

COVID-19 and OSHA

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As employers weigh their measure of response to COVID-19, the employers must recognize that The General Duty Clause of the Occupational Safety and Health Act (OSHA), 29 U.S.C. § 654(a) (1), requires employers to furnish each worker with “employment and a place of employment, which are free from recognized hazards that are causing or are likely to cause death or serious physical harm.” With this in mind, employers must be vigilant in ensuring that they keep their employees safe from COVID-19 and also meet related OSHA requirements.

Employer’s Obligation to Keep Employees Informed

While employers are already routinely updating employees about COVID-19, OSHA’s regulations specifically require someone to be available at a facility to provide information concerning employee health. Under 29 CFR 1910.151(a), an employer shall ensure the ready availability of medical personnel for advice and consultation on matters of plant health. OSHA has interpreted “plant” broadly to include other facilities, including individual offices. This obligation applies to all employers, regardless of size, who operate in states covered by federal OSHA. According to OSHA, this duty to have someone available for advice and consultation means that someone is available to provide information regarding the overall safety and health condition of the employees. Nothing under the standard precludes using third-party personnel or services, such as medical personnel provided through a group health plan, EAP or similar service. It is not only a good practice to keep employees informed about COVID-19 and the information being provided by the CDC and others, but this practice is also consistent with the OSHA standard and may help with some of the privacy concerns about providing general (not specific employee) information about COVID-19-related matters at a particular facility.

Consider Enhanced Personal Protective Equipment for Those Designated to Administer First Aid in Non-Health Care Settings

Under OSHA’s 29 CFR 1910.151(b) regulation, in the absence of an infirmary, clinic, or hospital in near proximity to the workplace, which is used for the treatment of all injured employees, a person or persons shall be adequately trained to render first aid at an employer’s facility. Thus, for employers who are not close enough to a hospital or facility that can quickly dispatch Emergency Medical Services, OSHA requires a sufficient number of employees to be trained in rendering first aid. Given the highly contagious nature of COVID-19, employers should consider if those employees who are currently designated to render first aid have been sufficiently trained on COVID-19 precautions and equipped with the appropriate personal protective equipment to minimize contamination. See our posting on OSHA’s guidance for protective measures that should be taken for those who are at high risk for exposure given their job duties, such as health care professionals, as this guidance should be similar for those employees who are designated to administer first aid.

N95 Masks

While there is still much debate as to the most effective defense against the coronavirus, many employees may choose to wear a surgical paper mask or respirator “dust mask” to the workplace. Employers must begin thinking about how to appropriately respond to employees who voluntarily wear, or request to wear, these devices in the workplace, or if an employer decides to require employees to wear such masks or respirators, what OSHA issues may arise from such a mandate.

As an initial matter, it is important to note the differences between the paper face surgical masks and a dust mask respirator given their similar appearances. A respirator is defined as a personal protective device that is worn on the face or head and covers at least the nose and mouth. The most common form of respirator is a N95 respirator, which means that the product filters at least 95% of airborne particles. These are the common dust masks that can be purchased at home improvement and other retailers. The CDC has published a useful chart detailing the differences between a surgical paper mask and the N95 dust mask respirator:

<https://www.cdc.gov/niosh/npptl/pdfs/UnderstandDifferenceInfographic-508.pdf>. This distinction is important because OSHA only governs respirators (such as N95 dust masks) and paper surgical masks are not respirators. However, an employee (or employer) may unknowingly purchase an N95 respirator without realizing the potential implications given their general availability. If an employee voluntarily wears or requests to wear the N95 or other respirator to work, Federal OSHA and State OSHA Agencies require employers to meet certain obligations. In these scenarios of voluntary use, an employer must provide the employee with a copy of the mandatory Appendix D of OSHA’s Respiratory Protection Standard or the equivalent state OSHA Agency document. This document advises the employee of certain precautions when voluntarily wearing a respirator and can be found on OSHA’s website: <https://www.osha.gov/laws-regs/regulations/standardnumber/1910/1910.134AppD>.

If an employer considers mandating that employees wear respirators, including N95 dust masks, there are numerous OSHA requirements to consider under OSHA’s Respiratory Protection standard in 29 CFR 1910.134(c)(1). This standard requires that employers establish and implement a written respiratory protection program with worksite-specific procedures. The respiratory program must include the following:

- Procedures for selecting respirators;
- Medical evaluation of employees required to use respirators;
- Fit testing procedures;
- Procedures for proper use;
- Procedures and schedules for cleaning, disinfecting, storing, inspecting, repairing, discarding, and maintaining respirators;
- Procedures to ensure adequate air quality, quantity, and flow of breathing air for atmosphere-supplying respirators;
- Employee training in respiratory hazards and proper use of respirators; and
- Regular evaluation of the effectiveness of the respiratory program.

If employers are considering mandating the use of N95 dust masks or other respirators, it is also important to note that the CDC does not currently recommend N95 respirators or any mask for general public use as a means to protect themselves from respiratory diseases, including coronavirus.

Recording COVID-19 Infection in the OSHA 300

OSHA requires that covered employers record certain work-related injuries and illnesses on their OSHA 300 log. And while the common cold and flu is generally exempt from this recordkeeping

requirement, the Department of Labor is taking the position that COVID-19 could be a recordable illness if an employee is infected as a result of performing work-related duties. But, according to the Department's latest guidance, employers are only responsible for recording cases of COVID-19 if all of the following are met:

1. The case is a confirmed case of COVID-19;
2. The case is work-related, as defined by 29 CFR 1904.5; and
3. The case involves one or more of the general recording criteria set forth in 29 CFR 1904.7 (e.g. medical treatment beyond first-aid, days away from work).

