



## Managing the Risk of COVID-19 Related Lawsuits Against Employers

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The COVID-19 pandemic is an economic boon for law firms that prosecute class actions on behalf of their client-victims. Businesses face legal exposure under various theories from people contracting the virus that they claim was linked either to the workplace or to the service provided. Potential plaintiffs include current employees and members of their households, as well as persons outside the employment relationship like customers, vendors, first responders, and government bodies.<sup>1</sup> One source has tracked over 340 complaints filed around the United States that allege some sort of breach of employment law.<sup>2</sup>



The failure to exercise reasonable care in managing COVID-19 at the workplace lies at the core of most of this litigation. One obstacle for the plaintiffs<sup>3</sup> is defining the standard of care against which to hold businesses responsible. Currently, there is no federal OSHA standard on COVID-19 in the workplace<sup>4</sup>, and, absent Congressional action, it is not likely that OSHA will promulgate a standard.<sup>5</sup> Plaintiffs are left with the guidance jointly issued by OSHA and the CDC, as well as guidance in executive orders issued by state and local governments.

As more states and localities begin to open up commercial activities, federal agencies, and state and local governments are encouraging and, in some places, requiring employers to develop and implement a comprehensive screening and monitoring strategy for employees aimed at preventing the introduction of COVID-19 into the workplace.



**Pete Nemmers**  
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## Managing the Risk of COVID-19 Related Lawsuits Against Employers

### Temperature and Other Medical Screening of COVID-19 Symptoms

Of course, the first step in the prevention of COVID-19 in the workplace lies with the employee. Employees should be required to self-screen, and, if they feel ill and display any of the COVID-19 symptoms, they must stay home. But, in addition to these self-screens taken by employees before even attempting to report to the workplace, many executive orders recommend that employers check worker temperatures and conduct symptom screens before entry into the workplace.<sup>6</sup>

The Equal Employment Opportunity Commission (EEOC) has stated in recent guidance<sup>7</sup> that, although it constitutes a medical inquiry under the Americans with Disabilities Act, employers are permitted to test and screen workers in order to determine possible exposure to COVID-19, provided the employers do so in accordance with applicable guidance from the government. Per guidance<sup>8</sup> jointly posted by the CDC and OSHA, employers who choose to screen workers for COVID-19 symptoms and possible exposure before starting their workday should:

- Develop the program in consultation with state and local health officials and occupational medicine professionals.
- Apply the program to all employees. (Do not select only older employees or employees with known medical conditions for screening, for example, to minimize potential claims of discrimination.)
- Screen before entry into the workplace. (Be careful to manage the process to avoid unintended wait time that may be compensable time pursuant to the Portal to Portal amendments to the Fair Labor Standards Act.)
- Provide verbal screening in appropriate language(s) that the worker will understand to determine whether workers have had COVID-19 symptoms in the past 24 hours.



