

COVID-19 Deep Dive Series

Best Practices for Employers to Manage PPE and Distancing Requirements Across the Country

MICHELE MILLER, DAVID BARRON, & JOHN HO



Our Team

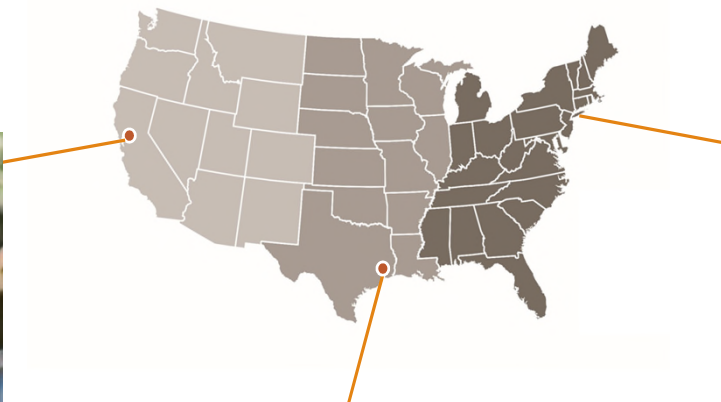
San Francisco
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Houston
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Overview of Webinar Topics

1. Mask and Distancing Requirements
 - *Sample Local Ordinances*
 - *Discipline/Reasonable Accommodation Issues*
 - *Wage and Hour Exposure*
2. OSHA PPE Requirements for Non-Healthcare Employers
3. Employer COVID-19 Liability Update



Mask and Distancing Requirements

MICHELE MILLER AND DAVID BARRON



Masks Are a Touchy Subject Right Now

A security guard was shot after telling a customer to wear a face mask, officials say. His widow calls the killing 'senseless and stupid'

By Christina Maxouris, CNN

🕒 Updated 10:06 AM ET, Wed May 6, 2020

TOP STORY

Face mask dispute escalates into violence at Decatur gas station, police say

Tony Reid May 3, 2020 Updated May 4, 2020 🗨️ 3

Crime & Safety

Face Mask Dispute, Exploitation: Elmhurst Police

An employee and supervisor got into an argument over wearing a face mask at Elmhurst Hospital, police said.

By David Giuliani, Patch Staff

Mar 20, 2020 9:37 am CT | Updated Mar 24, 2020 8:19 am CT





Masks and Face Coverings:

- **Mask:** A filtering respirator (such as N95 respirators) or a specialized medical grade or surgical mask worn by healthcare personnel, first responders, and workers in other industries.
 - due to supply issues, the CDC recommends that masks be reserved for healthcare workers and other medical first responders.
- **Face Covering:** A cloth, bandana, handmade mask that covers the wearers mouth and nose. The CDC states that cloth face coverings should:
 - fit snugly but comfortably against the side of the face
 - be secured with ties or ear loops
 - include multiple layers of fabric
 - allow for breathing without restriction
 - be able to be laundered and machine dried without damage or change to shape

<https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/cloth-face-cover.html>

Masks and Face Coverings:

- **Are Masks Required?**
 - **CDC:** recommends wearing cloth face coverings in public settings where other social distancing measures are difficult to maintain (e.g., grocery stores and pharmacies) *especially* in areas of significant community-based transmission. <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/diy-cloth-face-coverings.html>
 - **OSHA:** OSHA's Guidance on Preparing Workplaces for COVID-19 outlined four exposure risk categories: lower, medium, high, and very high. Majority of workplaces fall within the lower or medium risk category. No guidance that N95 "masks" required in lower or medium risk workplaces. <https://www.osha.gov/Publications/OSHA3990.pdf>
 - **Federal:** Varies from agency to agency. For example, the DoD updated guidance to require that face masks be worn on its facilities in settings where the CDC-recommended social distancing of six feet is impractical.

Masks and Face Coverings:

■ Are Masks Required?

