



REG **REVIEW**SM

July 2020

OSHA Releases Spring 2020 Regulatory Agenda

On July 1, the White House Office of Management and Budget released the Spring 2020 Unified Agenda of Regulatory and Deregulatory Actions. The Agenda provides a sneak peek into the federal government's plans to create or revise regulations in the next year.

Some of OSHA's listings for upcoming rulemakings include:

Rule	Timetable
Exposure to Beryllium to Review General Industry Provisions	Final rule, July 2020
Occupational Exposure to Beryllium and Beryllium Compounds in Construction and Shipyard Sectors	Final rule, July 2020
Procedures for Handling of Retaliation Complaints Under the Whistleblower Protection Statutes	The interim final rule, January 2021
Amendments to the Cranes and Derricks in Construction Standard	Proposed rule, July 2020
Communication Tower Safety	Proposed rule, December 2020
Update to the Hazard Communication Standard	Proposed rule, August 2020
Powered Industrial Trucks	Proposed rule, December 2020
Lockout/Tagout Update	Proposed rule, April 2021
Occupational Exposure to Crystalline Silica; Revisions to Table 1 in the Standard for Construction	Proposed rule, March 2021
Welding in Construction in Confined Spaces	Proposed rule, June 2020
Drug Testing Program and Safety Incentives Rule	Proposed rule, November 2020
Personal Protective Equipment in Construction	Proposed rule, August 2020
Occupational Exposure to Crystalline Silica: Revisions to Medical Surveillance Provisions for Medical Removal Protection	Proposed rule, April 2021

Other upcoming rules are still in the early stages of development; in many cases, OSHA is still gathering background information. These future revisions would affect the following areas:

- Emergency Response
- Mechanical Power Presses Update
- Tree Care Standard
- Prevention of Workplace Violence in Health Care and Social Assistance
- Blood Lead Level for Medical Removal



OSHA Issues Silica Standards Enforcement Guidance

OSHA has issued inspection and enforcement procedure guidance for its compliance safety and health officers (CSHOs) when addressing respirable crystalline silica exposures in general industry, construction, and maritime.

The new directive, CPL 02-02-080, provides guidance on how to enforce the silica standards' requirements, including:

- Methods of compliance;
- Table 1 tasks and specified exposure control methods;
- Exposure assessments;
- Housekeeping;
- Respiratory protection;
- Regulated areas;
- Recordkeeping;
- Employee information and training;
- Medical surveillance; and
- Communication of hazards.

The guidance also provides clarity on topics such as alternative exposure control methods when a construction employer does not fully and adequately implement Table 1; variability in sampling; multi-employer situations; and temporary workers.

OSHA began enforcing most provisions on the following dates:

- Construction - September 2017, with the enforcement of the requirements for sample analysis starting in June 2018.
- General industry and maritime - June 2018, with the enforcement of some medical surveillance requirements beginning on June 23, 2020.
- On June 23, 2021, OSHA will begin enforcing requirements for engineering controls for hydraulic fracturing operations in the oil and gas industry.

Cal/OSHA Recommends Delaying Some Medical Surveillance Examinations, Allows for Remote Review of Others

In recently issued emergency temporary guidance, Cal/OSHA recommends delaying some medical surveillance examinations due to the high risk of COVID-19 transmission and allows for remote review of others. Twenty-eight Cal/OSHA standards require employers to offer their employees medical surveillance examinations and other medical services on a specified schedule, when employees may be exposed to certain workplace hazards above an Action Level (AL).

The guidance includes a table to assist physicians and other licensed healthcare professionals (PLHCPs) who are planning to conduct mandated surveillance exams. The table suggests surveillance elements that might reasonably be delayed and those which should not be delayed, along with specific advice about certain standards.

For example, certain medical procedures, such as spirometry or audiometry in a closed hearing booth, pose an especially high risk of exposing both patients and medical staff to infectious droplets or aerosols and, therefore, could be delayed.

However, an initial respiratory exam and fit test must not be delayed when a respirator is required to protect an employee from airborne hazards. Likewise, surveillance exams pertinent to toxicants such as lead should not be postponed.

If an initial questionnaire or medical history reveals information about an employee's personal risk factors and guides the PLHCP's decisions about occupational exposures or the use of personal protective equipment (PPE), the employee's history should be obtained in a non-face-to-face setting.

