Common OSHA Issues Affecting Employers During COVID-19

Presented by: Colin Bernard and Mathew Watson

October 2020

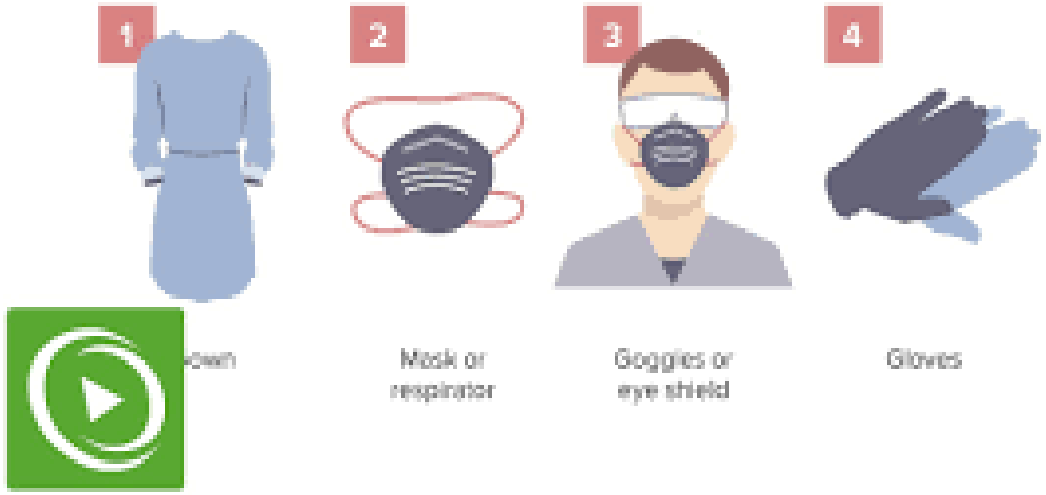
McGILL
GOTSDINER WORKMAN LEPP

COVID-19 in your Facility

- **High Risk -** includes:
  - those entering rooms with suspected or confirmed COVID-19 patients;
  - attending to suspected or confirmed COVID-19 patients through close contact (within 6 feet); or
  - transporting suspected or confirmed COVID-19 patients in enclosed vehicles.

- **Very High Risk** includes:
  - those performing aerosol-generating procedures on these patients, i.e.
    - Bronchoscopy;
    - nebulizer therapy;
    - open suctioning of airways;
    - cardiopulmonary resuscitation.

Personal Protective Equipment



McGILL
GOTSDINER WORKMAN LEPP

Personal Protective Equipment (PPE)

- Maintain an inventory of PPE in the facility:
  - Facemasks;
  - Respirators;
  - Gowns;
  - Gloves; and
  - Eye protection (i.e., face shield or goggles).

PPE

- Identify contacts for getting assistance during PPE shortages.
- Monitor daily use and use PPE burn rate calculator or other tools.
- Make necessary PPE available in areas where resident care is provided.
- Consider designating staff responsible for monitoring and providing just-in-time feedback promoting appropriate use by staff.

Respirator

- N95 respirator (or equivalent or higher-level respirator) before entry into the room of a resident with confirmed or suspected COVID-19.
  - Other respirators include other disposable filtering facepiece respirators, powered air purifying respirators (PAPRs), or elastomeric respirators.

- N95 respirators or respirators that offer a higher level of protection should be used instead of a facemask when performing or present for an aerosol generating procedure.

- **Cloth face coverings are NOT PPE and should not be worn for the care of patients with suspected or confirmed COVID-19 or other situations where use of a respirator or facemask is recommended.**

Respirator

- Disposable respirators and facemasks should be removed and discarded unless implementing extended use or reuse.
  - Perform hand hygiene after removing the respirator or facemask.
  - Reusable respirators should be removed after exiting the patient's room or care area and cleaned and disinfected according to manufacturer's reprocessing instructions prior to re-use.

- When the supply chain is restored, facilities with a respiratory protection program should return to use of respirators for patients with suspected or confirmed COVID-19 infection.

Eye Protection

- Eye protection (goggles or a face shield that covers the front and sides of the face) upon entry to the patient room or care area.
- Ensure compatibility with respirator.
- Remove eye protection after leaving the patient room or care area, unless implementing extended use.
- Reusable eye protection must be cleaned and disinfected according to manufacturer's reprocessing instructions prior to re-use. Disposable eye protection should be discarded after use unless following protocols for extended use or reuse.