Under OSHA regulation 29 CFR 1904.5(a), an illness is work-related if "an event or exposure in the work environment either caused or contributed to the resulting condition or significantly aggravated a pre-existing injury or illness." And an illness is generally presumed to be work-related if it resulted from an exposure in the work environment (which includes physical locations and equipment used by the employee in the course of work). Because of the contagious nature of COVID-19, employers need to be prepared to record coworker to coworker transmissions. Of course, whether COVID-19 is work-related becomes a much more difficult question as community spread of COVID-19 becomes more prevalent.

Conducting Hazard Assessments for At-Risk Workers

Under the OSH Act and its regulations, employers generally are required to provide a workplace free from recognized hazards that could cause serious injury or death. In light of COVID-19, employers should consider the [guidance from OSHA](#) that, among other things, indicates that employers should assess if they have workers who may be at risk based on their job duties and assess what controls (e.g., engineering, administrative, or personal protective equipment, etc.) are necessary for them to safely perform their jobs. While the majority of the job categories at issue that could benefit from this hazard assessment and review of protective controls are in health care or similar industries, it should be noted that those who frequently come in contact with the general public are considered by OSHA to be at a "medium exposure" risk. For these workers, OSHA recommends consideration of engineering controls (e.g., plastic sneeze guards, etc.), administrative controls (e.g., use of face masks and strategies to minimize face-to-face contact with the public), and personal protective equipment (e.g., gloves, goggles, respirators, gowns, etc.). As OSHA explains, the specific requirements are dependent on an employer's own hazard assessment as several factors will influence what is appropriate for a particular employer.

Protecting Workers from COVID-19 Under OSHA's General Duty Clause

Under Section 5(a)(1) of the OSH Act, employers are required to furnish a place of employment free from recognized hazards that are causing or are likely to cause death or serious injury to employees. At the American Bar Association OSHA Committee meetings March 3-6, 2020, OSHA leadership disclosed that the agency had received approximately 20 complaints from employees generally complaining that employers were not providing a safe workplace due to fears that fellow co-workers were infected with COVID-19. Employer measures designed to prevent exposure can be supported by the General Duty Clause obligation to provide a safe workplace. To prove a violation of the Clause, the Secretary of Labor must prove by a preponderance of the evidence that: (1) the employer failed to render its workplace free of a hazard to an employee; (2) the condition or activity is recognized as a hazard; (3) the hazard is causing or is likely to cause death or serious physical harm; and (4) feasible means exist to eliminate or materially reduce the hazard. Employer implementation of COVID-19 control measures should be considered regarding this General Duty

Clause abatement obligation as a feasible abatement measure is one that will eliminate or materially reduce the hazard.

When Providing Personal Protective Equipment, Review the Applicable OSHA Standard

The Personal Protective Equipment (PPE) standard (in general industry, 29 CFR 1910 Subpart I), addresses hand (gloves), eye and face, head, and respiratory protection. When respirators are necessary to protect workers or where employers require respirator use, employers must implement a comprehensive respiratory protection program in accordance with the Respiratory Protection standard (29 CFR 1910.134).

In addition to the OSHA Guidance Document, OSHA also Recommends Various Employer Actions

OSHA recommends that all employers stay updated on recommendations from federal, state, local, tribal, and/or territorial recommendations and consider how to incorporate those recommendations into workplace-specific plans. More specifically, the agency recommends that employers develop an infectious disease preparedness and response plan that can guide protective actions against COVID-19, including consideration of occupational and non-occupational exposure to the virus, workers' individual risk factors such as chronic medical conditions and immune-compromising conditions, and controls necessary to address these risks. OSHA also recommends that employers should prepare to implement basic infection prevention measures by:

- following good hygiene practices.
- providing tissues and trash receptacles to customers.
- exploring establishing policies and practices like flexible worksites (e.g., telecommuting) and flexible hours (e.g., staggered work shifts) to facilitate social distancing.
- discouraging the sharing of phones, desks, offices, or other work tools and equipment, where possible, among workers.
- maintaining regular housekeeping practices, including routine cleaning and disinfecting of surfaces, and using cleaners with EPA-approved disinfectant labels with claims against emerging viral pathogens.

Practical Concerns for Keeping Business Open

Many employers remain open and with a workforce that cannot work from home. OSHA mandates employers use feasible means of abatement once a hazard is recognized. Guidelines from health authorities or other regulatory agencies will be presumed to be viable abatement and employers are at risk if they ignore such guidelines. This includes sending any employee with any COVID symptoms home immediately on notice, increasing the thoroughness and frequency of cleanings, ensuring disinfectants and hand sanitizers are available throughout the workplace, instructing employees to maintain social distancing, limiting large group meetings or gatherings, limiting visitors and other third parties, and working with employees to make reasonable accommodations. For customer-facing roles, this may include increased distancing, increased breaks to wash hands, or disposable gloves for transactions that require touch. Consider whether separate or rotating shifts and squads are feasible.

Some employees may refuse to report to work out of fear of contracting the virus. OSHA prevents an employer from terminating or otherwise disciplining an employee for refusing to report to work if the employee reasonable believes she is in imminent danger. OSHA has not provided guidance on when a fear of contracting the virus becomes reasonable, but it may be as early as a reported

infection in the immediately surrounding area. Exercise caution in refusing employees' requests to remain home, whether to work remotely or not.

You might also be interested in:

[COVID-19 and American with Disabilities Act](#)

[COVID-19 and Discrimination Issues](#)

[COVID-19 Employer Checklist When an Employee Tests Positive](#)