

CONSTRUCTION INDUSTRY SAFETY COALITION

March 23, 2020

VIA ELECTRONIC MAIL

Loren Sweatt
Principal Deputy Assistant Secretary of Labor
Occupational Safety and Health Administration
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, D.C. 20210

Re: Construction Industry Safety Coalition
OSHA Response to COVID-19 Outbreak

Dear Ms. Sweatt:

We write on behalf of the Construction Industry Safety Coalition (“CISC”) regarding the Occupational Safety and Health Administration’s (“OSHA”) response to the ongoing COVID-19 outbreak. We recognize that this is an unprecedented public health emergency and appreciate the guidance that OSHA has given to date to employers in addressing the virus. The CISC looks forward to working in partnership with OSHA during these challenging times to protect workers and the public at large.

Notwithstanding this, the CISC is concerned with the position taken by the Agency regarding the recordability of COVID-19 cases and respectfully requests that OSHA reconsider its position. Treating confirmed cases of COVID-19 as typical “illnesses” under the rule has the potential to skew the national statistics on injuries and illnesses and put construction employers in an almost impossible position of determining work-relatedness for a virus that is spread easily – like the common cold and flu – and is becoming widespread in all communities across the country. In addition, given the current shortage of N95 respirators and the request from Vice President Pence and other elected officials that construction employers donate N95 respirators to the public health community, the construction industry requests that OSHA consider adopting a flexible enforcement policy that allows greater use of administrative controls – including job rotation – to minimize workplace exposures to hazardous chemicals and maintain compliance with OSHA permissible exposure limits (“PELs”). Doing so would reduce the need for construction employers to use respiratory protection on their jobsites, freeing up this equipment to be donated to healthcare facilities.

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A. Recordability of COVID-19 Cases

Within the last two weeks, OSHA has attempted to clarify whether cases of COVID-19 may be considered recordable under OSHA's recordkeeping rules. Recently, OSHA has stated that COVID-19 should *not* be treated as the common cold or flu under the regulation. These illnesses are specifically exempted from the geographic presumption for work-relatedness and, thus, are exempt from the recordkeeping rule as a practical matter. OSHA then stated that employers must record COVID-19 when there is (1) a confirmed case of COVID-19 in the workplace, (2) that the employer determines is work-related, and (3) that meets the additional "general" recordability criteria contained in the rule. For several reasons, the CISC requests that OSHA reconsider this position and either treat COVID-19 as the common cold or flu and thus not work-related, limit the application to situations where an employee contracts COVID-19 as the result of providing direct medical treatment to a person diagnosed with a confirmed case of COVID-19, or require employers to log cases of COVID-19 on a separate OSHA 300 Log, which would not impact an employer's overall Days Away, Restricted, or Transfer ("DART") rate.

OSHA's recordkeeping rules serve several purposes, including to create national injury and illness statistics and educate employers regarding safety and health hazards in the work environment. The data is also used by OSHA for enforcement programs and to learn of additional hazards during the course of inspections. Requiring employers to record COVID-19 cases does not support these goals.

COVID-19 has become a global pandemic with the number of cases increasing exponentially as of the writing of this letter. In order to contain and mitigate the spread of the virus, employers are following the CDC guidelines to help prevent the spread of COVID-19, including having workers stay home if they are sick, sending them home if they develop a fever or show signs or symptoms, and prohibiting them from working if they test positive for COVID-19. This is good public health policy to contain the virus, but for a case of work-related COVID-19, it will completely skew an employer's injury and illness records, as every case of COVID-19 will result in a Days, Away, Restricted, or Transfer case. If a small construction contractor has just two or three cases of COVID-19 that might be work-related, its DART rate will likely be completely out of line with previous years of injury and illness data. This complicates the ability of the contractor to track and trend – and learn from – injuries and illnesses in the work environment.

OSHA's position also will only confuse the national injury and illness statistics. Without separating in some meaningful way recordable cases of COVID-19, the Bureau of Labor Statistics ("BLS") data regarding the nationwide injury and illness statistics will be misleading and not useful in assessing nationwide injury and illness trends. This crisis is unlike any other that the country has experienced since OSHA's recordkeeping rules were promulgated. Treating COVID-19 as a "normal" illness does not serve OSHA's or employers' interests.