Gloves

- Latex, vinyl, nitrile, or other synthetic materials.
- Put on clean, non-sterile gloves upon entry into the patient room or care area.
  - Change gloves if torn or heavily contaminated.
- Remove and discard gloves before leaving the patient room or care area, and immediately perform hand hygiene.

Gowns

- Assure that employees wear appropriate protective clothing (e.g., an isolation gown) when it is anticipated that clothes or a uniform may get soiled with body fluids, including respiratory secretions.

- Put on a clean isolation gown upon entry into the patient room or area.
  - Change gown if soiled.
  - Remove and discard before leaving care area.
  - Disposable gowns should be discarded after use.
  - Cloth gowns should be laundered after each use.

Any workplace requiring respirators must establish and implement a written respiratory protection program with worksite-specific procedures.

Respirator Selection (29 CFR 1910.134(c)(1)(i)

- This one is easy, N95 or better
- Make a record of which respirator you select, and why.

Medical Evaluations (29 CFR 1910.134(c)(1)(ii))

- Medical evaluations of employees required to use respirators.
- Should be the first thing you do for each employee being run through the respiratory program protocols.
- Performed by a physician or other licensed health care professional
- Medical evaluations are needed to prevent injuries or illnesses that could arise from respirator use.
- Use the OSHA supplied questionnaire or conduct medical evaluation

Fit Testing (CFR 29 1910.134(c)(1)(iii))

- Fit Testing procedures for tight-fitting respirators;
- Tests the seal between the respirator's facepiece and user's face;
- Performed at least annually;
- After passing a fit test, a user must use the exact same make, model, style and size respirator on the job;
- Not to be confused with a seal test;
- There are two types of fit tests:
  - Qualitative and Quantitative.
    - Qualitative is usually used for N95 masks.

Qualitative Fit Testing

- A pass/fail test method that uses the wearer's sense of taste or smell, or reaction to an irritant in order to detect leakage into the respirator facepiece.

- Four OSHA approved testing methods:
  - Isoamyl acetate - smells like bananas
  - Saccharin - leaves a sweet taste in your mouth
  - Bitrex - leaves a bitter taste in your mouth
  - Irritant smoke - can cause coughing

Procedures for Proper Use (29 CFR 1910.134(c)(1)(iv))

- Procedures for proper use in routine and reasonably foreseeable emergency situations.

- Written policies should be updated to explicitly detail respirator usage within the COVID-19 context.

Cleaning, storing, etc. (29 CFR 1910.134(c)(1)(v))

- Procedures and schedules for cleaning, disinfecting, storing, inspecting, repairing, discarding, and otherwise maintaining respirators;

- N95s are disposable, but if you are using a different respirator make sure you are including procedures that follow manufacturer recommendations.

Atmosphere- Supplying Respirators (29 CFR 1910.134(c)(1)(vi))

- Procedures to ensure adequate air quality, quantity and flow of breathing air for atmosphere-supplying respirators.

Employee Training (29 CFR 1910.134(c)(1)(vii) – (viii))

- Train employees in potential respiratory hazard exposures during routine and emergency situations;
  - COVID-19 and other airborne pathogens with widespread community infection rates should be explicitly identified.

- Train employees in proper use of respirators, including putting on and removing them, any limitations on their use, and their maintenance.
  - Check to see if the CDC provides guidance for your specific respirators.
  - Make sure employees understand how and when to perform seal test

Program Evaluation (29 CFR 1910.134(c)(1)(ix))

- Procedures for regularly evaluating the effectiveness of the program
  - Should be evaluated at least annually.
    - Examine all records to make sure tests and inspections are up to date.
    - Observe and talk to users to ensure respirators are meeting their needs and that workers understand and follow procedures for using and maintaining them.
  - Record evaluations and findings, note deficiencies, document corrective measures, and correct plan accordingly.

Non-required Respirators (29 CFR 1910.134(c)(2))

- May provide respirators at employee request or permit employees to use their own.
  - Must determine such respirator use will not in itself create a hazard.
  - If allowed, must provide OSHA's "Information for Employees Using Respirators When Not Required Under the Standard"; and
  - Establish and implement those elements of respiratory protection program necessary to ensure that voluntarily respirator use is medically cleared, cleaned, stored and maintained so that its use does not present a health hazard to the user.

