

ing. I strongly encourage you to sign-up and attend this ground-breaking virtual seminar. I also encourage you to attend our annual Bootcamp, scheduled for September 16 in Chicago. Though these developments alone are enough to celebrate, I'm also pleased to report that we've secured often requested Austin, Texas as the location for our 2021 Construction Seminar! After our forced hiatus, Austin should offer a wonderful opportunity for us to reconnect. Please calendar April 29 and 30 and plan to meet us in Austin.

Meanwhile, on the off chance that I really did jinx us with my *Game of Thrones* themed warning last fall, I'll close with a positive message. After months of dismal outlook for almost every sector, I'm hopeful that the sun is breaking from behind the clouds. Even recent, wide-spread protests have reflected a cross-section of society and portend

positive change. And so, it is with great optimism that I say, here comes the sun.

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## Feature Articles

# OSHA Attempts Mitigation of Construction-Based COVID-19 Concerns

By Michael Barzyk and Adrienne Arlan



As we all continue to come to terms with the “new normal” of life amidst the COVID-19 pandemic, governmental bodies such as U.S Department of Labor and

the Occupational Safety and Health Administration (OSHA) have responded to concerns over the health and safety of construction employers and employees returning to the jobsite. On May 26, 2020, OSHA released a nonbinding set of guidelines for new and existing construction projects aimed at better protecting construction employers and workers as well as those around them. The guidelines include a table that describes work tasks and their exposure risk level (from “very high” to “lower”), based on the agency’s occupational risk pyramid for COVID-19. More specifically, the guidelines include: the need to assess the risk of COVID-19 outbreak conditions in the surrounding work areas; screening workers for the virus; using physical barriers to separate them from individuals experiencing signs or symptoms of the virus; the shortening or elimination of in-person meetings; the training of employees; increasing airflow in less ventilated areas; the cleaning of tools and equipment with solvents - approved by the Centers for Disease Control (CDC); the provision of proper personal protective equipment (PPE); and the staggering of

work schedules to decrease the number of workers on job sites to maintain social distancing measures.<sup>1</sup>

OSHA's new guidance makes training an integral part of the safety initiative and thus requires further training in the following areas:

- The signs and symptoms of COVID-19 and an explanation of how the disease is potentially spread, including the fact that infected people can spread the virus even if they do not have symptoms.
- All policies and procedures that are applicable to the employee’s duties as they relate to potential exposures to SARS-CoV-2. It is helpful to provide employees with a written copy of those standard operating procedures.
- Information on appropriate social distancing and hygiene practices.

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<sup>1</sup> The Public Works Department in Los Angeles County, California implemented 14 minimum recommended procedures to be practiced at construction sites, including identifying “choke points” where workers are forced to stand together as well as to maintain a daily attendance log of all workers and visitors. See <https://www.dpw.lacounty.gov>

- The types, proper use, limitations, location, handling, decontamination, removal, and disposal of any PPE being used.
- The importance of staying home if they are sick.
- Wearing masks over their noses and mouths to prevent them from spreading the virus.
- The need to continue using other normal control measures, including PPE, necessary to protect workers from other job hazards associated with construction activities.
- Using Environmental Protection Agency-approved cleaning chemicals from List N or that have label claims against the coronavirus for cleaning frequently touched surfaces like tools, handles, and machines.
- The need to report any safety and health concerns.

While these guidelines, in theory, present valid opportunities for construction employers and employees to both resume work as normal and deter the spread of the virus, the consequences flowing from them, namely the ability to best understand and implement the guidelines, is another story. From understanding what is lawfully required of employers and employees under these guidelines, to the time and financial constraints placed on varied members of the construction industry in implementing them, it is clear that many questions will remain on how best to implement the guidelines at construction sites both large and small across the country. It will be important for all the parties involved in the construction project to immediately begin a dialogue on how to comply with these new safety initiatives.

## Compliance issues

The first hurdle to overcome concerning the recent OSHA guidelines is determining the agency's intent in making them legally non-binding. The OSHA webpage on the topic notes the following:

[t]his guidance is not a standard or regulation, and it creates no new legal obligations. It contains recommendations as well as descriptions of mandatory safety and health standards. The recommendations are advisory in nature, informational in content, and are intended to assist employers in providing a safe and healthy workplace<sup>2</sup>.

