

OSHA's Response to Workplace Safety and Coronavirus Exposure

Compiled with information from the U.S. Chamber of Commerce

As employers seek to protect their workers from exposure to Coronavirus, either while maintaining operations or in anticipation of resuming operations, what is expected of them by OSHA is one area of concern and uncertainty. OSHA has issued guidance to cover three of the main questions: how should employers protect their employees; do employers have to record cases of COVID-19 on their injury logs; and how will OSHA conduct enforcement related to Coronavirus? OSHA has coordinated its approach with guidance from the Centers for Disease Control (CDC) with respect to various protective measures. Below are specific details about what OSHA has said on these various topics.

Employer Obligations to Protect Employees:

OSHA does not have a specific standard for dealing with exposure to Coronavirus, or infectious diseases, or pandemics. Accordingly, the relevant obligations come from the General Duty Clause (GDC) of the OSH Act that requires employers to provide their employees with workplaces that are “free from recognized hazards that are causing or are likely to cause death or serious physical harm.” In general, an employer must take reasonable steps to abate or prevent known hazards— both the hazard and the steps to address it must be known.¹ Exposure to Coronavirus meets these requirements. OSHA has prepared a guide for employers on how to prepare workplaces for exposure to Coronavirus. Highlights of it are below.

Some media coverage of OSHA's handling of Coronavirus exposure has pointed out that guidance is merely suggestive and can be disregarded, unlike regulations. Employers should treat OSHA's guidance as recommended best practices intended to help them comply with their obligations under the General Duty Clause.

Assessing the Exposure Risk:

OSHA has identified four categories of risk to describe a workplace:

- Very High: Jobs with a high potential for exposure to known or suspected sources of COVID-19 during specific medical, postmortem, or laboratory procedure such as health care or morgue workers handling specimens from patients or bodies of persons known to have COVID-19;
- High: Jobs with a high potential for exposure to known or suspected sources of COVID-19 such as healthcare delivery and support, medical transport, exposed to known or suspected COVID-19 patients;
- Medium: Jobs that require frequent/close contact with people who may be infected, but who are not known or suspected patients such as those who may have contact with the general public (e.g., schools, high-population-density work environments, some high-volume retail settings), including individuals returning from locations with widespread COVID-19 transmission;
- Lower Risk: Jobs that do not require contact with people known to be, or suspected of being, infected such as workers that have minimal occupational contact with the public and other coworkers.

Hierarchy of Controls:

Once the level of risk has been identified, like other hazards, OSHA expects employers to work through the Hierarchy of Controls in determining the best approach to protecting employees. The different categories of control, in order of protection are: eliminate the hazard, engineering controls, administrative controls, safe work practices, and personal protective equipment (PPE) such as gowns, gloves, face shields, and respirators. What level of controls, and which controls are appropriate will be determined by the category of risk for the workplace. Pages 12-16 of OSHA's guide give full details including what type of respirators should be used, and the regulatory requirements associated with them.

Note that PPE is considered the last approach. Employers must communicate to employees what they are required to use, explain how to use it, and why it is necessary. Also, unless a mask is rated as protective such as N95s respirators, it is not considered PPE and may not trigger regulatory requirements for training and inspection.

Special Guidance on Use of Respirators:

In recognition that the commonly used N95 filtering face piece respirators (N95 FFRs) are in short supply, OSHA announced special guidance on alternatives employers can consider when those respirators are indicated.

The interim enforcement guidance recommends that employers should reassess their engineering controls, work practices and administrative controls to identify any changes they can make to decrease the need for N95 respirators. If respiratory protection must be used, employers may consider use of alternative classes of respirators that provide equal or greater protection compared to an N95 FFR, such as National Institute for Occupational Safety and Health (NIOSH)- approved, non-disposable, elastomeric respirators or powered, air-purifying respirators.

When these alternatives are not available, or where their use creates additional safety or health hazards, employers may consider the extended use or reuse of N95 FFRs, or use of N95 FFRs that were approved but have since passed the manufacturer's recommended shelf life, under specified conditions. This interim guidance took effect on April 3 and will remain in effect until further notice. This guidance is intended to be time-limited to the current public health crisis.