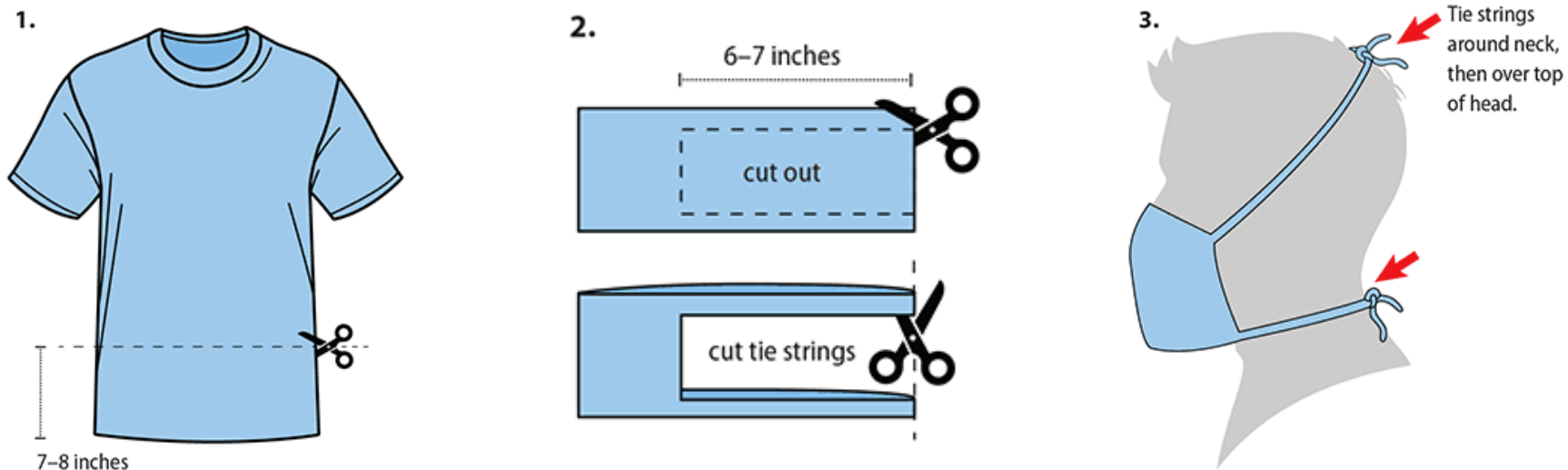
- **States:** Many issued guidance after CDC's guidance issued:
 - **New York:** "all essential businesses or entities" to provide "any employees who are present in the workplace" with face coverings to wear "when in direct contact with customers or members of the public," and stating that businesses, at their own expense, must provide employees with face coverings. <https://www.governor.ny.gov/news/no-20216-continuing-temporary-suspension-and-modification-laws-relating-disaster-emergency>
 - **Michigan:** "all businesses and operations whose workers perform in person work must provide non-medical grade face coverings to their workers at a minimum." https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705-526894--,00.html
 - **Colorado:** Workers in critical businesses and critical government functions in which workers interact in close proximity with other employees or with the public must (1) wear medical or non-medical cloth face coverings that cover the nose and mouth while working, except where doing so would inhibit that individual's health; and (2) to the extent possible, wear gloves when in contact with customers or goods if gloves are provided to workers by their employer. <https://www.colorado.gov/governor/sites/default/files/inline-files/D%202020%20039%20Masks.pdf>

Masks and Face Coverings:

■ **Local Ordinances:**

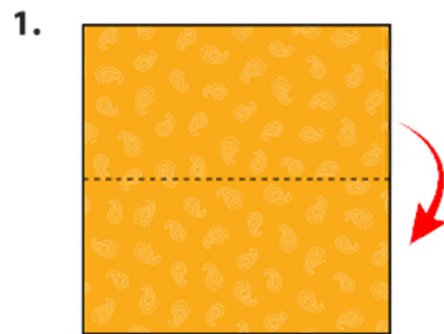
- **California:** San Francisco, City of Los Angeles, Sonoma County, San Mateo County, Alameda County, Marin County, Riverside County (\$1,000 fine for violations) and more.
- **Colorado:** Denver, Boulder, Boulder County, Erie, Loveland, Lonetree, Superior, and more.
- **Illinois:** A statewide mask requirement has been implemented after many Chicago suburbs decided to require citizens to wear masks while in public.
- **Massachusetts:** Bedford, Boston, Cambridge, Fall River, Worcester, and more.
- **New York:** Residents statewide are required to wear a mask or cloth covering when unable to maintain social distancing.
- **Texas:** Austin, Dallas, Houston, San Antonio and more.

