

Oregon COVID-19 FAQs

1. Are face coverings required full time on construction projects?

- a. As of July 14, 2020, face coverings are not required on all construction projects. Construction projects are not considered to be “public places” where the public is allowed to freely come and go, so when the governor’s order references “all public places,” it does not include construction sites. However, when social distancing is not practicable on a construction project, and administrative and/or engineering controls are not possible or feasible, face coverings are required when workers are within 6’ of each other.

2. Are employees allowed to carpool?

- a. There is no specific requirement that is enforceable when employees are off the clock and in their personal vehicles. However, if employees are on the clock and/or using work vehicles, precautions must be taken in order to be in compliance. Oregon OSHA has implemented a “Temporary Administrative Rule Addressing the COVID-19 Public Health Emergency in Labor Housing and Agricultural Employment.” Oregon OSHA has formally stated in a Construction Advisory Committee (CAC) meeting that they will not hold the construction industry to a different standard than the agriculture industry. The current rule that addresses workers commuting can be found on page 28, which states:

“(13) Section 3: Disease prevention in employer-provided transportation

- (a) During the current emergency and for activities covered by Section 1 of this rule, employers must ensure that the following disease prevention measures are implemented, at a minimum, when transportation is provided to and from the workplace or used to move individuals between workplaces:
 - (A) The vehicle operator and any passengers must be separated by at least 3 feet during the operation of the vehicle. Seats that do not allow for such separation cannot be used, regardless of the vehicle’s normal capacity.
 - (B) The vehicle operator and any passengers must wear cloth facial coverings that cover their nose and mouth.
 - (C) All high-contact surfaces (door handles, seatbelt buckles, armrests, steering wheel, etc.) must be sanitized before each trip, or at least twice each day when in continuous use.”

The entire section of the rule should be read and understood (not just what is copied and pasted here) before moving forward with allowing employees to commute together. The rule can be reviewed at [osha.oregon.gov/OSHArules/div1/437-001-0749.pdf](https://www.osha-oregon.gov/OSHArules/div1/437-001-0749.pdf)

3. Can OSHA write citations for COVID-19 related issues?

- a. Yes, OSHA has the authority to enforce the governor’s order as it pertains to workplaces. They can write citations under the general duty clause, which states that an employer is required to

furnish to its employees a place of employment that is free from recognized hazards that are causing or are likely to cause death or serious physical harm to their employees. COVID-19 is most certainly a recognized hazard, and OSHA can write citations for companies that are failing to protect their employees from exposure to the disease.

4. What should I do if I have a suspected or confirmed COVID-19 case in my workplace?

- a. Please refer to our AGC document on [Responding and Returning to Work After a COVID-19 Exposure or Illness](#).

5. If an employee is diagnosed with COVID-19, could it be considered a workers' compensation claim, and do I have to log it on my 300?

- a. Just as you would investigate a workplace injury (i.e., slip and fall), you must do the same for suspected or confirmed COVID-19 cases and document your investigation. Investigating will also assist with the determination of work-relatedness of the confirmed case or exposure. Include tracking in the investigation. Under [OSHA's Recording Cases of Coronavirus Disease recordkeeping requirements](#), COVID-19 is a recordable illness, and employers are responsible for recording cases of COVID-19, if **ALL** of the following are met:

- The case is a confirmed case of COVID-19, as defined by the CDC
- The case is work-related as defined by 29 CFR § 1904.5
- The case involves one or more of the general recording criteria set forth in 29 CFR § 1904.7

If it is determined that the illness was contracted at the workplace the illness would need to be added to the 300 log.

6. When can a sick person return to work?

- a. According to [CDC Return to Work Guidance](#), individuals may return to work in the following situations:
 - Individuals who think or know they had COVID-19 and had symptoms may return to work if:
 - Ten days have passed since symptoms first appeared, **and**
 - 24 hours with no fever without the use of fever-reducing medications, **and**
 - Other symptoms of COVID-19 are improving*.

* Note that loss of taste and smell may persist for weeks or months after recovery and need not delay the end of isolation.

As of September 10, 2020, CDC recommends using a “symptom-based strategy” for discontinuing isolation and returning to work. Oregon Health Authority as of July 23, 2020 also does not recommend retesting to determine when to discontinue isolation and return to work, except in “rare situations”. The reasoning: for many confirmed cases low levels of the virus may remain in the body for up to three months, so if that person is retested within three months they may keep testing positive even though they are highly unlikely to be contagious.

