DC Circuit Order Upholding OSHA Decision to Not Issue Emergency Temporary Standard for Infectious Diseases

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Briefly discuss practice group
Manesh Rath is a partner in Keller and Heckman’s litigation and OSHA practice groups. He has been the lead amicus counsel on several cases before the U.S. Supreme Court including Staub v. Proctor Hospital and Vance v. Ball State University.

Mr. Rath is a co-author of three books in the fields of wage/hour law, labor and employment law, and OSHA law.

Mr. Rath served for six years on the Board of Advisors for the National Federation of Independent Business (NFIB) Small Business Legal Center. He served on the Society For Human Resources (SHRM) Special Expertise Panel for Safety and Health law for several years.

He was voted by readers to Smart CEO Magazine’s Readers’ Choice List of Legal Elite; by fellow members to The Best Lawyers in America 2016, 2017 and 2018; selected by Super Lawyers 2016 – 2017, 2017 – 2018; and by corporate counsel as the 2017 Lexology winner of the Client Choice Award.
DAVID G. SARVADI

Mr. Sarvadi practices in the areas of occupational health and safety, toxic substance management, pesticide regulation, and product safety.

Mr. Sarvadi represents clients before a variety of federal and state enforcement agencies in legal proceedings involving OSHA citations, EPA Notice of Violations, TSCA consent orders, CPSC Notices, FIFRA Stop Sale Use and Removal Orders, and EEOC Charges of Discrimination. He works with clients in developing, reviewing, and auditing compliance programs in all of these areas, and in obtaining agency rulings on proposed or novel activities and questions, seeking interpretations of regulations as they apply to specific sets of facts. He has been counsel to the National Coalition on Ergonomics from its inception.

He has a background in occupational health and safety, having worked as an industrial hygienist for more than 15 years and became a Certified Industrial Hygienist in 1978, a designation he held until he voluntarily relinquished it in 2010. Prior to becoming an attorney, he managed a corporate industrial hygiene program for a Fortune 500 company. Mr. Sarvadi was selected by the National Academy of Sciences to participate in a panel of the Institute of Medicine that was asked to review a NIOSH study on the use of respirators. He was asked to participate because of his expertise in law and industrial hygiene.
TOPICS TO BE DISCUSSED

- Background on AFL-CIO emergency petition
- Understanding OSHA Emergency Temporary Standards
- Agency deference
- OSHA’s approach to COVID-19
- What employers should do
AFL-CIO Petition for Emergency Temporary Standard

- March 6, 2020: AFL-CIO petitioned OSHA to issue an ETS, arguing:
  - Infectious diseases, including COVID-19
  - OSHA's evolving voluntary guidance "no substitute" for standard
  - OSHA took no formal action on ETS petition
  - Existing standards (sanitation, respirator, PPE) and GDC don't apply
- May 18, 2020: AFL-CIO filed petition for a writ of mandamus in D.C. Circuit to compel OSHA to issue ETS within 30 days
- May 29, 2020: OSHA formally denied petition for ETS

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This is not the first time the AFL-CIO has petitioned OSHA to issue a rulemaking for infectious disease. AFL-CIO has done similar petitions in the past:
- Asked OSHA to issue ETS in 2005 to address influenza
- Asked OSHA to issue permanent standard in 2009 for infectious diseases
- OSHA began rulemaking for infectious diseases but never completed it
- Request for information from 2010
- SBREFA panel took place and issued report on infectious diseases in 2014
- Public stakeholder meetings on an infectious disease standard in 2011.

This petition came about in response to COVID-19
AFL-CIO: in the face of a global health emergency causing more deaths in less time than any other workplace crisis OSHA has faced in its fifty-year existence, OSHA's refusal to issue an ETS constitutes an abuse of agency discretion so blatant and of "such magnitude" as to amount to a clear "abdication of statutory responsibility."

Argued that OSHA's evolving voluntary guidance "no substitute" for mandatory COVID-19-specific duties on employers.

AFL-CIO argued that OSHA effectively denied its petition and is unreasonably delaying its statutory obligations by not formally responding to the petition in 2 months, besides an informal letter from the Secretary or Labor defending the adequacy of OSHA's guidance.

The AFL-CIO filed a petition for a writ of mandamus in the DC Circuit to compel OSHA to issue the ETS within 30 days (Argue OSHA can issue ETS within 30 days because it has been working on infectious disease standard already).

The Court of Appeals has authority to consider claims that an agency unlawfully withheld or unreasonably delayed regulatory action and the court can compel the agency to take action.

OSHA denial of petition: Letter from Loren Sweatt, Principal Deputy Assistant Secretary for OSHA, said that OSHA determined it lacks compelling evidence to find that an undefined category of infectious diseases generally pose a grave danger for which an ETS is an appropriate remedy. Also not necessary to issue an ETS for COVID-19 because the guidance issued, enforcement of existing standards, in combination with COVID-19 related requirements and guidelines by other entities render an ETS unnecessary.

It would be counter productive to attempt to fashion a COVID-19 standard at this time given that it is the subject of a constantly evolving multi-agency response.
OSHA Emergency Temporary Standards

- OSH Act provides for ETS if Secretary determines:
  - Employees are exposed to grave danger from new hazards
  - ETS is necessary to protect employees from such danger
- AFL-CIO: employees are in “grave danger” due to COVID-19
  - Essential workers
  - Health care providers, nursing home aides, first responders
  - Workers going back to work as stay-at-home orders are lifted
  - “a stunning act of agency nonfeasance”

JAV
- Section 6 of the OSH Act gives OSHA the authority to issue emergency temporary standards if the Agency determines:
  -- that employees are exposed to grave danger from exposure to new hazards, and
  -- that an emergency standard is necessary to protect employees from such danger.
- So if OSHA issues an emergency temporary standard, it takes effect immediately until it is superseded by a permanent standard which OSHA is supposed to promulgate within 6 months of the ETS

AFL-CIO argued that an ETS is appropriate because COVID-19 put employees in grave danger, saying that the virus poses a danger of incurable, permanent, or fatal consequences to workers exposed to the hazard. They cite to figures that over 2 million people in the US have been infected with the virus and about 110,000 people have died.

AFL-CIO also discussed how the dangers of COVID are especially true for workers who were deemed to be essential workers so they still went into work, and of course health care workers and nursing home aides and emergency responders who come into direct contact with people with the virus, and also for workers going back to work as state stay at home orders are lifted.

AFL-CIO argued that an OSHA standard for infectious diseases is necessary to protect employees from this grave danger. They asked OSHA to issue an ETS that would require employers to evaluate their workplaces for the risk of airborne disease transmission and to develop a comprehensive infection control plan with specified elements like social distancing, PPE, access to hand sanitizers, testing and quarantining.

And the AFL-CIO called OSHA’s refusal to take action on an ETS a stunning act of nonfeasance in the midst of this workplace health emergency.
AGENCY DEFERENCE ARGUMENTS

- OSHA:
  - Existing standards, voluntary guidance and General Duty Clause adequately protect workers from COVID-19

- AFL-CIO claims:
  - Existing standards do not impose specific measures
  - Guidance not mandatory
  - General duty clause violations difficult to prove

- D.C. Circuit: OSHA "reasonably" determined an ETS not necessary

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OSHA:
-- two prong strategy:
  1) enforcing existing rules
  2) using rapid, flexible guidance that is industry specific so that it can be easily updated as information on COVID and spread prevention continues to evolve
- AFL-CIO wants OSHA to issue ETS which would go into effect immediately without public input, and then a permanent rule informed by comment just 6 mos later
- "That is warp-speed for an agency like OSHA that must act upon substantial evidence with extensive public input, and ill-suited for an evolving hazard"
--ETS is rarely used and a drastic measure
-- to find that an ETS is necessary to address the grave danger, OSHA has to show that an ETS would substantially reduce the grave danger during the time the ETS would be in effect and that such a reduction could not be obtained by enforcing existing OSH Act requirements or widespread voluntary efforts to address the hazard
-- AFL-CIO lacks evidence that infectious diseases generally (as a group) pose a grave danger to worker safety (cannot issue broad standard to entire class of known and unknown substances and agents ) or that enforcement of existing standards would not substantially reduce the danger and so an ETS is needed
-- AFL-CIO fails to meet its high burden of overcoming the great deference that is due to OSHA's assessment of facts and policies underlying its decision that an ETS is not necessary now.
-- all enforcement guidance and guidance to industries; investigations of complaints
-- existing standards and general duty clause
-- coordination with other agencies and businesses and employee groups
-- coordination with state plans
-- monitoring state and local activities and industry guidance
-- attempting to permanently address workplace exposure to COVID based on evolving information is counterproductive and would deprive agency of needed flexibility to respond
AFL-CIO has not demonstrated that the lack of an ETS is the traceable cause of any injury
Setting rules in stone through an ETS and later a permanent rule may undermine worker protection by permanently mandating precautions that later prove to be ineffective

AFL-CIO
--Concerned about nonmandatory guidance because of non-uniform implementation
--Says given reported illnesses and deaths, it "should be obvious" that voluntary employer action has not adequately protected workers from COVID
--Also argued other agencies are taking regulatory action to address COVID to OSHA should too
--General duty clause: difficult to prove that hazard is present and that it is feasible for employers to abate the hazard

The Court accords great deference to the policy judgments of the agency unless their decision lacks support in the record.
DC Circuit: denied AFL-CIO petition for a writ of mandamus
OSHA's decision to not issue an ETS is entitled to considerable deference
In light of the unprecedented nature of the COVID 19 pandemic, as well as the regulatory tools that OSHA has at its disposal to ensure employers are maintaining hazard-free work environments, OSHA reasonably determined that an ETS is not necessary at this time

F YI Amicus briefs arguing why Secretary's decision is supported:
Chamber and other associations amicus brief
Secretary's decision is supported
Enforceable OSHA standards already protect workers from COVID such as PPE, eye and face protection, respiratory protection, sanitation, and hazard communication standard
OSHA has issued industry specific guidance explaining how these existing standards apply and articulated best practices for businesses and employers to follow in light of evolving scientific understanding of COVID
Approach is reasonable and preferable because data on COVID continues to develop so employers have to be able to adapt to the changing circumstances
Also CDC has issued guidance for industries
Better than a rigid uniform standard
Easier to quickly revise guidance
Guidance can be tailored to the needs of a specific industry
Private sector also issuing best practices

NAHB, ABC and other contractors amicus brief
Already a lot of construction specific guidance out there so no need for ETS
Not enough time for OSHA to assess how rule can apply to all industries
AFL-CIO petition does not present evidence of a need or risk specific to construction
Petition trivializes extensive industry efforts to implement control measures and active involvement of state and local authorities
The ETS would not provide for construction specific considerations (like being outdoors with continuous air flow)
General Duty Clause  
Guidance (Interpretations)  
Specific Regulations

OSH Act (1970)

- Personal Protective Equipment  
- Sanitation  
- Recordkeeping
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So before we get into the DC Circuit's ruling on the case, we wanted to give some background on the level of deference the D.C. Circuit affords OSHA when it decides not to issue an ETS.

The D.C. Circuit here looked to precedent in the Public Citizen Health Research Group vs. Auchter case from 1983 where the DC Circuit decided that OSHA is entitled to considerable deference when deciding whether or not to issue an ETS unless their decision lacks support in the record.

So that was the standard applied in this case by the D.C. Circuit.
OSHA’s Approach to COVID-19

- Enforcement of existing standards and General Duty Clause
- Compliance assistance
- Responding to complaints
- New guidance
  - Guidance for Preparing Workplaces for COVID-19
  - Respirators (5)
  - Reporting and recordkeeping (3)
  - High risk industries (9)
  - Enforcement policy
  - Procedures for complaints, referrals and severe illness reports

Let's dig in more to the actions that OSHA has taken so far to address COVID-19 that OSHA cited to for support that an ETS is not required.

First, OSHA already has existing standards that can address worker protections that are relevant to infectious diseases. For example, the respiratory protection, PPE, hazard communication, sanitation and bloodborne pathogens standards impose enforceable requirements on employers that can protect employees from airborne exposures.

OSHA has also worked to provide compliance assistance to companies by answering employers', workers', industry representatives and union representatives questions webinars, OSHA’s online portal, and phone calls. OSHA also shares best practices with its State Plan states every two weeks. OSHA’s consultation programs have also conducted over 4,000 outreach activities and its regional and area offices have conducted over 900 outreach activities related to COVID-19.

OSHA has also responded to COVID-19-related complaints. OSHA cited that as of May 21, OSHA has received about 4,200 COVID-19 related complaints, of which almost 3000 have been closed. And they are addressing whistleblower complaints.

And finally, OSHA has issued numerous guidance documents since March that address COVID-19, starting with guidance for preparing workplaces for COVID-19 so employers can assess the hazards in their workplaces; to issuing 5 different guidances on the use of respirators, and 3 different guidances that address recordkeeping and reporting, and at least 9 guidance documents addressing specific high risk industries like nursing home workers and food delivery services and meat packaging workers. And it clarified its enforcement policy during COVID-19 as well as its procedures for handling complaints and referrals during the pandemic.

So OSHA has been using all of these tools to address COVID-19.


Respirator Guidance:
U.S. Department of Labor Expands Temporary Guidance for Respirator Fit-Testing to All Industries During COVID-19 Pandemic - OSHA has expanded temporary guidance provided in a March 14, 2020, memorandum regarding supply shortages of N95s or other filtering facepiece respirators (FFRs) due to the COVID-19 pandemic. This expanded guidance applies to all workplaces covered by OSHA where there is required respirator use.


U.S. Department of Labor Issues Guidance for Respirators Certified under Other Countries' Standards During COVID-19 Pandemic – OSHA has issued interim enforcement guidance regarding disposable N95 FFRs that are either certified under certain standards of other countries or jurisdiction or certified under other countries' or jurisdictions' standards but are expired.

U.S. Department of Labor Issues Guidance for Respiratory Protection During N95 Shortage Due to COVID-19 Pandemic – OSHA has issued interim enforcement guidance to help combat supply shortages of disposable N95 FFRs. The action marks the department’s latest step to ensure the availability of respirators and follows President Donald J. Trump’s Memorandum on Making General Use Respirators Available.

Protecting Workers in High-Risk Industries

U.S. Department of Labor Issues Alert to Keep Nursing Home and Long-Term Care Facility Workers Safe During Coronavirus Pandemic – OSHA issued an alert listing safety tips employers can follow to help protect nursing home and long-term care facility workers from exposure to the coronavirus.

U.S. Department of Labor Issues Alert to Help Keep Retail Pharmacy Workers Safe During the Coronavirus Pandemic – OSHA has issued an alert listing safety tips employers can follow to help protect retail pharmacy workers from exposure to the coronavirus.

U.S. Department of Labor Issues Alert for Rideshare, Taxi And Car Service Safety During Coronavirus Pandemic – OSHA has issued an alert listing safety tips to help reduce the risk of exposure to the coronavirus in the car service industry.

U.S. Department of Labor Publishes New OSHA Poster Aimed At Reducing Workplace Exposure to the Coronavirus – OSHA issued a new poster listing steps all workplaces can take to reduce the risk of exposure to coronavirus.


U.S. Department of Labor Issues Alert to Keep Retail Workers Safe During Coronavirus Pandemic – OSHA issued an alert listing safety tips employers can follow to help protect retail workers from exposure to the coronavirus.

U.S. Department of Labor Issues Alert for Help Keep Manufacturing Workers Safe During Coronavirus Pandemic – OSHA issued an alert identifying workplace safety practices to help protect manufacturing workers from exposure to coronavirus.

U.S. Department of Labor Issues Alert to Help Keep Construction Workers Safe During The Coronavirus Pandemic – OSHA issued an alert identifying workplace safety practices to help protect construction workers from exposure to coronavirus.

OSHA Issue Safety Alert for Restaurant, Food and Beverage Businesses Providing Curbside Pickup and Takeout Service – OSHA released guidance to help restaurant, food and beverage businesses to keep employees safe while utilizing curbside pickup and takeout service delivery methods. The guidance includes practical recommendations like avoiding direct hand-off when possible and practicing social distancing.

Enforcing Safety in the Workplace

U.S. Department of Labor Adopts Revised Enforcement Policies For Coronavirus – OSHA has adopted revised policies for enforcing its requirements with respect to coronavirus as economies reopen in states throughout the country.

U.S. Department of Labor Announces OSHA Interim Enforcement Response Plan to Protect Workers During The Coronavirus Pandemic – OSHA announced an interim enforcement response plan for the coronavirus pandemic that provides instructions and guidance to OSHA Area Offices and compliance safety and health officers for handling coronavirus-related complaints, referrals and severe illness reports. The plan concentrates enforcement on coronavirus exposures of health workers, emergency responders and others.

U.S. Department of Labor Reminds Employers That They Cannot Retaliate Against Workers Reporting Unsafe Conditions During Coronavirus Pandemic – OSHA is reminding employers that it is illegal to retaliate against workers because they report unsafe and unhealthful working conditions during the coronavirus pandemic. Acts of retaliation can include terminations, demotions, denials of overtime or promotion, or reductions in pay or hours.

OSHA and CDC Issue Interim Guidance to Protect Workers in Meatpacking and Processing Industries – OSHA and the Centers for Disease Control and Prevention released joint interim guidance for meatpacking and meat processing workers and employers—including those involved in beef, pork, and poultry operations. The guidance includes recommended actions employers can take to reduce the risk of exposure to the coronavirus.

Statement of Enforcement Policy by Solicitor of Labor Kate O'Scannlain and Principal Deputy Assistant Secretary for OSHA Loren Sweatt regarding Meat and Poultry Processing Facilities – Responding to President Trump’s Executive Order, Solicitor of Labor Kate O'Scannlain and OSHA Principal Deputy Assistant Secretary Loren Sweatt released a statement of enforcement policy. The statement, which addresses guidance and enforcement actions regarding worker safety at meat, pork and poultry processing facilities, provides clarity for businesses whose continued operation will be critical to America’s food supply.

Offering Clear Direction for Employers:


U.S. Department of Labor Considers Employer's Good Faith Efforts When Enforcing Compliance During COVID-19 Pandemic – OSHA issued interim guidance that advises compliance safety and health officers to evaluate an employer's good faith efforts to comply with safety and health standards during the coronavirus pandemic. Employers are also expected to take corrective
action as soon as possible once normal activities resume.
OSHA's Approach to COVID-19

- General Duty Clause elements:
  - Employer failed to keep workplace free of hazard that employees were exposed to
  - Recognized hazard
  - Hazard caused or was likely to cause death or serious physical harm
  - There was a feasible and useful method to correct the hazard

- What are "feasible and useful" methods to address COVID-19?
  - Recommendations from state and local authorities, agencies, industry
  - Available guidance "enhances" power of GDC

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OSHA also has asserted that in addition to its standards, the General Duty Clause imposes additional mandatory obligations on employers.

Under Section 5(a)(1) of the OSH Act, employers are required to furnish its employees a place of employment free from recognized hazards that cause or are likely to cause death or serious physical harm.

And so OSHA can cite an employer for a general duty clause violation if (READ ELEMENTS)

Even in OSHA's April guidance on Interim Enforcement Response for Coronavirus, it says that if there are deficiencies that are not addressed by OSHA's standards, then the general duty clause can be considered.

OSHA said in its brief that COVID is a recognized hazard and that "employers who fail to take preventative measures against COVID-19 face potential liability under the general duty clause."

--So all of the guidance from CDC, OSHA, and other government authorities and private entities demonstrate the possible feasible methods employers may use.

--Employers have the ability to choose the effective method to abate the hazard under the general duty clause.

--The public availability of so much COVID-19 guidance actually enhances the power of the general duty clause as an enforcement tool.
COVID-19 Litigation

- **Wal-Mart**
  - Wrongful death suit (Illinois) for allegedly failing to adhere to CDC and OSHA guidelines
- **McDonald’s**
  - Lawsuit in Chicago (state court) seeking preliminary injunction
  - Public nuisance claims for creating unsafe workplace
- **Smithfield**
  - Public nuisance lawsuit in Missouri (dismissed in federal court)
  - Case being investigated by OSHA
- **Amazon**
  - Public nuisance suit in New York

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Walmart case: from April OSHA 30/30
Wal-Mart claim in Cook County, Illinois
Two employees died of COVID-19 and others experienced symptoms
Estate of one deceased employee brought suit alleging wrongful death, negligence, and willful and wanton misconduct for allegedly failing to adhere to CDC and OSHA guidelines
Alleged failures:
Cleaning failures
Social distancing
Failures in Providing PPE
Failure to warn employees of other symptomatic employees
Infection prevention measures
McDonalds
Suit brought by 4-5 employees
Legal theory in the public health context and could provide a way for the courts to enforce COVID-19 safety precautions
Allegedly failed to provide hand sanitizer, gloves, masks, and has not notified its staff when an employee becomes infected with coronavirus

Smithfield- similar suit but bought in federal court. Dismissed. The court concluded that dismissal was appropriate because the two traditional requirements of the primary jurisdiction doctrine applied. First, the court reasoned that the merits of plaintiffs’ claims will hinge on the determination of whether the company is complying with the CDC/OSHA joint guidance for industry operations, a matter that OSHA, in coordination with the USDA, is better positioned to assess. Second, the court concluded that deference to OSHA/USDA will ensure uniform national enforcement of the regulatory guidance. The court rejected plaintiffs’ argument that deferral would result in delay that might adversely impact employees and the community, citing emergency relief procedures available through OSHA’s statutory framework.

Amazon public nuisance suit (common law)
Brief from members of Congress (Open Society Policy Center)- brief submitted to U.S. District Court for the Eastern District of
New York in Amazon case (also public nuisance case). 
Plaintiffs identified practices in a fulfillment center that promote the spread of COVID-like practices that limit handwashing, sanitization, use of sick and personal leave, and limiting worker knowledge of potential exposures.
Brief asks court to take action and not defer to OSHA (primary jurisdiction doctrine). OSHA has not promulgated a relevant standard here and OSHA does not protect non-employees (family members of plaintiffs) 
OSHA has not issued citations for COVID violations—only one, and it was a recordkeeping violation
Argue OSHA not inspecting enough facilities (only focusing on health care facilities); mostly doing non-formal investigations (hazard alert letters) and not prioritizing onsite inspections
No standard directly addresses exposure to airborne or aerosol diseases in the workplace
Court can enforce common law tort of public nuisance
This is a claim that affects the public (outside of the workplace) and not just workers
Not preempted by OSHA
No state law actions are preempted by GDC
AFL-CIO FILED FOR REHEARING

- June 18
- Moved for rehearing en banc
- Alleges that the three-judge panel “misstated” OSHA’s arguments
COMMONWEALTH OF VIRGINIA

- State Plan State
- Emergency Temporary Standard
  - Six month
  - Recognizes droplet, airborne nuclei droplets, surface contact
  - Compliance with CDC publications deemed compliance
  - Exposure assessment
  - Training
  - Reporting symptoms and barring from workplace, return policy
  - Physical barriers, telecommuting, staggered shifts, mandatory distancing, face coverings, hand washing, sanitizing
  - 62 p.
WHAT EMPLOYERS SHOULD DO

- Develop an exposure assessment and control plan
- Continue to follow:
  - CDC and OSHA guidance
  - Other agency guidance
  - State and local regulations
  - Monitor as guidance evolves
- Tailor employee protections to specific industry and circumstances
- If require certain precautions (social distancing, face masks, testing, disinfecting procedures, etc.) document source of recommendation and date of source
IF YOU HAVE QUESTIONS:

Catch Manesh Rath on Twitter:
@RathManesh

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• Khiaw.com/osha3030
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OSHA 30/30
A thirty minute update on OSHA law every thirty days
with Manesh Rath

at 1:00 PM Eastern U.S.
July 22, 2020
www.khlaw.com/OSHA3030
Thank you!

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IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
ST. JOSEPH DIVISION

RURAL COMMUNITY WORKERS ALLIANCE and JANE DOE,1
Plaintiffs,
v. No. 5:20-CV-06063-DGK
SMITHFIELD FOODS, INC. and
SMITHFIELD FRESH MEATS CORP.,
Defendants.

ORDER GRANTING DEFENDANTS’ MOTION TO DISMISS

This lawsuit arises from Plaintiffs’ allegations that Defendant Smithfield Foods, Inc. and
its wholly owned subsidiary, Defendant Smithfield Fresh Meats Corporation (collectively,
“Smithfield”) have failed to adequately protect workers at its meat processing plant in Milan,
Missouri, (“the Plant” or “the Milan Plant”) from the virus that causes COVID-19. Now before
the Court are Plaintiffs’ Motion for a Temporary Restraining Order (“TRO”) and Preliminary
Injunction (Doc. 3), and Smithfield’s motion to dismiss and/or stay pursuant to the primary-
jurisdiction doctrine (Doc. 28).

After carefully reviewing the motions and the existing record, the Court holds that it
should decline to hear this matter pursuant to the primary-jurisdiction doctrine to allow the
Occupational Health and Safety Administration (“OSHA”) to consider the issues raised by this
case. But even if the Court did not apply the primary-jurisdiction doctrine, the Court would not

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1 The Court notes that there is currently a motion pending to allow Jane Doe to proceed using a pseudonym (Doc.
42). Given the Court’s dismissal of this action and the denial of injunctive relief, the Court finds that requiring
Plaintiff to reveal her identity would serve no important purpose, especially given that another named plaintiff
appears in this case. The issues presently before the Court are—for the most part—purely legal, and the majority of
Plaintiff’s allegations are not individualized. Thus, the public’s interest in Plaintiff’s identity and the prejudice to
Smithfield in allowing Plaintiff to proceed anonymously for purposes of deciding the instant motions is minimal.
Plaintiff Doe may therefore use a pseudonym for purposes of the motions presently before this Court. This Court
reserves judgment on her ability to do so should this case proceed to further stages of litigation.
issue a preliminary injunction because Plaintiffs have not met their burden of proving that the extraordinary remedy of an affirmative injunction is justified. Smithfield’s motion is GRANTED, and the case is DISMISSED WITHOUT PREJUDICE.

Background

The Background section of this order is arranged in chronological order. Although regrettably lengthy, it details how the regulatory environment in which meat-processing plants operate is constantly changing during this unique national emergency.

In late 2019, a new coronavirus emerged named severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2).² This virus causes coronavirus disease 2019 (COVID-19), a respiratory illness that can cause serious health problems, including death.³ SARS-CoV-2 is highly contagious; it appears to spread from person to person through respiratory droplets produced when an infectious person coughs, sneezes, or talks, and the virus can be spread by presymptomatic, or even asymptomatic, individuals.⁴

A global pandemic ensued, and the virus and COVID-19 reached the United States in early 2020. On March 13, 2020, the President declared a national emergency concerning COVID-19. That same day, Missouri’s governor also declared a state emergency, and on April 3, the Missouri Department of Health and Senior Services issued a stay-at-home order that mandated all individuals abide by social-distancing requirements and closed all nonessential

³ Id.
⁴ Id.
businesses in Missouri through May 4. The stay-at-home order defines essential businesses in accordance with guidance from the U.S. Department of Homeland Security, Cybersecurity & Infrastructure Security Agency (“Homeland Security”), which identified livestock-slaughter facilities, including the Plant and its operations, as “critical infrastructure.” On April 9, the Centers for Disease Control (“CDC”) published Interim Guidance for Businesses and Employers to Plan and Respond to Coronavirus Disease 2019 (COVID-19), which outlined several policies and procedures employers should implement to help prevent workplace exposure and community spread of the virus.

On April 22, OSHA sent Smithfield a “Rapid Response Investigation” requesting information regarding its COVID-19 work practices and infection at the Milan Plant, giving Smithfield seven days to respond. As part of its inquiry, OSHA requested information about Smithfield’s COVID-19 practices including what, if any, personal protective equipment has been given to its workers, what engineering controls have been implemented, what contact tracing methods have been employed, and what policies have been changed or implemented in light of the pandemic (Doc. 29-2). Smithfield responded on April 29 (Doc. 41).

The next day, on April 23, Plaintiffs Jane Doe and the Rural Community Workers Alliance (“RCWA”) filed suit. They allege Smithfield is not taking adequate steps to prevent transmission of the virus at its Plant, thereby endangering workers and members of the surrounding community. According to her declaration, Doe is a current Smithfield employee who has worked at its Milan Plant for at least five years. She claims she currently works on the...

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“cut floor” where animals are broken down into products and packaged.

The RCWA is a Missouri non-profit advocacy group whose members consist exclusively of workers in Northern Missouri. Several members of RCWA’s current leadership council work at the Plant, and sixty to seventy workers who attend its meetings work at the Plant, including Jane Doe.

Defendant Smithfield is one of the largest meat-processing companies in the world, with meat-processing plants all over the United States, including in Milan, Missouri. Several of its meat-processing plants in the United States have closed recently due to outbreaks of COVID-19 among its workers.

The Complaint (Doc. 1) alleges that several meat-processing plants in this country owned and operated by Smithfield have become major COVID-19 “hot spots.” It also alleges that in direct contravention of CDC guidelines, Smithfield has not implemented certain precautions to keep its workers and the Milan community safe from the virus. Such measures include keeping adequate distance between workers, prohibiting workers from taking a break to wash their hands or face, preventing workers from covering their faces if they need to cough or sneeze, implementing a sick-leave policy that penalizes workers for missing work even if they are exhibiting COVID-19 symptoms, and failing to implement plans for testing and contact tracing.

The Complaint brings state-law claims for public nuisance and breach of duty to provide a safe workplace. Plaintiffs are not seeking monetary damages, only declaratory judgments stating that: (1) Smithfield’s practices at the Plant constitute a public nuisance; and (2) Smithfield has breached its duty to provide a safe workplace.

The same day Plaintiffs filed suit, they also moved for a temporary restraining order and preliminary injunction (Doc. 3), seeking to force Smithfield to: provide masks; ensure social
distancing; give employees an opportunity to wash their hands while on the line; provide tissues; change its leave policy to discourage individuals to show up to work when they have symptoms of the virus; give workers access to testing; develop a contact-tracing policy; and allow their expert to tour the Plant. Attached to the motion were declarations from: (1) Jane Doe, who described working conditions at the Plant and stated she was afraid for health and safety, as well as the health and safety of the Milan community, because of what she considers inadequate safety procedures at the Plant; (2) RCWA’s Executive Director, Alex Fuentes; (3) a senior lobbyist with the non-profit organization Food & Water Watch (“FWW”), Anthony Corbo; (4) a lawyer, Thomas Fritzspeche, who has interviewed a number of Alabama poultry-plant workers about working conditions and authored a 2013 report for the Southern Poverty Law Center about modern industrial slaughterhouse workers; and (5) an occupational-medicine specialist, Dr. Robert Harrison, who works as Clinical Professor of Medicine at the University of California, and also serves the California Department of Public Health.

On April 26, the Court set a videoconference hearing on the preliminary injunction motion for April 30. That same day, the CDC and OSHA issued *Meat and Poultry Processing Workers and Employers – Interim Guidance* (“the Joint Guidance”), which provided supplemental guidance to meat-processing plants concerning COVID-19. The Joint Guidance states that to reduce the risk of transmission among employees, employers at meat-processing facilities should, where “feasible,” implement engineering controls, such as staggering shifts and breaks, requiring workers to stay six-feet apart, and/or erecting physical barriers; place handwashing or hand-sanitizing stations in multiple locations and encourage hand hygiene; give workers additional short breaks to wash hands; provide tissues; and allow workers to take breaks

in alternative areas to ensure social distancing. It also recommends employers provide personal protective equipment for workers to use during their shift and increase the frequency of sanitization in work and common spaces. It states employers should educate employees on measures they can take to decrease the risk of spreading the virus and provides a specific list of measures employers should take to promote social distancing, such as providing visual cues on floors, as reminders for social distancing. It encourages employers to screen workers for COVID-19 by implementing temperature checks prior to entering the workplace and sending home workers who appear to have symptoms (e.g., cough, fever, or shortness of breath), and monitor workers’ contacts so they can alert anyone who may have been exposed to the virus. Finally, it recommends employers review leave and incentive policies so as to not penalize workers for taking sick leave if they contract COVID-19.

On April 27, Smithfield filed a motion to dismiss this case pursuant to the primary-jurisdiction doctrine, arguing this Court should defer to OSHA in this case. The next day—April 28—the President signed an executive order (“the Executive Order”) under § 4511(b) of the Defense Production Act (“DPA”), 50 U.S.C. § 2061 et seq., delegating authority to the Secretary of Agriculture to take all appropriate action “to ensure that meat and poultry processors continue operations consistent with the guidance for their operations jointly issued by” the CDC and OSHA.8

On April 29, Smithfield made several filings, including a supplemental brief to its motion to dismiss, which alleged that pursuant to the Executive Order, the United States Department of Agriculture (“USDA”) now had jurisdiction over this case. It also submitted its Suggestions in

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Opposition (Doc. 32) to the preliminary injunction motion. Attached to its brief as exhibit A (Doc. 32-1) is a declaration from the Plant’s general manager, Tim Messman, along with pictures of the Plant and copies of the Plant’s policies and procedures related to COVID-19. Exhibit B (Doc. 32-2) is a declaration from John Henshaw, the head of OSHA from 2001 to 2003.

Later that same day, Plaintiffs’ filed their suggestions in opposition (Doc. 35) to Smithfield’s motion to dismiss. Included in it is a declaration from Dr. Melissa Perry (Doc. 35-2), a professor of environmental health at George Washington University.

On April 30, the Court held a hearing on the motion via teleconferencing. The Court offered the parties an opportunity to introduce evidence, including witness testimony, but both parties elected to stand on the existing record. The parties then argued their respective positions.

After the hearing, the parties filed supplemental briefs. Attached to Smithfield’s brief (Doc. 46) is a supplemental declaration from Smithfield’s plant manager, clarifying Smithfield’s leave policy and updating the Court on additional safety changes at the Plant.

Plaintiffs concede that Smithfield implemented new policies and procedures after this lawsuit was filed and have narrowed their requested injunctive relief to direct Smithfield to:

1. make all reasonable changes to its “production practices,” including potentially lowering its line speeds, to place as many workers as possible at least six feet apart;
2. provide reasonable additional breaks to allow workers to care for their personal hygiene without penalty, including blowing their noses, using tissues, and hand washing;
3. ensure that its policies do not require workers to come to the Plant to obtain COVID-19-related sick leave and take all reasonable steps to communicate that policy clearly to workers.

(Doc. 48 at 10). Plaintiffs characterize their requested relief as compliance with the Joint Guidance.

Findings of Fact

The Court gives the various declarations submitted by the parties the following
evidentiary weight.\(^9\)

The Court gives Jane Doe’s declaration limited weight. While she has personal knowledge of conditions in those parts of the Plant in which she works, it is unclear exactly what part of the “cutting floor” she works in, and whether she can see all that she claims to see from this area. Further, it appears that some of the information in her declaration is no longer accurate due to recent changes in the Plant’s policies and procedures. For example, although her declaration may be correct that Smithfield initially told workers they would receive only one mask per week, this policy has been superseded. As discussed below, workers are now given masks every day. Finally, because her identify is unknown, there is no way to determine, through the adversarial process or otherwise, whether Doe has some bias against Smithfield that could lead her to misrepresent or exaggerate conditions at the Plant. The Court notes that at least one of her statements—that Smithfield has increased the line speed at the Plant during the pandemic—is contradicted by other, more persuasive evidence.

Mr. Fuentes’ declaration concerning working conditions at the Plant are even less reliable than Jane Doe’s, and so the Court gives them less weight. Mr. Fuentes has no personal knowledge of conditions at the Plant because he has never set foot in it. His understanding is based on hearsay from unidentified employees whose statements to him, even if accurately relayed by Mr. Fuentes, were not made under penalty of perjury. That said, the Court finds the portions of his declaration concerning RCWA’s membership and activities are credible.

The Court finds the declarations of Messrs. Corbo, Fritzsche, and Harrison are based on some relevant knowledge, education, and experience concerning working conditions in American meat-processing plants generally, and so they possess some limited insight into what

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\(^9\) Smithfield filed a motion to strike Plaintiffs’ five declarations attached to the motion for a temporary restraining order and/or preliminary injunction (Doc. 34). The Court denies the motion, since, in considering these motions, the issues it complains of go to the weight of the evidence rather than its admissibility.
steps could be taken to prevent the spread of the SARS-CoV-2 virus in a generic American meat-processing facility. Because they are unfamiliar with specific working conditions at the Plant, however, their declarations provide limited help in determining whether Smithfield’s policies and procedure at the Plant are sufficient to stem transmission of the virus.

Finally, the Court turns to the declaration of Dr. Melissa J. Perry, Professor and Chair of Environmental and Occupational Health at the Milken Institute School of Public Health of the George Washington University. Dr. Perry credentials are excellent: She is a past President of the American College of Epidemiology and a past chair of the Board of Scientific Counselors for the CDC. She has also served as a member of the National Institute for Occupational Safety and Health research grant-review panel. She has studied meat-processing facilities since 2004 and has published six peer-reviewed-journal articles on work health and safety at meat-processing facilities. As part of that work, she has visited four meat-processing plants and spoken with engineers regarding the organizational structure of processing plants and how they can be redesigned to further worker health and safety.

Dr. Perry opines that meat-processing plants can allow workers to stand six feet apart if they reduce production line speed, and that, if they do not space production line workers six feet apart, the plants will “inevitably” have a COVID-19 outbreak. She contends slowing the production line is the only way the plant will be able to continue meat production without an outbreak. She also endorses the other requests Plaintiffs make, such as for more rest breaks and paid leave, as “absolutely necessary” so the Plant can continue operating.

This Court has respect for Dr. Perry’s opinion but finds it of limited value in this case. While this Court agrees that slowing down line speed may be beneficial for workers and allow more opportunities for social distancing, the Court found nothing in the Joint Guidance
recommending a decrease in line speed. To that point, she provides no specific opinion regarding whether the Milan Plant is currently in compliance with the Joint Guidance, and there is no evidence that Dr. Perry reviewed the policies and procedures at the Milan Plant in forming her opinion. Accordingly, the Court gives little weight to her opinion that unless the production line speed is slowed and workers spread six feet apart, spread of the virus through the Plant is “inevitable” and it “will be forced to shutter.” This assertion appears to be more of a good-faith speculation than an evidenced-based conclusion.

The Court gives more weight to the declarations provided by Smithfield. The statements made by Mr. Messman, the Plant’s general plant manager, are almost all based on his personal knowledge. He possesses the most recent information concerning working conditions at the Plant, and he appears to be a reliable source of information about Smithfield’s policies and procedures there.

The Court gives considerable weight to the declaration of John Henshaw, Smithfield’s expert witness. After reviewing Smithfield’s written policies and procedures at the Plant, the general manager’s declaration, the pictures, and the declarations in Plaintiffs’ motion, Mr. Henshaw opined that Smithfield’s current policies and procedures, if followed, were consistent with the Joint Guidance as of April 29, 2020. Although the Court is aware that he is a retained expert witness whose assumptions and conclusions have not been tested by cross-examination, his opinion is measured, qualified, and grounded in the facts at the Milan Plant.

With the credibility determinations in mind, the Court makes the following findings of fact concerning current the Plant’s working conditions and Smithfield’s COVID-19 policies and procedures.
Before entering the Plant, Smithfield requires all employees to undergo thermal screening. If employees exhibit one primary symptom or two secondary symptoms of COVID-19, Smithfield provides them with instructions for next steps, including directions to quarantine and call their physician for guidance, and sends the employee home for fourteen days of paid leave or until the individual receives a negative COVID-19 test result. Employees with underlying health concerns—verified by a doctor—that place them at a higher risk of COVID-19 are given fourteen days of paid leave and then are shifted to short-term disability leave.

While quarantining as a result of COVID-19 symptoms, Smithfield requires employees to complete a questionnaire that in part entails naming all other employees they have closely contacted within the two days before experiencing symptoms. If the employee tests positive for COVID-19, Smithfield notifies and screens the close contacts. As of April 29, 2020, thirteen employees had been tested for COVID-19. None were positive.

If employees miss work as a result of COVID-related symptoms, Smithfield does not penalize them. They do not receive attendance points and remain eligible for Smithfield’s Responsibility Bonus ($500), regardless of whether individuals provide a doctor’s or nurse’s note. Moreover, Smithfield has expanded its employee benefits by eliminating co-pays for COVID-related testing and treatment.

To ensure that those inside the Plant are complying with Smithfield’s COVID-19 safety procedures and policies, Smithfield has assigned both a nurse and a health-and-safety clerk to perform checks throughout the Plant. Smithfield has communicated these procedures and policies to its employees by several different media, including on televisions and signs at the Plant, through the Beekeeper communications app, and through the Textcaster mass

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10 Primary symptoms include fever, persistent dry cough, and shortness of breath, while secondary symptoms include chills, repeated shaking with chills, muscle pain/extreme fatigue, headache, sore throat, and/or loss of taste or smell (Doc. 46-2 at 8).
text-messaging tool. Signs at the Plant relay the information in English, Spanish, and French, while the Beekeeper and Textcaster communications are available in the employee’s language of choice. Interpreters are also available at the Plant to assist with these communications.

The Plant provides workers with an ear-looped face mask upon entry to the Plant each day, and if a mask breaks or becomes soiled, it provides a new one. Smithfield now requires all workers at the Plant to wear a mask at all times other than during meals and in certain offices where employees are spaced six feet apart. These masks prevent the spread of germs if an employee sneezes or coughs while on the line, reducing the need for tissues to reduce the spread of COVID-19. Additionally, Smithfield requires employees on the production floor to wear nitrile gloves and a plastic face shield.

As Smithfield concedes, it does not provide tissues to employees. It cannot provide tissues to individuals working on the production line because doing so would violate health standards set by the USDA. Thus, one of Plaintiff’s original complaints cannot be remedied. Smithfield could, however, provide tissues for employees to wipe their nose while on breaks, but the record does not support that employees are banned from bringing their own tissues or other hygienic wipes to use while on breaks.

As for Plaintiffs’ claim that Smithfield does not allow employees to wash their hands without penalty, the Court finds that Smithfield policies and procedures are reasonable under the circumstances. Due to the nature of the meat-processing business, employees must wear gloves on the production line. When workers leave the line for a break, they remove their gloves and sanitize their hands before entering common areas. They must also wash their hands and put on gloves before returning to the line. Smithfield currently administers hand sanitizer to employees every thirty minutes to use on their gloves and has added approximately 110 hand-sanitizing
stations throughout the Plant. Smithfield also expects a shipment of small hand-sanitizer bottles soon, which it will make available to employees for personal use. In the meantime, the Plant has invited employees to bring in personal bottles they may refill using the company supply. Thus, the need for continued hand washing is unnecessary because any contamination that may occur on the line is contained by the required use of gloves.

Moreover, Smithfield has also enhanced cleaning and disinfection of the Plant’s frequently touched surfaces in common areas using cleaning solutions identified by the CDC for use against the virus. These cleanings are performed as often as every two hours throughout the workday. Additional deep cleanings occur over the weekends, and Smithfield is working to implement use of fogging/misting disinfectants where possible.

Finally, the Court turns to the steps Smithfield has taken steps to facilitate social distancing at the Plant. Smithfield has staggered workday start times, as well as lunch and break times, to avoid large numbers of workers congregating in break rooms or around time clocks. Smithfield is currently working to secure a wireless means for employees to clock in and out of their shifts to minimize crowding. In the meantime, it has expanded the number of available clocks for employees to use and will implement a grace period for workers to clock in and out of their shifts, all increasing the ability of workers to maintain social distance.

Smithfield has erected two large tents and three carport structures on the Plant lawn and placed tables and chairs underneath each so that workers have more space to eat while on breaks. The Plant has also installed plastic barriers on eating tables that separate employees from those sitting beside and across from them. Tables are sanitized after one employee leaves and before another sits down.
Smithfield has also reduced the number of hogs harvested each day and sends some employees home before lunch. This requires fewer employees to be at the Plant, helping to minimize crowding in the cafeteria and other areas. However, these policies reduce the number of hours worked by the affected employees, thereby decreasing their weekly pay. To ease the resulting financial burden on employees, Smithfield has temporarily increased pay by $5/hour, and such pay is available to any employee who takes an approved leave as a result of COVID-related symptoms. Smithfield has also installed clear plastic barriers along the Plant production line to separate employees working across from each other and employees working side by side.

**Discussion**

I. The primary-jurisdiction doctrine applies.\(^\text{11}\)

Before reaching the merits of Plaintiffs’ request for a preliminary injunction, the Court must determine whether it should dismiss or stay this case pursuant to the primary-jurisdiction doctrine. “Primary jurisdiction is a common-law doctrine that is utilized to coordinate judicial and administrative decision making.” Access Telecomms. v. Sw. Bell Tel. Co., 137 F.3d 605, 608 (8th Cir. 1998) (citation omitted). “The doctrine allows a district court to refer a matter to the appropriate administrative agency for ruling in the first instance, even when the matter is initially cognizable by the district court.” Id. (citation omitted). “There exists no fixed formula for determining whether to apply the doctrine of primary jurisdiction.” Id. (citing United States v. W. Pac. R.R. Co., 352 U.S. 59, 64 (1956)). Instead, courts must consider in each case “whether the reasons for the doctrine are present and whether applying the doctrine will aid the purposes

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\(^{11}\) Although Smithfield previously argued Burford abstention also applied here, it conceded during the preliminary-injunction hearing that that argument no longer applies due to the President’s Executive Order. Accordingly, the Court does not address it. Because this Court finds the primary jurisdiction doctrine applies, it does not address Smithfield’s preemption arguments, which were asserted after the preliminary-injunction hearing.
for which the doctrine was created.” Id. (citation omitted). In undertaking this analysis, a court must be mindful that the primary-jurisdiction doctrine “is to be invoked sparingly, as it often results in added expense and delay.” Alpharma, Inc. v. Pennfield Oil Co., 411 F.3d 934, 938 (8th Cir. 2005). “Once a district court decides to refer an issue or claim to an administrative agency under the doctrine of primary jurisdiction, it may either dismiss or stay the action.” Chlorine Inst., Inc. v. Soo Line R.R., 792 F.3d 903, 913 (8th Cir. 2015).

There are two primary reasons courts apply the primary-jurisdiction doctrine. First, “to obtain the benefit of an agency’s expertise and experience . . . ‘in cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion. . . .’” Access Telecomms., 137 F.3d at 608 (noting “‘agencies created by Congress for regulating the subject matter should not be passed over’”) (quoting Far E. Conference v. United States, 342 U.S. 570, 574 (1952)). Second, “to promote uniformity and consistency within the particular field of regulation.” Id. (citation omitted). Thus, in deciding whether to apply the doctrine, courts focus on two questions: (1) “whether the issues raised in the case ‘have been placed within the special competence of an administrative body,’” and (2) whether the court’s disposition of the case could lead to inconsistent regulation of businesses in the same industry. Sprint Spectrum L.P. v. AT&T Corp., 168 F. Supp. 2d 1095, 1098 (W.D. Mo. 2001) (quoting United States v. W. Pac. R.R. Co., 352 U.S. at 64). In this case, the answer to both questions is yes.