How to Make a Face Covering



<https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/diy-cloth-face-coverings.html>

How to Make a Face Covering



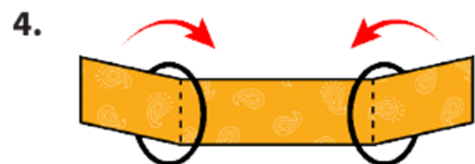
Fold bandana in half.



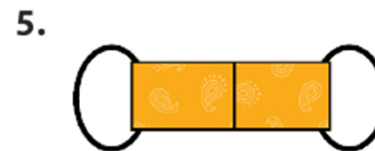
Fold top down. Fold bottom up.



Place rubber bands or hair ties about 6 inches apart.



Fold side to the middle and tuck.



<https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/diy-cloth-face-coverings.html>

Masks and Face Coverings: Who Pays?

- Are Masks Mandatory?
 - Some states (California, New York, New Jersey) and some local ordinances (LA City and County) require employers provide employees in essential, customer facing positions to provide face coverings at the employer's expense.
 - Some state statutes (wage and hour/ health and safety) can be interpreted to require employers to pay for face coverings if required by the employer.
 - No current guidance from OSHA or DOL regarding face coverings *provided they are used for source containment only.*
 - General PPE standards still mandate that PPE required by the employer be supplied and paid for by the employer (e.g. surgical masks in an operating room).

Masks and Face Coverings: Who Pays?

- Are Masks Voluntary?
 - No requirement that employers pay for face coverings that an employee elects to wear.
 - An employer can still require that the face covering:
 - Meet the CDC guidelines
 - Not create a safety hazard
 - Be properly cleaned
 - Be properly maintained

Masks and Face Coverings:

- **Can you require employees to wear a face covering?**

- Yes, An employer may require employees to wear protective gear (for example, masks and gloves) and observe infection control practices (for example, regular hand washing and social distancing protocols).
- However, where an employee with a disability needs a related reasonable accommodation under the ADA (e.g., non-latex gloves, modified face masks for interpreters or others who communicate with an employee who uses lip reading, or gowns designed for individuals who use wheelchairs), or a religious accommodation under Title VII (such as modified equipment due to religious garb), the employer should discuss the request and provide the modification or an alternative if feasible and not an **undue hardship** on the operation of the employer's business under the ADA or Title VII.

<https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>

Masks and Face Coverings:

- **D.10. What types of undue hardship considerations may be relevant to determine if a requested accommodation poses "significant difficulty" during the COVID-19 pandemic? (4/17/20)**

An employer may consider whether current circumstances create "significant difficulty" in acquiring or providing certain accommodations, considering the facts of the particular job and workplace. For example, it may be significantly more difficult in this pandemic to conduct a needs assessment or to acquire certain items, and delivery may be impacted, particularly for employees who may be teleworking. Or, it may be significantly more difficult to provide employees with temporary assignments, to remove marginal functions, or to readily hire temporary workers for specialized positions. If a particular accommodation poses an undue hardship, employers and employees should work together to determine if there may be an alternative that could be provided that does not pose such problems.