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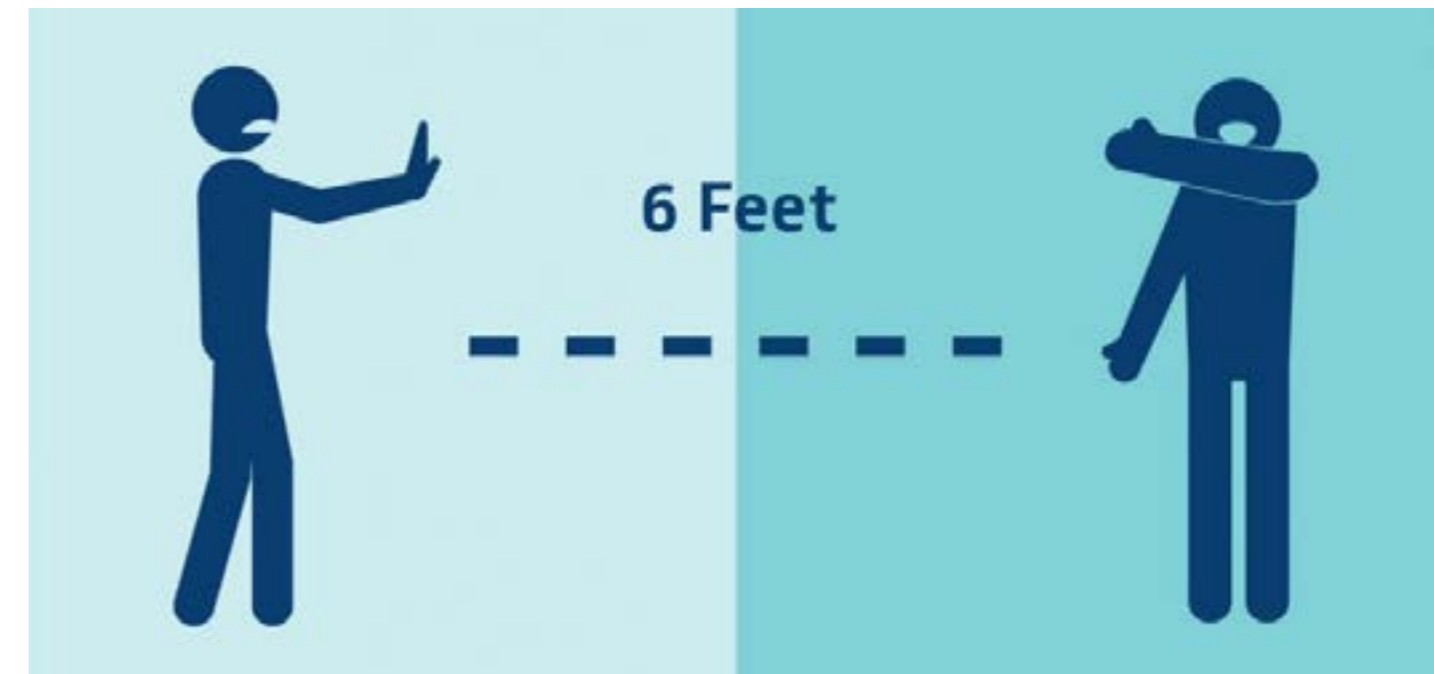
- Check temperatures of workers at the start of each shift to identify anyone with a fever of 100.4°F or greater (or reported feelings of feverishness).
- Ensure that screeners are trained to use temperature monitors and that monitors are accurate under conditions of use (such as cold temperatures).
- Evaluate the burdens and benefits of recording workers' temperatures or asking them to complete written questionnaires. These records must be retained for the duration of the workers' employment plus 30 years. *See 29 CFR § 1910.1020.* In addition, both the Americans with Disabilities Act and the Family Medical Leave Act require that the records be treated confidentially and maintained separately from personnel files.
- Ask whether the employee has been directly exposed to someone diagnosed with COVID-19.
- Determine whether the employee has traveled to any known CDC hotspots since the last screening or within the last two weeks.

Of course, employees should not enter the workplace if they have a fever of 100.4°F or higher (or report feelings of feverishness), or if screening results indicate that the worker is suspected of having COVID-19 based on symptoms, or if the employee says direct exposure to another person who has been diagnosed with COVID-19. Instead, employers should encourage self-isolation under the management of a healthcare provider. Return to work should be consistent with current CDC recommendations.

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The CDC/OSHA guidance also urges employers not to overlook the safety and health of the screeners. To protect them from exposure to potentially infectious workers entering the facility, employers should:

- Implement engineering controls, such as physical barriers or dividers or rope and stanchion systems, to maintain at least 6 feet of distance between screeners and workers being screened.
- If screeners need to be within 6 feet of workers, provide them with appropriate PPE based on the repeated close contact that the screeners have with other workers.
  - o Such PPE may include gloves, a gown, a face shield, and, at a minimum, a face mask.
  - o N95 filtering facepiece respirators (or more protective equipment) may be appropriate for workers performing screening duties and necessary for workers managing a sick employee in the work environment if that employee has signs or symptoms of COVID-19. If respirators are needed, they must be used in the context of a comprehensive respiratory protection program that includes medical exams, fit testing, and training per 29 CFR § 1910.134.



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### Face Coverings at Work

The latest FAQs from OSHA recommend that employers encourage workers to wear face coverings at work. Face coverings are intended to prevent asymptomatic or pre-symptomatic wearers from spreading potentially infectious respiratory droplets to others. As a source control, face coverings are not considered by OSHA to be PPE and cannot be used in place of respirators when respirators are otherwise required.

