

COVID-19 & LIABILITY

DON'T LET YOUR FAILURE TO MITIGATE THE RISK OF COVID-19 ON THE JOBSITE BECOME A TARGET FOR YOU BEING SUED

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From the onset of the COVID-19 pandemic in the United States, construction businesses have been deemed to be part of this nation's essential infrastructure allowing construction activities to continue without interruption. While governmental authorities permitted construction employers to continue to conduct business during the initial outbreak of COVID-19, there was little reliable information about how exactly or how easily the COVID-19 virus was transmitted between individuals and definitely little to no industry-specific guidance on how to protect employees on the jobsite; other than to basically cover your coughs, wash your hands,

and maintain at least six-foot social distancing from other individuals. The lack of overall and industry-specific guidance for construction employers created

frustration for employers and anxiety among employees.

Fast forward to today, with COVID-19 not going away anytime soon, states and municipalities have issued face mask mandates. The Centers for Disease Control and Prevention (CDC) and the Occupational Safety and Health Administration (OSHA) have issued specific COVID-19 guidelines for construction regarding safe work practices to help guide employers to provide an overall safe and healthy workplace. These mandates and industry-specific guidelines now provide construction employers a playbook on how to manage and mitigate the risk of COVID-19 on jobsites. Failing to follow this playbook, however, exposes your business to potential legal liability if an employee or third-party contracts COVID-19 on the jobsite and it is determined that it was one of your employees on the jobsite who was the source in spreading the virus.

COVID-19-related lawsuits by employees and others have already started against employers, based upon the allegation that the employers failed to provide adequate protections in the workplace to mitigate against the risk of human-to-human transmission of COVID-19. The pivotal and most complex issue in this type of litigation is causation. That is, will the individual making the claim be able to establish that he or she actually became infected with the virus from the jobsite as opposed to some other source outside of their employment? Intertwined with the issue of causation is whether the employer breached its duty of ordinary care; that is, did the employer do



something or fail to do something that a reasonable employer would recognize as creating an unreasonable risk of injury?

The element of causation becomes somewhat easier to establish when the employer fails to follow the various COVID-19 mandates and industry-specific guidelines. On the other hand, an employer who implements and enforces the various COVID-19 safety mandates and guidelines on the jobsite will have a greater chance to defend against such a lawsuit. This is because having proactive measures to mitigate against the risk of the transmission of COVID-19 on the jobsite puts an employer in a better position to establish that the cause of the employee's infection came from a source outside of the workplace.

When one of your own employees becomes ill with COVID-19, OSHA has now made it your responsibility, as the employer, to conduct an assessment to determine whether the employee's illness is work-related, and, therefore, recordable on the OSHA injury and illness logs. In other words, OSHA has made it the employer's responsibility to first determine causation as to whether the employee's COVID-19 illness is job-related even before a potential lawsuit is filed.

As a result, this makes an employer's responsibility to adopt and follow legal mandates and industry-specific guidelines related to COVID-19 even more imperative so employers can plausibly assert that an employee's COVID-19 illness was not the result of any exposure on the jobsite. Adopting and implementing CDC and OSHA guidelines, and following Wisconsin's and applicable municipal face mask mandates, will help make the case for your business that the individual's illness is less likely to have originated from your jobsite or work practices, and rather, originated from some other source or environment.



Maintaining a Safe and Healthy Work Environment, Face Mask Mandates and CDC and OSHA Guidelines

For some individuals, choosing whether or not to wear a cloth face mask is a political statement. However, for construction employers, not requiring employees to wear a cloth face mask on the jobsite, when applicable safety standards permit it, is an invitation for potential legal liability. You don't want an individual on the jobsite to become ill with COVID-19 because of your failure to have your employees wear face masks as recommended by the CDC and OSHA.

The state of Wisconsin, city of Milwaukee, and Dane County all currently have legal mandates that require individuals to wear a cloth face mask while indoors or in an enclosed space. There are exceptions, including when wearing a face mask creates a risk to the person related to their work as determined by government safety guidelines. The city of Milwaukee's face mask mandate also requires an individual to wear a face mask even while outdoors. Failing to comply with these state and municipal face mask mandates, when applicable, can subject violators to civil forfeitures. The CDC and OSHA also both recommend, but don't



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require, that employees engaged in construction activities wear cloth face masks in addition to maintaining social distancing at the jobsite. Although these recommendations are simply suggested guidelines for employers to follow and do not necessarily constitute legally enforceable standards or regulations, they nonetheless set an expected standard of care for construction employers to follow.

In addition, both the CDC and OSHA require construction employers to maintain a healthy work environment during the COVID-19 outbreak and recommend that employers take steps to reduce the transmission risk of COVID-19 among workers at jobsites. These steps include:

- Training employees on the signs and symptoms of COVID-19.
- Encouraging workers to stay home if they are sick.
- Requiring employees/visitors showing signs or symptoms of COVID-19 to leave the jobsite and return home.
- Training employees on proper respiratory etiquette, including covering coughs and sneezes.
- Encouraging workers to wear cloth face masks over their



noses and mouths to prevent them from spreading the virus to others and requiring workers to do so when state or local units of government require it.