<https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>

Masks and Face Coverings:

- **What types of undue hardship considerations may be relevant to determine if a requested accommodation poses "significant expense" during the COVID-19 pandemic? (4/17/20)**

“Prior to the COVID-19 pandemic, most accommodations did not pose a significant expense when considered against an employer's overall budget and resources (always considering the budget/resources of the entire entity and not just its components). But, the sudden loss of some or all of an employer's income stream because of this pandemic is a relevant consideration. Also relevant is the amount of discretionary funds available at this time - when considering other expenses - and whether there is an expected date that current restrictions on an employer's operations will be lifted (or new restrictions will be added or substituted). These considerations do not mean that an employer can reject any accommodation that costs money; an employer must weigh the cost of an accommodation against its current budget while taking into account constraints created by this pandemic. For example, even under current circumstances, there may be many no-cost or very low-cost accommodations.”

<https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>

Masks and Face Coverings:

- **What can you do if the employee refuses?**
 - **Is it for a medical or religious reason?** Yes, the employer should engage in the interactive process to determine if the employee can be accommodated.
 - **Is it for a non-medical reason?** Yes, the employer should still engage with the employee to determine why there is a concern:
 - Make sure there are no underlying protected reasons (for example, the mask is in conflict with dress or grooming requirements of a religion).
 - Address the employee's concerns.
 - Discipline if the employee is not raising any medical or otherwise protected objection.



CDC Distancing Recommendations

CDC/OSHA Specific Guidance on Changes to the Workplace

- General Guidance
 - <https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html>
 - <https://www.osha.gov/Publications/OSHA3990.pdf>
- Increase Ventilation rates and external air circulation
- Close communal meeting rooms. Partition workspace to ensure social distance (6 ft apart).
- Respiratory Etiquette (*i.e.* handshakes, cough etiquette)
 - CDC Guidance on Coughing & Sneezing (https://www.cdc.gov/healthywater/hygiene/etiquette/coughing_sneezing.html)
- Intensify janitorial cleaning, especially in common areas (*e.g.* breakrooms, kitchens)
 - CDC Guidance on clearing community areas - <https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/cleaning-disinfection.html>
 - EPA Guidance of effective cleaning products - <https://www.epa.gov/pesticide-registration/list-n-disinfectants-use-against-sars-cov-2>

Example of State Distancing Orders - Pennsylvania

April 19, 2020 – Businesses Other than Healthcare Providers

- Provide space for employees to be 6 feet apart for breaks
- Limit access to common areas such as locker rooms and kitchens to ensure distancing requirements followed
- No meetings of more than 10 people and maintain distance of at least 6 feet
- Prohibit non essential visitors

Example of State Distancing Orders - Illinois

April 30, 2020 – Executive Order

4. **Requirements for manufacturers. Manufacturers that continue to operate pursuant to this Order must follow Social Distancing Requirements and take appropriate precautions, which may include:**

- **providing face coverings to all employees who are not able to maintain a minimum six-foot social distance at all times;**
- **staggering shifts;**
- **reducing line speeds;**
- **operating only essential lines, while shutting down non-essential lines;**
- **ensuring that all spaces where employees may gather, including locker rooms and lunchrooms, allow for social distancing; and**
- **downsizing operations to the extent necessary to allow for social distancing and to provide a safe workplace in response to the COVID-19 emergency.**



Practice Social Distancing

Pursuant to Executive Order 2020-32 (Stay at Home Order), your employer must comply, to the greatest extent feasible, with social distancing requirements. This means that your employer should:

- Make sure that you can maintain at least 6 feet of physical separation between yourself and others around you, including your co-workers and customers.
- Mark with signage or tape 6-foot spacing for employees and customers to maintain appropriate distance from one another.
- Provide face coverings to employees, especially when it is not possible to maintain at least 6 feet of space between you and another person.
- Provide handwashing stations with soap, clean water, and single use paper towels and encourage frequent handwashing for 20 seconds or longer.
- Provide hand sanitizer (with at least 60% alcohol) & sanitizing products for employees and customers.
- Regularly clean high-touch surfaces including doorknobs, light switches, shared equipment, toilet handles, sink faucets, and clock in/out areas.

Do Not Work if You Are Sick

You should not report to work if you are experiencing symptoms of Coronavirus Disease (COVID-19), including fever (100.4° or above), cough, shortness of breath, sore throat, chest tightness, extreme fatigue, loss of sense of taste or smell, diarrhea, muscle aches, or headaches.

