



OSHA Issues New Guidance Given N95 Mask Shortage During COVID-19 Pandemic

Insights

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The Occupational Safety and Health Administration (OSHA) just issued interim enforcement guidance regarding respiratory protection, relaxing its standard in light of the nationwide shortage of N95 masks during the COVID-19 pandemic. From now on, if respiratory protection must be used and alternatives are not available, employers may now consider the extended use or reuse of N95s – and may consider using N95s that have since passed the manufacturer’s recommended shelf life.

Unlike prior guidance on this issue, the new guidance applies to all industries and all workplaces where the respiratory protection standard (29 C.F.R. § 1910.134) applies. This includes the healthcare industry, where OSHA has provided more situation-specific guidelines as well and we have summarized below.

It is important to note, however, that employers in states with their own OSHA-approved state plans should check their state’s regulations or consult with legal counsel. Although the federal OSHA regulations set a minimum standard for all state plans, some states have additional requirements.

The Details

Until further notice, a worker is permitted to extend the use of, or to reuse, their N95, as long as the respirator maintains its structural and functional integrity and the filter material is not physically damaged, soiled, or contaminated (e.g., with blood, oil, paint).

Extended Use And Reuse Of N95s

Unfortunately, OSHA directs employers to the National Institute for Occupational Safety and Health (NIOSH) webpage to determine the difference between extended use and re-use of N95s. But by its terms, the NIOSH guidance is “intended for use by professionals who manage respiratory protection programs in healthcare institutions to protect health care workers from job-related risks of exposure to infectious respiratory illnesses.”

Thus, outside the healthcare industry, there is little guidance on extended use of N95s at this time, except to say that eight hours of continuous use is allowed so long as the structural integrity of the mask is not compromised. As to reuse, employers should limit the number of reuses to no more than five uses per device, or, alternatively, NIOSH recommends following the N95 manufacturer’s guidelines on the maximum number of donnings for the N95.

When allowing workers to reuse N95s or use them for an extended amount of time, employers must ensure (and should document) that:

- Users perform a user seal check each time they don a mask and do not use a mask on which they cannot perform a successful user seal check.
- Workers are trained to understand that if the structural and functional integrity of any part of the mask is compromised, it should be discarded, and that if a successful user seal check cannot be performed, another mask should be tried.
- If reuse of N95s is necessary, an appropriate sequence for donning/doffing procedures is used to prevent contamination, and training needs to address appropriate donning/doffing procedures.
- The circumstances under which a disposable respirator will be considered contaminated and not available for extended use or reuse is documented in an employer's written respiratory protection plan.
- Employees understand the proper storage of N95s in between periods of reuse.

Expired N95s

Employers should immediately stop disposing of unused but expired N95s. That's because if an employer can show a good faith attempt to acquire proper respirators, including in-date N95s, Compliance Safety and Health Officers (CSHOs) are to "exercise enforcement discretion" for the use of out-of-date N95s. In short, employers may use expired N95s with a few conditions.

First, workers should be notified that they are using expired N95s. Second, employers should visually inspect, or ensure that workers visually inspect, the N95s to determine if the structural and functional integrity of the respirator has been compromised. This is because over time, components such as the straps, nose bridge, and nose foam material may degrade, which can affect the quality of the fit and seal. This should be addressed by the employer in training and in a written respiratory protection plan.

Third, "[w]here an employer has expired N95s available from their own stored cache (i.e., not from the U.S. Strategic National Stockpile), the employer should seek assistance from the respirator manufacturer or independent lab regarding testing of those stored respirators prior to use." Finally, for healthcare providers, OSHA includes additional guidelines for the use of expired N95s.

Healthcare Providers Receive Additional Guidance

Even under the new standard, OSHA makes clear that expired N95s generally must not be used when healthcare providers are performing surgical procedures on patients infected with, or potentially infected with, COVID-19. Moreover, they cannot be used to perform (or be present for) procedures expected to generate aerosols or procedures where respiratory secretions are likely to be poorly controlled (e.g., cardiopulmonary resuscitation, intubation, extubation, bronchoscopy, nebulizer therapy, sputum induction).

The guidance also states that, in accordance with [CDC guidance for optimizing the supply of respirators](#), employers should prioritize the use of N95 respirators by activity type. When healthcare providers perform (or are present for) aerosol-generating procedures or procedures where respiratory secretions are likely to be poorly controlled, they are advised to use respirators (including N95 FFRs; other FFRs; non-disposable, elastomeric respirators; and PAPRs) that are still within their manufacturer's recommended shelf life, if available, before using respirators that are beyond their manufacturer's recommended shelf life.

Employers Must Still Follow The Respiratory Protection Standard

Despite the above deviation from OSHA's normal enforcement practices, this guidance makes clear that all employers must reassess their engineering controls, work practices, and administrative controls to "identify any changes they can make to decrease the need for N95 respirators." It goes on to suggest that employers "consider whether it is possible to increase the use of wet methods or portable local exhaust systems or to move operations outdoors, . . . or [to] tak[e] steps to temporarily suspend certain non-essential operations."

Moreover, before employees can utilize the extended use or reuse of N95s or the use of N95s beyond the manufacturers' shelf life, employers should consider using respirators that provide equal or greater protection compared to an N95, "such as NIOSH-approved, non-disposable, elastomeric respirators or powered, air-purifying respirators (PAPRs)." The guidance provides [helpful links to the CDC as to other filtering facepiece respirators that may be available for employee use](#).

OSHA further states that employers who have employees required or permitted to use respiratory protection must continue to manage their respiratory protection programs and comply with the OSHA respiratory protection standard, including the requirement that N95 alternatives be [NIOSH-approved](#).

Finally, OSHA notes that an assessment of employer good faith will be an essential element in any enforcement discretion given to CSHOs, including a requirement that an employer monitor its supply of N95s and make every attempt to obtain the N95 or respirators that provide equal or greater protection for its workers. And any good faith analysis will inevitably look at what engineering controls, work practices, and administrative controls the employer evaluated before utilizing the above reuse or extended use measures. Thus, documentation will be key in contesting any future citations under 29 C.F.R. § 1910.134.

Conclusion

This interim guidance is a welcome development in these trying times, but employers must still abide by the majority of the respiratory protection standard and should document all decisions made to justify N95 alternatives, the extended use or reuse of N95s, or using N95s that have since passed the manufacturer's recommended shelf life.

For now, we will continue to monitor the rapidly developing COVID-19 situation and provide updates as appropriate. Make sure you are subscribed to Fisher Phillips' Alert System to get the most up-to-

as appropriate. Make sure you are subscribed to [Fisher Phillips Alert System](#) to get the most up to date information. For further information, contact your Fisher Phillips attorney, any member of our [Healthcare Practice Group](#), our [Workplace Safety and Catastrophe Management Practice Group](#), or [our COVID-19 Taskforce](#). You can also review our nationwide [Comprehensive and Updated FAQs for Employers on the COVID-19 Coronavirus](#) and our [FP Resource Center For Employers](#), maintained by our Taskforce.

This Legal Alert provides an overview of a specific developing situation. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.

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