Plaintiffs allege that because the Plant is not abiding by the Joint Guidance, it constitutes a public nuisance and has created an unreasonably unsafe workplace. Thus, Plaintiffs’ claims both succeed or fail on the determination of whether the Plant is complying with the Joint Guidance. Due to its expertise and experience with workplace regulation, OSHA (in
coordination with the USDA per the Executive Order) is better positioned to make this determination than the Court is. Indeed, this determination goes to the heart of OSHA’s special competence: its mission includes “enforcing” occupational safety and health standards. In fact, OSHA has already shown interest in determining whether the Plant is abiding by the Joint Guidance. The day before Plaintiffs filed this lawsuit, OSHA sent Smithfield a request for information regarding its COVID-19 work practices and infection at the Plant.

Turning to the second question, the Court finds only deference to OSHA/USDA will ensure uniform national enforcement of the Joint Guidance. If the Court ruled on whether the Plant is complying with the Joint Guidance, this ruling would be binding on Smithfield but not other meat-processing facilities because the Court lacks personal jurisdiction over them. Thus, any determination by this Court whether the Plant is complying with the Joint Guidance could easily lead to inconsistent regulation of businesses in the same industry. And under these circumstances, where the guidelines are rapidly evolving, maintaining a uniform source for guidance and enforcement is crucial.

Plaintiffs’ argue that deference will add delay. But OSHA has already requested information about the Plant’s safety measures. And if OSHA fails to act quickly on this information, Plaintiffs have a remedy: they may receive emergency relief through OSHA’s statutory framework. Section 662(a) of the Occupational Safety and Health Act (“the Act”), 29 U.S.C. §§ 651 et seq., permits the Secretary of Labor to petition the court “to restrain any [dangerous] conditions or practices in any place of employment . . . which could reasonably be expected to cause death or serious physical harm immediately or before the imminence of such danger can be eliminated through the enforcement procedures otherwise provided by [the Act].” Upon the filing of such petition, “the district court shall have jurisdiction to grant such injunctive
relief or temporary restraining order pending the outcome of an enforcement proceeding.” *Id.* at § 662(b). If the Secretary “arbitrarily or capriciously fails to seek relief,” a worker can file a writ of mandamus to compel the Secretary to seek such an order. *Id.* at § 662(d). Granted, there may be some delay before Plaintiffs can invoke this procedure, but following this procedure ensures the USDA and OSHA can take a measured and uniform approach to the meat-processing plants under its oversight. The Court’s intervention at this point, on the other hand, would only risk haphazard application of the Joint Guidance.

In sum, the Court holds that the issue of Smithfield’s compliance with OSHA’s guidelines and regulations falls squarely within OSHA/USDA’s jurisdiction. The Court finds dismissal without prejudice is preferable to a stay here so that Plaintiffs may seek relief through the appropriate administrative and regulatory framework.

III. **Plaintiffs’ have not met their burden for a preliminary injunction.**

Although the Court’s ruling on the primary-jurisdiction doctrine is dispositive, to aid in any appellate review, the Court will consider whether Plaintiffs have met their extraordinary burden of proving an affirmative preliminary injunction is proper in this case.

In determining whether to grant injunctive relief the Court considers the following factors, which were set forth in the seminal decision *Dataphase Sys., Inc. v. C L Sys., Inc.*, 640 F.2d 109, 114 (8th Cir. 1981): 1) the threat of irreparable harm to the movant; 2) the balance between this harm and any injury that granting the injunction will inflict on the non-moving party; 3) the likelihood that the moving party will prevail on the merits; and 4) the public interest. *Phelps-Roper v. Nixon*, 509 F.3d 480, 484 (8th Cir. 2007). No single factor is determinative; they must be “balanced to determine whether they tilt towards or away” from


1. **Plaintiffs have not demonstrated a threat of irreparable harm.**

To demonstrate a sufficient threat of irreparable harm, the moving party must show that there is no adequate remedy at law; that is, that an award of damages cannot compensate the movant for the harm. *See Noodles Dev.*, 507 F.Supp.2d at 1036-37. But, when analyzing this factor, the Eighth Circuit has held that “[m]erely demonstrating the ‘possibility of harm’ is not enough.” *Chlorine Inst., Inc. v. Soo Line R.R.*, 792 F.3d 903, 915 (8th Cir. 2015); see also *S.J.W. ex rel Wilson v. Lee’s Summit R–7 Sch. Dist.*, 696 F.3d 771, 779 (8th Cir. 2012) (“Speculative harm does not support a preliminary injunction.”). In the context of a global pandemic, this Court must consider the threat after “accounting for the protective measures” defendant has already implemented. *Valentine v. Collier*, --- F.3d ---, 2020 WL 1934431, *5 (5th Cir. Apr. 22, 2020).

Plaintiffs argue that their injury is potentially contracting COVID-19, which could result in serious illness or even death. But this type of injury is too speculative under Eighth Circuit precedent.
Plaintiffs’ claim otherwise, citing two cases from the Eighth Circuit, which they argue held the possibility of “death or serious illness” constitutes an irreparable injury (Doc. 3 at 24). Plaintiffs’ cite *Kai v. Ross*, 336 F.3d 650, 656 (8th Cir. 2003), a case in which the state of Nebraska revoked a program providing medical care for the needy. The plaintiffs, who suffered from physical and mental disabilities and received their prescription medications through the program, sought to enjoin revocation of the program. *Id.* The Eighth Circuit held that the present danger to plaintiffs’ health without their medications is an irreparable harm. *Id.* Plaintiffs also cite *Harris v. Blue Cross Blue Shield of Mo.*, 995 F.2d 877, 879 (8th Cir. 1993), which similarly held that denial of coverage for the treatment of a life-threatening illness is an irreparable injury. These two cases are inapposite, since the plaintiffs were already suffering from illnesses, and would undoubtedly suffer serious illness or death in the absence of an injunction. In other words, the threat of serious injury or death was a certainty and not merely a possibility.

The Court is not unsympathetic to the threat that COVID-19 presents to the Plant’s workers. But in conducting its analysis, the Court must determine whether Plaintiffs will suffer an actual, imminent harm if the injunction is denied. This is not the same as analyzing whether employees risk exposure if they continue to work, and, unfortunately, no one can guarantee health for essential workers—or even the general public—in the middle of this global pandemic.

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12 Plaintiffs also cite *Mertzlufft v. Bunker Res. Recycling & Reclamation, Inc.*, 760 S.W.2d 592 (Mo. Ct. App. 1988) as persuasive authority. In *Mertzlufft*, the plaintiffs sought to enjoin a business which was illegally transporting, storing, and incinerating hazardous waste without a permit. *Id.* at 595. The plaintiffs brought a citizen’s suit to enjoin the defendant from charging and loading the incinerator with hospital wastes, or otherwise operating it, which the trial court granted. *Id.* The Missouri court of appeals, reviewing the case under a standard deferential to the trial court’s judgment—not operating under the preliminary injunction standard set forth in *Dataphase*—held that the preliminary injunction was warranted. *Id.* at 598. It did not, however, address whether the plaintiffs proved there was a threat of irreparable harm. *Id.* at 598. To the contrary, the court held that plaintiffs were “not obligated to allege and prove they had suffered irreparable harm in order to obtain injunctive relief, but were only required to prove that they were adversely affected in fact by the unlicensed operation, which they did.” *Id.* Accordingly, this case is also inapplicable because the court of appeals did not consider—and plaintiffs were not required to prove—a threat of irreparable harm. But, even if they were, the defendant was illegally operating a hazardous waste facility, and thus presented a present threat of certain harm to the plaintiffs.
But given the significant measures Smithfield is now taking to protect its essential workers from COVID-19 and the fact that there are no confirmed cases of COVID-19 currently at the Plant, the Court cannot conclude that the spread of COVID-19 at the Plant is inevitable or that Smithfield will be unable to contain it if it occurs. Thus, Plaintiffs have not established an immediate threat of irreparable harm.

2. Plaintiffs have not shown that the balance of harms favors issuing injunctive relief.

The second factor “examines the harm of granting or denying the injunction upon both of the parties to the dispute and upon other interested parties, including the public.” Noodles Dev., 507 F. Supp. 2d at 1038 (citing Dataphase, 640 F.2d at 114). “To determine what must be weighed, . . . courts of this circuit have looked at the threat to each of the parties’ rights that would result from granting or denying the injunction.” Id. The “potential economic harm to the parties” is a relevant consideration, as is “whether the defendant has already voluntarily taken remedial action.” Id.

Here, there is no doubt that if workers at the Plant contract COVID-19, the harm to Plaintiffs could be great. But Plaintiffs have alleged only that—potential harm—and, in this time, no essential-business employer can completely eliminate the risk that COVID-19 will spread to its employees through the workplace. Thus, it is important that employers make meaningful, good faith attempts to reduce the risk. Here, Smithfield has taken significant remedial steps in accordance with the Joint Guidance to protect its workers from COVID-19.

Moreover, national and local guidance on COVID-19 is continuously evolving and changing. An injunction would deny Smithfield the flexibility needed to quickly alter workplace procedures to remain safe during the ever-changing circumstances of this pandemic. Valentine, 2020 WL 1934431 at *5 (staying injunction that would “interfer[e] with the rapidly changing and
flexible system-wide approach that [defendant] has used to respond to the pandemic so far” and “[defendant’s] ability to continue to adjust its policies is significantly hampered by the preliminary injunction, which locks in place a set of policies for a crisis that defies fixed approaches”) (citing Jacobson v. Massachusetts, 197 U.S. 11, 28–29 (1905); In re Abbott, 954 F.3d 772, 791 (5th Cir. 2020)). Thus, the remedial measures Smithfield has implemented convince the Court that the balance of harms weighs in its favor.

3. **Plaintiffs have not shown a likelihood of success on the merits.**

To demonstrate likelihood of success on the merits, a movant does not need to show that it ultimately will succeed on its claims, only that the movant’s prospects for success is sufficiently likely to support the kind of relief it requests. See Noodles Dev., 507 F.Supp.2d at 1036–37 (emphasis added) (citations omitted). That is, the movant need only show “a fair chance of prevailing.” Phelps-Roper, 509 F.3d at 485. On this record, Plaintiffs have not shown a fair chance of prevailing on either of their claims.

a. **Plaintiffs have not shown they are likely to succeed on their public-nuisance claim.**

Under Missouri law, “a public nuisance is an offense against the public order and economy of the state and violates the public’s right to life, health, and the use of property, while, ‘at the same time annoys, injures, endangers, renders insecure, interferes with, or obstructs the rights or property of the whole community, or neighborhood, or of any considerable number of persons.’” State ex rel. Schmitt v. Henson, ED 107970, 2020 WL 1862001, at *4 (Mo. Ct. App. April 14, 2020) (citations omitted).

The parties agree that the Plant cannot be a public nuisance simply by virtue of the fact that it is a meat-processing plant during a global pandemic. Moreover, in this case, Smithfield has implemented substantial health and safety measures to protect Plant workers, and no
employees of the Plant have been diagnosed with COVID-19. While Plaintiffs argue that Smithfield could do more to protect its workers, that is not the issue before this Court. The issue is whether the Plant, as it is currently operating, constitutes an offense against the public order. Because of the significant measures Smithfield has implemented to combat the disease and the lack of COVID-19 at the facility, the Plant cannot be said to violate the public’s right to health and safety. Thus, the Court finds that Plaintiffs are unlikely to be succeed on their public nuisance claim.

b. Plaintiffs have shown they are unlikely to succeed on their right to a safe workplace claim.

Under Missouri law, Plaintiffs must prove that Smithfield negligently breached its duty to provide a safe place to work and that such negligence was the direct and proximate cause of the Plaintiffs injuries. *Hamilton v. Palm*, 621 F.3d 816, 818 (8th Cir. 2010). As discussed, Smithfield has taken substantial steps to reduce the potential for COVID-19 exposure at the Plant and appears to the Court to be complying with the Joint Guidance regarding the same. Thus, Plaintiffs are not substantially likely to prove Smithfield breached any duty.

More importantly, however, Plaintiffs have not alleged they have suffered any injury, only that they may suffer an injury in the future. A potential injury is insufficient to state a claim of the breach of the duty to provide a safe workplace under Missouri law. Plaintiffs citation to *Smith v. W. Elec. Co.*, 643 S.W.2d 10 (Mo. Ct. App. 1982), to establish that they have stated a sufficient injury is unavailing. In *Smith*, the plaintiff proved that he had been exposed to harmful second-hand smoke in the workplace which caused him to suffer a severe adverse reaction. *Id.* at 12. The adverse reaction was the actual injury he suffered, and he suffered this harm—and sought relief through an administrative process—before seeking an injunction. Thus, *Smith* is not analogous to this case, and Plaintiffs have not shown they are likely to be successful on their
breach of a safe workplace claim.

4. The public interest factor is neutral.

Certainly, the spread of COVID-19 is a public-health matter of great concern, and, so, preventing transmission of the virus which causes COVID-19 is within the public interest. At the same time, the public has an interest in maintaining the food-supply chain and access to meat products, an interest which might be impaired if the Court granted the injunction. Because Smithfield’s current policies and procedures temper public health worries, the Court finds a preliminary injunction is not in the public interest at this time.

Thus, Plaintiffs have not met their extraordinary burden of showing an affirmative preliminary injunction is warranted in this case.

III. Plaintiffs’ requested relief lacks the specificity required for a preliminary injunction.

Finally, the Court finds that Plaintiffs requested relief is impermissibly vague. Federal Rule of Civil Procedure 65(d) states that an injunction must be “specific in [its] terms” and describe in reasonable detail the actions sought to be enjoined. Fed. R. Civ. P. 65(d). This specificity requirement is “designed to prevent uncertainty and confusion on the part of those to whom the injunction is directed and to avoid the possible founding of a contempt citation on a decree too vague to be understood.” Helzberg’s Diamond Shops, Inc. v. Valley W. Des Moines Shopping Ctr., Inc., 564 F.2d 816, 820 (8th Cir. 1977).

In this case, Plaintiffs request this Court enter an injunction requiring Smithfield to “make all reasonable changes to its ‘production practices,’ including potentially lowering its line speeds, to place as many workers as possible at least six feet apart” (Doc. 46 at 10). Plaintiffs do not explain what changes would be “reasonable,” except for “potentially” reducing line speeds. In other words, they do not specify in reasonable detail what Smithfield should do. They
demand workers have “reasonable additional breaks to allow workers to care for their personal hygiene without penalty, including blowing their noses, using tissues, and hand washing,” but they do not specify how often or how long such breaks should take place, or what would constitute a reasonable break. Finally, Plaintiffs request the Court order Smithfield to change its policies to “not require workers to come to the Plant to obtain COVID-19-related sick leave and take all reasonable steps to communicate that policy clearly to workers.” But Plaintiffs do not identify which policies should be eliminated, what constitutes “reasonable steps,” or why Smithfield’s current policies are insufficient. Because “a person of ordinary intelligence” would not understand what is prohibited based on Plaintiffs’ proposed preliminary injunction, Schenck v. Pro-Choice Network of W. N.Y., 519 U.S. 357, 383 (1997), it is impermissibly vague, and thus unenforceable.

**Conclusion**

Plaintiffs are naturally concerned for their health and the health of their community in these unprecedented times. The Court takes their concern seriously. Nevertheless, the Court cannot ignore the USDA’s and OSHA’s authority over compliance with the Joint Guidance or the significant steps Smithfield has taken to reduce the risk of a COVID-19 outbreak at the Plant. For the reasons discussed above, Defendants motion to dismiss is GRANTED, and the case is DISMISSED without prejudice.

**IT IS SO ORDERED.**

Date: May 5, 2020

/s/ Greg Kays

GREG KAYS, JUDGE

UNITED STATES DISTRICT COURT
Occupational Safety and Health Administration (OSHA): Emergency Temporary Standards (ETS) and COVID-19

Updated October 20, 2020
Occupational Safety and Health Administration (OSHA): Emergency Temporary Standards (ETS) and COVID-19

The Occupational Safety and Health Administration (OSHA) does not currently have a specific standard that protects healthcare or other workers from airborne or aerosol transmission of disease or diseases transmitted by airborne droplets. Some in Congress, and some groups representing healthcare, meat and poultry processing, and other workers, are calling on OSHA to promulgate an emergency temporary standard (ETS) to protect workers from exposure to SARS-CoV-2, the virus that causes Coronavirus Disease 2019 (COVID-19). The Occupational Safety and Health Act of 1970 (OSH Act) gives OSHA the ability to promulgate an ETS that would remain in effect for up to six months without going through the normal review and comment process of rulemaking. OSHA, however, has rarely used this authority in the past—not since the courts struck down its ETS on asbestos in 1983.

The California Division of Occupational Safety and Health (Cal/OSHA), which operates California’s state occupational safety and health plan, has had an aerosol transmissible disease (ATD) standard since 2009. This standard includes, among other provisions, the requirement that employers provide covered employees with respirators, rather than surgical masks, when these workers interact with ATDs, such as known or suspected COVID-19 cases. In addition, according to the Cal/OSHA ATD standard, certain procedures require the use of powered air purifying respirators (PAPR).

The Virginia state occupational safety and health plan (VOSH) and the Michigan state occupational safety and health plan (MIOSHA) have each promulgated emergency standards to specifically address COVID-19 in workplaces. Unlike the Cal/OSHA ATD standard, these emergency standards are in effect for only six months and apply to all employers.

H.R. 6139, the COVID-19 Health Care Worker Protection Act of 2020, would require OSHA to promulgate an ETS on COVID-19 that incorporates both the Cal/OSHA ATD standard and the Centers for Disease Control and Prevention’s (CDC’s) 2007 guidelines on occupational exposure to infectious agents in healthcare settings; similar provisions appear in S. 3475. The CDC’s 2007 guidelines generally require stricter controls than its interim guidance on COVID-19 exposure. The provisions of H.R. 6139 were incorporated into the version of H.R. 6201, the Families First Coronavirus Response Act, as introduced in the House. The OSHA ETS provisions were not included in the House- and Senate-passed version of legislation that was signed into law as P.L. 116-127.

H.R. 6379, as introduced in the House, also would include a requirement for an OSHA ETS and permanent standard to address COVID-19 exposure; similar provisions appear in S. 3584. H.R. 6559 would include the requirements for an ETS and permanent standard, clarify the requirement that employers must report work-related COVID-19 cases, and expand protections for whistleblowers; similar provisions appear in S. 3677. The provisions of H.R. 6559 were included in H.R. 6800, The Heroes Act, passed by the House on May 15, 2020, and in the House Amendment to the Senate Amendment to H.R. 925, the revised Heroes Act passed by the House on October 1, 2020.

Through October 1, 2020, OSHA has issued COVID-19-related citations to employers at 62 work sites, with total proposed penalties of $913,133. These citations have been issued for violations of the OSH Act’s General Duty Clause and other existing OSHA standards, such as those for respiratory protection, that may apply to COVID-19. Senators Elizabeth Warren and Cory A. Booker have raised concerns about the low amount of penalties being assessed for COVID-19-related violations.
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Occupational Safety and Health Administration Standards

Section 6 of the Occupational Safety and Health Act of 1970 (OSH Act) grants the Occupational Safety and Health Administration (OSHA) of the Department of Labor (DOL) the authority to promulgate, modify, or revoke occupational safety and health standards that apply to private sector employers, the United States Postal Service, and the federal government as an employer. In addition, Section 5(a)(1) of the OSH Act, commonly referred to as the General Duty Clause, requires that all employers under OSHA’s jurisdiction provide workplaces free of “recognized hazards that are causing or are likely to cause death or serious physical harm” to their employees. OSHA has the authority to enforce employer compliance with its standards and with the General Duty Clause through the issuance of abatement orders, citations, and civil monetary penalties. The OSH Act does not cover state or local government agencies or units. Thus, certain entities that may be affected by Coronavirus Disease 2019 (COVID-19), such as state and local government hospitals, local fire departments and emergency medical services, state prisons and county jails, and public schools, are not covered by the OSH Act or subject to OSHA regulation or enforcement.

State Plans

Section 18 of the OSH Act authorizes states to establish their own occupational safety and health plans and preempt standards established and enforced by OSHA. OSHA must approve state plans if they are “at least as effective” as OSHA’s standards and enforcement. If a state adopts a state plan, it also must cover state and local government entities, such as public schools, not covered by OSHA. Currently, 21 states and Puerto Rico have state plans that cover all employers, and 5 states and the U.S. Virgin Islands have state plans that cover only state and local government employers not covered by the OSH Act. In the remaining states, state and local government employers are not covered by OSHA standards or enforcement. State plans may incorporate OSHA standards by reference, or states may adopt their own standards that are at least as effective as OSHA’s standards. State plans do not have jurisdiction over federal agencies and generally do not cover maritime workers and private-sector workers at military bases or other federal facilities.

Promulgation of OSHA Standards

OSHA may promulgate occupational safety and health standards on its own initiative or in response to petitions submitted to the agency by various government agencies, the public, or employer and employee groups. OSHA is not required, however, to respond to a petition for a

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1 29 U.S.C. §655. The provisions of the Occupational Safety and Health Act of 1970 (OSH Act) are extended to the legislative branch as an employer by the Congressional Accountability Act (P.L. 104-1).
4 For additional information on Occupational Safety and Health Administration (OSHA) state plans, see CRS Report R43969, OSHA State Plans: In Brief, with Examples from California and Arizona.
5 Information on specific state plans is available from the OSHA website at https://www.osha.gov/stateplans.
6 Per Section 6(b)(1) of the OSH Act [29 §655(b)(1)], a petition may be submitted by “an interested person, a representative of any organization of employers or employees, a nationally recognized standards-producing
standard or to promulgate a standard in response to a petition. OSHA may also consult with one of the two statutory standing advisory committees—the National Advisory Committee on Occupational Safety and Health (NACOSH) or the Advisory Committee on Construction Safety and Health (ACCSH)—or an ad-hoc advisory committee for assistance in developing a standard.  

**Notice and Comment**

OSHA’s rulemaking process for the promulgation of standards is largely governed by the provisions of the Administrative Procedure Act (APA) and Section 6(b) of the OSH Act. Under the APA informal rulemaking process, federal agencies, including OSHA, are required to provide notice of proposed rules through the publication of a Notice of Proposed Rulemaking in the Federal Register and provide the public a period of time to provide comments on the proposed rules.

Section 7(b) of the OSH Act mirrors the APA in that it requires notice and comment in the rulemaking process. After publishing a proposed standard, the public must be given a period of at least 30 days to provide comments. In addition, any person may submit written objections to the proposed standard and may request a public hearing on the standard.

**Statement of Reasons**

Section 6(e) of the OSH Act requires OSHA to publish in the Federal Register a statement of the reasons the agency is taking action whenever it promulgates a standard, conducts other rulemaking, or takes certain additional actions, including issuing an order, compromising on a penalty amount, or settling an issued penalty.

**Other Relevant Laws and Executive Order 12866**

In addition to the APA and OSH Act, other federal laws that generally apply to OSHA rulemaking include the Paperwork Reduction Act, Regulatory Flexibility Act, Congressional Review Act, Information Quality Act, and Small Business Regulatory Enforcement Fairness Act (SBREFA). Also, Executive Order 12866, issued by President Clinton in 1993, requires...
agencies to submit certain regulatory actions to the Office of Management and Budget (OMB) and Office of Information and Regulatory Affairs (OIRA) for review before promulgation.\footnote{Executive Order 12866, "Regulatory Planning and Review," 58 Federal Register 51735, October 4, 1993.}

**OSHA Rulemaking Time Line**

OSHA rulemaking for new standards historically has been a relatively time-consuming process. In 2012, at the request of Congress, the Government Accountability Office (GAO) reviewed 59 significant OSHA standards promulgated between 1981 (after the enactments of the Paperwork Reduction Act and Regulatory Flexibility Act) and 2010.\footnote{GAO-12-330, Workplace Safety and Health.} For these standards, OSHA's average time between beginning formal consideration of the standard—either through publishing a Request for Information or Advance Notice of Proposed Rulemaking in the Federal Register or placing the rulemaking on its semiannual regulatory agenda—and promulgation of the standard was 93 months (7 years, 9 months). Once the Notice of Proposed Rulemaking was published for these 59 standards, the average time until promulgation of the standard was 39 months (3 years, 3 months).

In 2012, OSHA's Directorate of Standards and Guidance published a flowchart of the OSHA rulemaking process on the agency's website.\footnote{OSHA, Directorate of Standards and Guidance, The OSHA Rulemaking Process, October 15, 2012, at https://www.osha.gov/OSHA_FlowChart.pdf.} This flowchart includes estimated duration ranges for a variety of rulemaking actions, beginning with pre-rule activities—such as developing the idea for the standard and meeting with stakeholders—and ending with promulgation of the standard. The flowchart also includes an estimated duration range for post-promulgation activities, such as judicial review. The estimated time from the start of preliminary rulemaking to the promulgation of a standard ranges from 52 months (4 years, 4 months) to 138 months (11 years, 6 months). After a Notice of Proposed Rulemaking is published in the Federal Register, the estimated length of time until the standard is promulgated ranges from 26 months (2 years, 2 months) to 63 months (5 years, 3 months). Table 1 provides OSHA's estimated time lines for six major pre-rulemaking and rulemaking activities leading to the promulgation of a standard.

<table>
<thead>
<tr>
<th>Stage</th>
<th>Activities</th>
<th>Estimated Duration</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Preliminary rulemaking activities</td>
<td>12-36 months</td>
</tr>
<tr>
<td>2</td>
<td>Developing the proposed rule</td>
<td>12-36 months</td>
</tr>
<tr>
<td>3</td>
<td>Publishing the Notice of Proposed Rulemaking (NPRM)</td>
<td>2-3 months</td>
</tr>
<tr>
<td>4</td>
<td>Developing and analyzing the rulemaking record, including public comments and hearings</td>
<td>6-24 months</td>
</tr>
<tr>
<td>5</td>
<td>Developing the final rule, including Office of Information and Regulatory Affairs (OIRA) submission</td>
<td>18-36 months</td>
</tr>
<tr>
<td>6</td>
<td>Publishing the final rule (promulgating the new standard)</td>
<td>2-3 months</td>
</tr>
</tbody>
</table>

**Table 1. OSHA Rulemaking Process: Estimated Durations of Activities**


Judicial Review

Both the APA and the OSH Act provide for judicial review of OSHA standards. Section 7(f) of the OSH Act provides that any person who is “adversely affected” by a standard may file, within 60 days of its promulgation, a petition challenging the standard with the U.S. Court of Appeals for the circuit in which the person lives or maintains his or her principal place of business. A petition for judicial review does not automatically stay the implementation or enforcement of the standard. However, the court may order such a stay. OSHA estimates that post-promulgation activities, including judicial review, can take between 4 and 12 months after the standard is promulgated.

Emergency Temporary Standards

Section 6(c) of the OSH Act provides the authority for OSHA to issue an Emergency Temporary Standard (ETS) without having to go through the normal rulemaking process. OSHA may promulgate an ETS without supplying any notice or opportunity for public comment or public hearings. An ETS is immediately effective upon publication in the Federal Register. Upon promulgation of an ETS, OSHA is required to begin the full rulemaking process for a permanent standard with the ETS serving as the proposed standard for this rulemaking. An ETS is valid until superseded by a permanent standard, which OSHA must promulgate within six months of publishing the ETS in the Federal Register. An ETS must include a statement of reasons for the action in the same manner as required for a permanent standard. State plans are required to adopt or adhere to an ETS, although the OSH Act is not clear on how quickly a state plan must come into compliance with an ETS.

ETS Requirements

Section 6(c)(1) of the OSH Act requires that both of the following determinations be made in order for OSHA to promulgate an ETS:

- that employees are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards, and
- that such emergency standard is necessary to protect employees from such danger.

Grave Danger Determination

The term grave danger, used in the first mandatory determination for an ETS, is not defined in statute or regulation. The legislative history demonstrates the intent of Congress that the ETS process “not be utilized to circumvent the regular standard-setting process,” but the history is unclear as to how Congress intended the term grave danger to be defined.
In addition, although the federal courts have ruled on challenges to previous ETS promulgations, the courts have provided no clear guidance as to what constitutes a grave danger. In 1984, the U.S. Court of Appeals for the Fifth Circuit in Asbestos Info. Ass’n v. OSHA issued a stay and invalidated OSHA’s November 1983 ETS lowering the permissible exposure limit for asbestos in the workplace. In its decision, the court stated that “gravity of danger is a policy decision committed to OSHA, not to the courts.” The court, however, ultimately rejected the ETS, in part on the grounds that OSHA did not provide sufficient support for its claim that 80 workers would ultimately die because of exposures to asbestos during the six-month life of the ETS.

**Necessity Determination**

In addition to addressing a grave danger to employees, an ETS must also be necessary to protect employees from that danger. In Asbestos Info. Ass’n, the court invalidated the asbestos ETS for the additional reason that OSHA had not demonstrated the necessity of the ETS. The court cited, among other factors, the duplication between the respirator requirements of the ETS and OSHA’s existing standards requiring respirator use. The court dismissed OSHA’s argument that the ETS was necessary because the agency felt that the existing respiratory standards were “unenforceable absent actual monitoring to show that ambient asbestos particles are so far above the permissible limit that respirators are necessary to bring employees’ exposure within the PEL of 2.0 f/cc.”

The court determined that “fear of a successful judicial challenge to enforcement of OSHA’s permanent standard regarding respirator use hardly justifies resort to the most dramatic weapon in OSHA’s enforcement arsenal.”

Although OSHA has not promulgated an ETS since the 1983 asbestos standard, it has since determined the necessity of an ETS. In 2006, the agency considered a petition from the United Food and Commercial Workers (UFCW) and International Brotherhood of Teamsters (IBT) for an ETS on diacetyl. The UFCW and IBT petitioned OSHA for the ETS after the National Institute for Occupational Safety and Health (NIOSH) and other researchers found that airborne exposure to diacetyl, then commonly used as an artificial butter flavoring in microwave popcorn and a flavoring in other food and beverage products, was linked to the lung disease bronchiolitis obliterans, now commonly referred to as “popcorn lung.” According to GAO’s 2012 report on OSHA’s standard-setting processes, OSHA informed GAO that although the agency may have been able to issue an ETS based on the grave danger posed by diacetyl, the actions taken by the food and beverage industries, including reducing or removing diacetyl from products, made it less likely that the necessity requirement could be met.

**ETS Duration**

Section 6(c)(2) of the OSH Act provides that an ETS is effective until superseded by a permanent standard promulgated pursuant to the normal rulemaking provisions of the OSH Act. Section 6(c)(3) of the OSH Act requires OSHA to promulgate a permanent standard within six months of...
promulgating the ETS. As shown earlier in this report, six months is well outside of historical and currently expected time frames for developing and promulgating a standard under the notice and comment provisions of the APA and OSH Act, as well as under other relevant federal laws and executive orders. This dichotomy between the statutory mandate to promulgate a standard and the time lines that, based on historical precedent, other provisions in the OSH Act might realistically require for such promulgation raises the question of whether or not OSHA could extend an ETS’s duration without going through the normal rulemaking process. The statute and legislative history do not clearly address this question.

OSHA has used its ETS authority sparingly in its history and not since the asbestos ETS promulgated in 1983. As shown in Table A-1 in the Appendix, of the nine times OSHA has issued an ETS, the courts have fully vacated or stayed the ETS in four cases and partially vacated the ETS in one case. Of the five cases that were not challenged or that were fully or partially upheld by the courts, OSHA issued a permanent standard either within the six months required by the statute or within several months of the six-month period and always within one year of the promulgation of the ETS. Each of these cases, however, occurred before 1980, when a combination of additional federal laws and court decisions added additional procedural requirements to the OSHA rulemaking process. OSHA did not attempt to extend the ETS’s expiration date in any of these cases.

Although the courts have not ruled directly on an attempt by OSHA to solely extend the life of an ETS, in 1974, the U.S. Court Appeals for the Fifth Circuit held in Florida Peach Growers Ass’n v. United States Department of Labor that OSHA was within its authority to amend an ETS without going through the normal rulemaking process. The court stated that “it is inconceivable that Congress, having granted the Secretary the authority to react quickly in fast-breaking emergency situations, intended to limit his ability to react to developments subsequent to his initial response.” The court also recognized the difficulty OSHA may have in promulgating a standard within six months due to the notice and comment requirements of the OSH Act, stating that in the case of OSHA seeking to amend an ETS to expand its focus, “adherence to subsection (b) procedures would not be in the best interest of employees, whom the Act is designed to protect. Such lengthy procedures could all too easily consume all of the temporary standard’s six months life.”

30 For example, OSHA promulgated the Acrylonitrile (vinyl cyanide) ETS on January 17, 1978, and the permanent standard on October 3, 1978, with an effective date of November 2, 1978. The preamble to the permanent standard published in the Federal Register does not include information on the status of the ETS during the time between its expiration and the promulgation of the permanent standard. OSHA, “Occupational Exposure to Acrylonitrile (Vinyl Cyanide),” 43 Federal Register 45762, October 3, 1978.
31 489 F.2d. 120 (5th Cir. 1974).
32 489 F.2d. at 127 (5th Cir. 1974).
33 489 F.2d. at 127 (5th Cir. 1974).
OSHA Standards Related to COVID-19

Current OSHA Standards

Currently, no OSHA standard directly covers exposure to airborne or aerosol diseases in the workplace. As a result, OSHA is limited in its ability to enforce protections for healthcare and other workers who may be exposed to SARS-CoV-2, the virus that causes COVID-19. 34

OSHA may enforce the General Duty Clause in the absence of a standard, if it can be determined that an employer has failed to provide a worksite free of “recognized hazards” that are “causing or are likely to cause death or serious physical harm” to workers. 35 In addition, OSHA’s standards for the use of personal protective equipment (PPE) may apply in cases in which workers require eye, face, hand, or respiratory protection against COVID-19 exposure. 36

As of October 1, 2020, OSHA has issued citations related to COVID-19 to employers at 62 worksites resulting in a total of $913,133 in proposed civil penalties. 37 The majority of these citations were issued to healthcare, nursing, and long-term care providers, including two Department of Veterans Affairs facilities—a hospital in Indianapolis, Indiana, and a community living center in Queens, New York. 38 Two employers in the meat processing industry—Smithfield Packaged Foods, Inc. in Sioux Falls, South Dakota and JBS Foods, Inc. in Greeley, Colorado—were also cited. 39 In the two meat processing cases, citations were issued for General Duty Clause violations. Other citations were issued for violations of OSHA’s respiratory protection, injury and illness reporting, and recordkeeping standards.

The highest amount of proposed penalties issued to a single employer for COVID-19-related violations was $28,070 to the Harborage nursing home operated by Hackensack Meridian Healthcare in New Jersey for four serious and one other than serious violations of the respiratory protection standard. 40 For two of the serious violations, OSHA issued the maximum allowable penalty of $13,494. 41 For the other two serious violations, OSHA issued citations but no monetary penalties. For the other than serious violation, OSHA issued a penalty of $1,082. The two meat processing employers were each assessed maximum penalties of $13,494 for serious violations of the General Duty Clause.

In a letter to OSHA, Senators Elizabeth Warren and Cory A. Booker raised concerns over the amount of penalties issued to these employers. 42 The Senators asked OSHA why these employers

34 OSHA has a standard on blood-borne pathogens (29 C.F.R. §1910.1030) but does not have a standard on pathogens transmitted by airborne droplets.
39 OSHA has the authority to issue citations to Executive Branch agencies, but does not have the authority to issue civil monetary penalties to these agencies.
40 Detailed information on the citations issued to this employer is available at https://www.osha.gov/pls/imis/establishment_inspection_detail?id=1476465.015.
41 OSHA citations are classified as “serious,” “other than serious,” “willful,” or “repeated.” The maximum amounts of OSHA penalties are subject to annual inflationary adjustments.
42 Letter from Senators Elizabeth Warren and Cory A. Booker to Loren Sweatt, Principal Deputy Assistant Secretary of
were each cited for single serious violations of the General Duty Clause rather than multiple violations for each area of the facilities in which social distancing measures were not implemented. They also asked why OSHA did not issue penalties for willful or repeated violations that carry maximum penalties of $134,937 per violation. None of the employers cited for COVID-19-related violations were issued penalties for willful or repeated violations.

**OSHA Respiratory Protection Standard**

**National Institute for Occupational Safety and Health Certification**

The OSHA respiratory protection standard requires the use of respirators certified by NIOSH in cases in which engineering controls, such as ventilation or enclosure of hazards, are insufficient to protect workers from breathing contaminated air. Surgical masks, procedure masks, and dust masks are not considered respirators. NIOSH certifies respirators pursuant to federal regulations. For nonpowered respirators, such as filtering face piece respirators commonly used in healthcare and construction, NIOSH classifies respirators based on their efficiency at filtering airborne particles and their ability to protect against oil particles. Under the NIOSH classification system, the letter (N, R, or P) indicates the level of oil protection as follows: N—no oil protection; R—oil resistant; and P—oil proof. The number following the letter indicates the efficiency rating of the respirator as follows: 95—filters 95% of airborne particles; 97—filters 97% of airborne particles; and 100—filters 99.7% of airborne particles. Thus an N95 respirator, the most common type, is one that does not protect against oil particles and filters out 95% of airborne particles. An R or P respirator can be used in place of an N respirator.

A respirator that is past its manufacturer-designated shelf life is no longer considered to be certified by NIOSH. However, in response to potential shortages in respirators, NIOSH has tested and approved certain models of respirators for certified use beyond their manufacturer-designated shelf lives.

Respirators designed for certain medical and surgical uses are subject to both certification by NIOSH (for oil protection and efficiency) and regulation by the Food and Drug Administration (FDA) as medical devices. In general, respirators with exhalation valves cannot be used in surgical and certain medical settings because, although the presence of an exhalation valve does not affect the respirator’s protection afforded the user, it may allow unfiltered air from the user into a sterile field. On March 2, 2020, FDA issued an Emergency Use Authorization (EUA) to approve for use in medical settings certain NIOSH-certified respirators not previously regulated by FDA.

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43 29 C.F.R. §1910.134.
44 42 C.F.R. Part 84.
46 Letter from RADM Denise M. Hinton, chief scientist, Food and Drug Administration (FDA), to Robert R. Redfield, Director, CDC, March 2, 2020, at https://www.fda.gov/media/135763/download. The list of respirators approved under this Emergency Use Authorization (EUA) is in Appendix B to this letter, updated at https://www.fda.gov/media/135921/download.
CDC Interim Guidance on Respiratory Protection

On March 10, 2020, the Centers for Disease Control and Prevention (CDC) updated its interim guidance for the protection of healthcare workers against exposure to COVID-19 to permit healthcare workers caring for known or suspected COVID-19 cases to use “facemasks” when respirators are not available or are in limited supply. This differs from the CDC’s 2007 guidelines for control of infectious agents in healthcare settings, which required the use of respirators for treatment of known or suspected cases. CDC states that respirators should be prioritized for use in medical procedures likely to generate respiratory aerosols. Before this interim guidance was released, Representative Bobby Scott, Chairman of the House Committee on Education and Labor, and Representative Alma Adams, Chair of the Subcommittee on Workforce Protections, sent a letter to Secretary of Health and Human Services (HHS) Alex M. Azar II expressing their opposition to this change in the interim standard.

Medical Evaluation and Fit Testing

The OSHA respiratory protection standard requires that the employer provide a medical evaluation to the employee to determine if the employee is physiologically able to use a respirator. This medical evaluation must be completed before any fit testing. For respirators designed to fit tightly against the face, the specific type and model of respirator that an employee is to use must be fit tested in accordance with the procedures provided in Appendix A of the OSHA respiratory protection standard to ensure there is a complete seal around the respirator when worn. Once an employee has been fit tested for a respirator, he or she is required to be fit tested annually or whenever the model of respirator, but not the actual respirator itself, is changed. Each time an individual uses a respirator, he or she is required to perform a check of the seal of the respirator to his or her face in accordance with the procedures provided in Appendix B of the standard. On March 14, 2020, OSHA issued guidance permitting employers to suspend annual fit testing of respirators for employees that have already been fit tested on the same model respirator.

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47 Although the interim guidance does not specifically define the term facemask, it does differentiate between a facemask and a respirator such that any recommendation to use a facemask does not require the use of a respirator. CDC, Interim Infection Prevention and Control Recommendations for Patients with Suspected or Confirmed Coronavirus Disease 2019 (COVID-19) in Healthcare Settings, updated March 10, 2020, at https://www.cdc.gov/coronavirus/2019-ncov/infection-control/control-recommendations.html.


50 29 C.F.R. §1910.134 Appendix A. Powered air purifying respirators (PAPR) that do not require a seal to the user’s face do not need to be fit tested.

51 29 C.F.R. §1910.134 Appendix B.
Temporary OSHA Enforcement Guidance on the Respiratory Protection Standard

In response to shortages of respirators and other PPE during the national response to the COVID-19 pandemic, OSHA has issued three sets of temporary enforcement guidance to permit the following exceptions to the respiratory protection standard:

1. Employers may suspend annual fit testing of respirators for employees that have already been fit tested on the same model respirator;\(^{52}\)

2. Employers may permit the use of expired respirators and the extended use or reuse of respirators, provided the respirator maintains its structural integrity and is not damaged, soiled, or contaminated (e.g., with blood, oil, or paint);\(^{53}\) and

3. Employers may permit the use of respirators not certified by NIOSH, but approved under standards used by the following countries or jurisdictions, in accordance with the protection equivalency tables provided in Appendices A and B of the enforcement guidance document:
   - Australia,
   - Brazil,
   - European Union,
   - Japan,
   - Mexico,
   - People's Republic of China, and
   - Republic of Korea.\(^{54}\)

California: Cal/OSHA Aerosol Transmissible Disease Standard

Although no OSHA standard specifically covers aerosol or airborne disease transmission, the California Division of Occupational Safety and Health (Cal/OSHA), under its state plan, promulgated its aerosol transmissible disease (ATD) standard in 2009.\(^{55}\) The ATD standard covers most healthcare workers, laboratory workers, as well as workers in correctional facilities, homeless shelters, and drug treatment programs. Under the ATD standard, SARS-CoV-2, the virus that causes COVID-19, is classified as a disease or pathogen requiring airborne isolation. This classification subjects the virus to stricter control standards than diseases requiring only


\(^{55}\) Cal. Code Regs. tit. 8, §5199. The California state plan covers all state and local government agencies and all private-sector workers in the state, with the exception of maritime workers; workers on military bases and in national parks, monuments, memorials, and recreation areas; workers on federally recognized Native American reservations and trust lands; and U.S. Postal Service contractors.
droplet precautions, such as seasonal influenza.\textsuperscript{56} The key requirements of the ATD standard include

- written ATD exposure control plan and procedures,
- training of all employees on COVID-19 exposure, use of PPE, and procedures if exposed to COVID-19,
- engineering and work practice controls to control COVID-19 exposure, including the use of airborne isolation rooms,
- provision of medical services to employees, including removal of exposed employees,
- specific requirements for laboratory workers, and
- PPE requirements.

**Cal/OSHA Aerosol Transmissible Disease PPE Requirements**

The Cal/OSHA ATD standard requires that employers provide employees PPE, including gloves, gowns or coveralls, eye protection, and respirators certified by NIOSH at least at the N95 level whenever workers

- enter or work in an airborne isolation room or area with a case or suspected case;
- are present during procedures or services on a case or suspected case;
- repair, replace, or maintain air systems or equipment that may contain pathogens;
- decontaminate an area that is or was occupied by a case or suspected case;
- are present during aerosol generating procedures on cadavers of cases or suspected cases;
- transport a case or suspected case within a facility or within a vehicle when the patient is not masked; and
- are working with a viable virus in the laboratory.\textsuperscript{57}

In addition, a powered air purifying respirator (PAPR) with a high-efficiency particulate air (HEPA) filter must be used whenever a worker performs a *high-hazard procedure* on a known or suspected COVID-19 case.\textsuperscript{58} High-hazard procedures are those in which "the potential for being exposed to aerosol transmissible pathogens is increased due to the reasonably anticipated generation of aerosolized pathogens"—they include intubation, airway suction, and caring for patients on positive pressure ventilation.\textsuperscript{59} Emergency medical services (EMS) workers may use N100, R100, or P100 respirators in place of PAPRs.

\textsuperscript{56} Cal. Code Regs. tit. 8, §5199 Appendix A.
\textsuperscript{58} A PAPR uses a mechanical device to draw in room air and filter it before expelling that air over the user’s face. In general, PAPRs do not require a tight seal to the user’s face and do not need to be fit tested.
\textsuperscript{59} Cal. Code Regs. tit. 8, §5199(b).
OSHA E75 and COVID-19

Cal/OSHA Interim Guidance on COVID-19

Cal/OSHA has issued interim guidance in response to shortages of respirators in the state due to the COVID-19 pandemic response. Under this interim guidance, if the supply of N95 respirators or PAPRs are insufficient to meet current or anticipated needs, surgical masks may be used for low-hazard patient contacts that would otherwise require the use of respirators, and respirators may be used for high-hazard procedures that would otherwise require the use of PAPRs.

Virginia: VOSH COVID-19 ETS

On July 15, 2020, the Virginia Safety and Health Codes Board adopted an ETS to specifically protect employees from exposure to SARS-CoV-2, the virus that causes COVID-19. This ETS, promulgated under Virginia’s state occupational safety and health plan (VOSH) is the first state standard to specifically address COVID-19 in the workplace. As an ETS, the VOSH standard expires within six months of its effective date, upon expiration of the Governor’s State of Emergency, when superseded by a permanent standard, or when repealed by the Virginia Safety and Health Codes Board, whichever comes first. The ETS can be extended only through the normal state rulemaking process.

Unlike the Cal/OSHA ATD standard, the VOSH ETS applies to all state and local government agencies and all covered private-sector employees in the state. As part of a state plan, the VOSH ETS applies to state and local government entities, such as public schools, as employers. All covered employers in Virginia must comply with the following ETS requirements:

- exposure assessment and determination, notification of suspected cases and contacts with those cases, and employee access to their own exposure and medical records;
- return to work of employees known or suspected to have COVID-19 based on a duration of time since last symptoms or negative COVID-19 tests;
- maintenance of physical distancing between employees while working and on paid breaks at the worksite, including restricted access to the worksite and common areas and break rooms;
- compliance with applicable existing PPE and respiratory protection standards when physical distancing between employees is not possible; and
- sanitation and disinfection requirements.

For all employers, if engineering, administrative, or work practice controls are not feasible or do not provide sufficient protection from SARS-CoV-2 transmission, then PPE, including respiratory PPE—such as respirators, if necessary—must be provided to employees.

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62 The Virginia state plan covers all state and local government agencies and all private-sector workers in the state, with the exception of maritime workers, U.S Postal Service contractors, workers at military bases or other federal enclaves in which the federal government has civil jurisdiction, workers at the U.S. Department of Energy’s Southeastern Power Administration Kerr-Philpott System, and aircraft cabin crew members.

