

# COVID-19 OSHA Guidance: Hazard Assessments at Workplaces Considered Essential Businesses Under Shelter in Place Orders

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**PRACTICES** OSHA, Hospitality, Employment Litigation, Pharmaceuticals, Food, Beverage and Restaurant, Healthcare and Life Sciences, Labor and Employment, Litigation

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Several state and local governments have issued “shelter in place” orders and undoubtedly more will follow. All of them have various exemptions for “essential businesses” and many rely on these exemptions as outlined in the Department of Homeland Security’s Cybersecurity and Infrastructure Security Agency (“CISA”) guidance on critical infrastructure workers. According to this [guidance](#), which was issued on March 19, 2020:

If you work in a critical infrastructure industry, as defined by the Department of Homeland Security, such as healthcare services and pharmaceutical and food supply, you have a special responsibility to maintain your normal work schedule.

The Department of Homeland Security developed this initial list of “Essential Critical Infrastructure Workers” to assist states in protecting “their communities, while ensuring continuity of functions critical to public health and safety, as well as economic and national security.” The list includes, among others, operations and services that support medical and healthcare, telecommunications, information technology systems, defense, food and agriculture, transportation and logistics, energy, water and wastewater, law enforcement, and public works industries.

These essential business employers should consider safety and health issues if their employees will be frequently interfacing with the public given the COVID-19 concerns prompting these shelter in place orders. In other words, employees who are interfacing with the public should, if not already, be subject to some form of job hazard assessment. It may be, particularly with employers who are already following the CDC and other relevant government guidance, that no further action is necessary regarding protective measures. However, it seems prudent for employers to at least ensure that this hazard assessment has occurred, that it is current given the recent shelter in place orders, and that the controls designed to protect employees are working.

This article summarizes current OSHA guidance—federal and state—for employers operating these essential businesses. For purposes of this article, we are focusing on non-health care employees as health care employers have unique health and safety issues regarding patient care that are beyond the scope of this article.

The **first step** in conducting this hazard assessment is to consider the OSHA jurisdiction in which the employer has operations.

## Federal OSHA States

Several states operate under the jurisdiction of federal OSHA regarding private sector employers, including the current shelter in place states of New York, New Jersey, Connecticut, Pennsylvania, Illinois, Louisiana, Ohio, Delaware, Massachusetts, Idaho, Wisconsin, Colorado, West Virginia, and Montana.

In these federal OSHA states, OSHA requires employers to furnish to each worker “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.” (Section 5(a)(1) of the Occupational Safety and Health (OSH) Act of 1970, 29 USC 654(a)(1)).

In turn, under federal OSHA’s COVID-19 [guidance](#), employers should determine if COVID-19 infection is a hazard in their respective workplaces. With respect to hazard exposure, OSHA has classified worker jobs as “very high,” “high,” “medium” or “low” risk of exposure to coronavirus. Regarding these essential businesses that interact with the public, medium exposure risk jobs include those that require frequent and/or close contact (*i.e.*, within 6 feet) of people who may be infected with the virus, but who are not known or suspected COVID-19 patients. Workers in this category may generally have some occupational contact with the public and other coworkers. As explained below, employers should examine if they have assessed the workplace controls for these employees.

While beyond the scope of this article, employers should also be cognizant regarding their OSHA obligation to perform good housekeeping and maintain surfaces in sanitary conditions.

## State OSHA Plans

Regarding states that operate under their own state plan for private sector employers, these businesses should consider the nuances of state OSHA laws as some have unique and considerably different regulations than the federal OSHA states. Currently, variations of shelter in place orders are in effect in the state plans of California, Oregon, Washington, New Mexico, Michigan, Indiana, Minnesota, Vermont, Hawaii, and North Carolina (note that we will update this article with other state OSHA programs in states that adopt shelter in place orders if the obligations differ from what has been discussed herein).

### California

Cal-OSHA has opined that its unique regulation under Title 8, section 5141 (Control of Harmful Exposures), requires employers to protect employees from inhalation exposures that can result in injury, illness, disease, impairment or loss of function. According to Cal-OSHA, COVID-19 is a harmful exposure if there is an increased risk of infection at the workplace. This guidance was issued before the current shelter in place order in California. Consequently, it seems prudent to assess whether the shelter in place order signals an increased risk of infection for these essential businesses that remain open. In turn, employers should explore the implementation of the various controls discussed below. Cal-OSHA employers will also be familiar with their obligation to review their Injury Illness Prevention Program (“IIPP”) based on these issues.

### Oregon

Oregon OSHA directs employers to the federal OSHA guidance, but also includes a [checklist](#) for employers regarding infection control. Employers should also review the unique Oregon regulations that could be implicated. For example, under OAR 437-001-0760(1)(c): Every employer is responsible for providing the health hazard control measures necessary to protect the employees’

health from harmful or hazardous conditions and for maintaining such control measures in good working order and use.

## **Washington**

Like Oregon, Washington OSHA references the federal guidance, and includes the following separate [alert](#) as to recommendations for employers. Washington OSHA also has several unique regulations that could be implicated, including broad obligations to do everything “reasonably necessary” to protect the safety of employees. (WAC 296-800-11010).

## **New Mexico**

For employers in New Mexico, its state agency has issued the following [guidance](#) for employers.

