennsylvania.

The dispute between the Governor and the Legislature had little, if any, direct impact on employers. The Orders issued by the Pennsylvania Department of Health concerning worker and building safety were not impacted by HR 836 and remain in place.

UPDATED MASK REQUIREMENTS

On July 1, 2020, PA Secretary of Health Dr. Rachel Levine issued an [Order](#) mandating universal masking in Pennsylvania. Under the Order, all individuals are required to wear a mask in the following situations:

- When outdoors, if they are unable to maintain social distancing from others who are not family members;
- In any indoor location where members of the public are generally permitted;
- Waiting for, riding on, driving or operating public transportation or paratransit, or while in a taxi, private care or ride-sharing vehicle;
- While obtaining services from the healthcare sector, including hospitals, pharmacies, clinics, laboratories, doctor offices, dental offices, veterinary clinics and blood banks; and
- While engaged at work, whether in the workplace or working off-site, when interacting in-person with any member of the public, working in any space visited by members of the public, working in any space where food is prepared or packaged for sale or distribution

to others, working in or walking through common areas, or any room or enclosed area where other people are present and unable to physically distance.

In order to provide further guidance concerning Pennsylvania's masking requirements, the Department of Health ("DOH") also published an [FAQ](#) explaining the masking order in greater detail. With respect to employers, the FAQ provides:

- The new masking order applies to individuals inside and outside local government facilities, court houses and other government buildings.
- Employees isolated in their personal office space, which is not shared with any other individual, and at least 6 feet apart from another person, do not need to wear masks in the workplace.
- Disposable face shields may be used in lieu of masks.
- Masks are not required when an employee is traveling alone but must be worn when traveling in a vehicle with others, and when traveling through a toll booth or drive-thru.
- Masks are required for employees that work outdoors.
- The following individuals are not required to wear masks:
 - Individuals who cannot wear a mask due to a medical condition, including those with respirator issues that impede breathing, those with mental health conditions or disabilities;
 - Individuals for whom wearing a mask while working would create an unsafe condition in which to operate equipment or execute a task as determined by local, state or federal regulators or workplace safety guidelines;
 - Individuals who would be unable to remove a mask without assistance;
 - Individuals under the age of 2; and
 - Individuals who are communicating or seeking to communicate with someone who is hearing impaired or has another disability, where the ability to see the mouth is essential for communication.

TRAVEL RECOMMENDATIONS

On July 2, 2020, the DOH issued a [recommendation](#) that Pennsylvania residents self-quarantine if returning from travel to areas with high incidents of COVID-19. As of July 2, the following states have been designated as areas for which self-quarantine is recommended: Alabama, Arizona, Arkansas, California, Florida, Georgia, Idaho, Louisiana, Mississippi, Nevada, North Carolina, South Carolina, Tennessee, Texas and Utah.

The DOH travel advisory is a recommendation only and post-travel quarantine is not currently required by law. Employers are permitted, however, to require employees that have traveled outside of Pennsylvania (within the U.S. or abroad), to remain out of work for a period of self-quarantine. Employers that have not already done so should adopt a policy which addresses the following:

- Business travel expectations during the COVID pandemic, including the suspension of business travel and/or transition to teleconferencing.
- Personal travel expectations, including, but not limited to, the requirement that employees disclose all travel outside of Pennsylvania, and quarantine requirements for both international and domestic travel.

Employees that must be out of work to self-quarantine may be entitled to paid leave under the Families First Coronavirus Response Act (“FFCRA”), if their medical provider recommends that they quarantine. Absent a doctor’s recommendation, employees should be permitted to cover any required quarantine period with paid time off or, if no paid leave is available, to take time off unpaid.

OSHA UPDATE

Enforcement Guidance – Recordable Illnesses

OSHA has updated its position concerning recording of COVID-19 cases in the workplace. In April 2020, OSHA issued enforcement guidance stating that: (1) the recording standard would be enforced as usual for employers in the healthcare, emergency response and correctional institution industries; (2) for all other employers, OSHA would not require employers to make work-relatedness determinations unless there was objective evidence reasonably available to the employer that a COVID-19 case was work-related.

OSHA has since updated its position in a revised [Enforcement Memorandum](#) issued on May 19, 2020. Under the new guidance, COVID-19 is a recordable illness if:

1. The case is a confirmed case of COVID-19, as defined by the CDC (at least one positive test);
2. The case is work-related (an event or exposure in the work environment caused or contributed to the condition); and
3. The case involves one or more of the general recording criteria (death, days away from work, restricted work/transfer, medical treatment beyond first aid, loss of consciousness).

In determining whether a case of COVID-19 is “work-related” employers are not expected to undertake extensive medical inquiries. Upon learning of a case of COVID-19, it is sufficient for an employer to: (1) ask how the employee believes they contracted the COVID-19 illness; (2) while respecting employee privacy, discuss with the employee their work and out-of-work activities that may have led to the COVID-19 illness; (3) review the employee’s work environment for potential COVID-19 exposure (including consideration of other cases occurring in the workplace).

Certain evidence may weigh in favor of or against a determination of work-relatedness, including:

- COVID-19 illnesses are likely work-related when several cases develop among workers who work closely together and there is no alternative explanation.
- An employee's COVID-19 illness is likely work-related if it is contracted shortly after lengthy, close exposure to a particular customer or coworker who has a confirmed case of COVID-19 and there is no alternative explanation.
- An employee's COVID-19 illness is likely work-related if the employee’s job duties include having frequent, close exposure to the general public in a locality with ongoing community transmission and there is no alternative explanation.
- An employee's COVID-19 illness is likely *not* work-related if the employee is the only worker to contract COVID-19 in the vicinity and the job duties do not include having frequent contact with the general public, regardless of the rate of community spread.
- An employee's COVID-19 illness is likely *not* work-related if, outside the workplace, the employee closely and frequently associates with someone (e.g., a family member,

significant other, or close friend) who (1) has COVID-19; (2) is not a coworker, and (3) exposes the employee during the period in which the individual is likely infectious.

- Due weight should be given to any evidence of causation provided by medical providers, public health authorities, or the employee.

Employers that have a case of COVID-19 in the workplace should critically evaluate whether it is more likely than not that the exposure occurred in the workplace. To the extent an employer determines that a particular case was not work-related, the employer should document the reason for its decision and maintain that information in the employee's confidential medical file.

Guidance on Return to Work

On June 18, 2020, OSHA issued new [Guidance on Returning to Work](#) for nonessential businesses that were closed under state shut down orders. Most of the recommendations set forth in the Guidance are already required under Pennsylvania's Worker Safety Order or recommended under existing CDC guidance. One area not addressed in existing guidance is the recommendation that employers conduct hazard assessments to evaluate when, where, how and what sources of COVID-19 are likely in the workplace. Hazard assessments may be helpful to employers in making work-relatedness determinations under OSHA's recording standard.

If you have questions about your workplace safety obligations, BCGL's Employment Team of [Theresa Mongiovi](#) and [Angela Sanders](#) are available to assist you.