- Maintaining social distancing of at least six feet between workers when possible.
- Limiting in-person or toolbox meetings and practicing social distancing during such meetings.
- Limiting tool sharing, and if such tool sharing is necessary, then providing instructions for workers on using alcohol-based wipes to clean tools before and after use.
- Cleaning and disinfecting frequently-touched surfaces.
- Having workers practice proper hand hygiene by either making soap and water available for hand washing, or if water is not available, then making hand sanitizers available that consists of at least 60% alcohol.
- Discouraging employees from ridesharing to the jobsite.
- Encouraging employees to report any safety and health concerns.

A construction employer who does not adopt and follow these basic COVID-19 safe work practices, including requiring its employees to wear face masks on the job as recommended by the CDC and OSHA or as required by either Wisconsin's or the various municipal face mask mandates when applicable, faces potential legal liability. That liability, depending on who makes the claim, can either be made under the worker's compensation statute or as a tort claim for negligence in circuit court. Negligence

under Wisconsin law occurs when a person fails to exercise ordinary care, which is care a reasonable person would use in similar circumstances. While damages for a claim under worker's compensation is limited by statute, such damage limitations do not apply in a claim for negligence.

A construction jobsite is unique compared to other workplaces. Oftentimes, employees from other contractors are working at the same jobsite alongside your employees. If another contractor's employee becomes infected with COVID-19 from one of your employees not wearing a face mask on the jobsite, for example, then you face a potential claim for legal liability; if it can be established that you failed to exercise ordinary care by not having implemented a COVID-19 response plan designed to protect workers on the jobsite from the transmission of COVID-19 between individuals. That is, an employer's failure to follow and enforce any of the applicable safe work practices in a COVID-19 environment may open the door for a tort claim for negligence. Although causation, or proving that an individual actually contracted COVID-19 on the jobsite from one of your employees, may be extremely difficult to establish (as opposed to that individual having become infected from some other source like visiting a crowded restaurant or bar, riding mass transit, or coming in contact with another person outside of the jobsite having COVID-19), the potential for legal liability still exists.

 **OSHA Requires Employers to Investigate Whether Employees' COVID-19 Illnesses are Work-Related**

As of May 26, 2020, OSHA obligates employers, who are required to keep OSHA injury and illness logs, to conduct an assessment of every employee who contracts COVID-19 to determine whether the illness is work-related and, therefore, recordable as an OSHA reportable injury or illness. This required assessment is actually an investigation by the employer to determine whether elements and conditions in the employee's work environment were the cause of the COVID-19 infection. OSHA requires that the employer's investigation be reasonable in that the investigation should be conducted in good faith and designed to collect that information which is probative as to whether the employee's illness is work-related. The employer's investigation should consider the type of work performed, the proximity of the work performed to other workers, preventive



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measures in place to mitigate against the risk of transmission of COVID-19, and other factors such as ongoing community transmission. OSHA requires an employer to consider an illness, like COVID-19, to be work-related if an event or exposure in the work environment either caused or contributed to the resulting condition or illness. However, it is OSHA's position that if, after a reasonable and good faith investigation, the employer cannot determine whether it is more likely than not that exposure in the workplace played a causal role with respect to an employee acquiring COVID-19, then the employer is not required to record the COVID-19 as a recordable illness.

Whether in a lawsuit for negligence or in a claim for worker's compensation benefits, this required OSHA assessment to determine whether an employee's COVID-19 infection is work-related may be one of the first pieces of evidence that a plaintiff's lawyer attempts to obtain. The lawyer will try to establish causation that the employee's exposure to COVID-19 is directly from the employee's work environment. If an employer's own assessment concludes that an employee's COVID-19 infection is work-related, the road for an infected worker to establish causation may be a little less difficult.

Therefore, having your business implement and enforce safe work practices related to COVID-19 is important. This means requiring your employees to wear face masks when permitted under applicable safety standards. This will allow your business, consistent with OSHA's enforcement policy, to conclude that an employee's COVID-19 illness is not work-related. This is because

it will then be plausible that it will be more likely than not that exposure in the workplace did not play a causal role with respect to the employee acquiring COVID-19. However, your business will change the calculus of this determination if, on the other hand, you do not implement the necessary safe work practices on your jobsites related to protecting your employees and others against the risk of infection of COVID-19 between workers.

Conclusion

Having a basic COVID-19 response plan that puts in place specific safe work practices to address the risk of COVID-19 on the jobsite and implementing CDC and OSHA guidelines decreases the risk of human-to-human transmission of COVID-19 on your jobsites. It also provides you with a greater credible opportunity to conclude that an employee's COVID-19 infection is not work-related, and therefore, not recordable for OSHA purposes. If, however, you do not have a basic COVID-19 response plan, and you do not make an effort to implement CDC and OSHA guidelines on your jobsites, then it may be difficult for you to conclude in good faith that an employee's COVID-19 infection occurred from some source outside of the workplace. In that case, you clearly will place a litigation target on the back of your business. Avoid being that target. [ABC Wisconsin](#)

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