



OSHA Requirements and Enforcement Guidelines in the Face of COVID-19

(Updated as of May 26, 2020 as noted below)

OSHA requires that employers provide a workplace free from recognized hazards that may cause injury or death to employees. These requirements apply to all businesses, with very few limited exceptions. The COVID-19 crisis has displaced certain requirements and, where applicable, OSHA has relaxed certain enforcement measures. This article shall address OSHA's activity on these subjects to date. The OSHA COVID-19 webpage can be accessed at <https://www.osha.gov/SLTC/covid-19/>.

Enforcement discretion during inspections and the employer's good faith efforts

OSHA has recognized that some employers may have difficulty complying with certain standards during the crisis, and this may be identified at an OSHA inspection. Accordingly, OSHA will exercise enforcement discretion provided that the employer undertakes a good faith effort to comply. More specifically, OSHA "will assess an employer's efforts to comply with standards that require annual or recurring audits, reviews, training, or assessments." Employers should explore all options to comply, and the OSHA inspection will consider any interim measures implemented in lieu of full compliance. If the employer has made good faith efforts to comply, OSHA will take that into consideration when deciding to issue a violation.

OSHA has identified certain areas where it expects to exercise enforcement discretion. Examples include, but are not limited to, hazardous waste operations training and respirator FIT testing and training. A full list of these examples is available at <https://www.osha.gov/memos/2020-04-16/discretion-enforcement-when-considering-employers-good-faith-efforts-during>.

Enforcement guidance for respiratory protection standards under 29 CFR 1910.134

OSHA has issued five guidance documents with respect to several respiratory protection standards under 29 CFR 1910.134. OSHA has indicated that, where applicable, it may exercise enforcement discretion.

First, OSHA will exercise enforcement discretion for the annual FIT testing requirements for healthcare professionals. This may include changing the annual FIT testing procedure from a destructive to non-destructive method.

Second, OSHA will exercise “enforcement discretion to permit the extended use and reuse of respirators, as well as the use of respirators that are beyond their manufacturer’s recommended shelf life.” Accordingly, if respiratory protection must be used, employees may use certain alternatives or respiratory protection beyond its shelf life. OSHA will exercise enforcement discretion here on a case-by-case basis if employers make a good faith effort to comply with the requirements set forth therein.

Third, tangential to the second guidance, healthcare employees may use respirators that are certified under different countries or jurisdictions if the appropriate protective equipment is not otherwise available. However, employers should make good faith efforts to maintain the use of the “most appropriate” respiratory protection and continue to seek equipment that has not exceeded the performance or shelf life. Again, OSHA will exercise enforcement guidance on a case-by-case basis.

Fourth, OSHA has expanded the guidance set out in the first guidance regarding FIT testing. OSHA has expanded the FIT testing guidance to include any employer whose occupation requires a respirator, regardless of whether the employees are healthcare professionals. The requirements in the related preceding guidance apply here.

Fifth, OSHA provided guidance for decontaminating face piece respirators that will be reused. OSHA has identified acceptable cleaning methods (i.e. moist heat) and unacceptable cleaning methods (i.e. soap or chlorine bleach). During OSHA workplace inspections that identify such alternative practices, employers shall show that they made a good faith effort and, among other things, train employees to identify the structural integrity of the protective equipment. OSHA will exercise enforcement discretion on a case-by-case basis.

A compilation of the links to each of these documents can be found at https://www.osha.gov/SLTC/covid-19/standards.html#enforcement_discretion.

OSHA’s guidance for preparing the workplace

OSHA recommends identifying classes of workers that are at low, medium, and high risk of transmission, and providing employees in each risk category with recommendations while in the workplace. OSHA also recommends developing – if the employer does not already have one – an infectious disease and preparedness response plan. This can help prepare your business for the worst in the event of an outbreak.

If appropriate, the employer should also identify procedures for identifying sick employees. A strict self-monitoring policy is usually the best defense, but employers should also encourage sick employees to stay home and implement workplace controls to limit transmission risks.

The OSHA guidance provides detailed instructions to help employers implement these recommendations and more. The full text of this guidance can be found at <https://www.osha.gov/Publications/OSHA3990.pdf>.

Enforcement guidance for recording COVID-19 illness in the workplace

Employers outside the healthcare and correctional industries are required to record occupational illnesses, which may include COVID-19 if “(1) the case is a confirmed case of COVID-19, as defined by Centers for Disease Control and Prevention (CDC), (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.” OSHA recognizes that these determinations may be difficult, particularly in hot-spot communities. For that reason, OSHA will exercise enforcement discretion with respect to the recording requirement while the crisis is ongoing.

For employers who operate a healthcare industry site or correctional institution, the employer should undertake a “work-relatedness determinations pursuant to 29 CFR § 1904.” For these employers, OSHA “will not enforce 29 CFR § 1904 to require other employers to make the same work-relatedness determinations, 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. For purposes of this memorandum, examples of reasonably available evidence include 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.”

OSHA’s enforcement policy on this topic is available at <https://www.osha.gov/memos/2020-04-10/enforcement-guidance-recording-cases-coronavirus-disease-2019-covid-19>.

On May 19, 2020, OSHA issued a Revised Enforcement Guidance for Recording Cases of Coronavirus Disease 2019, which rescinds the enforcement policy discussed above. The Revised Guidelines now extends to most employers, rather than solely healthcare or correctional facilities. OSHA will now enforce the recordkeeping requirements under 29 CFR 1904 according to the guidelines set forth under the Revised Guidance, which can be accessed at https://www.osha.gov/memos/2020-05-19/revised-enforcement-guidance-recording-cases-coronavirus-disease-2019-covid-19#_ftn1.

The Revised Guidelines include the following:

- The employer should (1) ask the employee how he believes he contracted the COVID-19 illness; (2) while respecting employee privacy, discuss with the employee his work and out-of-work activities that may have led to the COVID-19 illness; and (3) review the employee's work environment for potential SARS-CoV-2 exposure. Employers are not expected to undertake detailed medical inquiries into their employees’ personal lives, and should reasonably respect the employees’ right to medical privacy.
- The employer should evaluate the evidence reasonably available in making the determination. This determination should be made in good faith.
 - o Certain evidentiary factors include whether the exposure may have occurred due to contact with fellow employees, customers, or family members that are at risk of transmission.
 - o The overarching question is the likelihood that exposure occurred at work.
- If the employer cannot determine that the exposure was work-related, the employer need not report the infection.

In sum, employers are now obligated – beginning May 26, 2020 – under the Revised Guidance to make a reasonable determination of work-related exposure consistent with the guidelines therein.

OSHA guidance for the construction industry

OSHA released a one-page guidance document of “tips” intended to protect construction workforces. The guidance can be found at <https://www.osha.gov/Publications/OSHA4000.pdf>. Industry specific tips include limiting the number and duration of “toolbox talks” and safety meetings, while adhering to social distancing guidelines. In addition, all shared tools should be disinfected after use, while noting manufacturer recommendations for cleaning methods.

Interim guidance for specific worker groups and their employers can be found at <https://www.osha.gov/SLTC/covid-19/controlprevention.html#interim>.

For further information on the implications of COVID-19 on employment, or other employment related questions, please contact Attorneys [Christopher L. Brigham](#), at (203) 786-8310 or cbriham@uks.com, or [Valerie M. Ferdon](#) at (860) 548-2607 or vferdon@uks.com.

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