

# **OSHA's COVID-19 Guidelines for the Construction Industry are Generally Consistent with New York State's and New York City's Existing Guidelines**

Article By:

Lisa B. Andrzejewski

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On May 26, 2020, the Occupational Safety and Health Administration (OSHA) launched a webpage with coronavirus-related guidance for construction employers and workers. The guidance includes recommended actions to reduce the risk of exposure to the coronavirus. While this guidance is not a standard or regulation and creates no new legal obligations, following OSHA guidance could help in defending a General Duty Clause citation.

Under OSHA, all employers have the obligation, pursuant to the General Duty Clause, to “furnish to each of its employees a workplace that is free from recognized hazards that are causing or likely to cause death or serious physical harm.” Consistent with trends seen prior to the COVID-19 pandemic, most OSHA investigations and citations for COVID-19 related issues are arising from employee complaints. Should OSHA issue a citation to an employer, the penalties per violation can range from \$9,472 to \$134,937.

[OSHA's recent COVID-19 guidance for construction](#) employers generally compiles and consolidates OSHA's preexisting health and safety principles related to workplace social distancing and use of safety protection. The following is a brief summary of some important aspects of OSHA's guidance as it applies to construction sites:

- As part of the hazard assessments already required under OSHA regulations, employers should be conducting a job hazard analysis that includes COVID-19 hazards to help determine whether work activities require close contact (within 6 feet) between workers and customers, visitors, or other members of the public. When a job hazard analysis identifies activities with higher exposure risks, and those activities are not essential, employers should consider delaying them until they can be performed safely.
- If indoor construction work is determined to be essential or emergency work, “and a person ... suspected of having or known to have COVID-19 is present at the worksite in close proximity to where workers would be working,” additional engineering and administrative controls should be implemented, such as erecting plastic barriers between workers and other

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occupants.

- Employers should periodically reassess engineering controls, as well as work practices and administrative controls, to identify any possible changes to decrease the need and use of N95 or comparable respirators and other PPE. This will allow these high demand materials to be directed to activities associated with higher COVID-19 exposure risks. For example, dust control or collection could be increased when cutting, breaking, jackhammering, or drilling so that the use of an N95 or comparable respirator would not be necessary.
- Employers should recognize that the wearing of cloth face coverings at construction sites presents unique challenges to workers who may be working eight or more hour shifts. Employers should not only ensure the face coverings they are providing fit properly and securely, but also assess the need to make available multiple masks to each worker per shift. This is because at construction sites face coverings can quickly become wet, soiled, or otherwise visibly contaminated, and should be replaced.
- Employers should screen all workers and visitors at all construction sites for signs and symptoms of COVID-19. Additional administrative controls can include staggered work schedule, identifying and eliminating “choke points” where social distancing is not possible, coordinating site deliveries to eliminate congestion and implementing delivery controls (e.g., delivery personnel remain in their vehicles if at all possible), eliminate or reduce the duration of in-person meetings, and implement and maintain stringent and rigorous cleaning and sanitation efforts.

In New York State, OSHA exercises authority over private sector employers and federal government workers, while state and local government workers are regulated by the Public Employee Safety and Health Bureau (PESH), which is part of the New York Department of Labor. PESH has generally adopted all OSHA standards applicable to state and local government employment and has the authority to develop alternative and/or state-initiated standards. A brief summary of the [New York State Plan](#) is included in the Code of Federal Regulations at 29 C.F.R. § 1952.24.

In addition to OSHA and PESH guidance and regulations, New York State’s Empire State Development has separately issued required construction industry safety and health precautions. The [mandatory health and safety guidelines for the construction industry](#) (“NY Guidance”) address COVID-19 protection in the areas of physical distancing, protective equipment, cleaning and hygiene, and communication. The NY Guidance is generally equal to or more stringent than OSHA’s recent guidance. For example, the NY Guidance restricts indoor work to only 1 worker per 250 sq. feet, while OSHA describes “close contact” indoors as 6 feet or less. While OSHA recommends “screening of all workers and visitors at all construction sites,” NY Guidance recommends (although does not mandate) “prohibit[ing] visitors from the site.” The OSHA guidelines state that employers should “implement and maintain stringent and rigorous cleaning and sanitation efforts”, while NY Guidance discusses in detail the cleaning and sanitation requirements including the need for “maintaining cleaning logs.”

As for New York City construction (currently limited to emergency construction and essential businesses, but soon to re-start), the Department of Buildings (DOB) has issued its [“Industry Best Practices for Physical Distancing Guidelines for Construction Sites”](#) (“NYC Guidelines”). These “are based on the latest COVID-19 guidance from the CDC, OSHA and other publications.”

“Best Practices” may be a misnomer, however, inasmuch as the DOB advises in its “[FAQs](#)” that “[v]iolations for not practicing social distancing on an essential construction site will result in a maximum penalty of \$10,000, issued to each permit holder found in violation on the site.” It is unclear if the DOB’s consideration of “social distancing” is limited to solely what is required under federal and state government requirements, or if there must be demonstrated compliance with the DOB’s listed Best Practices.

In that regard, the NYC Guidelines vary slightly from the NY Guidance for worker distancing. As described above, the NY Guidance allows 1 person per 250 sq. feet when performing construction indoors. By contrast, the NYC Guidelines provide very specific examples and potential strategies for “*all operations* when proper physical distancing can’t be followed” (emphasis added), including eliminating contractors altogether: “Replace a worker with mechanical means for operations that require multiple workers.” Unfortunately, the DOB does not provide any recommendations for the “mechanical means” it proposes.

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