

COVID-19: MANAGING WORKER HEALTH & SAFETY

July 2020

Businesses and other entities must contend with challenges posed by multiple layers of government regulations and guidance applicable to managing worker health and safety hazards with reference to SARS-CoV-2 — the coronavirus that causes COVID-19. These challenges include preparing workplace health and safety plans in compliance with federal and state guidelines; procuring a reliable supply of federally-approved cleaners, disinfectants, hand sanitizers, personal protective equipment (PPE), and face masks; managing situations where federally-approved products are unavailable and use of alternatives may subject the business to government enforcement action; and keeping abreast of evolving regulations and guidance, including with reference to testing, contact tracing, reporting, and notification in the event an employee tests positive.

Occupational Safety and Health Administration (OSHA) — Federal and State Guidelines

- Employers have a “General Duty” under the Occupational Safety and Health Act (OSH Act) [General Duty Clause \(GDC\)](#) to furnish a workplace free from recognized hazards that may cause death or serious harm to their employees. OSHA has issued guidance on how to mitigate the hazards of COVID-19 in the context of the GDC.
 - Before reopening, employers are strongly advised to create an assessment and control plan that corresponds to federal OSHA’s [Guidance on Preparing Workplaces for COVID-19](#) (March 9, 2020) and [Guidance on Returning to Work](#) (June 17, 2020). This plan should: (1) characterize workers’ occupational risk for COVID-19, and (2) identify appropriate controls depending on the identified risks, such as distancing requirements, cleaning and disinfecting protocols, engineering controls, and personal protective equipment (PPE). Guidance from the Centers for Disease Control and Prevention (CDC) (see below) should further inform appropriate control measures. OSHA has published interim guidance for specific sectors and employee groups (e.g., healthcare, manufacturing, laboratories, airlines, business travelers) on its [COVID-19 Webpage](#).
 - OSHA’s existing recording and reporting requirements at [29 CFR Part 1904](#) remain in effect during the COVID-19 pandemic, and COVID-19 is OSHA 300 recordable if it otherwise meets the criteria of a work-related illness. However, OSHA is exercising enforcement discretion, because in many instances it remains difficult to determine whether a COVID-19 illness is work-related, especially when an employee has experienced potential exposure both in and out of the workplace. See [Revised Enforcement Guidance for Recording COVID-19 Cases](#) (May 19, 2020).
 - Some states have issued guidance indicating that an employer must presume that an employee contracted COVID-19 in the workplace unless it can prove otherwise. For example, on May 6, 2020, the California Governor signed [Executive Order N-62-20](#), which created a rebuttable presumption that, for the purposes of awarding workers’ compensation benefits, employees who test positive for or are diagnosed with COVID-19 within 14 days of performing labor or services at the place of employment at the employer’s direction contracted the virus while at work.

Occupational Safety and Health Administration (OSHA) — Federal and State Guidelines

- When developing assessment and control plans, OSHA strongly recommends that employers consult the CDC [Interim Guidance for Businesses and Employers Responding to COVID-19](#). This guidance sets forth specific protocols to reduce the risks associated with COVID-19, including protocols for detecting sick employees and those for protecting healthy employees. OSHA and the CDC jointly issued guidance for [Manufacturing Workers and Employers](#) (May 12, 2020) and [Meat and Poultry Processing Workers and Employers](#) (April 26, 2020). Other industry-specific guidance issued by the CDC cover [Airlines](#), the [Ship Industry](#), [Restaurants and Bars](#), [Casinos and Gaming Operations](#), and [Small Businesses](#) generally.
 - In its May 2020 “reopening plan” [guidance document](#), the CDC provides step-by-step guidance on reopening for specific institutions such as restaurants, schools, and mass transit.
 - The CDC also has [guidance](#) that addresses how businesses should handle high-density situations where distancing is not possible that includes recommendations for testing strategies.
 - On June 30, 2020, the CDC issued new [guidance on contact tracing](#).
 - Many state and local governments have issued enforceable orders and/or guidance and continue to issue updates based on evolving knowledge and the spread of the virus. It is important to understand these orders and stay abreast of updates, especially with reference to testing, contact tracing, reporting and notification when an employee tests positive.
- All OSHA guidance is non-binding guidance. On May 18, 2020, the AFL-CIO filed an [emergency petition](#) in the D.C. Circuit Court of Appeals to compel OSHA to issue an Emergency Temporary Standard (ETS) for Infectious Diseases to *require* all OSHA-regulated workplaces to develop safety plans to safeguard workers against the risk of airborne disease transmission. On June 11, 2020, the [D.C. Circuit denied the emergency petition](#) because “OSHA’s decision not to issue an ETS is entitled to considerable deference.” AFL-CIO filed a [petition for rehearing en banc](#) on June 18, 2020. Employers are recommended to frequently check the news, including [Latham & Watkins’ COVID-19 Resources page](#), to stay up to date on this case.
- In 22 states, state occupational safety and health agencies have the authority to implement and enforce the federal OSH Act and any state equivalents. These states — known as “State Plan States” — have the authority to issue their own guidance and regulations, including an emergency standard.
 - On June 24, 2020, the Virginia Safety and Health Codes Board voted 9-3 to approve a resolution to enact an ETS protecting all workers from COVID-19, and the final text will be adopted at a later meeting. See [Virginia Department of Labor and Industry Page on the COVID-19 ETS](#).
 - Additionally, Oregon has enacted a [temporary rule](#) (April 28, 2020) limited to agricultural workers.

