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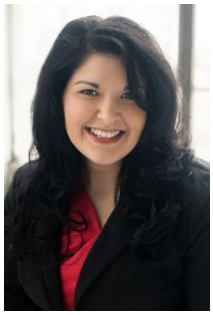

OHIO'S NEWEST STAY SAFE OHIO ORDER: WHAT DOES IT MEAN FOR EMPLOYERS?

On April 30, 2020, Ohio implemented yet another statewide order affecting all residents and businesses, regardless of whether the business has been deemed essential or non-essential in the past. The most recent Order of the State of Ohio Department of Health – Director's Stay Safe Ohio Order – was signed on April 30, 2020, and will remain in effect until 11:59 p.m. on May 29, 2020. The new Order can be accessed here.

While many Ohioans anticipated a new order related to the shutdown of businesses and the reopening of certain industries, the breadth and rigidness of the new Order came as a surprise to many. With respect to business operations, the critical provisions of the Order are found at Paragraph 8 (Facial Coverings), Paragraph 15 (Travel), Paragraph 16 (Social Distancing Requirements) and Paragraph 21 (Sector Specific COVID-19 Information and Checklist for Businesses/Employers). Here is what businesses need to know about the new mandates on employers:

1. Businesses must allow invitees to utilize facial coverings and they must require employees to use facial coverings unless one of six reasons would mitigate against the use:

(a) prohibited by law;
(b) in violation of industry standard;
(c) not advisable for health reasons;
(d) in violation of the business's documented safety policies;
(e) the employee is working alone in an assigned area; or
(f) functional practical reasons not to wear a facial covering exists.

This mandate applies to all Ohio businesses in operation, not only businesses that are re-opening for the first time since the statewide shutdown. Thus, for many businesses, the new Order contains far more requirements than the previous one. The six exceptions to employees being required to wear face coverings permit an employer some latitude in not enforcing the mandatory use, but an employer must be somewhat innovative to come within one of the exceptions, especially since the new Order comes with a requirement that an employer provide written justification to the State upon request. Employers must also be prepared to justify the non-use of facial coverings by employees visiting customers and owners of premises.

The use of face coverings can be problematic in many trades, including construction and manufacturing. For example, facial coverings may obstruct vision or "steam up" safety glasses or regular glasses, or impact the employee's visibility due to other masks or coverings that the employee must wear to perform his or her job. Masks may also impact the employee's ability to perform safety-sensitive tasks, and can also create asphyxiation hazards if worn too tightly or improperly constructed on a homemade basis. Homemade face masks made of impermeable materials or face masks covered with mucus or saliva may excessively limit an employee's breathing, which can cause rebreathing of carbon dioxide or other infectious materials. Employees with respiratory or other underlying health conditions may be particularly susceptible to this hazard. Of course, the restriction on breathing of fresh air can also create an asphyxiation hazard. Caught-in-entanglement hazards may also arise and could create a greater hazard to employees if used. The ability to communicate may be diminished by the use of facial coverings, which would be detrimental for certain positions requiring detailed communications, such as in a control room where the use of facial coverings may be a safety hazard and not practical. Facial coverings may also exacerbate heat stress issues, and interfere with hydration practices that must often be maintained by workers in high-heat environments. Remember, respirators and facial coverings are different. Employees should not be allowed to use N95 masks unless the employer's OSHA Respirator program requires such.

As outlined above, numerous circumstances exist where it is not "industry best practice" to use face coverings, and in fact, certain uses could increase the hazards to which workers are exposed. Thus, employers should consider immediately the potential hazards and the impact of face coverings on those hazards to determine whether facial coverings should be mandatory for certain positions, certain individuals, or in a particular work environment or operation. The justifications should be documented by the employer so that the rationale can be made available upon request from the State to justify the non-mandatory application of the Order. Of course, if some employees are permitted to utilize the facial coverings while others are not (based on an exception to the use), then the justification for non-use could appear to be artificial, so employers should carefully make these determinations based only on the six exceptions contained within the Order.

