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Client Alert: Coronavirus: What Employers Need to Know About Providing Personal Protective Equipment

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As a result of the outbreak of COVID-19, many questions have arisen over the obligation of employers to provide personal protective equipment (PPE), such as respirators. Among them are:

1. What type of PPE is required to be provided to my employees?
2. Can I allow employees to re-use N95 respirators and/or use expired N95s?
3. If PPE cannot be provided, what can I require of my employees?
4. If I have PPE and provide it to my employees, can an employee be disciplined for refusing to carry out job-related tasks?

The answers to these questions may depend on each employer's circumstances. However, this article is intended to outline the general guidance provided so far to address these issues.

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1. What type of PPE is an employer required to provide to employees?

The overall requirements for PPE are set forth in 29 C.F.R. 1910.132–1910.138, setting out the requirements ranging from eye and face protection, to gloves and respiratory protection. PPE must be provided at no cost to employees and in a reasonably safe manner (which means that the PPE is properly fitted and sanitized as required). If an employee volunteers to provide his or her own PPE, this may be permitted, but such PPE must provide equal or greater protection than the employer’s PPE.

In response to coronavirus concerns, OSHA published additional [Guidance on Preparing Workplaces for COVID-19](#). In it, they identify four levels of occupational risk, each requiring varying levels of PPE: Very High, High, Medium, and Lower Risk.

For both Very High and High risk employers, respirators (e.g. National Institute for Occupational Safety and Health approved N95 masks, or better)¹ should be provided. Face shields or goggles, gloves, and gowns should also be provided depending on an employee’s job tasks and exposure risks. Employers in the “Very High” category of risk include: health care workers performing procedures (e.g. intubation, dental procedures) on, laboratory personnel collecting specimens from, or morgue workers performing autopsies on known or suspected COVID-19 patients. Employers in the “High” category of risk include: health care workers entering patient rooms exposed to known or suspected COVID-19 patients, medical transport workers (e.g. ambulances), or mortuary workers undertaking tasks for burial or cremation of people with or suspected to have COVID-19.

For Medium Risk employers, some combination of gloves, gowns, face masks, and/or face shields or goggles should be provided—dependent on the work tasks completed by the employee and the types of exposure the employee may face (e.g. will come within six feet of known or suspected COVID-19 patients versus never coming in contact with them). Employers in the Medium category of risk include: any employers whose employees require frequent and/or close contact with people (e.g. within six feet) who may be infected with COVID-19, but are not known or suspected patients. For example, retail or grocery establishments open to the public.

For Lower Risk employers, PPE is likely not required. Employers in the lower risk category include: those whose employees do not require contact with people known to be or suspected of having COVID-19. For example, companies whose employees are working from home, or offices that are otherwise closed.

2. Can an employer re-use N95 respirators and/or use expired N95s?

[Recent OSHA guidance](#) permits the extended use and re-use of N95 respirators by the *same worker* if necessary. The respirator must maintain its structural and functional integrity and cannot have a filter that is damaged, soiled, or contaminated. In any case, employers must ensure the mask is functioning properly, is fitted properly (e.g. maintaining a proper seal), and is properly stored between uses.

Use of expired N95 respirators beyond the manufacturer’s recommended shelf life may also be possible, but only if the employer has made a good faith effort to obtain N95s within their shelf life. The use of expired N95s is subject to certain restrictions, including notification to employees whenever they are provided an N95 respirator that has expired.

Note that health care personnel are generally prohibited from using expired N95 masks if they are performing or present for surgical procedures (e.g. resuscitation, intubation/extubation, sputum induction) on patients infected with or potentially infected with COVID-19. The Food and Drug Administration has provided a [list of authorized emergency-use respirators](#) for such health care personnel if PPE is otherwise

unavailable.

3. What can an employer require of employees if PPE is unavailable?

The short and safest answer is that if an employer does not have PPE where it is required; the employer cannot require an employee to perform activities that would pose a risk of exposure. For example, if a health care worker could not be provided PPE and refused to work with COVID-19 patients, an employer could not force an employee to do so or take disciplinary action for the employee's refusal.

It should be remembered that this answer can vary based on the factual circumstances (e.g. an employee's overall refusal to come into work even if not working with COVID-19 patients might be handled differently). That said, for employers who fall within the lower risk category, as outlined above, implementing best practices, like social distancing, limiting store patrons, or providing hand sanitizer or hand washing opportunities to employees could be sufficient despite the lack of PPE.

4. What can an employer do if PPE is provided but an employee still refuses to carry out job-related tasks?

In this limited circumstance, it is likely that disciplinary action could be taken for an employee's failure to carry out job-related tasks.² However, there are many other laws that may require a different result to include the [Coronavirus Aid, Relief, and Economic Security Act \(CARES Act\)](#) or [Families First Coronavirus Response Act \(FFRCA\)](#).

For example, if the employee's refusal to work is a combination of concerns both for the employee's own safety, as well as a need to take care of a close relative or dependent child, the employee may still be entitled to refuse to come into work. Thus, employers cannot make these decisions in a vacuum, but should give consideration to all recent updates in legislation.

We understand that this article may address only a fraction of the coronavirus concerns employers are facing. If you have further questions or concerns, please do not hesitate to contact us.

For the most up-to-date legal and legislative information related to the coronavirus pandemic, please visit our Shumaker COVID-19 Client Resource & Back-to-Work Guide at shumaker.com. We have also established a 24/7 Legal & Legislative Helpline at 1.800.427.1493 monitored by Shumaker lawyers around the clock.

¹ Other acceptable respirators can include R/P95, N/R/P99, N/R/P100, air-purifying elastomeric respirator (full-face or half-face), powered air purifying respirator with high-efficiency particulate arrestance (HEPA) filter, or supplied air respirators. Any such respirator used must be NIOSH approved.

² Generally refusal is permitted if (1) the employee reasonably believes that doing the work would put him/her in serious and immediate danger; (2) the employee asked his/her employer to fix the hazard; (3) there is no time to call OSHA in order to report the condition/hazard; and (4) there is no other way to do the job safely.