If you are experiencing any of these symptoms, stay home and call your doctor.

Who You Can Contact if You Have Concerns About Social Distancing in Your Workplace

If you have concerns that your employer is not allowing for safe social distancing or that it is not maintaining a safe and sanitary work environment to minimize the risk of spread of COVID-19, please contact the Workplace Rights Bureau of the Illinois Attorney General's Office at 844-740-5076 or workplacereights@atg.state.il.us.

If you believe that two or more employees at your workplace have COVID-19, please notify your local public health department.

A list of local health departments can be found here:

<http://www.idph.state.il.us/IDPH/Programs/VA/HHDDirectory/Show-VLHDDirectory-Public.aspx>.

Pursuant to Section 25(b) of the Whistleblower Protection Act, 740 ILCS 174, businesses are prohibited from retaliating against an employee for disclosing information when the employee has reasonable cause to believe that the information discloses a violation of a state or federal law, rule, or regulation.

For more information about COVID-19, including ways to protect yourself and others, visit the Illinois Department of Public Health's COVID-19 website: <https://www.idph.state.il.us/covid19>.



Masks and Distancing: Big Questions

- Can we prohibit employees from wearing face coverings / masks while at work because we believe it would negatively affect our business?
- For some businesses particularly restaurants, that would lose money if they had to cut capacity by 50% or implement strict social distancing rules which would significantly reduce the amount of patrons / customers, do they still have to follow social distancing rules?

OSHA PPE Requirements for Non-Healthcare Workers

JOHN HO



OSHA

No specific federal OSHA standard covering COVID-19.

- The General Duty Clause, Section 5(a)(1) of the Occupational Safety and Health (OSH) Act of 1970, 29 USC 654(a)(1), 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.”
- Future Emergency Rule Making? Not likely.

OSHA Resources

<https://www.osha.gov/Publications/OSHA3990.pdf> - Guidance on Preparing Workplaces for COVID-19

<https://www.osha.gov/SLTC/covid-19/>

- [COVID-19 Guidance for Restaurants & Beverage Vendors Offering Takeout or Curbside Pickup](#)
- [COVID-19 Guidance for the Construction Workforce](#)
- [COVID-19 Guidance for the Manufacturing Industry Workforce](#)
- [COVID-19 Guidance for the Package Delivery Workforce](#)
- [COVID-19 Guidance for Retail Workers](#)
- <https://www.osha.gov/SLTC/covid-19/healthcare-workers.html>

OSHA Poster: 10 Steps All Workplaces Can Take to Reduce Risk of Exposure

<https://www.osha.gov/Publications/OSHA3994.pdf> (13 different languages)

(1) Encourage employees to stay home if sick (2) Encourage respiratory etiquette (3) Provide place to wash hands or alcohol-based hand rubs of at least 60% alcohol (4) Limit access to only essential workers (5) Establish flexible worksite (6) Discourage workers from using other workers' equipment (phones, desks, etc.) (7) Regularly clean and disinfect surfaces (8) Use EPA approved cleaning chemicals (9) Follow manufacturer instructions for use of all cleaning / disinfection products (10) Encourage workers to report any safety and health concerns

Hygiene and Environmental Safety

Cleaning of visibly dirty surfaces followed by disinfection is the best practice measure for prevention of COVID-19.

Perform additional environmental cleaning on all frequently touched areas, such as front desk, elevator banks, coffee stations, doorknobs, etc.

CDC – No additional disinfection beyond routine cleaning is recommended at this time.

Products with EPA-approved emerging viral pathogens claims are expected to be effective against COVID-10 based on data for harder to kill viruses. Ensure use for linens / laundry.

https://www.epa.gov/sites/production/files/2020-03/documents/sars-cov-2-list_03-03-2020.pdf



OSHA Employee Hazard Assessments

Classifying Worker Risk Level Based on Job Tasks: Very High, High, Medium, Lower

Most employees will likely fall in the lower exposure risk (caution) or medium exposure risk levels depending on duties, location and other fact specific considerations.

