

CONSTRUCTION LAW AND LITIGATION

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IN THIS ISSUE

As construction is deemed an essential business in many states' coronavirus quarantined and social distancing orders, employers need to be conscious of increased safety risks in this environment. This article discusses the responses OSHA has initiated to address to this evolving situation.

OSHA Safety and Reporting Guidelines: Changes in Response to the Novel Coronavirus Pandemic and Impact on the Construction Industry

ABOUT THE AUTHOR



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ABOUT THE COMMITTEE

The Construction Law and Litigation Committee consists of lawyers who represent general contractors, design/build firms, subcontractors, construction lenders, architects, engineers and owners. The Committee provides an opportunity to keep up to date on the latest developments in construction law, as well as a good networking and referral source for experienced construction litigators throughout the country. Members can also obtain information on liability and damage experts with e-mail inquiries to the Committee. Learn more about the Committee at www.iadclaw.org.

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Under many states' standing orders regarding quarantining and social distancing as a means of controlling the spread of the novel coronavirus, construction has been deemed an essential occupation that can continue operations if done safely. Even in states in which construction has been deemed nonessential, certain infrastructure, public or other construction projects have been deemed essential. Given that, a significant amount of work is continuing in the construction industry in the face of state orders that have slowed or shut down other industries.

In this environment, the steps that need to be taken with regard to worker safety in connection with the potential spread of the novel coronavirus obviously become critical. While no specific OSHA standards apply to virus protection, and the virtually unprecedented nature of this pandemic results in a situation in which no specific regulations have yet been promulgated to address it, there are OSHA standards that the Department of Labor (DOL) has highlighted as applying to worker exposure to the novel coronavirus.

(1) PPE Standards

Of particular interest in the construction industry is the DOL's highlight of personal protective equipment (PPE) standards as applying to occupational exposure to the novel coronavirus, confirming that when gloves, eye and face protection and respiratory protection are required by job hazards, they need to be provided by

employers as previous OSHA PPE standards have indicated. For the construction industry, OSHA regulation §1926.28 mandates that the employer is responsible for "requiring the wearing of appropriate personal protective equipment in all operations where there is an exposure to hazardous conditions or where this part indicates the need for using such equipment to reduce the hazards to employees." Beyond the usual and customary PPE required under construction regulations, (hardhats, safety goggles, boots, gloves, etc.), additional PPE in order to protect from exposure to novel coronavirus, such as gloves and masks, may well be required under the current environment.

(2) General Duty Clause

Furthermore, OSHA's general duty clause, (§1926.21 of the construction standards), requires employers to instruct each employee in the recognition and avoidance of unsafe conditions in the regulations applicable to the work environment to control or eliminate any hazards. As with the PPE standards, the DOL has highlighted the applicability of the general duty clause to coronavirus exposure in the workplace. Employers would be well advised to expand their existing safety plans and hazard recognition protocols to account for these additional infection hazards.

(3) Guidance on Preparing Workplaces

OSHA also recently released its "Guidance on Preparing Workplaces for COVID-19," which is an advisory publication designed to assist employers in protecting workers from

coronavirus. The Guidance does not set forth specific regulations but provides advisory standards that OSHA recommends in furthering its protection. In addition to dividing employees into four levels of risk, the Guidance sets forth specific standards that are recommended for each level of risk. Typically, the high and very high exposure risk employees are in the health care industry, and construction employees will likely fall into the medium exposure risk and lower exposure risk categories.

Even so, under the Guidance, for workers in the medium risk category OSHA indicates that employers "should" implement the following control measures: engineering controls including physical barriers such as clear plastic sneeze guards; administrative controls, including strategies to minimize face-to-face contact, phone based communications, and limiting public access to the worksite; and PPE's, including "some combination of gloves, a gown, face mask, and/or a face shield or goggles." With regard to construction activities in particular, it is important to note that the Guidance indicates that required PPE will vary by work task, the results of that employer's hazard assessment, and the types of exposures employees have a job. With regard to respirators, the Guidance sets forth that "[i]n rare situations that will require workers in this risk category to use respirators, the respirator regulations need to be followed. OSHA's more detailed respirator guidelines (§1910.134) requiring respirators and a comprehensive respiratory protection program where required to protect workers would apply in this instance.

Employers in all risk categories are recommended to implement a plan to reduce worker exposure, including: an infectious disease and preparedness and response plan; implementation of basic infection prevention method measures; policies and procedures for prompt identification and isolation of sick people; communication about workplace flexibilities and protections; and workplace controls as described above.

(4) Reportable/Recordable Condition

Most recently, as of its April 10, 2020 Enforcement Memorandum, the DOL has confirmed COVID-19 as a potential reportable and/or recordable illness under OSHA's recordkeeping requirements. Injuries and illnesses that that must, under OSHA regulations, be reported to the local OSHA office are limited to fatal or extremely serious injuries or illnesses, and certainly those involving hospitalization. OSHA also requires employees to log and keep records of all work-related injuries or illnesses that require medical treatment beyond first-aid, not only those that are reportable. With regard to COVID-19, the enforcement memorandum made it clear that work-related contraction of COVID-19 would be a recordable event under the regulations. While there was some initial consternation in the industry as the extent to which cases of COVID-19 would impose a recordkeeping burden on employers, the recent enforcement guideline from the DOL makes it clear that employers, other than first responders and correctional institutions, will not be required to make a work relatedness determination as to contraction of COVID-19

other than where: “(1) there is objective evidence that a COVID-19 case may be work-related (this can include, for example, a number of cases developing among workers who work closer together without an alternate explanation); and (2) the evidence was reasonably available to the employer. For purposes of this memorandum, examples of reasonably available evidence include information given to the employer by employees, as well as information that an employer learns regarding its employee's health and safety in the ordinary course of managing its business and employee.”

Accordingly, while there is still a recordkeeping requirement with regard to COVID-19 contraction, it appears that OSHA will only enforce that requirement with regard to situations where there is clear objective evidence that the contraction is work-related. In such instances, infection leading to significant medical treatment or death would presumably be reportable, where less severe cases would still require a record being kept in a logbook pursuant to OSHA guidelines.

Conclusion

Overall, while the construction industry faces many of the same challenges that other industries are struggling with in reaction to the widespread impact of the novel

coronavirus pandemic, OSHA's guidelines in that connection need to be considered, but do not appear to place onerous additional safety requirements on the construction industry. While acting within its mandate to protect worker safety, OSHA has issued guidelines that indicate applicability of existing standards, (PPE's, general duty, reporting/recording illnesses that are work-related), as opposed to promulgating new regulations, particularly with respect to industries like construction that likely fall within the medium and lower exposure risk levels. Even with respect to high-risk occupations, the guidelines at this point are advisory only and not in the form of additional mandatory regulations. OSHA mandates continue to be focused on worker safety, and it is important to review safety programs and confirm that the programs in place, potentially coupled with additional safety plans and measures such as administrative and personal protection controls related specifically to the spread of infection, are sufficient to meet the needs of worker safety.

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