- Individuals who tested positive for COVID-19 but had no symptoms may return to work if:
 - a. Ten days have passed since test date.

If you develop symptoms after testing positive, follow the guidance above for “Individuals who think or know they had COVID-19 and had symptoms.”

7. What should I do if I have an employee that is known to have been exposed, whether in the workplace or in their personal lives, to another person with COVID-19?

- a. Anyone who has close contact with someone with COVID-19 should stay home for 14 days after exposure, the time it takes to develop the illness.

8. Am I required to train my employees on the hazards of COVID-19 prior to working?

- a. Yes. Employers are required to train all workers with reasonably anticipated occupational exposure to injuries or illnesses. According to [OSHA’s COVID-19 Control and Prevention Page](#) the training should include “the sources of exposure to the virus, the hazards associated with that exposure, and appropriate workplace protocols in place to prevent or reduce the likelihood of exposure. Training should include information about how to isolate individuals with suspected or confirmed COVID-19 or other infectious diseases, and how to report possible cases. Training must be offered during scheduled work times and at no cost to the employee.”

The following FAQ might be helpful with labor law issues surrounding COVID-19. They were retrieved from an article from Fisher Phillips, a labor and employment attorney who partners with AGC on a national level. The article can be reviewed in its entirety at www.fisherphillips.com/faqs

9. Can we ask an employee to stay home or leave work if they exhibit symptoms of the COVID-19 coronavirus or the flu?

- a. Yes, you are permitted to ask them to seek medical attention and get tested for COVID-19. The CDC states that employees who exhibit symptoms of influenza-like illness at work during a pandemic should leave the workplace. The Equal Employment Opportunity Commission (EEOC) [confirmed that advising workers to go home](#) is permissible and not considered disability-related if the symptoms present are similar to the COVID-19 coronavirus or the flu.

10. Can I take an employee’s temperature at work to determine whether they might be infected?

- a. Yes. The EEOC confirmed that measuring employees’ body temperatures is permissible given the current circumstances. While the Americans with Disabilities Act (ADA) places restrictions on the inquiries that an employer can make into an employee’s medical status, and the EEOC considers taking an employee’s temperature to be a “medical examination” under the ADA, the federal agency recognizes the need for this action now because the CDC and state/local health authorities have acknowledged community spread of COVID-19 and issued attendant precautions.

However, as a practical matter, an employee may be infected with the COVID-19 coronavirus without exhibiting recognized symptoms such as a fever, so temperature checks may not be the most effective method for protecting your workforce.

Note: If your company does business in the State of California (e.g., if you have one or more locations, employees, customers, suppliers, etc. in the state), and your business is subject to the California Consumer Privacy Act (CCPA), then you must provide employees a CCPA-compliant notice prior to or at the same time as your collection of this information.

11. What precautions are needed for individuals who are taking the temperatures of employees, applicants, or customers?

- a. To protect the individual who is taking the temperature, you must first conduct an evaluation of reasonably anticipated hazards and assess the risk to which the individual may be exposed. The safest thing to do would be to assume the testers are going to potentially be exposed to someone who is infected who may cough or sneeze during their interaction. Based on that anticipated exposure, you must then determine what mitigation efforts can be taken to protect the employee by eliminating or minimizing the hazard, including personal protective equipment (PPE). Different types of devices can take temperature without exposure to bodily fluids. Further, the tester could have a face shield in case someone sneezes or coughs. Further information can be found at OSHA's website, examining the guidance it provides for healthcare employees (which includes recommendations on gowns, gloves, approved N95 respirators, and eye/face protection).

12. One of our employees has a suspected but unconfirmed case of COVID-19. What should we do?

- a. Take the same precautions as noted above. Treat the situation as if the suspected case is a confirmed case for purposes of sending home potentially infected employees. Communicate with your affected workers to let them know that the employee has not tested positive for the virus but has been exhibiting symptoms that lead you to believe a positive diagnosis is possible.

As discussed above, critical infrastructure workers who have been potentially exposed may continue to work if they are asymptomatic and the additional precautions are implemented.

13. Can we require an employee to notify the company if they have been exposed, have symptoms, and/or have tested positive for the COVID-19 coronavirus?

- a. Yes, you should require any employee who becomes ill at work with COVID-19 coronavirus symptoms to notify their supervisor. Employees who are suffering from symptoms should be directed to remain at home until they are symptom-free for at least 24 hours.

