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OSHA STANDARDS: APPLICABILITY TO PUBLIC SECTOR EMPLOYMENT

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Effective February 1, 2019, G.L. c. 149 § 6½, as amended (the "Act"), requires all "public employer[s]," to provide their employees at least the level of protection provided under the federal Occupational Safety and Health Act of 1970 ("OSHA"). The new law defines "public employer" broadly to include "any political subdivision of the commonwealth, any quasi-public independent entity and any authority or body politic and corporate established by the general court to serve a public purpose."

General Duty Clause

To meet the minimum protections provided by the Act, public employers and their employees are subject to the OSHA "general duty clause", 29 U.S.C. § 654, generally cited when no specific OSHA standard is applicable. Employers must provide employees "employment and a place of employment free from recognized hazards that are causing or are likely to cause death or serious physical harm to [their] employees" and further they must "comply with occupational safety and health standards promulgated under [the] Act." The clause also requires employees to comply with rules and regulations applicable to their own actions and conduct.

OSHA-Promulgated Standards

OSHA standards establish rules that employers must implement to protect their employees from hazards, although not all will apply to public employers. The OSHA standards for Construction Work (29 CFR § 1926) and General Industry (29 CFR § 1910) are most applicable to municipal worksites, including use of certain safe practices and equipment, limiting exposure to hazardous chemicals, monitoring hazards and keeping records of workplace injuries and illnesses, described briefly below.

- *Walking-Working Surfaces (Subpart D)*: The employer is responsible for ensuring all places of employment are clean, orderly, sanitary and dry, and free of hazards including snow and ice. Additionally, the employer must provide safe means of access and ingress/egress. The employer must regularly inspect all walking and working surfaces and make repairs as necessary. This Subpart also details standards for specific surfaces, including ladders, stairways, and scaffolding. See 29 CFR. §§ 1910.23, 1910.25, and 1910.27, respectively.
- *Exit Routes and Emergency Planning (Subpart E)*: Employers are required to adopt written emergency action and fire prevention plans, and have them available for employee review. Emergency action plans must include procedures for reporting fires and other emergencies and for evacuations. Employers must also maintain an employee alarm system and designate and train employees to assist in safe and orderly evacuation. Fire prevention plans must include a comprehensive list of workplace fire hazards,

procedures to control accumulation of combustible materials, and the name or job title of the employees responsible for controlling fuel source hazards and maintaining fire prevention equipment.

- *Personal Protective Equipment (Subpart I)*: In addition to addressing general requirements, this Subpart establishes specific standards for respiratory and head protection. The employer must ensure that personal protective equipment ("PPE"), whether or not the employer provides the PPE, is sanitary and reliable and meets applicable standards. Employers should conduct in each workplace a "workplace hazard assessment" to identify existing or likely hazards and determine what PPE is necessary. Employers must train employees to know when and what PPE is necessary and how to use it. Only PPE trained employees can perform work where PPE is required.
- *Medical Services and First Aid (Subpart K)*: Employers must ensure that workplace personnel are trained and ready to perform first aid and ensure that first aid supplies are available. Where corrosive materials are present in a workplace, such supplies must include drenching or flushing equipment.
- *Hand and Portable Powered Tools (Subpart P)*: Employers are responsible for ensuring that all such tools, including tools furnished by an employee, are in safe operating condition and do in fact operate safely.
- *Toxic and Hazardous Substances (Subpart Z), Hazard Communication (29 CFR § 1910.1200)*: In workplaces where chemical products are used or stored, employers must develop a written program for classifying the health or physical hazards associated with each product, and then label the product with its name and associated hazards. The employer's program must include training of employees as to products that may have hazardous health effects and include a separate list of all chemicals used in each workplace, as well as individual "safety data sheets" for each hazardous product. No sheets must be maintained for household quantities of consumer products used typically.
- *Construction Standards:* Certain construction standards may be applicable to departments that perform construction, including, for example, highway and DPW employees. Specific industry standards take priority over general industry standards if they address identical hazards. For example, fall protection is required when an employee is working on a walking/working surface (horizontal and vertical surface) with an unprotected side or edge six feet or more above a lower level. 29 CFR § 1926.501(b)(1). For construction work in confined spaces, Subpart AA of 29 CFR § 1926, sets practices and procedures requirements. Construction sites are also subject to specific lighting requirements. 29 CFR § 1926.56.