### Conclusion

While many states have enacted immunity laws to protect businesses against COVID-19 liability, prudent employers should familiarize themselves with applicable guidance published at the federal level by OSHA and CDC and guidance issued by applicable state and local governments. Compliance with the guidance best positions employers against the risk of COVID-related liability. **For the full text, including citations referencing pending court cases, click [here](#).**



**Michael C. Lord, an attorney with Williams Mullen.** *Mike has over three decades of experience in providing occupational health and safety counsel and citation defense. By handling hundreds of these matters, he has practical experience with the General Duty Clause and virtually every OSHA standard. Williams Mullen is a regional, full-service law firm with approximately 240 attorneys in offices across North Carolina, South Carolina, Virginia and Washington D.C. The goal of Williams Mullen is to provide solutions to help clients' businesses thrive.*

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## Top Causes of Workplace Injuries Costing Employers \$1B a Week

The top ten causes of workplace injuries, such as slips, trips, and falls, and strains from lifting heavy objects are costing U.S. businesses more than \$1 billion per week (that's billion with a B!), according to a new report from Liberty Mutual Insurance.

Disabling workplace injuries cost employers \$59 billion per year with the top ten causes making up 89% or \$52.93 billion of the total cost burden, the report states.

Obviously, getting these top causes under control could keep employees from getting hurt while saving the company a great deal of money.

The annual report is based on information collected by Liberty Mutual, the U.S. Bureau of Labor Statistics and National Academy of Social Insurance on the top causes of the most serious workplace injuries – those that cause employees to miss work for more than five days.

### The Top 5

The 2020 Workplace Safety Index names these causes as the top five:

1. Overexertion involving outside sources, costing \$13.98 billion per year and accounting for 23.5% of the overall national burden
2. Falls on the same level, costing \$10.84 billion per year and 18.2% of the burden
3. Being struck by an object or equipment, costing \$6.12 billion per year and 10.3% of the burden.
4. Falls to a lower level, costing \$5.71 billion per year and 9.6% of the burden.
5. Awkward postures including bending, reaching, twisting, climbing, crawling, etc. costing \$4.69 billion per year and 7.9% of the burden

These injury cases account for 69.5% of the total cost burden employers bear.





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#### The Final 5

The remaining five causes, listed below, make up 19.5% of the total cost burden:

1. Vehicle crashes, costing \$3.56 billion per year
2. Slips or trips without a fall, costing \$2.06 billion per year
3. Repetitive motions involving microtasks, costing \$2.05 billion per year
4. Colliding with objects, costing \$2 billion per year
5. Running equipment or machinery, costing \$1.92 billion per year

Causes were ranked by their direct cost to employers based on medical and lost-wage expenses, and for the sake of accuracy, the index is based on data from three years prior, so the 2020 index reflects 2017 data.

In tallying up this list, ergonomic related injuries account for \$20.72 billion dollars alone! It is of no surprise that implementing a proactive ergonomics program would be beneficial to not only the employees, but to the bottom line. To learn how to implement an ergonomics program, and more, click [here](#) to register for NASP's Workplace Ergonomics Specialist course.

## Two Great Courses, One Week of Excitement and Education

It is no secret that e-learning is all the rage during this COVID-19 pandemic. While e-learning is certainly a great alternative to traditional courses, NASP understands that some training, and some individuals, are best suited for live, instructor-led classes. Benefits to NASP's instructor-led courses include:

- The opportunity for individuals to have more in-depth conversations, which allows a greater comprehension of the subject matter.
- A space for individuals to make genuine connections both inside and outside of their organization.
- Accountability and Return on Investment (ROI). NASP's instructors are better able to identify an individual's comprehension by leveraging group exercises and discussions.
- Hands-on learning. Experiential, or kinesthetic learners can struggle with e-learning content because of its presentation and limited opportunities for a hands-on approach. NASP's live training, by design, can support all types of learners.

Join NASP in Wilmington, NC on October 12th -16th for a one-of-a-kind training experience. For the first time, NASP will be combining the [Certified Safety Manager \(CSM\)](#) and [Certified Safety Manager-Construction \(CSMC\)](#) courses to maximize training effectiveness during this pandemic.







## Two Great Courses, One Week of Excitement and Education



Students will enjoy three days of energetic training focused on training methodologies, workplace safety, and behavior-based safety. Breakout sessions, conducted in the final two days, will focus on various General Industry and Construction related standards depending on which certification the student is seeking to gain.

