



Armstrong
Teasdale

Protecting Your Employees in the Pandemic

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Overview

- CDC Guidance
- OSHA Requirements and Guidance
- Emergency Orders
- Minimizing Workers' Compensation and Negligence Risks

Keys to Understanding CDC and OSHA Guidance

- Guidance is not law but should be followed when possible.
- CDC operates on guidance. OSHA operates on guidance but also on binding laws and regulations.
- Guidance is not always clear and is often written rapidly and loosely to apply broadly to millions of workplaces.
 - Often includes ambiguous terms, e.g., “consider” or “increase” (to what?)
 - Does not address all possible circumstances

Guidance Offers Limited Protection

- “Following” guidance is wise but not guaranteed to prevent employee illness, workers’ compensation or tort liability.
- Ignoring guidance makes it more likely employees will experience cases, and could become evidence used against employer later.
- OSHA COVID-19 webpage recommends that employers consult the OSHA webpage, and also CDC COVID-19 guidance.
- Both agencies are still issuing new guidance from time to time, and that will continue.
- Each agency’s guidance documents are fairly compatible with the other’s.

Implementing Guidance – Policy Options

- **Develop / update policies to address pandemic risks:**
 - Update any existing response and communications plans.
 - Listen to federal, state and local health officials and watch for new guidance; update plans as necessary.
 - Develop flexible policies for scheduling and telework (if feasible) and create leave policies.
 - One possible example: Allow employees with COVID-19 symptoms to stay home without using sick leave, or telework, to prevent them from feeling the need to come to work.
 - Develop policies and procedures for prompt identification and isolation of sick employees.

Prepare Your Worksite

- **Conduct risk assessment of workstations; evaluate exposure. Document for consistency.**
- **Social distancing measures:**
 - If workstations are less than 6 feet apart, install Plexiglas barriers if possible.
 - Avoid requiring employees to share equipment where possible.
 - Employees tend to cluster around time clocks and exits. Put markings or stanchions in those areas to control numbers.
- **Cleaning efforts:**
 - Disinfect work spaces and surfaces that employees may contact.
 - Use EPA's published list of disinfectants.
 - Conduct regular cleanings; clean touch points like door handles, touch screens more frequently.
- **CDC – Wait 24 hours to clean after suspected or confirmed sick employee has left before disinfecting to prevent breathing droplets still in air. During this time, open windows and doors if possible.**
- **Check water systems and air filters – CDC suggests “considering” increasing # of air changes. Like many CDC recommendations, this one is not clear.**

Implement Work Rules

- Set guidelines around in-person interactions; limit meetings.
- Provide education and training materials to employees, including on industry specific protocols.
- Best to use spoken word (while social distancing) rather than require employees to read. May require multiple sessions, or use of video screens, to communicate with all employees. Post signs. (More on training specifics later.)
- OSHA guidance from April allows employers to postpone many routine annual requirements due during pandemic if employees are otherwise protected.
- Communicate with employees about their concerns. Attempt to resolve.
- **DO NOT IGNORE, ESPECIALLY WHEN CONCERN IS WITH SOCIAL DISTANCING OR SHARED EQUIPMENT.**

CDC and OSHA Guidance – Employee Training – Key Rules

- Require social distancing (stay 6 feet apart). If employees don't abide, make it clear they will be disciplined and assign someone (dept. supervisor?) to enforce. Employees who ignore this are great source of anxiety for others. Include around time clocks, exits, lunch rooms, temperature check points.
- “Frequently” wash hands for 20 seconds.
- If soap and water not available, use hand sanitizer with at least 60 percent alcohol. Employer should provide hand sanitizer throughout facility.
- Wear “face coverings” (these are not respirators) – CDC recommends wearing them in public settings, or where social distancing difficult to maintain, esp. in areas of “significant community transmission.” N95s, which are respirators, are in short supply as discussed next, so face coverings are the fallback.
- Note, CDC doesn't recommend requiring PPE (e.g., gloves, gowns) where it is not normally worn.

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CDC and OSHA Guidance – Employee Training – Key Rules

- CDC guidance makes temperature screening optional-prefers that employees take own temperature at work or home, at safe distance from screener.
- Avoid touching your eyes, nose and mouth. Don't cover face with hand when coughing, sneezing.
- Stay home when sick.

Respiratory Protection Shortage Issues

- OSHA and CDC – Respiratory Protection – OSHA has always had a respiratory protection standard: 29 CFR 1910.134
- It is being applied in context of COVID-19.
- N95 respirators are in short supply. N95s are considered a most basic and inexpensive respirator. There are many other types of superior respirators that are not in short supply that may be appropriate.
- OSHA and CDC policies recognize N95 shortage.
- If not for the shortage, OSHA and CDC would be pushing for employers to require N95 usage to prevent spread of virus.