63 A COVID-19 test for the purposes of determining if an employee can return to work must be paid for by the employer or offered such that the employee bears no cost for the test.
Hazard and Job Task Classification

The VOSH ETS requires that each employer assess its workplace for hazards and job tasks that potentially expose employees to the SARS-CoV-2 virus. Employers must classify each job task as having a “very high,” “high,” “medium,” or “lower” risk level of exposure, according to the hazards to which employees are potentially exposed. The VOSH ETS provides the following examples of activities for the “very high” and “high” risk levels:

- “very high” risk activities include
  - using aerosol-generating procedures, such as intubation, on patients known or suspected to be infected with SARS-CoV-2;
  - collecting or handling specimens from patients known or suspected to be infected with SARS-CoV-2; and
  - performing an autopsy involving aerosol-generating procedures on the body of a person known or suspected to be infected with the SARS-CoV-2 virus at the time of death; and

- “high risk” activities include
  - health care services, including inpatient care, outpatient care, skilled nursing care, and nonmedical support services such as room cleaning, provided to patients known or suspected to be infected with SARS-CoV-2;
  - first responder and medical transport services to patients known or suspected to be infected with SARS-CoV-2; and
  - mortuary services to persons known or suspected to be infected with the SARS-CoV-2 virus at the time of death.

“Medium” risk activities are those that require employees to have more than minimal contact, within six feet of other employees, customers, or members of the public who are not known or suspected to be infected with SARS-CoV-2.64 “Lower” risk activities are those that do not require contact with other persons within six feet or that are able to utilize the following types of engineering, administrative, or work practice controls to minimize contact between persons:

- installation of floor to ceiling barriers, such as barriers between cashiers and customers;
- telecommuting;
- staggered work shifts to reduce the number of workers at a site;
- delivering services remotely, including curbside pickup of retail purchases; and
- mandatory physical distancing of persons.

The use of face coverings other than respirators or medical or surgical masks, including cloth face coverings now required by several states, is not an acceptable method of minimizing physical contact between persons. However, the VOSH ETS requires the use of face coverings for brief contacts between persons within six feet of each other.

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64 Examples of “medium” risk work activities are provided in the VOSH ETS at 16 Va. Admin. Code §25-220-30.
Engineering, Administrative, Work Practice, and PPE Requirements for “Very High,” “High,” and “Medium” Risk Activities

Employers with job tasks or activities in the “very high,” “high,” or “medium” risk classifications must adhere to specific engineering, administrative, work practice, and PPE requirements. For “very high” and “high” risk activities, engineering controls include the use of airborne infection isolation rooms (AIIR) for known or suspected COVID-19 patients and aerosol-generating procedures and Biosafety Level 3 (BSL-3) precautions for the handling of specimens from known or suspected COVID-19 patients.65

Employers with “very high” and “high” risk activities must implement administrative and work practice controls, including the prescreening of all employees to ensure that employees do not have signs or symptoms of COVID-19; enhanced medical screening of employees during COVID-19 outbreaks; and the use of flexible work arrangements, such as telecommuting, when feasible. In addition, all employers with “very high” or “high” risk activities must provide, to the extent feasible, psychological and behavioral support to address employee stress at no cost to the employee.

The standard also provides for engineering, administrative, and work practice controls for “medium” risk activities.66

PPE Requirements for “Very High” and “High” Risk Activities

Employers with “very high” and “high” risk activities, who are not already covered by the general OSHA PPE standards, are required to comply with the VOSHETS requirements for PPE. An employer subject to these requirements must assess the workplace to determine if there are any COVID-19 hazards present or likely to be present that would require the use of PPE by employees. The employer must provide for the participation of employees and employee representatives in this assessment process and verify that this assessment has been conducted through a written certification.

If hazards that require PPE are identified, the employer must select and provide the appropriate PPE to each employee and ensure that PPE fits properly. If respiratory PPE, such as respirators or PAPR are used as PPE, the existing OSHA standards for respiratory PPE, which include medical evaluation of employees and fit testing, must be followed.

Unless contraindicated by the hazard and PPE assessment, when any employee is in contact within six feet of any person known or suspected to be infected with SARS-CoV-2, that employee must be provided with the following types of PPE:

- gloves,
- gown large enough to cover areas needing protection,
- face shield or goggles, and
- respirator.


66 Engineering, administrative, and work practice controls for “medium” risk activities are provided in the VOSH ETS at 16 Va. Admin. Code §25-220-60.
While there are no specific PPE requirements for “medium” risk activities, PPE may be required based on an assessment of the hazards of these activities.

Infectious Disease Preparedness and Response Plan and Training

Infectious Disease Preparedness and Response Plan

All employers with “very high” and “high” risk activities, and employers with 11 or more employees and “medium” risk activities, must develop written infectious disease preparedness and response plans. These plans must be developed with input from employees. The deadline for the development of these plans is 60 days from the effective date of the ETS.

The infectious disease preparedness plan must include a consideration of the COVID-19 risks in the workplace, and to the extent possible and in compliance with medical privacy laws, the specific risks faced by employees with certain preexisting medical conditions. The plan must include contingency plans for continued operations during a COVID-19 outbreak and provide for the prompt identification and isolation of employees with known or suspected COVID-19 and a procedure for employees to notify the employer of COVID-19 signs or symptoms. The plan must also address interactions between the employer’s worksite and other businesses, such as vendors and contractors to ensure employees of these businesses comply with the VOSH ETS and the employer’s infectious disease preparedness and response plan.

Training

All employers with “very high,” “high,” or “medium” risk activities must provide training to all employees, including those employees whose work does not involve any COVID-19 risks. This training must teach employees to recognize the hazards of the SARS-CoV-2 virus, signs and symptoms of COVID-19, and the procedures to minimize SARS-CoV-2 hazards. If the employer has an infectious disease preparedness and response plan, training must be provided on this plan. Written certification of training must be prepared, and retraining must be provided when necessary.

Employers with only “lower” risk activities are not required to prepare a formal training plan but must provide oral or written communication on the hazards of SARS-CoV-2, the signs and symptoms of COVID-19, and measures to minimize SARS-CoV-2 exposure. VOSH is required to develop an information sheet that employers can use to satisfy this training requirement.

Training must be provided within 30 days of the effective date of the standard, except for training on the infectious disease preparedness and response plan, which must be completed within 60 days.

Whistleblower Protections

The VOSH ETS prohibits any employer from discharging or otherwise discriminating against any employee who does the following:

- exercises his or her rights under the ETS or existing whistleblower protection provisions, including the limited right of an employee to refuse work because of a reasonable fear of injury or death or serious injury;\(^{67}\)

\(^{67}\) To exercise this right, the employee must, if possible, have sought unsuccessfully to have the employer remedy the hazard, and there must be insufficient time to attempt to remedy the hazard through normal regulatory enforcement
OSHA provides and wears his or her own PPE, provided the PPE does not create a greater hazard to the employee or create a serious hazard to other employees; or raises a reasonable concern about SARS-CoV-2 and COVID-19 infection control to the employer, the employer’s agent, other employees, the government, or the public through any type of media including social media.

Michigan: MIOSHA COVID-19 Emergency Rules

On October 14, 2020, the director of the Michigan Department of Labor and Economic Opportunity, which operates Michigan’s state occupational safety and health plan (MIOSHA), promulgated emergency rules to address workplace exposure to COVID-19. These rules, which apply to all employers in the state, went into immediate effect and will remain in effect for six months. In addition to rules that apply to all employers, the emergency rules include specific provisions that apply to the following industries:

- construction;
- manufacturing;
- retail, libraries, and museums;
- restaurants and bars;
- healthcare;
- in-home services such as house cleaning and repair;
- personal care services such as hair styling and tattooing;
- public accommodations such as sports and entertainment venues;
- sports and exercise facilities;
- meat and poultry processing; and
- casinos.

Exposure Determination

Rule 3 of the MIOSHA emergency rules requires all employers to evaluate all routine and anticipated job tasks and categorize these job tasks based on potential employee exposure to COVID-19 into one of the following four categories:

1. “Lower exposure risk” tasks are those that do not require contact with known or suspected COVID-19 cases or frequent close (within six feet) contact with the general public.
2. “Medium exposure risk” tasks are those that require frequent or close contact with persons who may be infected with COVID-19 but who are not known or suspected COVID-19 cases. In areas of the state without ongoing community channels.

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transmission of COVID-19, tasks that require frequent contact with persons travelling from areas with widespread COVID-19 transmission are included in this category. In areas with ongoing community transmission, tasks that involve contact with the general public are included in this category.

3. “High exposure risk” tasks are those with high potential for exposure to known or suspected COVID-19 cases. Licensed healthcare providers, medical first responders, nursing home workers, law enforcement and correctional officers, and mortuary workers are examples of types of workers that may perform tasks in this category.

4. “Very high exposure risk” tasks are those that involve the generation of aerosols during medical or mortuary procedures on known or suspected COVID-19 cases and the collection and handling of laboratory specimens from known or suspected COVID-19 cases.

Preparedness and Response Plan

Rule 4 of the MIOSHA emergency rules requires all employers to develop a written COVID-19 preparedness and response plan based on current CDC and OSHA guidance. This plan must detail measures the employer will take to protect employees from COVID-19 exposure and must be readily available to employees and their representatives.

Basic Infection Prevention Measures

Rule 5 of the MIOSHA emergency rules requires all employers to implement the following basic infection prevention measures:

- promote frequent hand-washing and provide hand-washing facilities or hand sanitizer to workers, customers, and visitors;
- require employees who are sick to not report to work or to report to an isolated location;
- prohibit workers from using other workers’ desks, phones, and other equipment when possible;
- increase facility cleaning, especially of high-touch surfaces and shared equipment;
- establish procedures, consistent with CDC guidance, for disinfection of the worksite if a worker, customer, or visitor has a known case of COVID-19;
- use Environmental Protection Agency (EPA) approved disinfectants that are expected to effective against SARS-CoV-2;
- follow all manufacturer’s guidelines for use of all cleaning and disinfectant products; and
- prohibit in-person work for employees whose work can be done remotely.

Health Surveillance

Rule 6 of the MIOSHA emergency rules requires all employers to implement a health surveillance system for the workplace. This system must include, at a minimum, a COVID-19 screening questionnaire for all employees and contractors entering the workplace. Employees must be directed to immediately report any signs or symptoms of COVID-19 to the employer and known and suspected COVID-19 cases must be isolated from the rest of the workforce.
employer learns of an employee, contractor, customer, or visitor to the worksite with a known case of COVID-19, the employer must immediately notify the local health department and, must notify, within 24 hours, any workers, contractors, or suppliers who may have come into contact with the infected person. When determining if an employee with a known or suspected case of COVID-19 may return to the workplace, the employer must follow CDC guidelines and health department quarantine and isolation orders.

Workplace Controls

Rule 7 of the MIOSHA emergency rules requires all employers to implement the following workplace controls:

- designate one or more worksite COVID-19 safety coordinators to implement, monitor, and report on COVID-19 control strategies developed by the employer and to remain on site at all times when employees are present;
- place posters in appropriate languages in the workplace that provide information on staying away from work while sick, cough and sneeze etiquette, and hand hygiene;
- keep all persons at least six feet from each other using signs, floor markings, and barriers appropriate for the worksite, to the extent possible;
- provide all employees with non-medical grade face coverings at no cost to the employees;
- require the use of face coverings when employees cannot maintain six feet of distance from other persons in the workplace, and consider the use of face shields when three feet of distance cannot be maintained;
- require face coverings in shared spaces, such as restrooms and hallways and during in-person meetings.

PPE

Rule 8 of the MIOSHA emergency rules requires that employers provide appropriate PPE, including respiratory protection, to employees based on the exposure risks of the job and current CDC and OSHA guidelines. All PPE must be properly fitted, inspected, maintained, cleaned, stored, and disposed of. In workplaces that provide medical treatment to known or suspected COVID-19 cases, employees with frequent or prolonged close contact with such patients must be provided with and wear, at a minimum, an N95 respirator, goggles or face shield, and gown.

Training Requirements

Rule 10 of the MIOSHA emergency rules requires all employers to provide training and communication, in languages common among the employees, on the following subjects:

- workplace infection-control practices;
- proper use of PPE;
- how to notify the employer of COVID-19 symptoms or diagnosis;
- how to report unsafe working conditions.

This training must be updated if the employer’s COVID-19 preparedness and response plan changes or new information on COVID-19 transmission becomes available.
Recordkeeping Requirements

Rule 11 of the MIOSHA emergency rules requires that all employers maintain, for one year, records of employee training, the screening of persons entering the workplace, and any health surveillance notifications required by Rule 6.

OSHA Infectious Disease Standard Rulemaking

In 2010, OSHA published a Request for Information in the Federal Register seeking public comments on strategies to control exposure to infectious diseases in healthcare workplaces. After collecting public comments and holding public meetings, OSHA completed the SBREFA process in 2014. Since then, however, no public actions have occurred on this rulemaking; since spring 2017, this rulemaking has been listed as a “long-term action” in DOL’s semiannual regulatory agenda.

Congressional Activity to Require an OSHA Emergency Temporary Standard on COVID-19

On March 5, 2020, Representative Bobby Scott, chairman of the House Committee on Education and Labor, and Representative Alma Adams, chair of the Subcommittee on Workforce Protections, sent a letter to Secretary of Labor Eugene Scalia calling on OSHA to promulgate an ETS to address COVID-19 exposure among healthcare workers. This letter followed a January 2020 letter requesting that OSHA reopen its rulemaking on the infectious disease standard and begin to formulate for possible future promulgation an ETS to address COVID-19 exposure.

Senator Patty Murray, ranking member of the Senate Committee on Health, Education, Labor, and Pensions and a group of Democratic Senators sent a similar letter to the Secretary of Labor calling for an OSHA ETS.

In addition, in March 2020, David Michaels, who served as the Assistant Secretary of Labor for Occupational Safety and Health during the Obama Administration, wrote an op-ed in The Atlantic calling on OSHA to promulgate a COVID-19 ETS. On March 6, 2020, the AFL-CIO and 22 other unions petitioned OSHA for an ETS on infectious diseases that would cover all workers with potential exposures. OSHA formally denied the AFL-CIO petition on May 29, 2020, claiming that an ETS is not necessary to protect employees from infectious diseases generally, or

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71 Letter from Representative Scott, chairman, House Committee on Education and Labor, and Representative Adams, chair, Subcommittee on Workforce Protections, to The Honorable Eugene Scalia, Secretary of Labor, March 5, 2020, at https://edlabor.house.gov/imo/media/doc/2020-03-05%20OSHA%20ETS%20Letter.pdf.
from COVID-19. 76 National Nurses United submitted a similar petition requesting that OSHA promulgate an ETS based largely on the Cal/OSHA ATD standard. 77 On May 4, 2020, the Center for Food Safety and Food Chain Workers Alliance submitted a petition requesting that OSHA promulgate an ETS to protect meat and poultry processing workers from COVID-19 exposure in the workplace. 78 On May 18, 2020, the AFL-CIO petitioned the U.S. Court of Appeals for the D.C. Circuit for a writ of mandamus to compel OSHA to promulgate a COVID-19 ETS. 79 The circuit court denied this petition on June 11, 2020.

H.R. 6139, the COVID-19 Health Care Worker Protection Act of 2020

On March 9, 2020, Representative Bobby Scott introduced H.R. 6139, the COVID-19 Health Care Worker Protection Act of 2020. This bill would require OSHA to promulgate a COVID-19 ETS within one month of enactment. The ETS would be required to cover healthcare workers and any workers in sectors determined by the CDC or OSHA to be at an elevated risk of COVID-19 exposure. The ETS would be required to include an exposure control plan provision and be, at a minimum, based on CDC’s 2007 guidance and any updates to this guidance. The ETS would also be required to provide no less protection than any state standard on novel pathogens, thus requiring OSHA to include the elements of the Cal/OSHA ATD standard, the VOSH COVID-19 ETS, and the MIOSHA emergency rules in this ETS. Title II of the bill would provide that hospitals and skilled nursing facilities that receive Medicare funding and that are owned by state or local government units and not subject to state plans would be required to comply with the ETS. Similar provisions are included in S. 3475.

P.L. 116-127, the Families First Coronavirus Response Act

The provisions of H.R. 6139 were included as Division C of H.R. 6201, the Families First Coronavirus Response Act, as introduced in the House. The American Hospital Association (AHA) issued an alert to its members expressing its opposition to the OSHA ETS provisions in the bill. 80 Specifically, the AHA opposed the requirement that the ETS be based on the CDC’s 2007 guidance. The AHA stated that unlike severe acute respiratory syndrome (SARS), which was transmitted through the air, COVID-19 transmission is through droplets and surface contacts. Thus, the requirement of the 2007 CDC guidance that N95 respirators, rather than surgical masks, be used for patient contact is not necessary to protect healthcare workers from COVID-19, and the use of surgical masks is consistent with World Health Organization guidance. The AHA also

76 Letter from Loren Sweatt, Principal Deputy Assistant Secretary of Labor, to Richard L. Trumka, president, AFL-CIO, May 29, 2020.

77 Letter from Bonnie Castillo, executive director, National Nurses United, to The Honorable Eugene Scalia, Secretary of Labor, and The Honorable Loren Sweatt, Principal Deputy Assistant Secretary of Labor for Occupational Safety and Health, March 4, 2020, at https://act.nationalnursesunited.org/page/-/files/graphics/NNUPetitionOSHA03042020.pdf.


79 In re: American Federation of Labor and Congress of Industrial Organizations, D.C. Cir., No. 19-1158, May 18, 2020. This petition was filed in the U.S. Court of Appeals as Section 6(f) of the OSH Act [29 U.S.C. §655(6)] grants this court exclusive jurisdiction to provide judicial review of OSHA standards.

claimed that shortages of available respirators could reduce the capacity of hospitals to treat COVID-19 patients, due to a lack of respirators for staff. The OSHA ETS provisions were not included in the version of the legislation that was passed by the House and the Senate and signed into law as P.L. 116-127.

H.R. 6379, the Take Responsibility for Workers and Families Act

Division D of H.R. 6379, the Take Responsibility for Workers and Families Act, as introduced in the House on March 23, 2020, includes the requirement that OSHA promulgate an ETS on COVID-19 within seven days of enactment and a permanent COVID-19 standard within 24 months of enactment to cover healthcare workers, firefighters and emergency response workers, and workers in other occupations that CDC or OSHA determines to have an elevated risk of COVID-19 exposure. Division D of H.R. 6379 would amend the OSH Act, for the purposes of the ETS only, such that state and local government employers in states without state plans would be covered by the ETS. The provisions of Division D of H.R. 6379 were also included in S. 3584, the COVID-19 Workers First Protection Act of 2020, as introduced in the Senate.

This legislation would specifically provide that the ETS would remain in force until the permanent standard is promulgated and would explicitly exempt the ETS from the Regulatory Flexibility Act, Paperwork Reduction Act, and Executive Order 12866. OSHA would be granted enforcement discretion in cases in which it is not feasible for an employer to fully comply with the ETS (such as a case in which PPE is unavailable) if the employer is exercising due diligence to comply and implementing alternative means to protect employees.

Like the provisions in H.R. 6139 and the version of H.R. 6201 introduced in the House, the ETS and permanent standard under H.R. 6379 would be required to include an exposure control plan and provide no less protection than any state standard on novel pathogens, thus requiring OSHA to include the elements of the Cal/OSHA ATD, the VOSH COVID-19 ETS, and the MIOSHA emergency rules in this ETS and permanent standard. Although the ETS provisions in H.R. 6139 and H.R. 6201 would require that the ETS be based on the 2007 CDC guidance, specific reference to the 2007 guidance is not included in this legislation. Rather, under H.R. 6379, the ETS and permanent standard would have to incorporate, as appropriate, “guidelines issued by the Centers for Disease Control and Prevention, and the National Institute for Occupational Safety and Health, which are designed to prevent the transmission of infectious agents in healthcare settings” and scientific research on novel pathogens.

States with occupational safety and health plans would be required to adopt the ETS, or their own ETS at least as effective as the ETS, within 14 days of the legislation’s enactment.

H.R. 6559, the COVID-19 Every Worker Protection Act of 2020

H.R. 6559, the COVID-19 Every Worker Protection Act of 2020, was introduced in the House by Representative Bobby Scott on April 21, 2020. This legislation includes the ETS and permanent standard provisions of Division D of H.R. 6379 and S. 3584 and would require that these standards cover healthcare workers, emergency medical responders, and “other employees at occupational risk” of COVID-19 exposure. This legislation also adds two provisions that would clarify the requirements for employers to record work-related COVID-19 infections and strengthen the protections against retaliation and discrimination offered to whistleblowers. Similar provisions are included in S. 3677 and were incorporated into H.R. 6800, the Heroes Act, as passed by the House.
COVID-19 Recordkeeping

Sections 8(c) and 24(a) of the OSH Act require employers to maintain records of occupational injuries and illnesses in accordance with OSHA regulations. OSHA’s reporting and recordkeeping regulations require that employers with 10 or more employees must keep records of work-related injuries and illnesses that result in lost work time for employees or that require medical care beyond first aid. Employers must also report to OSHA, within 8 hours, any workplace fatality, and within 24 hours, any injury or illness that results in in-patient hospitalization, amputation, or loss of an eye. Employers in certain industries determined by OSHA to have lower occupational safety and health hazards are listed in the regulations as being exempt from the recordkeeping requirements but not the requirement to report to OSHA serious injuries, illnesses, and deaths. Offices of physicians, dentists, other health practitioners, and outpatient medical clinics are included in the industries that are exempt from the recordkeeping requirements.

OSHA regulations require the employer to determine if an employee’s injury or illness is related to his or her work and thus subject to the recordkeeping requirements. The regulations provide a presumption that an injury or illness that occurs in the workplace is work-related and recordable, unless one of the exemptions provided in the regulations applies. One of the listed exemptions is “The illness is the common cold or flu (Note: contagious diseases such as tuberculosis, brucellosis, hepatitis A, or plague are considered work-related if the employee is infected at work).”

Because of the nature of COVID-19 transmission, which can occur in the community as well as the workplace, it can be difficult to determine the exact source of any person’s COVID-19 transmission. Absent any specific guidance, this may make it difficult for employers to determine if an employee’s COVID-19 is subject to the recordkeeping requirements.

Initial OSHA Recordkeeping Guidance

On April 10, 2020, OSHA issued enforcement guidance on how cases of COVID-19 should be treated under the recordkeeping requirements. This guidance stated that COVID-19 cases were recordable if they were work-related.

Under this guidance, employers in the following industry groups were to fully comply with the recordkeeping regulations, including the requirement to determine if COVID-19 cases were work-related:

- healthcare;
- emergency response, including firefighting, emergency medical services, and law enforcement; and
- correctional institutions.

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81 29 U.S.C. §§657(c) and 673(a).
82 OSHA’s reporting and recordkeeping regulations are at 29 C.F.R. Part 1904.
83 The list of exempted industries is at 29 C.F.R. Subpart B, Appendix A. States with state occupational safety and health plans may require employers in these exempted industries to comply with the recordkeeping requirements.
84 29 C.F.R. §1904.5.
85 29 C.F.R. §1905.5(a).
86 29 C.F.R. §1904.5(b)(2)(viii).
For all other employers, OSHA required employers to determine if COVID-19 cases were work-related and subject to the recordkeeping requirements only if both of the following two conditions were met:

1. There was objective evidence that a COVID-19 case may have been work-related. This could have included, for example, a number of cases developing among workers who worked closely together without an alternative explanation.
2. The evidence of work-relatedness was reasonably available to the employer. For purposes of this guidance, examples of reasonably available evidence included information given to the employer by employees, as well as information that an employer learned regarding its employees’ health and safety in the ordinary course of managing its business and employees.

**Updated OSHA Recordkeeping Guidance**

OSHA issued new guidance, effective May 26, 2020, on recordkeeping of COVID-19 cases. This new guidance rescinds the previous guidance issued by OSHA on April 10, 2020. Under this new guidance, all employers, regardless of type of industry or employment, are subject to the recordkeeping and recording regulations for work-related cases of COVID-19. To determine if an employer has made a reasonable determination that a case of COVID-19 was work-related, OSHA says it will consider the following factors:

- the reasonableness of the employer’s investigation of the COVID-19 case and its transmission to the employee;
- the evidence that is available to the employer; and
- the evidence that COVID-19 was contracted at work.

The guidance provides examples of evidence that can be used to demonstrate that a COVID-19 case was or was not work-related such as if an employee had frequent close contact with members of the public in an area with ongoing community transmission of COVID-19.

**H.R. 6559**

H.R. 6559 would require that the ETS and permanent standard established pursuant to the legislation include the requirement for the recording and reporting of all COVID-19 cases in accordance with OSHA regulations in place at the time of enactment. By referencing the regulations in place, this provision would serve to supersede OSHA’s guidance from April 10, 2020, and apply the requirement, currently provided in the guidance effective May 26, 2020, to determine the work-relatedness of COVID-19 cases to all employers covered by the recordkeeping regulations.

**Whistleblower Protections**

Section 11(c) of the OSHAct prohibits any person from retaliating or discriminating against any employee who exercises certain rights provided by the OSHAct. Commonly referred to as the

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whistleblower protection provision, this provision protects any employee who takes any of the following actions:

- files a complaint with OSHA related to a violation of the OSH Act;
- causes an OSHA proceeding, such as an investigation, to be instituted;
- testifies or is about to testify in any OSHA proceeding; and
- exercises on his or her own behalf, or on behalf of others, any other rights afforded by the OSH Act.90

Other rights afforded by the OSH Act that are covered by the whistleblower protection provision include the right to inform the employer about unsafe work conditions; the right to access material safety data sheets or other information required to be made available by the employer; and the right to report a work-related injury, illness, or death to OSHA.91 In limited cases, the employee has the right to refuse to work if conditions reasonably present a risk of serious injury or death and there is not sufficient time to eliminate the danger through other means.92

H.R. 6559 would require that the ETS and permanent standard promulgated pursuant to the legislation expand the protections for whistleblowers. The following additional activities taken by employees would grant them protection from retaliation and discrimination from employers and agents of employers:

- reporting to the employer; a local, state, or federal agency; or the media; or on a social media platform; the following:
  - a violation of the ETS or permanent standard promulgated pursuant to the legislation;
  - a violation of the infectious disease control plan required by the ETS or permanent standard; or
  - a good-faith concern about an infectious disease hazard in the workplace;
- seeking assistance from the employer or a local, state, or federal agency with such a report; and
- using personally supplied PPE with a higher level of protection than offered by the employer.

H.R. 6800, The Heroes Act

The provisions of H.R. 6559, including the provisions relating to recordkeeping and whistleblower protections, were included as Title III of Division L of H.R. 6800, The Heroes Act. H.R. 6800 was passed by the House on May 15, 2020. In a letter to Speaker of the House Nancy Pelosi, the AHA expressed its opposition to the ETS provisions in The Heroes Act citing the potential for confusion that new regulations could bring and the “ongoing global lack of supplies, equipment and testing capability” faced by hospitals.93 The AHA also stated that the provision

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90 29 C.F.R. §1977.3. Public-sector employees, except employees of the United States Postal Service, are not protected by the whistleblower provision, but may be covered by whistleblower provisions in other federal and state statutes.
91 For additional information on other rights covered by the whistleblower protection provision, see OSHA, January 9, 2019, Investigator’s Desk Aid to the Occupational Safety and Health Act (OSH Act) Whistleblower Protection Provision, pp. 5-7, at https://www.osha.gov/sites/default/files/11cDeskAid.pdf.
93 Letter from Thomas P. Nickels, executive vice president, American Hospital Association, to Hon. Nancy Pelosi,
that would require the ETS to be based on state standards “suggests that the federal government is
surrendering its responsibility to appropriately regulate the nation to a state government agency
without consideration of whether that state’s decisions are appropriate for implementation
anywhere and everywhere.”

**H.R. 925, The Heroes Act (Revised)**

The provisions of H.R. 6559 and H.R. 6800 were included in the House Amendment to the Senate
Amendment to H.R. 925, the revised Heroes Act, passed by the House on October 1, 2020.

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Speaker, U.S. House of Representatives, May 14, 2020, at https://www.aha.org/system/files/media/file/2020/05/web-
AHALettertoHouseconHEROESAct051420final.pdf.
## Appendix. OSHA Emergency Temporary Standards

### Table A-1. OSHA Emergency Temporary Standards (ETS)

<table>
<thead>
<tr>
<th>Year</th>
<th>Subject of ETS</th>
<th>Federal Register Citation of ETS</th>
<th>Result of Judicial Review</th>
<th>Judicial Review Case Citation</th>
</tr>
</thead>
<tbody>
<tr>
<td>1971</td>
<td>Asbestos</td>
<td>36 Federal Register 23207 (December 7, 1971)</td>
<td>Not challenged</td>
<td></td>
</tr>
<tr>
<td>1973</td>
<td>Organophosphorous pesticides</td>
<td>38 Federal Register 10715 (May 1, 1973); amended by 38 Federal Register 17214 (June 29, 1973)</td>
<td>Vacated</td>
<td>Florida Peach Growers Ass'n v. United States Department of Labor, 489 F.2d 120 (5th Cir. 1974)</td>
</tr>
<tr>
<td>1974</td>
<td>Vinyl chloride</td>
<td>39 Federal Register 12342 (April 5, 1974)</td>
<td>Not challenged</td>
<td></td>
</tr>
<tr>
<td>1976</td>
<td>Diving operations</td>
<td>41 Federal Register 24271 (June 15, 1976)</td>
<td>Stayed</td>
<td>Taylor Diving &amp; Salvage Co. v. Department of Labor, 537 F.2d 819 (5th Cir. 1976)</td>
</tr>
<tr>
<td>1977</td>
<td>1,2 Dibromo-3-chloropropane (DBCP)</td>
<td>42 Federal Register 45535 (September 9, 1977)</td>
<td>Not challenged</td>
<td></td>
</tr>
</tbody>
</table>


### Author Information

Scott D. Szymendera
Analyst in Disability Policy
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Hi All,

Virginia has received the attached petition for an Emergency Temporary Standard for COVID-19 Hazards in the Poultry Processing/Meatpacking Industries.

While I’m aware that OSHA has received a petition from the AFL-CIO for a broad based Emergency Temporary Standard for COVID-19 Hazards, I wanted to know if any other state plans are dealing with any such petitions (either broad based or focused on particular industries) and if you would be willing to share information with Virginia on what approach you are taking?

If you could provide contact information for someone we could contact directly, that would be very helpful.

Thanks much,

Jay

Jay Withrow, Director
Division of Legal Support, VPP, ORA, OPPPI, and OWP
Virginia Department of Labor and Industry
600 E. Main Street, Suite 207
Richmond, VA 23219
jay.withrow@doli.virginia.gov
804.786.9873

Visit our website at www.doli.virginia.gov
### Exhibit A
Model Policy Language & Commentary

<table>
<thead>
<tr>
<th>Policy Language</th>
<th>Commentary</th>
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<tbody>
<tr>
<td><strong>Section 1. Definitions</strong></td>
<td>In order to protect workers and the public during the COVID-19 crisis, it is essential that worker health and safety protections, and related protections for whistleblowers, apply broadly to all workers who regardless of how they are classified -- or in many cases misclassified.</td>
</tr>
<tr>
<td>(a) “Worker” means any person whom an employer suffers or permits to work, and shall include independent contractors, and persons performing work for an employer through a temporary services or staffing agency.</td>
<td></td>
</tr>
<tr>
<td>(b) “Employer” means an individual or entity that suffers or permits a person to work, and shall include contracting for the services of a person. More than one entity may be the “employer.”</td>
<td>This policy therefore uses a broad definition of “worker” that includes employees (using the broad “suffer or permit” to work employment standard found in the federal Fair Labor Standards Act), but also independent contractors and employees performing work through temporary services or staffing agencies.</td>
</tr>
<tr>
<td>(c) “Hand sanitizer” means alcohol-based hand sanitizer that is at least 60% alcohol.</td>
<td>It also recognizes a Department chiefly charged with enforcement of the policy -- which could be either the state Department of Labor or, for a municipal policy, a city or county labor or health agency.</td>
</tr>
<tr>
<td>(d) “Department” means the Department of Labor, or other state or local agency responsible for enforcing this Act.</td>
<td>As discussed below in the enforcement section, it also empowers a full range of law enforcement entities, including the attorney general, district attorneys, and city and county attorneys to enforce the law, recognizing that limited enforcement capacity is a major obstacle to ensuring safe workplaces.</td>
</tr>
</tbody>
</table>

| Section 2. Protecting Workers From COVID-19 | And crucially, it authorizes workers and other whistleblowers to enforce the law through a private right of action and “qui tam” enforcement, supplementing limited government enforcement resources. |
| (b) Employers | Since OSHA has failed to adopt a COVID-19 standard, or any infectious disease standard, to protect workers, states and even cities, can act to adopt such standards. |
Employers must comply with the following measures:

1. **Social Distancing:** The employer shall maintain 6 feet between workers, and between workers and customers, by using one or more of the following measures: Implementing flexible worksites (e.g., telework); Implementing flexible work hours (e.g., staggered shifts); Increasing physical space between workers at the worksite to six feet; Increasing physical space between workers and customers (e.g., drive-through, partitions, and limits to the number of customers in grocery stores, for example); Implementing flexible meeting and travel options (e.g., postpone non-essential meetings or events); Delivering services remotely (e.g., phone, video, or web); or Delivering products through curbside pick-up or delivery. Further, this should include reconfiguring spaces where workers congregate including lunch and break rooms, locker rooms and time clocks.

2. **Face Masks and Plastic Face Shields:** All workers shall be provided (free of charge) cotton face masks (double layer cotton) by their employer. All customers in grocery stores and pharmacies shall be required to wear face masks. Face shields shall also be made available by employers to workers.

3. **Hand Sanitizing, Hand Washing and Gloves:** Employers must provide hand sanitizers that are readily available in multiple locations in the workplace. Workers must have the ability to wash their hands with soap and water regularly. Gloves shall be provided by employers to workers who request them.

4. **Regular Disinfection:** Employers must clean and disinfect regularly all frequently touched surfaces in the workplace, such as workstations, touchscreens, telephones, handrails, and doorknobs.

5. **Increase Ventilation Rates:** Increase the percentage of outdoor air that circulates in the system.

6. **Notification of Workers:** If a worker is confirmed to have COVID-19 infection, the employer must inform fellow workers of their possible exposure to COVID-19 in the workplace while keeping the infected worker’s identity confidential as required by the Americans with Disabilities Act (ADA).

- This section outlines standards that states should adopt to protect workers. The model includes basic protections in six areas: (1) Social distancing; (2) Face masks and plastic face shields; (3) Hand sanitizing, hand washing and gloves; (4) Regular disinfection; (5) Ventilation (6) Notification of workers of illness in the workplace; and (7) Deep cleaning after confirmed cases.

- This proposed standard is drawn in large part from voluntary, non-binding guidance that CDC and OSHA have issued for employers on how to protect all other essential workers. That guidance is gathered and linked to below the proposed standard.

- Already states are beginning to step in to mandate some of these protections for workers during the COVID crisis—though none have yet mandated the full range of needed protections. In addition to California, New York Governor Andrew Cuomo recently issued an Executive Order that requires all employers to provide essential workers with masks free of charge when interacting with the public.

- Cities are also now stepping in to require employers to protect workers. Los Angeles now requires that delivery employers provide masks, gloves or hand sanitizers and physical distancing to workers. They have also enacted specific limits to how many customers can be in stores.

- The most critical guidance to follow to prevent COVID transmission in the workplace, is social distancing—physical distancing of workers from the public and from one another.

- Equally important, face masks are recommended by CDC to help those who are infected with the virus and do not know it (those who are asymptomatic or pre-symptomatic) from spreading the virus to others. It is well established that there is significant risk of transmission from asymptomatic and presymptomatic individuals. CDC states: “It is critical to emphasize that maintaining six feet social distancing remains important to slowing the spread of the virus. CDC is additionally advising the use of simple cloth face coverings to slow the spread of the virus and help people who may have the virus and do not know it from transmitting it to others.”

- Because not all cotton face masks provide equal protection, face shields are also being provided...
Deep Cleaning after Confirmed Cases: If a worker is suspected or confirmed to have COVID-19, the employer shall close off workplace areas visited by the ill person. Open outside doors and windows and use ventilating fans to increase circulation in the area. Wait 24 hours or as long as practical, and then conduct cleaning and disinfection as directed by CDC Cleaning and Disinfection for Community Facilities guidelines.

References:
https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/cloth-face-cover.html (employers must provide masks that are at least as protective as the more protective masks made from two layers of cotton sheet);

<table>
<thead>
<tr>
<th>Section 3. Whistleblower Protection</th>
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<tbody>
<tr>
<td>(a) No employer or other person shall discriminate or take adverse action against any worker or other person who raises any concern about infection control related to COVID-19 to the employer, the employer's agent, other workers, a government agency, or to the public such as through print, online, social, or any other media.</td>
</tr>
<tr>
<td>(b) No employer shall discriminate or take adverse action against a worker who voluntarily brings in and wears his or her own personal protective equipment, such as a mask, faceguard, or gloves, if such equipment is not provided by the employer.</td>
</tr>
<tr>
<td>(c) If an employer or other person takes an adverse action against a worker or other person within 90 days of the worker or person's engagement or attempt to engage in activities protected by this Section, such conduct shall raise a presumption that the action is retaliation in violation of this act. The presumption may be rebutted by clear and convincing evidence that the action was taken for other permissible reasons.</td>
</tr>
<tr>
<td>Section 4. Refusal to Work Under Dangerous Conditions</td>
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<td>-----------------------------------------------------</td>
</tr>
<tr>
<td>(a) A worker shall have the right to refuse to work under conditions that the worker reasonably believes would expose him or her, other workers or the public to an unreasonable risk of illness or exposure to COVID-19.</td>
</tr>
<tr>
<td>(b) An employer shall not discriminate or take adverse action against a worker for a good faith refusal to work if the worker has requested that the employer correct such a condition and the condition remains uncorrected.</td>
</tr>
<tr>
<td>(c) A worker who has refused in good faith to work under such a condition and who has not been reassigned to other work by the employer shall, in addition to retaining a right to continued employment, shall continue to be paid by the employer for the hours that would have been worked until such time as the employer can demonstrate that the condition has been remedied.</td>
</tr>
<tr>
<td>(d) If an employer or other person takes an adverse action against a worker or other person within 90 days of the worker or person's engagement or attempt to engage in activities protected by this Section, such conduct shall raise a presumption that the action is retaliation in violation of this act. The presumption may be rebutted by clear and convincing evidence that the action was taken for other permissible reasons.</td>
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<thead>
<tr>
<th>Section 5. State Unemployment Insurance Benefits for Separating from Work Because of Dangerous Conditions</th>
</tr>
</thead>
<tbody>
<tr>
<td>Notwithstanding any other provisions of chapter X [the state Unemployment Insurance law]:</td>
</tr>
<tr>
<td>• This model also includes a rebuttable presumption that any adverse action taken against an employee or person within 90 days of protected activity is retaliatory. Such a presumption is an effective approach for protecting whistleblowers and has been incorporated into state and local wage theft laws.</td>
</tr>
<tr>
<td>• Workers should not have to choose between their lives and their paycheck.</td>
</tr>
<tr>
<td>• While OSHA rules protect this right on paper, they are weak at best and are largely unenforced.</td>
</tr>
<tr>
<td>• It is therefore urgent that states and cities step to ensure that workers may refuse to work under dangerous conditions without being subject to retaliation—and that they continue to be paid so long as the dangerous workplace condition remains unremedied.</td>
</tr>
<tr>
<td>• This right to be free from retaliation should, like the whistleblower protections detailed above, include a rebuttable presumption that any adverse action taken against an employee or person within 90 days of protected activity is retaliatory.</td>
</tr>
<tr>
<td>• State unemployment insurance laws should be amended to clarify that workers have good cause to quit—and therefore should be eligible for unemployment insurance benefits—if their...</td>
</tr>
</tbody>
</table>
(a) A claimant who has left his or her employment, or had their hours reduced after they refused to work because their employer maintained and failed to cure a health or safety condition that made the environment unsuitable, or because the claimant needed to care for a sick or quarantined family member, shall be deemed constructively discharged and eligible for benefits.

(b) In a public health emergency, no claimant shall be required to prove that an unreasonable condition created a risk unique to them. Nor shall a claimant be required to prove that the risk was not customary to their occupation.

(c) The claimant shall not be subject to traditional exhaustion requirements, but shall be deemed to have exhausted alternatives if he or she notified the employer and the employer refused to cure, if another employee notified the employer and the employer refused to cure, or if the employer had or should have had reason to know that the condition made the work environment unsuitable and did not cure it.

(d) In a public health emergency, when processing a claim for benefits for a worker who has quit for a health/safety-related reason, the worker shall be entitled to a presumption that he or she left their job for good cause, and the agency shall interpret any other existing statutory or regulatory requirement accordingly.

Section 6. Presumption of State Worker’s Compensation Coverage for All Workers

For purposes of workers compensation coverage under chapter X [the state workers’ compensation law], a worker who contracts COVID-19 is presumed to have an occupational disease arising out of and in the course of employment if the worker is a worker of a health care and emergency responder employer, or a front-line worker, including workers of grocery stores and pharmacies, food beverage, cannabis production and agriculture, organizations that provide charitable and social services, gas stations and businesses needed for transportation, financial institutions, hardware and supplies stores, critical trades, mail, post, shipping, logistics, delivery, and pick-up services, educational institutions, laundry

- Workers’ compensation provides a crucial source of healthcare coverage and income support for sick workers. Importantly, workers’ compensation coverage is broadly available to all sick workers, regardless of factors such as immigration status.
- During the COVID-19 crisis, states should ensure that COVID-19 and any associated quarantine are covered by the state workers’ compensation program.
- Governors and legislatures in some states are already acting to clarify or expand workers’ compensation eligibility for COVID-19 illness through orders issued under their emergency powers.
services, restaurants for consumption off-premises, supplies to work from home, supplies for essential businesses and operations, transportation, home-based care and services, residential facilities and shelters, professional services, day care centers, and manufacture, distribution, and supply chain for critical products and industries, media or any other worker deemed to be essential during the COVID-19 crisis.

powers, while other states are doing so through legislation. Cities, however, cannot reform state workers’ compensation systems.

- This model language is adapted from some of these new workers’ compensation reforms that have been implemented in states across the country.
- The best language contains a presumption that all workers who continue to work outside of their homes are covered by workers’ compensation if they become sick with COVID-19.
- These changes can be implemented by legislation or governors’ executive orders. It would be advisable to have the orders include a requirement for immediate payment of benefits pending resolution of individual claims (and hold harmless the claimant for benefits paid).
- Illinois’ Emergency COVID-19 related workers’ compensation amendment is a great model with broad coverage. It contains a rebuttable presumption that any COVID-19 illness is covered.
- Kentucky’s governor recently adopted a similar workers’ compensation coverage presumption through an executive order issue pursuant to the governor’s emergency powers:
- Washington State’s governor took steps to ensure workers compensation coverage during the COVID crisis for healthcare workers and first responders:
- Alaska passed new legislation to ensure that COVID-19 illness among health care workers and first responders is presumed to be work-related:
  http://www.akleg.gov/PDF/31/Bills/SB0241Z.PDF
- Here is a summary of workers’ compensation action by states since April 2020:
Section 7. Enforcement

a. Administrative Enforcement. The Department shall enforce the requirements of this Act and shall have the authority to inspect workplaces, and to subpoena records and witnesses. Where an employer does not comply with any of them, the Department shall order relief as authorized in this Section.

b. Private Civil Action. Where an employer does not comply with any requirement of this Act, an aggrieved worker or other person, may bring a civil action in a court of competent jurisdiction within three years of an alleged violation and, upon prevailing, shall be awarded the relief authorized in this section. Pursuing administrative relief shall not be a prerequisite for bringing a civil action.

c. Other Government Enforcement. The attorney general, a district attorney, or a city or county attorney may also enforce the requirements of this Act, acting in the public interest, including the need to deter future violations. Such law enforcement agencies may inspect workplaces and subpoena records and witnesses and, where they determine that a violation has occurred, may bring a civil action as provided in Section 7(b).

d. Relief. In a civil action or administrative proceeding brought to enforce this Act, the court or the Department shall order relief as follows:

   i. For any violation of any provision of this Act:

      i. An injunction to order compliance with the requirements of this Act and to restrain continued violations, including through a stop-work order or business closure;

      ii. Payment to a prevailing worker by the employer of reasonable costs, disbursements, and attorney’s fees; and

      iii. Civil penalties payable to the state or city of not less than $100 per day per worker affected by any noncompliance with the provisions of this chapter.

   • Strong enforcement of these important new protections is crucial in order for them to be effective. This proposed policy includes key components detailed below that are essential for strong enforcement. For an even more comprehensive model bill detailing the full range of state-of-the-art protections against retaliation, see NELP, Model Bill to Protect Workers Who Experience Wage Theft from Retaliation (Sept. 2019).

   • This proposal provides four distinct avenues for enforcement, to ensure maximum flexibility and empower a range of public and private actors to serve as watch dogs and fill the enforcement gap.

   • First, it authorizes administrative enforcement by the state or local Labor Department – the agency chiefly responsible for implementation and enforcement.

   • Second, it provides for a private right of action which is especially important to enforce worker whistleblower protections and the right to still be paid while refusing to work under dangerous conditions, together with attorney’s fees and other remedies to make it realistic for low-wage workers to hire lawyer to help them enforce their rights. Given limited government enforcement capacity, a private right of action is crucial for ensuring meaningful enforcement – and is a key gap in OSHA’s enforcement system.

   • Third, it empowers the full range of public enforcement officers, including the Labor Department, the state attorney general, district attorneys, and city and county attorneys to bring actions to enforce the law. Public enforcement by the full range of law enforcement entities can help fill the enforcement gap left by OSHA’s failure to act during the COVID crisis.

