

Changing COVID-19 Guidance and Requirements Cause Consternation at Construction Sites

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After a year of frequently changing guidance and requirements for construction firms, the Occupational Safety and Health Administration (OSHA) has issued new [Guidance on Mitigating and Preventing the Spread of COVID-19 in the Workplace](#), which expands on earlier guidance on preventive measures and addresses new topics, such as workplace testing programs, employee vaccinations, and sick leave policies. This is the latest in changing recommendations for employers, including those in the construction industry, from federal and state agencies in response to the COVID-19 pandemic.

Nearly a year ago, construction sites were among the first that OSHA and its state-equivalents focused on in the fight to prevent the spread of COVID-19. As construction can be essential, urgent, and involve emergency work, many construction workers' daily operations were unfazed by state and local COVID-19-related shutdown orders. However, some construction sites have experienced significant outbreaks with ongoing infections linked to the site, causing many challenges and legal issues. Construction employers, for example, have had to contend with constantly changing guidance on how to prevent the spread of COVID-19, conflicting guidance between federal and state agencies, and increasing enforcement initiatives.

Various Guidance Provided to Construction Industry

At the beginning of the pandemic, OSHA focused its enforcement efforts on concerns over construction workers' sharing of tools and equipment and access to adequate sanitation and wash facilities. [The New York City Department of Buildings](#) and the [Los Angeles Department of Building and Safety](#) were two of the first to provide specific guidance for construction projects, which included a requirement that construction employers develop comprehensive exposure control plans to address COVID-19. Some state safety agencies, such as the [California Department of Industrial Relations Division of Occupational Safety and Health](#) the [Washington State Department of Labor & Industries](#) and [Oregon Occupational Safety and Health](#), followed suit by issuing COVID-19-infection prevention guidance for the construction industry. Along with COVID-19 preventive and control plans, the guidance generally directed construction employers to conduct hazard assessments aimed at identifying COVID-19 hazards, implement responsive controls and policies, and communicate on COVID-19 issues with employees in a language they could understand.

OSHA eventually followed with [guidance of its own](#), which recommended a variety of preventive measures at construction sites, such as:

- Using Environmental Protection Agency-approved cleaning chemicals from [List N](#) or products that have label claims against COVID-19 for cleaning and disinfecting frequently touched surfaces like tools, handles, and machines;
- Using physical barriers (such as walls, closed doors, or plastic sheeting) to separate workers from individuals experiencing signs or symptoms consistent with COVID-19;
- Keeping in-person meetings (such as toolbox talks and safety meetings) as short as possible, limiting the number of workers in attendance, and using social distancing

practices;

- Utilizing screening calls or surveys when scheduling indoor construction work (*e.g.*, in-home construction project) to assess potential exposures and circumstances of the work environment before worker entry;
- Staggering work schedules (such as alternating workdays or extra shifts) to reduce the number of employees on a job site at any given time and to ensure physical distancing;
- Requesting residents at residential worksites diagnosed with or are experiencing signs or symptoms of COVID-19 to remain physically separated from others and communicate remotely with workers;
- Requiring employees to wear a cloth or other face covering when there is a potential for contact with others; and
- Improving air flow when working indoors by turning on an air conditioner or opening windows, weather permitting, consistent with [Centers for Disease Control and Prevention \(CDC\) recommended precautions for people in households](#).

OSHA also subsequently provided a one-page alert titled [COVID-19 Guidance for Construction Workers](#), which outlines the steps the agency views as necessary to prevent the risk of exposure to COVID-19 among construction workers.

New OSHA Guidance

In addition to expanding on earlier guidance related to COVID-19 preventive measures and addressing some new topics, such as workplace testing programs, employee vaccinations, and sick leave policies, the latest OSHA guidance incorporates recent recommendations from the CDC, as well as responds directly to some of the challenges employees and employers have reported over the past year. For example, it details expectations for remote work policies, use of the hierarchy of controls in response to COVID-19 hazards (*e.g.*, preference is for use of engineering controls to eliminate or reduce a hazard before implementing other controls), and removing and excluding potentially sick workers from the workplace. Although not specific to the construction industry, the new guidance emphasizes a need for ongoing preventive measures. It also provides insight into what may be included in an [Emergency Temporary Standard](#), which the Biden administration directed OSHA to consider by March 15, 2021. As of this writing, OSHA has not yet published the standard.

Other Challenges

Along with updates and changes in federal guidance, COVID-19 circumstances have continued to evolve. COVID-19 cases, for example, have drastically decreased in some areas of the country. Vaccinations are being rolled out in phases by state and local public health authorities. Even though widespread vaccinations are not expected to be in place for months, some states have responded to these changing circumstances as sufficient cause to lift restrictions and start returning to “normal.” [Mississippi](#) and [Texas](#), for example, have lifted mandated requirements on state residents to wear cloth face coverings, capacity limitations on businesses, and other COVID-19-related restrictions. Other states, such as Idaho, Nebraska, and Oklahoma, implemented COVID-19 restrictions, but did not go so far as to require residents to wear cloth face coverings or masks while in public.

While most states still have mask mandates, the inconsistency and changing requirements in COVID-19 restrictions continue to challenge employers in determining how to provide a safe work environment. This is particularly true for construction employers that must contend with balancing workplace safety considerations with workplace cultures, employee perspectives, and continually changing dynamics with customers and other site employers.

Even as states begin lifting COVID-19 restrictions and mask mandates, OSHA has instituted a National Emphasis Program (NEP), or national enforcement initiative, to target establishments that have workers with increased potential exposure to COVID-19, such as construction sites. Although focused on industries where workers have an increased risk of occupational exposure (such as healthcare employers with frontline COVID-19 workers), the NEP also targets workplaces where the hazard is prevalent. As a result, workplaces experiencing multiple infectious, outbreaks, or significant occurrences of COVID-19 cases could be targeted for enforcement. Some construction worksites, such as specialty trade contractors, heavy and civil engineering construction, and building construction related to essential and critical infrastructure, also are on the list of targeted industries under the NEP. Employers operating in these areas may experience additional enforcement scrutiny over their COVID-19-related protocols in the event of a complaint, COVID-19 occurrence, outbreak, hospitalization or fatality case investigation, or related referral.

If you have questions or need assistance, please reach out to a Jackson Lewis attorney or any member of the [Construction Industry Team](#) or the [Workplace Safety and Health Practice Group](#).

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