## **Michigan**

Regarding Michigan OSHA, it also cross references the federal OSHA guidance. While Michigan OSHA generally adopts the federal OSHA standards, there are variations and some additional requirements, including an employer’s general obligation to train employees on hazards, that could include additional training on the COVID-19 hazards of being an essential business worker. (Mich. Admin. Code R. R. § 408.10011).

## **Indiana**

Currently, the Indiana Department of Labor simply cross references guidance from federal OSHA and the CDC. See, <https://www.in.gov/dol/3142.htm>.

## **Minnesota**

Under the state OSH Act and its regulations, certain employers (based on their NAISC code) will have in place a Workplace Accident and Injury Reduction (AWAIR) program. As with IIPP in California, employers who operate under such a program should review how COVID-19 hazards implicate the program. For example, the program requires employers to use methods to identify, analyze, and control new or existing hazards, conditions, and operations. In turn, an AWAIR program could be implicated regarding the effect of COVID-19 on essential business workers, such as Minnesota OSHA’s position that:

- supervisors should address all safety concerns raised by staff members by initially investigating the issue, determining if the concern is valid, and taking appropriate corrective action whenever necessary;
- the safety director will recommend improvements in physical plant, machinery, equipment, raw materials, and personal protective equipment to management, supervision, and the safety committee; and
- the safety committee will conduct monthly meetings and area inspections to review accident reports, identify hazards, and address any and all safety concerns raised by employees, first-line supervision or the safety director.

## **Vermont**

Vermont adopts the federal OSHA regulations. While it has some unique regulations that should be reviewed, employers may generally follow the federal OSHA guidance. Vermont OSHA has published the following [resources](#) for employers.

## ***Hawaii***

While Hawaii [cross-references](#) guidance from federal OSHA, employers should review regulations that are unique or considerably different from federal OSHA and ensure compliance with those regulations. For example, Hawaii's General Duty Clause, HAR 12-60-(2)(a)(3) provides:

Every employer shall provide safe work places and practices by elimination or reduction of existing or potential hazards. Elimination of existing or potential hazards by design, process substitution, or other appropriate methods is preferred because it eliminates the need for further employee protection. When elimination is not feasible, reduction of existing or potential hazards to acceptable levels, using methods such as engineering or administrative controls, isolation, or guarding, shall be promptly used. When these methods are inadequate to reach acceptable levels, personal protective equipment shall be provided and used.

This standard, as applied to COVID-19, provides a framework of the hierarchy of controls (consistent with the federal OSHA guidance) that Hawaii employers should follow for conducting hazard assessments for protecting employees from exposure to coronavirus. For protection of public facing employees, potential exposure to the virus should be minimized by implementation of suitable controls. As indicated, PPE should be provided when other controls are insufficient.

## ***North Carolina***

In North Carolina, the agency generally utilizes the federal regulations and has directed employers to review the federal regulations regarding PPE, hazard communication, and bloodborne pathogens on its [website](#). North Carolina additionally directs employers to consider its version of the General Duty Clause (NCGS 95-129(1)), which mirrors the federal language.

The **second step** in conducting the hazard assessment is to determine what controls can be put in place regarding potential exposure to employees who are interfacing with the public.

Under federal OSHA's guidance, when employees interact with third-parties in the workplace, such as customers, employers should examine possible engineering controls. For example and if feasible, physical barriers, such as clear plastic sneeze guards could be used to minimize exposure.

Next, if engineering controls are not appropriate, employers should review administrative controls. For example, OSHA suggests that employers implement feasible strategies for social distancing and minimizing face-to-face interaction (for example, drive-through windows and phone-based communications). Where appropriate, employers should limit customers' and the public's access to the workplace, or limit access to only certain areas in the workplace.

Finally, where engineering and administrative controls are insufficient, employers should assess whether personal protective equipment ("PPE") may be required. According to OSHA, workers with medium exposure risk may need to wear some combination of gloves, a gown, a face mask, and/or a face shield or goggles. OSHA expects that any such PPE may vary by work task, the results of the employer's hazard assessment, and the types of exposures to employees when performing their jobs. OSHA mandates that employees required to use PPE must be trained, including on (a) proper use, (b) how to maintain the PPE, (c) inspection techniques to discover any damage, and (d) limitations of the PPE. As addressed on this webpage in our separate article on N95 dust masks, an employer must ensure compliance with OSHA's respiratory protection standard if it mandates this or any other form of respiratory protection.

Regarding California, Cal-OSHA's interim guidance to general industry employers notes that the CDC recommendations as to minimizing exposure are a form of administrative control. As a reminder these CDC administrative controls include:

- Actively encouraging sick employees to stay home;
- Sending employees with acute respiratory illness symptoms home immediately; and
- Providing information and training to employees on: (a) cough and sneeze etiquette; (b) hand hygiene; (c) avoiding close contact with sick persons; (d) avoiding touching eyes, nose, and mouth with unwashed hands; (e) avoiding sharing personal items with co-workers (i.e. dishes, cups, utensils, towels); (f) providing tissues, no-touch disposal trash cans and hand sanitizer for use by employees; and (g) performing routine environmental cleaning of shared workplace equipment and furniture.

In the other state OSHA programs (Oregon, Washington, New Mexico, and Michigan), as they generally reference the federal guidance, an employer should be able to rely on the federal OSHA process outlined above. However, employers should review those state regulations as to whether additional training or other efforts may be required.

Whether in a state or federal OSHA jurisdiction, employers who operate essential businesses under these shelter in place orders should at least ensure that they have considered whether appropriate hazard assessments have been conducted and whether additional controls are necessary.