   • Fourth, it authorizes “qui tam” enforcement to enlist whistleblowers in holding companies accountable, expand limited public enforcement capacity, and ensure that workers who are blocked by forced arbitration clauses from bringing private suits can play a powerful role in enforcement.
For any violation of Sections 3 and 4 of this Act protecting whistleblowers and workers' right to refuse to work under dangerous conditions:

i. Reinstatement of the worker to the same position held before any adverse personnel action, or to an equivalent position, reinstatement of full fringe benefits and seniority rights, and compensation for unpaid wages, benefits and other remuneration, or front pay in lieu of reinstatement; and

ii. Compensatory damages payable to the aggrieved worker equal to the greater of $5,000 or twice the actual damages, including but not limited to unpaid wages, benefits and other remuneration.

c. Qui tam enforcement. The relief specified in subdivision (d)(i) of this section may be recovered through a civil action brought on behalf of the Department in a court of competent jurisdiction by a whistleblower, defined herein as a worker, contractor, or employee of a contractor of the employer, or by a representative nonprofit or labor organization designated by said person, pursuant to the following procedures:

i. The whistleblower shall give written notice to the Department of the specific provisions of this Act alleged to have been violated. The whistleblower or representative organization may commence a civil action under this subsection if no enforcement action is taken by the Department within 30 days.

ii. Civil penalties recovered pursuant to this subsection shall be distributed as follows: 70 percent to the Department for enforcement of this act, with 25 percent of that amount reserved for grants to community organizations for outreach and education about worker rights under this Act; and 30 percent to the whistleblower or representative organization.

iii. The right to bring an action under this section shall not be impaired by any private contract. A public enforcement

- For remedies, it authorizes the full range of necessary relief.
- For violations of the workplace protection standards: injunctive relief, civil penalties payable to the state, and attorneys' fees to make it economically realistic for low-wage workers to find attorneys to represent them.
- For violations of the whistleblower and right-to-refuse to work under dangerous conditions provisions: the above plus reinstatement or "front pay" in lieu of reinstatement, unpaid wages and benefits, and compensatory damages equal to the greater of $5,000 or twice any unpaid wages, to provide a strong deterrent against employers punishing whistleblowers during this time when public health and safety depend on workers' being able to speak up.
action shall be tried promptly, without regard to concurrent adjudication of private claims.
RE: Protecting Poultry Workers During the COVID-19 Pandemic

Dear Governor Northam, Commissioner Oliver, Attorney General Herring, Commissioner Davenport, and Director Graham:

We write you with urgency to request immediate protection for the Commonwealth of Virginia’s poultry plant worker community during this dire health care crisis.

As workers in the food supply chain, poultry plant workers are considered essential workers, both in normal times and especially now. As this global crisis deepens, these workers are as invaluable as they are at risk. Many poultry plant workers in Virginia are highly vulnerable to COVID-19 illness because they are low-income individuals, lack access to medical care, are sometimes not fluent in English (which limits their ability to relay health concerns to employers), and work in very tight spaces in factories with hundreds of other workers.

Meat processing plants typically employ hundreds of workers who work in tight quarters with others. Meat processing is one of the most dangerous jobs in the country, with injury rates at 2.4 times the national average and occupational illness rates at 17 times the national average. These statistics illustrate the heavy burden we already place on these workers and the duty we owe to them now.

Further, these plants are located in semi-rural areas such as Harrisonburg or extremely rural areas such Accomack, where resources are spread thin. As a result, poultry workers are much more likely to not have access to COVID-19 testing and will instead suffer in silence, or go to work even though they are symptomatic, out of both fear of losing their jobs and the necessity to keep food on their own tables.

Inaction could lead to rapid outbreaks in the processing plants, overwhelming rural health centers and quickly turning into a catastrophe. These workers’ health and financial stability—and that of their families—must be unequivocally prioritized in recognition of their human rights and dignity, as well as their essential role in keeping our food system running during this emergency.

We stress that the above concerns are not merely hypothetical. Processing plants around the country are already experiencing outbreaks and are being forced to reckon with the fallout, including worker deaths.
Just this month, COVID-19 has killed four Tyson Foods poultry workers in Georgia and two in Iowa. In South Dakota, a massive Smithfield Foods swine plant was shut down after nearly 600 workers contracted the virus. **Most notably, workers indicate that most (if not all) poultry plants in the Commonwealth already have multiple workers who have tested positive for COVID-19, and that number is growing daily. Workers are dying from COVID-19 in the Commonwealth. In sum, the potential for an outbreak is ripe, and the time to act is now.**

States have broad power to protect public health and to protect workers. At present, however, there are few (if any) enforceable state or federal regulations in place to protect Virginia poultry workers. Fortunately, federal OSHA law does not preempt or limit states from acting to protect workers from the threats of COVID-19 transmission in the workplace. Indeed, as an OSHA “State Plan” state, **Virginia is free to promulgate its own standards regarding worker health and safety**, as long as they are at least as protective as the standards promulgated by the federal Occupational Safety and Health Administration (OSHA). And since OSHA has not adopted a federal standard that deals specifically with the workplace health and safety risks associated with COVID-19, the Virginia Occupational Safety and Health Program (VOSH) has free rein to create its own. Moreover, neither OSHA nor any other federal law would preempt state or local laws that protect whistleblowers who speak up about COVID-19 in the workplace.

Unfortunately, neither VOSH nor OSHA have issued any enforceable standards to protect workers during pandemics. Rather, only recommendations and suggested guidance have been issued, providing no oversight over employers and no protection to employees. As a State Plan state, however, **VOSH does not have to wait for OSHA to act** – it can issue enforceable emergency standards immediately in conjunction with the Governor’s office and the Attorney General’s office. See Va. Code § 2.2-4011; see also Va. Code § 32.1-13 (granting emergency rulemaking power to the State Board of Health); Va. Code § 44.146-17 (granting emergency rulemaking power to the Governor, including in cases of a communicable disease of public health threat).

In light of the above, we ask that VOSH and other state agencies immediately work with the Governor’s and Attorney General’s offices to promulgate enforceable emergency standards, as well as implement a procedure for inspections and enforcement of those standards.

For your review and consideration, we attached to this letter as Exhibit A recommended regulatory language, along with commentary. This model language is broad, and encompasses sectors beyond meat processing plants.

In addition to the requests delineated in Exhibit A, we further request that you strongly urge the General Assembly to enact emergency state legislation that applies the paid leave provisions in the federal Families First Coronavirus Response Act to employers with over 500 employees. As noted above, states have the ability to protect workers beyond what is required under federal law.

Finally, the following requested regulations are specific to the poultry and meatpacking industry:

1. To the maximum extent allowable under the law and in conformity with applicable privacy regulations, facilities must notify the local health department and facility workers immediately when an employee tests positive for COVID-19. The companies shall provide:
   a. The department(s) and shift(s) worked by the employees testing positive for COVID-19. This is a continuing request for information if other employees test positive for the COVID-19 virus.
   b. The names of all employees who worked in those department(s) and shift(s) on days when the COVID-19 positive employees last worked.
   c. The date or dates last worked by the employees testing positive for the COVID-19 virus.
2. Workers who failed the temperature check shall be sent home, and be paid at their regular rate of pay.

3. Poultry and meatpacking facilities must take the following actions in order to protect the health and safety of workers at all poultry and meatpacking facilities:
   a. Immediately shut down for a minimum of 72 hours the department(s) in which the COVID-19 positive employees worked and clean and sanitize the department in accordance with CDC recommended guidelines. Workers in these departments should be paid at their regular rate of pay during the duration of the cleaning.
   b. Pursuant to CDC guidelines, require that any employee who worked in the same department(s) and shift(s) with the COVID-19 positive employees quarantine for 14 consecutive days. Employees shall be paid during this period of quarantine at their regular rate of pay.
   c. Proper PPE shall be provided for all employees, including but not limited to gloves, masks, face shields, smocks and other appropriate PPE in order to prevent any transmission of the COVID-19 virus.
   d. Install Plexiglass shielding between workstations, especially on the deboning lines where some poultry companies are currently forcing employees to work shoulder to shoulder without proper PPE.
   e. Employers should set a schedule to ensure that all frequently touched surfaces are sanitized on a regular basis during the work day.

4. In addition to mandated daily temperature checks, as of the date of adoption of the regulations, facilities shall require mandatory COVID-19 testing of each employee. The employer shall bear the burden of the costs of such testing.

CONCLUSION

As Virginia addresses these concerns, we strive to ensure that the administration has the information and community trust needed to help implement the above requests. As such, we request a telephonic or videoconference meeting on or before Wednesday, April 29, 2020 to address the above concerns to ensure protection of all workers in Virginia (including but not limited to poultry plant workers), their families and communities, and the residents of the Commonwealth of Virginia. Finally, we acknowledge that you are exceedingly busy during this extraordinarily tasking time. As such, to the extent you would not be able to participate in such a call, we request the telephone or videoconference meeting be with the policy directors at your respective offices that are charged with oversight of the requested protections.

Sincerely,

Legal Aid Justice Center
Virginia Organizing
Community Solidarity with the Poultry Workers
Cc:
Rita Davis, Counselor to the Governor
Jessica Killeen, Deputy Counsel to the Governor
Senator Mark Warner, United States Senate
Senator Tim Kaine, United States Senate
Representative Elaine Luria, United States House of Representatives
Representative Ben Cline, United States House of Representatives
W. Lynwood Lewis, Jr., Senate of Virginia
Mark Obenshain, Senate of Virginia
Robert S. Bloxom, Jr., Virginia House of Delegates
Tony Wilt, Virginia House of Delegates
C. Reneta Major, Chair, Accomack County Board of Supervisors
Sally Wolf Garrison, Rockingham County Board of Supervisors
William B. Kyger, Chairman, Rockingham County Supervisor
Salvador Romero, Vice-Mayor, Harrisonburg
Looping you all in. (I was off yesterday afternoon.)

(b) 5
(b) 5
ORDER OF THE HEALTH OFFICER OF THE COUNTY OF MERCED
DIRECTING FOSTER FARMS POULTRY PROCESSING PLANT
IN LIVINGSTON, CA TO RESPOND TO CURRENT OUTBREAKS AT THE LIVINGSTON
COMPLEX AND COMPLY WITH OTHER DIRECTIVES OF THIS ORDER

DATE OF ORDER: August 26, 2020

WHEREAS, the worldwide pandemic of COVID-19 disease, also known as “novel coronavirus”
has infected over 7,500 Merced County residents and has resulted in the death of 112 Merced
County residents.

WHEREAS, over 800 residents in the City of Livingston, located in Merced County, have been
infected with COVID-19.

WHEREAS, there is significant evidence of increasing transmission of COVID-19 within the
County of Merced and surrounding counties, placing a measurable strain on the local healthcare
systems.

WHEREAS, according to the Meat and Poultry Processing Workers and Employers Interim
Guidance from CDC and the Occupational Safety and Health Administration (OSHA), meat and
poultry processing facilities are particularly vulnerable to COVID-19 infections due to working
conditions. These conditions include prolonged, close contact with coworkers on the production
line.

WHEREAS, Foster Poultry Farms maintains a poultry processing facility located in the City of
Livingston.

WHEREAS, the California Department of Public Health has defined an outbreak in a congregate
employment setting as three (3) or more cases of laboratory confirmed COVID-19 in employees
not linked outside of the workplace.

WHEREAS, the Foster Farms complex at Livingston consists of multiple buildings on the same
campus. Foster Farms first experienced an outbreak of COVID-19 at their Livingston facility on
June 29, 2020, the first known case dated to June 9, 2020. As of the date of this Order, the initial
outbreak is ongoing and outbreaks are widespread throughout multiple separate buildings at the
Livingston facility. One department at the facility currently has an active outbreak that has affected
105 workers and other departments have active outbreaks affecting over 20 workers. Of the
approximate 2,600 workers at the Livingston facility, 13.7 percent of the workforce has received
a positive test result based on worker self-reporting. Most concerning is that these current testing
figures do not accurately represent the extent of outbreak at the facility as universal testing has not
been accomplished within the timeline necessary to accurately identify the extent of the outbreak.

WHEREAS, since April 24, 2020, the Merced County Department of Public Health (MCDPH) has
received report of 358 confirmed cases of COVID-19 and eight (8) deaths attributed to COVID-
19 linked to workers from the Foster Farms Livingston facility. Five (5) of the eight (8) deaths
occurred in a hospital located outside of Merced County, illustrating the serious impact of the
Foster Farms outbreak on healthcare systems and the community-at-large in California.
WHEREAS, in the past month, Foster Farms has experienced an increase of 214 reported cases of COVID-19 positive workers and six (6) deaths. Weekly reports from Foster Farms indicate the outbreak has continued since the initial reported outbreak on June 29, 2020.

WHEREAS, to-date, there has been insufficient timely testing of Foster Farms workers to assess the true extent of cases at the facility. Without accurate information on the number of cases, it is not possible to properly identify workers who require testing and/or quarantine because of exposure to the virus. This is hampered by the difficulty of testing and monitoring a growing temporary workforce. Hospital data on current hospitalizations and mortality has been slowly reported to MCDPH, further complicating decisive interventions that would allow a safe production process to continue at the facility.

WHEREAS, the Merced County Health Officer issued Directives to Foster Farms on August 5, 2020 and August 11, 2020, providing specific direction on testing requirements and other measures to control the spread of COVID-19 within the Livingston building. In summary, these Directives required immediate COVID PCR testing of all permanent, volunteer, and temporary employees who share air within a facility that has an outbreak (three or more individuals within the same building). Once an outbreak is initiated within a building, the outbreak is not considered resolved until the building reports zero additional cases for two consecutive weeks, or until universal testing of the building within the previous three (3) day period, reveals less than 1% positivity rate within the workforce.

WHEREAS, in response to the previous Merced County Health Officer Directives, Foster Farms has not implemented the required universal testing of the entire Livingston Complex, as directed. Over the three-week period since the August 5, 2020 directive was issued, the spread of disease within the facility has not been contained and active outbreaks continue to spread, creating a public nuisance as defined by California Penal Code 370 and Civil Code 3479, and posing a great risk to the health and safety of Merced County residents and the surrounding counties. Given the current epidemiological data, the slowness in testing workers, and the time necessary to complete comprehensive contact tracing and quarantine those who are exposed, partial closure of the facility for timely, universal testing of all workers and sanitation is necessary.

WHEREAS, based on the increasing number of positive COVID-19 cases at the Foster Farms Livingston Facility, the mounting death rates, the delay in implementation of a comprehensive testing scheme, the need for comprehensive contact tracing and quarantine of those exposed, decisive intervention is essential to control the COVID-19 outbreak. It is imperative that the Merced County Health Officer issue this Order to protect and preserve the health of workers at the Facility and residents of Merced County, surrounding counties, and the State of California.

Under the authority of California Health and Safety Code Sections 101040, 101085, 120175; California Government Code Sections 8610, 8630, and 8634; Article XI of the California Constitution; Title 17 California Code of Regulations Section 2501; and Merced County Code Chapter 2.72, the Health Officer of the County of Merced (“Health Officer”) Orders Foster Poultry Farms A Corp (Foster Farms):

Page 2 of 7
1. **Livingston Plant (including, but not limited to, Food Service Operations, Livingston Plant 1, Livingston Plant 2, Livingston Retail Packaging, Livingston Weigh and Price, and Livingston Rotis Room)** located at 843 Davis St., Livingston, CA 95334: To cease all operations within twelve (12) hours of issuance of this Order including any and all on-site manufacturing, transportation, processing, food service, packing, administrative, and/or other similar operations within Livingston Plant for the purposes of deep cleaning and testing all workers (permanent, temporary, contract, volunteer, and other) for clearance (as defined as two (2) negative PCR COVID-19 tests taken at least three (3) days but no more than seven (7) days apart), and implementing other measures in compliance with this Order. Foster Farms is further required to direct its agents, employees, officers, and others acting on its behalf, as well as subsidiaries, affiliates, and other entities controlled by Foster Farms, in such a manner as to ensure the closure of the entire Livingston Plant and that Livingston Plant on-site operations cease and resume only in accordance with this Order.
   a. Once Foster Farms accomplishes the requirements of this Section to the satisfaction of the Merced County Public Health Officer and/or Health Officer designee (MCDPH contact), Foster Farms may be able to resume operations at the Livingston Plant facility.
   b. No worker may return to work at the Livingston Plant until they have received two (2) negative PCR COVID-19 tests taken at least three (3) days but no more than seven (7) days apart.

2. **NCDC 2** located at 843 Davis St., Livingston, CA 95334: will be allowed to remain open and operational despite active outbreak status due to the ability to maintain at least six (6) foot social distancing within the workplace and a lower worker density within the facility, if:
   a. Foster Farms enforces 6 feet of social distancing between workers at NCDC 2;
   b. The current break room(s) are closed and Foster Farms provides an alternative, appropriate break space that can accommodate and ensure social distancing (that is actively monitored); and
   c. Foster Farms to provides food provisions, accommodating dietary needs to its workers to preventing the need for kitchen facilities for all workers with the facility until outbreak is cleared from NCDC 2 facility;
   d. Items 2(b)-(c) shall remain in place until the facility is cleared, defined as <1% positivity rate of the entire workforce at the NCDC 2, tested same day, for 2 rounds of testing, three (3) days apart. If testing positivity rate is greater than 1%, testing must be continued every three (3) days until outbreak is cleared.

3. **All Other Facilities** located at 843 Davis St., Livingston, CA 95334 and 1000 Davis St., Livingston, CA 95334: can remain open and operational, if:
   a. All employees (permanent, temporary, contract, volunteer, and other) are tested immediately and every seven (7) days thereafter until Livingston Complex is cleared from outbreak. If testing positivity rate is greater than 1%, testing must be increased to every three (3) days.
4. Conduct a terminal cleaning of the entirety of the Livingston Complex through a qualified cleaning agency either during facility closure or within seven (7) days of the issuance of this Order. Ensure that high-traffic areas and high-touch areas are disinfected following CDC guidelines:
https://www.cdc.gov/coronavirus/2019-ncov/community/disinfecting-building-facility.html and

5. The following COVID-19 line lists of data, at a minimum and as required by MCDPH, shall be reported to the MCDPH contact directly in a format determined by MCDPH and at intervals determined by MCDPH, but at no time less often than two times each week on Tuesdays and Fridays by 12:00PM:
   a. Worker full name, date of birth, gender, race, phone number, county of residence, job title, location in facility/assigned department, unit/shift (e.g., day, night, swing), if the individual works in another facility/location and name of the other facility, positive test date, last day worked, symptom start date (note if asymptomatic), testing location, if worker was tested due to part of mandated response testing, type of test used (e.g., PCR, antigen), return to work date, if worker was hospitalized due to illness, hospitalization date, if worker died due to illness (if yes, immediately e-mail the MCDPH contact), date of death, number of close contacts sent home/teleworking due to exposure, and if the case was a close contact to another index/case in the facility.
   b. The full laboratory testing line list data (including on-site testing), at a minimum, shall be reported to the MCDPH contact directly in a format and at intervals determined by MCDPH, including worker full name, date of birth, phone number, address of residence, county of residence, test result, and test date. Submission via the CalREDIE system alone will not be accepted.

6. Immediately upon issuance of this Order, a COVID-19 Mitigation Plan for the entire Livingston Complex is required to be prepared and submitted to and approved by the MCDPH contact and shall include continued proper COVID-19 worker medical screening, symptom-based testing, and testing of new hires and temporary workers, including the following:
   a. Permanent employees, temporary workers, contract workers, and/or volunteers that present with a positive COVID-19 test result shall be sent home from work for the required quarantine period and follow MCDPH, California Department of Public Health (CDPH), and CDC requirements and guidance. Workers who refuse or are unable to be tested as directed by MCDPH should be quarantined at home for 14 days, and shall not be allowed to work during the isolation period as defined by CDC:
   b. Workplace contact tracing shall be conducted by Foster Farms within 24 hours of notification of a positive employee. Close contacts, is defined as being within six
(6) feet for more than 15 minutes during the case's infectious period to positive workers. Close contacts shall be sent home from work for a 14-day quarantine period. The infectious period begins 48 hours prior to development of symptoms. For the purposes of contact tracing of individual who were asymptomatic and tested positive, the infectious period commences 48 hours prior to the day the sample was collected.

c. Temporary workers, permanent employees, contract employees, and/or volunteers will not be allowed to begin work without submitting proof to Foster Farms of a COVID-19 negative point-of-care antigen or PCR test result dated same day before start of work up to 48 hours before the start date.

d. Symptom-based testing is required when a permanent employee, temporary worker, contract worker, and/or volunteer presents with any one of the COVID-19 symptoms described by the CDC in the following guidance: https://www.cdc.gov/coronavirus/2019-ncov/symptoms-testing/symptoms.html. Immediately upon notice to or observation by Foster Farms of any one of the COVID-19 symptoms by any worker at the site, testing of the worker shall immediately occur by either PCR or point-of-care antigen testing, or other Health Officer approved testing method, and results shall be obtained within 24-48 hours.

e. When there is a COVID-19 outbreak of three (3) permanent employees, temporary workers, contract workers, and/or volunteers in any building, or area that shares the same air supply, all individuals who had worked in the area during the potential outbreak period (within 48 hours prior to the onset of symptoms of a positive employee throughout the duration of the outbreak) must be tested for COVID-19 by PCR immediately and every seven (7) days thereafter until the building reports zero additional cases for two consecutive weeks, or until universal testing of the building reveals less than 1% positivity rate within the workforce.

f. The employer is responsible for ensuring all workers, including temporary workers, permanent employees, contract employees, and/or volunteers, are offered and provided COVID-19 testing at no cost to the employee.

7. As soon as practical, but no less than 14 days of issuance of this Order, expand the on-site Occupational Health program and clinic, consisting of a designated licensed medical or nursing professional and liaison for MCDPH to ensure and oversee proper COVID-19 worker medical screening processes, contact tracing, case investigation and referral to health care provider as needed, accurate data collection and reporting of all workers tested, reporting of all COVID-19 positive results regardless of county of residence, immediate notification of COVID-19 related hospitalizations to the MCDPH contact and CalOSHA, immediate reporting of COVID-19 related deaths to the MCDPH contact and CalOSHA, data quality assurance verification protocol, and the implementation of adequate COVID-19 surveillance testing and reporting to the MCDPH contact, as approved by MCDPH. These requirements are subject to review and supervision by MCDPH to ensure adequate procedures and practices are implemented.

8. Foster Farms management shall ensure that all employees be informed of testing requirements, outbreaks that occur, areas affected, and trained on safety requirements, in English, Spanish, and Punjabi, working with the union as applicable.
9. Provide proper face coverings at no cost to all contract employees, permanent employees, temporary workers, and/or volunteers prior to each shift, and if a replacement is needed during a shift, and require use as directed in the Merced County Health Officer Order.


11. This Order is issued in accordance with, and incorporates by reference, the: March 4, 2020 Proclamation of a State of Emergency issued by Governor Gavin Newsom; March 12, 2020 Executive Order N-25-20 and March 19, 2020 Executive Order N-33-20, each issued by Governor Newsom ordering all state residents to heed any orders and guidance of state and local public health officials with respect to COVID-19; May 4, 2020 Executive Order N-60-20 issued by Governor Newsom ordering various protocols and reaffirming the existing authority of local health officers to establish public health measures that are more restrictive or additional to statewide directives; Government Code section 8567(a); the March 13, 2020 Declaration of Local Health Emergency in Merced County pursuant to Health and Safety Code section 101080; the March 13, 2020 Proclamation of Local Emergency pursuant to Government Code section 8630 and Merced County Code section 2.72.060; the March 16, 2020 Resolutions of the Board of Supervisors of the County of Merced ratifying the Local Emergency and Local Health Emergency; and the California Department of Public Health, Cal/OSHA, and the California Department of Food and Agriculture jointly issued Industry Guidance for Food Packing and Processing updated on July 29, 2020 and any future dated updates.

12. Violation of this Order by Foster Farms is a misdemeanor punishable by fines up to $1,000 per day, imprisonment of 90 days, or both. Violation also subjects Foster Farms to civil enforcement actions including injunctive relief, attorneys’ fees and costs. A violation of this Order constitutes a public nuisance. (Health and Safety Code Sections 120275 and 120295; Penal Code Sections 19 and 370; Government Code Sections 25132 and 8665; Merced County Code 2.72.100)

13. Pursuant to Government Code Sections 26602 and 41601 and Health and Safety Code Sections 101029, the Health Officer requests that the Sheriff and all chiefs of police in the County ensure compliance with and enforce this Order.

14. Copies of this Order shall promptly be: (1) made available at the County Administration Building at 2222 M Street, Merced, California 95340; (2) and provided to any member of the public requesting a copy of this Order.
SO ISSUED AND ORDERED:

Salvador Sandoval, MD, MPH
Merced County Health Officer

Dated: August 26, 2020
Time: 2025 hr.

NOTICE OF RIGHTS

1. If you object to this order, you have a right to arrange for your own legal representative.
2. You have a right to also file for judicial relief to seek release from the order.
3. All requests to contact the County Health Officer will be through Merced County
   Department of Public Health at 209-381-1203 during normal business hours.

Salvador Sandoval, MD, MPH
Merced County Health Officer
Dated: August 26, 2020
2025 hr.
My suggested changes and comments are in the OHE attachment.

Dionne Williams, DrPH, MPH
Deputy Director
OSHA - Directorate of Enforcement Programs
200 Constitution Ave, NW
Washington, DC 20210
202-693-2140
(b) 5
(b) 5
(b) 5
May 1, 2020

The Honorable Sonny Perdue  
Secretary  
U.S. Department of Agriculture  
1400 Independence Ave. SW  
Washington, D.C. 20250

The Honorable Eugene Scalia  
Secretary  
U.S. Department of Labor  
200 Constitution Ave. NW  
Washington, D.C. 20210

The Honorable Alex M. Azar, II  
Secretary  
U.S. Department of Health and Human Services  
200 Independence Ave. SW  
Washington, D.C. 20201

Dear Secretary Perdue, Secretary Scalia, and Secretary Azar:

We write to follow up on the Executive Order signed by President Trump on April 28, 2020, invoking the Defense Production Act (DPA) to classify meat processing plants as critical infrastructure to keep them in operation during the coronavirus national emergency.¹

Prior to issuance of the Executive Order, media reports indicated the government would provide personal protective equipment (PPE) and guidance for employees and employers on worker safety, and that the order would shield meat processing companies from legal liability against worker claims of inadequate protection.² However, neither the Executive Order nor the subsequent press release issued by the Department of Agriculture (USDA) contain information about coordination between federal agencies to provide PPE or plans to increase coronavirus testing for plant employees and the surrounding communities.³

Over 6,500 employees at meat processing plants have either tested positive or gone into self-quarantine, and 20 workers have died since the start of the pandemic, according to the United Food and Commercial Workers Union.⁴ Continued operations at these plants and reopening currently closed facilities would require coordination between federal agencies, states, local communities, plant owners and workers, otherwise more workers will be at risk. To better understand federal efforts in this area, we request responses to the following by May 6, 2020:

---

1) What guidance has been shared with meat processing plants regarding the steps they need to undertake to ensure worker health and safety before reopening or the steps they must undertake immediately to ensure worker health and safety if they are currently operating?

2) How is the federal government coordinating with meat companies, employees, state and local health departments, and local communities? How will each of these stakeholders be involved during the time the DPA is invoked?

3) What is the plan and timeline for distribution of PPE for all plant employees and will these supplies be sourced from the states’ supply or the federal stockpile? Will there be continued deliveries of PPE while the DPA is invoked for these processing plants to ensure all employees are adequately protected?

4) As part of the DPA and any forthcoming guidance, will companies be required to retrofit plants and/or modify shifts and other practices in order to ensure compliance with the Center for Disease Control (CDC) and Occupational Safety and Health Administration (OSHA) recommended social distancing?

5) What enforcement mechanisms will be put in place to ensure OSHA and CDC guidance is adhered to at individual plants? Will teams from USDA’s Food Safety and Inspection Service or OSHA regularly inspect these plants during the DPA?

6) Will there be a hotline or other mechanism for employees to report violations?

7) Will increased testing be provided at these plants for symptomatic and asymptomatic employees, including contact tracing? Is there sufficient testing capacity to regularly test all employees, whether or not they are symptomatic? What consultation have your agencies completed with the CDC and state and local health departments regarding testing capabilities in these states?

8) How will your agencies coordinate with the CDC to develop guidance regarding employees most at risk of developing COVID-19 complications? What is the timeline for release of that guidance? If such guidance has been developed, what actions does it recommend or require plants to undertake to protect these employees?

Maintaining our food supply chain is critical to the food security of all Americans, as well as our farmers and producers. however, it cannot be at the expense of worker health and safety,

Thank you for your prompt attention to this important issue. We look forward to receiving your response.

Sincerely,

Emanuel Cleaver, II
Member of Congress

Marcia L. Fudge
Member of Congress
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Hello,

Attached is a letter from 48 members to Secretary Scalia on PPE in meat processing facilities that are staying.

Thank you

---

From: Smith, Jacob W - OCIA <Smith.Jacob.W@dol.gov>
Sent: Friday, May 1, 2020 2:37 PM
To: Executive Secretariat <m-Executive.Secretaria@dol.gov>
Cc: Wheeler, Joe - OCIA <Wheeler.Joe@dol.gov>; Walsh, John Patrick - OCIA <Walsh.JohnPatrick@dol.gov>; Thomas, Bradley J - OCIA <Thomas.Bradley.J@dol.gov>; Turner, Adam E - OCIA <Turner.Adam.E@dol.gov>
Subject: FW: Letter to Secretary Scalia regarding meat processing facilities

Hello,

Attached is a letter from 48 members to Secretary Scalia on PPE in meat processing facilities that are staying.

Thank you

From: Mahoney, Christina <Christina.Mahoney@mail.house.gov>
Sent: Friday, May 1, 2020 2:29 PM
To: Thomas, Bradley J - OCIA <Thomas.Bradley.J@dol.gov>; Smith, Jacob W - OCIA <Smith.Jacob.W@dol.gov>
Cc: Mahoney, Christina <Christina.Mahoney@mail.house.gov>; Garrison, Eyang <Eyang.Garrison@mail.house.gov>
Subject: Letter to Secretary Scalia regarding meat processing facilities

Hello,

Please see the attached letter signed by 48 members to Secretary Scalia regarding meat processing facilities.

Thank you,

Christina Mahoney
Legislative Director
Office of U.S. Representative Emanuel Cleaver, II
2335 Rayburn HOB, Washington, D.C. 20515
Ph: 202-225-4535 Fx: 202-225-4403

---

Hope On.
From: McGowan, Larry - OSHA
(FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=82D06D77AEB5468AB567680E32454605C-MCGOWAN, LA]
Sent: 5/26/2020 3:20:51 PM
To: Williams, Dionne - OSHA
(FYDIBOHF23SPDLT)/cn=Recipients/cn=ee09c10b393e4e8e821753f955d65f1f-Williams, D]; Holmes, Mikki - OSHA
(FYDIBOHF23SPDLT)/cn=Recipients/cn=ffa0e3b499654100bf7e3f7066ae1d00-Holmes, Mik]
CC:

Attachments: 14147_OASP_Clearance Document (1-1)_05_07_2005_06 PM.doc; 14147_DTSEM Response to OPA_ASP Comments_05_21_2020_4pm.doc; CTS 14147_DTSEM Response to OPA_ASP Comments_05_21_2020_4pm OHE.docx; CTS 14147 Rep Cleaver et al - Meat Processing Plants and CoVID (5-1-2020).pdf

Dionne, Mikki,

Hi Larry,

Hi Larry,

From: Wheeler, Young - OSHA <Wheeler.Young@dol.gov>
Sent: Thursday, May 21, 2020 3:01 PM
To: McGowan, Larry - OSHA <McGowan.Larry@dol.gov>
Good afternoon Larry,

From: McGowan, Larry - OSHA <McGowan.Larry@dol.gov>
Sent: Friday, May 8, 2020 1:12 PM
To: Wheeler, Young - OSHA <Wheeler.Young@dol.gov>
Cc: Holmes, Mikki - OSHA <Holmes.Mikki@dol.gov>; Williams, Dionne - OSHA <Williams.Dionne@dol.gov>
Let me know what you think.

From: McGowan, Larry - OSHA <McGowan.Larry@dol.gov>
Sent: Monday, May 4, 2020 10:27 AM
To: McGowan, Larry - OSHA <McGowan.Larry@dol.gov>
Cc: McGowan, Larry - OSHA <McGowan.Larry@dol.gov>


OHE,

Please respond to questions 1, 5, and 8.

Thank you,

From: Wanko, Jeffrey - OSHA <Wanko.Jeffrey@dol.gov>
Sent: Monday, May 4, 2020 11:13 AM
To: Kapust, Patrick - OSHA <Kapust.Patrick@dol.gov>
Cc: Kapust, Patrick - OSHA <Kapust.Patrick@dol.gov>


Thanks
jeff

From: Kapust, Patrick - OSHA <Kapust.Patrick@dol.gov>
Sent: Monday, May 4, 2020 9:59 AM
To: Kapust, Patrick - OSHA <Kapust.Patrick@dol.gov>; Wanko, Jeffrey - OSHA <Wanko.Jeffrey@dol.gov>
Attached is a Congressional correspondence assigned to DEP for response.

From: admin@cmp.dol.gov <admin@cmp.dol.gov>
Sent: Monday, May 4, 2020 8:17 AM
Subject: [Intra Agency Assignment Notification] CTS #14147: OSHA: Cleaver, Emanuel: Concern About Executive Order For Meat Packing Plants Under Defence Production Act During COVID-19 Emergency

The following Correspondence has an assignment for Directorate of Enforcement Programs (DEP). It will be displayed in the My Work tab.

Intra Agency Assignment Notification

CTS # 14147: Concern About Executive Order For Meat Packing Plants Under Defence Production Act During COVID-19 Emergency
Correspondence Type: Congressional Non-Casework
Action Agency: OSHA
Expected Date:
ExecSec Clearance Required: Yes

Comment:
DEP, Linked below is an incoming cabinet correspondence assigned to your directorate for response. Signature Level - Principal Deputy Assistant Secretary. Please coordinate with any appropriate regions and/or directorates. Please upload Draft Word version of response for OAS and departmental clearance. CCU will let you know when the response is approved for signing and mailing. Also, please provide a salutation list with the draft response. Thank you. OSHA CCU

Please review this Correspondence and draft a response.

The Correspondence will appear on the Search tab or you can access it directly through the hyperlink/url below:

Follow this link

Thank you,
DOL CMP Team
dolcmpteam@dol.gov

OSHA-002065
***This is a system generated message. Please do not reply to this email.***
May 1, 2020

The Honorable Sonny Perdue
Secretary
U.S. Department of Agriculture
1400 Independence Ave. SW
Washington, D.C. 20250

The Honorable Eugene Scalia
Secretary
U.S. Department of Labor
200 Constitution Ave. NW
Washington, D.C. 20210

The Honorable Alex M. Azar, II
Secretary
U.S. Department of Health and Human Services
200 Independence Ave. SW
Washington, D.C. 20201

Dear Secretary Perdue, Secretary Scalia, and Secretary Azar:

We write to follow up on the Executive Order signed by President Trump on April 28, 2020, invoking the Defense Production Act (DPA) to classify meat processing plants as critical infrastructure to keep them in operation during the coronavirus national emergency.¹

Prior to issuance of the Executive Order, media reports indicated the government would provide personal protective equipment (PPE) and guidance for employees and employers on worker safety, and that the order would shield meat processing companies from legal liability against worker claims of inadequate protection.² However, neither the Executive Order nor the subsequent press release issued by the Department of Agriculture (USDA) contain information about coordination between federal agencies to provide PPE or plans to increase coronavirus testing for plant employees and the surrounding communities.³

Over 6,500 employees at meat processing plants have either tested positive or gone into self-quarantine, and 20 workers have died since the start of the pandemic, according to the United Food and Commercial Workers Union.⁴ Continued operations at these plants and reopening currently closed facilities would require coordination between federal agencies, states, local communities, plant owners and workers, otherwise more workers will be at risk. To better understand federal efforts in this area, we request responses to the following by May 6, 2020:

1) What guidance has been shared with meat processing plants regarding the steps they need to undertake to ensure worker health and safety before reopening or the steps they must undertake immediately to ensure worker health and safety if they are currently operating?

2) How is the federal government coordinating with meat companies, employees, state and local health departments, and local communities? How will each of these stakeholders be involved during the time the DPA is invoked?

3) What is the plan and timeline for distribution of PPE for all plant employees and will these supplies be sourced from the states’ supply or the federal stockpile? Will there be continued deliveries of PPE while the DPA is invoked for these processing plants to ensure all employees are adequately protected?

4) As part of the DPA and any forthcoming guidance, will companies be required to retrofit plants and/or modify shifts and other practices in order to ensure compliance with the Center for Disease Control (CDC) and Occupational Safety and Health Administration (OSHA) recommended social distancing?

5) What enforcement mechanisms will be put in place to ensure OSHA and CDC guidance is adhered to at individual plants? Will teams from USDA’s Food Safety and Inspection Service or OSHA regularly inspect these plants during the DPA?

6) Will there be a hotline or other mechanism for employees to report violations?

7) Will increased testing be provided at these plants for symptomatic and asymptomatic employees, including contact tracing? Is there sufficient testing capacity to regularly test all employees, whether or not they are symptomatic? What consultation have your agencies completed with the CDC and state and local health departments regarding testing capabilities in these states?

8) How will your agencies coordinate with the CDC to develop guidance regarding employees most at risk of developing COVID-19 complications? What is the timeline for release of that guidance? If such guidance has been developed, what actions does it recommend or require plants to undertake to protect these employees?

Maintaining our food supply chain is critical to the food security of all Americans, as well as our farmers and producers. However, it cannot be at the expense of worker health and safety.

Thank you for your prompt attention to this important issue. We look forward to receiving your response.

Sincerely,

Emanuel Cleaver, II
Member of Congress

Marcia L. Fudge
Member of Congress
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T J Cox
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André Carson
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Christina

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Legislative Director
Office of U.S. Representative Emanuel Cleaver, II
2335 Rayburn HOB, Washington, D.C. 20515
Ph: 202-225-4535 Fx: 202-225-4403

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From: McGowan, Larry - OSHA
(FYDIOHBF23SPDLT)/CN=RECIPIENTS/CN=82DO6D77AE85468AB56780E32454605C-MCGOWAN, LA

Sent: 5/8/2020 5:12:18 PM

To:

CC:


(b) 5

Let me know what you think.

OSHA-002072

(b) 5

Sent: Monday, May 4, 2020 11:17 AM
To: McGowan, Larry - OSHA <McGowan.Larry@dol.gov>
Cc: 

Thank you,

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OHE can respond to #1, 5, and 8. I don’t see anything else here to which DEP can respond.

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jeff

(b) 6

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Patrick/Jeff

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Thank you,

Christina

Christina Mahoney
Legislative Director
Office of U.S. Representative Emanuel Cleaver, II
2335 Rayburn HOB, Washington, D.C. 20515
Ph: 202-225-4535 Fx: 202-225-4403

Hope On.
Occupational Safety and Health Administration (OSHA): Emergency Temporary Standards (ETS) and COVID-19

Updated October 20, 2020
Occupational Safety and Health Administration (OSHA): Emergency Temporary Standards (ETS) and COVID-19

The Occupational Safety and Health Administration (OSHA) does not currently have a specific standard that protects healthcare or other workers from airborne or aerosol transmission of disease or diseases transmitted by airborne droplets. Some in Congress, and some groups representing healthcare, meat and poultry processing, and other workers, are calling on OSHA to promulgate an emergency temporary standard (ETS) to protect workers from exposure to SARS-CoV-2, the virus that causes Coronavirus Disease 2019 (COVID-19). The Occupational Safety and Health Act of 1970 (OSH Act) gives OSHA the ability to promulgate an ETS that would remain in effect for up to six months without going through the normal review and comment process of rulemaking. OSHA, however, has rarely used this authority in the past—not since the courts struck down its ETS on asbestos in 1983.

The California Division of Occupational Safety and Health (Cal/OSHA), which operates California’s state occupational safety and health plan, has had an aerosol transmissible disease (ATD) standard since 2009. This standard includes, among other provisions, the requirement that employers provide covered employees with respirators, rather than surgical masks, when these workers interact with ATDs, such as known or suspected COVID-19 cases. In addition, according to the Cal/OSHA ATD standard, certain procedures require the use of powered air purifying respirators (PAPR).

The Virginia state occupational safety and health plan (VOSH) and the Michigan state occupational safety and health plan (MIOSHA) have each promulgated emergency standards to specifically address COVID-19 in workplaces. Unlike the Cal/OSHA ATD standard, these emergency standards are in effect for only six months and apply to all employers.

H.R. 6139, the COVID-19 Health Care Worker Protection Act of 2020, would require OSHA to promulgate an ETS on COVID-19 that incorporates both the Cal/OSHA ATD standard and the Centers for Disease Control and Prevention’s (CDC’s) 2007 guidelines on occupational exposure to infectious agents in healthcare settings; similar provisions appear in S. 3475. The CDC’s 2007 guidelines generally require stricter controls than its interim guidance on COVID-19 exposure. The provisions of H.R. 6139 were incorporated into the version of H.R. 6201, the Families First Coronavirus Response Act, as introduced in the House. The OSHA ETS provisions were not included in the House- and Senate-passed version of legislation that was signed into law as P.L. 116-127.

H.R. 6379, as introduced in the House, also would include a requirement for an OSHA ETS and permanent standard to address COVID-19 exposure; similar provisions appear in S. 3584. H.R. 6559 would include the requirements for an ETS and permanent standard, clarify the requirement that employers must report work-related COVID-19 cases, and expand protections for whistleblowers; similar provisions appear in S. 3677. The provisions of H.R. 6559 were included in H.R. 6800, The Heroes Act, passed by the House on May 15, 2020, and in the House Amendment to the Senate Amendment to H.R. 925, the revised Heroes Act passed by the House on October 1, 2020.

Through October 1, 2020, OSHA has issued COVID-19-related citations to employers at 62 work sites, with total proposed penalties of $913,133. These citations have been issued for violations of the OSH Act’s General Duty Clause and other existing OSHA standards, such as those for respiratory protection, that may apply to COVID-19. Senators Elizabeth Warren and Cory A. Booker have raised concerns about the low amount of penalties being assessed for COVID-19-related violations.
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  - H.R. 6559, the COVID-19 Every Worker Protection Act of 2020......................... 21
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Occupational Safety and Health Administration Standards

Section 6 of the Occupational Safety and Health Act of 1970 (OSH Act) grants the Occupational Safety and Health Administration (OSHA) of the Department of Labor (DOL) the authority to promulgate, modify, or revoke occupational safety and health standards that apply to private sector employers, the United States Postal Service, and the federal government as an employer. In addition, Section 5(a)(1) of the OSH Act, commonly referred to as the General Duty Clause, requires that all employers under OSHA's jurisdiction provide workplaces free of "recognized hazards that are causing or are likely to cause death or serious physical harm" to their employees. OSHA has the authority to enforce employer compliance with its standards and with the General Duty Clause through the issuance of abatement orders, citations, and civil monetary penalties. The OSH Act does not cover state or local government agencies or units. Thus, certain entities that may be affected by Coronavirus Disease 2019 (COVID-19), such as state and local government hospitals, local fire departments and emergency medical services, state prisons and county jails, and public schools, are not covered by the OSH Act or subject to OSHA regulation or enforcement.

State Plans

Section 18 of the OSH Act authorizes states to establish their own occupational safety and health plans and preempt standards established and enforced by OSHA. OSHA must approve state plans if they are "at least as effective" as OSHA's standards and enforcement. If a state adopts a state plan, it also must cover state and local government entities, such as public schools, not covered by OSHA. Currently, 21 states and Puerto Rico have state plans that cover all employers, and 5 states and the U.S. Virgin Islands have state plans that cover only state and local government employers not covered by the OSH Act. In the remaining states, state and local government employers are not covered by OSHA standards or enforcement. State plans may incorporate OSHA standards by reference, or states may adopt their own standards that are at least as effective as OSHA's standards. State plans do not have jurisdiction over federal agencies and generally do not cover maritime workers and private-sector workers at military bases or other federal facilities.

Promulgation of OSHA Standards

OSHA may promulgate occupational safety and health standards on its own initiative or in response to petitions submitted to the agency by various government agencies, the public, or employer and employee groups. OSHA is not required, however, to respond to a petition for a

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1 29 U.S.C. §655. The provisions of the Occupational Safety and Health Act of 1970 (OSH Act) are extended to the legislative branch as an employer by the Congressional Accountability Act (P.L. 104-1).
4 For additional information on Occupational Safety and Health Administration (OSHA) state plans, see CRS Report R43969, OSHA State Plans: In Brief, with Examples from California and Arizona.
5 Information on specific state plans is available from the OSHA website at https://www.osha.gov/stateplans.
6 Per Section 6(b)(1) of the OSH Act [29 §655(b)(1)], a petition may be submitted by "an interested person, a representative of any organization of employers or employees, a nationally recognized standards-producing
standard or to promulgate a standard in response to a petition. OSHA may also consult with one of the two statutory standing advisory committees—the National Advisory Committee on Occupational Safety and Health (NACOSH) or the Advisory Committee on Construction Safety and Health (ACCSH)—or an ad-hoc advisory committee for assistance in developing a standard.7

Notice and Comment

OSHA’s rulemaking process for the promulgation of standards is largely governed by the provisions of the Administrative Procedure Act (APA) and Section 6(b) of the OSH Act.8 Under the APA informal rulemaking process, federal agencies, including OSHA, are required to provide notice of proposed rules through the publication of a Notice of Proposed Rulemaking in the Federal Register and provide the public a period of time to provide comments on the proposed rules.

Section 7(b) of the OSH Act mirrors the APA in that it requires notice and comment in the rulemaking process.9 After publishing a proposed standard, the public must be given a period of at least 30 days to provide comments. In addition, any person may submit written objections to the proposed standard and may request a public hearing on the standard.

Statement of Reasons

Section 6(e) of the OSH Act requires OSHA to publish in the Federal Register a statement of the reasons the agency is taking action whenever it promulgates a standard, conducts other rulemaking, or takes certain additional actions, including issuing an order, compromising on a penalty amount, or settling an issued penalty.10

Other Relevant Laws and Executive Order 12866

In addition to the APA and OSH Act, other federal laws that generally apply to OSHA rulemaking include the Paperwork Reduction Act,11 Regulatory Flexibility Act,12 Congressional Review Act,13 Information Quality Act,14 and Small Business Regulatory Enforcement Fairness Act (SBREFA).15 Also, Executive Order 12866, issued by President Clinton in 1993, requires

organization, the Secretary of Health and Human Services (HHS), the National Institute for Occupational Safety and Health, or a state or political subdivision.16

7 The National Advisory Committee on Occupational Safety and Health (NACOSH) was established by Section 7(a) of the OSH Act [29 U.S.C. §656(a)]. The Advisory Committee on Construction Safety and Health (ACCSH) was established by Section 107 of the Contract Work Hours and Safety Act (P.L. 87-581). Section 7(b) of the OSH Act provides OSHA the authority to establish additional advisory committees.


10 29 U.S.C. §655(e).


OSHA: ETS and COVID-19

agencies to submit certain regulatory actions to the Office of Management and Budget (OMB) and Office of Information and Regulatory Affairs (OIRA) for review before promulgation.\textsuperscript{16}

**OSHA Rulemaking Time Line**

OSHA rulemaking for new standards historically has been a relatively time-consuming process. In 2012, at the request of Congress, the Government Accountability Office (GAO) reviewed 59 significant OSHA standards promulgated between 1981 (after the enactments of the Paperwork Reduction Act and Regulatory Flexibility Act) and 2010.\textsuperscript{17} For these standards, OSHA's average time between beginning formal consideration of the standard—either through publishing a Request for Information or Advance Notice of Proposed Rulemaking in the *Federal Register* or placing the rulemaking on its semiannual regulatory agenda—and promulgation of the standard was 93 months (7 years, 9 months). Once the Notice of Proposed Rulemaking was published for these 59 standards, the average time until promulgation of the standard was 39 months (3 years, 3 months).