Recordkeeping Requirements for COVID-19 Cases:

OSHA has said that incidents of employees contracting COVID-19 are recordable illnesses under the following criteria:

- The case is confirmed as a COVID-19 illness;
- The employee exposure is work-related as defined by 29 CFR 1904.5; and
- The case involves one or more of the general recording criteria in 29 CFR 1904.7, such as medical treatment beyond first aid or days away from work.



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Recordkeeping Requirements for COVID-19 Cases Continued:

For the purposes of determining whether a COVID-19 case is work-related, OSHA has said that in areas where there is ongoing community transmission, employers other than those in the healthcare industry, emergency response organizations (e.g., emergency medical, firefighting and law enforcement services), and correctional institutions may have difficulty making determinations about whether workers who contracted COVID-19 did so due to exposures at work. Accordingly, until further notice, OSHA will not enforce its recordkeeping requirements to require employers outside the above industries to make work-relatedness determinations for COVID-19 cases, except where:

- (1) There is objective evidence that a COVID-19 case may be work related. This could include, for example, a number of cases developing among workers who work closely together without an alternative explanation; and
- (2) The evidence was reasonably available to the employer which includes information given to the employer by employees, as well as information that an employer learns regarding its employees' health and safety in the ordinary course of managing its business and employees.

Employers of workers in the healthcare industry, emergency response organizations and correctional institutions must continue to make work-relatedness determinations pursuant to 29 CFR Part 1904.

OSHA's Enforcement Approach and Priorities:

OSHA has announced a special interim enforcement plan to prioritize how they will address workplace Coronavirus issues. The plan provides instructions and guidance to OSHA Area Offices and compliance safety and health officers (CSHOs) for handling coronavirus-related complaints, referrals, and severe illness reports. The plan took effect upon its issuance on April 14 and will remain in effect until further notice. It is intended to be time-limited to the current public health crisis.



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OSHA's Enforcement Approach and Priorities Continued:

During the coronavirus outbreak, OSHA Area Offices will utilize their inspection resources to fulfill mission essential functions and protect workers exposed to the disease. The response plan contains interim procedures that allow flexibility and discretion for field offices to maximize OSHA's impact in securing safe workplaces in this evolving environment.

The response plan outlines procedures for addressing reports of workplace hazards related to the coronavirus. Fatalities and imminent danger exposures related to the coronavirus will be prioritized for on-site inspections. The response plan contains procedures and sample documentation for OSHA inspectors to use during coronavirus-related inspections. Workers requesting inspections, complaining of coronavirus exposure, or reporting illnesses may be protected under one or more whistleblower statutes and will be informed of their protections from retaliation.

Recognition of Employer Good Faith Effort:

OSHA has announced that the agency will take an employer's good faith effort to comply with workplace safety requirements into consideration before deciding whether to issue a citation for a violation. OSHA's decision reflects the realities that government ordered closures, and shortages of key personnel can have a significant impact on an employer's ability to fully meet the requirements specified by OSHA such as training, testing, or inspections.

The guidance to OSHA inspectors specifies that during an inspection, compliance with standards that require annual or recurring audits, reviews, training or assessments. Officers should evaluate if the employer:

- Explored all options to comply with applicable standards (e.g., use of virtual training or remote communication strategies);
- Implemented interim alternative protections, such as engineering or administrative controls; and
- Rescheduled required annual activity as soon as possible.



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Recognition of Employer Good Faith Effort Continued:

The agency may issue a citation if it finds an employer cannot demonstrate any efforts to comply. To ensure corrective actions employers have taken once normal activities resume, OSHA will develop a program to conduct monitoring inspections from a randomized sampling of cases where the agency noted, but did not cite, violations.

The guidance is in effect as of issuance on April 17, until further notice consistent with the Coronavirus public health emergency.

Conclusion:

As employers begin to resume operations, protecting employees from exposure to Coronavirus will be a key component to the overall public health goal of preventing further spread of the virus. The combined guidance from OSHA and CDC provide the best resources for employers to consult as they make their plans. OSHA may update and expand their guidance going forward so checking OSHA's website set up for COVID-19 regularly is recommended. In addition, if you operate in a state with its own workplace safety agency, you should consult that agency's website for specific guidance or requirements.

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