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OSHA: How to React to a Sick Construction Worker Who Is Presumed or Confirmed to Be Infected With COVID-19

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The risk that a construction worker will show up to work at a project site, perhaps unaware, but already infected with the COVID-19 virus must be anticipated and planned for. Such a situation threatens the health of other workers and imperils the continuance of the project itself. Construction Contractors, Subcontractors, and project Owners must be prepared to ensure all workers' immediate and long-term safety, properly document and report such incidents, and take decisive action to minimize the impact to the Project itself.

There are no hard-and-fast rules for dealing with the current, unprecedented crisis, especially in the unique environment of construction projects. There are, however, general rules and guidance that inform the proper course to follow, which guidance remains fluid and subject to change.

OSHA has developed general guidance for all industries in a whitepaper titled "Guidance on Preparing Workplaces for COVID-19," available on OSHA's [website](#). This alert will assume the reader's familiarity with OSHA's overall guidance, as well as the CDC's general best practices guidance on COVID-19, both of which are required reading for any employer continuing to operate in this environment.

Within OSHA's guidance, employers are divided into four risk categories with recommendations on engineering controls, administrative controls, and personal protective equipment for protection against COVID-19 varying, depending upon the classification. Most American workers are expected to experience low (caution) or medium exposure risk levels at their place of employment.

"Very High Exposure" and "High Exposure" categories are described as (generally) those in the health-care industry, paramedics, EMTs, mortuary workers and the like who face a high or very high risk of exposure.

"Medium Exposure" is defined as those workers whose jobs include frequent or close (within 6 feet) contact with other persons, and others who work in high-population density work environments. "Low Exposure" is the catch-all category for all other workers.

For employers with "Medium Exposure," the OSHA guidance requires, as engineering controls, the installation of physical barriers, such as clear plastic sneeze guards. As administrative controls, employers in this category must inform customers about COVID-19 and ask sick customers to minimize their contact with employees; limit customer/public access to the worksite; consider and implement strategies to minimize face-to-face contact; and communicate the availability of medical screening.

For those workplaces falling within the scope of “Low Exposure,” there are no additional engineering controls recommended, and employers are recommended to monitor the CDC’s COVID-19 website and other public health communications.

Employers should ask employees who are sick to call out and not come to the workplace. Employers are permitted, in light of the pandemic, under the EEOC’s current guidance, to inquire as to whether employees are experiencing symptoms of COVID-19, including fever (per CDC guidelines, over 100.4 degrees Fahrenheit), cough, shortness of breath. It should be noted that an infected employee may not demonstrate all of these symptoms. Employers may also consider asking that employees notify them if they or their household members have been in close contact with someone with a suspected or confirmed case of COVID-19. It is currently permissible to screen employees for body temperature; however, this screening poses its own risks. For example, it is preferred to have a trained medical professional perform such screenings and the individual would need to have adequate personal protective equipment. Employers should familiarize themselves with leave entitlements under Federal, State and/or local law.

The most important thing is for the employer to immediately remove any suspected COVID-19 positive employee from the workplace to avoid exposing co-workers and further risking the Project. An employer who fails to keep its workers safe may be cited by OSHA under the general duty clause, especially if the employer allows an employee known to be sick to come to work and expose others. Where an employee in the workplace is suspected of having COVID-19, the employee should be isolated immediately until such time as their status can be confirmed.

The employer should isolate the affected employee from other workers, identify any potentially exposed workers, and contact the CDC and/or local health authorities for further guidance. To the extent possible, employers should ask the employee who they have had contact with on the job site and where they have been working. The CDC guidance states that “[i]f an employee is confirmed to have COVID-19 infection, employers should inform fellow employees of their possible exposure to COVID-19 in the workplace but maintain confidentiality as required by the Americans with Disabilities Act (“ADA”). The fellow employees should then self-monitor for symptoms (ie., fever, cough, or shortness of breath).” Under the ADA and similar state and local laws, the employer must maintain confidentiality regarding employee’s identity and status. The employee’s identity should not leave the organization and should only be limited to supervisors and/or Human Resources personnel with a “need to know”.