In 2012, OSHA's Directorate of Standards and Guidance published a flowchart of the OSHA rulemaking process on the agency's website.\textsuperscript{18} This flowchart includes estimated duration ranges for a variety of rulemaking actions, beginning with pre-rule activities—such as developing the idea for the standard and meeting with stakeholders—and ending with promulgation of the standard. The flowchart also includes an estimated duration range for post-promulgation activities, such as judicial review. The estimated time from the start of preliminary rulemaking to the promulgation of a standard ranges from 52 months (4 years, 4 months) to 138 months (11 years, 6 months). After a Notice of Proposed Rulemaking is published in the *Federal Register*, the estimated length of time until the standard is promulgated ranges from 26 months (2 years, 2 months) to 63 months (5 years, 3 months). *Table 1* provides OSHA's estimated time lines for six major pre-rulemaking and rulemaking activities leading to the promulgation of a standard.

<table>
<thead>
<tr>
<th>Stage</th>
<th>Activities</th>
<th>Estimated Duration</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Preliminary rulemaking activities</td>
<td>12-36 months</td>
</tr>
<tr>
<td>2</td>
<td>Developing the proposed rule</td>
<td>12-36 months</td>
</tr>
<tr>
<td>3</td>
<td>Publishing the Notice of Proposed Rulemaking (NPRM)</td>
<td>2-3 months</td>
</tr>
<tr>
<td>4</td>
<td>Developing and analyzing the rulemaking record, including public comments and hearings</td>
<td>6-24 months</td>
</tr>
<tr>
<td>5</td>
<td>Developing the final rule, including Office of Information and Regulatory Affairs (OIRA) submission</td>
<td>18-36 months</td>
</tr>
<tr>
<td>6</td>
<td>Publishing the final rule (promulgating the new standard)</td>
<td>2-3 months</td>
</tr>
</tbody>
</table>

Total estimated duration | 52-138 months
Estimated duration from NPRM to final rule | 26-63 months


\textsuperscript{16} Executive Order 12866, "Regulatory Planning and Review," 58 *Federal Register* 51735, October 4, 1993.

\textsuperscript{17} GAO-12-330, *Workplace Safety and Health*.

Judicial Review

Both the APA and the OSH Act provide for judicial review of OSHA standards. Section 7(f) of the OSH Act provides that any person who is “adversely affected” by a standard may file, within 60 days of its promulgation, a petition challenging the standard with the U.S. Court of Appeals for the circuit in which the person lives or maintains his or her principal place of business. A petition for judicial review does not automatically stay the implementation or enforcement of the standard. However, the court may order such a stay. OSHA estimates that post-promulgation activities, including judicial review, can take between 4 and 12 months after the standard is promulgated.

Emergency Temporary Standards

Section 6(c) of the OSH Act provides the authority for OSHA to issue an Emergency Temporary Standard (ETS) without having to go through the normal rulemaking process. OSHA may promulgate an ETS without supplying any notice or opportunity for public comment or public hearings. An ETS is immediately effective upon publication in the Federal Register. Upon promulgation of an ETS, OSHA is required to begin the full rulemaking process for a permanent standard with the ETS serving as the proposed standard for this rulemaking. An ETS is valid until superseded by a permanent standard, which OSHA must promulgate within six months of publishing the ETS in the Federal Register. An ETS must include a statement of reasons for the action in the same manner as required for a permanent standard. State plans are required to adopt or adhere to an ETS, although the OSH Act is not clear on how quickly a state plan must come into compliance with an ETS.

ETS Requirements

Section 6(c)(1) of the OSH Act requires that both of the following determinations be made in order for OSHA to promulgate an ETS:

- that employees are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards, and
- that such emergency standard is necessary to protect employees from such danger.

Grave Danger Determination

The term grave danger, used in the first mandatory determination for an ETS, is not defined in statute or regulation. The legislative history demonstrates the intent of Congress that the ETS process “not be utilized to circumvent the regular standard-setting process,” but the history is unclear as to how Congress intended the term grave danger to be defined.

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21 29 U.S.C §655(c)(2).
In addition, although the federal courts have ruled on challenges to previous ETS promulgations, the courts have provided no clear guidance as to what constitutes a grave danger. In 1984, the U.S. Court of Appeals for the Fifth Circuit in Asbestos Info. Ass'n v. OSHA issued a stay and invalidated OSHA’s November 1983 ETS lowering the permissible exposure limit for asbestos in the workplace. In its decision, the court stated that “gravity of danger is a policy decision committed to OSHA, not to the courts.” The court, however, ultimately rejected the ETS, in part on the grounds that OSHA did not provide sufficient support for its claim that 80 workers would ultimately die because of exposures to asbestos during the six-month life of the ETS.

**Necessity Determination**

In addition to addressing a grave danger to employees, an ETS must also be *necessary* to protect employees from that danger. In Asbestos Info. Ass'n, the court invalidated the asbestos ETS for the additional reason that OSHA had not demonstrated the necessity of the ETS. The court cited, among other factors, the duplication between the respirator requirements of the ETS and OSHA’s existing standards requiring respirator use. The court dismissed OSHA’s argument that the ETS was necessary because the existing respiratory standards were “unenforceable absent actual monitoring to show that ambient asbestos particles are so far above the permissible limit that respirators are necessary to bring employees’ exposure within the PEL of 2.0 f/cc.”

The court determined that “fear of a successful judicial challenge to enforcement of OSHA’s permanent standard regarding respirator use hardly justifies resort to the most dramatic weapon in OSHA’s enforcement arsenal.”

Although OSHA has not promulgated an ETS since the 1983 asbestos standard, it has since determined the necessity of an ETS. In 2006, the agency considered a petition from the United Food and Commercial Workers (UFCW) and International Brotherhood of Teamsters (IBT) for an ETS on diacetyl. The UFCW and IBT petitioned OSHA for the ETS after the National Institute for Occupational Safety and Health (NIOSH) and other researchers found that airborne exposure to diacetyl, then commonly used as an artificial butter flavoring in microwave popcorn and a flavoring in other food and beverage products, was linked to the lung disease *bouchnioltitis obliterans*, now commonly referred to as “popcorn lung.” According to GAO’s 2012 report on OSHA’s standard-setting processes, OSHA informed GAO that although the agency may have been able to issue an ETS based on the grave danger posed by diacetyl, the actions taken by the food and beverage industries, including reducing or removing diacetyl from products, made it less likely that the necessity requirement could be met.

**ETS Duration**

Section 6(c)(2) of the OSHAct provides that an ETS is effective until superseded by a permanent standard promulgated pursuant to the normal rulemaking provisions of the OSHAct. Section 6(c)(3) of the OSHAct requires OSHA to promulgate a permanent standard within six months of
promulgating the ETS. As shown earlier in this report, six months is well outside of historical and currently expected time frames for developing and promulgating a standard under the notice and comment provisions of the APA and OSH Act, as well as under other relevant federal laws and executive orders. This dichotomy between the statutory mandate to promulgate a standard and the timelines that, based on historical precedent, other provisions in the OSH Act might realistically require for such promulgation raises the question of whether or not OSHA could extend an ETS’s duration without going through the normal rulemaking process. The statute and legislative history do not clearly address this question.

OSHA has used its ETS authority sparingly in its history and not since the asbestos ETS promulgated in 1983. As shown in Table A-1 in the Appendix, of the nine times OSHA has issued an ETS, the courts have fully vacated or stayed the ETS in four cases and partially vacated the ETS in one case. Of the five cases that were not challenged or that were fully or partially upheld by the courts, OSHA issued a permanent standard either within the six months required by the statute or within several months of the six-month period and always within one year of the promulgation of the ETS. Each of these cases, however, occurred before 1980, when a combination of additional federal laws and court decisions added additional procedural requirements to the OSHA rulemaking process. OSHA did not attempt to extend the ETS’s expiration date in any of these cases.

Although the courts have not ruled directly on an attempt by OSHA to solely extend the life of an ETS, in 1974, the U.S. Court Appeals for the Fifth Circuit held in Florida Peach Growers Ass’n v. United States Department of Labor that OSHA was within its authority to amend an ETS without going through the normal rulemaking process. The court stated that “it is inconceivable that Congress, having granted the Secretary the authority to react quickly in fast-breaking emergency situations, intended to limit his ability to react to developments subsequent to his initial response.” The court also recognized the difficulty OSHA may have in promulgating a standard within six months due to the notice and comment requirements of the OSH Act, stating that in the case of OSHA seeking to amend an ETS to expand its focus, “adherence to subsection (b) procedures would not be in the best interest of employees, whom the Act is designed to protect. Such lengthy procedures could all too easily consume all of the temporary standard’s six months life.”


30 For example, OSHA promulgated the Acrylonitrile (vinyl cyanide) ETS on January 17, 1978, and the permanent standard on October 3, 1978, with an effective date of November 2, 1978. The preamble to the permanent standard published in the Federal Register does not include information on the status of the ETS during the time between its expiration and the promulgation of the permanent standard. OSHA, “Occupational Exposure to Acrylonitrile (Vinyl Cyanide),” 43 Federal Register 45762, October 3, 1978.

31 489 F.2d. 120 (5th Cir. 1974).

32 489 F.2d. at 127 (5th Cir. 1974).

33 489 F.2d. at 127 (5th Cir. 1974).
OSHA Standards Related to COVID-19

Current OSHA Standards

Currently, no OSHA standard directly covers exposure to airborne or aerosol diseases in the workplace. As a result, OSHA is limited in its ability to enforce protections for healthcare and other workers who may be exposed to SARS-CoV-2, the virus that causes COVID-19.\(^{34}\)

OSHA may enforce the General Duty Clause in the absence of a standard, if it can be determined that an employer has failed to provide a worksite free of “recognized hazards” that are “causing or are likely to cause death or serious physical harm” to workers.\(^{35}\) In addition, OSHA’s standards for the use of personal protective equipment (PPE) may apply in cases in which workers require eye, face, hand, or respiratory protection against COVID-19 exposure.\(^{36}\)

As of October 1, 2020, OSHA has issued citations related to COVID-19 to employers at 62 worksites resulting in a total of $913,133 in proposed civil penalties.\(^{37}\) The majority of these citations were issued to healthcare, nursing, and long-term care providers, including two Department of Veterans Affairs facilities—a hospital in Indianapolis, Indiana, and a community living center in Queens, New York.\(^{38}\) Two employers in the meat processing industry—Smithfield Packaged Foods, Inc. in Sioux Falls, South Dakota and JBS Foods, Inc. in Greeley, Colorado—were also cited.\(^{39}\) In the two meat processing cases, citations were issued for General Duty Clause violations. Other citations were issued for violations of OSHA’s respiratory protection, injury and illness reporting, and recordkeeping standards.

The highest amount of proposed penalties issued to a single employer for COVID-19-related violations was $28,070 to the Harborage nursing home operated by Hackensack Meridian Healthcare in New Jersey for four serious and one other than serious violations of the respiratory protection standard.\(^{40}\) For two of the serious violations, OSHA issued the maximum allowable penalty of $13,494.\(^{41}\) For the other two serious violations, OSHA issued citations but no monetary penalties. For the other than serious violation, OSHA issued a penalty of $1,082. The two meat processing employers were each assessed maximum penalties of $13,494 for serious violations of the General Duty Clause.

In a letter to OSHA, Senators Elizabeth Warren and Cory A. Booker raised concerns over the amount of penalties issued to these employers.\(^{42}\) The Senators asked OSHA why these employers

\(^{34}\) OSHA has a standard on blood-borne pathogens (29 C.F.R. §1910.1030) but does not have a standard on pathogens transmitted by airborne droplets.


\(^{38}\) A list of all COVID-19-related citations issued by OSHA through October 1, 2020, is available at https://www.osha.gov/enforcement/covid-19-data/inspections-covid-related-citations.

\(^{39}\) OSHA has the authority to issue citations to Executive Branch agencies, but does not have the authority to issue civil monetary penalties to these agencies.

\(^{40}\) Detailed information on the citations issued to this employer is available at https://www.osha.gov/pls/imis/establishment.inspection_detail?id=1476465.015.

\(^{41}\) OSHA citations are classified as “serious,” “other than serious,” “willful,” or “repeated.” The maximum amounts of OSHA penalties are subject to annual inflationary adjustments.

\(^{42}\) Letter from Senators Elizabeth Warren and Cory A. Booker to Loren Sweatt, Principal Deputy Assistant Secretary of
were each cited for single serious violations of the General Duty Clause rather than multiple violations for each area of the facilities in which social distancing measures were not implemented. They also asked why OSHA did not issue penalties for willful or repeated violations that carry maximum penalties of $134,937 per violation. None of the employers cited for COVID-19-related violations were issued penalties for willful or repeated violations.

OSHA Respiratory Protection Standard

National Institute for Occupational Safety and Health Certification

The OSHA respiratory protection standard requires the use of respirators certified by NIOSH in cases in which engineering controls, such as ventilation or enclosure of hazards, are insufficient to protect workers from breathing contaminated air. Surgical masks, procedure masks, and dust masks are not considered respirators. NIOSH certifies respirators pursuant to federal regulations. For nonpowered respirators, such as filtering face piece respirators commonly used in healthcare and construction, NIOSH classifies respirators based on their efficiency at filtering airborne particles and their ability to protect against oil particles. Under the NIOSH classification system, the letter (N, R, or P) indicates the level of oil protection as follows: N—no oil protection; R—oil resistant; and P—oil proof. The number following the letter indicates the efficiency rating of the respirator as follows: 95—filters 95% of airborne particles; 97—filters 97% of airborne particles; and 100—filters 99.7% of airborne particles. Thus an N95 respirator, the most common type, is one that does not protect against oil particles and filters out 95% of airborne particles. An R or P respirator can be used in place of an N respirator.

A respirator that is past its manufacturer-designated shelf life is no longer considered to be certified by NIOSH. However, in response to potential shortages in respirators, NIOSH has tested and approved certain models of respirators for certified use beyond their manufacturer-designated shelf lives.

Respirators designed for certain medical and surgical uses are subject to both certification by NIOSH (for oil protection and efficiency) and regulation by the Food and Drug Administration (FDA) as medical devices. In general, respirators with exhalation valves cannot be used in surgical and certain medical settings because, although the presence of an exhalation valve does not affect the respirator’s protection afforded the user, it may allow unfiltered air from the user into a sterile field. On March 2, 2020, FDA issued an Emergency Use Authorization (EUA) to approve for use in medical settings certain NIOSH-certified respirators not previously regulated by FDA.


43 29 C.F.R. §1910.134.

44 42 C.F.R. Part 84.


46 Letter from RADM Denise M. Hinton, chief scientist, Food and Drug Administration (FDA), to Robert R. Redfield, Director, CDC, March 2, 2020, at https://www.fda.gov/media/135763/download. The list of respirators approved under this Emergency Use Authorization (EUA) is in Appendix B to this letter, updated at https://www.fda.gov/media/135921/download.
CDC Interim Guidance on Respiratory Protection

On March 10, 2020, the Centers for Disease Control and Prevention (CDC) updated its interim guidance for the protection of healthcare workers against exposure to COVID-19 to permit healthcare workers caring for known or suspected COVID-19 cases to use “facemasks” when respirators are not available or are in limited supply. This differs from the CDC’s 2007 guidelines for control of infectious agents in healthcare settings, which required the use of respirators for treatment of known or suspected cases. CDC states that respirators should be prioritized for use in medical procedures likely to generate respiratory aerosols. Before this interim guidance was released, Representative Bobby Scott, Chairman of the House Committee on Education and Labor, and Representative Alma Adams, Chair of the Subcommittee on Workforce Protections, sent a letter to Secretary of Health and Human Services (HHS) Alex M. Azar II expressing their opposition to this change in the interim standard.

Medical Evaluation and Fit Testing

The OSHA respiratory protection standard requires that the employer provide a medical evaluation to the employee to determine if the employee is physiologically able to use a respirator. This medical evaluation must be completed before any fit testing. For respirators designed to fit tightly against the face, the specific type and model of respirator that an employee is to use must be fit tested in accordance with the procedures provided in Appendix A of the OSHA respiratory protection standard to ensure there is a complete seal around the respirator when worn. Once an employee has been fit tested for a respirator, he or she is required to be fit tested annually or whenever the model of respirator, but not the actual respirator itself, is changed. Each time an individual uses a respirator, he or she is required to perform a check of the seal of the respirator to his or her face in accordance with the procedures provided in Appendix B of the standard. On March 14, 2020, OSHA issued guidance permitting employers to suspend annual fit testing of respirators for employees that have already been fit tested on the same model respirator.

47 Although the interim guidance does not specifically define the term facemask, it does differentiate between a facemask and a respirator such that any recommendation to use a facemask does not require the use of a respirator. CDC, Interim Infection Prevention and Control Recommendations for Patients with Suspected or Confirmed Coronavirus Disease 2019 (COVID-19) in Healthcare Settings, updated March 10, 2020, at https://www.cdc.gov/coronavirus/2019-ncov/infection-control/control-recommendations.html.


50 29 C.F.R. §1910.134 Appendix A. Powered air purifying respirators (PAPR) that do not require a seal to the user’s face do not need to be fit tested.

51 29 C.F.R. §1910.134 Appendix B.
Temporary OSHA Enforcement Guidance on the Respiratory Protection Standard

In response to shortages of respirators and other PPE during the national response to the COVID-19 pandemic, OSHA has issued three sets of temporary enforcement guidance to permit the following exceptions to the respiratory protection standard:

1. Employers may suspend annual fit testing of respirators for employees that have already been fit tested on the same model respirator;\(^\text{52}\)
2. Employers may permit the use of expired respirators and the extended use or reuse of respirators, provided the respirator maintains its structural integrity and is not damaged, soiled, or contaminated (e.g., with blood, oil, or paint);\(^\text{53}\) and
3. Employers may permit the use of respirators not certified by NIOSH, but approved under standards used by the following countries or jurisdictions, in accordance with the protection equivalency tables provided in Appendices A and B of the enforcement guidance document:
   - Australia,
   - Brazil,
   - European Union,
   - Japan,
   - Mexico,
   - People’s Republic of China, and
   - Republic of Korea.\(^\text{54}\)

California: Cal/OSHA Aerosol Transmissible Disease Standard

Although no OSHA standard specifically covers aerosol or airborne disease transmission, the California Division of Occupational Safety and Health (Cal/OSHA), under its state plan, promulgated its aerosol transmissible disease (ATD) standard in 2009.\(^\text{55}\) The ATD standard covers most healthcare workers, laboratory workers, as well as workers in correctional facilities, homeless shelters, and drug treatment programs. Under the ATD standard, SARS-CoV-2, the virus that causes COVID-19, is classified as a disease or pathogen requiring airborne isolation. This classification subjects the virus to stricter control standards than diseases requiring only

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\(^{55}\) Cal. Code Regs. tit. 8, §5199. The California state plan covers all state and local government agencies and all private-sector workers in the state, with the exception of maritime workers; workers on military bases and in national parks, monuments, memorials, and recreation areas; workers on federally recognized Native American reservations and trust lands; and U.S. Postal Service contractors.
droplet precautions, such as seasonal influenza. The key requirements of the ATD standard include:

- written ATD exposure control plan and procedures,
- training of all employees on COVID-19 exposure, use of PPE, and procedures if exposed to COVID-19,
- engineering and work practice controls to control COVID-19 exposure, including the use of airborne isolation rooms,
- provision of medical services to employees, including removal of exposed employees,
- specific requirements for laboratory workers, and
- PPE requirements.

Cal/OSHA Aerosol Transmissible Disease PPE Requirements

The Cal/OSHA ATD standard requires that employers provide employees PPE, including gloves, gowns or coveralls, eye protection, and respirators certified by NIOSH at least at the N95 level whenever workers

- enter or work in an airborne isolation room or area with a case or suspected case;
- are present during procedures or services on a case or suspected case;
- repair, replace, or maintain air systems or equipment that may contain pathogens;
- decontaminate an area that is or was occupied by a case or suspected case;
- are present during aerosol generating procedures on cadavers of cases or suspected cases;
- transport a case or suspected case within a facility or within a vehicle when the patient is not masked; and
- are working with a viable virus in the laboratory.

In addition, a powered air purifying respirator (PAPR) with a high-efficiency particulate air (HEPA) filter must be used whenever a worker performs a high-hazard procedure on a known or suspected COVID-19 case. High-hazard procedures are those in which “the potential for being exposed to aerosol transmissible pathogens is increased due to the reasonably anticipated generation of aerosolized pathogens”—they include intubation, airway suction, and caring for patients on positive pressure ventilation. Emergency medical services (EMS) workers may use N100, R100, or P100 respirators in place of PAPRs.

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56 Cal. Code Regs. tit. 8, §5199 Appendix A.
58 A PAPR uses a mechanical device to draw in room air and filter it before expelling that air over the user’s face. In general, PAPRs do not require a tight seal to the user’s face and do not need to be fit tested.
59 Cal. Code Regs. tit. 8, §5199(b).
Cal/OSHA Interim Guidance on COVID-19

Cal/OSHA has issued interim guidance in response to shortages of respirators in the state due to the COVID-19 pandemic response. Under this interim guidance, if the supply of N95 respirators or PAPRs are insufficient to meet current or anticipated needs, surgical masks may be used for low-hazard patient contacts that would otherwise require the use of respirators, and respirators may be used for high-hazard procedures that would otherwise require the use of PAPRs.

Virginia: VOSH COVID-19 ETS

On July 15, 2020, the Virginia Safety and Health Codes Board adopted an ETS to specifically protect employees from exposure to SARS-CoV-2, the virus that causes COVID-19. This ETS, promulgated under Virginia’s state occupational safety and health plan (VOSH) is the first state standard to specifically address COVID-19 in the workplace. As an ETS, the VOSH standard expires within six months of its effective date, upon expiration of the Governor’s State of Emergency, when superseded by a permanent standard, or when repealed by the Virginia Safety and Health Codes Board, whichever comes first. The ETS can be extended only through the normal state rulemaking process.

Unlike the Cal/OSHA ATD standard, the VOSH ETS applies to all state and local government agencies and all covered private-sector employees in the state. As part of a state plan, the VOSH ETS applies to state and local government entities, such as public schools, as employers. All covered employers in Virginia must comply with the following ETS requirements:

- exposure assessment and determination, notification of suspected cases and contacts with those cases, and employee access to their own exposure and medical records;
- return to work of employees known or suspected to have COVID-19 based on a duration of time since last symptoms or negative COVID-19 tests;
- maintenance of physical distancing between employees while working and on paid breaks at the worksite, including restricted access to the worksite and common areas and break rooms;
- compliance with applicable existing PPE and respiratory protection standards when physical distancing between employees is not possible; and
- sanitation and disinfection requirements.

For all employers, if engineering, administrative, or work practice controls are not feasible or do not provide sufficient protection from SARS-CoV-2 transmission, then PPE, including respiratory PPE—such as respirators, if necessary—must be provided to employees.


62 The Virginia state plan covers all state and local government agencies and all private-sector workers in the state, with the exception of maritime workers, U.S Postal Service contractors, workers at military bases or other federal enclaves in which the federal government has civil jurisdiction, workers at the U.S. Department of Energy’s Southeastern Power Administration Kerr-Philpott System, and aircraft cabin crew members.

63 A COVID-19 test for the purposes of determining if an employee can return to work must be paid for by the employer or offered such that the employee bears no cost for the test.
Hazard and Job Task Classification

The VOSH ETS requires that each employer assess its workplace for hazards and job tasks that potentially expose employees to the SARS-CoV-2 virus. Employers must classify each job task as having a "very high," "high," "medium," or "lower" risk level of exposure, according to the hazards to which employees are potentially exposed. The VOSH ETS provides the following examples of activities for the "very high" and "high" risk levels:

- "very high" risk activities include
  - using aerosol-generating procedures, such as intubation, on patients known or suspected to be infected with SARS-CoV-2;
  - collecting or handling specimens from patients known or suspected to be infected with SARS-CoV-2; and
  - performing an autopsy involving aerosol-generating procedures on the body of a person known or suspected to be infected with the SARS-CoV-2 virus at the time of death; and

- "high risk" activities include
  - health care services, including inpatient care, outpatient care, skilled nursing care, and nonmedical support services such as room cleaning, provided to patients known or suspected to be infected with SARS-CoV-2;
  - first responder and medical transport services to patients known or suspected to be infected with SARS-CoV-2; and
  - mortuary services to persons known or suspected to be infected with the SARS-CoV-2 virus at the time of death.

"Medium" risk activities are those that require employees to have more than minimal contact, within six feet of other employees, customers, or members of the public who are not known or suspected to be infected with SARS-CoV-2. "Lower" risk activities are those that do not require contact with other persons within six feet or that are able to utilize the following types of engineering, administrative, or work practice controls to minimize contact between persons:

- installation of floor to ceiling barriers, such as barriers between cashiers and customers;
- telecommuting;
- staggered work shifts to reduce the number of workers at a site;
- delivering services remotely, including curbside pickup of retail purchases; and
- mandatory physical distancing of persons.

The use of face coverings other than respirators or medical or surgical masks, including cloth face coverings now required by several states, is not an acceptable method of minimizing physical contact between persons. However, the VOSH ETS requires the use of face coverings for brief contacts between persons within six feet of each other.

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64 Examples of "medium" risk work activities are provided in the VOSH ETS at 16 Va. Admin. Code §25-220-30.
Engineering, Administrative, Work Practice, and PPE Requirements for “Very High,” “High,” and “Medium” Risk Activities

Employers with job tasks or activities in the “very high,” “high,” or “medium” risk classifications must adhere to specific engineering, administrative, work practice, and PPE requirements. For “very high” and “high” risk activities, engineering controls include the use of airborne infection isolation rooms (AIIR) for known or suspected COVID-19 patients and aerosol-generating procedures and Biosafety Level 3 (BSL-3) precautions for the handling of specimens from known or suspected COVID-19 patients.65

Employers with “very high” and “high” risk activities must implement administrative and work practice controls, including the prescreening of all employees to ensure that employees do not have signs or symptoms of COVID-19; enhanced medical screening of employees during COVID-19 outbreaks; and the use of flexible work arrangements, such as telecommuting, when feasible. In addition, all employers with “very high” or “high” risk activities must provide, to the extent feasible, psychological and behavioral support to address employee stress at no cost to the employee.

The standard also provides for engineering, administrative, and work practice controls for “medium” risk activities.66

PPE Requirements for “Very High” and “High” Risk Activities

Employers with “very high” and “high” risk activities, who are not already covered by the general OSHA PPE standards, are required to comply with the VOSHET S requirements for PPE. An employer subject to these requirements must assess the workplace to determine if there are any COVID-19 hazards present or likely to be present that would require the use of PPE by employees. The employer must provide for the participation of employees and employee representatives in this assessment process and verify that this assessment has been conducted through a written certification.

If hazards that require PPE are identified, the employer must select and provide the appropriate PPE to each employee and ensure that PPE fits properly. If respiratory PPE, such as respirators or PAPR are used as PPE, the existing OSHA standards for respiratory PPE, which include medical evaluation of employees and fit testing, must be followed.

Unless contraindicated by the hazard and PPE assessment, when any employee is in contact within six feet of any person known or suspected to be infected with SARS-CoV-2, that employee must be provided with the following types of PPE:

- gloves,
- gown large enough to cover areas needing protection,
- face shield or goggles, and
- respirator.


While there are no specific PPE requirements for “medium” risk activities, PPE may be required based on an assessment of the hazards of these activities.

**Infectious Disease Preparedness and Response Plan and Training**

**Infectious Disease Preparedness and Response Plan**

All employers with “very high” and “high” risk activities, and employers with 11 or more employees and “medium” risk activities, must develop written infectious disease preparedness and response plans. These plans must be developed with input from employees. The deadline for the development of these plans is 60 days from the effective date of the ETS.

The infectious disease preparedness plan must include a consideration of the COVID-19 risks in the workplace, and to the extent possible and in compliance with medical privacy laws, the specific risks faced by employees with certain preexisting medical conditions. The plan must include contingency plans for continued operations during a COVID-19 outbreak and provide for the prompt identification and isolation of employees with known or suspected COVID-19 and a procedure for employees to notify the employer of COVID-19 signs or symptoms. The plan must also address interactions between the employer’s worksite and other businesses, such as vendors and contractors to ensure employees of these businesses comply with the VOSHETS and the employer’s infectious disease preparedness and response plan.

**Training**

All employers with “very high,” “high,” or “medium” risk activities must provide training to all employees, including those employees whose work does not involve any COVID-19 risks. This training must teach employees to recognize the hazards of the SARS-CoV-2 virus, signs and symptoms of COVID-19, and the procedures to minimize SARS-CoV-2 hazards. If the employer has an infectious disease preparedness and response plan, training must be provided on this plan. Written certification of training must be prepared, and retraining must be provided when necessary.

Employers with only “lower” risk activities are not required to prepare a formal training plan but must provide oral or written communication on the hazards of SARS-CoV-2, the signs and symptoms of COVID-19, and measures to minimize SARS-CoV-2 exposure. VOSH is required to develop an information sheet that employers can use to satisfy this training requirement.

Training must be provided within 30 days of the effective date of the standard, except for training on the infectious disease preparedness and response plan, which must be completed within 60 days.

**Whistleblower Protections**

The VOSH ETS prohibits any employer from discharging or otherwise discriminating against any employee who does the following:

- exercises his or her rights under the ETS or existing whistleblower protection provisions, including the limited right of an employee to refuse work because of a reasonable fear of injury or death or serious injury;\(^\text{67}\)

\(^\text{67}\) To exercise this right, the employee must, if possible, have sought unsuccessfully to have the employer remedy the hazard, and there must be insufficient time to attempt to remedy the hazard through normal regulatory enforcement
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- provides and wears his or her own PPE, provided the PPE does not create a greater hazard to the employee or create a serious hazard to other employees; or
- raises a reasonable concern about SARS-CoV-2 and COVID-19 infection control to the employer, the employer’s agent, other employees, the government, or the public through any type of media including social media.

Michigan: MIOSHA COVID-19 Emergency Rules

On October 14, 2020, the director of the Michigan Department of Labor and Economic Opportunity, which operates Michigan’s state occupational safety and health plan (MIOSHA), promulgated emergency rules to address workplace exposure to COVID-19. These rules, which apply to all employers in the state, went into immediate effect and will remain in effect for six months. In addition to rules that apply to all employers, the emergency rules include specific provisions that apply to the following industries:

- construction;
- manufacturing;
- retail, libraries, and museums;
- restaurants and bars;
- healthcare;
- in-home services such as house cleaning and repair;
- personal care services such as hair styling and tattooing;
- public accommodations such as sports and entertainment venues;
- sports and exercise facilities;
- meat and poultry processing; and
- casinos.

Exposure Determination

Rule 3 of the MIOSHA emergency rules requires all employers to evaluate all routine and anticipated job tasks and categorize these job tasks based on potential employee exposure to COVID-19 into one of the following four categories:

1. “Lower exposure risk” tasks are those that do not require contact with known or suspected COVID-19 cases or frequent close (within six feet) contact with the general public.
2. “Medium exposure risk” tasks are those that require frequent or close contact with persons who may be infected with COVID-19 but who are not known or suspected COVID-19 cases. In areas of the state without ongoing community channels. This right is provided in the OSHA standards at 29 C.F.R. §1977.12(b)(2) and in the VOSH standards at 16 Va. Admin. Code §25-60-110.


transmission of COVID-19, tasks that require frequent contact with persons travelling from areas with widespread COVID-19 transmission are included in this category. In areas with ongoing community transmission, tasks that involve contact with the general public are included in this category.

3. “High exposure risk” tasks are those with high potential for exposure to known or suspected COVID-19 cases. Licensed healthcare providers, medical first responders, nursing home workers, law enforcement and correctional officers, and mortuary workers are examples of types of workers that may perform tasks in this category.

4. “Very high exposure risk” tasks are those that involve the generation of aerosols during medical or mortuary procedures on known or suspected COVID-19 cases and the collection and handling of laboratory specimens from known or suspected COVID-19 cases.

Preparedness and Response Plan

Rule 4 of the MIOSHA emergency rules requires all employers to develop a written COVID-19 preparedness and response plan based on current CDC and OSHA guidance. This plan must detail measures the employer will take to protect employees from COVID-19 exposure and must be readily available to employees and their representatives.

Basic Infection Prevention Measures

Rule 5 of the MIOSHA emergency rules requires all employers to implement the following basic infection prevention measures:

- promote frequent hand-washing and provide hand-washing facilities or hand sanitizer to workers, customers, and visitors;
- require employees who are sick to not report to work or to report to an isolated location;
- prohibit workers from using other workers’ desks, phones, and other equipment when possible;
- increase facility cleaning, especially of high-touch surfaces and shared equipment;
- establish procedures, consistent with CDC guidance, for disinfection of the worksite if a worker, customer, or visitor has a known case of COVID-19;
- use Environmental Protection Agency (EPA) approved disinfectants that are expected to effective against SARS-CoV-2;
- follow all manufacturer’s guidelines for use of all cleaning and disinfectant products; and
- prohibit in-person work for employees whose work can be done remotely.

Health Surveillance

Rule 6 of the MIOSHA emergency rules requires all employers to implement a health surveillance system for the workplace. This system must include, at a minimum, a COVID-19 screening questionnaire for all employees and contractors entering the workplace. Employees must be directed to immediately report any signs or symptoms of COVID-19 to the employer and known and suspected COVID-19 cases must be isolated from the rest of the workforce. When an
employer learns of an employee, contractor, customer, or visitor to the worksite with a known case of COVID-19, the employer must immediately notify the local health department and, must notify, within 24 hours, any workers, contractors, or suppliers who may have come into contact with the infected person. When determining if an employee with a known or suspected case of COVID-19 may return to the workplace, the employer must follow CDC guidelines and health department quarantine and isolation orders.

Workplace Controls

Rule 7 of the MIOSHA emergency rules requires all employers to implement the following workplace controls:

- designate one or more worksite COVID-19 safety coordinators to implement, monitor, and report on COVID-19 control strategies developed by the employer and to remain on site at all times when employees are present;
- place posters in appropriate languages in the workplace that provide information on staying away from work while sick, cough and sneeze etiquette, and hand hygiene;
- keep all persons at least six feet from each other using signs, floor markings, and barriers appropriate for the worksite, to the extent possible;
- provide all employees with non-medical grade face coverings at no cost to the employees;
- require the use of face coverings when employees cannot maintain six feet of distance from other persons in the workplace, and consider the use of face shields when three feet of distance cannot be maintained;
- require face coverings in shared spaces, such as restrooms and hallways and during in-person meetings.

PPE

Rule 8 of the MIOSHA emergency rules requires that employers provide appropriate PPE, including respiratory protection, to employees based on the exposure risks of the job and current CDC and OSHA guidelines. All PPE must be properly fitted, inspected, maintained, cleaned, stored, and disposed of. In workplaces that provide medical treatment to known or suspected COVID-19 cases, employees with frequent or prolonged close contact with such patients must be provided with and wear, at a minimum, an N95 respirator, goggles or face shield, and gown.

Training Requirements

Rule 10 of the MIOSHA emergency rules requires all employers to provide training and communication, in languages common among the employees, on the following subjects:

- workplace infection-control practices;
- proper use of PPE;
- how to notify the employer of COVID-19 symptoms or diagnosis;
- how to report unsafe working conditions.

This training must be updated if the employer’s COVID-19 preparedness and response plan changes or new information on COVID-19 transmission becomes available.
Recordkeeping Requirements

Rule 11 of the MIOSHA emergency rules requires that all employers maintain, for one year, records of employee training, the screening of persons entering the workplace, and any health surveillance notifications required by Rule 6.

OSHA Infectious Disease Standard Rulemaking

In 2010, OSHA published a Request for Information in the Federal Register seeking public comments on strategies to control exposure to infectious diseases in healthcare workplaces.70 After collecting public comments and holding public meetings, OSHA completed the SBREFA process in 2014. Since then, however, no public actions have occurred on this rulemaking; since spring 2017, this rulemaking has been listed as a “long-term action” in DOL’s semiannual regulatory agenda.

Congressional Activity to Require an OSHA Emergency Temporary Standard on COVID-19

On March 5, 2020, Representative Bobby Scott, chairman of the House Committee on Education and Labor, and Representative Alma Adams, chair of the Subcommittee on Workforce Protections, sent a letter to Secretary of Labor Eugene Scalia calling on OSHA to promulgate an ETS to address COVID-19 exposure among healthcare workers.71 This letter followed a January 2020 letter requesting that OSHA reopen its rulemaking on the infectious disease standard and begin to formulate for possible future promulgation an ETS to address COVID-19 exposure.72 Senator Patty Murray, ranking member of the Senate Committee on Health, Education, Labor, and Pensions and a group of Democratic Senators sent a similar letter to the Secretary of Labor calling for an OSHA ETS.73

In addition, in March 2020, David Michaels, who served as the Assistant Secretary of Labor for Occupational Safety and Health during the Obama Administration, wrote an op-ed in The Atlantic calling on OSHA to promulgate a COVID-19 ETS.74 On March 6, 2020, the AFL-CIO and 22 other unions petitioned OSHA for an ETS on infectious diseases that would cover all workers with potential exposures.75 OSHA formally denied the AFL-CIO petition on May 29, 2020, claiming that an ETS is not necessary to protect employees from infectious diseases generally, or

71 Letter from Representative Scott, chairman, House Committee on Education and Labor, and Representative Adams, chair, Subcommittee on Worker Protections, to The Honorable Eugene Scalia, Secretary of Labor, March 5, 2020, at https://edlabor.house.gov/imo/media/doc/2020-03-05%20OSHA%20ETS%20Letter.pdf.

**H.R. 6139, the COVID-19 Health Care Worker Protection Act of 2020**

On March 9, 2020, Representative Bobby Scott introduced H.R. 6139, the COVID-19 Health Care Worker Protection Act of 2020. This bill would require OSHA to promulgate a COVID-19 ETS within one month of enactment. The ETS would be required to cover healthcare workers and any workers in sectors determined by the CDC or OSHA to be at an elevated risk of COVID-19 exposure. The ETS would be required to include an exposure control plan provision and be, at a minimum, based on CDC’s 2007 guidance and any updates to this guidance. The ETS would also be required to provide no less protection than any state standard on novel pathogens, thus requiring OSHA to include the elements of the Cal/OSHA ATD standard, the VOSH COVID-19 ETS, and the MIOSHA emergency rules in this ETS. Title II of the bill would provide that hospitals and skilled nursing facilities that receive Medicare funding and that are owned by state or local government units and not subject to state plans would be required to comply with the ETS. Similar provisions are included in S. 3475.

**P.L. 116-127, the Families First Coronavirus Response Act**

The provisions of H.R. 6139 were included as Division C of H.R. 6201, the Families First Coronavirus Response Act, as introduced in the House. The American Hospital Association (AHA) issued an alert to its members expressing its opposition to the OSHA ETS provisions in the bill. Specifically, the AHA opposed the requirement that the ETS be based on the CDC’s 2007 guidance. The AHA stated that unlike severe acute respiratory syndrome (SARS), which was transmitted through the air, COVID-19 transmission is through droplets and surface contacts. Thus, the requirement of the 2007 CDC guidance that N95 respirators, rather than surgical masks, be used for patient contact is not necessary to protect healthcare workers from COVID-19, and the use of surgical masks is consistent with World Health Organization guidance. The AHA also

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76 Letter from Loren Sweatt, Principal Deputy Assistant Secretary of Labor, to Richard L. Trumka, president, AFL-CIO, May 29, 2020.

77 Letter from Bonnie Castillo, executive director, National Nurses United, to The Honorable Eugene Scalia, Secretary of Labor, and The Honorable Loren Sweatt, Principal Deputy Assistant Secretary of Labor for Occupational Safety and Health, March 4, 2020, at https://act.nationalnursesunited.org/page/-/files/graphics/NNUPetitionOSHA03042020.pdf.


79 In re: American Federation of Labor and Congress of Industrial Organizations, D.C. Cir., No. 19-1158, May 18, 2020. This petition was filed in the U.S. Court of Appeals as Section 6(f) of the OSH Act [29 U.S.C. §655(f)] grants this court exclusive jurisdiction to provide judicial review of OSHA standards.

claimed that shortages of available respirators could reduce the capacity of hospitals to treat COVID-19 patients, due to a lack of respirators for staff. The OSHA ETS provisions were not included in the version of the legislation that was passed by the House and the Senate and signed into law as P.L. 116-127.

**H.R. 6379, the Take Responsibility for Workers and Families Act**

Division D of H.R. 6379, the Take Responsibility for Workers and Families Act, as introduced in the House on March 23, 2020, includes the requirement that OSHA promulgate an ETS on COVID-19 within seven days of enactment and a permanent COVID-19 standard within 24 months of enactment to cover healthcare workers, firefighters and emergency response workers, and workers in other occupations that CDC or OSHA determines to have an elevated risk of COVID-19 exposure. Division D of H.R. 6379 would amend the OSH Act, for the purposes of the ETS only, such that state and local government employers in states without state plans would be covered by the ETS. The provisions of Division D of H.R. 6379 were also included in S. 3584, the COVID-19 Workers First Protection Act of 2020, as introduced in the Senate.

This legislation would specifically provide that the ETS would remain in force until the permanent standard is promulgated and would explicitly exempt the ETS from the Regulatory Flexibility Act, Paperwork Reduction Act, and Executive Order 12866. OSHA would be granted enforcement discretion in cases in which it is not feasible for an employer to fully comply with the ETS (such as a case in which PPE is unavailable) if the employer is exercising due diligence to comply and implementing alternative means to protect employees.

Like the provisions in H.R. 6139 and the version of H.R. 6201 introduced in the House, the ETS and permanent standard under H.R. 6379 would be required to include an exposure control plan and provide no less protection than any state standard on novel pathogens, thus requiring OSHA to include the elements of the Cal/OSHA ATD, the VOSH COVID-19 ETS, and the MIOSHA emergency rules in this ETS and permanent standard. Although the ETS provisions in H.R. 6139 and H.R. 6201 would require that the ETS be based on the 2007 CDC guidance, specific reference to the 2007 guidance is not included in this legislation. Rather, under H.R. 6379, the ETS and permanent standard would have to incorporate, as appropriate, “guidelines issued by the Centers for Disease Control and Prevention, and the National Institute for Occupational Safety and Health, which are designed to prevent the transmission of infectious agents in healthcare settings” and scientific research on novel pathogens.

States with occupational safety and health plans would be required to adopt the ETS, or their own ETS at least as effective as the ETS, within 14 days of the legislation’s enactment.

**H.R. 6559, the COVID-19 Every Worker Protection Act of 2020**

H.R. 6559, the COVID-19 Every Worker Protection Act of 2020, was introduced in the House by Representative Bobby Scott on April 21, 2020. This legislation includes the ETS and permanent standard provisions of Division D of H.R. 6379 and S. 3584 and would require that these standards cover healthcare workers, emergency medical responders, and “other employees at occupational risk” of COVID-19 exposure. This legislation also adds two provisions that would clarify the requirements for employers to record work-related COVID-19 infections and strengthen the protections against retaliation and discrimination offered to whistleblowers. Similar provisions are included in S. 3677 and were incorporated into H.R. 6800, the Heroes Act, as passed by the House.
COVID-19 Recordkeeping

Sections 8(c) and 24(a) of the OSH Act require employers to maintain records of occupational injuries and illnesses in accordance with OSHA regulations. OSHA’s reporting and recordkeeping regulations require that employers with 10 or more employees must keep records of work-related injuries and illnesses that result in lost work time for employees or that require medical care beyond first aid. Employers must also report to OSHA, within 8 hours, any workplace fatality, and within 24 hours, any injury or illness that results in in-patient hospitalization, amputation, or loss of an eye. Employers in certain industries determined by OSHA to have lower occupational safety and health hazards are listed in the regulations as being exempt from the recordkeeping requirements but not the requirement to report to OSHA serious injuries, illnesses, and deaths. Offices of physicians, dentists, other health practitioners, and outpatient medical clinics are included in the industries that are exempt from the recordkeeping requirements.

OSHA regulations require the employer to determine if an employee’s injury or illness is related to his or her work and thus subject to the recordkeeping requirements. The regulations provide a presumption that an injury or illness that occurs in the workplace is work-related and recordable, unless one of the exemptions provided in the regulations applies. One of the listed exemptions is “The illness is the common cold or flu (Note: contagious diseases such as tuberculosis, brucellosis, hepatitis A, or plague are considered work-related if the employee is infected at work).”

Because of the nature of COVID-19 transmission, which can occur in the community as well as the workplace, it can be difficult to determine the exact source of any person’s COVID-19 transmission. Absent any specific guidance, this may make it difficult for employers to determine if an employee’s COVID-19 is subject to the recordkeeping requirements.

Initial OSHA Recordkeeping Guidance

On April 10, 2020, OSHA issued enforcement guidance on how cases of COVID-19 should be treated under the recordkeeping requirements. This guidance stated that COVID-19 cases were recordable if they were work-related.

Under this guidance, employers in the following industry groups were to fully comply with the recordkeeping regulations, including the requirement to determine if COVID-19 cases were work-related:

- healthcare;
- emergency response, including firefighting, emergency medical services, and law enforcement; and
- correctional institutions.

81 29 U.S.C. §§657(c) and 673(a).
82 OSHA’s reporting and recordkeeping regulations are at 29 C.F.R. Part 1904.
83 The list of exempted industries is at 29 C.F.R. Subpart B, Appendix A. States with state occupational safety and health plans may require employers in these exempted industries to comply with the recordkeeping requirements.
84 29 C.F.R. §1904.5.
85 29 C.F.R. §1904.5(a).
86 29 C.F.R. §1904.5(b)(2)(viii).
For all other employers, OSHA required employers to determine if COVID-19 cases were work-related and subject to the recordkeeping requirements only if both of the following two conditions were met:

1. There was objective evidence that a COVID-19 case may have been work-related. This could have included, for example, a number of cases developing among workers who worked closely together without an alternative explanation.

2. The evidence of work-relatedness was reasonably available to the employer. For purposes of this guidance, examples of reasonably available evidence included information given to the employer by employees, as well as information that an employer learned regarding its employees’ health and safety in the ordinary course of managing its business and employees.

**Updated OSHA Recordkeeping Guidance**

OSHA issued new guidance, effective May 26, 2020, on recordkeeping of COVID-19 cases. This new guidance rescinds the previous guidance issued by OSHA on April 10, 2020. Under this new guidance, all employers, regardless of type of industry or employment, are subject to the recordkeeping and recording regulations for work-related cases of COVID-19. To determine if an employer has made a reasonable determination that a case of COVID-19 was work-related, OSHA says it will consider the following factors:

- the reasonableness of the employer’s investigation of the COVID-19 case and its transmission to the employee;
- the evidence that is available to the employer; and
- the evidence that COVID-19 was contracted at work.

