COVID-19 Webinar: Follow-up Q&A

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The following are responses were prepared on April 21, 2020, to questions posed during the April 17, 2020, webinar on COVID-19 and Workplace Safety, presented by MCAA. For updates check OSHA/CDC/MSHA/State government websites. Please contact Adele Abrams if you have any additional questions or comments. Be well and stay safe!

1. Where can I find a list of states and their temperature requirements?

The MCAA is in the process of providing an up-to-date list for all 50 states on temperature and other requirements for essential services/critical infrastructure employers. This information should be available shortly. In the interim, you can check each state's version of "Emergency Declarations" or COVID-19 information pages and look for guidance for employers. Please be aware that federal OSHA has no requirements for this, and state rules will supersede any more relaxed federal policies.

2. How long are we required to log temperatures with the reopening of the economy?

As long as individual state "Emergency Declarations" imposing procedural requirements for temperature logging on employers who are permitted to remain open (or to reopen), employers must follow those state dictates. In some areas, there may also be county or municipal policies to follow that may be more stringent than state laws. The EEOC has held that because the CDC and state/local health authorities acknowledge that community spread of COVID-19 is occurring and have issued precautions, employers may legally measure employees' body temperature without violating the ADA or HIPAA. However, employers must keep in mind that some people with COVID-19 do not have a fever, and infected people can transmit the disease for days prior to symptoms manifesting.

3. Due to this crisis our workers are wearing the N-95 masks. Our company's preferred provider stopped offering fit testing. Would we have any leg to stand on

if we got a notice from our clinic stating that it is no longer providing fit testing services?

OSHA has clarified that its policy suspending annual fit testing requirements is now expanded to cover all industries, not just employers in the healthcare sector. However, an initial fit test must still be conducted before first use of a respirator (an N-95 mask is an APF 10 respirator, and so is subject to OSHA rules, unlike cotton masks). In addition, if you are bypassing annual fit testing due to clinic issues, you should: (1) document your efforts to obtain fit testing; (2) notify affected workers as to why the fit test is being delayed (and reschedule it as soon as restrictions lift and clinics can resume providing tests); and (3) let the employees know that if their assigned respirator has damage or if the worker cannot obtain a tight fit (e.g., due to weight loss or gain), they need to notify management immediately so that a replacement can be issued.

4. If you are a mechanical contractor working in a hospital, does that automatically put you in the high exposure risk category?

Yes. Although the work you are performing may not involve direct contact with patients or healthcare professionals, a mechanical contractor in a hospital or other health care setting has potential high risks of exposure due to aerosol transmissible droplets from others sharing the work area, contaminated surfaces (where contamination can linger for several days if not cleaned properly), and potentially through shared use of equipment or areas such as elevators, stair railings, door handles and rest rooms. Therefore, it is recommended that such contractors follow the safety and health protocols in OSHA/CDC guidance and also develop a written response plan in the event of accidental contamination.

5. If some of our workers performing their jobs in hospital tests positive, must it go on our OSHA log?

On April 10, 2020, OSHA updated its guidance on recording cases of COVID-19. As a basic premise, employers must record an illness if it is: (1) confirmed as a case of COVID-19; (2) is work-related as defined by 29 CFR 1904.5; and, (3) involves one or more of the general recording criteria in 1904.7 (medical treatment beyond first aid, restricted duty, days away from work, or a fatality).

However, in areas with “ongoing community transmission,” employers outside the healthcare industry, emergency response organizations, or correctional institutions may have difficulty making work-related determinations, and OSHA will excuse them from logging any COVID-19 cases among their employees. For mechanical contractors working in these “high risk environments” (hospitals, nursing homes, urgent care or other clinics, drug treatment facilities, correctional facilities, or places where emergency responders may be present such as fire or police stations), it is recommended that because there is potential on-the-job exposure, if a worker assigned to these settings does contract the illness, the employer should do a work-relatedness assessment

based on the totality of circumstances. Ultimately, the employer makes the decision as to whether the illness is OSHA-recordable.

6. Do these rules apply to cloth face-coverings?

If an N-95 mask is mandated by the employer, or is allowed to be used voluntarily, OSHA standard 29 CFR 1910.134 would apply. Mandated use would be subject to medical evaluation and initial fit testing. Voluntary use would require posting of Appendix D to this standard, and best practice would dictate that employers review it with workers and get a signed acknowledgment that use is voluntary and that workers understand the limitations of such masks (including wearing them over more than one day's growth of beard, which prevents a tight fit).

For the "cloth masks" that many employees are bringing from home (or which some employers are providing), because they do not provide any real respiratory protection, they are not subject to this standard and so training would not be mandated. However, I recommend still posting Appendix D and reviewing it with workers (as with any other voluntary mask use) in the event that an inspector takes a different viewpoint!

7. What is our liability as to providing the state mandated face covering?

The employer needs to look at each state emergency declaration, to determine if the employer must provide the face covering (cloth mask) or require workers to come with their own. Normally, OSHA requires employers to pay for and provide PPE, but the agency has not made a declaration at this point on these masks. If the employer DOES provide a cloth face covering, they could face liability if the employee wears it inappropriately (e.g., due to lack of training or enforcement – such as a worker removing it to converse or to drink water or eat in the workplace) and becomes ill. The OSHA policy of April 10th infers that any illness in areas with "ongoing community transition" could be considered non-work-related (outside of healthcare, corrections, emergency response) and this finding may carry over to state worker's compensation hearings or to tort proceedings brought by third parties such as temporary workers or day laborers. Beyond that, if the employer provides a cloth face covering and allows the worker to bring it home for laundering, there could be a remote chance of "take home contamination" claims being brought by the worker's family members who become ill, particularly if they had no other routes of exposure due to being on home quarantine.

