



**Challenges Faced by the Construction Industry as a Consequence of  
COVID-19 and the Workplace Health and  
Safety Ramifications Created by COVID-19**

John D. Surma  
Juliana C. Gaige  
Jackson Lewis P.C.  
1415 Louisiana Street  
Suite 3325  
Houston, Texas 77002  
(713) 650-0404  
[John.Surma@jacksonlewis.com](mailto:John.Surma@jacksonlewis.com)

**John D. Surma** is a principal in the Houston, Texas, office of Jackson Lewis P.C. John counsels and represents clients throughout the United States in workplace safety and health matters before OSHA, MSHA, the U.S. Chemical Safety Board, the Nuclear Regulatory Commission, the U.S. Environmental Protection Agency, the Federal Railroad Administration/American Association of Railroads, the Texas Commission on Environmental Quality, and the Texas Department of Public Safety.

**Juliana C. Gaige** is an associate in the Houston, Texas, office of Jackson Lewis P.C. She began her legal career representing Texas state agencies, insurers and private employers before the Texas Department of Insurance Division of Workers' Compensation and State Office of Administrative Hearings. Her practice soon evolved to defending employers in personal injury, contract and employment lawsuits in state and federal court, counseling and working with employers on health and safety matters before OSHA, and advising employers on state and federal regulatory initiatives.

The COVID-19 pandemic continues to affect every industry, but perhaps none faces the unique challenges that the construction industry faces. General measures to mitigate the spread of the virus were almost universally implemented in March and April, 2020, while other policies and regulations were tailored to meet the specific needs of certain industries, including the construction industry. This fluid situation presents unique challenges to the construction industry, which has been identified as an essential business in nearly all states and often works in an asymmetrical workplace that, by definition, constantly changes. Moreover, construction employers have had to deal with constantly changing guidance on how to prevent the spread of COVID-19, conflicting guidance between federal and state agencies, and increasing enforcement initiatives targeting the construction industry.

### **Changing Guidance and Requirements**

In March of 2020, the Cybersecurity and Infrastructure Security Agency (CISA) and Centers for Disease Control (CDC) identified construction as having a high frequency of close contact exposures to the public or to coworkers resulting from their on-site work-related duties. Accordingly, construction sites were among the first that the Occupational Safety and Health Administration (OSHA) and its state equivalents paid particular attention to in the fight to prevent the spread of COVID-19. Construction employers have contended with evolving guidance for preventing the spread of COVID-19, and often conflicting guidance between federal and state agencies, with the simultaneous increase of enforcement initiatives.

OSHA initially concentrated its enforcement efforts on concerns over construction workers' sharing of tools and equipment and access to adequate sanitation and wash facilities. The New York City Department of Buildings and the Los Angeles Department of Building and Safety were two of the first to provide specific guidance for construction projects, which included a requirement that construction employers develop comprehensive exposure control plans to address COVID-19. Some state safety agencies, such as the California Department of Industrial Relations Division of Occupational Safety and Health, the Washington State Department of Labor & Industries, and Oregon Occupational Safety and Health issued COVID-19-infection prevention guidance for the construction industry. Generally, these guidelines directed construction employers to conduct hazard assessments to identify COVID-19 hazards, implement controls and policies, and communicate clearly about these with their employees.

Some states such as California, Oregon, Michigan, and Virginia enacted emergency temporary standards specifically requiring employers to ensure they have a COVID-19 mitigation plan in place. OSHA also recently indicated it intends issue its own emergency temporary standard which it will aggressively enforce. Moreover, OSHA recently issued a National Emphasis Program ("NEP") and almost all sectors of the industry are targets of the NEP. Meanwhile, employers have been forced to balance workplace safety considerations with workplace cultures, polarized viewpoints, and continually changing dynamics, especially as states continued to modify COVID-19 executive orders and restrictions.

As states lift their COVID-19 related orders, employers must carefully consider the workplace safety measures implemented in their workplaces and whether those measures meet the changing horizon and regulator expectations. Employers operating on a national level or in multiple states face different compliance obligations related to workplace safety requirements in different locations, which could cause significant confusion for employees, customers, visitors, and other third parties that may be onsite. Depending on the sector and the state of construction, the workplace health and safety provisions that relate to COVID-19 may need to be adjusted on a near daily basis.

### **The General Duty Clause**

The Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.*, (OSH Act) requires employers to comply with safety and health standards set forth by OSHA or by a state with an OSHA-approved state plan. Further, the OSH Act's General Duty Clause requires employers to provide employees with a workplace free from recognized hazards likely to cause death or serious physical harm. Accordingly, construction employers should evaluate COVID-19 hazards in their workplace and implement responsive preventive controls, even if there is no standing executive order compelling this action. Construction employers should also consider the general duty clause of the OSH Act as it relates to COVID-19 hazards:

- Did the employer fail to keep the workplace free of a hazard to which employees of that employer were exposed?
- Was the hazard recognized?
- Was the hazard causing or likely to cause death or serious physical harm?
- Was there a feasible and useful method to correct the hazard?

### **OSHA's Guidance for the Construction Industry**

First, OSHA recommends a job hazard analysis be performed to determine the exposure risk level with each work task. *Lower risk* tasks are those that allow employees to remain at least six feet apart and involve little contact with the public, visitors, or customers. *Medium* risk tasks typically require workers to be within six feet of one another, as well as require workers to be in close contact with customers, visitors, or members of the public. *High* risk level tasks involve entering an indoor work site occupied by people such as other workers, customers or residents suspected of having or known to have COVID-19, including when an occupant of the site reports signs and symptoms consistent with COVID-19. Because most construction work tasks would not reach the *very high* risk level, OSHA refers instead to the lower, medium, and high categories.