Recording and Reporting Requirements

Throughout the year, private employers are required to report on particular OSHA-mandated forms workplace injuries and illnesses as they occur. In contrast, public employers, while required to internally record workplace injuries and illnesses, are not generally required to complete specific OSHA-mandated forms unless requested by the state Bureau of Labor Statistics or a Department of Labor Standards ("DLS") inspector. DLS should be contacted, however, within 24 hours if an accident causes death, amputation, loss of an eye, loss of consciousness, or inpatient hospitalization. For all injuries, employers should comply with current workers' compensation procedures and file with the Department of Industrial Accidents what are known as "First Reports".

Enforcement of G.L. c. 149, § 6½

DLS is responsible for enforcing the amended statute, and in 2014 promulgated regulations for enforcing the current version of the law applicable to ***state*** employers. Under 454 CMR 25.00, DLS has authority to enter "any

place of employment where work is performed by an employee," at reasonable times, without delay. While at a workplace, DLS may inspect and investigate, including examination of accident-protection methods, means of escape from fire, sanitary provisions, and lighting. DLS investigators may question personnel and review records.

DLS makes an appointment for all inspections other than "imminent" inspections, and prioritizes them as follows:

> Imminent Hazard: DLS inspectors stop at active trenches, aerial lift operations, and roofing to ensure safety equipment and procedures are used;
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> Accident Investigation: DLS inspects workplaces in response to a worker injury. Examples of recent inspections include amputation, electric shock, fall from ladder, broken leg, crushed hand, trench collapse, and flash fire;
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> Voluntary: An employer can request a voluntary safety and health audit;
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> Complaint: DLS responds to complaints about workplace safety conditions. Examples of complaints include ladder handling, lack of respirators, and facility maintenance; and
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> Planned Programmed Inspection: DLS inspects a representative number of inspections in workplaces expected to contain machinery or other hazards. Examples of recent inspections include wastewater treatment plants, drinking water plants, highway departments, municipal electric power, school kitchens, and crossing guard locations.

Where an investigation reveals a violation, an employer's first offense results in a written "Order to Correct" the infraction. Employers who make the necessary corrections within the timeframe specified in the Order will not be fined. The Attorney General may bring a civil action to enforce the Order. 454 CMR 25.05(5). Additionally, the regulations provide that if necessary, DLS may proceed past the written order in accordance with procedures detailed by 453 CMR 29.00, *Civil Administrative Remedies* (formerly 453 CMR 9.00). Following a written warning, DLS may issue citations of amounts varying between $1,000 and $5,000. Failure to pay can lead to an order to cease operation. Furthermore, the Commissioner of DLS can seek a restraining order or other injunctive relief through superior court action, the violation of which would cost $10,000 per day.

DLS has produced a self-audit checklist, sample training, and other resources to help public employers comply with the new requirements under the amended law. See https://www.mass.gov/workplace-safety-and-health-program-wshp. Employers may also consider retaining an auditing firm to evaluate whether their workplace is in compliance with the requirements of the amended law or request that DLS conduct a safety audit. Employers should also review their existing policies to determine if they require revision or amendment, should draft new policies to cover any currently exposed areas, and engage bargaining groups due to the likelihood that the amended law will raise collective bargaining obligations.

Please contact Brian Maser (bmaser@k-plaw.com) or any member of our Labor and Employment Practice Group at (617) 556-0007 with any questions concerning the amendment to G.L. c. 149, § 6½ and its implementation.