8. How do you handle a service company when you are in a state where we are required to provide face covering?

If you are bringing service companies into your workplace, it is critical to harmonize worker protections with them in advance and to make them aware of your PPE requirements. Ideally, the host employer would not provide contractors with PPE (N95 respirators) or cloth masks, as there is no "worker's comp exclusive remedy" in the event they claimed illness resulted from what was provided (e.g., contaminated masks).

It is also a best practice to put in the contract any requirements for contractors to provide masks/respirators for their workers, to maintain social distancing or otherwise follow OSHA and state guidelines for essential service workers, and to report any illness or positive cases of COVID-19 among their crew, which may arise after the service contractors leaves the premises, immediately. Finally, it makes sense to let the contractor know in advance of temperature or other testing requirements to which their crew members will be subject before entering your workplace, in case any workers wish to opt out and must be replaced.

9. Does it make sense to provide workers with cloth masks on jobsites instead of N95s or dust masks since cloth masks are not considered respirators and would not need to be included in a respirator program?

This is certainly one option, as discussed in #6 above. However, watch out for substituting "cloth dust masks" for N95 respirators, for workers who might otherwise be required to use an APF-10 respirator (e.g., for silica exposure during their work). This is illegal and OSHA is not allowing any relaxing of the respiratory protection requirements under Table 1 of the silica rule.

10. Which exposure level does Mechanical contracting work fall into on a typical construction site?

There is no "permissible exposure limit" for COVID-19 (any exposure is potentially fatal). In terms of OSHA's April 13, 2020, "Interim Enforcement Response Plan" for COVID-19, the agency has set up three different classification levels: (1) High/very high exposure: hospitals, nursing centers, laboratories, medical transport, and emergency response facilities; (2) Medical exposure risks: those with close or frequent contact with other people, such as schools, retail, and high-population-density work environments; and (3) Lower exposure: those jobs that do not require contact with people known or suspected of being infected, and jobs without close contact (6-feet) of the general public, and minimal contact with coworkers.

Based on this framework, employers should consider the types of exposure their work crew will encounter when on a job and plan accordingly. For a typical "new" construction site, where work is often performed outdoors or with ventilation due to partial construction, or where crews can be staggered and workers can spread out, these would more likely fall into category 3 (low risk), whereas a mechanical repair job inside a hospital or a prison would fall into category 1 (high risk).

11. How can we show good faith when forced to deviate from the COVID-19 guidelines? For example, what if two plumbers are performing a task that requires them to be closer than 6 feet apart?

For workers engaged in critical infrastructure and construction activities, the CDC recommends wearing a mask at all times in the workplace, maintaining a 6-feet distance between workers and practicing social distancing "as work duties permit in the

workplace." This language suggests that OSHA/CDC understand that in some tasks, workers may need to be positioned closer together (e.g., during materials handling). CDC cautions that the employer also must clean and disinfect all areas such as offices, trailers, bathrooms and portable facilities, common areas such as break rooms, and shared equipment and tools routinely.

Additional OSHA/state OSHA recommendations for construction include:

- Create at least 6 feet between workers by staging/staggering crews to prevent droplet spread;
- Provide soap and running water on all job sites to encourage frequent handwashing (or make a 60%+ alcohol hand sanitizer readily available);
- If you work in healthcare facilities doing construction, train workers in infection control risk assessment;
- Clean and disinfect high-touch surfaces on job sites and in offices frequently; and,
- Have workers stay 6 feet apart during morning gatherings, training sessions and other meetings (and meet outdoors where possible).

12. If employees are voluntarily wearing N95 respirators, are fit testing and medical evaluations still required?

For truly voluntary use of N95 respirators, fit testing and medical evaluation is not required but 29 CFR 1910.134 governs in terms of posting and having workers review Appendix D. However, employers should clarify that voluntary use without a tight fit (or over facial hair) will not provide the 95% particulate protection of these respirators. Workers must be aware of the limitations of voluntary use of any type of face covering.

13. Should we be documenting all our decisions regarding risk assessments, risk categories, PPE selections, etc.?

Yes. OSHA standard 29 CFR 1910.132 requires employers to do a written hazard assessment for PPE that is mandated, and so where use of respirators is required this should be included in the risk assessment document, along with the tasks where use is required. The employer should also document how it determined that the selected PPE is appropriate for the hazard involved. This includes not only respiratory protection (choosing the right APF – Assigned Protection Factor – and style of respirator (N95 mask, half-face, full-face, PAPR, etc.) but also safety goggles, face masks, work gloves (cloth, plastic – what type of hazard, physical or chemical), and FR clothing. As a reminder, all respirators and other mandated PPE must be provided and paid for by the employer. There are a few exceptions for PPE worn off the job such as steel-toed boots, prescription lenses, but it is still a best practice for the employer to pay to ensure that the correct PPE is utilized.