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- Many State Plan States have issued multiple guidance documents as indicative of the changing situation and state of knowledge. For example, [Cal/OSHA](#) issued [Workplace Outbreak Employer Guidance](#) (June 18, 2020) and [Interim Guidelines on Protecting Workers from COVID-19](#) (May 14, 2020), which set forth a more specific list of recommended practices than federal guidance. Employers are advised to check their state agency's website frequently.
- Depending on their specific operations, businesses may have to comply with binding standards such as the federal [OSHA Bloodborne Pathogens Standard](#) or the [Personal Protective Equipment Standard](#).
 - OSHA is exercising temporary enforcement discretion around the requirements of certain standards, especially those requiring initial or recurring training, audits, review, testing, or assessments. Employers should regularly check [OSHA's COVID-19 Enforcement Memorandums page](#) for updates (see COVID-19, Novel Coronavirus).

Environmental Protection Agency (EPA) — List N Disinfectants

- When establishing a plan to clean and disinfect surfaces in the workplace, employers should recognize that only certain disinfectants are effective at killing SARS-CoV-2 – the coronavirus that causes COVID-19. [EPA's List N](#) identifies specific products registered under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) that are considered effective. See [EPA's Frequent Questions about Disinfectants and Coronavirus \(COVID-19\)](#).
- It is important to recognize that a FIFRA label for a product may include different instructions depending upon the use situation, such as level of dilution with water, contact time, spraying, wiping, etc. Importantly, List N also includes information about which instruction on the label must be followed in order for the product to kill SARS-CoV-2, and employers should follow that instruction and not another one on the label that may not achieve the desired result.
- The EPA issued [additional guidance](#) on April 29, 2020, on developing and implementing a plan to disinfect workplaces and businesses. In addition to recommending frequent cleaning using List N products, the EPA has stated that when List N products are not available, certain “alternative disinfectants” may be used such as bleach or alcohol solutions.

EPA, OSHA and Food and Drug Administration (FDA) — Proper Use of Hand Sanitizers and Face Masks

Hand Sanitizers

- Employers are advised to have hand sanitizer available in areas of the workplace where soap and water are not available and to encourage employees to frequently sanitize their hands. To ensure hand sanitizer is widely available, the FDA has issued the below guidance for the temporary preparation of alcohol-based hand sanitizers by certain companies and pharmacies during the public health emergency posed by COVID-19:
 - [Temporary Policy for Preparation of Certain Alcohol-Based Hand Sanitizer Products During the Public Health Emergency \(COVID-19\) Guidance for Industry](#)
 - [Policy for Temporary Compounding of Certain Alcohol-Based Hand Sanitizer Products During the Public Health Emergency](#)
 - [Temporary Policy for Manufacture of Alcohol for Incorporation Into Alcohol-Based Hand Sanitizer Products During the Public Health Emergency \(COVID-19\)](#)
- It is generally not recommended to repurpose hand sanitizer for use as a surface disinfectant. Doing so may not be permissible under FIFRA or the Food Drug and Cosmetic Act (FD&C Act), and in any event, hand sanitizer formulations may not be as effective for disinfecting surfaces as surface disinfectant formulations.

Personal Protective Equipment (PPE), including Face Masks and Respirators

- Employers are responsible for complying with OSHA's PPE standards ([29 CFR 1910 Subpart I](#)), including the Respiratory Protection standard ([29 CFR 1910.134](#)). However, OSHA is providing temporary enforcement flexibility for certain requirements under these and other health standards. See [Enforcement Guidance for Respiratory Protection and the N95 Shortage; Enforcement Guidance for Use of Respiratory Project Equipment Certified under Standards of Other Countries or Jurisdictions; COVID-19 Enforcement Memorandums](#).
 - Cloth face coverings are not considered PPE, but employers may choose to ensure that cloth face coverings are worn as one feasible abatement measure in a COVID-19 control plan. See [Frequently Asked Questions – Cloth Face Coverings](#).
- Businesses reopening should, when appropriate, consider the use of face masks and respirators that are FDA-approved or meet the standards set forth in FDA guidance for use without approval:
 - The FDA in its [Enforcement Policy for Face Masks and Respirators During COVID-19](#) (Revised May 2020) addressed the urgent public health concerns caused by shortages of face masks and respirators, and set forth specific standards that certain masks and respirators must meet to be used without prior FDA approval. The FDA has also issued an FAQ on [Manufacturing, Purchasing, Importing, and Donating Face Masks and Surgical Masks During the Public Health Emergency](#).
 - The FDA has issued two separate Emergency Use Authorizations (EUAs) covering non-NIOSH approved respirators that do not comply with certain otherwise applicable FDA regulations (see [Frequently Asked Questions on EUAs](#)):
 - [Imported, Non-NIOSH Approved Disposable Filtering Facepiece Respirators \(FFR\)](#)
 - [Non-NIOSH Approved Disposable FFRs Manufactured in China](#)

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