

REOPENING OHIO, April 27, 2020

Governor DeWine rolled out his plan for reopening Ohio on April 27th. He issued another list on April 29th. I will take this opportunity to list and discuss the published plan as it affects construction and general industry. The Association Office is planning an Ohio employer webinar for Tuesday, May 5th at 10:00 am EDT. The following represents my thoughts and interpretations of the requirements and recommendations which we issued on April 27th and April 29th.

I am sure the governor and his staff have worked to provide requirements and recommendations that will prevent the spread of the coronavirus as we get back to business. But it appears that there may be some confusion by businesses that try to interpret what is expected of them as they reopen. One of the slides used with the governor's presentation was titled "Getting Back to Work". This is a pretty generic slide that listed five points:

- Require face coverings for employees
- Conduct daily health assessments
- Maintain good hygiene
- Clean and sanitize
- Limit capacity to meet social distancing.

These appear to be straightforward and appear to permit employers to employ best practices to meet the guidelines. I feel that some confusion may occur because of the unfortunate decision to issue a more detailed list for manufacturing, distribution and construction. There is a wide difference between work environments (especially between manufacturing and construction) and trying to force fit the same requirements to both industries will cause significant compliance issues and/or impossibilities. I must ask myself whether any effort was made to obtain any input from any subject matter experts in either the construction industry or the manufacturing industry regarding the practicality and/or feasibility to combine the two industries for compliance requirements. Construction has been an essential industry since the beginning of the emergency and I am not aware of any information that indicates the safeguards put in place from the beginning by those companies that continued to operate were ineffective in preventing the spread of the coronavirus. So, why now?

The detailed chart issued by the governor addresses all three industries – manufacturing, distribution and construction. And there does not appear to have been any effort to list which requirement applies to which industry. For example, in the first block the governor establishes requirements for employees, distributors and guests. On construction sites there are no guests or distributors. So, we must assume that all the listed requirements apply to construction employees. According to the chart these requirements take effect on May 4th:

- 1.Ensure (guarantee) minimum 6 feet between people (how do you do that in construction?) or install barriers, but how do you do that in construction? Doable in manufacturing and maybe doable in distribution”
2. Employees must perform daily symptom assessment – doable in all three industries
3. Require employees to stay home if sick - doable. In all three industries
- 4.Face coverings must always be worn. Has anyone thought about the potential of increasing employee exposure to heat illness when working on a very hot roof with a face mask? Or, the fact that a face covering on a construction site may well impair the vision of employees which can lead to struck by accidents, slips, trips and falls, which themselves can lead to fatalities. Then to add to the confusion, the April 29th edition adds more exceptions and conditions to the list. Also, in one location the requirement is for face covering and yet shows a face mask. Doable in manufacturing and distribution
5. Require hand washing – doable in all three industries
6. Stagger or limit arrivals of employees – on a construction site this is virtually impossible if for no other reason than performing required initial safety briefings and pre task planning. Doable in manufacturing and distribution to the extent they use more than one shift
7. Shift patterns – on most construction projects there is but one shift. Same as #6
8. There is an entire section on physical spaces and workstations. This works for manufacturing and possibly for distribution, but not for construction.

Now, if you are ready, let me discuss the “exception.” These apply to the “requirement for face coverings. It appears that the governor pulled back from the position announced by the ABC on April 28th to what I am now going to share with you. This may be the most important of all the information for Ohio employers. The governor’s office as reported by the Columbus Dispatch has provided a list of exceptions to the mandatory face mask requirement. They are as follows:

1. An employee in a position is prohibited by a law or regulation from wearing a face covering while on the job.
2. Wearing a face covering on the job is against documented industry best practices.
3. Wearing a face covering is not advisable for health purposes.
4. If wearing a face covering is a violation of a company’s safety policies.
5. An employee sitting alone in an enclosed workplace.
6. There is a practical reason a face covering cannot be worn by an employee.

The ORCA, DBX, BFBA, Ohio Masonry Association through their safety professionals have developed best practices for their industries regarding the wearing of face coverings on their worksites. The best practices rely on solid safety considerations and will be issued to our members in a separate document. The governor’s office has indicated that if you are challenged on a jobsite because your employees are not wearing face coverings and you not requiring them for any of the listed reasons you will have to provide a written best practice or policy to be able to take advantage of the exception.

But we have one more unanswered question – must the employer supply the face coverings for employees? There is no quick and easy answer to this question. First, we need to go back to the top of this article. Governor DeWine has required, subject to the exceptions I have discussed, that all employees wear face coverings when on the job starting with May 4th. His order, unlike New York, did not require the employer to provide the face coverings. Governor DeWine stated that employees must wear face coverings. Other states have rules ranging from the extreme of New York to Ohio. In some it depends on the job of the employee. I have not seen any order (so far) that requires the employer to provide face coverings even if it does not take advantage of one of the exceptions and requires employees to wear a face covering.

Notice I am continuing to use the word face covering. This is the term used by the governor. The CDC has stated that a face covering is not PPE and I agree with this interpretation. In Ohio, this is very important because as a face covering it is not covered by the Ohio Specific Safety Requirement for PPE which does have an obligation for the employer to supply them. So, why did the CDC take this position? I have not seen a reason for it, but I suspect it is because PPE is intended to protect the wearer from a hazard. A face covering is not intended to and does not protect the wearer; it is intended to protect others from “catching” the sneeze or cough” of the wearer.

Osha also requires the employer to provide PPE (to protect the wearer) to employees. But face coverings are not PPE. While I have not seen a statement from OSHA like the statement from the CDC, I would say here that its silence speaks volumes. So, until someone can show me a statement from OSHA that a face covering is PPE, I will stand by my statement that they are not PPE. And unless the governor requires the employer to provide the face covering, which as far as I know he has not, I will stand by my opinion that the employer does have to provide it to the employee.

I must state that there are exceptions here also. If you have a contract with a general contractor or an owner that requires you to provide face coverings to your employees, you may have to do so. I urge you to carefully such contract language if the owner or general seeks to force you to provide face coverings. I do not believe (but the contract language will be determinative, that a construction contract can redefine a face covering into PPE. Another exception might be in a collective bargaining agreement, but again I would guess that any reference would be to PPE, not to face coverings. Finally, you still need to look to the six exceptions in the governor’s order and decide whether your employee’s health and/or safety will be compromised by face coverings or where your industry has a best practice against face coverings. If any of the exceptions apply be sure you site supervision has a copy of the exception and the support for it.

These new requirements go into effect on Monday, May 4th. They apply, as I have stated to businesses that will be reopening for the first time as well as those that have been in operation during the entire time sheltering period. So, for those of you who have been operating with a different set of guidelines you will have to update the

procedures and requirements you already have in place. I find no grandfather language that can be applied.

Please plan to participate in the Town Hall webinar on May 4th when I will discuss the above in more detail and try to answer any questions you may have. We will continue to work to try to get more clarification on the comments in this article.

I KNOW we all recognize the serious issues facing us as we begin to reopen Ohio. I am sure all of us in the construction and manufacturing industries want to protect ALL our employees. I think we will All do the BEST we can to try to understand what is being asked of us. I know those of you who know me KNOW that my FIRST concern and my FIRST direction to ANY client on ANY safety or health issue is to make sure ALL employees are as safe as possible, So, we need to get our hands around these regulations and recommendations and reopen with the well being of our employees our #1 priority!