The guidance provides examples of evidence that can be used to demonstrate that a COVID-19 case was or was not work-related such as if an employee had frequent close contact with members of the public in an area with ongoing community transmission of COVID-19.

**H.R. 6559**

H.R. 6559 would require that the ETS and permanent standard established pursuant to the legislation include the requirement for the recording and reporting of all COVID-19 cases in accordance with OSHA regulations in place at the time of enactment. By referencing the regulations in place, this provision would serve to supersede OSHA’s guidance from April 10, 2020, and apply the requirement, currently provided in the guidance effective May 26, 2020, to determine the work-relatedness of COVID-19 cases to all employers covered by the recordkeeping regulations.

**Whistleblower Protections**

Section 11(c) of the OSHAct prohibits any person from retaliating or discriminating against any employee who exercises certain rights provided by the OSHAct. Commonly referred to as the

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whistleblower protection provision, this provision protects any employee who takes any of the following actions:

- files a complaint with OSHA related to a violation of the OSH Act;
- causes an OSHA proceeding, such as an investigation, to be instituted;
- testifies or is about to testify in any OSHA proceeding; and
- exercises on his or her own behalf, or on behalf of others, any other rights afforded by the OSH Act. 90

Other rights afforded by the OSH Act that are covered by the whistleblower protection provision include the right to inform the employer about unsafe work conditions; the right to access material safety data sheets or other information required to be made available by the employer; and the right to report a work-related injury, illness, or death to OSHA. 91 In limited cases, the employee has the right to refuse to work if conditions reasonably present a risk of serious injury or death and there is not sufficient time to eliminate the danger through other means. 92

H.R. 6559 would require that the ETS and permanent standard promulgated pursuant to the legislation expand the protections for whistleblowers. The following additional activities taken by employees would grant them protection from retaliation and discrimination from employers and agents of employers:

- reporting to the employer; a local, state, or federal agency; or the media; or on a social media platform; the following:
  - a violation of the ETS or permanent standard promulgated pursuant to the legislation;
  - a violation of the infectious disease control plan required by the ETS or permanent standard; or
  - a good-faith concern about an infectious disease hazard in the workplace;
- seeking assistance from the employer or a local, state, or federal agency with such a report; and
- using personally supplied PPE with a higher level of protection than offered by the employer.

**H.R. 6800, The Heroes Act**

The provisions of H.R. 6559, including the provisions relating to recordkeeping and whistleblower protections, were included as Title III of Division L of H.R. 6800, The Heroes Act. H.R. 6800 was passed by the House on May 15, 2020. In a letter to Speaker of the House Nancy Pelosi, the AHA expressed its opposition to the ETS provisions in The Heroes Act citing the potential for confusion that new regulations could bring and the "ongoing global lack of supplies, equipment and testing capability" faced by hospitals. 93 The AHA also stated that the provision

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90 29 C.F.R. §1977.3. Public-sector employees, except employees of the United States Postal Service, are not protected by the whistleblower provision, but may be covered by whistleblower provisions in other federal and state statutes.

91 For additional information on other rights covered by the whistleblower protection provision, see OSHA, January 9, 2019, *Investigator’s Desk Aid to the Occupational Safety and Health Act (OSH Act) Whistleblower Protection Provision*, pp. 5-7, at https://www.osha.gov/sites/default/files/11cDeskAid.pdf.


93 Letter from Thomas P. Nickels, executive vice president, American Hospital Association, to Hon. Nancy Pelosi,
that would require the ETS to be based on state standards "suggests that the federal government is surrendering its responsibility to appropriately regulate the nation to a state government agency without consideration of whether that state’s decisions are appropriate for implementation anywhere and everywhere."

**H.R. 925, The Heroes Act (Revised)**

The provisions of H.R. 6559 and H.R. 6800 were included in the House Amendment to the Senate Amendment to H.R. 925, the revised Heroes Act, passed by the House on October 1, 2020.

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Appendix. OSHA Emergency Temporary Standards

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<th>Federal Register Citation of ETS</th>
<th>Result of Judicial Review</th>
<th>Judicial Review Case Citation</th>
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<td>Asbestos</td>
<td>36 Federal Register 23207 (December 7, 1971)</td>
<td>Not challenged</td>
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<td>1973</td>
<td>Organophosphorous pesticides</td>
<td>38 Federal Register 10715 (May 1, 1973); amended by 38 Federal Register 17214 (June 29, 1973)</td>
<td>Vacated</td>
<td>Florida Peach Growers Ass'n v. United States Department of Labor, 489 F.2d 120 (5th Cir. 1974)</td>
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<td>1974</td>
<td>Vinyl chloride</td>
<td>39 Federal Register 12342 (April 5, 1974)</td>
<td>Not challenged</td>
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<td>1976</td>
<td>Diving operations</td>
<td>41 Federal Register 24271 (June 15, 1976)</td>
<td>Stayed</td>
<td>Taylor Diving &amp; Salvage Co. v. Department of Labor, 537 F.2d 819 (5th Cir. 1976)</td>
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<td>1977</td>
<td>1,2 Dibromo-3-chloropropane (DBCP)</td>
<td>42 Federal Register 45535 (September 9, 1977)</td>
<td>Not challenged</td>
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Message

From: Levinson, Andrew - OSHA [O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP
(FYDIOBF23SPDLT)/cn=RECIPIENTS/cn=C71A236E7D8E428DA9CF906192E4766B-LEVINSON, A]
Sent: 10/27/2020 8:47:54 PM
To: Ruskin, Maureen - OSHA [O=ExchangeLabs/OU=Exchange Administrative Group
(FYDIOBF23SPDLT)/cn=Recipients/cn=152f04555f4b5ac5f66a5131f8de4-Ruskin, Maui]; Long, Lisa - OSHA
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(FYDIOBF23SPDLT)/cn=Recipients/cn=21d6a321337f43a1b83b0dd8d28e81af-Long, Lisa]; Schifano, Jessica - OSHA
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Subject: FW: R46288.pdf
Attachments: R46288.pdf

FYI

From: Jillings, Lee Anne - OSHA <Jillings.LeeAnne@dol.gov>
Sent: Tuesday, October 27, 2020 1:27 PM
To: Levinson, Andrew - OSHA <Levinson.Andrew@dol.gov>; Edens, Mandy - OSHA <Edens.Mandy@dol.gov>
Subject: FW: R46288.pdf

FYI

From: Hodgson, Michael - OSHA <Hodgsoravlicheol@dol.gov>
Sent: Tuesday, October 27, 2020 12:57 PM
To: zzOSHA-DTSEM-MANAGERS <zzOSHA-DTSEM-MANAGERS@dol.gov>
Subject: FW: R46288.pdf

interesting

From: Radonovich, Lewis (CDC/NIOSH/RHD/OD) <rnto5@cdcgov>
Sent: Tuesday, October 27, 2020 12:14 PM
To: Hodgson, Michael - OSHA <Hodgsoravlicheol@dol.gov>
Subject: FW: R46288.pdf

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A nice summary from CRS!

From: Radonovich, Lewis (CDC/NIOSH/RHD/OD) <rnto5@cdcgov>
Sent: Tuesday, October 27, 2020 9:21 AM
To: Radonovich, Lewis (CDC/NIOSH/RHD/OD) <rnto5@cdcgov>
Subject: R46288.pdf

OSHA-002352
Occupational Safety and Health Administration (OSHA): Emergency Temporary Standards (ETS) and COVID-19

Updated October 20, 2020
Occupational Safety and Health Administration (OSHA): Emergency Temporary Standards (ETS) and COVID-19

The Occupational Safety and Health Administration (OSHA) does not currently have a specific standard that protects healthcare or other workers from airborne or aerosol transmission of disease or diseases transmitted by airborne droplets. Some in Congress, and some groups representing healthcare, meat and poultry processing, and other workers, are calling on OSHA to promulgate an emergency temporary standard (ETS) to protect workers from exposure to SARS-CoV-2, the virus that causes Coronavirus Disease 2019 (COVID-19). The Occupational Safety and Health Act of 1970 (OSH Act) gives OSHA the ability to promulgate an ETS that would remain in effect for up to six months without going through the normal review and comment process of rulemaking. OSHA, however, has rarely used this authority in the past—not since the courts struck down its ETS on asbestos in 1983.

The California Division of Occupational Safety and Health (Cal/OSHA), which operates California’s state occupational safety and health plan, has had an aerosol transmissible disease (ATD) standard since 2009. This standard includes, among other provisions, the requirement that employers provide covered employees with respirators, rather than surgical masks, when these workers interact with ATDs, such as known or suspected COVID-19 cases. In addition, according to the Cal/OSHA ATD standard, certain procedures require the use of powered air purifying respirators (PAPR).

The Virginia state occupational safety and health plan (VOSH) and the Michigan state occupational safety and health plan (MIOSHA) have each promulgated emergency standards to specifically address COVID-19 in workplaces. Unlike the Cal/OSHA ATD standard, these emergency standards are in effect for only six months and apply to all employers.

H.R. 6139, the COVID-19 Health Care Worker Protection Act of 2020, would require OSHA to promulgate an ETS on COVID-19 that incorporates both the Cal/OSHA ATD standard and the Centers for Disease Control and Prevention’s (CDC’s) 2007 guidelines on occupational exposure to infectious agents in healthcare settings; similar provisions appear in S. 3475. The CDC’s 2007 guidelines generally require stricter controls than its interim guidance on COVID-19 exposure. The provisions of H.R. 6139 were incorporated into the version of H.R. 6201, the Families First Coronavirus Response Act, as introduced in the House. The OSHA ETS provisions were not included in the House- and Senate-passed version of legislation that was signed into law as P.L. 116-127.

H.R. 6379, as introduced in the House, also would include a requirement for an OSHA ETS and permanent standard to address COVID-19 exposure; similar provisions appear in S. 3584. H.R. 6559 would include the requirements for an ETS and permanent standard, clarify the requirement that employers must report work-related COVID-19 cases, and expand protections for whistleblowers; similar provisions appear in S. 3677. The provisions of H.R. 6559 were included in H.R. 6800, The Heroes Act, passed by the House on May 15, 2020, and in the House Amendment to the Senate Amendment to H.R. 925, the revised Heroes Act passed by the House on October 1, 2020.

Through October 1, 2020, OSHA has issued COVID-19-related citations to employers at 62 work sites, with total proposed penalties of $913,133. These citations have been issued for violations of the OSH Act’s General Duty Clause and other existing OSHA standards, such as those for respiratory protection, that may apply to COVID-19. Senators Elizabeth Warren and Cory A. Booker have raised concerns about the low amount of penalties being assessed for COVID-19-related violations.
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Occupational Safety and Health Administration Standards

Section 6 of the Occupational Safety and Health Act of 1970 (OSH Act) grants the Occupational Safety and Health Administration (OSHA) of the Department of Labor (DOL) the authority to promulgate, modify, or revoke occupational safety and health standards that apply to private sector employers, the United States Postal Service, and the federal government as an employer. In addition, Section 5(a)(1) of the OSH Act, commonly referred to as the General Duty Clause, requires that all employers under OSHA’s jurisdiction provide workplaces free of “recognized hazards that are causing or are likely to cause death or serious physical harm” to their employees. OSHA has the authority to enforce employer compliance with its standards and with the General Duty Clause through the issuance of abatement orders, citations, and civil monetary penalties. The OSH Act does not cover state or local government agencies or units. Thus, certain entities that may be affected by Coronavirus Disease 2019 (COVID-19), such as state and local government hospitals, local fire departments and emergency medical services, state prisons and county jails, and public schools, are not covered by the OSH Act or subject to OSHA regulation or enforcement.

State Plans

Section 18 of the OSH Act authorizes states to establish their own occupational safety and health plans and preempt standards established and enforced by OSHA. OSHA must approve state plans if they are “at least as effective” as OSHA’s standards and enforcement. If a state adopts a state plan, it also must cover state and local government entities, such as public schools, not covered by OSHA. Currently, 21 states and Puerto Rico have state plans that cover all employers, and 5 states and the U.S. Virgin Islands have state plans that cover only state and local government employers not covered by the OSH Act. In the remaining states, state and local government employers are not covered by OSHA standards or enforcement. State plans may incorporate OSHA standards by reference, or states may adopt their own standards that are at least as effective as OSHA’s standards. State plans do not have jurisdiction over federal agencies and generally do not cover maritime workers and private-sector workers at military bases or other federal facilities.

Promulgation of OSHA Standards

OSHA may promulgate occupational safety and health standards on its own initiative or in response to petitions submitted to the agency by various government agencies, the public, or employer and employee groups. OSHA is not required, however, to respond to a petition for a

1 29 U.S.C. §655. The provisions of the Occupational Safety and Health Act of 1970 (OSH Act) are extended to the legislative branch as an employer by the Congressional Accountability Act (P.L. 104-1).
4 For additional information on Occupational Safety and Health Administration (OSHA) state plans, see CRS Report R43969, OSHA State Plans: In Brief, with Examples from California and Arizona.
5 Information on specific state plans is available from the OSHA website at https://www.osha.gov/stateplans.
6 Per Section 6(b)(1) of the OSH Act [29 §655(b)(1)], a petition may be submitted by “an interested person, a representative of any organization of employers or employees, a nationally recognized standards-producing
standard or to promulgate a standard in response to a petition. OSHA may also consult with one of the two statutory standing advisory committees—the National Advisory Committee on Occupational Safety and Health (NACOSH) or the Advisory Committee on Construction Safety and Health (ACCSH)—or an ad-hoc advisory committee for assistance in developing a standard.7

**Notice and Comment**

OSHA’s rulemaking process for the promulgation of standards is largely governed by the provisions of the Administrative Procedure Act (APA) and Section 6(b) of the OSH Act.8 Under the APA informal rulemaking process, federal agencies, including OSHA, are required to provide notice of proposed rules through the publication of a Notice of Proposed Rulemaking in the Federal Register and provide the public a period of time to provide comments on the proposed rules.

Section 7(b) of the OSH Act mirrors the APA in that it requires notice and comment in the rulemaking process.9 After publishing a proposed standard, the public must be given a period of at least 30 days to provide comments. In addition, any person may submit written objections to the proposed standard and may request a public hearing on the standard.

**Statement of Reasons**

Section 6(e) of the OSH Act requires OSHA to publish in the Federal Register a statement of the reasons the agency is taking action whenever it promulgates a standard, conducts other rulemaking, or takes certain additional actions, including issuing an order, compromising on a penalty amount, or settling an issued penalty.10

**Other Relevant Laws and Executive Order 12866**

In addition to the APA and OSH Act, other federal laws that generally apply to OSHA rulemaking include the Paperwork Reduction Act,11 Regulatory Flexibility Act,12 Congressional Review Act,13 Information Quality Act,14 and Small Business Regulatory Enforcement Fairness Act (SBREFA).15 Also, Executive Order 12866, issued by President Clinton in 1993, requires organization, the Secretary of Health and Human Services (HHS), the National Institute for Occupational Safety and Health, or a state or political subdivision.16

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7 The National Advisory Committee on Occupational Safety and Health (NACOSH) was established by Section 7(a) of the OSH Act [29 U.S.C. §656(a)]. The Advisory Committee on Construction Safety and Health (ACCSH) was established by Section 107 of the Contract Work Hours and Safety Act (P.L. 87-581). Section 7(b) of the OSH Act provides OSHA the authority to establish additional advisory committees.


10 29 U.S.C. §655(e).


agencies to submit certain regulatory actions to the Office of Management and Budget (OMB) and Office of Information and Regulatory Affairs (OIRA) for review before promulgation.16

OSHA Rulemaking Time Line

OSHA rulemaking for new standards historically has been a relatively time-consuming process. In 2012, at the request of Congress, the Government Accountability Office (GAO) reviewed 59 significant OSHA standards promulgated between 1981 (after the enactments of the Paperwork Reduction Act and Regulatory Flexibility Act) and 2010.17 For these standards, OSHA’s average time between beginning formal consideration of the standard—either through publishing a Request for Information or Advance Notice of Proposed Rulemaking in the Federal Register or placing the rulemaking on its semiannual regulatory agenda—and promulgation of the standard was 93 months (7 years, 9 months). Once the Notice of Proposed Rulemaking was published for these 59 standards, the average time until promulgation of the standard was 39 months (3 years, 3 months).

In 2012, OSHA’s Directorate of Standards and Guidance published a flowchart of the OSHA rulemaking process on the agency’s website.18 This flowchart includes estimated duration ranges for a variety of rulemaking actions, beginning with pre-rule activities—such as developing the idea for the standard and meeting with stakeholders—and ending with promulgation of the standard. The flowchart also includes an estimated duration range for post-promulgation activities, such as judicial review. The estimated time from the start of preliminary rulemaking to the promulgation of a standard ranges from 52 months (4 years, 4 months) to 138 months (11 years, 6 months). After a Notice of Proposed Rulemaking is published in the Federal Register, the estimated length of time until the standard is promulgated ranges from 26 months (2 years, 2 months) to 63 months (5 years, 3 months). Table 1 provides OSHA’s estimated time lines for six major pre-rulemaking and rulemaking activities leading to the promulgation of a standard.

Table 1. OSHA Rulemaking Process: Estimated Durations of Activities

<table>
<thead>
<tr>
<th>Stage</th>
<th>Activities</th>
<th>Estimated Duration</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Preliminary rulemaking activities</td>
<td>12-36 months</td>
</tr>
<tr>
<td>2</td>
<td>Developing the proposed rule</td>
<td>12-36 months</td>
</tr>
<tr>
<td>3</td>
<td>Publishing the Notice of Proposed Rulemaking (NPRM)</td>
<td>2-3 months</td>
</tr>
<tr>
<td>4</td>
<td>Developing and analyzing the rulemaking record, including public comments and hearings</td>
<td>6-24 months</td>
</tr>
<tr>
<td>5</td>
<td>Developing the final rule, including Office of Information and Regulatory Affairs (OIRA) submission</td>
<td>18-36 months</td>
</tr>
<tr>
<td>6</td>
<td>Publishing the final rule (promulgating the new standard)</td>
<td>2-3 months</td>
</tr>
<tr>
<td></td>
<td>Total estimated duration</td>
<td>52-138 months</td>
</tr>
<tr>
<td></td>
<td>Estimated duration from NPRM to final rule</td>
<td>26-63 months</td>
</tr>
</tbody>
</table>


17 GAO-12-330, Workplace Safety and Health.
Judicial Review

Both the APA and the OSH Act provide for judicial review of OSHA standards. Section 7(f) of the OSH Act provides that any person who is "adversely affected" by a standard may file, within 60 days of its promulgation, a petition challenging the standard with the U.S. Court of Appeals for the circuit in which the person lives or maintains his or her principal place of business. A petition for judicial review does not automatically stay the implementation or enforcement of the standard. However, the court may order such a stay. OSHA estimates that post-promulgation activities, including judicial review, can take between 4 and 12 months after the standard is promulgated.

Emergency Temporary Standards

Section 6(c) of the OSH Act provides the authority for OSHA to issue an Emergency Temporary Standard (ETS) without having to go through the normal rulemaking process. OSHA may promulgate an ETS without supplying any notice or opportunity for public comment or public hearings. An ETS is immediately effective upon publication in the Federal Register. Upon promulgation of an ETS, OSHA is required to begin the full rulemaking process for a permanent standard with the ETS serving as the proposed standard for this rulemaking. An ETS is valid until superseded by a permanent standard, which OSHA must promulgate within six months of publishing the ETS in the Federal Register. An ETS must include a statement of reasons for the action in the same manner as required for a permanent standard. State plans are required to adopt or adhere to an ETS, although the OSH Act is not clear on how quickly a state plan must come into compliance with an ETS.

ETS Requirements

Section 6(c)(1) of the OSH Act requires that both of the following determinations be made in order for OSHA to promulgate an ETS:

- that employees are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards, and
- that such emergency standard is necessary to protect employees from such danger.

Grave Danger Determination

The term grave danger, used in the first mandatory determination for an ETS, is not defined in statute or regulation. The legislative history demonstrates the intent of Congress that the ETS process "not be utilized to circumvent the regular standard-setting process," but the history is unclear as to how Congress intended the term grave danger to be defined.
In addition, although the federal courts have ruled on challenges to previous ETS promulgations, the courts have provided no clear guidance as to what constitutes a grave danger. In 1984, the U.S. Court of Appeals for the Fifth Circuit in Asbestos Info. Ass’n v. OSHA issued a stay and invalidated OSHA’s November 1983 ETS lowering the permissible exposure limit for asbestos in the workplace.\textsuperscript{23} In its decision, the court stated that “gravity of danger is a policy decision committed to OSHA, not to the courts.”\textsuperscript{24} The court, however, ultimately rejected the ETS, in part on the grounds that OSHA did not provide sufficient support for its claim that 80 workers would ultimately die because of exposures to asbestos during the six-month life of the ETS.

Necessity Determination

In addition to addressing a grave danger to employees, an ETS must also be necessary to protect employees from that danger. In Asbestos Info. Ass’n, the court invalidated the asbestos ETS for the additional reason that OSHA had not demonstrated the necessity of the ETS. The court cited, among other factors, the duplication between the respirator requirements of the ETS and OSHA’s existing standards requiring respirator use. The court dismissed OSHA’s argument that the ETS was necessary because the agency felt that the existing respiratory standards were “unenforceable absent actual monitoring to show that ambient asbestos particles are so far above the permissible limit that respirators are necessary to bring employees’ exposure within the PEL of 2.0 f/cc.”\textsuperscript{25} The court determined that “fear of a successful judicial challenge to enforcement of OSHA’s permanent standard regarding respirator use hardly justifies resort to the most dramatic weapon in OSHA’s enforcement arsenal.”\textsuperscript{26}

Although OSHA has not promulgated an ETS since the 1983 asbestos standard, it has since determined the necessity of an ETS. In 2006, the agency considered a petition from the United Food and Commercial Workers (UFCW) and International Brotherhood of Teamsters (IBT) for an ETS on diacetyl. The UFCW and IBT petitioned OSHA for the ETS after the National Institute for Occupational Safety and Health (NIOSH) and other researchers found that airborne exposure to diacetyl, then commonly used as an artificial butter flavoring in microwave popcorn and a flavoring in other food and beverage products, was linked to the lung disease bronchiolitis obliterans, now commonly referred to as “popcorn lung.”\textsuperscript{27} According to GAO’s 2012 report on OSHA’s standard-setting processes, OSHA informed GAO that although the agency may have been able to issue an ETS based on the grave danger posed by diacetyl, the actions taken by the food and beverage industries, including reducing or removing diacetyl from products, made it less likely that the necessity requirement could be met.\textsuperscript{28}

ETS Duration

Section 6(c)(2) of the OSHAct provides that an ETS is effective until superseded by a permanent standard promulgated pursuant to the normal rulemaking provisions of the OSH Act. Section 6(c)(3) of the OSHAct requires OSHA to promulgate a permanent standard within six months of

\textsuperscript{23} 727 F.2d at 415, 425-427 (5th Cir. 1984).
\textsuperscript{24} 727 F.2d at 427 (5th Cir. 1984).
\textsuperscript{25} 727 F.2d at 427 (5th Cir. 1984). The ETS mandated a permissible exposure limit (PEL) for asbestos of two asbestos fibers per cubic centimeter of air (2.0 f/cc).
\textsuperscript{26} 727 F.2d at 427 (5th Cir. 1984).
\textsuperscript{27} See, for example, Centers for Disease Control and Prevention (CDC): National Institute for Occupational Safety and Health (NIOSH), NIOSH Alert: Preventing Lung Disease in Workers who Use or Make Flavorings, DHHS (NIOSH) publication no. 2004–110, December 2003, at https://www.cdc.gov/niosh/docs/2004-110/.
\textsuperscript{28} GAO-12-330, Workplace Safety and Health.
promulgating the ETS. As shown earlier in this report, six months is well outside of historical and currently expected time frames for developing and promulgating a standard under the notice and comment provisions of the APA and OSH Act, as well as under other relevant federal laws and executive orders. This dichotomy between the statutory mandate to promulgate a standard and the time lines that, based on historical precedent, other provisions in the OSH Act might realistically require for such promulgation raises the question of whether or not OSHA could extend an ETS’s duration without going through the normal rulemaking process. The statute and legislative history do not clearly address this question.

OSHA has used its ETS authority sparingly in its history and not since the asbestos ETS promulgated in 1983. As shown in Table A-1 in the Appendix, of the nine times OSHA has issued an ETS, the courts have fully vacated or stayed the ETS in four cases and partially vacated the ETS in one case.29 Of the five cases that were not challenged or that were fully or partially upheld by the courts, OSHA issued a permanent standard either within the six months required by the statute or within several months of the six-month period and always within one year of the promulgation of the ETS.30 Each of these cases, however, occurred before 1980, when a combination of additional federal laws and court decisions added additional procedural requirements to the OSHA rulemaking process. OSHA did not attempt to extend the ETS’s expiration date in any of these cases.

Although the courts have not ruled directly on an attempt by OSHA to solely extend the life of an ETS, in 1974, the U.S. Court Appeals for the Fifth Circuit held in Florida Peach Growers Ass’n v. United States Department of Labor that OSHA was within its authority to amend an ETS without going through the normal rulemaking process.31 The court stated that “it is inconceivable that Congress, having granted the Secretary the authority to react quickly in fast-breaking emergency situations, intended to limit his ability to react to developments subsequent to his initial response.”32 The court also recognized the difficulty OSHA may have in promulgating a standard within six months due to the notice and comment requirements of the OSH Act, stating that in the case of OSHA seeking to amend an ETS to expand its focus, “adherence to subsection (b) procedures would not be in the best interest of employees, whom the Act is designed to protect. Such lengthy procedures could all too easily consume all of the temporary standard’s six months life.”33

30 For example, OSHA promulgated the Acrylonitrile (vinyl cyanide) ETS on January 17, 1978, and the permanent standard on October 3, 1978, with an effective date of November 2, 1978. The preamble to the permanent standard published in the Federal Register does not include information on the status of the ETS during the time between its expiration and the promulgation of the permanent standard. OSHA, “Occupational Exposure to Acrylonitrile (Vinyl Cyanide),” 43 Federal Register 45762, October 3, 1978.
31 489 F.2d. 120 (5th Cir. 1974).
32 489 F.2d. at 127 (5th Cir. 1974).
33 489 F.2d. at 127 (5th Cir. 1974).
OSHA Standards Related to COVID-19

Current OSHA Standards

Currently, no OSHA standard directly covers exposure to airborne or aerosol diseases in the workplace. As a result, OSHA is limited in its ability to enforce protections for healthcare and other workers who may be exposed to SARS-CoV-2, the virus that causes COVID-19.34

OSHA may enforce the General Duty Clause in the absence of a standard, if it can be determined that an employer has failed to provide a worksite free of “recognized hazards” that are “causing or are likely to cause death or serious physical harm” to workers.35 In addition, OSHA’s standards for the use of personal protective equipment (PPE) may apply in cases in which workers require eye, face, hand, or respiratory protection against COVID-19 exposure.36

As of October 1, 2020, OSHA has issued citations related to COVID-19 to employers at 62 work sites resulting in a total of $913,133 in proposed civil penalties.37 The majority of these citations were issued to healthcare, nursing, and long-term care providers, including two Department of Veterans Affairs facilities—a hospital in Indianapolis, Indiana, and a community living center in Queens, New York.38 Two employers in the meat processing industry—Smithfield Packaged Foods, Inc. in Sioux Falls, South Dakota and JBS Foods, Inc. in Greeley, Colorado—were also cited.39 In the two meat processing cases, citations were issued for General Duty Clause violations. Other citations were issued for violations of OSHA’s respiratory protection, injury and illness reporting, and recordkeeping standards.

The highest amount of proposed penalties issued to a single employer for COVID-19-related violations was $28,070 to the Harborage nursing home operated by Hackensack Meridian Healthcare in New Jersey for four serious and one other than serious violations of the respiratory protection standard.40 For two of the serious violations, OSHA issued the maximum allowable penalty of $13,494.41 For the other two serious violations, OSHA issued citations but no monetary penalties. For the other than serious violation, OSHA issued a penalty of $1,082. The two meat processing employers were each assessed maximum penalties of $13,494 for serious violations of the General Duty Clause.

In a letter to OSHA, Senators Elizabeth Warren and Cory A. Booker raised concerns over the amount of penalties issued to these employers.42 The Senators asked OSHA why these employers

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34 OSHA has a standard on blood-borne pathogens (29 C.F.R. §1910.1030) but does not have a standard on pathogens transmitted by airborne droplets.
39 OSHA has the authority to issue citations to Executive Branch agencies, but does not have the authority to issue civil monetary penalties to these agencies.
40 Detailed information on the citations issued to this employer is available at https://www.osha.gov/pls/imis/establishment_inspection_detail?id=1476465.015.
41 OSHA citations are classified as “serious,” “other than serious,” “willful,” or “repeated.” The maximum amounts of OSHA penalties are subject to annual inflationary adjustments.
42 Letter from Senators Elizabeth Warren and Cory A. Booker to Loren Swett, Principal Deputy Assistant Secretary of
were each cited for single serious violations of the General Duty Clause rather than multiple
violations for each area of the facilities in which social distancing measures were not
implemented. They also asked why OSHA did not issue penalties for willful or repeated
violations that carry maximum penalties of $134,937 per violation. None of the employers cited
for COVID-19-related violations were issued penalties for willful or repeated violations.

**OSHA Respiratory Protection Standard**

**National Institute for Occupational Safety and Health Certification**

The OSHA respiratory protection standard requires the use of respirators certified by NIOSH in
cases in which engineering controls, such as ventilation or enclosure of hazards, are insufficient
to protect workers from breathing contaminated air. Surgical masks, procedure masks, and dust
masks are not considered respirators. NIOSH certifies respirators pursuant to federal
regulations. For nonpowered respirators, such as filtering face piece respirators commonly used
in healthcare and construction, NIOSH classifies respirators based on their efficiency at filtering
airborne particles and their ability to protect against oil particles. Under the NIOSH classification
system, the letter (N, R, or P) indicates the level of oil protection as follows: N—no oil
protection; R—oil resistant; and P—oil proof. The number following the letter indicates the
efficiency rating of the respirator as follows: 95—filters 95% of airborne particles; 97—filters
97% of airborne particles; and 100—filters 99.7% of airborne particles. Thus an N95 respirator,
the most common type, is one that does not protect against oil particles and filters out 95% of
airborne particles. An R or P respirator can be used in place of an N respirator.

A respirator that is past its manufacturer-designated shelf life is no longer considered to be
certified by NIOSH. However, in response to potential shortages in respirators, NIOSH has tested
and approved certain models of respirators for certified use beyond their manufacturer-designated
shelf lives. Respirators designed for certain medical and surgical uses are subject to both certification by
NIOSH (for oil protection and efficiency) and regulation by the Food and Drug Administration
(FDA) as medical devices. In general, respirators with exhalation valves cannot be used in
surgical and certain medical settings because, although the presence of an exhalation valve does
not affect the respirator’s protection afforded the user, it may allow unfiltered air from the user
into a sterile field. On March 2, 2020, FDA issued an Emergency Use Authorization (EUA) to
approve for use in medical settings certain NIOSH-certified respirators not previously regulated
by FDA.

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Labor, Occupational Safety and Health Administration, September 22, 2020, https://www.warren.senate.gov/imo/

43 29 C.F.R. §1910.134.
44 42 C.F.R. Part 84.
45 NIOSH, Release of Stockpiled Filtering Facepiece Respirators Beyond the Manufacturer-Designated ShelfLife:
release-stockpiled-N95.html.
46 Letter from RADM Denise M. Hinton, chief scientist, Food and Drug Administration (FDA), to Robert R. Redfield,
Director, CDC, March 2, 2020, at https://www.fda.gov/media/135763/download. The list of respirators approved under
this Emergency Use Authorization (EUA) is in Appendix B to this letter, updated at https://www.fda.gov/media/
135921/download.
**CDC Interim Guidance on Respiratory Protection**

On March 10, 2020, the Centers for Disease Control and Prevention (CDC) updated its interim guidance for the protection of healthcare workers against exposure to COVID-19 to permit healthcare workers caring for known or suspected COVID-19 cases to use “facemasks” when respirators are not available or are in limited supply.\(^\text{47}\) This differs from the CDC’s 2007 guidelines for control of infectious agents in healthcare settings, which required the use of respirators for treatment of known or suspected cases.\(^\text{48}\) CDC states that respirators should be prioritized for use in medical procedures likely to generate respiratory aerosols. Before this interim guidance was released, Representative Bobby Scott, Chairman of the House Committee on Education and Labor, and Representative Alma Adams, Chair of the Subcommittee on Workforce Protections, sent a letter to Secretary of Health and Human Services (HHS) Alex M. Azar II expressing their opposition to this change in the interim standard.\(^\text{49}\)

**Medical Evaluation and Fit Testing**

The OSHA respiratory protection standard requires that the employer provide a medical evaluation to the employee to determine if the employee is physiologically able to use a respirator. This medical evaluation must be completed before any fit testing. For respirators designed to fit tightly against the face, the specific type and model of respirator that an employee is to use must be fit tested in accordance with the procedures provided in Appendix A of the OSHA respiratory protection standard to ensure there is a complete seal around the respirator when worn.\(^\text{50}\) Once an employee has been fit tested for a respirator, he or she is required to be fit tested annually or whenever the model of respirator, but not the actual respirator itself, is changed. Each time an individual uses a respirator, he or she is required to perform a check of the seal of the respirator to his or her face in accordance with the procedures provided in Appendix B of the standard.\(^\text{51}\) On March 14, 2020, OSHA issued guidance permitting employers to suspend annual fit testing of respirators for employees that have already been fit tested on the same model respirator.

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\(^{47}\) Although the interim guidance does not specifically define the term *facemask*, it does differentiate between a facemask and a respirator such that any recommendation to use a facemask does not require the use of a respirator. CDC, *Interim Infection Prevention and Control Recommendations for Patients with Suspected or Confirmed Coronavirus Disease 2019 (COVID-19) in Healthcare Settings*, updated March 10, 2020, at https://www.cdc.gov/coronavirus/2019-ncov/infection-control/control-recommendations.html.


\(^{50}\) 29 C.F.R. §1910.134 Appendix A. Powered air purifying respirators (PAPR) that do not require a seal to the user’s face do not need to be fit tested.

\(^{51}\) 29 C.F.R. §1910.134 Appendix B.
Temporary OSHA Enforcement Guidance on the Respiratory Protection Standard

In response to shortages of respirators and other PPE during the national response to the COVID-19 pandemic, OSHA has issued three sets of temporary enforcement guidance to permit the following exceptions to the respiratory protection standard:

1. Employers may suspend annual fit testing of respirators for employees that have already been fit tested on the same model respirator;\(^{52}\)
2. Employers may permit the use of expired respirators and the extended use or reuse of respirators, provided the respirator maintains its structural integrity and is not damaged, soiled, or contaminated (e.g., with blood, oil, or paint);\(^{53}\) and
3. Employers may permit the use of respirators not certified by NIOSH, but approved under standards used by the following countries or jurisdictions, in accordance with the protection equivalency tables provided in Appendices A and B of the enforcement guidance document:
   - Australia,
   - Brazil,
   - European Union,
   - Japan,
   - Mexico,
   - People’s Republic of China, and
   - Republic of Korea.\(^{54}\)

California: Cal/OSHA Aerosol Transmissible Disease Standard

Although no OSHA standard specifically covers aerosol or airborne disease transmission, the California Division of Occupational Safety and Health (Cal/OSHA), under its state plan, promulgated its aerosol transmissible disease (ATD) standard in 2009.\(^{55}\) The ATD standard covers most healthcare workers, laboratory workers, as well as workers in correctional facilities, homeless shelters, and drug treatment programs. Under the ATD standard, SARS-CoV-2, the virus that causes COVID-19, is classified as a disease or pathogen requiring airborne isolation. This classification subjects the virus to stricter control standards than diseases requiring only


\(^{55}\) Cal. Code Regs. tit. 8, §5199. The California state plan covers all state and local government agencies and all private-sector workers in the state, with the exception of maritime workers; workers on military bases and in national parks, monuments, memorials, and recreation areas; workers on federally recognized Native American reservations and trust lands; and U.S. Postal Service contractors.
OSHA: ETS and COVID-19

droplet precautions, such as seasonal influenza. The key requirements of the ATD standard include

• written ATD exposure control plan and procedures,
• training of all employees on COVID-19 exposure, use of PPE, and procedures if exposed to COVID-19,
• engineering and work practice controls to control COVID-19 exposure, including the use of airborne isolation rooms,
• provision of medical services to employees, including removal of exposed employees,
• specific requirements for laboratory workers, and
• PPE requirements.

Cal/OSHA Aerosol Transmissible Disease PPE Requirements

The Cal/OSHA ATD standard requires that employers provide employees PPE, including gloves, gowns or coveralls, eye protection, and respirators certified by NIOSH at least at the N95 level whenever workers

• enter or work in an airborne isolation room or area with a case or suspected case;
• are present during procedures or services on a case or suspected case;
• repair, replace, or maintain air systems or equipment that may contain pathogens;
• decontaminate an area that is or was occupied by a case or suspected case;
• are present during aerosol generating procedures on cadavers of cases or suspected cases;
• transport a case or suspected case within a facility or within a vehicle when the patient is not masked; and
• are working with a viable virus in the laboratory.

In addition, a powered air purifying respirator (PAPR) with a high-efficiency particulate air (HEPA) filter must be used whenever a worker performs a high-hazard procedure on a known or suspected COVID-19 case. High-hazard procedures are those in which “the potential for being exposed to aerosol transmissible pathogens is increased due to the reasonably anticipated generation of aerosolized pathogens”—they include intubation, airway suction, and caring for patients on positive pressure ventilation. Emergency medical services (EMS) workers may use N100, R100, or P100 respirators in place of PAPRs.

56 Cal. Code Regs. tit. 8, §5199 Appendix A.
58 A PAPR uses a mechanical device to draw in room air and filter it before expelling that air over the user’s face. In general, PAPRs do not require a tight seal to the user’s face and do not need to be fit tested.
59 Cal. Code Regs. tit. 8, §5199(b).
Cal/OSHA Interim Guidance on COVID-19

Cal/OSHA has issued interim guidance in response to shortages of respirators in the state due to the COVID-19 pandemic response.60 Under this interim guidance, if the supply of N95 respirators or PAPRs are insufficient to meet current or anticipated needs, surgical masks may be used for low-hazard patient contacts that would otherwise require the use of respirators, and respirators may be used for high-hazard procedures that would otherwise require the use of PAPRs.

Virginia: VOSH COVID-19 ETS

On July 15, 2020, the Virginia Safety and Health Codes Board adopted an ETS to specifically protect employees from exposure to SARS-CoV-2, the virus that causes COVID-19.61 This ETS, promulgated under Virginia’s state occupational safety and health plan (VOSH) is the first state standard to specifically address COVID-19 in the workplace.62 As an ETS, the VOSH standard expires within six months of its effective date, upon expiration of the Governor’s State of Emergency, when superseded by a permanent standard, or when repealed by the Virginia Safety and Health Codes Board, whichever comes first. The ETS can be extended only through the normal state rulemaking process.

Unlike the Cal/OSHA ATD standard, the VOSH ETS applies to all state and local government agencies and all covered private-sector employees in the state. As part of a state plan, the VOSH ETS applies to state and local government entities, such as public schools, as employers. All covered employers in Virginia must comply with the following ETS requirements:

• exposure assessment and determination, notification of suspected cases and contacts with those cases, and employee access to their own exposure and medical records;
• return to work of employees known or suspected to have COVID-19 based on a duration of time since last symptoms or negative COVID-19 tests;63
• maintenance of physical distancing between employees while working and on paid breaks at the worksite, including restricted access to the worksite and common areas and break rooms;
• compliance with applicable existing PPE and respiratory protection standards when physical distancing between employees is not possible; and
• sanitation and disinfection requirements.

For all employers, if engineering, administrative, or work practice controls are not feasible or do not provide sufficient protection from SARS-CoV-2 transmission, then PPE, including respiratory PPE—such as respirators, if necessary—must be provided to employees.

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62 The Virginia state plan covers all state and local government agencies and all private-sector workers in the state, with the exception of maritime workers, U.S. Postal Service contractors, workers at military bases or other federal enclaves in which the federal government has civil jurisdiction, workers at the U.S. Department of Energy’s Southeastern Power Administration Kerr-Philpott System, and aircraft cabin crew members.
63 A COVID-19 test for the purposes of determining if an employee can return to work must be paid for by the employer or offered such that the employee bears no cost for the test.
Hazard and Job Task Classification

The VOSH ETS requires that each employer assess its workplace for hazards and job tasks that potentially expose employees to the SARS-CoV-2 virus. Employers must classify each job task as having a “very high,” “high,” “medium,” or “lower” risk level of exposure, according to the hazards to which employees are potentially exposed. The VOSH ETS provides the following examples of activities for the “very high” and “high” risk levels:

- “very high” risk activities include
  - using aerosol-generating procedures, such as intubation, on patients known or suspected to be infected with SARS-CoV-2;
  - collecting or handling specimens from patients known or suspected to be infected with SARS-CoV-2; and
  - performing an autopsy involving aerosol-generating procedures on the body of a person known or suspected to be infected with the SARS-CoV-2 virus at the time of death; and

- “high risk” activities include
  - health care services, including inpatient care, outpatient care, skilled nursing care, and nonmedical support services such as room cleaning, provided to patients known or suspected to be infected with SARS-CoV-2;
  - first responder and medical transport services to patients known or suspected to be infected with SARS-CoV-2; and
  - mortuary services to persons known or suspected to be infected with the SARS-CoV-2 virus at the time of death.

“Medium” risk activities are those that require employees to have more than minimal contact, within six feet of other employees, customers, or members of the public who are not known or suspected to be infected with SARS-CoV-2.64 “Lower” risk activities are those that do not require contact with other persons within six feet or that are able to utilize the following types of engineering, administrative, or work practice controls to minimize contact between persons:

- installation of floor to ceiling barriers, such as barriers between cashiers and customers;
- telecommuting;
- staggered work shifts to reduce the number of workers at a site;
- delivering services remotely, including curbside pickup of retail purchases; and
- mandatory physical distancing of persons.

The use of face coverings other than respirators or medical or surgical masks, including cloth face coverings now required by several states, is not an acceptable method of minimizing physical contact between persons. However, the VOSH ETS requires the use of face coverings for brief contacts between persons within six feet of each other.

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64 Examples of “medium” risk work activities are provided in the VOSH ETS at 16 Va. Admin. Code §25-220-30.
Engineering, Administrative, Work Practice, and PPE Requirements for “Very High,” “High,” and “Medium” Risk Activities

Employers with job tasks or activities in the “very high,” “high,” or “medium” risk classifications must adhere to specific engineering, administrative, work practice, and PPE requirements. For “very high” and “high” risk activities, engineering controls include the use of airborne infection isolation rooms (AIIR) for known or suspected COVID-19 patients and aerosol-generating procedures and Biosafety Level 3 (BSL-3) precautions for the handling of specimens from known or suspected COVID-19 patients.65

Employers with “very high” and “high” risk activities must implement administrative and work practice controls, including the prescreening of all employees to ensure that employees do not have signs or symptoms of COVID-19; enhanced medical screening of employees during COVID-19 outbreaks; and the use of flexible work arrangements, such as telecommuting, when feasible. In addition, all employers with “very high” or “high” risk activities must provide, to the extent feasible, psychological and behavioral support to address employee stress at no cost to the employee.

The standard also provides for engineering, administrative, and work practice controls for “medium” risk activities.66

PPE Requirements for “Very High” and “High” Risk Activities

Employers with “very high” and “high” risk activities, who are not already covered by the general OSHA PPE standards, are required to comply with the VOSHETS requirements for PPE. An employer subject to these requirements must assess the workplace to determine if there are any COVID-19 hazards present or likely to be present that would require the use of PPE by employees. The employer must provide for the participation of employees and employee representatives in this assessment process and verify that this assessment has been conducted through a written certification.

If hazards that require PPE are identified, the employer must select and provide the appropriate PPE to each employee and ensure that PPE fits properly. If respiratory PPE, such as respirators or PAPR are used as PPE, the existing OSHA standards for respiratory PPE, which include medical evaluation of employees and fit testing, must be followed.

Unless contraindicated by the hazard and PPE assessment, when any employee is in contact within six feet of any person known or suspected to be infected with SARS-CoV-2, that employee must be provided with the following types of PPE:

- gloves,
- gown large enough to cover areas needing protection,
- face shield or goggles, and
- respirator.


While there are no specific PPE requirements for “medium” risk activities, PPE may be required based on an assessment of the hazards of these activities.

**Infectious Disease Preparedness and Response Plan and Training**

**Infectious Disease Preparedness and Response Plan**

All employers with “very high” and “high” risk activities, and employers with 11 or more employees and “medium” risk activities, must develop written infectious disease preparedness and response plans. These plans must be developed with input from employees. The deadline for the development of these plans is 60 days from the effective date of the ETS.

The infectious disease preparedness plan must include a consideration of the COVID-19 risks in the workplace, and to the extent possible and in compliance with medical privacy laws, the specific risks faced by employees with certain preexisting medical conditions. The plan must include contingency plans for continued operations during a COVID-19 outbreak and provide for the prompt identification and isolation of employees with known or suspected COVID-19 and a procedure for employees to notify the employer of COVID-19 signs or symptoms. The plan must also address interactions between the employer’s worksite and other businesses, such as vendors and contractors to ensure employees of these businesses comply with the VOSH ETS and the employer’s infectious disease preparedness and response plan.

**Training**

All employers with “very high,” “high,” or “medium” risk activities must provide training to all employees, including those employees whose work does not involve any COVID-19 risks. This training must teach employees to recognize the hazards of the SARS-CoV-2 virus, signs and symptoms of COVID-19, and the procedures to minimize SARS-CoV-2 hazards. If the employer has an infectious disease preparedness and response plan, training must be provided on this plan. Written certification of training must be prepared, and retraining must be provided when necessary.

Employers with only “lower” risk activities are not required to prepare a formal training plan but must provide oral or written communication on the hazards of SARS-CoV-2, the signs and symptoms of COVID-19, and measures to minimize SARS-CoV-2 exposure. VOSH is required to develop an information sheet that employers can use to satisfy this training requirement.

Training must be provided within 30 days of the effective date of the standard, except for training on the infectious disease preparedness and response plan, which must be completed within 60 days.

**Whistleblower Protections**

The VOSH ETS prohibits any employer from discharging or otherwise discriminating against any employee who does the following:

- exercises his or her rights under the ETS or existing whistleblower protection provisions, including the limited right of an employee to refuse work because of a reasonable fear of injury or death or serious injury;67

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67 To exercise this right, the employee must, if possible, have sought unsuccessfully to have the employer remedy the hazard, and there must be insufficient time to attempt to remedy the hazard through normal regulatory enforcement.
• provides and wears his or her own PPE, provided the PPE does not create a greater hazard to the employee or create a serious hazard to other employees; or
• raises a reasonable concern about SARS-CoV-2 and COVID-19 infection control to the employer, the employer’s agent, other employees, the government, or the public through any type of media including social media.