The publication continues by reminding readers, however, that said guidelines stem from mandatory safety and health standards set by OSHA. It is unclear from the 'disclaimer',

<sup>2</sup> See generally, <https://www.osha.gov/SLTC/covid-19/construction.html>, May 26, 2020

whether the guidance would be interpreted as essentially legally binding on construction companies and employees, and whether or not a construction site can be shut down if there is lack of compliance or if an outbreak occurs on a construction site.<sup>3</sup>

A related concern is the confusing language contained in some of the provisions within the guidelines. One notable example is the subsection on "breathing protection" which states that "*the CDC recommends wearing cloth face coverings as a protective measure on construction sites*"<sup>4</sup>. OSHA's standard with respect to the personal protection equipment (PPE) used at construction sites, however, also requires employers to consider whether their hazard and risk assessments, including construction site job hazard analyses, indicate a need for the use of more protective PPE such as respirators and face shields<sup>5</sup>. The guidance does remind employers that cloth face coverings are not considered to be PPE and thus should not be used as a substitute.

Interestingly OSHA's new guidance does not address whether construction sites in areas with lower infection rates will be required to maintain the same compliance as construction sites in areas with higher infections rates. As states and counties move into different phases of re-opening across the country, it is not clear whether OSHA's new safety guidelines will continue to adapt or remain the same. Contractors should continue to be on the look-out for announcements and press releases from OSHA, the Center for Disease Control (CDC) and the U.S. Department of Labor.

After attempting to understand how these new OSHA guidelines function, a second hurdle for construction employers and employees to overcome will be implementing the guidelines in the field. While some companies may be able to strictly follow the guidelines, others may struggle to do so due, in part, to their size, financial capabilities and the potential lack of resources necessary to assign employees to enforce the new guidelines. One example tied to this disparity is the need to assess the risk for infection at all proposed and existing construction sites (in the face of an unpredictable virus and the fact that new information is learned every day). The unanswered questions posed by

<sup>3</sup> The Smithfield pork plant in South Dakota produced the biggest cluster of COVID-19 positive workers in the United States after 644 workers out of 3,700 tested positive for the virus. The outbreak led to the shutdown of the facility and a massive upstream disruption, stranding farmers without a place to sell their livestock. See <https://www.bbc.com/news/world-us-canada-52311877>

<sup>4</sup> Id.

<sup>5</sup> See 29 CFR 1926 Subpart E.

this requirement are many. If construction employers are required to make these assessments at each construction site, does risk assessment need to be repeated on a continuing basis at these sites, perhaps on a daily or weekly basis? Who pays for this new expense if it was not contemplated in the prime contract? Should the owner of the project be solely responsible for the expense, or should it be passed down to the subcontractors? All of these questions will need to be addressed by the parties to the contract.

Another issue tied to this risk assessment requirement is how quickly and efficiently the foregoing can be accomplished. Implementing new guidelines mid-stream in a construction project likely means that completion schedules and budgets will be altered, perhaps drastically. Nonetheless, with nearly seven million construction employees at approximately 252,000 construction sites across the nation on any given day<sup>6</sup>, the reality of is that “time is money” and the construction industry must adapt and overcome.

A related concern tied to the implementation of the guidelines is the screening of workers for the virus before or throughout construction projects. While this guidepost presents another valiant attempt by OSHA to decrease the spread of the virus amongst the public, there is still a shortage of COVID-19 testing supplies and medical personnel necessary to conduct tests. Does screening simply mean asking employees about symptoms they have experienced or are experiencing, who they live with, and their belief that they may have been exposed to the virus, or does this screening require actual testing of employers and/or employees on site, or in a medical setting? Given the ever-changing nature of the virus and the overall intent of the new guidelines to protect employees and employers, the general contractor of the project should strive to treat its construction site just like any other workplace. Ultimately, a general contractor, just like an owner of any business, should develop a safety plan that is OSHA compliant.

The final and perhaps most daunting task for the construction industry under the new OSHA guidelines is ensuring that the guidelines are implemented while actual construction tasks are occurring. Though it is highly recommended that employers and employees practice social distancing, establish flexible worksites, and install physical partitions where necessary, the essence of construction makes this difficult to envision. The typical construction project is a perfect storm of tight spaces and familiar faces. Often, multiple tradesmen such as carpenters, pipefitters,

welders, foremen, and the like must work closely together to ensure that their work is done correctly and efficiently. Though their tasks are their own to complete, most must work in unison with others to ensure that one person’s work is not undone, destroyed, or otherwise halted, and supervisors and city building officials are required to inspect and monitor the progress of the project at hand. Would it be possible to erect plastic sheets or plexiglass partitions in a manner that would work at all job sites? Moreover, would staggered work schedules with less employees and contractors on site even render such barriers necessary? What if employees fail to respect plastic barriers after they are erected? These are just some of the questions that contractors must deal with to protect themselves and their employees moving forward in the face of the COVID-19 pandemic.

