



Ordering work without PPE could violate regulation, trigger whistleblower complaints

By Anjali Patel, Esq., **cyberFEDS**® Legal Editor Washington Bureau

IN FOCUS: As employees return to the workplace, HR can help prevent complaints about any lack of personal protective equipment by showing flexibility and empathy, but should also be prepared to handle concerns about lack of PPE, Richard Renner, an attorney with Kalijarvi, Chuzi, Newman, and Fitch told **cyberFEDS**®.

"Keep your eye on the mission of the agency," he said, but understand "that mission includes keeping a workforce that feels safe and shares the commitment to the mission of the agency."

Working together will be crucial and lead to fewer complaints even when obstacles arise, he said, so HR must be flexible and show "a little tenderness" when dealing with employees who are concerned about their lives or their family members.

In a statement to **cyberFEDS**®, a Federal Emergency Management Agency spokesperson said "FEMA and HHS are providing face coverings to federal departments and agencies with mission essential functions to promote health and safety in the workplace and in their execution of public-facing missions."

The spokesperson said FEMA has inter-agency agreements with multiple FEMA agencies, including the Department of Homeland Security and the Department of Veterans Affairs. Shipments can include N95 masks, gloves, and other equipment specific to an agency's needs and missions.

Renner said that even though the law requires agencies to provide employees personal protective equipment, enforcing this requirement may be challenging, particularly in areas with shortages.

Refusing to obey an order

If employees feel that work conditions are not safe because they do not have PPE, they could file a [whistleblower](#) complaint under the Follow the Rules Act, [5 USC 2302](#) (b)(9)(D), which amended the Whistleblower Protection Act to give employees "a comprehensive right" not to follow orders that violate a law, rule, or regulation, Renner said.

So, "if someone were to refuse to come to work because [there isn't] adequate PPE, they would be protected by this section of the WPA," he said.

However, "the specific application of the Follow the Rules Act has not been tested in the courts" because the provision was only enacted in 2017, he added.

In addition, "employees are allowed to raise these concerns to any lawful outlet, including superiors, Congress, and inspector general."

Relevant laws, rules, regulations

Congress requires federal agencies to comply with specific Occupational Safety and Health Administration rules and regulations, Renner said, including [29 CFR 1960.8](#) (a) and (d), which require agency heads to:

- Acquire, maintain, and require the use of approved personal protective equipment, approved safety equipment, and other devices necessary to protect employees; and
- Provide "employment and a place of employment" free from recognized hazards that are causing or are likely to cause death or serious physical harm.

Claiming the COVID-19 pandemic is "unrecognized" as agencies reopen would be "untenable" because the virus is "so widely known," Renner noted.

OSHA

Employees could also ask for an inspection from or file a complaint with OSHA, which has "longstanding regulations to provide PPE" and jurisdiction over federal agencies.

Although the regulation requires providing PPE, "OSHA has not adopted a specific standard to protect workers from infections," so that might make enforcement challenging, he added.

In addition, agencies are supposed to include representatives from their unions in developing safety programs under Section 19 of the Occupational Safety and Health Act, [29 USC 668](#) , and [Executive Order 12196 \(02/26/80\)](#), he explained. So, the "federal sector OSHA provision does require agencies to have a safety committee and requires that the committee has to have union representation." If union employees feel they are being excluded from the decisions made on safety, they can notify OSHA to see what can be done to ensure compliance with the law, he said.

Yet, getting OSHA assistance may be challenging because "OSHA is not as strong in the federal sector," does not have the same level of resources for federal workplaces as the private sector, and is severely understaffed, Renner said.

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