Cal/OSHA emphasizes that this guidance does not relieve employers of their duty to offer mandated surveillance exams. However, the Agency recognizes that in the current pandemic, many employees will be engaged in "essential" jobs and tasks and that employers must rely on the medical judgment of a PLHCP in fulfilling these surveillance obligations.

OSHA: Worker Safety a Priority as Businesses Reopen

As more workplaces reopen, OSHA reminds employers that worker safety remains a priority amid both coronavirus and common workplace hazards.

OSHA notes that in all phases of reopening, employers need to plan for potential hazards related to the coronavirus, as well as those stemming from routine workplace processes.

The Agency recommends employers:

- Be aware that the pandemic may increase employee stress, fatigue, and distractions. These factors should be considered in planning employees' return to work to ensure the operations resume in a safe and healthful manner.

- Carefully plan before attempting to increase production or tasks to make up for downtime to avoid exposing employees to additional safety and health hazards.
- Provide workers with refreshers on safety and health training and address maintenance issues they may have deferred during a shutdown.
- Revisit and update standard operating procedures and remember that exposures to hazards may increase during shutdown and startup periods.
- Review and address process safety issues - including stagnant or expired chemicals - as part of their reopening effort.
- Remember that employers are prohibited from retaliating against workers for raising concerns about safety and health conditions.

Federal OSHA COVID-19 Enforcement Update, States Issue Mask Guidance

State and federal OSHA agencies have been responding to COVID-related complaints. State agencies may have adopted requirements for wearing masks under particular circumstances, and have been enforcing those provisions.

A spokesperson for the United States Department of Labor reported that, as of June 7, 2020, Federal OSHA has received 4,872 valid COVID-related complaints. The Agency initiated 471 COVID-related inspections and issued one COVID-related citation. The citation was issued to a healthcare employer for failing to report work-related hospitalizations in the time required by OSHA's recordkeeping rule at 1904.39. The spokesperson noted that OSHA will continue to prioritize COVID-related inspections.

Two state OSHA agencies recently published guidance on mask requirements based on risk evaluations.

Washington state OSHA published guidance titled "Which Mask for Which Task." Based on potential risk, employers can evaluate whether to require homemade cloth masks, disposable KN-95 masks, NIOSH-approved N-95 masks, or full-face respirators. The publication defines the following risk levels:

- **Negligible:** Cloth face coverings may be required in some circumstances when the risk is negligible (very low). You don't need a face covering if you work or drive alone, but a cloth face covering is required if you work outdoors or in a building around several other people and need to pass within six feet of them once or twice a day.
- **Low:** A cloth face covering is required when the risk for transmission is low, such as working around others while staying at least six feet apart, except for briefly passing others several times a day. Risk is also considered low when one or two workers provide personal services to healthy clients who also wear a cloth face covering.

- **Medium:** Risk for transmission is considered medium when you stay at least six feet away from others, but several times per day, the six-foot distance is broken for several minutes, and prevention measures such as physical barriers aren't feasible. Risk is also considered a medium when three to six people work in a room providing personal services to healthy clients who wear a cloth face covering.
- **High:** Risk for transmission is considered high when working or traveling within three feet of others for more than 10 minutes an hour, many times a day, and other prevention measures aren't feasible. Risk is also considered high when cleaning and sanitizing areas recently occupied by a person with known COVID-19 illness.
- **Extremely high:** Transmission risk is extremely high when you work in residential or non-hospital or clinic settings within six feet of people with COVID-19.

Michigan OSHA also published guidance on evaluating risks. In that guide, very high-risk jobs include health care providers such as doctors and nurses, while high-risk jobs include things like medical support staff. Medium risk jobs include those that require frequent or close contact (within six feet) of people who may be infected. Lower risk jobs do not require contact with people known or suspected to be infected, as well as jobs that do not require frequent or close contact with members of the public. The guidance describes various types of masks and the protections offered.

EPA Stops Sale of Pesticides Falsely Claiming to be Effective Against COVID-19

The Environmental Protection Agency (EPA) issued a "Stop Sale" order to an Illinois company regarding the sale or distribution of certain pesticide products. The company made claims that are not allowed under the products' registrations regarding the products' safety and effectiveness against the virus that causes COVID-19.

The order requires the company to stop selling or distributing pesticides, which EPA has determined to be misbranded until those false or misleading claims are removed from their labels and sales materials. In order to make public health claims referencing effectiveness against SARS-CoV-2, the company must apply for and obtain approval from EPA.