During this course, NASP will be implementing all safety precautions necessary to meet CDC, OSHA, and state-level guidance. The classroom will be optimized to provide social distancing, and hand sanitizer will be provided to all students. Students are required to wear a face mask when not able to socially distance per state guidelines.

Enroll today. **Only four (4) seats remain!** Seating is limited due to state capacity requirements.

To learn more and register for CSM, click [here](#) now.

To learn more and register for CSMC, click [here](#) now.



## OSHA Regulations up for Review, Revisions in First 2020 Agenda

OSHA has listed 24 regulations for review in its first Regulatory Agenda of 2020. Standards covering cranes and derricks, beryllium, forklifts, silica, and workplace violence are on the agenda.

Here's a breakdown by stage in the regulatory process:

### Final rules

These are among the standards which are closest to the finish line for revisions:

- Exposure to beryllium, review general industry provisions: The revisions OSHA proposes are to clarify the standard in response to comments. OSHA is reviewing comments received.
- Occupational exposure to beryllium and beryllium compounds in construction and shipyard sectors: Exposure to construction and shipyards occurs almost entirely during abrasive blasting and welding. The proposal would tailor the requirements for construction and shipyards to those exposures.
- OSHA access to employee medical records: OSHA's regulation 1913.10 includes procedures for OSHA personnel when obtaining and using personally identifiable employee medical information. OSHA has identified several needed revisions.



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# Proposed Rule Change

### Proposed rules

OSHA is working on revisions to these standards, but they're further away from completion:

- Amendments to the Cranes and Derricks in Construction Standard: This would make various clarifications to the standard. Notice of Proposed Rulemaking (NPRM) scheduled July 2020.
- Update to Hazard Communication Standard: This would harmonize the HCS to the latest edition of the Globally Harmonized System of Classification and Labeling of Chemicals. NPRM scheduled for August 2020.
- Powered industrial trucks: OSHA will develop a proposed rule updating the consensus standard of the American National Standard B56.1 to the 2016 version. NPRM scheduled December 2020.
- Lockout/tagout update: OSHA would take into account recent technology advances that use computer-based controls of hazardous energy and make changes to its existing lockout/tagout standard. NPRM scheduled April 2021.
- Exposure to crystalline silica, revisions to Table 1 for construction: OSHA is interested in control measures, tasks, and tools, and dust control methods not addressed in Table 1, Specified Exposure Control Methods When Working with Materials Containing Crystalline Silica. NPRM scheduled March 2021.
- Welding in construction confined spaces: OSHA wants to eliminate any ambiguity about the definition of confined space that applies to welding in construction. NPRM scheduled July 2020.

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- Drug Testing Program and Safety Incentives Rule: OSHA proposes to make official its position that its regulations don't prohibit post-incident drug testing or safety incentive programs. NPRM scheduled November 2020.
- Personal protective equipment in construction: This revision would clarify the requirement for the fit of PPE in construction. NPRM scheduled August 2020.
- Walking working surfaces: OSHA has received feedback indicating that several regulatory provisions of the 2016 final rule on Walking-Working Surfaces are unclear. NPRM June 2020.



## Virginia First State to Adopt Safety Standard for Coronavirus

**Virginia is the first state in the nation to adopt workplace safety standards to address the coronavirus.**

The state's Safety and Health Codes Board adopted the emergency temporary standard on infectious disease prevention – drafted under the direction of Governor Ralph Northam – by a 9-2 vote July 15.

Virginia is mandating PPE, sanitation, social distancing, infectious disease preparedness, recordkeeping and training under the new standard, which will be in place for six months, according to The Hill.



### **Social Distance, Mask Mandates**

Employers are also required to mandate social distancing measures and face coverings for employees in customer-facing positions.

If social distancing isn't possible, frequent access to hand washing or hand sanitizer is required along with regular cleaning of high-contact surfaces.

Employees must be notified within 24 hours if a co-worker tests positive for the virus, and employees known or suspected to be positive for COVID-19 aren't allowed to return to work for ten days or until they receive two consecutive negative tests.

These rules were adopted since there is no federal standard addressing the coronavirus despite calls from labor unions and worker advocate groups for OSHA to create one.

Do you feel like your in-house COVID-19 policies and procedures are lacking? Want to know how to better protect your employees? Then look no further! Enroll today in NASP's COVID-19 Specialist course to learn how to best combat this epidemic in your workplace! Click [here](#) to view the course page and register today.

*National Association of Safety*

**NASFP**

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