**Michigan: MIOSHA COVID-19 Emergency Rules**

On October 14, 2020, the director of the Michigan Department of Labor and Economic Opportunity, which operates Michigan’s state occupational safety and health plan (MIOSHA), promulgated emergency rules to address workplace exposure to COVID-19. These rules, which apply to all employers in the state, went into immediate effect and will remain in effect for six months. In addition to rules that apply to all employers, the emergency rules include specific provisions that apply to the following industries:

- construction;
- manufacturing;
- retail, libraries, and museums;
- restaurants and bars;
- healthcare;
- in-home services such as house cleaning and repair;
- personal care services such as hair styling and tattooing;
- public accommodations such as sports and entertainment venues;
- sports and exercise facilities;
- meat and poultry processing; and
- casinos.

**Exposure Determination**

Rule 3 of the MIOSHA emergency rules requires all employers to evaluate all routine and anticipated job tasks and categorize these job tasks based on potential employee exposure to COVID-19 into one of the following four categories:

1. “Lower exposure risk” tasks are those that do not require contact with known or suspected COVID-19 cases or frequent close (within six feet) contact with the general public.
2. “Medium exposure risk” tasks are those that require frequent or close contact with persons who may be infected with COVID-19 but who are not known or suspected COVID-19 cases. In areas of the state without ongoing community channels. This right is provided in the OSHA standards at 29 C.F.R. §1977.12(b)(2) and in the VOSH standards at 16 Va. Admin. Code §25-60-110.


transmission of COVID-19, tasks that require frequent contact with persons travelling from areas with widespread COVID-19 transmission are included in this category. In areas with ongoing community transmission, tasks that involve contact with the general public are included in this category.

3. “High exposure risk” tasks are those with high potential for exposure to known or suspected COVID-19 cases. Licensed healthcare providers, medical first responders, nursing home workers, law enforcement and correctional officers, and mortuary workers are examples of types of workers that may perform tasks in this category.

4. “Very high exposure risk” tasks are those that involve the generation of aerosols during medical or mortuary procedures on known or suspected COVID-19 cases and the collection and handling of laboratory specimens from known or suspected COVID-19 cases.

Preparedness and Response Plan

Rule 4 of the MIOSHA emergency rules requires all employers to develop a written COVID-19 preparedness and response plan based on current CDC and OSHA guidance. This plan must detail measures the employer will take to protect employees from COVID-19 exposure and must be readily available to employees and their representatives.

Basic Infection Prevention Measures

Rule 5 of the MIOSHA emergency rules requires all employers to implement the following basic infection prevention measures:

- promote frequent hand-washing and provide hand-washing facilities or hand sanitizer to workers, customers, and visitors;
- require employees who are sick to not report to work or to report to an isolated location;
- prohibit workers from using other workers’ desks, phones, and other equipment when possible;
- increase facility cleaning, especially of high-touch surfaces and shared equipment;
- establish procedures, consistent with CDC guidance, for disinfection of the worksite if a worker, customer, or visitor has a known case of COVID-19;
- use Environmental Protection Agency (EPA) approved disinfectants that are expected to effective against SARS-CoV-2;
- follow all manufacturer’s guidelines for use of all cleaning and disinfectant products; and
- prohibit in-person work for employees whose work can be done remotely.

Health Surveillance

Rule 6 of the MIOSHA emergency rules requires all employers to implement a health surveillance system for the workplace. This system must include, at a minimum, a COVID-19 screening questionnaire for all employees and contractors entering the workplace. Employees must be directed to immediately report any signs or symptoms of COVID-19 to the employer and known and suspected COVID-19 cases must be isolated from the rest of the workforce. When an
employer learns of an employee, contractor, customer, or visitor to the worksite with a known case of COVID-19, the employer must immediately notify the local health department and, must notify, within 24 hours, any workers, contractors, or suppliers who may have come into contact with the infected person. When determining if an employee with a known or suspected case of COVID-19 may return to the workplace, the employer must follow CDC guidelines and health department quarantine and isolation orders.

Workplace Controls

Rule 7 of the MIOSHA emergency rules requires all employers to implement the following workplace controls:

- designate one or more worksite COVID-19 safety coordinators to implement, monitor, and report on COVID-19 control strategies developed by the employer and to remain on site at all times when employees are present;
- place posters in appropriate languages in the workplace that provide information on staying away from work while sick, cough and sneeze etiquette, and hand hygiene;
- keep all persons at least six feet from each other using signs, floor markings, and barriers appropriate for the worksite, to the extent possible;
- provide all employees with non-medical grade face coverings at no cost to the employees;
- require the use of face coverings when employees cannot maintain six feet of distance from other persons in the workplace, and consider the use of face shields when three feet of distance cannot be maintained;
- require face coverings in shared spaces, such as restrooms and hallways and during in-person meetings.

PPE

Rule 8 of the MIOSHA emergency rules requires that employers provide appropriate PPE, including respiratory protection, to employees based on the exposure risks of the job and current CDC and OSHA guidelines. All PPE must be properly fitted, inspected, maintained, cleaned, stored, and disposed of. In workplaces that provide medical treatment to known or suspected COVID-19 cases, employees with frequent or prolonged close contact with such patients must be provided with and wear, at a minimum, an N95 respirator, goggles or face shield, and gown.

Training Requirements

Rule 10 of the MIOSHA emergency rules requires all employers to provide training and communication, in languages common among the employees, on the following subjects:

- workplace infection-control practices;
- proper use of PPE;
- how to notify the employer of COVID-19 symptoms or diagnosis;
- how to report unsafe working conditions.

This training must be updated if the employer’s COVID-19 preparedness and response plan changes or new information on COVID-19 transmission becomes available.
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Recordkeeping Requirements

Rule 11 of the MIOSHA emergency rules requires that all employers maintain, for one year, records of employee training, the screening of persons entering the workplace, and any health surveillance notifications required by Rule 6.

OSHA Infectious Disease Standard Rulemaking

In 2010, OSHA published a Request for Information in the Federal Register seeking public comments on strategies to control exposure to infectious diseases in healthcare workplaces. After collecting public comments and holding public meetings, OSHA completed the SBREFA process in 2014. Since then, however, no public actions have occurred on this rulemaking; since spring 2017, this rulemaking has been listed as a “long-term action” in DOL’s semiannual regulatory agenda.

Congressional Activity to Require an OSHA Emergency Temporary Standard on COVID-19

On March 5, 2020, Representative Bobby Scott, chairman of the House Committee on Education and Labor, and Representative Alma Adams, chair of the Subcommittee on Workforce Protections, sent a letter to Secretary of Labor Eugene Scalia calling on OSHA to promulgate an ETS to address COVID-19 exposure among healthcare workers. This letter followed a January 2020 letter requesting that OSHA reopen its rulemaking on the infectious disease standard and begin to formulate for possible future promulgation an ETS to address COVID-19 exposure. Senator Patty Murray, ranking member of the Senate Committee on Health, Education, Labor, and Pensions and a group of Democratic Senators sent a similar letter to the Secretary of Labor calling for an OSHA ETS.

In addition, in March 2020, David Michaels, who served as the Assistant Secretary of Labor for Occupational Safety and Health during the Obama Administration, wrote an op-ed in The Atlantic calling on OSHA to promulgate a COVID-19 ETS. On March 6, 2020, the AFL-CIO and 22 other unions petitioned OSHA for an ETS on infectious diseases that would cover all workers with potential exposures. OSHA formally denied the AFL-CIO petition on May 29, 2020, claiming that an ETS is not necessary to protect employees from infectious diseases generally, or

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71 Letter from Representative Scott, chairman, House Committee on Education and Labor, and Representative Adams, chair, Subcommittee on Worker Protections, to The Honorable Eugene Scalia, Secretary of Labor, March 5, 2020, at https://edlabor.house.gov/imo/media/doc/2020-03-05%20OSHA%20ETS%20Letter.pdf.


from COVID-19. 76 National Nurses United submitted a similar petition requesting that OSHA promulgate an ETS based largely on the Cal/OSHA ATD standard. 77 On May 4, 2020, the Center for Food Safety and Food Chain Workers Alliance submitted a petition requesting that OSHA promulgate an ETS to protect meat and poultry processing workers from COVID-19 exposure in the workplace. 78 On May 18, 2020, the AFL-CIO petitioned the U.S. Court of Appeals for the D.C. Circuit for a writ of mandamus to compel OSHA to promulgate a COVID-19 ETS. 79 The circuit court denied this petition on June 11, 2020.

H.R. 6139, the COVID-19 Health Care Worker Protection Act of 2020

On March 9, 2020, Representative Bobby Scott introduced H.R. 6139, the COVID-19 Health Care Worker Protection Act of 2020. This bill would require OSHA to promulgate a COVID-19 ETS within one month of enactment. The ETS would be required to cover healthcare workers and any workers in sectors determined by the CDC or OSHA to be at an elevated risk of COVID-19 exposure. The ETS would be required to include an exposure control plan provision and be, at a minimum, based on CDC’s 2007 guidance and any updates to this guidance. The ETS would also be required to provide no less protection than any state standard on novel pathogens, thus requiring OSHA to include the elements of the Cal/OSHA ATD standard, the VOSH COVID-19 ETS, and the MIOSHA emergency rules in this ETS. Title II of the bill would provide that hospitals and skilled nursing facilities that receive Medicare funding and that are owned by state or local government units and not subject to state plans would be required to comply with the ETS. Similar provisions are included in S. 3475.

P.L. 116-127, the Families First Coronavirus Response Act

The provisions of H.R. 6139 were included as Division C of H.R. 6201, the Families First Coronavirus Response Act, as introduced in the House. The American Hospital Association (AHA) issued an alert to its members expressing its opposition to the OSHA ETS provisions in the bill. 80 Specifically, the AHA opposed the requirement that the ETS be based on the CDC’s 2007 guidance. The AHA stated that unlike severe acute respiratory syndrome (SARS), which was transmitted through the air, COVID-19 transmission is through droplets and surface contacts. Thus, the requirement of the 2007 CDC guidance that N95 respirators, rather than surgical masks, be used for patient contact is not necessary to protect healthcare workers from COVID-19, and the use of surgical masks is consistent with World Health Organization guidance. The AHA also

76 Letter from Loren Sweatt, Principal Deputy Assistant Secretary of Labor, to Richard L. Trumka, president, AFL-CIO, May 29, 2020.
79 In re: American Federation of Labor and Congress of Industrial Organizations, D.C. Cir., No. 19-1158, May 18, 2020. This petition was filed in the U.S. Court of Appeals as Section 6(f) of the OSH Act [29 U.S.C. §655(f)] grants this court exclusive jurisdiction to provide judicial review of OSHA standards.
claimed that shortages of available respirators could reduce the capacity of hospitals to treat COVID-19 patients, due to a lack of respirators for staff. The OSHA ETS provisions were not included in the version of the legislation that was passed by the House and the Senate and signed into law as P.L. 116-127.

**H.R. 6379, the Take Responsibility for Workers and Families Act**

Division D of H.R. 6379, the Take Responsibility for Workers and Families Act, as introduced in the House on March 23, 2020, includes the requirement that OSHA promulgate an ETS on COVID-19 within seven days of enactment and a permanent COVID-19 standard within 24 months of enactment to cover healthcare workers, firefighters and emergency response workers, and workers in other occupations that CDC or OSHA determines to have an elevated risk of COVID-19 exposure. Division D of H.R. 6379 would amend the OSH Act, for the purposes of the ETS only, such that state and local government employers in states without state plans would be covered by the ETS. The provisions of Division D of H.R. 6379 were also included in S. 3584, the COVID-19 Workers First Protection Act of 2020, as introduced in the Senate.

This legislation would specifically provide that the ETS would remain in force until the permanent standard is promulgated and would explicitly exempt the ETS from the Regulatory Flexibility Act, Paperwork Reduction Act, and Executive Order 12866. OSHA would be granted enforcement discretion in cases in which it is not feasible for an employer to fully comply with the ETS (such as a case in which PPE is unavailable) if the employer is exercising due diligence to comply and implementing alternative means to protect employees.

Like the provisions in H.R. 6139 and the version of H.R. 6201 introduced in the House, the ETS and permanent standard under H.R. 6379 would be required to include an exposure control plan and provide no less protection than any state standard on novel pathogens, thus requiring OSHA to include the elements of the Cal/OSHA ATD, the VOSH COVID-19 ETS, and the MIOSHA emergency rules in this ETS and permanent standard. Although the ETS provisions in H.R. 6139 and H.R. 6201 would require that the ETS be based on the 2007 CDC guidance, specific reference to the 2007 guidance is not included in this legislation. Rather, under H.R. 6379, the ETS and permanent standard would have to incorporate, as appropriate, “guidelines issued by the Centers for Disease Control and Prevention, and the National Institute for Occupational Safety and Health, which are designed to prevent the transmission of infectious agents in healthcare settings” and scientific research on novel pathogens.

States with occupational safety and health plans would be required to adopt the ETS, or their own ETS at least as effective as the ETS, within 14 days of the legislation’s enactment.

**H.R. 6559, the COVID-19 Every Worker Protection Act of 2020**

H.R. 6559, the COVID-19 Every Worker Protection Act of 2020, was introduced in the House by Representative Bobby Scott on April 21, 2020. This legislation includes the ETS and permanent standard provisions of Division D of H.R. 6379 and S. 3584 and would require that these standards cover healthcare workers, emergency medical responders, and “other employees at occupational risk” of COVID-19 exposure. This legislation also adds two provisions that would clarify the requirements for employers to record work-related COVID-19 infections and strengthen the protections against retaliation and discrimination offered to whistleblowers. Similar provisions are included in S. 3677 and were incorporated into H.R. 6800, the Heroes Act, as passed by the House.
COVID-19 Recordkeeping

Sections 8(c) and 24(a) of the OSH Act require employers to maintain records of occupational injuries and illnesses in accordance with OSHA regulations. OSHA’s reporting and recordkeeping regulations require that employers with 10 or more employees must keep records of work-related injuries and illnesses that result in lost work time for employees or that require medical care beyond first aid. Employers must also report to OSHA, within 8 hours, any workplace fatality, and within 24 hours, any injury or illness that results in in-patient hospitalization, amputation, or loss of an eye. Employers in certain industries determined by OSHA to have lower occupational safety and health hazards are listed in the regulations as being exempt from the recordkeeping requirements but not the requirement to report to OSHA serious injuries, illnesses, and deaths. Offices of physicians, dentists, other health practitioners, and outpatient medical clinics are included in the industries that are exempt from the recordkeeping requirements.

OSHA regulations require the employer to determine if an employee’s injury or illness is related to his or her work and thus subject to the recordkeeping requirements. The regulations provide a presumption that an injury or illness that occurs in the workplace is work-related and recordable, unless one of the exemptions provided in the regulations applies. One of the listed exemptions is “The illness is the common cold or flu (Note: contagious diseases such as tuberculosis, brucellosis, hepatitis A, or plague are considered work-related if the employee is infected at work).”

Because of the nature of COVID-19 transmission, which can occur in the community as well as the workplace, it can be difficult to determine the exact source of any person’s COVID-19 transmission. Absent any specific guidance, this may make it difficult for employers to determine if an employee’s COVID-19 is subject to the recordkeeping requirements.

Initial OSHA Recordkeeping Guidance

On April 10, 2020, OSHA issued enforcement guidance on how cases of COVID-19 should be treated under the recordkeeping requirements. This guidance stated that COVID-19 cases were recordable if they were work-related.

Under this guidance, employers in the following industry groups were to fully comply with the recordkeeping regulations, including the requirement to determine if COVID-19 cases were work-related:

- healthcare;
- emergency response, including firefighting, emergency medical services, and law enforcement; and
- correctional institutions.

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81 29 U.S.C. §§657(c) and 673(a).
82 OSHA’s reporting and recordkeeping regulations are at 29 C.F.R. Part 1904.
83 The list of exempted industries is at 29 C.F.R. Subpart B, Appendix A. States with state occupational safety and health plans may require employers in these exempted industries to comply with the recordkeeping requirements.
84 29 C.F.R. §1904.5.
85 29 C.F.R. §1905.5(a).
86 29 C.F.R. §1904.5(b)(2)(viii).
For all other employers, OSHA required employers to determine if COVID-19 cases were work-related and subject to the recordkeeping requirements only if both of the following two conditions were met:

1. There was objective evidence that a COVID-19 case may have been work-related. This could have included, for example, a number of cases developing among workers who worked closely together without an alternative explanation.

2. The evidence of work-relatedness was reasonably available to the employer. For purposes of this guidance, examples of reasonably available evidence included information given to the employer by employees, as well as information that an employer learned regarding its employees’ health and safety in the ordinary course of managing its business and employees.

**Updated OSHA Recordkeeping Guidance**

OSHA issued new guidance, effective May 26, 2020, on recordkeeping of COVID-19 cases. This new guidance rescinds the previous guidance issued by OSHA on April 10, 2020. Under this new guidance, all employers, regardless of type of industry or employment, are subject to the recordkeeping and recording regulations for work-related cases of COVID-19.

To determine if an employer has made a reasonable determination that a case of COVID-19 was work-related, OSHA says it will consider the following factors:

- the reasonableness of the employer’s investigation of the COVID-19 case and its transmission to the employee;
- the evidence that is available to the employer; and
- the evidence that COVID-19 was contracted at work.

The guidance provides examples of evidence that can be used to demonstrate that a COVID-19 case was or was not work-related such as if an employee had frequent close contact with members of the public in an area with ongoing community transmission of COVID-19.

**H.R. 6559**

H.R. 6559 would require that the ETS and permanent standard established pursuant to the legislation include the requirement for the recording and reporting of all COVID-19 cases in accordance with OSHA regulations in place at the time of enactment.

By referencing the regulations in place, this provision would serve to supersede OSHA’s guidance from April 10, 2020, and apply the requirement, currently provided in the guidance effective May 26, 2020, to determine the work-relatedness of COVID-19 cases to all employers covered by the recordkeeping regulations.

**Whistleblower Protections**

Section 11(c) of the OSHAct prohibits any person from retaliating or discriminating against any employee who exercises certain rights provided by the OSHAct. Commonly referred to as the

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whistleblower protection provision, this provision protects any employee who takes any of the following actions:

- files a complaint with OSHA related to a violation of the OSH Act;
- causes an OSHA proceeding, such as an investigation, to be instituted;
- testifies or is about to testify in any OSHA proceeding; and
- exercises on his or her own behalf, or on behalf of others, any other rights afforded by the OSH Act.\(^90\)

Other rights afforded by the OSH Act that are covered by the whistleblower protection provision include the right to inform the employer about unsafe work conditions; the right to access material safety data sheets or other information required to be made available by the employer; and the right to report a work-related injury, illness, or death to OSHA.\(^91\) In limited cases, the employee has the right to refuse to work if conditions reasonably present a risk of serious injury or death and there is not sufficient time to eliminate the danger through other means.\(^92\)

H.R. 6559 would require that the ETS and permanent standard promulgated pursuant to the legislation expand the protections for whistleblowers. The following additional activities taken by employees would grant them protection from retaliation and discrimination from employers and agents of employers:

- reporting to the employer; a local, state, or federal agency; or the media; or on a social media platform; the following:
  - a violation of the ETS or permanent standard promulgated pursuant to the legislation;
  - a violation of the infectious disease control plan required by the ETS or permanent standard; or
  - a good-faith concern about an infectious disease hazard in the workplace;
- seeking assistance from the employer or a local, state, or federal agency with such a report; and
- using personally supplied PPE with a higher level of protection than offered by the employer.

**H.R. 6800, The Heroes Act**

The provisions of H.R. 6559, including the provisions relating to recordkeeping and whistleblower protections, were included as Title III of Division L of H.R. 6800, The Heroes Act. H.R. 6800 was passed by the House on May 15, 2020. In a letter to Speaker of the House Nancy Pelosi, the AHA expressed its opposition to the ETS provisions in The Heroes Act citing the potential for confusion that new regulations could bring and the “ongoing global lack of supplies, equipment and testing capability” faced by hospitals.\(^93\) The AHA also stated that the provision

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\(^{90}\) 29 C.F.R. §1977.3. Public-sector employees, except employees of the United States Postal Service, are not protected by the whistleblower provision, but may be covered by whistleblower provisions in other federal and state statutes.

\(^{91}\) For additional information on other rights covered by the whistleblower protection provision, see OSHA, January 9, 2019, Investigator’s Desk Aid to the Occupational Safety and Health Act (OSH Act) Whistleblower Protection Provision, pp. 5-7, at https://www.osha.gov/sites/default/files/11cDeskAid.pdf.

\(^{92}\) 29 C.F.R. §1977.12(b)(2).

\(^{93}\) Letter from Thomas P. Nickels, executive vice president, American Hospital Association, to Hon. Nancy Pelosi,
that would require the ETS to be based on state standards "suggests that the federal government is surrendering its responsibility to appropriately regulate the nation to a state government agency without consideration of whether that state’s decisions are appropriate for implementation anywhere and everywhere."

**H.R. 925, The Heroes Act (Revised)**

The provisions of H.R. 6559 and H.R. 6800 were included in the House Amendment to the Senate Amendment to H.R. 925, the revised Heroes Act, passed by the House on October 1, 2020.

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## Appendix. OSHA Emergency Temporary Standards

### Table A-I. OSHA Emergency Temporary Standards (ETS)

<table>
<thead>
<tr>
<th>Year</th>
<th>Subject of ETS</th>
<th>Federal Register Citation of ETS</th>
<th>Result of Judicial Review</th>
<th>Judicial Review Case Citation</th>
</tr>
</thead>
<tbody>
<tr>
<td>1971</td>
<td>Asbestos</td>
<td>36 Federal Register 23207 (December 7, 1971)</td>
<td>Not challenged</td>
<td>—</td>
</tr>
<tr>
<td>1973</td>
<td>Organophosphorous pesticides</td>
<td>38 Federal Register 10715 (May 1, 1973); amended by 38 Federal Register 17214 (June 29, 1973)</td>
<td>Vacated</td>
<td>Florida Peach Growers Ass’n v. United States Department of Labor, 489 F.2d 120 (5th Cir. 1974)</td>
</tr>
<tr>
<td>1974</td>
<td>Vinyl chloride</td>
<td>39 Federal Register 12342 (April 5, 1974)</td>
<td>Not challenged</td>
<td>—</td>
</tr>
<tr>
<td>1976</td>
<td>Diving operations</td>
<td>41 Federal Register 24271 (June 15, 1976)</td>
<td>Stayed</td>
<td>Taylor Diving &amp; Salvage Co. v. Department of Labor, 537 F.2d 819 (5th Cir. 1976)</td>
</tr>
<tr>
<td>1977</td>
<td>1,2 Dibromo-3-chloropropane (DBCP)</td>
<td>42 Federal Register 45535 (September 9, 1977)</td>
<td>Not challenged</td>
<td>—</td>
</tr>
<tr>
<td>1978</td>
<td>Acrylonitrile (vinyl cyanide)</td>
<td>43 Federal Register 2585 (January 17, 1978)</td>
<td>Stayed denied</td>
<td>Vistran v. OSHA, 6 OSHC 1483 (6th Cir. 1978)</td>
</tr>
</tbody>
</table>


### Author Information

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Iowa Republican legislators are fast-tracking a bill that would give meatpacking plants, nursing homes and other businesses broad immunity from coronavirus lawsuits despite criticism that it would also enable them to ignore workplace safety requirements.

The bill, which the state House passed Friday with only Republican support, is supported by groups that represent hospitals and doctors, restaurants, casinos, grocery stores, bankers, meat processors, truckers and insurance companies. The American Civil Liberties Union of Iowa, labor unions and the Iowa State Bar Association are among those who oppose the measure.

Republican Rep. Gary Carlson of Muscatine, who managed the bill in the House, said the owners of small businesses want to reopen but need certainty they can't be sued by their employees.

"They're trying to follow guidelines but are scared to death they're going to be sued by someone when they tried to do their best," he said.

Rep. Chris Hall, a Sioux City Democrat, said most businesses will work to protect customers and workers and deserve protection from frivolous lawsuits, but the broad protections in the bill also will help some hide the truth.

"Essentially, this means that companies have been given the privilege of legal protection without the responsibility to maintain a safe workplace to prevent further spread of a deadly disease in our state," he said.

The Iowa Association for Justice, a state organization of about 1,000 attorneys who fight for individual and civil rights, said more Iowans in nursing homes will die because of the bill and "and individual Iowans will have no power to seek accountability or answers."

"It's pathetic. Iowans are looking for leadership, and they expect better than this. If no one is accountable, no one is safe," the group's executive director, Brad Lint, said in a statement.

As in many states, the coronavirus struck Iowa nursing homes particularly hard, with nursing home residents accounting for half of the state's 622 COVID-19 deaths. The state reported Tuesday that 39 facilities have had outbreaks, with more than 1,560 residents testing positive for the virus since it arrived in Iowa. Many states have passed legislation limited to protecting healthcare and elderly care facilities from lawsuits related to coronavirus illnesses and deaths.

Iowa's bill offers protection against civil damage lawsuits for healthcare providers and manufacturers or distributors of household disinfecting or cleaning supplies. It includes many other businesses by stating that anyone who wants to sue must first have been hospitalized or died, and that there must be an intent on the part of a business or employer to cause harm and actual malice. The measure says anyone who is in substantial compliance with federal or state statues, regulations, orders or public health guidance cannot be sued for civil damages. The bill is retroactive to Jan. 1, 2020.

It also would protect owners of meatpacking plants, which also have been heavily affected by the virus, with thousands of workers sickened. The Iowa counties that have had the heaviest concentration of virus activity have been those with
meatpacking plants. Owners of a wide range of other businesses, including restaurants, hair salons and others who serve the public, expressed concern that they could be sued if someone claimed to have contracted the virus at their business. Oklahoma, Utah and Wyoming enacted similar laws in May that were signed by Republican governors. Several other states have bills pending or have attempted similar action. U.S. Senate Majority Leader Mitch McConnell proposed including nationwide liability protection in a coronavirus relief bill, but his efforts so far have not succeeded.

Louise Melling, ACLU deputy legal director, said she has concerns about the implications of shutting off people's ability to go to court to hold business owners accountable if they're not protecting workers.

"What are we trying to protect and at the expense of whom?" she said. "What are we saying as a country about what we're going to insist on for the safety of workers?"

The Iowa House approved the bill late Friday with only Republican support after ending debate by Democrats. It now shifts to the Senate, which is also controlled by Republicans. Senate Republican Leader Jack Whitver has said the bill is a priority for him.

Because the Senate passed a different version of the bill in February without the immunity language, the measure can gain final approval if the amended language get a majority vote. It then would go to Republican Gov. Kim Reynolds, who hasn't said if she would sign the measure.
FYI

From: Jillings, Lee Anne - OSHA <Jillings.LeeAnne@dol.gov>
Sent: Tuesday, October 27, 2020 1:27 PM
To: Levinson, Andrew - OSHA <Levinson.Andrew@dol.gov>; Edens, Mandy - OSHA <Edens.Mandy@dol.gov>
Subject: FW: R46288.pdf

FYI

From: Hodgson, Michael - OSHA <Hodgson.Michael@dol.gov>
Sent: Tuesday, October 27, 2020 12:57 PM
To: zzOSHA-DTSEM-MANAGERS <zzOSHA-DTSEM-MANAGERS@dol.gov>
Subject: FW: R46288.pdf

interesting

From: Radonovich, Lewis (CDC/NIOSH/RHD/OD) <mto5@cdc.gov>
Sent: Tuesday, October 27, 2020 12:14 PM
To: Hodgson, Michael - OSHA <Hodgson.Michael@dol.gov>
Subject: FW: R46288.pdf

CAUTION - The sender of this message is external to the DOL network. Please use care when clicking on links and responding with sensitive information. Send suspicious email to spam@dol.gov.

A nice summary from CRS!

From: Radonovich, Lewis (CDC/NIOSH/RHD/OD) <mto5@cdc.gov>
Sent: Tuesday, October 27, 2020 9:21 AM
To: Radonovich, Lewis (CDC/NIOSH/RHD/OD) <mto5@cdc.gov>
Subject: R46288.pdf
Occupational Safety and Health Administration (OSHA): Emergency Temporary Standards (ETS) and COVID-19

Updated October 20, 2020
Occupational Safety and Health Administration (OSHA): Emergency Temporary Standards (ETS) and COVID-19

The Occupational Safety and Health Administration (OSHA) does not currently have a specific standard that protects healthcare or other workers from airborne or aerosol transmission of disease or diseases transmitted by airborne droplets. Some in Congress, and some groups representing healthcare, meat and poultry processing, and other workers, are calling on OSHA to promulgate an emergency temporary standard (ETS) to protect workers from exposure to SARS-CoV-2, the virus that causes Coronavirus Disease 2019 (COVID-19). The Occupational Safety and Health Act of 1970 (OSH Act) gives OSHA the ability to promulgate an ETS that would remain in effect for up to six months without going through the normal review and comment process of rulemaking. OSHA, however, has rarely used this authority in the past—not since the courts struck down its ETS on asbestos in 1983.

The California Division of Occupational Safety and Health (Cal/OSHA), which operates California’s state occupational safety and health plan, has had an aerosol transmissible disease (ATD) standard since 2009. This standard includes, among other provisions, the requirement that employers provide covered employees with respirators, rather than surgical masks, when these workers interact with ATDs, such as known or suspected COVID-19 cases. In addition, according to the Cal/OSHA ATD standard, certain procedures require the use of powered air purifying respirators (PAPR).

The Virginia state occupational safety and health plan (VOSH) and the Michigan state occupational safety and health plan (MIOSHA) have each promulgated emergency standards to specifically address COVID-19 in workplaces. Unlike the Cal/OSHA ATD standard, these emergency standards are in effect for only six months and apply to all employers.

H.R. 6139, the COVID-19 Health Care Worker Protection Act of 2020, would require OSHA to promulgate an ETS on COVID-19 that incorporates both the Cal/OSHA ATD standard and the Centers for Disease Control and Prevention’s (CDC’s) 2007 guidelines on occupational exposure to infectious agents in healthcare settings; similar provisions appear in S. 3475. The CDC’s 2007 guidelines generally require stricter controls than its interim guidance on COVID-19 exposure. The provisions of H.R. 6139 were incorporated into the version of H.R. 6201, the Families First Coronavirus Response Act, as introduced in the House. The OSHA ETS provisions were not included in the House- and Senate-passed version of legislation that was signed into law as P.L. 116-127.

H.R. 6379, as introduced in the House, also would include a requirement for an OSHA ETS and permanent standard to address COVID-19 exposure; similar provisions appear in S. 3584. H.R. 6559 would include the requirements for an ETS and permanent standard, clarify the requirement that employers must report work-related COVID-19 cases, and expand protections for whistleblowers; similar provisions appear in S. 3677. The provisions of H.R. 6559 were included in H.R. 6800, The Heroes Act, passed by the House on May 15, 2020, and in the House Amendment to the Senate Amendment to H.R. 925, the revised Heroes Act passed by the House on October 1, 2020.

Through October 1, 2020, OSHA has issued COVID-19-related citations to employers at 62 work sites, with total proposed penalties of $913,133. These citations have been issued for violations of the OSH Act’s General Duty Clause and other existing OSHA standards, such as those for respiratory protection, that may apply to COVID-19. Senators Elizabeth Warren and Cory A. Booker have raised concerns about the low amount of penalties being assessed for COVID-19-related violations.
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Occupational Safety and Health Administration Standards

Section 6 of the Occupational Safety and Health Act of 1970 (OSH Act) grants the Occupational Safety and Health Administration (OSHA) of the Department of Labor (DOL) the authority to promulgate, modify, or revoke occupational safety and health standards that apply to private sector employers, the United States Postal Service, and the federal government as an employer. In addition, Section 5(a)(1) of the OSH Act, commonly referred to as the General Duty Clause, requires that all employers under OSHA’s jurisdiction provide workplaces free of “recognized hazards that are causing or are likely to cause death or serious physical harm” to their employees. OSHA has the authority to enforce employer compliance with its standards and with the General Duty Clause through the issuance of abatement orders, citations, and civil monetary penalties. The OSH Act does not cover state or local government agencies or units. Thus, certain entities that may be affected by Coronavirus Disease 2019 (COVID-19), such as state and local government hospitals, local fire departments and emergency medical services, state prisons and county jails, and public schools, are not covered by the OSH Act or subject to OSHA regulation or enforcement.

State Plans

Section 18 of the OSH Act authorizes states to establish their own occupational safety and health plans and preempt standards established and enforced by OSHA. OSHA must approve state plans if they are “at least as effective” as OSHA’s standards and enforcement. If a state adopts a state plan, it also must cover state and local government entities, such as public schools, not covered by OSHA. Currently, 21 states and Puerto Rico have state plans that cover all employers, and 5 states and the U.S. Virgin Islands have state plans that cover only state and local government employers not covered by the OSH Act. In the remaining states, state and local government employers are not covered by OSHA standards or enforcement. State plans may incorporate OSHA standards by reference, or states may adopt their own standards that are at least as effective as OSHA’s standards. State plans do not have jurisdiction over federal agencies and generally do not cover maritime workers and private-sector workers at military bases or other federal facilities.

Promulgation of OSHA Standards

OSHA may promulgate occupational safety and health standards on its own initiative or in response to petitions submitted to the agency by various government agencies, the public, or employer and employee groups. OSHA is not required, however, to respond to a petition for a

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1 29 U.S.C. §655. The provisions of the Occupational Safety and Health Act of 1970 (OSH Act) are extended to the legislative branch as an employer by the Congressional Accountability Act (P.L. 104-1).
4 For additional information on Occupational Safety and Health Administration (OSHA) state plans, see CRS Report R43969, OSHA State Plans: In Brief, with Examples from California and Arizona.
5 Information on specific state plans is available from the OSHA website at https://www.osha.gov/stateplans.
6 Per Section 6(b)(1) of the OSH Act [29 §655(b)(1)], a petition may be submitted by “an interested person, a representative of any organization of employers or employees, a nationally recognized standards-producing
standard or to promulgate a standard in response to a petition. OSHA may also consult with one of the two statutory standing advisory committees—the National Advisory Committee on Occupational Safety and Health (NACOSH) or the Advisory Committee on Construction Safety and Health (ACCSH)—or an ad-hoc advisory committee for assistance in developing a standard.7

**Notice and Comment**

OSHA's rulemaking process for the promulgation of standards is largely governed by the provisions of the Administrative Procedure Act (APA) and Section 6(b) of the OSH Act.8 Under the APA informal rulemaking process, federal agencies, including OSHA, are required to provide notice of proposed rules through the publication of a Notice of Proposed Rulemaking in the Federal Register and provide the public a period of time to provide comments on the proposed rules. Section 7(b) of the OSH Act mirrors the APA in that it requires notice and comment in the rulemaking process.9 After publishing a proposed standard, the public must be given a period of at least 30 days to provide comments. In addition, any person may submit written objections to the proposed standard and may request a public hearing on the standard.

**Statement of Reasons**

Section 6(e) of the OSH Act requires OSHA to publish in the Federal Register a statement of the reasons the agency is taking action whenever it promulgates a standard, conducts other rulemaking, or takes certain additional actions, including issuing an order, compromising on a penalty amount, or settling an issued penalty.10

**Other Relevant Laws and Executive Order 12866**

In addition to the APA and OSH Act, other federal laws that generally apply to OSHA rulemaking include the Paperwork Reduction Act,11 Regulatory Flexibility Act,12 Congressional Review Act,13 Information Quality Act,14 and Small Business Regulatory Enforcement Fairness Act (SBREFA).15 Also, Executive Order 12866, issued by President Clinton in 1993, requires

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7 The National Advisory Committee on Occupational Safety and Health (NACOSH) was established by Section 7(a) of the OSH Act [29 U.S.C. §656(a)]. The Advisory Committee on Construction Safety and Health (ACCSH) was established by Section 107 of the Contract Work Hours and Safety Act (P.L. 87-581). Section 7(b) of the OSH Act provides OSHA the authority to establish additional advisory committees.
10 29 U.S.C. §655(e).
agencies to submit certain regulatory actions to the Office of Management and Budget (OMB) and Office of Information and Regulatory Affairs (OIRA) for review before promulgation.16

**OSHA Rulemaking Time Line**

OSHA rulemaking for new standards historically has been a relatively time-consuming process. In 2012, at the request of Congress, the Government Accountability Office (GAO) reviewed 59 significant OSHA standards promulgated between 1981 (after the enactments of the Paperwork Reduction Act and Regulatory Flexibility Act) and 2010.17 For these standards, OSHA's average time between beginning formal consideration of the standard—either through publishing a Request for Information or Advance Notice of Proposed Rulemaking in the Federal Register or placing the rulemaking on its semiannual regulatory agenda—and promulgation of the standard was 93 months (7 years, 9 months). Once the Notice of Proposed Rulemaking was published for these 59 standards, the average time until promulgation of the standard was 39 months (3 years, 3 months).

In 2012, OSHA's Directorate of Standards and Guidance published a flowchart of the OSHA rulemaking process on the agency’s website.18 This flowchart includes estimated duration ranges for a variety of rulemaking actions, beginning with pre-rule activities—such as developing the idea for the standard and meeting with stakeholders—and ending with promulgation of the standard. The flowchart also includes an estimated duration range for post-promulgation activities, such as judicial review. The estimated time from the start of preliminary rulemaking to the promulgation of a standard ranges from 52 months (4 years, 4 months) to 138 months (11 years, 6 months). After a Notice of Proposed Rulemaking is published in the Federal Register, the estimated length of time until the standard is promulgated ranges from 26 months (2 years, 2 months) to 63 months (5 years, 3 months). **Table 1** provides OSHA's estimated time lines for six major pre-rulemaking and rulemaking activities leading to the promulgation of a standard.

<table>
<thead>
<tr>
<th>Stage</th>
<th>Activities</th>
<th>Estimated Duration</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Preliminary rulemaking activities</td>
<td>12-36 months</td>
</tr>
<tr>
<td>2</td>
<td>Developing the proposed rule</td>
<td>12-36 months</td>
</tr>
<tr>
<td>3</td>
<td>Publishing the Notice of Proposed Rulemaking (NPRM)</td>
<td>2-3 months</td>
</tr>
<tr>
<td>4</td>
<td>Developing and analyzing the rulemaking record, including public comments and hearings</td>
<td>6-24 months</td>
</tr>
<tr>
<td>5</td>
<td>Developing the final rule, including Office of Information and Regulatory Affairs (OIRA) submission</td>
<td>18-36 months</td>
</tr>
<tr>
<td>6</td>
<td>Publishing the final rule (promulgating the new standard)</td>
<td>2-3 months</td>
</tr>
<tr>
<td>Total estimated duration</td>
<td></td>
<td>52-138 months</td>
</tr>
<tr>
<td>Estimated duration from NPRM to final rule</td>
<td></td>
<td>26-63 months</td>
</tr>
</tbody>
</table>

**Table 1. OSHA Rulemaking Process: Estimated Durations of Activities**


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17 GAO-12-330, *Workplace Safety and Health*.

Judicial Review

Both the APA and the OSH Act provide for judicial review of OSHA standards. Section 7(f) of the OSH Act provides that any person who is "adversely affected" by a standard may file, within 60 days of its promulgation, a petition challenging the standard with the U.S. Court of Appeals for the circuit in which the person lives or maintains his or her principal place of business. A petition for judicial review does not automatically stay the implementation or enforcement of the standard. However, the court may order such a stay. OSHA estimates that post-promulgation activities, including judicial review, can take between 4 and 12 months after the standard is promulgated.

Emergency Temporary Standards

Section 6(c) of the OSH Act provides the authority for OSHA to issue an Emergency Temporary Standard (ETS) without having to go through the normal rulemaking process. OSHA may promulgate an ETS without supplying any notice or opportunity for public comment or public hearings. An ETS is immediately effective upon publication in the Federal Register. Upon promulgation of an ETS, OSHA is required to begin the full rulemaking process for a permanent standard with the ETS serving as the proposed standard for this rulemaking. An ETS is valid until superseded by a permanent standard, which OSHA must promulgate within six months of publishing the ETS in the Federal Register. An ETS must include a statement of reasons for the action in the same manner as required for a permanent standard. State plans are required to adopt or adhere to an ETS, although the OSH Act is not clear on how quickly a state plan must come into compliance with an ETS.

ETS Requirements

Section 6(c)(1) of the OSH Act requires that both of the following determinations be made in order for OSHA to promulgate an ETS:

- that employees are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards, and
- that such emergency standard is necessary to protect employees from such danger.

Grave Danger Determination

The term grave danger, used in the first mandatory determination for an ETS, is not defined in statute or regulation. The legislative history demonstrates the intent of Congress that the ETS process "not be utilized to circumvent the regular standard-setting process," but the history is unclear as to how Congress intended the term grave danger to be defined.
In addition, although the federal courts have ruled on challenges to previous ETS promulgations, the courts have provided no clear guidance as to what constitutes a grave danger. In 1984, the U.S. Court of Appeals for the Fifth Circuit in Asbestos Info. Ass’n v. OSHA issued a stay and invalidated OSHA’s November 1983 ETS lowering the permissible exposure limit for asbestos in the workplace. In its decision, the court stated that “gravity of danger is a policy decision committed to OSHA, not to the courts.” The court, however, ultimately rejected the ETS, in part on the grounds that OSHA did not provide sufficient support for its claim that 80 workers would ultimately die because of exposures to asbestos during the six-month life of the ETS.

**Necessity Determination**

In addition to addressing a grave danger to employees, an ETS must also be necessary to protect employees from that danger. In Asbestos Info. Ass’n, the court invalidated the asbestos ETS for the additional reason that OSHA had not demonstrated the necessity of the ETS. The court cited, among other factors, the duplication between the respirator requirements of the ETS and OSHA’s existing standards requiring respirator use. The court dismissed OSHA’s argument that the ETS was necessary because the agency felt that the existing respiratory standards were “unenforceable absent actual monitoring to show that ambient asbestos particles are so far above the permissible limit that respirators are necessary to bring employees’ exposure within the PEL of 2.0 f/cc.”

The court determined that “fear of a successful judicial challenge to enforcement of OSHA’s permanent standard regarding respirator use hardly justifies resort to the most dramatic weapon in OSHA’s enforcement arsenal.”

Although OSHA has not promulgated an ETS since the 1983 asbestos standard, it has since determined the necessity of a new ETS on diacetyl. In 2006, the agency considered a petition from the United Food and Commercial Workers (UFCW) and International Brotherhood of Teamsters (IBT) for an ETS on diacetyl. The UFCW and IBT petitioned OSHA for the ETS after the National Institute for Occupational Safety and Health (NIOSH) and other researchers found that airborne exposure to diacetyl, then commonly used as an artificial butter flavoring in microwave popcorn and a flavoring in other food and beverage products, was linked to the lung disease bronchiolitis obliterans, now commonly referred to as “popcorn lung.” According to GAO’s 2012 report on OSHA’s standard-setting processes, OSHA informed GAO that although the agency may have been able to issue an ETS based on the grave danger posed by diacetyl, the actions taken by the food and beverage industries, including reducing or removing diacetyl from products, made it less likely that the necessity requirement could be met.

**ETS Duration**

Section 6(c)(2) of the OSHAct provides that an ETS is effective until superseded by a permanent standard promulgated pursuant to the normal rulemaking provisions of the OSH Act. Section 6(c)(3) of the OSHAct requires OSHA to promulgate a permanent standard within six months of...

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23 727 F.2d at 415, 425-427 (5th Cir. 1984).
24 727 F.2d at 427 (5th Cir. 1984).
25 727 F.2d at 427 (5th Cir. 1984). The ETS mandated a permissible exposure limit (PEL) for asbestos of two asbestos fibers per cubic centimeter of air (2.0 f/cc).
26 727 F.2d at 427 (5th Cir. 1984).
28 GAO-12-330, Workplace Safety and Health.
promulgating the ETS. As shown earlier in this report, six months is well outside of historical and currently expected time frames for developing and promulgating a standard under the notice and comment provisions of the APA and OSH Act, as well as under other relevant federal laws and executive orders. This dichotomy between the statutory mandate to promulgate a standard and the timelines that, based on historical precedent, other provisions in the OSH Act might realistically require for such promulgation raises the question of whether or not OSHA could extend an ETS’s duration without going through the normal rulemaking process. The statute and legislative history do not clearly address this question.

OSHA has used its ETS authority sparingly in its history and not since the asbestos ETS promulgated in 1983. As shown in Table A-1 in the Appendix, of the nine times OSHA has issued an ETS, the courts have fully vacated or stayed the ETS in four cases and partially vacated the ETS in one case. Of the five cases that were not challenged or that were fully or partially upheld by the courts, OSHA issued a permanent standard either within the six months required by the statute or within several months of the six-month period and always within one year of the promulgation of the ETS. Each of these cases, however, occurred before 1980, when a combination of additional federal laws and court decisions added additional procedural requirements to the OSHA rulemaking process. OSHA did not attempt to extend the ETS’s expiration date in any of these cases.

Although the courts have not ruled directly on an attempt by OSHA to solely extend the life of an ETS, in 1974, the U.S. Court Appeals for the Fifth Circuit held in Florida Peach Growers Ass’n v. United States Department of Labor that OSHA was within its authority to amend an ETS without going through the normal rulemaking process. The court stated that “it is inconceivable that Congress, having granted the Secretary the authority to react quickly in fast-breaking emergency situations, intended to limit his ability to react to developments subsequent to his initial response.” The court also recognized the difficulty OSHA may have in promulgating a standard within six months due to the notice and comment requirements of the OSH Act, stating that in the case of OSHA seeking to amend an ETS to expand its focus, “adherence to subsection (b) procedures would not be in the best interest of employees, whom the Act is designed to protect. Such lengthy procedures could all too easily consume all of the temporary standard’s six months life.”

