

CONSTRUCTION SAFETY INDUSTRY COALITION

April 17, 2020

VIA ELECTRONIC MAIL

Ms. Loren Sweatt
Principal Deputy Assistant Secretary of Labor
Occupational Safety and Health Administration
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, D.C. 20210

Re: Construction Industry Safety Coalition
COVID-19 Outbreak Guidance

Dear Ms. Sweatt:

On behalf of the Construction Industry Safety Coalition (“CISC”), we write as a follow-up to the CISC’s March 23, 2020 letter to the Occupational Safety and Health Administration (“OSHA”) requesting guidance from the Agency regarding the COVID-19 outbreak. The CISC wishes to thank you and your team for recently publishing enforcement memoranda regarding the use of respiratory protection during the COVID-19 outbreak and COVID-19 recordability under 29 C.F.R. Part 1904. In addition, we appreciate OSHA’s very recent publication of its Interim Enforcement Response Plan (“Interim Enforcement Program”). Collectively, this guidance has been very helpful to construction contractors.

Recognizing the need for construction specific guidance and the essential nature of construction operations, the CISC developed a Construction Industry COVID-19 Exposure Prevention, Preparedness, and Response Plan (“Response Plan”) that could be adapted by contractors to protect their employees. It provides a program structure, key protective measures to consider, cleaning and disinfecting procedures, and other useful information, including a COVID-19 “Toolbox Talk.” The CISC intends to issue an updated plan to account for some of the recent public health guidance to controlling the virus.

As the CISC, OSHA, and the public health community continue to collectively address the outbreak, our contractor members are interested in receiving additional guidance from OSHA and, in particular, as it relates to construction.¹ With the risk of OSHA enforcement under the General Duty Clause, we are seeking OSHA guidance and information in two areas, as described more fully below: (1) reportability of COVID-19 cases, and (2) the recommended approach to social distancing and face coverings *in construction*.

¹ OSHA’s Interim Enforcement Program – correctly in the CISC’s view – focused principally on enforcement protocols in the *healthcare industry*.

1. Reporting of COVID-19 Cases

As stated above, the CISC appreciates the recent guidance given by OSHA regarding recording confirmed COVID-19 positive cases in various industries. The guidance distinguishes between employers of workers in the healthcare/emergency response/correctional industries and employers in other industries. With respect to the latter, OSHA stated that it will not enforce 29 C.F.R. Part 1904 to require those employers to make work-relatedness determinations, except where:

- a) There is objective evidence that a COVID-19 case may be work-related (for example, a number of cases developing among workers who work closely together without an alternative explanation); and
- b) The evidence was reasonably available to the employer (such as information given to the employer by employees, as well as information that an employer learns regarding its employees' health and safety in the ordinary course of managing its business and employees).

By its terms, the guidance only applies to “the requirements of 29 CFR Part 1904 with respect to the **recording** of occupational illnesses” (emphasis added). OSHA does not appear to address the requirement in 29 C.F.R. Part 1904 that employers **report** work-related confirmed COVID-19 positive cases that result in a fatality or the in-patient hospitalization of an employee. Similarly, in the Interim Enforcement Program, OSHA discusses reporting obligations and OSHA's response to same, but does not clarify whether the guidance given for recording COVID-19 cases is also applicable to reporting COVID-19 cases.

The same considerations driving the initial enforcement memorandum are equally applicable to reporting COVID-19 cases. It is very difficult for contractors to determine work-relatedness in any particular case and requiring contractors to analyze particular cases for work-relatedness will shift resources away from protecting employees from the virus itself. Given the above, the CISC urges OSHA to issue a second enforcement memorandum clarifying that its recordkeeping enforcement position applies to both *recording* and *reporting* obligations under 29 C.F.R. Part 1904.

2. Social Distancing and Face Coverings

In virtually all states and localities, construction work has been deemed “essential.” As a result, most contractors continue to work during the outbreak and contractors continue to have numerous questions regarding OSHA compliance. As OSHA stated explicitly in the Interim Enforcement Program, OSHA's General Duty Clause can be used by the Agency to cite employers for not taking adequate precautions to protect their employees from COVID-19. There are two particular issues that have arisen recently that are of significant concern to contractors: social distancing and face coverings.

- a) *Social Distancing*. One of the most basic recommendations by OSHA and the Centers for Disease Control and Prevention (“CDC”) relates to social distancing. While

working, employees are strongly encouraged to maintain at least six feet between each other. This will help slow the spread of the virus. The CISC's Response Plan includes a social distancing recommendation. Notwithstanding this, there are times where it could be difficult to work six feet apart on construction jobsites. The nature of some construction activities makes social distancing challenging.

Several contractors have received employee complaint letters asserting that employers are not enforcing social distancing requirements, creating a hazard at the worksite. This is of concern, as these could ultimately result in an on-site inspection and – possibly – alleged violations issued by OSHA under the General Duty Clause. Without any guidance from OSHA regarding how to address situations where keeping six feet away presents a challenge, contractors are faced with potential citation even though they are taking multiple steps to protect employees from COVID-19.

The CISC requests that OSHA issue guidance to contractors making it clear that social distancing should be practiced where possible, but that a failure to do so will not, on its own, result in a General Duty Clause violation. Furthermore, the CISC notes that there is general confusion among contractors regarding whether, and how, to implement multiple CDC and OSHA recommendations at the same time for preventing spread of the virus on construction worksites (e.g., need to enforce social distancing when face coverings are mandated by state or local authorities).

- b) *Face Coverings*. Since the CDC issued a recommendation that persons wear face coverings when in public, several states and localities have issued similar recommendations for essential employers. In some circumstances, local authorities are mandating such use, as noted above. As a result, several contractors are questioning whether such face coverings are PPE or whether there are any other requirements that contractors must consider when allowing or mandating their use.

The CISC recommends that OSHA issue guidance clearly stating that face coverings are not PPE, as OSHA recognized during a conference call on April 8, 2020 and alluded to in its enforcement memorandum regarding use of non-NIOSH certified respirators. Unlike N95 filtering facepiece respirators, the face coverings do not serve as barriers to the transmission of the virus *to the wearer*; however they are effective at preventing community spread and should be promoted as meeting CDC recommended guidelines. This clarification is important. It will ensure that all employers and employees understand the purpose of the face coverings and their limitations, as opposed to respiratory protection program requirements. It will also help employers establish practices for the use and maintenance of the face coverings, whether voluntary or mandatory.

Again, we appreciate the information provided by OSHA to date related to COVID-19. The CISC continues to stand ready to support the Agency to protect employees during this difficult time.

Sincerely,

American Road and Transportation Builders Association
American Society of Concrete Contractors
American Subcontractors Association
Associated Builders and Contractors
Associated General Contractors
Association of the Wall and Ceiling Industry
Concrete Sawing & Drilling Association
Construction & Demolition Recycling Association
Distribution Contractors Association
Interlocking Concrete Pavement Institute
International Council of Employers of Bricklayers and
Allied Craftworkers
Leading Builders of America
Mason Contractors Association of America
Mechanical Contractors Association of America
National Asphalt Pavement Association
National Association of Home Builders of the United States
National Association of the Remodeling Industry
National Demolition Association
National Electrical Contractors Association
National Roofing Contractors Association
National Utility Contractors Association
Natural Stone Council
Natural Stone Institute
Sheet Metal & Air Conditioning Contractors' National
Association
The Association of Union Constructors
Tile Roofing Industry Alliance

cc: Rachel Mondl (*via* Electronic Mail)
Kelly Tyroler (*via* Electronic Mail)