## Best Practices for a Safe Worksites

The best practice for any safety initiative at a construction site is to emphasize top-level ownership, participation by employees and a ‘find and fix’ approach to workplace hazards.<sup>7</sup>

First, a contractor should communicate his or her commitment to a safety and health program. A written policy signed by top management, communicating the policy must be established and must be visible throughout all operations including the bidding process and selection of subcontractors. The contractor should add the new safety initiative to his or her weekly or daily “toolbox talks.”

Second, the contractor should establish goals and objectives to improve the risk of spreading the disease and set expectations for project managers and supervisors. These goals and objectives should be reduced to writing and posted at all times in a location where they can be reviewed by both the employer and employees alike.

Third, the management of the construction firm should provide the resources needed to implement the new safety guidelines. If there is an inability to obtain supplies, the contractor should document his or her attempts to obtain safety supplies. If the contract does not address this added cost, then it could possibly be submitted through a change order and passed through to the owner.

Fourth, a contractor should expect performance of the safety measures and identify a frontline person who will

<sup>6</sup> See <https://www.acg.or/learn/construction-data>

<sup>7</sup> See generally, Occupational Safety and Health Administration 3886, Recommended Practices for Safety and Health Programs in Construction, October 2016.

lead the new safety initiative, then track the company's compliance with the guidelines. There should be positive recognition for meeting or exceeding safety and health goals aimed at limiting the exposure.

Finally, project superintendents and foremen should establish ways to communicate freely and often about safety and health issues and compliance with the guidelines without fear of retaliation.

## Guidance from the North American Building Trades Union

Prior to the May 26th, 2020 OSHA guidance, there was very little the construction industry could look to for guidance to ensure a safe workplace. On April 27, 2020, North American's Building Trades Unions (NABTU) and The Center for Construction Research and Training (CPWR) collaborated and developed national guidelines on infectious disease exposure control practices for construction sites. The NABTU guidance recommends that employers create an 'exposure control plan' that includes designating a site-specific COVID-19 officer and arranging for office staff to work from home.<sup>8</sup> Further, the plan recommended the following:

- Train workers using the most current information on the hazard and control measures;
- Ask workers to self-monitor symptoms of COVID-19 (fever, cough, shortness of breath, chills, muscle pain, headache, sore throat, and new loss of states or smell) before, during, and after shifts, as well as while at home;
- Implement physical distancing procedures such as keeping 6 feet of space between workers and modifying shifts to stagger work;
- Frequently clean and disinfect high-touch surfaces on jobsites and in offices, per Centers for Disease Control and Prevention guidelines;
- Provide soap and running water on worksites, when possible, to allow for frequent hand washing; if running water is unavailable, supply alcohol-based hand sanitizers that contain at least 60 percent ethanol or 70 percent isopropanol; and,
- Provide NIOSH-approved respirators for job task requiring works to operate in confined spaces or close quarters.

<sup>8</sup> See Safety and Health, COVID-19 pandemic: BANTU, CPWR Create Infection Control Guidance for Construction Sites, May 13, 2020.

The NABTU guidance provides specific advice for construction work occurring in health care facilities, recommending that employers educate employees on CPWR's Infection Control Risk Assessment program.<sup>9</sup> Additionally, the NABTU guidance calls on workers to stay home if they are sick or experiencing COVID-19 symptoms, avoid sick people and shaking hands with others, commute to worksites or parking areas alone, and more. "*The covid-19 pandemic clearly underscores the need for and value of a strong, adaptable and multipurpose exposure control standard to prevent the spread of infectious diseases on U.S. construction sites,*" BANTU President Sean McGarvey stated in a press release.<sup>10</sup> "*Amid growing concerns across various industries regarding workplace safety in lieu of federal actions, the building trades are trying to do our best to protect our members and contractors on the job, and - for that matter - everyone in the construction industry.*"<sup>11</sup>

## Conclusion

The construction industry represents a crucial part of the U.S. economy where it is estimated that nearly \$1.3 trillion worth of structures are created each year. Continuing to work under these new safety requirements will lead to conflicts and adversity, but it will be the prime contractor's responsibility to keep the project moving while providing a safe workplace for all. With these non-binding guidelines now in place, and with the increase in construction needs, one thing is certain: the construction industry will remain an essential business forcing everyone involved to adapt quickly or be left behind.

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<sup>9</sup> Id.

<sup>10</sup> Id.

<sup>11</sup> Id.