At this time, the general opinion is that facial coverings do not constitute PPE, and therefore, need not be provided by or paid for by the employer. In addition, the new Order does not obligate the employer to provide or pay for facial coverings. However, unionized employers should look to their collective bargaining agreement to determine whether

there is any employer obligation to pay for facial coverings. Many employers are providing facial coverings (not respirators) in order to placate employee concerns. Also, employers should consider how to best communicate with employees about the facial coverings mandate, and any applicable exceptions, particularly in a unionized environment, where the implementation of a new policy related to safety could cause an obligation to bargain – at least over the effects of the new policy.

2. Paragraph 15 of the Order requires social distancing on business travel and implicates the Social Distancing Requirements set forth in Paragraph 16. This could create issues when workers are traveling together in a vehicle, where social distancing is not feasible or practical.

3. Paragraph 16 addresses social distancing and, while it appears to set forth an absolute mandate of maintaining at least six-foot distancing from other individuals, the Order seems to relax the standard in other sections. At Paragraph 21, which is the sector-specific provision, the manufacturing, distribution and construction employer checklist references a six-foot distance between people, but permits the use of barriers when six-feet distancing is not possible. The Order also implements the same policy for general office environments and consumer, retail and service industries. Because of the industry-specific guidance offered in Paragraph 21, employers can likely argue that the specific provisions of paragraph 21 override paragraphs 15 and 16, and that if six-feet distancing cannot be maintained, then some type of barrier could be utilized, such as Plexiglas or other barriers. The term "barrier" is not defined in the Order. Additionally, at paragraph 17, the intent of the Order includes that individuals "should at all times ***and as much as reasonably possible comply with Social Distancing Requirements***," which assumes that there will be instances and circumstances where social distancing is not possible or practical.

4. Paragraph 21 sets forth a laundry list of actions, segregated by industry type, which all businesses and employers, whether currently open or reopening, are required to implement. Among the required actions include the following for manufacturing, distribution and construction:

- Ensure a minimum of six feet between people; if not possible, install barriers;
- Require employees to perform daily symptom assessments, including taking temperature with thermometer and monitoring for fever, coughing or trouble breathing;
- Mandate frequent handwashing;
- Stagger or limit arrivals of employees and guests; also stagger lunch and break times;
- Reduce the number of shifts;
- Space factory floor to allow for distancing;
- Contact the local health district about suspected cases or exposures;
- Shutdown shop/floor for deep sanitation, if possible; and
- Perform daily deep disinfection of high-contact surfaces.

In general office environments, the required actions include all of those listed above, in addition to cancelling or postponing all in-person events when social distancing guidelines cannot be met, posting signage on health safety guidelines in common areas, limiting travel as much as possible, reducing sharing of work materials, and restricting buffets in cafeterias.

It goes without saying that these sector-specific checklists, social distancing and facial covering provisions are problematic in many work environments, but especially for work crews that must perform certain operations in close proximity of each other – less than six feet and without the possibility of installing some type of barrier – and the wearing of masks is not practical, whether due to safety or industry standard reasons. Based on several of the reasons outlined above, it may very well be the case that the required use of face coverings does not constitute industry best practice, and that the mandated use of face coverings, under certain circumstances, may create a greater hazard than noncompliance with the Order. Under those circumstances, employers should not require use of face coverings. Outside of those circumstances, employers should require the use of face coverings where the use would be both appropriate and safe in order to avoid the criminal sanctions within the Order. Finally, employers must consider how they will enforce the various provisions of the new Order, including facial covering and social distancing requirements – progressive corrective discipline is one such approach.

In summary, the most recent Order creates compliance challenges for employers. However, a creative employer – with the assistance of counsel – should be able to fashion some methods to avoid strict compliance. Of course, even if this is possible, there remains the consideration of satisfying employees in that the employer is taking adequate steps to protect their wellbeing.

While the above guidance will assist employers in dealing with these complicated issues, please be reminded that this is an overview of developing legal issues and is not intended to be and should not be construed as legal advice. For more specific information, contact Bob Dunlevey, Board Certified Specialist in Labor and Employment Law, at (937) 641-1743 or Nadia A. Lampton at (937) 641-2055.