The employer should follow CDC and OSHA guidance to appropriately sanitize the area in and around where the infected employee was working. The CDC recommends that employers “[c]lean AND disinfect frequently touched objects and surfaces such as workstations, keyboards, telephones, handrails, and doorknobs. Dirty surfaces can be cleaned with soap and water prior to disinfection. To disinfect, use products that meet EPA’s criteria for use against SARS-CoV-2, the cause of COVID-19, and are appropriate for the surface.” The CDC recommends that where possible: close off the area to other staff, increase air circulation, and wait 24 hours, if possible, to disinfect to decrease risk of infection by cleaning personnel. More information on cleaning and disinfecting is available on the CDC’s [website](#).

For confirmed cases, there is limited definitive guidance as to when the employee may return to work. The CDC *currently* recommends exclusion from work until the employee is no longer under home isolation. The CDC’s *current* guidelines for discontinuing home isolation provide a non-test based and a test-based strategy. Tests are hard to come by currently, so the non-test based strategy is the most likely to be used and states as follows:

- At least 3 days (72 hours) after recovery, defined as resolution of fever without the use of fever-reducing medications,
- Improvement in respiratory symptoms (e.g., cough, shortness of breath), and
- At least 7 days have passed *since symptoms first appeared*.

As an alternative, the employee may discontinue home isolation using the test-based strategy upon:

- Resolution of fever without the use of fever-reducing medications,
- Improvement in respiratory symptoms (e.g., cough, shortness of breath), *and*
- Negative results for COVID-19 from at least two consecutive tests collected at least 24 hours apart.

As concerns reporting and recordkeeping, OSHA's guidance could prove problematic for employers, and the Associated General Contractors of America ("AGC") and other groups, such as the Construction Industry Safety Coalition ("CISC"), are currently working hard to convince OSHA to clarify its guidance as concerns construction workers.

OSHA's recordkeeping regulations (29 C.F.R. Part 1904), obligate employers to record any illnesses that are "work related" and which meet any one of the recording criteria which include: days away from work, job transfer, and medical treatment. Any work-related illness that qualifies under this criteria must be recorded on the employer's OSHA Form 300 and a Form 301 filled out. Generally an employer must record a work-related illness within seven calendar days after the employer learns of the illness. "An illness is work-related if it is more likely than not that a factor or exposure in the workplace caused or contributed to the illness."

OSHA has decided to treat cases of employees contracting COVID-19 as recordable incidents where the employee was infected as a result of performing work-related duties. COVID-19 is a recordable illness only where all of the following criteria are met:

1. The case is *a confirmed case* of COVID-19;
2. The case is work-related, as defined by 29 C.F.R. 1904.5; and
3. The case involves one or more of the general recording criteria set forth in 29 C.F.R. 1904.7 (e.g., medical treatment beyond first aid, days away from work).

Section 1904.5(a) provides that an injury or illness must be considered work-related if an event or exposure in the work environment either caused or contributed to the injury or illness. Work-relatedness is presumed for injuries and illness resulting from events or exposures occurring in the work environment, unless an exception in Section 1904.5(b)(2) specifically applies. A case is only presumed to be work-related if an event or exposure in the work environment is a discernable cause of the injury or illness or of a significant aggravation to a pre-existing condition. If an employee's condition arose outside of his work environment and there was no discernable event or exposure at work that led to his condition, the presumption of work-relationship does not apply.

It is critical that employers conduct a full assessment of an employee's work duties and work environment prior to making any decision to record the case, or not, just as would be done under the circumstances of any incident. OSHA's guidance is clear in stating that where there is no evidence that the employee contracted the virus in the workplace, it is not a recordable incident.



If the infection is work-related as noted above, and the infected employee is hospitalized as an in-patient, the hospitalization must be reported to OSHA within 24 hours of the incident. If the infected employee is not hospitalized as an in-patient but dies from the infection, the death must be reported to OSHA if it occurred within 30 days of the work-related incident.

OSHA's decision to treat COVID-19 illness differently than a cold or flu creates difficulties for employers in terms of these recording obligations, such as potential workers' compensation liability. It also creates the real potential for an employer's injury and illness records to be significantly impacted, and the skewing of Bureau of Labor Statistics' data regarding nationwide injury and illness trends. We will continue to watch the guidance from OSHA to see if it modifies its guidance on reporting COVID-19 related illnesses in the workplace.

Lastly, it must be mentioned that this article deals with obligations under OSHA's regulations, and that the guidance from OSHA and CDC continues to develop as this situation progresses. Some states, like California, may have their own broader reporting requirements which must be considered in addition to OSHA's requirements.



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