

Additional OSHA Guidance Addresses Uncertainties Regarding COVID-19 Recordkeeping and Face Coverings

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In recent weeks, OSHA has issued additional guidance that helps resolve uncertainties regarding certain issues that businesses have faced during the COVID-19 pandemic. In its revised enforcement guidance for recording cases of COVID-19, OSHA makes clear that all employers with recordkeeping obligations, including those in the energy and infrastructure industries, must make work-relatedness determinations for confirmed cases of COVID-19 and must record such cases when it is more likely than not that exposure in the workplace caused a particular case of COVID-19. OSHA's guidance regarding the use of face coverings in the workplace clarifies that OSHA does not consider cloth face coverings to be personal protective equipment ("PPE") and therefore the requirements of OSHA's PPE Standard do not apply to them. Energy and infrastructure employers must consider this guidance as they return to work in various jurisdictions.

Revised Enforcement Guidance for Recording Cases of COVID-19

Under OSHA's recordkeeping requirements, COVID-19 is a recordable illness, and thus employers are responsible for recording cases of COVID-19, if the case:

1. Is confirmed as a COVID-19 illness;
2. Is work-related, meaning an event or exposure in the work environment either caused or contributed to the resulting case of COVID-19 or significantly aggravated a pre-existing case of COVID-19; and

3. Involves one or more of the general recording criteria, e.g., death, days away from work, restricted work or transfer to another job, medical treatment beyond first aid or loss of consciousness.

OSHA's [previous enforcement guidance](#) for recording cases of COVID-19 (discussed in a [prior post](#)) allowed most employers¹ to assume that a confirmed case of COVID-19 was *not* work-related for purposes of recording unless there was (i) objective evidence that the case may be work-related and (ii) such evidence was reasonably available to the employer.

OSHA subsequently issued [revised enforcement guidance](#) for recording cases of COVID-19, which went into effect on May 26, 2020, and will remain in effect until further notice. Under OSHA's revised enforcement guidance, all employers with recordkeeping obligations must make work-relatedness determinations for confirmed cases of COVID-19. If the employer cannot determine, after conducting a reasonable and good faith inquiry, whether it is *more likely than not* that exposure in the workplace caused a particular case of COVID-19, the employer does not need to record that COVID-19 illness. In assessing whether an employer has made a reasonable determination of work-relatedness, OSHA will consider the following factors:

1. ***Reasonableness of the Employer's Investigation into Work-Relatedness.***

According to the revised enforcement guidance, it is sufficient in most circumstances for the employer, when it learns of an employee's COVID-19 illness, to (a) ask the employee how they believe they contracted the COVID-19 illness; (b) while respecting employee privacy, discuss with the employee their work and out-of-work activities that may have led to the COVID-19 illness; and (c) review the employee's work environment for potential SARS-CoV-2 (the virus that causes COVID-19) exposure, taking into account any other instances of workers in that environment contracting COVID-19 illness.

2. ***Evidence Available to the Employer.*** OSHA will consider (a) the information reasonably available to the employer at the time it made its work-relatedness determination, and (b) any additional information the employer later learns related to an employee's COVID-19 illness.

3. ***Evidence That COVID-19 Illness Was Contracted at Work.*** According to the revised enforcement guidance, COVID-19 illnesses are likely work-related (a) when several cases develop among workers who work closely together and there is no alternative explanation, (b) if it is contracted shortly after lengthy, close exposure to a particular customer or coworker who has a confirmed case of COVID-19 and there is no alternative explanation, or (c) if the employee's job duties include having frequent, close exposure to the general public in a locality

with ongoing community transmission and there is no alternative explanation.

The revised enforcement guidance then states an employee's COVID-19 illness is likely not work-related (x) if they are the only worker to contract COVID-19 in their vicinity and their job duties do not include having frequent contact with the general public, regardless of the rate of community spread, or (y) if they, outside the workplace, closely and frequently associate with someone (e.g., a family member, significant other or close friend) who (i) has COVID-19, (ii) is not a coworker and (iii) exposes the employee during the period in which the individual is likely infectious.