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As important, it will be almost impossible for a construction contractor to determine whether a particular case of COVID-19 that presents in the work environment is considered “work-related.” Given the number of confirmed and undiagnosed cases and the ever-increasing community spread, a construction contractor would not have the tools to make a definitive judgment as to work-relatedness. It would also require contractors to make invasive inquiries of employees regarding their personal activities, family member medical conditions and exposures, and the like. These types of personal inquiries are generally not necessary for employers making work-relatedness decisions for other injuries and illnesses, and further distinguishes this situation from others.

The recordkeeping rules further suggest that employers may consult with a healthcare professional to assist in the determination as to whether a particular illness is work-related or not. Given the strain on the healthcare system that the country is currently experiencing, it would not be a good use of construction employer or healthcare resources to spend time trying to make difficult work-relatedness determinations for OSHA recordkeeping purposes.

In light of the above, the CISC respectfully recommends that OSHA change its position with respect to recordability of COVID-19 cases. One possible approach would be to treat COVID-19 as the common cold or flu and consider cases to be an exception to the geographic presumption of work-relatedness. Given the nature of how the virus spreads, that would be an appropriate interpretation of the rule.

Alternatively, OSHA could consider further interpreting work-relatedness in this context as only applying to situations where an employee contracts COVID-19 as the result of providing *direct* medical treatment to a person diagnosed with a confirmed case of COVID-19. This approach would greatly assist employers in attempting to make the very difficult work-relatedness determinations discussed above. It would also focus employers on those situations where there is the greatest risk of workplace exposure.

A final option would be for employers to maintain a separate 300 Log of COVID-19 cases that could be reviewed or reported separately to OSHA and BLS, if required. Under this option, an employer’s DART rate would not be impacted by COVID-19 cases and national statistics could be gathered and analyzed without being skewed by same. Should OSHA and BLS wish to request the separate Log from employers, they could do so, but those cases and that Log would be considered separately by the agencies.

The CISC encourages OSHA to consider these options and reconsider its initial approach to recordkeeping. This is an unprecedented situation and the CISC encourages OSHA to think creatively about how it addresses recordkeeping for the virus.

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B. Flexibility of Respiratory Protection

Vice President Pence and other elected officials recently encouraged construction employers to donate N95 and other respirators to the healthcare industry to ensure those workers on the front lines of battling COVID-19 are protected. Many hospitals have separately reached out to employers across the country to request N95 and other types of personal protective equipment (“PPE”). The CISC strongly supports our front line healthcare workers and our members want to help in any way possible.

Having said this, many CISC member companies are concerned about providing respirators that they have stockpiled to healthcare professionals, as OSHA has not put forth any change in enforcement with respect to respiratory protection and the hierarchy of controls in non-healthcare environments. Without some change in enforcement, construction employers will be subject to citation and penalty from OSHA if there are exposure situations that are above the PEL for a hazardous chemical, an employer has already implemented feasible engineering and work practice controls in the work environment, and employees do not wear respiratory protection.

Furthermore, even if construction employers do not provide respirators to healthcare facilities, very soon employers may no longer be able to obtain N95 respirators or even more protective respirators, such as powered air purifying respirators (“PAPRs”). We are requesting that OSHA consider additional enforcement flexibility for construction employers for the foreseeable future given this unprecedented situation.

One approach for the Agency’s consideration is to permit the use of job rotation to reduce exposures to employees to below the PEL for exposure to hazardous chemicals in the workplace. OSHA permits this practice with respect to respirable crystalline silica, but does not do so for other hazardous chemicals on construction worksites. While the CISC understands the Agency’s historical reticence to allow for job rotation when certain chemical exposures are involved, the CISC believes that increased use of job rotation on a short-term basis will not adversely impact the health and safety of employees, as job rotation will be used only after implementation of all feasible engineering control measures and will be designed to keep *all* employee exposures below the PEL.

The CISC welcomes a discussion with OSHA regarding other potential ways to address what is and will continue to be a critical shortage of respirators at least for the foreseeable future. Either way, we urge OSHA to evaluate its enforcement position with respect to respirator use as the shortage will affect a significant portion of the construction industry, and, in fact, many other industries throughout the country.

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In this unprecedented period, the CISC is supportive of OSHA's efforts and all contractors in fighting COVID-19. We hope that OSHA carefully considers these requests.

Sincerely,



Robert Matuga, AVP, Labor, Safety & Health
National Association of Home Builders



Greg Sizemore
Vice President, HSE and Workforce Development
Associated Builders and Contractors



Kevin Cannon, Senior Director, Safety & Health Services
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