

Update On OSHA COVID-19 Guidance for All Industries and for Healthcare Employers

As the current pandemic unfolds and public health agency and governmental responses to it evolve, the issue of infectious disease prevention and personal protective equipment (PPE) in the workplace has become increasingly important. On March 29, 2020, Bond addressed this subject in its [alert](#) concerning OSHA's March 2020 Publication 3990 on COVID-19 related workplace safety in all industries and OSHA's temporary enforcement guidance for healthcare employers concerning respirator use in light of N95 shortages. As discussed in that alert, Publication 3990 recommends that every employer develop an Infectious Disease Preparedness and Response Plan (IDPRP) if it has not already done so. OSHA subsequently has issued numerous guidance memoranda, fact sheets and posters that are intended to assist employees in IDPRPs a manner that keeps pace with emerging CDC and other public health agency guidance and has expanded its temporary enforcement guidance regarding N95 respirator use beyond the healthcare to cover all workplaces requiring the use of respirators. This update provides a survey of these OSHA developments and provides links to the pertinent documents.

GUIDANCE FOR ALL EMPLOYERS

- **Interim Enforcement Guidance for Recording Cases of Coronavirus.** Under 29 CFR Part 1904, many employers with more than 10 employees are required to keep a record of serious work-related injuries and illnesses on their OSHA 300 log. OSHA's [April 10, 2020 interim enforcement guidance](#) on this subject makes clear that COVID-19 is a recordable illness if (1) the case is a confirmed case of COVID-19; (2) the case is work-related as defined by 29 CFR 1904.5; and (3) the case involves one or more of the general recording criteria set forth in 29 CFR 1904.7 (e.g. medical treatment beyond first-aid, days away from work).

However, until further notice, in recognition of the difficulty in making determinations about whether workers who contracted COVID-19 did so due to exposures at work, OSHA will not enforce the requirement to make such determinations against employers that are not in the healthcare industry, emergency response organizations (e.g., emergency medical, firefighting, and law enforcement services), and correctional institutions, except that such determinations must still be made by all employers where:

1. There is objective evidence that a COVID-19 case may be work-related. This could include, for example, a number of cases developing among workers who work closely together without an alternative explanation; and
2. The evidence was reasonably available to the employer, such as information given to the employer by employees, as well as information that an employer learns regarding its employees' health and safety in the ordinary course of managing its business and employees.

OSHA further advises that COVID-19 should be coded as a respiratory illness on the OSHA Form 300, and employers must comply with any employee requests for anonymity pursuant to 29 CFR § 1904.29(b)(7)(vi).

- **Expanded Temporary Enforcement Guidance titled "Healthcare Respiratory Protection Annual Fit-Testing for N95 Filtering Facepieces."** Bond's March 29, 2020 alert summarized OSHA's March 14, 2020 Temporary Enforcement Guidance entitled "Healthcare Respiratory Protection Annual Fit-Testing for N95 Filtering Facepieces During the

COVID-19 Outbreak.” This temporary enforcement guidance, as [updated](#) on April 3, 2020, has been expanded to apply to all workplaces covered by OSHA where there is required use of respirators. (Note that voluntary respirator use has been subject to a set of existing regulatory standards in 1910.134(c)(2)-(4)).

The highlights of OSHA’s temporary guidance on Respiratory Protection Plan (RPP) requirements as applicable to all industries are as follows (requirements specific to healthcare facilities are summarized at the end of this alert):

Extended use or reuse of N95s: Allows extended use or reuse of N95 filtering facepiece respirators (FFRs) as long as the respirator maintains its structural and functional integrity and the filter material is not physically damaged, soiled or contaminated and the employer’s written RPP addresses when a respirator will be considered unsuitable for extended use or reuse and proper storage of the FFRs in between periods of reuse.

- User should conduct a successful seal check at each donning and should not use a respirator if seal check fails.
- Workers should be trained concerning structural and functional integrity of respirators and when respirators should be discarded.
- Workers should understand and follow sequence for donning/doffing and procedures to prevent contamination if reuse is necessary.

Use of expired N95s: If N95s are not available despite an employer’s good faith effort to acquire them or to use specified alternative options, use of N95 FFRs and surgical N95s is allowed.

- Employers may use only previously NIOSH-certified expired N95 FFRs found [here](#). Workers should be notified that they are using expired N95s.
- Purchasers and users of PPE should not commingle products that are past their manufacturer’s recommended shelf life (i.e., expired) with items that are within their shelf life.
- Employers should visually inspect, or ensure that workers visually inspect, the N95 FFRs to determine if the structural and functional integrity of the respirator has been compromised.
- Where an employer has expired N95s available from their own stored cache (i.e., not from the U.S. Strategic National Stockpile), the employer should seek assistance from the respirator manufacturer or independent lab regarding testing of those stored respirators prior to use.