The revised enforcement guidance also states that OSHA's Compliance Safety and Health Officers should give due weight to any evidence of causation provided by the employee, medical providers or public health authorities.

Guidance on Cloth Face Coverings, Surgical Masks and Respirators in the Context of COVID-19

OSHA has also provided guidance in the form of [frequently asked questions and answers](#) regarding cloth face coverings, surgical masks and respirators (e.g., filtering facepieces) in the context of COVID-19.

- **Cloth face coverings** (i.e., commercially produced or homemade garments, scarves, bandanas or items made from t-shirts or other fabrics that are worn in public over the nose and mouth to contain the wearer's potentially infectious respiratory droplets and to limit the spread of SARS-CoV-2 to others) are not considered PPE. Since cloth face coverings are not considered PPE and are not intended to be used when workers need PPE for protection against exposure to occupational hazards, OSHA generally recommends that employers encourage workers to wear cloth face coverings at work as a means of source control (i.e., they can prevent wearers who have COVID-19 without knowing it from spreading potentially infectious respiratory droplets to others), but OSHA's [PPE Standard](#) does not require employers to provide them, ensure that workers use them, or train workers on their use, care, disposal or limitations; however, we note that state or local orders or guidance may include some or all of these requirements.
- **Surgical masks**, when used to protect workers against splashes and sprays (i.e., droplets) containing potentially infectious materials (such as in healthcare and emergency response settings), are considered PPE; under OSHA's PPE Standard, employers must provide them at no cost to workers, ensure that workers use them,

and train workers on their use, care, disposal and limitations. When surgical masks are worn as a means of source control, and not to protect workers against splashes and sprays containing potentially infectious materials (which most likely would be the case for most workers in the energy and infrastructure sectors), such surgical masks are not PPE and OSHA's PPE Standard would not apply.

- **Respirators** (e.g., filtering facepieces, such as N95 masks) prevent workers from inhaling small particles, including airborne transmissible or aerosolized infectious agents; where respiratory hazards exist, respirators must be provided and used in accordance with OSHA's [Respiratory Protection Standard](#) (in addition to OSHA's PPE Standard). OSHA's COVID-19 guidance for construction work indicates that most [construction workers](#) are unlikely to need PPE beyond what they use to protect themselves during routine job tasks, but that respiratory protection may be needed in limited circumstances (e.g., situations involving close contact [i.e., within six feet] with someone who is suspected or confirmed to have COVID 19). Under OSHA's Respiratory Protection Standard, respirators: (i) must be certified by the National Institute for Occupational Safety and Health;² (ii) need proper filter material (e.g., N95 or better) and, other than for loose-fitting powered, air purifying respirators, tight fit (to prevent air leaks); (iii) require proper training, fit testing, availability of appropriate medical evaluations and monitoring, cleaning and oversight by a knowledgeable staff member;³ and (iv) when necessary to protect workers, require a respiratory protection program that is compliant with OSHA's Respiratory Protection Standard. If an employer permits voluntary use of a respirator, employees must receive the information contained in [Appendix D](#) of OSHA's Respiratory Protection Standard.

Energy and Infrastructure Businesses Should Continue to Track OSHA Guidance Regarding COVID-19

Throughout the COVID-19 pandemic, OSHA has continued to provide guidance to businesses in response to changing circumstances to provide more clarity as to how OSHA's standards applied to COVID-19. Energy and infrastructure businesses should continue to track new and revised OSHA guidance with respect to COVID-19, as the regulatory landscape will likely continue to change.

1. Except those in the healthcare, emergency response and correctional institution industries.↵

2. OSHA has [temporarily exercised its enforcement discretion](#) concerning supply shortages of disposable filtering facepiece respirators, including as it relates to their [extended use or reuse](#), [use beyond their manufacturer's recommended shelf life](#), [use of equipment from certain other countries and jurisdictions](#), and [decontamination](#).↵

3. OSHA has [temporarily exercised its enforcement discretion](#) concerning annual fit testing requirements in the Respiratory Protection Standard, as long as employers have made good faith efforts to comply with the requirements of the Standard and to follow the steps outlined in the [March 14, 2020](#), and [April 8, 2020](#), memoranda (as applicable to their industry).↵

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