Medium: Frequent or close contact with people who may be infected but who are not known or suspected COVID-19 patients, e.g., in areas with ongoing community transmission, contact with travelers who may return from international locations with widespread transmission.

Low: Jobs that do not require contact with people known to be, or suspected of being infected nor frequent close contact with them.

Lower Exposure Risk

Follow “Steps All Employers Can Take to Reduce Workers’ Risk of Exposure to SARS-coV 2.”

- No additional engineering controls recommended
- Administrative controls: Monitor public health communications recommendations and ensure employees have access to information
- Collaborate with workers to designate effective means of communication lines
- No additional PPE recommended. Note: Surgical face masks are recommended for source containment only.

Medium Exposure Risk

- Install physical barriers such as clear plastic sneeze guards when feasible.
- Administrative controls: Considering offering face masks to ill employees and customers to contain respiratory secretions until they can leave the workplace.
- Keep customers informed about symptoms and ask them to minimize contact with workers until healthy again, *e.g.*, posting signs about COVID-19 where sick customers may visit such as pharmacies.
- Limit customers' and public's access to worksite or restrict access to only certain areas.
- Consider strategies to minimize face-to-face contact.
- Communicate availability of medical screening other worker health resources, *e.g.*, on-site nurse, telemedicine services.

Medium Exposure Risk

- Employees with medium exposure risk may need to wear some combination of gloves, a gown, a face mask, and/or a face shield or goggles, *e.g.*, employees taking temperature checks.
- PPE for workers in the medium exposure risk category will vary by work task, the results of the employer's hazard assessment, and the types of exposures workers have on the job.
- High level of contact with public (cashiers, front desk in hotel, etc.) Consider plastic shield guards.

Face Coverings / Masks: CDC and OSHA Guidance

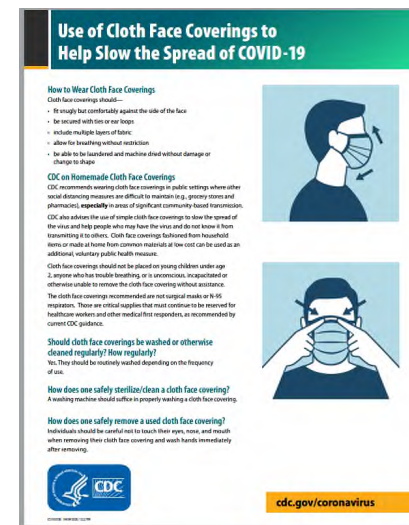
CDC recommends individuals wear cloth masks when out “in public settings where other social distancing are difficult to maintain (e.g. grocery stores and pharmacies) especially in areas of significant community based transmission.”

Respirators/N95 masks should be left for healthcare professionals and require training under OSHA standard.

- Face covering should:
 - fit snugly but comfortably against the side of the face
 - be secured with ties or ear loops
 - include multiple layers of fabric
 - allow for breathing without restriction
 - be able to be laundered and machine dried without damage or change to shape

State / Local Orders May Apply.

Recommendation Regarding the Use of Cloth Face Coverings, Especially in Areas of Significant Community-Based Transmission



Face Coverings / Masks: CDC and OSHA Guidance

Each OSHA industry specific guidance provides:

- Allow workers to wear masks over their nose and mouth to prevent spread of the virus.
- OSHA general employer guidance recommends monitoring / adopting CDC practices.
- Still need to determine if wearing face covering creates “greater hazard,” e.g., cook working over stove, employees working with chemicals with potential of chemical absorption, etc.
- Optics? The new norm?



Personal Protective Equipment

Generally, when face coverings / masks are used for source containment, they are not considered PPE and thus PPE standards do not apply.

If required PPE, regulations generally require:

- Selected based on hazard to employee
- Properly fitted and periodically refitted as applicable
- Consistently and properly worn when required
- Regularly inspected, maintained and replaced when necessary
- Properly removed, cleaned, and store or disposed of, to avoid contamination of self, others or the environment

Personal Protective Equipment Cont.