Next, engineering controls should be implemented, especially for the indoor construction environment in which COVID-19 positive persons are on the work site in close proximity to workers. In that instance, use of closed doors and walls, where feasible, and physical barriers to separate workers from individuals with symptoms is encouraged. At the same time, OSHA recommends periodically reassessing engineering controls to identify opportunities to decrease the need for PPE in short supply.

Because administrative controls also help reduce the risk of exposure, OSHA recommends updating policies consistent with CDC, OSHA and local guidelines for prevent the spread of COVID-19, training employees about the spread in the geographic areas in which they work, and scrutinizing scheduled indoor construction work to assess potential exposure before workers arrive on site. Training should include:

- COVID-19 signs and symptoms, as well as how the disease is spread;
- All COVID-19 policies and procedures applicable to the employee's duties in writing;
- Social distancing and hygiene practices;
- Types, proper use, limitations, location, handling, decontamination, removal, and disposal of used PPE;
- Use of EPA-approved cleanings chemicals effective against the virus on frequently touched surfaces; and
- Importance of reporting any safety and health concerns.

Standard operating procedures for entering home environments or areas where construction is ongoing in occupied buildings should include:

- Requesting any individuals under quarantine or isolation for COVID-19, or experiencing symptoms, remain physically separated from the worker;
- Asking individuals in the workplace to wear a face covering and cover coughs and sneezes; and
- Requesting the air flow in shared spaces be optimized.

Consistent with CDC recommendations, OSHA encourages construction workers to wear a cloth face covering in addition to social distancing. Notably, cloth face coverings are not PPE, and are not a substitute for N95 respirators or surgical masks needed where required to protect the worker. Those employers who determine cloth face coverings should be worn at a site should also ensure, at a minimum, that they fit properly, permit unrestricted breathing, and can be laundered or replaced

regularly. Providing a supply of fresh, clean (or new) face coverings is often required by state or local mandate.

Safe work practices, such as screening visitors and staggering or staging work schedules, are encouraged. Further, employers are asked to identify areas where workers are forced to stand together (hallways, hoists, break areas, buses) and implement policies for social distancing—for instance, in elevators and personnel hoists, ensuring 6 feet between passengers and equipment operators with appropriate respiratory protection and other necessary PPE.<sup>1</sup> Rigorous cleaning protocols and housekeeping are also recommended. In-person meetings should be kept as short as possible and limit the number of attendees. Toilet and handwashing facilities on site should be cleaned and disinfected regularly, along with other frequently touched surfaces.

OSHA points out that most construction workers likely need no PPE beyond what they use during routine job tasks, such as a hard hat, gloves, safety glasses and face mask. Employers must still conduct a hazard and risk assessment pursuant to 29 CFR 1926 Subpart E to determine when workers need PPE, such as gloves, eye protection and face shields. Additional respiratory protection is warranted when close contact with someone suspected or confirmed with COVID-19, in accordance with 29 CFR 1910.134.

### **OSHA's Latest Guidance for All Employers**

OSHA's Guidance on Mitigating and Preventing the Spread of COVID-19 in the Workplace, issued January 29, 2021, incorporates CDC recommendations on preventive measures, and further addresses workplace testing programs, employee vaccinations and sick leave policies. While not specific to the construction industry, it should be reviewed and incorporated into the construction employer's COVID-19 prevention program. Particularly, the following should be incorporated:

- Assignment of a workplace coordinator;
- Identification of where and how workers might be exposed to COVID-19 at work;
- Identification of a combination of measures that will limit the spread of COVID-19 in the workplace, including eliminating the hazard, engineering controls, workplace administrative policies, PPE, and other measures;
- Consideration of protections for workers at higher risk for severe illness through supportive policies and practices;

---

<sup>1</sup> It bears noting that in some states, specific plans for ensuring the safe and healthful use of vehicles by multiple people for work must be created, implemented, and subject to training.

- Establishment of a system for communicating effectively with workers and in a language they understand;
- Educating and training workers on your COVID-19 policies and procedures using accessible formats and in a language they understand;
- Instructing workers who are infected to potentially infected to stay home and isolate or quarantine;
- Minimize the negative impact of quarantine and isolation on workers;
- Isolating workers who show symptoms at work;
- Performing enhanced cleaning and disinfection after people with suspected or confirmed COVID-19 have been in the facility;
- Providing guidance on screening and testing;
- Recording and reporting COVID-19 infections and deaths;
- Implementing protects from retaliation and setting up an anonymous process for workers to voice concerns about COVID-19 hazards;
- Making a COVID-19 vaccine or vaccination series available at no cost to all eligible employees;
- Not distinguishing between workers who are vaccinated and those who are not; and
- Adhering to other applicable standards, such as requirements for PPE (29 CFR 1910, Subpart I (*e.g.*, 1910.132 and 133)), respiratory protection (29 CFR 1910.134), sanitation (29 CFR 1910.141), protection from bloodborne pathogens (29 CFR 1910.1030), OSHA's requirements for employee access to medical and exposure records (29 CFR 1910.1020), and the General Duty Clause, Section 5(a)(1) of the OSH Act, to provide a safe and healthful workplace that is free from recognized hazards that can cause serious physical harm or death.

## **Conclusion**

It is imperative that construction professionals review OSHA's construction-specific guidance, as well as the most recently-issued guidance for all employers to ensure they are taking all necessary steps to comply. This is not only important for protecting the health and safety of construction workers and the general public, but also for avoiding a possible OSHA violation for failure to adhere to its COVID-19 safety guidance. As many in the industry know, OSHA's General Duty clause is

very broadly enforced. Construction professionals should do their best to follow the OSHA guidance by using the resources they have available.