While outside of work, if an employee begins experiencing symptoms, has been exposed to someone that is exhibiting symptoms, or has tested positive, the employee should contact your company by telephone or email and should not report to work.

14. We are hiring employees during the outbreak; what steps can we take to protect our workforce?

- a. The EEOC has confirmed that you may screen applicants for symptoms of the COVID-19 coronavirus after you make a conditional job offer, as long as you do so for all entering employees in the same type of job. You can also take an applicant's temperature as part of a post-offer, pre-employment medical exam after you have made a conditional offer of employment.

The EEOC has also said you may delay the start date of an applicant who has COVID-19 or symptoms associated with it. According to current CDC guidance, an individual who has the COVID-19 coronavirus or symptoms associated with it should not be in the workplace. In fact, the EEOC has also said you may withdraw a job offer when you need the applicant to start immediately but the individual has COVID-19 or symptoms of it.

15. Can an employee refuse to come to work because of fear of infection?

- a. Employees are only entitled to refuse to work if they believe they are in imminent danger. Section 13(a) of the Occupational Safety and Health Act (OSH Act) defines "imminent danger" to include "any conditions or practices in any place of employment which are such that a danger exists which can reasonably be expected to cause death or serious physical harm immediately or before the imminence of such danger can be eliminated through the enforcement procedures otherwise

provided by this Act.” OSHA discusses imminent danger as where there is “threat of death or serious physical harm,” or “a reasonable expectation that toxic substances or other health hazards are present, and exposure to them will shorten life or cause substantial reduction in physical or mental efficiency.”

The threat must be immediate or imminent, which means that an employee must believe that death or serious physical harm could occur within a short time, for example, before OSHA could investigate the problem. Requiring travel to China or to work with patients in a medical setting without personal protective equipment at this time may rise to this threshold. Most work conditions in the United States, however, do not meet the elements required for an employee to refuse to work. Once again, this guidance is general, and employers must determine when this unusual state exists in your workplace before determining whether it is permissible for employees to refuse to work.

In addition, Section 7 of the National Labor Relations Act (NLRA) extends broad-based statutory protection to those employees (in union and non-union settings alike) to engage in “protected concerted activity for mutual aid or protection.” Such activity has been defined to include circumstances in which two or more employees act together to improve their employment terms and conditions, although it has been extended to individual action expressly undertaken on behalf of co-workers.

On its own website, the National Labor Relations Board (NLRB) offers a number of examples, including, “talking with one or more employees about working conditions,” “participating in a concerted refusal to work in unsafe conditions,” and “joining with co-workers to talk to the media about problems in your workplace.” Employees are generally protected against discipline or discharge for engaging in such activity.

16. What actions can we take if an employee is exhibiting flu-like symptoms but refuses to leave the workplace?

- a. You should first take a collaborate approach. Remind the employee that you are asking them to leave. Try to make them understand the reasons why their departure is necessary to maintain the health and safety of the entire workplace. If there are benefits available such as paid sick leave, use of accrued vacation, or something else that may appease them, you should explain these benefits and how the employee can utilize them.

If the employee still refuses to leave the workplace, you can consider (a) explaining that the employee is now trespassing on private property and if they do not leave you will be forced to call local law enforcement to escort them off the premises; or (b) terminating the employee for insubordination. Termination of the employee, however, should be considered a last resort. Given the current climate, you will need to also consider public perception related to taking overly strong adverse action against an employee expressing concerns or apprehension related to the coronavirus.

17. Can an employee refuse to work without a mask?

- a. OSHA has addressed the common question of whether an employee can simply refuse to work in unsafe conditions. The safety agency provides the following guidance, which wouldn't require the use of a mask or respirator in most situations. An employee's right to refuse to do a task is protected if all of the following conditions are met:
 - Where possible, you have asked the employer to eliminate the danger, and the employer failed to do so;

- You refused to work in “good faith.” This means that you must genuinely believe that an imminent danger exists;
- A reasonable person would agree that there is a real danger of death or serious injury; and
- There isn't enough time, due to the urgency of the hazard, to get it corrected through regular enforcement channels, such as requesting an OSHA inspection.

Given the consensus that face masks are only necessary when treating someone who is infected with the COVID-19 coronavirus or influenza, masks are likely not necessary to protect the health of most employees. Therefore, most employers do not have to provide, or allow employees to wear, a surgical mask or respirator to protect against the spread of the COVID-19 coronavirus or influenza. The use of the word “may” in OSHA’s respiratory protection standard makes it clear that when a respirator is not necessary to protect the health of an employee, it is within the discretion of the employer to allow employees to use a respirator.