Also, the "Stop Sale" order alleges that the company made false or misleading claims that the products can be used to "sterilize" a facility that is not supported by the product registration. The company's website also stated that the products are "safe" and "not poisonous" even though the labeling required for each product includes language such as "poison," "harmful if swallowed, absorbed through the skin, or inhaled," or "causes irreversible eye damage and skin burns."

Finally, the order addressed claims that a product can be used to sterilize N95 masks using a process approved by the EPA, among other federal agencies. In fact, the product is not registered for use as a sterilant or to sterilize N95 masks.

In a similar case, EPA reported that a woman who sold an unregistered pesticide as protection against viruses such as COVID-19 has pleaded guilty to violating FIFRA. The defendant sold an unregistered pesticide through eBay, claiming that it would help protect individuals from viruses.

These cases show that consumers need to be cautious of products that make claims of controlling viruses. Consumers can visit epa.gov/coronavirus for a list of approved products. Under the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), products that claim to kill, destroy, prevent, or repel bacteria or viruses, among other things on surfaces, are considered pesticides and must go through EPA's registration process to ensure that the products perform as intended prior to their distribution or sale in commerce.

Coordinate Worker Protections from Heat Illness and COVID-19

All employers with outdoor workers should take steps to prevent heat illness and to review high-temperature advisories and warnings. Employers in California must follow the Cal/OSHA requirements, but employers in other states could benefit from those guidelines.

Under Cal/OSHA, supervisors and workers must be trained on the signs and symptoms of heat illness, so they know when to take steps to assist a coworker. Employers must also evaluate each worksite and make sure workers know the procedures for contacting emergency medical services, which includes directing them to the worksite if needed.

Employers should also have a plan to prevent the spread of COVID-19 at each worksite, coordinating to allow space for employees to take breaks in adequate shade while maintaining a safe distance. This may require staggered breaks or increased shaded areas.

To help prevent the spread of COVID-19, employers should provide cloth face coverings or allow workers to use their own. Wearing face coverings can make it more difficult to breathe and harder for a worker to cool off, so additional breaks may be needed. Face coverings should be removed in outdoor high heat conditions when others are not nearby. The general workforce is not encouraged to use surgical masks or respirators as face coverings at this time.

Employers should also provide drinking water and encourage workers to drink one quart per hour. Since face coverings will be removed for drinking, employees should maintain distance at the water source. Employers should determine whether disinfection of frequently touched surfaces is necessary, or if water can be provided in a way that reduces or eliminates touched surfaces.

Are my Remote Employees Eligible for FMLA Leave?

Like many company employees, Pam had been working from home since mid-March, when she became subject to a stay-at-home order. Since then, the arrangement had allowed her to perform her job effectively. Now, however, she asked Renee in the HR department if she could have some time off to care for her daughter, who needed a planned medical procedure. The company didn't have many FMLA-related cases to deal with, and this was the first since employees began working from home.

Renee knew the general employee eligibility criteria for FMLA leave, but she wasn't quite sure whether Pam would meet the criterion of working at a location with at least 50 employees; her home was about 100 miles away. Renee decided to investigate further.

According to some statistics, the percentage of employees working from home climbed from 7 percent before the pandemic to over 60 percent since the pandemic hit. Since most aspects of life continue, employees who work from home may find themselves in situations involving leave under the federal Family and Medical Leave Act (FMLA). Just because they work from home does not mean that these employees are not eligible to take such leave.

Employees are eligible to take FMLA leave for a qualifying reason if they meet the following criteria:

- They have been employed by your company for at least 12 months,
- They have worked at least 1,250 hours in the 12 months before the leave is to begin, and
- They work at a site with at least 50 company employees within 75 miles.

That last criterion can be a bit tricky for remote workers. That's because an employee's private residence is not considered a worksite for purposes of employee eligibility for FMLA leave.

Instead, for employees who work from home, their worksite is the office to which they report and from which assignments are made.

Therefore, assuming Pam is receiving her assignments from the worksite to which she used to report, that worksite would be considered her worksite. If at least 50 company employees within 75 miles work at that site, Pam would meet the "50 employees within 75 miles" eligibility criterion. This would be true even if Pam's residence was 200 or 300 miles away from the office where her assignments originated.

Consequently, if Pam had worked for the company for at least 12 months and had performed at least 1,250 hours of work in the 12 months before leave was to begin, she would be eligible to take FMLA leave for a qualifying reason.