Respiratory Protection Program Administrator (29 CFR 1910.134(c)(3))

- Designate a Program Administrator qualified to administer or oversee the program and conduct the required evaluations.
  - Must have training or experience that matches the program's level of complexity.
    - Appropriate training or experience allows Administrator to recognize, evaluate, and control workplace respiratory hazards.
- Must be familiar with:
  - OSHA Respiratory Protection standards
  - How to use the respirators at the facility.
- Responsible for:
  - Provision of respirators;
  - Medical evaluations; and
  - Employee training

Respiratory Protection Program Administrator

- Program questions should be directed to Administrator.
- Administrator must additionally:
  - Identify work areas or tasks requiring respirator protection.
  - Monitor OSHA policy and standards for changes and adjust RPP accordingly.
  - Select respiratory protection products.
  - Monitor respirator use to ensure that respirators are used in accordance with their certification.
  - Distribute and evaluate education/medical questionnaire and make sure medical evaluations are conducted and passed prior to fit tests.
  - Evaluate any feedback information or surveys.
  - Arrange for and/or conduct training and fit testing.
  - Ensure proper storage and maintenance of respirator protection equipment.

Respiratory Protect Program Administrator

- Identify airborne hazards that employees may encounter.
- Evaluate Respiratory Protection Program and its implementation.
- Workers who voluntarily wear respirators comply with the medical evaluation, and cleaning, storing and maintenance requirements of the standard.
- Recent changes in the workplace such as new processes have been evaluated for necessary respiratory program changes.
- Keep a written assessment of program operations and implement changes that may be considered as efforts toward improvement.

Cost (29 CFR 1910.134(c)(4))

- Respirators, training, and medical evaluations provided at no cost to the employee.

Training

- Workers must be trained annually. At a minimum, training should cover:
  - Why employees need to use respirators
  - What a respirator can and cannot do to protect them
  - How to properly inspect, put on, take off, and use a respirator
  - How to perform a “user seal check”
  - Understand that if a successful seal check cannot be performed, use another
  - Effective respirator use in emergency situations
  - Recognizing signs and symptoms limiting or preventing respirator use
  - How improper fit, use, or maintenance can reduce effectiveness
  - Maintenance and storage procedures
  - OSHA respiratory protection standards
  - Identify compromised integrity in a respirator

Respiratory Protection Program Record Keeping

Retain written information regarding:

- Medical evaluations
- Fit testing (fit test records must be maintained until the next fit test)
- The respirator protection program and its various evaluations
- All training efforts and programs

Recording and Reporting

Recording

- > 10 employees – must routinely record serious employee injuries or illness
- COVID-19 is a “recordable illness”

Report

- Not all serious injuries or illnesses are reportable
- COVID-19 illness, injuries, and fatalities are reportable

Ways to Report (29 C.F.R. § 1904.39(a)(3))

- By telephone or in-person to OSHA Area Office nearest to the site of the incident
- By telephone to OSHA's toll-free number: 1-800-321-OSHA
- By on-line submission using the reporting application at www.osha.gov

Primary Reporting Obligations (29 C.F.R. § 1904.39(a-b))

Fatality

- Death of an employee *as a result of a work-related incident* must be reported within 8 hours, provided . . .
- death occurs *within* **30 days** of the work-related incident

In-Patient Hospitalization

- In-patient hospitalization *as a result of a work-related incident* must be reported within 24 hours, provided . . .
- hospitalization *occurs* within **24 hours** of the work-related incident

Applied in the COVID-19 Context - Fatality

Reportable COVID-19 fatality event:

- Employee dies of COVID-19; and
- Employee's death occurs within 30 days of COVID-19 workplace exposure

- If both are satisfied, employer must report to OSHA within 8 hours of determination that death was the result of workplace exposure

Applied in the COVID-19 Context – In-Patient Hospitalization

Reportable COVID-19 hospitalization event:

- Employee hospitalized as a result of COVID-19; and
- Hospitalization occurred within 24 hours of *work-related* COVID-19 exposure.

- If both are satisfied, employer must report to OSHA within 24 hours of determination.

“Work-related” (29 C.F.R. § 1904.5(a))

What is “work-related” exposure?