Respiratory Protection Shortage Issues

- Because of shortage, the guidance encourages the use of “face masks” or coverings in appropriate circumstances in efforts to preserve N95s for health care workers.
- “Face masks,” “surgical masks” and “face coverings” are not considered respiratory protection, but may provide some protection.
- If employer has N95s (stockpiled?), and if employer mandates their use, full respiratory protection program must be implemented for them (in addition to any other type of respirator).

Respiratory Protection Shortage Issues

- If N95 use is voluntary, no full respiratory protection program is required, but employees who use them must be given basic information found in Appendix D to OSHA respiratory protection standard.
- In March, CDC recommended against wearing face coverings but later reversed its position.

OSHA's Risk Categories

- 1. Very High Exposure Risk – Health care workers, including first responders, performing intubations and other invasive procedures including specimen collection on known or suspected COVID-19 patients or handling specimens.**
- 2. High Exposure Risk – Health care workers not doing the above, but who enter rooms of knowns or suspected COVID-19 patients; medical transport workers.**
- 3. Medium Exposure Risk – Require frequent and/or close contact with (within 6 feet of) people who may be infected but not known or suspected COVID-19 patients. In areas with ongoing community transmission, workers may have contact with the general public (e.g., in schools, high-population density work environments, and some high-volume retail settings).**

OSHA RECOMMENDATION

- Install physical barriers, like clear plastic sneeze guards, where feasible.
- Consider offering face masks to ill employees and customers to “contain” secretions until they are able to leave the workplace (cross references CDC guidance); if shortage of masks, a reusable face shield.
- “May need to wear some combination of gloves, a gown, a face mask, and/or a face shield or goggles.” PPE ensembles for works “will vary by work task” and depend on the “types of exposures workers have on the job.”
- Respirator likely not necessary (but note, CDC recommends a cloth mask, which is not a respirator, if social distancing not possible).

OSHA's Low Exposure Risk Category

- **Low exposure risk – Jobs that do not require contact with people known to be, or suspected of being, infected with COVID-19 nor frequent close contact with the general public. Minimal occupational contact with the public or other co-workers.**
- **OSHA recommendation: no extra PPE, administrative or engineering controls. But note, CDC recommends a cloth mask if social distancing not possible.**

OSHA Employee Complaint Process

- Employees are filing many COVID-19 complaints with OSHA. OSHA is inundated.
- OSHA guidance: prefers to deal with non-health care-related COVID-19 complaints by a letter exchange.
- Guidance states it will avoid entering employer sites and will prioritize health care.
- Exception to OSHA's hands-off approach: meat packing (or any other hot spot that might erupt).
- If you get a complaint, respond and describe in detail what you are doing to protect employees.

Refusal to Work

- **Federal OSH Act does not expressly give employees the right to refuse to work due to safety concerns. OSHA has gleaned a right from two places in OSH Act.**
 1. **General Duty Clause – Section 5(a)(1) – employers are obligated to provide workplace free of recognized hazard likely to result in death or serious harm.**
 2. **Imminent Danger Process – Requires OSHA to obtain court order to prevent imminent danger. Slow process.**

Refusal to Work

- OSHA's website tells employees their right to refuse to do a task is protected if all of the following are met:
 - Where possible you have asked employer to eliminate danger, and employer has failed.
 - Refusal to work is in good faith. You must genuinely believe an imminent danger exists.
 - Reasonable person would agree there is a real danger of death or serious harm.
 - There isn't enough time to get it corrected through regular enforcement channels.

Refusal to Work

- **OSHA tells employees to take the following steps:**
 - Ask employer to correct the hazard, or to assign other work.
 - Tell employer you won't perform the work until hazard corrected.
 - Remain at worksite until ordered to leave by employer.

Employee Refusal to Work

- **What if an employee refuses to work due to fear of getting the virus? No well-defined scheme or process under federal OSH Act.**
- **Many considerations:**
 - Whether workplace is low, medium, high or very high risk
 - Precautions taken by employer
 - Ability of employee to maintain safe distance
 - Employee health factors (immunocompromised)

11(c) Retaliation Claims

- Making a safety complaint to the employer may be protected activity. If the employee is retaliated against for exercising that right, employer may face a retaliation claim under Section 11(c) of the OSH Act.