Appendix D to Sec. 1910.134 (Mandatory) Information for Employees Using Respirators When Not Required Under the Standard : -- *Obtain Signed Acknowledgement / Check List* -

1. Read and heed all instructions provided by the manufacturer on use, maintenance, cleaning and care, and warnings regarding the respirators limitations.
2. Choose respirators certified for use to protect against the contaminant of concern. NIOSH, the National Institute for Occupational Safety and Health of the U.S. Department of Health and Human Services, certifies respirators. A label or statement of certification should appear on the respirator or respirator packaging. It will tell you what the respirator is designed for and how much it will protect you.
3. Do not wear your respirator into atmospheres containing contaminants for which your respirator is not designed to protect against. For example, a respirator designed to filter dust particles will not protect you against gases, vapors, or very small solid particles of fumes or smoke.
4. Keep track of your respirator so that you do not mistakenly use someone else's respirator.

Enforcement Guidance for Respiratory Protection and the N95 Shortage Due to the Coronavirus Disease 2019 (COVID-19) Pandemic – April 3, 2020

<https://www.osha.gov/memos/2020-04-03/enforcement-guidance-respiratory-protection-and-n95-shortage-due-coronavirus>

Enforcement discretion to permit the extended use and reuse of respirators and the use of respirators beyond their manufacturer's recommended shelf life for all employers and healthcare employers.

OSHA will exercise discretion in issuing citations where:

- Employer has made a good faith effort to obtain other alternative filtering facepiece respirators, reusable elastomeric respirators, or PAPRs appropriate to protect workers;
- Employer has monitored their supply of N95s and prioritized their use according to CDC guidance. Surgical masks and eye protection (e.g., face shields, goggles) were provided as an interim measure to protect against splashes and large droplets; and
- Other feasible measures, such as using partitions, restricting access, cohorting patients (healthcare), or using other engineering controls, work practices, or administrative controls that reduce the need for respiratory protection, were implemented to protect employees.

OSHA Recordkeeping Guidance – April 10, 2020

COVID-19 is a recordable illness, and employers are responsible for recording cases of COVID-19, if the case:

- Is confirmed as a COVID-19 illness;
- Is work-related as defined by 29 CFR 1904.5; and
- 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.
- Unless in a specific identified industry, OSHA will not enforce recordkeeping requirements 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; and (2) The evidence was reasonably available to the employer.

Recent OSHA Complaint Enforcement Guidance – April 13, 2020

<https://www.osha.gov/memos/2020-04-13/interim-enforcement-response-plan-coronavirus-disease-2019-covid-19>

Complaints in the initial months of the outbreak relate to lack of personal protective equipment, such as respirators, gloves, and gowns and complaints concerning a lack of training on appropriate standards and about possible COVID-19 illnesses in the workplace.

In most cases, Area Offices should process complaints from non-healthcare and non-emergency response establishments as "non-formal phone/fax," following the non-formal complaint and referral procedures in the Field Operations Manual (FOM), CPL 02-00-163, September 13, 2019.

Discretion in Enforcement when Considering an Employer's Good Faith Efforts During the Coronavirus Disease 2019 Pandemic – April 16, 2020

Focused on employer's good faith efforts to comply with standards that require annual or recurring audits, reviews, training, or assessments.

Did employer explore all options to comply with the applicable standard(s) (e.g., the use of virtual training or remote communication strategies)? Interim alternative protections implemented such as engineering or administrative controls and did the employer take steps to reschedule the required annual activity as soon as possible?

Annual Audiograms; Process Safety Management Requirements (Process Hazard Analysis (PHA) Revalidation, Review of Operating Procedures, and Refresher Training); Hazardous Waste Operations Training; Respirator Fit Testing and Training; Maritime Crane Testing and Certification; Construction Crane Operator Certification; Medical Evaluation.