OSHA definition:

> “if an event or exposure in the work environment either caused or contributed to the resulting condition or significantly aggravated a pre-existing injury or illness”

Likely "Work-Related"

Work Cluster
Several cases develop among employees who work closely together

Prolonged Exposure to Customer/Employee
COVID-19 contracted shortly after lengthy, close exposure to a particular customer or another employee who has a confirmed case

Higher Risk to Exposure
Employee's job duties include having frequent, close exposure to the general public in a locality with ongoing community transmission

AND: no alternate explanation

Likely Not "Work-Related"

Isolated Case

- employee is the only employee to contract COVID-19 in the employee's vicinity; and
- employee's job duties do not include having frequent contact with the general public, regardless of the rate of community spread

High Risk Non-Work Exposure

- employee closely and frequently associates with someone outside of the workplace (e.g., a family member, significant other, or close friend) who: (1) has COVID-19; (2) is not an employee; and (3) exposes the employee during the period in which the individual is likely infectious

"Work-related" (29 C.F.R. § 1904.5(a))

How does the employer satisfy its obligation to determine if exposure was work-related?

1. Ask the employee how she believes she contracted COVID-19.
2. Ask the employee what work and out-of-work activities she has engaged in that may have led to the COVID-19 illness (can be a delicate conversation).
3. Review the employee's work environment for potential exposure.

Best Practice: document this inquiry

OSHA Enforcement Actions

OSHA's Updated Interim Guidance provides:

- "particular attention for on-site inspections will be given to high-risk workplaces, such as hospital and other healthcare providers treating patients with COVID-19, as well as workplaces, with high numbers of complaints or known COVID-19 cases"

Enforcement Actions: Winder Nursing - Georgia

- May 18, 2020
- First COVID-19-related OSHA citation
- Citation: Employer reported six hospitalizations that occurred as early as April 19, but did not inform OSHA until May 5
- Proposed penalty: $6,506
- Citation did not mention COVID-19, but reports confirmed all six were infected

Enforcement Actions: Winder Nursing - Georgia

- Basis for citation was failure to comply with 24-hour hospitalization rule
- "other than serious" violation
- Notable citation findings:
  - No "repeated, willful, or failure to abate violations, nor were there a significant number of high gravity serious violations"
  - "a good understanding of the actions necessary to correct the violations cited"

Enforcement Actions: Winder Nursing - Georgia

- Update September 30, 2020: citation withdrawn
- “based on guidance contained in the updated FAQs”
- Does not identify what aspect of the updated guidance that led to the decision to withdraw

OHNH EMP - Three Ohio Facilities

- July 21, 2020
- Citation:
  - failing to develop a comprehensive written respiratory protection program
  - failing to provide medical evaluations to determine employees' ability to use a respirator in the workplace
- "serious violation"
- Proposed penalty: $40,482

OHNH EMP - Three Ohio Facilities

- Secondary “hazard alert”
  - Allowing N95 respirator use for up to seven days
  - Not conducting initial fit testing
- Inspection occurred because company reported COVID-related hospitalizations of seven employees
- No citation for violating 24-hour hospitalization rule
- Take away: be aware that reporting opens the door to inspection for other COVID-19-related violations
- OHNH: *“We really feel the decision was made in a vacuum . . . we were trying to comply with changing regulations in the midst of the pandemic”*

Hypothetical #1

Monday

- Four CNAs who work the same hall report COVID-19 symptoms
- Two take COVID-19 tests
- All four are ordered to stay home from work and quarantine

Tuesday

- The two employees who took the COVID-19 test receive positive results

Wednesday

- One of the employees who did not take the test is hospitalized

Is the employee's hospitalization reportable?

Hypothetical #1 - Answer

Answer: No

Why?

- Hospitalization occurred more than 24 hours after the possible exposure on Monday.

What if the hospitalization had occurred on Tuesday?

- Likely Yes
- Likely qualifies as a workplace cluster if no alternate explanations
- Depends on what time the hospitalization occurred on Tuesday

Hypothetical #2

- Same scenario
- Except this time, one of the employees who did not take a test dies of COVID-19
- Death occurs 27 days after the Monday all four employees were sent home with COVID-19 symptoms?

Reportable?

Hypothetical #2 - Answer

Answer: Possibly, but additional information needed

- Did the employee appear to fully recover from initial symptoms?
- Did the employee come back to work after being quarantined?
- Was there a possible new exposure outside of work?

Colin Bernard

Mathew Watson

colinbernard@mgwl.com

mathewwatson@mgwl.com

402.492.9200

McGILL
GOTSDINER WORKMAN LEPP