OSHA Recordkeeping and Reporting

- OSHA normally requires work-related illnesses that require days away from work to be recorded on an OSHA 300 log (for nonexempt employers).
- OSHA guidance issued in April somewhat reversed its prior guidance, and states that in light of difficulty in determining whether a COVID-19 case is work related, OSHA does not expect employers to record COVID-19 cases on their logs absent objective evidence, e.g., several employees who work in close proximity.
- OSHA has always exempted cold and flu from recordkeeping.
- Fatality and hospitalization reporting. Seems unlikely any case would be reportable (required phoned in) to OSHA under reporting requirements. Guidance did not specifically address reporting.

The Road to Recovery



MO Emergency Orders – Move to Recovery Plans

▪ Missouri

- May 4, 2020: stay-at-home orders moved into Phase 1 of Missouri's recovery plan
 - <https://governor.mo.gov/show-me-strong-recovery-plan-guidance-and-frequently-asked-questions>

MO Emergency Orders – Move to Recovery Plans

- Prepare to implement Infection Prevention Measures.
- Modify physical workspaces to maximize social distancing.
- Minimize business travel.
- Develop an infectious disease business response plan, including policies and procedures for workforce contact tracing when an employee tests positive for COVID-19.
- Monitor workforce for indicative symptoms. Do not allow symptomatic people to physically return to work until cleared by a medical provider.
- Develop, implement and communicate about workplace flexibilities and protections.

KS Emergency Orders – Move to Recovery Plans

- **Kansas**

- May 4, 2020: stay-at-home orders moved into Phase 1 of the Kansas recovery plan.
 - <https://covid.ks.gov/wp-content/uploads/2020/05/Reopen-Kansas-Framework-043020.2.pdf>

KS Emergency Orders – Move to Recovery Plans

- Encourage telework.
- Social distance (maintain a 6-foot distance).
- Limit spaces to avoid groups of more than 10 individuals unless space is configured to consistently maintain 6 feet of distance with only incidental moments of closer proximity.
- Require sick employees to stay at home.
- Minimize or limit nonessential travel and follow quarantine guidelines for travel to high risk areas.
- Maintain fundamental cleaning and public health practices.

IL Emergency Orders – Move to Recovery Plans

■ Illinois

- May 1, 2020: stay at home orders continued with limited exceptions for essential retail business reopenings.
 - <https://www2.illinois.gov/Pages/Executive-Orders/ExecutiveOrder2020-32.aspx>
- May 5, 2020: Governor issues the “Restore Illinois Plan” which highlights five phases for reopening.
 - <https://coronavirus.illinois.gov/sfc/servlet.shepherd/document/download/069t000000BadS0AAJ?operationContext=S1>

IL Emergency Orders – Limited Reopening

- Retail stores classified as within Essential Businesses and Operations (including, but not limited to, stores that sell groceries and medicine, hardware stores, and greenhouses, garden centers and nurseries) shall to the greatest extent possible:
 - Provide face coverings to all employees who are not able to maintain a minimum 6-foot social distance at all times.
 - Cap occupancy at 50% of store capacity,
 - Set up store aisles to direct customers in a one-way direction .
 - Notify customers of the social distancing requirements of the Order.
 - Discontinue use of reusable bags.
 - Retail stores not classified within Essential Businesses and Operations may reopen for the limited minimum basic operations purposes of fulfilling telephone and online orders through pickup outside the store and delivery. Must comply with social distancing requirements.
 - All businesses that are not classified as Essential Businesses and Operations must cease all activities other than minimum basic operations.

Minimizing Workers' Compensation and Negligence Risks

- Workers' compensation laws provide for compensation for occupational diseases that arise out of and in the course of employment.
- Ordinary diseases like the common cold or the flu are generally excluded.
- Workers' compensation is generally the exclusive remedy for employees' compensable injuries and bars tort remedies for negligence claims, with the exception for claims based on gross negligence.

Minimizing Workers' Compensation and Negligence Risks

- Some states have passed laws providing that certain health care and other essential workers who contract COVID-19 are presumed to have contracted it at work, shifting the burden to the employer to prove that the employee contracted it outside of work.
- To prevent claims that they acted with gross negligence, employers should:
 - comply with state and local orders;
 - document the actions taken protect worker safety; and
 - take other recommended measures to protect employees from contracting the virus.

Next Steps:

- Develop and implement a business response plan.
- Appoint a COVID-19 coordinator or team responsible for coordinating the logistics for the return of employees.
- Ensure proper controls are implemented to facilitate social distancing and comply with other provisions of the order.
- Secure cleaning supplies.
- Secure facial covering.
- Train employees on COVID-19 and prevention measures.
- Communicate and listen to your employees and timely address concerns.
- Update your company policies and procedures as necessary.

Questions

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