Big Questions

- May an employee file a complaint with OSHA alleging fear of COVID-19 exposure without any supporting evidence?
- If we permit employees to work from home, do we have to ensure their homes are a safe and healthy work environment like we normally would while they are on Company premises?

Legal Update: Employer Liability for COVID-19 Exposure

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What are Legal Risks

1. OSHA fines and reporting obligations
2. Fines and penalties under local ordinances or orders
3. Workers Compensation claims
4. Lawsuits from employee or family of deceased employee

W/C Claims -Presumptions of Compensable Illness

At last count...

- Many states have enacted statutory or administrative changes to create a presumption (conclusive or rebuttable) that employees who contract COVID-19 were infected while in the course and scope of their employment (Alaska, Arkansas, California, Kentucky, Michigan, Minnesota, Missouri, North Dakota, Utah, Washington, and Wisconsin).
- Additional states are considering such changes (Louisiana, Massachusetts, New Jersey, New York, Ohio, Pennsylvania, and Vermont).

New Presumptions of Compensable Illness

California

May 6, 2020 – Executive Order from Governor Gavin Newsom

- Any COVID-19 related illness of an employee shall be presumed to be work related if certain requirements are satisfied, including testing positive within 14 days of a work day on or after March 19, 2020.
- Only applies to illnesses occurring through next 60 days (July 6,2020)
- Presumption applies unless disputed by carrier within 30 days of filing

New Presumptions of Compensable Illness

Pennsylvania

- House Bill 2396 – individuals employed in “life-sustaining” businesses or occupations (including retail, restaurant, grocery, and food service workers) who contract, have symptoms of, or are exposed to COVID-19 are presumed to have “work-related hazardous duty” that entitles them to workers’ compensation benefits for medical costs related to infection or exposure.

New Presumptions of Compensable Illness

Illinois

- April 13, 2020 – amended workers’ comp. rules by emergency order, creating a rebuttable presumption that first responders or other essential front-line workers who become infected had incurred a compensable occupational injury, entitling them to workers’ compensation benefits.
- April 27, 2020 – county court issued a temporary restraining order barring enforcement of the amendment.
- May 5, 2020 - Illinois Workers’ Compensation Commission repealed the emergency rule.

Workers' Comp. Exclusive Remedy & Exceptions

Texas

- In Texas, workers' compensation benefits are the exclusive remedy for a covered employee or covered employee's legal beneficiary for work-related injuries or illnesses

(Tex. Lab. Code Ann. § 408.001(a);

- The only exception to the exclusive remedy provision is when an employee's death was caused by either:
 - An intentional act or omission by the employer; or
 - The employer's gross negligence.

(Tex. Lab. Code Ann. § 408.001(b).)

Workers' Comp. Exclusive Remedy & Exceptions

California

- Labor Code Section 3602(a): workers' compensation is an injured employee's exclusive remedy for injury or death that happen while in the course and scope of employment.
- Employees typically cannot sue their employers for ordinary negligence.
- This exclusivity is waived and the employee can sue in court for damages in certain circumstances, including:
 - Employer's fraudulent concealment of the injury (typically excludes illness or injury caused by toxic exposure - e.g. *Deville v. Bloch*, Calif. Ct. App., No. B291099 (Nov. 21, 2019)(not reported));
 - When the employer does not have workers' compensation coverage or permissible self-insurance.

(Cal. Lab. Code § 3602.)

Workers' Comp. Exclusive Remedy & Exceptions

New York

- An employer's liability under the New York Workers' Compensation Law (NYWCL) is exclusive and in place of any other liability

(N.Y. Workers' Comp. Law §)

- The NYWCL does not apply when the employer engages in conduct constituting an intentional tort. An employee has a private right of action if employee shows that the employer committed an intentional tort resulting in injury to the employee.

(*Corcoran v. N.Y. Power Auth.*, 202 F.3d 530, 541 (2d Cir. 1999) (applying New York law); *Pereira v. St. Joseph's Cemetery*, 864 N.Y.S.2d 491, 492 (2d Dep't 2008).)

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