CSB Issues Extreme Weather Event Safety Message, Alert for Hazardous Chemical Facilities

The U.S. Chemical Safety and Hazard Investigation Board (CSB) has issued a video safety message and safety alert intended to help hazardous chemical facilities better prepare for extreme weather events such as hurricanes and flooding. They highlight recent actions by the Center for Chemical Process Safety (CCPS) to produce industry guidance following a 2017 chemical incident in Texas.

The CSB's investigation into the 2017 incident found a significant lack of industry guidance on planning for flooding or other severe weather events and called on CCPS to produce such guidance. Recently, CCPS

released "Assessment of and Planning for Natural Hazards," which provides an updated approach for assessing natural hazards, means to address the hazards, and emergency planning.

The CSB's safety alert outlines specific procedures to assure safe restarts following a severe weather event. For example, facilities are urged to follow established startup procedures and checklists, and to recognize that "human performance may be compromised due to crisis conditions."

Additional safety protocols include checking bulk storage tanks for evidence of floating displacement or damage, and examining insulation systems, sewers, drains, furnace systems, electric motors, and other equipment, including warning systems, to make sure they are fully functional.

CVSA to Hold Operation Safe Driver Week in mid-July

Speeding is the focus of the Commercial Vehicle Safety Alliance's (CVSA) 2020 Operation Safe Driver Week, scheduled to take place July 12 through 18 throughout North America.

During the week, law enforcement personnel will watch for drivers who are engaging in unsafe driving behaviors. Those motorists will be stopped and may receive a warning or citation.

Why is CVCSA emphasizing speeding this year?

COVID-19 stay-at-home orders resulted in decreased traffic on the roads. The Governors Highway Safety Association suggests that fewer vehicles on the roads may encourage some drivers to break traffic laws. In fact, many jurisdictions are reporting a severe spike in speeding. CVSA has chosen to emphasize speeding during Operation Safe Driver Week to address this recent trend.

Other areas of unsafe driving

Law enforcement will address more than just speeding during the week-long initiative. Other dangerous driving behaviors will be tracked during Operation Safe Driver Week, such as:

- Distracted driving,
- Failure to use a seatbelt,
- Following too closely,
- Improper lane change,
- Reckless or aggressive driving,
- Failure to obey traffic control devices, and
- Impaired driving.

The goal of the safety initiative

Interactions between law enforcement and drivers have been found to reduce targeted problematic behaviors. Using enforcement campaigns, such as Operation Safe Driver Week, CVSA hopes to reduce risky driving behaviors.



FMCSA Issues New Waiver for Pre-employment Drug Testing

The Federal Motor Carrier Safety Administration (FMCSA) has issued a new drug-testing waiver to help motor carriers bring back their furloughed truck and bus drivers.

In effect until September 30, the waiver allows motor carriers to re-employ drivers without performing a pre-employment drug test, provided certain steps are documented.

Current regulations in §382.301(b) allow employers to skip the pre-employment drug test only if the driver was enrolled in a compliant drug-testing program in the past 30 days. The waiver extends that exception to 90 days in light of the COVID-19 emergency.

"As employers begin to recall drivers who were furloughed, laid off, or otherwise not working for the company for more than 30 days, the cost and logistical barriers of testing a large influx of drivers in a short timeframe are significant," the FMCSA announced.

The waiver applies from June 5, 2020, through 11:59 p.m. on September 30, 2020.

No matter a driver's employment status, he or she must normally undergo a pre-employment drug test if removed from the company's random testing program for more than 30 days (which is now extended to 90 days). No test is required for drivers who remained in the random testing pool during an absence.

Terms

To use the new waiver, an employer must:

1. Verify that the driver participated in a Part 382 drug testing program within the prior 90 days;
2. Verify that the driver, while in that testing program, was either tested for drugs within the last 6 months (prior to the new date of application) or participated in the random drug testing program for the previous 12 months;
3. Verify that the driver had no recorded violations of another DOT agency's drug-use regulations within the previous 6 months;
4. Purchase a pre-employment query from the Drug & Alcohol Clearinghouse (§382.701) and not allow any safety-sensitive functions if the results of the query show that the driver had a violation;
5. Investigate the driver's drug and alcohol testing history with current and previous employers, per §40.25, §382.413, and §391.23; and
6. Email the FMCSA within five business days of any recordable accident involving any driver for whom the waiver was used.

Refer to §382.301(c) for documentation requirements when using the pre-employment testing exception.

The FMCSA issued guidance in late March pertaining to other drug and alcohol testing requirements during the pandemic. That guidance remains in effect until June 30.