OSHA’s April 8, 2020 update to this expanded respirator guidance recommends that all employers assess their engineering controls, work practices and administrative controls on an ongoing basis to identify any changes they can make to decrease the need for N95s or other FFRs. Examples provided include potential increase in the use of wet methods or portable local exhaust systems, moving operations outdoors and/or temporary suspension of non-essential operations. OSHA also encourages employers to prioritize use of fit-testing equipment to protect employees who must use respirators for high-hazard procedures.

- **OSHA Fact Sheet 3747 – Protecting Workers during pandemic.** This [fact sheet](#) distills the main points raised in OSHA’s Publication 3990 into a two-page summary of basic disease control measures, social distancing, sick leave policies, worker training that tracks CDC recommendations, workplace controls to provide additional worker protection, workplace risk assessment, risk communication and a comparison of the key differences between surgical masks and respirators.

- **OSHA Fact Sheet 3219 – Respiratory Infection Control: Respirators Versus Surgical Masks.** This two-page [fact sheet](#) outlines the significant differences between respirators (generally designed to reduce exposure to airborne contaminants) and surgical masks (generally used as a physical barrier to trap large particles of bodily fluids). This useful reference is intended to inform the decision whether to require workers to use either item based upon an analysis of hazards that may be present in a specific work environment.
- **OSHA Fact Sheet 3993 – Worker Exposure Risk to COVID-19.** As discussed in Bond's March 29, 2020 alert, OSHA [recommends](#) that an employer's IDPRP incorporate appropriate controls that are tailored to employee exposure "risk levels" (i.e. lower, medium, high and very high) that can be assigned to job tasks based on general criteria described in in OSHA's Publication 3990. Fact Sheet 3993 provides a one-page illustration of how employers might divide job tasks into particular levels for purposes of formulating appropriate workplace infectious disease prevention measures.
- **Ten Steps All Workplaces Can Take to Reduce Exposure to Coronavirus.** (Poster 3994 & 3995). This [poster](#) serves to reinforce sound infection prevention strategy in the workplace, including such measures as encouraging sick workers to stay home; establishing flexible worksites and staggered work shifts; discouraging workers from using other workers' phones, desks and other work equipment; and using Environmental Protection Agency (EPA)-approved cleaning chemicals.
- **COVID-19 Guidance for Retail Workers.** This [OSHA alert](#) covers safety measures employers can implement to protect employees working in pharmacies, supermarkets, big box stores and other retail establishments including, among other things, disinfecting surfaces and equipment with EPA-approved chemicals; use of drive-through windows or curbside pick-up; use of masks; practicing sensible social distancing, use of physical barriers and hygiene training.
- **Enforcement Guidance for Use of Respiratory Protection Equipment Certified under Standards of Other Countries or Jurisdictions During the Coronavirus Disease 2019.** This [memorandum](#) provides interim enforcement guidance under the Respiratory Protection standard in 29 CFR § 1910.134 and outlines when it is permissible to use FFRs and air-purifying elastomeric respirators that are either certified under certain standards of specified countries or jurisdictions or when such equipment is beyond their manufacturer's recommended shelf life (i.e., expired).
- **Anti-Retaliation Reminder.** This OSHA [press release](#) serves as a reminder to employers that it is illegal to retaliate against workers because they report unsafe and unhealthful working conditions during the coronavirus pandemic. Acts of retaliation can include such things as terminations, demotions, denials of overtime or promotion or reductions in pay or hours. If OSHA finds that an employer took such retaliatory actions due to an employee's protected activity, it may refer to Solicitor's Office and seek to impose reinstatement, back-pay, restoration of benefits, attorneys' fees and other possible remedies (including treble damages in extreme cases).

GUIDANCE FOR HEALTHCARE EMPLOYERS ONLY:

OSHA's April 3, 2020 [revision](#) to its expanded temporary enforcement guidance concerning respiratory protection discussed above includes guidance specific to healthcare employers, key aspects of which are summarized below:

Expired N95s generally must **not** be used when healthcare personnel (HCP):

- Perform surgical procedures on patients infected with, or potentially infected with, SARS-CoV-2, or perform or are present for procedures expected to generate aerosols or procedures where respiratory secretions are likely to be poorly controlled (e.g., cardiopulmonary resuscitation, intubation, extubation, bronchoscopy, nebulizer therapy, sputum induction).

- In accordance with CDC guidance for optimizing the supply of respirators, employers should prioritize the use of N95 respirators by activity type. When HCP perform or are present for aerosol-generating procedures or procedures where respiratory secretions are likely to be poorly controlled, use respirators (including N95 FFRs; other FFRs; non-disposable, elastomeric respirators; and or powered, air-purifying respirators/PAPRs) that are still within their manufacturer's recommended shelf life, if available, before using respirators that are beyond their manufacturer's recommended shelf life. See [here](#).

Bond is continuing to monitor COVID-19 legal issues and is hosting weekly webinars on the latest federal and state developments. You can register for the complimentary weekly webinar [here](#).

If you have any questions about this memorandum or OSHA compliance matters generally, please contact [Steven J. Ricca](#), any of the [attorneys](#) in our [OSHA Practice](#) or the attorney in the firm with whom you are regularly in contact.



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