Accordingly, you are well within the applicable OSHA standard to deny an employee’s request to wear a surgical mask or a respirator in almost all situations.

However, in light of the CDC’s recent guidance recommending that people wear cloth face coverings in public settings, it’s not recommended that you refuse an employee’s request to wear a mask at work. However, you should recommend that the employee wear a cloth face covering instead of a surgical mask. As the CDC notes, the cloth face coverings recommended are not surgical masks or N-95 respirators. The cloth face coverings are not subject to OSHA’s respiratory protection standard.

18. Is COVID-19 a recordable illness for purposes of OSHA logs?

- OSHA has published guidance on this issue. OSHA recordkeeping requirements mandate covered employers record certain work-related injuries and illnesses on their OSHA 300 log. You must record instances of workers contracting COVID-19 if the worker contracts the virus while on the job. The illness is not recordable if the worker was exposed to the virus while off the clock. You are responsible for recording cases of COVID-19 if:
 - The case is a confirmed case of COVID-19;
 - The case is work-related, as defined by 29 CFR 1904.5; and
 - The case involves one or more of the general recording criteria set forth in 29 CFR 1904.7 (e.g. medical treatment beyond first-aid, days away from work).

OSHA recently published guidance for enforcing their recordkeeping requirements for cases of COVID-19. Recognizing the difficulty in determining whether COVID-19 was contracted while on the job, OSHA will not enforce its recordkeeping requirements that would require employers in areas where there is ongoing community transmission to make work-relatedness determinations for COVID-19 cases, except where:

- There is objective evidence that a COVID-19 case may be work-related; and
- The evidence was reasonably available to the employers.

This waiver of enforcement does not apply to employers in the healthcare industry, emergency response organizations (e.g., emergency medical, firefighting and law enforcement services), and correctional institutions in areas where there is ongoing community transmission. These employers must continue to make work-relatedness determinations.

19. My employee alleges that they contracted the coronavirus while at work. Will this result in a compensable workers' compensation claim?

- a. It depends. If the employee is a health care worker or first responder, the answer is likely yes (subject to variations in state law). For other categories of employees, a compensable workers' compensation claim is possible, but the analysis would be very fact specific.

It is important to note that the workers' compensation system is a no-fault system, meaning that an employee claiming a work-related injury does not need to prove negligence on the part of the employer. Instead, the employee need only prove that the injury occurred at work and was proximately caused by their employment. Additionally, the virus is not an "injury" but is instead analyzed under state law to determine if it is an "occupational disease." To be an occupational disease (again subject to state law variations), an employee must generally show two things:

- the illness or disease must be "occupational," meaning that it arose out of and was in the course of employment; and
- the illness or disease must arise out of or be caused by conditions peculiar to the work and creates a risk of contracting the disease in a greater degree and in a different manner than in the public generally.

The general test in determining whether an injury "arises out of and in the course of employment" is whether the employee was involved in some activity where they were benefitting the employer and was exposed to the virus. Importantly, special consideration will be given to health care workers and first responders, as these employees will likely enjoy a presumption that any communicable disease was contracted as the result of employment. This would also include plant nurses and physicians who are exposed to the virus while at the worksite.

As for other categories of employees, compensability for a workers' compensation claim will be determined on a case-by-case basis. The key point will be whether the employee contracted the virus at work and whether the contraction of the disease was "peculiar" to their employment. Even if the employer takes all of the right steps to protect the employees from exposure, a compensable claim may be determined where the employee can show that they contracted the virus after an exposure, the exposure was peculiar to the work, and there are no alternative means of exposure demonstrated.

Absent state legislation on this topic, an employee seeking workers' compensation benefits for a coronavirus infection will still have to provide medical evidence to support the claim. Employers who seek to contest such a claim may be able to challenge the allowance if there is another alternative exposure or if the employee's medical evidence is merely speculative.

Finally, employers should be aware that states are acting on this issue. For instance, Washington Governor Jay Inslee recently directed his Department of Labor and Industries to "ensure" workers' compensation protections for health care workers and first responders. The directive instructs the Department to change its policies regarding coverage for these two groups and to "provide benefits to these workers during the time they're quarantined after being exposed to COVID-19 on the job." We expect other states to follow Washington's lead.