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30 For example, OSHA promulgated the Acrylonitrile (vinyl cyanide) ETS on January 17, 1978, and the permanent standard on October 3, 1978, with an effective date of November 2, 1978. The preamble to the permanent standard published in the Federal Register does not include information on the status of the ETS during the time between its expiration and the promulgation of the permanent standard. OSHA, “Occupational Exposure to Acrylonitrile (Vinyl Cyanide),” 43 Federal Register 45762, October 3, 1978.
31 489 F.2d 120 (5th Cir. 1974).
32 489 F.2d at 127 (5th Cir. 1974).
33 489 F.2d at 127 (5th Cir. 1974).
OSHA Standards Related to COVID-19

Current OSHA Standards

Currently, no OSHA standard directly covers exposure to airborne or aerosol diseases in the workplace. As a result, OSHA is limited in its ability to enforce protections for healthcare and other workers who may be exposed to SARS-CoV-2, the virus that causes COVID-19.34

OSHA may enforce the General Duty Clause in the absence of a standard, if it can be determined that an employer has failed to provide a worksite free of “recognized hazards” that are “causing or are likely to cause death or serious physical harm” to workers.35 In addition, OSHA’s standards for the use of personal protective equipment (PPE) may apply in cases in which workers require eye, face, hand, or respiratory protection against COVID-19 exposure.36

As of October 1, 2020, OSHA has issued citations related to COVID-19 to employers at 62 worksites resulting in a total of $913,133 in proposed civil penalties.37 The majority of these citations were issued to healthcare, nursing, and long-term care providers, including two Department of Veterans Affairs facilities—a hospital in Indianapolis, Indiana, and a community living center in Queens, New York.38 Two employers in the meat processing industry—Smithfield Packaged Foods, Inc. in Sioux Falls, South Dakota and JBS Foods, Inc. in Greeley, Colorado—were also cited.39 In the two meat processing cases, citations were issued for General Duty Clause violations. Other citations were issued for violations of OSHA’s respiratory protection, injury and illness reporting, and recordkeeping standards.

The highest amount of proposed penalties issued to a single employer for COVID-19-related violations was $28,070 to the Harborage nursing home operated by Hackensack Meridian Healthcare in New Jersey for four serious and one other than serious violations of the respiratory protection standard.40 For two of the serious violations, OSHA issued the maximum allowable penalty of $13,494.41 For the other two serious violations, OSHA issued citations but no monetary penalties. For the other than serious violation, OSHA issued a penalty of $1,082. The two meat processing employers were each assessed maximum penalties of $13,494 for serious violations of the General Duty Clause.

In a letter to OSHA, Senators Elizabeth Warren and Cory A. Booker raised concerns over the amount of penalties issued to these employers.42 The Senators asked OSHA why these employers

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34 OSHA has a standard on blood-borne pathogens (29 C.F.R. §1910.1030) but does not have a standard on pathogens transmitted by airborne droplets.
39 OSHA has the authority to issue citations to Executive Branch agencies, but does not have the authority to issue civil monetary penalties to these agencies.
40 Detailed information on the citations issued to this employer is available at https://www.osha.gov/pls/imis/establishment_inspection_detail?id=1476465.015.
41 OSHA citations are classified as “serious,” “other than serious,” “willful,” or “repeated.” The maximum amounts of OSHA penalties are subject to annual inflationary adjustments.
42 Letter from Senators Elizabeth Warren and Cory A. Booker to Loren Sweatt, Principal Deputy Assistant Secretary of...
were each cited for single serious violations of the General Duty Clause rather than multiple violations for each area of the facilities in which social distancing measures were not implemented. They also asked why OSHA did not issue penalties for willful or repeated violations that carry maximum penalties of $134,937 per violation. None of the employers cited for COVID-19-related violations were issued penalties for willful or repeated violations.

**OSHA Respiratory Protection Standard**

**National Institute for Occupational Safety and Health Certification**

The OSHA respiratory protection standard requires the use of respirators certified by NIOSH in cases in which engineering controls, such as ventilation or enclosure of hazards, are insufficient to protect workers from breathing contaminated air. Surgical masks, procedure masks, and dust masks are not considered respirators. NIOSH certifies respirators pursuant to federal regulations. For nonpowered respirators, such as filtering face piece respirators commonly used in healthcare and construction, NIOSH classifies respirators based on their efficiency at filtering airborne particles and their ability to protect against oil particles. Under the NIOSH classification system, the letter (N, R, or P) indicates the level of oil protection as follows: N—no oil protection; R—oil resistant; and P—oil proof. The number following the letter indicates the efficiency rating of the respirator as follows: 95—filters 95% of airborne particles; 97—filters 97% of airborne particles; and 100—filters 99.7% of airborne particles. Thus an N95 respirator, the most common type, is one that does not protect against oil particles and filters out 95% of airborne particles. An R or P respirator can be used in place of an N respirator.

A respirator that is past its manufacturer-designated shelf life is no longer considered to be certified by NIOSH. However, in response to potential shortages in respirators, NIOSH has tested and approved certain models of respirators for certified use beyond their manufacturer-designated shelf lives. Respirators designed for certain medical and surgical uses are subject to both certification by NIOSH (for oil protection and efficiency) and regulation by the Food and Drug Administration (FDA) as medical devices. In general, respirators with exhalation valves cannot be used in surgical and certain medical settings because, although the presence of an exhalation valve does not affect the respirator’s protection afforded the user, it may allow unfiltered air from the user into a sterile field. On March 2, 2020, FDA issued an Emergency Use Authorization (EUA) to approve for use in medical settings certain NIOSH-certified respirators not previously regulated by FDA.

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43 29 C.F.R. §1910.134.

44 29 C.F.R. Part 84.


46 Letter from RADM Denise M. Hinton, chief scientist, Food and Drug Administration (FDA), to Robert R. Redfield, Director, CDC, March 2, 2020, at https://www.fda.gov/media/135763/download. The list of respirators approved under this Emergency Use Authorization (EUA) is in Appendix B to this letter, updated at https://www.fda.gov/media/135921/download.
**CDC Interim Guidance on Respiratory Protection**

On March 10, 2020, the Centers for Disease Control and Prevention (CDC) updated its interim guidance for the protection of healthcare workers against exposure to COVID-19 to permit healthcare workers caring for known or suspected COVID-19 cases to use “facemasks” when respirators are not available or are in limited supply. This differs from the CDC’s 2007 guidelines for control of infectious agents in healthcare settings, which required the use of respirators for treatment of known or suspected cases. CDC states that respirators should be prioritized for use in medical procedures likely to generate respiratory aerosols. Before this interim guidance was released, Representative Bobby Scott, Chairman of the House Committee on Education and Labor, and Representative Alma Adams, Chair of the Subcommittee on Workforce Protections, sent a letter to Secretary of Health and Human Services (HHS) Alex M. Azar II expressing their opposition to this change in the interim standard.

**Medical Evaluation and Fit Testing**

The OSHA respiratory protection standard requires that the employer provide a medical evaluation to the employee to determine if the employee is physiologically able to use a respirator. This medical evaluation must be completed before any fit testing. For respirators designed to fit tightly against the face, the specific type and model of respirator that an employee is to use must be fit tested in accordance with the procedures provided in Appendix A of the OSHA respiratory protection standard to ensure there is a complete seal around the respirator when worn. Once an employee has been fit tested for a respirator, he or she is required to be fit tested annually or whenever the model of respirator, but not the actual respirator itself, is changed. Each time an individual uses a respirator, he or she is required to perform a check of the seal of the respirator to his or her face in accordance with the procedures provided in Appendix B of the standard. On March 14, 2020, OSHA issued guidance permitting employers to suspend annual fit testing of respirators for employees that have already been fit tested on the same model respirator.

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47 Although the interim guidance does not specifically define the term facemask, it does differentiate between a facemask and a respirator such that any recommendation to use a facemask does not require the use of a respirator.


50 29 C.F.R. §1910.134 Appendix A. Powered air purifying respirators (PAPR) that do not require a seal to the user’s face do not need to be fit tested.

51 29 C.F.R. §1910.134 Appendix B.
Temporary OSHA Enforcement Guidance on the Respiratory Protection Standard

In response to shortages of respirators and other PPE during the national response to the COVID-19 pandemic, OSHA has issued three sets of temporary enforcement guidance to permit the following exceptions to the respiratory protection standard:

1. Employers may suspend annual fit testing of respirators for employees that have already been fit tested on the same model respirator;\(^{52}\)

2. Employers may permit the use of expired respirators and the extended use or reuse of respirators, provided the respirator maintains its structural integrity and is not damaged, soiled, or contaminated (e.g., with blood, oil, or paint);\(^{53}\) and

3. Employers may permit the use of respirators not certified by NIOSH, but approved under standards used by the following countries or jurisdictions, in accordance with the protection equivalency tables provided in Appendices A and B of the enforcement guidance document:
   - Australia,
   - Brazil,
   - European Union,
   - Japan,
   - Mexico,
   - People’s Republic of China, and
   - Republic of Korea.\(^ {54}\)

California: Cal/OSHA Aerosol Transmissible Disease Standard

Although no OSHA standard specifically covers aerosol or airborne disease transmission, the California Division of Occupational Safety and Health (Cal/OSHA), under its state plan, promulgated its aerosol transmissible disease (ATD) standard in 2009.\(^ {55}\) The ATD standard covers most healthcare workers, laboratory workers, as well as workers in correctional facilities, homeless shelters, and drug treatment programs. Under the ATD standard, SARS-CoV-2, the virus that causes COVID-19, is classified as a disease or pathogen requiring airborne isolation. This classification subjects the virus to stricter control standards than diseases requiring only

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\(^{55}\) Cal. Code Regs. tit. 8, §5199. The California state plan covers all state and local government agencies and all private-sector workers in the state, with the exception of maritime workers; workers on military bases and in national parks, monuments, memorials, and recreation areas; workers on federally recognized Native American reservations and trust lands; and U.S. Postal Service contractors.
droplet precautions, such as seasonal influenza. The key requirements of the ATD standard include

- written ATD exposure control plan and procedures,
- training of all employees on COVID-19 exposure, use of PPE, and procedures if exposed to COVID-19,
- engineering and work practice controls to control COVID-19 exposure, including the use of airborne isolation rooms,
- provision of medical services to employees, including removal of exposed employees,
- specific requirements for laboratory workers, and
- PPE requirements.

Cal/OSHA Aerosol Transmissible Disease PPE Requirements

The Cal/OSHA ATD standard requires that employers provide employees PPE, including gloves, gowns or coveralls, eye protection, and respirators certified by NIOSH at least at the N95 level whenever workers

- enter or work in an airborne isolation room or area with a case or suspected case;
- are present during procedures or services on a case or suspected case;
- repair, replace, or maintain air systems or equipment that may contain pathogens;
- decontaminate an area that is or was occupied by a case or suspected case;
- are present during aerosol generating procedures on cadavers of cases or suspected cases;
- transport a case or suspected case within a facility or within a vehicle when the patient is not masked; and
- are working with a viable virus in the laboratory.

In addition, a powered air purifying respirator (PAPR) with a high-efficiency particulate air (HEPA) filter must be used whenever a worker performs a high-hazard procedure on a known or suspected COVID-19 case. High-hazard procedures are those in which “the potential for being exposed to aerosol transmissible pathogens is increased due to the reasonably anticipated generation of aerosolized pathogens”—they include intubation, airway suction, and caring for patients on positive pressure ventilation. Emergency medical services (EMS) workers may use N100, R100, or P100 respirators in place of PAPRs.

56 Cal. Code Regs. tit. 8, §5199 Appendix A.
58 A PAPR uses a mechanical device to draw in room air and filter it before expelling that air over the user’s face. In general, PAPRs do not require a tight seal to the user’s face and do not need to be fit tested.
59 Cal. Code Regs. tit. 8, §5199(b).
**Cal/OSHA Interim Guidance on COVID-19**

Cal/OSHA has issued interim guidance in response to shortages of respirators in the state due to the COVID-19 pandemic response.\(^6^0\) Under this interim guidance, if the supply of N95 respirators or PAPRs are insufficient to meet current or anticipated needs, surgical masks may be used for low-hazard patient contacts that would otherwise require the use of respirators, and respirators may be used for high-hazard procedures that would otherwise require the use of PAPRs.

**Virginia: VOSH COVID-19 ETS**

On July 15, 2020, the Virginia Safety and Health Codes Board adopted an ETS to specifically protect employees from exposure to SARS-CoV-2, the virus that causes COVID-19.\(^6^1\) This ETS, promulgated under Virginia’s state occupational safety and health plan (VOSH) is the first state standard to specifically address COVID-19 in the workplace.\(^6^2\) As an ETS, the VOSH standard expires within six months of its effective date, upon expiration of the Governor’s State of Emergency, when superseded by a permanent standard, or when repealed by the Virginia Safety and Health Codes Board, whichever comes first. The ETS can be extended only through the normal state rulemaking process.

Unlike the Cal/OSHA ATD standard, the VOSH ETS applies to all state and local government agencies and all covered private-sector employees in the state. As part of a state plan, the VOSH ETS applies to state and local government entities, such as public schools, as employers. All covered employers in Virginia must comply with the following ETS requirements:

- exposure assessment and determination, notification of suspected cases and contacts with those cases, and employee access to their own exposure and medical records;
- return to work of employees known or suspected to have COVID-19 based on a duration of time since last symptoms or negative COVID-19 tests;\(^6^3\)
- maintenance of physical distancing between employees while working and on paid breaks at the worksite, including restricted access to the worksite and common areas and break rooms;
- compliance with applicable existing PPE and respiratory protection standards when physical distancing between employees is not possible; and
- sanitation and disinfection requirements.

For all employers, if engineering, administrative, or work practice controls are not feasible or do not provide sufficient protection from SARS-CoV-2 transmission, then PPE, including respiratory PPE—such as respirators, if necessary—must be provided to employees.

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\(^6^2\) The Virginia state plan covers all state and local government agencies and all private-sector workers in the state, with the exception of maritime workers, U.S. Postal Service contractors, workers at military bases or other federal enclaves in which the federal government has civil jurisdiction, workers at the U.S. Department of Energy’s Southeastern Power Administration Kerr-Philpott System, and aircraft cabin crew members.

\(^6^3\) A COVID-19 test for the purposes of determining if an employee can return to work must be paid for by the employer or offered such that the employee bears no cost for the test.
Hazard and Job Task Classification

The VOSH ETS requires that each employer assess its workplace for hazards and job tasks that potentially expose employees to the SARS-CoV-2 virus. Employers must classify each job task as having a “very high,” “high,” “medium,” or “lower” risk level of exposure, according to the hazards to which employees are potentially exposed. The VOSH ETS provides the following examples of activities for the “very high” and “high” risk levels:

- **“very high” risk activities include**
  - using aerosol-generating procedures, such as intubation, on patients known or suspected to be infected with SARS-CoV-2;
  - collecting or handling specimens from patients known or suspected to be infected with SARS-CoV-2; and
  - performing an autopsy involving aerosol-generating procedures on the body of a person known or suspected to be infected with the SARS-CoV-2 virus at the time of death; and
- **“high risk” activities include**
  - health care services, including inpatient care, outpatient care, skilled nursing care, and nonmedical support services such as room cleaning, provided to patients known or suspected to be infected with SARS-CoV-2;
  - first responder and medical transport services to patients known or suspected to be infected with SARS-CoV-2; and
  - mortuary services to persons known or suspected to be infected with the SARS-CoV-2 virus at the time of death.

“Medium” risk activities are those that require employees to have more than minimal contact, within six feet of other employees, customers, or members of the public who are not known or suspected to be infected with SARS-CoV-2.64 “Lower” risk activities are those that do not require contact with other persons within six feet or that are able to utilize the following types of engineering, administrative, or work practice controls to minimize contact between persons:

- installation of floor to ceiling barriers, such as barriers between cashiers and customers;
- telecommuting;
- staggered work shifts to reduce the number of workers at a site;
- delivering services remotely, including curbside pickup of retail purchases; and
- mandatory physical distancing of persons.

The use of face coverings other than respirators or medical or surgical masks, including cloth face coverings now required by several states, is not an acceptable method of minimizing physical contact between persons. However, the VOSH ETS requires the use of face coverings for brief contacts between persons within six feet of each other.

64 Examples of “medium” risk work activities are provided in the VOSH ETS at 16 Va. Admin. Code §25-220-30.
Engineering, Administrative, Work Practice, and PPE Requirements for “Very High,” “High,” and “Medium” Risk Activities

Employers with job tasks or activities in the “very high,” “high,” or “medium” risk classifications must adhere to specific engineering, administrative, work practice, and PPE requirements. For “very high” and “high” risk activities, engineering controls include the use of airborne infection isolation rooms (AIIR) for known or suspected COVID-19 patients and aerosol-generating procedures and Biosafety Level 3 (BSL-3) precautions for the handling of specimens from known or suspected COVID-19 patients.65

Employers with “very high” and “high” risk activities must implement administrative and work practice controls, including the prescreening of all employees to ensure that employees do not have signs or symptoms of COVID-19; enhanced medical screening of employees during COVID-19 outbreaks; and the use of flexible work arrangements, such as telecommuting, when feasible. In addition, all employers with “very high” or “high” risk activities must provide, to the extent feasible, psychological and behavioral support to address employee stress at no cost to the employee.

The standard also provides for engineering, administrative, and work practice controls for “medium” risk activities.66

PPE Requirements for “Very High” and “High” Risk Activities

Employers with “very high” and “high” risk activities, who are not already covered by the general OSHA PPE standards, are required to comply with the VOSHETS requirements for PPE. An employer subject to these requirements must assess the workplace to determine if there are any COVID-19 hazards present or likely to be present that would require the use of PPE by employees. The employer must provide for the participation of employees and employee representatives in this assessment process and verify that this assessment has been conducted through a written certification.

If hazards that require PPE are identified, the employer must select and provide the appropriate PPE to each employee and ensure that PPE fits properly. If respiratory PPE, such as respirators or PAPR are used as PPE, the existing OSHA standards for respiratory PPE, which include medical evaluation of employees and fit testing, must be followed.

Unless contraindicated by the hazard and PPE assessment, when any employee is in contact within six feet of any person known or suspected to be infected with SARS-CoV-2, that employee must be provided with the following types of PPE:

- gloves,
- gown large enough to cover areas needing protection,
- face shield or goggles, and
- respirator.


While there are no specific PPE requirements for “medium” risk activities, PPE may be required based on an assessment of the hazards of these activities.

**Infectious Disease Preparedness and Response Plan and Training**

**Infectious Disease Preparedness and Response Plan**

All employers with “very high” and “high” risk activities, and employers with 11 or more employees and “medium” risk activities, must develop written infectious disease preparedness and response plans. These plans must be developed with input from employees. The deadline for the development of these plans is 60 days from the effective date of the ETS.

The infectious disease preparedness plan must include a consideration of the COVID-19 risks in the workplace, and to the extent possible and in compliance with medical privacy laws, the specific risks faced by employees with certain preexisting medical conditions. The plan must include contingency plans for continued operations during a COVID-19 outbreak and provide for the prompt identification and isolation of employees with known or suspected COVID-19 and a procedure for employees to notify the employer of COVID-19 signs or symptoms. The plan must also address interactions between the employer’s worksite and other businesses, such as vendors and contractors to ensure employees of these businesses comply with the VOSH ETS and the employer’s infectious disease preparedness and response plan.

**Training**

All employers with “very high,” “high,” or “medium” risk activities must provide training to all employees, including those employees whose work does not involve any COVID-19 risks. This training must teach employees to recognize the hazards of the SARS-CoV-2 virus, signs and symptoms of COVID-19, and the procedures to minimize SARS-CoV-2 hazards. If the employer has an infectious disease preparedness and response plan, training must be provided on this plan. Written certification of training must be prepared, and retraining must be provided when necessary.

Employers with only “lower” risk activities are not required to prepare a formal training plan but must provide oral or written communication on the hazards of SARS-CoV-2, the signs and symptoms of COVID-19, and measures to minimize SARS-CoV-2 exposure. VOSH is required to develop an information sheet that employers can use to satisfy this training requirement.

Training must be provided within 30 days of the effective date of the standard, except for training on the infectious disease preparedness and response plan, which must be completed within 60 days.

**Whistleblower Protections**

The VOSH ETS prohibits any employer from discharging or otherwise discriminating against any employee who does the following:

- exercises his or her rights under the ETS or existing whistleblower protection provisions, including the limited right of an employee to refuse work because of a reasonable fear of injury or death or serious injury;\(^\text{67}\)

\(^{67}\)To exercise this right, the employee must, if possible, have sought unsuccessfully to have the employer remedy the hazard, and there must be insufficient time to attempt to remedy the hazard through normal regulatory enforcement
OSHA: ETS and COVID-19

- provides and wears his or her own PPE, provided the PPE does not create a greater hazard to the employee or create a serious hazard to other employees; or
- raises a reasonable concern about SARS-CoV-2 and COVID-19 infection control to the employer, the employer’s agent, other employees, the government, or the public through any type of media including social media.

Michigan: MIOSHA COVID-19 Emergency Rules

On October 14, 2020, the director of the Michigan Department of Labor and Economic Opportunity, which operates Michigan’s state occupational safety and health plan (MIOSHA), promulgated emergency rules to address workplace exposure to COVID-19. These rules, which apply to all employers in the state, went into immediate effect and will remain in effect for six months. In addition to rules that apply to all employers, the emergency rules include specific provisions that apply to the following industries:

- construction;
- manufacturing;
- retail, libraries, and museums;
- restaurants and bars;
- healthcare;
- in-home services such as house cleaning and repair;
- personal care services such as hair styling and tattooing;
- public accommodations such as sports and entertainment venues;
- sports and exercise facilities;
- meat and poultry processing; and
- casinos.

Exposure Determination

Rule 3 of the MIOSHA emergency rules requires all employers to evaluate all routine and anticipated job tasks and categorize these job tasks based on potential employee exposure to COVID-19 into one of the following four categories:

1. “Lower exposure risk” tasks are those that do not require contact with known or suspected COVID-19 cases or frequent close (within six feet) contact with the general public.
2. “Medium exposure risk” tasks are those that require frequent or close contact with persons who may be infected with COVID-19 but who are not known or suspected COVID-19 cases. In areas of the state without ongoing community channels. This right is provided in the OSHA standards at 29 C.F.R. §1977.12(b)(2) and in the VOSH standards at 16 Va. Admin. Code §25-60-110.


transmission of COVID-19, tasks that require frequent contact with persons travelling from areas with widespread COVID-19 transmission are included in this category. In areas with ongoing community transmission, tasks that involve contact with the general public are included in this category.

3. “High exposure risk” tasks are those with high potential for exposure to known or suspected COVID-19 cases. Licensed healthcare providers, medical first responders, nursing home workers, law enforcement and correctional officers, and mortuary workers are examples of types of workers that may perform tasks in this category.

4. “Very high exposure risk” tasks are those that involve the generation of aerosols during medical or mortuary procedures on known or suspected COVID-19 cases and the collection and handling of laboratory specimens from known or suspected COVID-19 cases.

**Preparedness and Response Plan**

Rule 4 of the MIOSHA emergency rules requires all employers to develop a written COVID-19 preparedness and response plan based on current CDC and OSHA guidance. This plan must detail measures the employer will take to protect employees from COVID-19 exposure and must be readily available to employees and their representatives.

**Basic Infection Prevention Measures**

Rule 5 of the MIOSHA emergency rules requires all employers to implement the following basic infection prevention measures:

- Promote frequent hand-washing and provide hand-washing facilities or hand sanitizer to workers, customers, and visitors;
- Require employees who are sick to not report to work or to report to an isolated location;
- Prohibit workers from using other workers’ desks, phones, and other equipment when possible;
- Increase facility cleaning, especially of high-touch surfaces and shared equipment;
- Establish procedures, consistent with CDC guidance, for disinfection of the worksite if a worker, customer, or visitor has a known case of COVID-19;
- Use Environmental Protection Agency (EPA) approved disinfectants that are expected to effective against SARS-CoV-2;
- Follow all manufacturer’s guidelines for use of all cleaning and disinfectant products; and
- Prohibit in-person work for employees whose work can be done remotely.

**Health Surveillance**

Rule 6 of the MIOSHA emergency rules requires all employers to implement a health surveillance system for the workplace. This system must include, at a minimum, a COVID-19 screening questionnaire for all employees and contractors entering the workplace. Employees must be directed to immediately report any signs or symptoms of COVID-19 to the employer and known and suspected COVID-19 cases must be isolated from the rest of the workforce. When an
employer learns of an employee, contractor, customer, or visitor to the worksite with a known case of COVID-19, the employer must immediately notify the local health department and, must notify, within 24 hours, any workers, contractors, or suppliers who may have come into contact with the infected person. When determining if an employee with a known or suspected case of COVID-19 may return to the workplace, the employer must follow CDC guidelines and health department quarantine and isolation orders.

Workplace Controls
Rule 7 of the MIOSHA emergency rules requires all employers to implement the following workplace controls:

- designate one or more worksite COVID-19 safety coordinators to implement, monitor, and report on COVID-19 control strategies developed by the employer and to remain on site at all times when employees are present;
- place posters in appropriate languages in the workplace that provide information on staying away from work while sick, cough and sneeze etiquette, and hand hygiene;
- keep all persons at least six feet from each other using signs, floor markings, and barriers appropriate for the worksite, to the extent possible;
- provide all employees with non-medical grade face coverings at no cost to the employees;
- require the use of face coverings when employees cannot maintain six feet of distance from other persons in the workplace, and consider the use of face shields when three feet of distance cannot be maintained;
- require face coverings in shared spaces, such as restrooms and hallways and during in-person meetings.

PPE
Rule 8 of the MIOSHA emergency rules requires that employers provide appropriate PPE, including respiratory protection, to employees based on the exposure risks of the job and current CDC and OSHA guidelines. All PPE must be properly fitted, inspected, maintained, cleaned, stored, and disposed of. In workplaces that provide medical treatment to known or suspected COVID-19 cases, employees with frequent or prolonged close contact with such patients must be provided with and wear, at a minimum, an N95 respirator, goggles or face shield, and gown.

Training Requirements
Rule 10 of the MIOSHA emergency rules requires all employers to provide training and communication, in languages common among the employees, on the following subjects:

- workplace infection-control practices;
- proper use of PPE;
- how to notify the employer of COVID-19 symptoms or diagnosis;
- how to report unsafe working conditions.

This training must be updated if the employer’s COVID-19 preparedness and response plan changes or new information on COVID-19 transmission becomes available.
Recordkeeping Requirements

Rule 11 of the MIOSHA emergency rules requires that all employers maintain, for one year, records of employee training, the screening of persons entering the workplace, and any health surveillance notifications required by Rule 6.

OSHA Infectious Disease Standard Rulemaking

In 2010, OSHA published a Request for Information in the Federal Register seeking public comments on strategies to control exposure to infectious diseases in healthcare workplaces. After collecting public comments and holding public meetings, OSHA completed the SBREFA process in 2014. Since then, however, no public actions have occurred on this rulemaking; since spring 2017, this rulemaking has been listed as a “long-term action” in DOL’s semiannual regulatory agenda.

Congressional Activity to Require an OSHA Emergency Temporary Standard on COVID-19

On March 5, 2020, Representative Bobby Scott, chairman of the House Committee on Education and Labor, and Representative Alma Adams, chair of the Subcommittee on Workforce Protections, sent a letter to Secretary of Labor Eugene Scalia calling on OSHA to promulgate an ETS to address COVID-19 exposure among healthcare workers. This letter followed a January 2020 letter requesting that OSHA reopen its rulemaking on the infectious disease standard and begin to formulate for possible future promulgation an ETS to address COVID-19 exposure. Senator Patty Murray, ranking member of the Senate Committee on Health, Education, Labor, and Pensions and a group of Democratic Senators sent a similar letter to the Secretary of Labor calling for an OSHA ETS.

In addition, in March 2020, David Michaels, who served as the Assistant Secretary of Labor for Occupational Safety and Health during the Obama Administration, wrote an op-ed in The Atlantic calling on OSHA to promulgate a COVID-19 ETS. On March 6, 2020, the AFL-CIO and 22 other unions petitioned OSHA for an ETS on infectious diseases that would cover all workers with potential exposures. OSHA formally denied the AFL-CIO petition on May 29, 2020, claiming that an ETS is not necessary to protect employees from infectious diseases generally, or

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71 Letter from Representative Scott, chairman, House Committee on Education and Labor, and Representative Adams, chair, Subcommittee on Worker Protections, to The Honorable Eugene Scalia, Secretary of Labor, March 5, 2020, at https://edlabor.house.gov/imo/media/doc/2020-03-05%20OSHA%20ETS%20Letter.pdf.
from COVID-19. On May 4, 2020, the Center for Food Safety and Food Chain Workers Alliance submitted a petition requesting that OSHA promulgate an ETS to protect meat and poultry processing workers from COVID-19 exposure in the workplace. On May 18, 2020, the AFL-CIO petitioned the U.S. Court of Appeals for the D.C. Circuit for a writ of mandamus to compel OSHA to promulgate a COVID-19 ETS. The circuit court denied this petition on June 11, 2020.

H.R. 6139, the COVID-19 Health Care Worker Protection Act of 2020

On March 9, 2020, Representative Bobby Scott introduced H.R. 6139, the COVID-19 Health Care Worker Protection Act of 2020. This bill would require OSHA to promulgate a COVID-19 ETS within one month of enactment. The ETS would be required to cover healthcare workers and any workers in sectors determined by the CDC or OSHA to be at an elevated risk of COVID-19 exposure. The ETS would be required to include an exposure control plan provision and be, at a minimum, based on CDC’s 2007 guidance and any updates to this guidance. The ETS would also be required to provide no less protection than any state standard on novel pathogens, thus requiring OSHA to include the elements of the Cal/OSHA ATD standard, the VOSH COVID-19 ETS, and the MIOSHA emergency rules in this ETS. Title II of the bill would provide that hospitals and skilled nursing facilities that receive Medicare funding and that are owned by state or local government units and not subject to state plans would be required to comply with the ETS. Similar provisions are included in S. 3475.

P.L. 116-127, the Families First Coronavirus Response Act

The provisions of H.R. 6139 were included as Division C of H.R. 6201, the Families First Coronavirus Response Act, as introduced in the House. The American Hospital Association (AHA) issued an alert to its members expressing its opposition to the OSHA ETS provisions in the bill. Specifically, the AHA opposed the requirement that the ETS be based on the CDC’s 2007 guidance. The AHA stated that unlike severe acute respiratory syndrome (SARS), which was transmitted through the air, COVID-19 transmission is through droplets and surface contacts. Thus, the requirement of the 2007 CDC guidance that N95 respirators, rather than surgical masks, be used for patient contact is not necessary to protect healthcare workers from COVID-19, and the use of surgical masks is consistent with World Health Organization guidance. The AHA also

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76 Letter from Loren Sweatt, Principal Deputy Assistant Secretary of Labor, to Richard L. Trumka, president, AFL-CIO, May 29, 2020.
77 Letter from Bonnie Castillo, executive director, National Nurses United, to The Honorable Eugene Scalia, Secretary of Labor, and The Honorable Loren Sweatt, Principal Deputy Assistant Secretary of Labor for Occupational Safety and Health, March 4, 2020, at https://act.nationalnursesunited.org/page/-/files/graphics/NNUPetitionOSHA03042020.pdf.
79 In re: American Federation of Labor and Congress of Industrial Organizations, D.C. Cir., No. 19-1158, May 18, 2020. This petition was filed in the U.S. Court of Appeals as Section 6(f) of the OSH Act [29 U.S.C. §655(f)] grants this court exclusive jurisdiction to provide judicial review of OSHA standards.
claimed that shortages of available respirators could reduce the capacity of hospitals to treat COVID-19 patients, due to a lack of respirators for staff. The OSHA ETS provisions were not included in the version of the legislation that was passed by the House and the Senate and signed into law as P.L. 116-127.

H.R. 6379, the Take Responsibility for Workers and Families Act

Division D of H.R. 6379, the Take Responsibility for Workers and Families Act, as introduced in the House on March 23, 2020, includes the requirement that OSHA promulgate an ETS on COVID-19 within seven days of enactment and a permanent COVID-19 standard within 24 months of enactment to cover healthcare workers, firefighters and emergency response workers, and workers in other occupations that CDC or OSHA determines to have an elevated risk of COVID-19 exposure. Division D of H.R. 6379 would amend the OSH Act, for the purposes of the ETS only, such that state and local government employers in states without state plans would be covered by the ETS. The provisions of Division D of H.R. 6379 were also included in S. 3584, the COVID-19 Workers First Protection Act of 2020, as introduced in the Senate.

This legislation would specifically provide that the ETS would remain in force until the permanent standard is promulgated and would explicitly exempt the ETS from the Regulatory Flexibility Act, Paperwork Reduction Act, and Executive Order 12866. OSHA would be granted enforcement discretion in cases in which it is not feasible for an employer to fully comply with the ETS (such as a case in which PPE is unavailable) if the employer is exercising due diligence to comply and implementing alternative means to protect employees.

Like the provisions in H.R. 6139 and the version of H.R. 6201 introduced in the House, the ETS and permanent standard under H.R. 6379 would be required to include an exposure control plan and provide no less protection than any state standard on novel pathogens, thus requiring OSHA to include the elements of the Cal/OSHA ATD, the VOSH COVID-19 ETS, and the MIOSHA emergency rules in this ETS and permanent standard. Although the ETS provisions in H.R. 6139 and H.R. 6201 would require that the ETS be based on the 2007 CDC guidance, specific reference to the 2007 guidance is not included in this legislation. Rather, under H.R. 6379, the ETS and permanent standard would have to incorporate, as appropriate, “guidelines issued by the Centers for Disease Control and Prevention, and the National Institute for Occupational Safety and Health, which are designed to prevent the transmission of infectious agents in healthcare settings” and scientific research on novel pathogens.

States with occupational safety and health plans would be required to adopt the ETS, or their own ETS at least as effective as the ETS, within 14 days of the legislation’s enactment.

H.R. 6559, the COVID-19 Every Worker Protection Act of 2020

H.R. 6559, the COVID-19 Every Worker Protection Act of 2020, was introduced in the House by Representative Bobby Scott on April 21, 2020. This legislation includes the ETS and permanent standard provisions of Division D of H.R. 6379 and S. 3584 and would require that these standards cover healthcare workers, emergency medical responders, and “other employees at occupational risk” of COVID-19 exposure. This legislation also adds two provisions that would clarify the requirements for employers to record work-related COVID-19 infections and strengthen the protections against retaliation and discrimination offered to whistleblowers. Similar provisions are included in S. 3677 and were incorporated into H.R. 6800, the Heroes Act, as passed by the House.
COVID-19 Recordkeeping

Sections 8(c) and 24(a) of the OSH Act require employers to maintain records of occupational injuries and illnesses in accordance with OSHA regulations.\(^{81}\) OSHA's reporting and recordkeeping regulations require that employers with 10 or more employees must keep records of work-related injuries and illnesses that result in lost work time for employees or that require medical care beyond first aid.\(^{82}\) Employers must also report to OSHA, within 8 hours, any workplace fatality, and within 24 hours, any injury or illness that results in in-patient hospitalization, amputation, or loss of an eye. Employers in certain industries determined by OSHA to have lower occupational safety and health hazards are listed in the regulations as being exempt from the recordkeeping requirements but not the requirement to report to OSHA serious injuries, illnesses, and deaths.\(^{83}\) Offices of physicians, dentists, other health practitioners, and outpatient medical clinics are included in the industries that are exempt from the recordkeeping requirements.

OSHA regulations require the employer to determine if an employee's injury or illness is related to his or her work and thus subject to the recordkeeping requirements.\(^{84}\) The regulations provide a presumption that an injury or illness that occurs in the workplace is work-related and recordable, unless one of the exemptions provided in the regulations applies.\(^{85}\) One of the listed exemptions is "The illness is the common cold or flu (Note: contagious diseases such as tuberculosis, brucellosis, hepatitis A, or plague are considered work-related if the employee is infected at work)."\(^{86}\)

Because of the nature of COVID-19 transmission, which can occur in the community as well as the workplace, it can be difficult to determine the exact source of any person's COVID-19 transmission. Absent any specific guidance, this may make it difficult for employers to determine if an employee's COVID-19 is subject to the recordkeeping requirements.

Initial OSHA Recordkeeping Guidance

On April 10, 2020, OSHA issued enforcement guidance on how cases of COVID-19 should be treated under the recordkeeping requirements.\(^{87}\) This guidance stated that COVID-19 cases were recordable if they were work-related.

Under this guidance, employers in the following industry groups were to fully comply with the recordkeeping regulations, including the requirement to determine if COVID-19 cases were work-related:

- healthcare;
- emergency response, including firefighting, emergency medical services, and law enforcement; and
- correctional institutions.

\(^{81}\) 29 U.S.C. §§657(c) and 673(a).
\(^{82}\) OSHA's reporting and recordkeeping regulations are at 29 C.F.R. Part 1904.
\(^{83}\) The list of exempted industries is at 29 C.F.R. Subpart B, Appendix A. States with state occupational safety and health plans may require employers in these exempted industries to comply with the recordkeeping requirements.
\(^{84}\) 29 C.F.R. §1904.5.
\(^{85}\) 29 C.F.R. §1905.5(a).
\(^{86}\) 29 C.F.R. §1904.5(b)(2)(viii).
For all other employers, OSHA required employers to determine if COVID-19 cases were work-related and subject to the recordkeeping requirements only if both of the following two conditions were met:

1. There was objective evidence that a COVID-19 case may have been work-related. This could have included, for example, a number of cases developing among workers who worked closely together without an alternative explanation.

2. The evidence of work-relatedness was reasonably available to the employer. For purposes of this guidance, examples of reasonably available evidence included information given to the employer by employees, as well as information that an employer learned regarding its employees’ health and safety in the ordinary course of managing its business and employees.

**Updated OSHA Recordkeeping Guidance**

OSHA issued new guidance, effective May 26, 2020, on recordkeeping of COVID-19 cases. This new guidance rescinds the previous guidance issued by OSHA on April 10, 2020. Under this new guidance, all employers, regardless of type of industry or employment, are subject to the recordkeeping and recording regulations for work-related cases of COVID-19. To determine if an employer has made a reasonable determination that a case of COVID-19 was work-related, OSHA says it will consider the following factors:

- the reasonableness of the employer’s investigation of the COVID-19 case and its transmission to the employee;
- the evidence that is available to the employer; and
- the evidence that COVID-19 was contracted at work.

The guidance provides examples of evidence that can be used to demonstrate that a COVID-19 case was or was not work-related such as if an employee had frequent close contact with members of the public in an area with ongoing community transmission of COVID-19.

**H.R. 6559**

H.R. 6559 would require that the ETS and permanent standard established pursuant to the legislation include the requirement for the recording and reporting of all COVID-19 cases in accordance with OSHA regulations in place at the time of enactment. By referencing the regulations in place, this provision would serve to supersede OSHA’s guidance from April 10, 2020, and apply the requirement, currently provided in the guidance effective May 26, 2020, to determine the work-relatedness of COVID-19 cases to all employers covered by the recordkeeping regulations.

**Whistleblower Protections**

Section 11(c) of the OSH Act prohibits any person from retaliating or discriminating against any employee who exercises certain rights provided by the OSH Act. Commonly referred to as the

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OSHA ETS and COVID-19

whistleblower protection provision, this provision protects any employee who takes any of the following actions:

- files a complaint with OSHA related to a violation of the OSH Act;
- causes an OSHA proceeding, such as an investigation, to be instituted;
- testifies or is about to testify in any OSHA proceeding; and
- exercises on his or her own behalf, or on behalf of others, any other rights afforded by the OSH Act.90

Other rights afforded by the OSH Act that are covered by the whistleblower protection provision include the right to inform the employer about unsafe work conditions; the right to access material safety data sheets or other information required to be made available by the employer; and the right to report a work-related injury, illness, or death to OSHA.91 In limited cases, the employee has the right to refuse to work if conditions reasonably present a risk of serious injury or death and there is not sufficient time to eliminate the danger through other means.92

H.R. 6559 would require that the ETS and permanent standard promulgated pursuant to the legislation expand the protections for whistleblowers. The following additional activities taken by employees would grant them protection from retaliation and discrimination from employers and agents of employers:

- reporting to the employer; a local, state, or federal agency; or the media; or on a social media platform; the following:
  - a violation of the ETS or permanent standard promulgated pursuant to the legislation;
  - a violation of the infectious disease control plan required by the ETS or permanent standard; or
  - a good-faith concern about an infectious disease hazard in the workplace;
- seeking assistance from the employer or a local, state, or federal agency with such a report; and
- using personally supplied PPE with a higher level of protection than offered by the employer.

H.R. 6800, The Heroes Act

The provisions of H.R. 6559, including the provisions relating to recordkeeping and whistleblower protections, were included as Title III of Division L of H.R. 6800, The Heroes Act. H.R. 6800 was passed by the House on May 15, 2020. In a letter to Speaker of the House Nancy Pelosi, the AHA expressed its opposition to the ETS provisions in The Heroes Act citing the potential for confusion that new regulations could bring and the “ongoing global lack of supplies, equipment and testing capability” faced by hospitals.93 The AHA also stated that the provision

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90 29 C.F.R. §1977.3. Public-sector employees, except employees of the United States Postal Service, are not protected by the whistleblower provision, but may be covered by whistleblower provisions in other federal and state statutes.
91 For additional information on other rights covered by the whistleblower protection provision, see OSHA, January 9, 2019, Investigator's Desk Aid to the Occupational Safety and Health Act (OSH Act) Whistleblower Protection Provision, pp. 5-7, at https://www.osha.gov/sites/default/files/11cDeskAid.pdf.
93 Letter from Thomas P. Nickels, executive vice president, American Hospital Association, to Hon. Nancy Pelosi,
that would require the ETS to be based on state standards “suggests that the federal government is surrendering its responsibility to appropriately regulate the nation to a state government agency without consideration of whether that state’s decisions are appropriate for implementation anywhere and everywhere.”

**H.R. 925, The Heroes Act (Revised)**

The provisions of H.R. 6559 and H.R. 6800 were included in the House Amendment to the Senate Amendment to H.R. 925, the revised Heroes Act, passed by the House on October 1, 2020.

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Appendix. OSHA Emergency Temporary Standards

Table A-1. OSHA Emergency Temporary Standards (ETS)

<table>
<thead>
<tr>
<th>Year</th>
<th>Subject of ETS</th>
<th>Federal Register Citation of ETS</th>
<th>Result of Judicial Review</th>
<th>Judicial Review Case Citation</th>
</tr>
</thead>
<tbody>
<tr>
<td>1971</td>
<td>Asbestos</td>
<td>36 Federal Register 23207 (December 7, 1971)</td>
<td>Not challenged</td>
<td></td>
</tr>
<tr>
<td>1973</td>
<td>Organophosphorous pesticides</td>
<td>38 Federal Register 10715 (May 1, 1973); amended by 38 Federal Register 17214 (June 29, 1973)</td>
<td>Vacated</td>
<td>Florida Peach Growers Ass’n v. United States Department of Labor, 489 F.2d 120 (5th Cir. 1974)</td>
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<tr>
<td>1974</td>
<td>Vinyl chloride</td>
<td>39 Federal Register 12342 (April 5, 1974)</td>
<td>Not challenged</td>
<td></td>
</tr>
<tr>
<td>1976</td>
<td>Diving operations</td>
<td>41 Federal Register 24271 (June 15, 1976)</td>
<td>Stayed</td>
<td>Taylor Diving &amp; Salvage Co. v. Department of Labor, 537 F.2d 819 (5th Cir. 1976)</td>
</tr>
<tr>
<td>1977</td>
<td>1,2 Dibromo-3-chloropropane (DBCP)</td>
<td>42 Federal Register 45535 (September 9, 1977)</td>
<td>Not challenged</td>
<td></td>
</tr>
</tbody>
</table>


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FYI

From: Winingham, Bonita - OSHA  
   [O=EXCHANGE/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=0B9D7706070E4318BB3BECE734A-WININGHAM,]
Sent: 5/12/2020 6:47:19 PM
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Subject: FW: Region 7 Daily Report 5.12.2020

Below is the COVID-19 Daily Report for Region 7

Administrative Actions, Waivers, and Other Programmatic Changes that Impact Agency Provision of Service or Mission Delivery (Externally Facing)

- Nothing new to report

Guidance, Communication and Outreach with Stakeholders

- Nothing new to report

Actions That Affect Federal Facilities and Personnel

- Nothing new to report

Other Notable Responses

Region 7
- Media reports and unreleased White House report identifies the top ten areas of recorded surges of 72.4 percent or greater. Des Moines, Iowa is among the ten.
- The report includes a separate list of “locations to watch” that include: Kansas City, Missouri; Omaha and Lincoln, Nebraska. The rates of new cases in Kansas City represented an increase of more than 200 percent over the previous week.

Missouri
- St Louis County has stated it will be filing a lawsuit after a gym re-opened in violation of the county stay-at-home order.
- The St Louis area coronavirus task is reporting a downward trend in hospitalizations while acknowledging that the area has twice the number of cases as Kansas City and three times the deaths.
- Rep. Maxine Waters’ sister has died of coronavirus in a St. Louis hospital.
- Masks will be required to ride mass transit in the St. Louis area.

Nebraska
- Nebraska’s American Civil Liberties Union issued a four page plea to three health department directors and the state’s labor commissioner requesting them to mandate safety policies in meat packing plants... The ACLU memo requests health officials to mandate federal guidelines to do the following:... KETV NewsWatch 7 reached out to Gov. Pete Ricketts for a response to the ACLU’s plea. "Apparently, the ACLU in their press release is saying the facilities aren’t following OSHA’s guidelines," said Ricketts. "That’s really OSHA’s business to enforce, not the state of Nebraska.”
- Thousands of meatpacking workers across the country were recently ordered back to work in plants that have seen massive outbreaks of COVID-19... President Trump’s recent executive order hasn’t stopped more plants from closing down due to COVID-19 concerns, but 14 are slated to reopen this week, spiking fears among some workers that they will inevitably catch the virus. And while Agriculture Secretary Sonny Perdue has promised the agency is "working round the clock" to implement OSHA’s recent pandemic safety guidelines for meatpackers, many are concerned those policies don’t go far enough to reduce the risk of transmission in plants nationwide... A few days later, after coping with another week of more sick coworkers and the lack of communication around the near closure, dozens of employees, advocates and their families felt they had no choice left but to protest pandemic conditions at the plant. In the age of COVID, that means weekly drive-by demonstrations.

Iowa
- State leaders are closely watching Iowa’s meat packing facilities, including Tyson’s pork processing plant in Perry. The Perry plant had at least 730 workers test positive for COVID-19. KCCI’s Lauren Donovan interviewed a woman who tested positive at the plant. Referred to Iowa OSHA.
- The Friendship Village Retirement Community is reporting that as of May 11th, 20 employees are reported positive due to COVID-19. Referred to Iowa OSHA.
- After reports of an uptick in COVID-19 cases, a strike team tested more than 400 employees at a Postville kosher beef plant. Rumors of COVID-19 at the plant have been circulating for weeks in the community of about 2,100 on the Allamakee-Clayton County border about 85 miles north of Cedar Rapids, Mayor Leigh Rekow said. Referred to Iowa OSHA.
- West Liberty Foods an Iowa turkey plant that is the site of a coronavirus outbreak said Friday that hundreds of employees will be furloughed this fall due to the nation’s economic collapse... The company confirmed Friday that 136 employees have tested positive for coronavirus, after mass testing at the West Liberty plant last week. Referred to Iowa OSHA.

Kansas
- The Wichita Area Office is investigation three worker COVID deaths at National Beef, Dodge City, KS.

Please let me know if you have questions.

Bonita

The photos below are links to safety and health information to help employers provide safe and healthful workplaces.
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