NOVEMBER 19, 2020 | LABOR & EMPLOYMENT INTERSECTIONS

Fed OSHA and State OSH Plans Address Ventilation to Reduce the Workplace Spread of COVID-19

By Conn Maciel Carey's COVID-19 Task Force

While each week seems to bring news of new COVID-19 rules imposed by a state, county or city, federal OSHA continues to offer guidance of which employers should take notice. Earlier this month, on November 5th, OSHA issued a new publication focused on ways employers can use ventilation to reduce the transmission of COVID-19 virus droplets through the air in their workplaces.

"Ensuring adequate ventilation throughout the work environment can help to maintain a safe and healthy workplace."

The guidance provides a window into the types of questions OSHA may ask during future COVID-related

inspections, and could be referenced as support for General Duty Clause violations. Employees, as well as lawyers representing individuals bringing wrongful death actions on behalf of deceased employees, may also question why an employer opted not to evaluate ventilation systems and take some or all of the steps recommended by OSHA.

We had been bracing for guidance or regulatory requirements related to ventilation, with concerns that it would require capital projects to overhaul existing HVAC systems. But fortunately, this guidance does not go that far, and in fact, most of the recommended steps are not particularly burdensome. For example, OSHA suggests working with a heating, ventilation, and air conditioning (HVAC) specialist to ensure the employer's HVAC systems are fully functional. OSHA also recommends that employers open windows or provide other sources of fresh air wherever possible, and leave restroom exhaust fans on continuously while operating at maximum capacity — steps that can be achieved without infrastructure changes to the workplace.

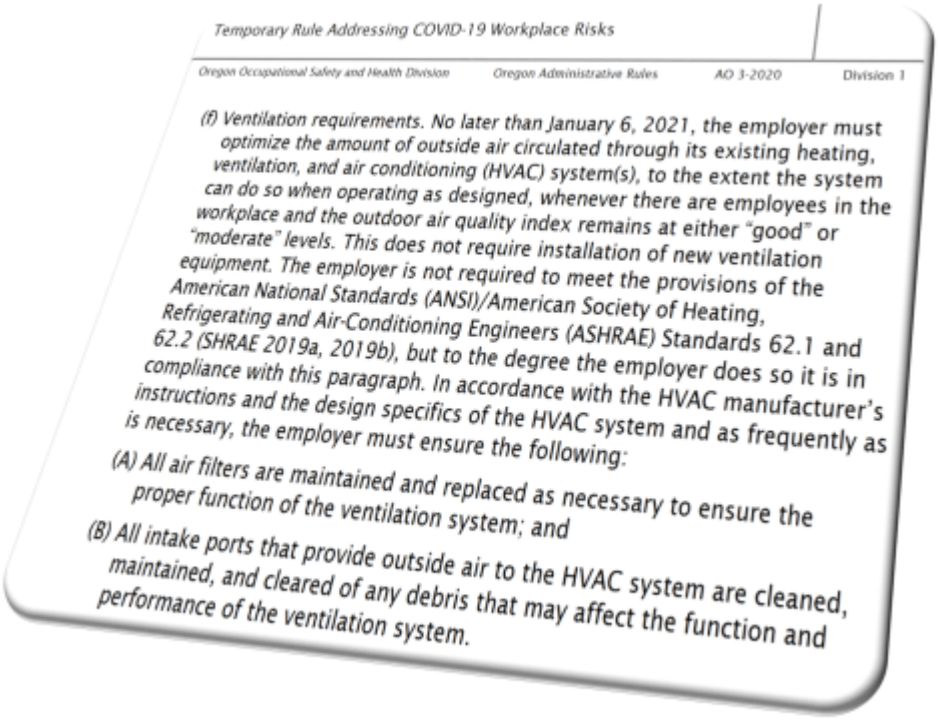
More burdensome than leaving a bathroom fan running or a window open, however, OSHA also advises installing air filters with a Minimum Efficiency Reporting Value (MERV) rating of 13 or higher, where feasible (i.e., where the system can handle it), and using portable high-efficiency particulate air (HEPA) fan/filtration systems to increase clean air, especially in higher-risk areas.

When working with an HVAC specialist, the guidance recommends that employers also should confirm that exhaust air is not pulled back into the building from HVAC air intakes or open windows, and to increase the HVAC system's outdoor air intake.

It is imperative, according to OSHA, that employees wear appropriate personal protective equipment during routine HVAC system maintenance and filters changes. To that end, the American Society of Heating, Refrigerating and Air-Conditioning Engineers (ASHRAE) guidance recommends N95 respirators, eye protection (safety glasses, goggles, or face shields, and disposable gloves when changing filters or otherwise servicing equipment that could result in exposure to contaminated surfaces. OSHA also reminds employers to remove or redirect personal fans to prevent blowing air from one worker to another.

Federal OSHA, however, is not the only agency to address ventilation and air handling. While OSHA issued a

guidance document, Oregon OSHA included a section on ventilation in its new COVID-19 Emergency Temporary Standard (the "Oregon ETS"), which goes into effect November 16. The Oregon ETS provides that employers must, no later than January 6, 2021:



Temporary Rule Addressing COVID-19 Workplace Risks

Oregon Occupational Safety and Health Division | Oregon Administrative Rules | AO 3-2020 | Division 1

(f) Ventilation requirements. No later than January 6, 2021, the employer must optimize the amount of outside air circulated through its existing heating, ventilation, and air conditioning (HVAC) system(s), to the extent the system can do so when operating as designed, whenever there are employees in the workplace and the outdoor air quality index remains at either "good" or "moderate" levels. This does not require installation of new ventilation equipment. The employer is not required to meet the provisions of the American National Standards (ANSI)/American Society of Heating, Refrigerating and Air-Conditioning Engineers (ASHRAE) Standards 62.1 and 62.2 (SHRAE 2019a, 2019b), but to the degree the employer does so it is in compliance with this paragraph. In accordance with the HVAC manufacturer's instructions and the design specifics of the HVAC system and as frequently as is necessary, the employer must ensure the following:

(A) All air filters are maintained and replaced as necessary to ensure the proper function of the ventilation system; and

(B) All intake ports that provide outside air to the HVAC system are cleaned, maintained, and cleared of any debris that may affect the function and performance of the ventilation system.

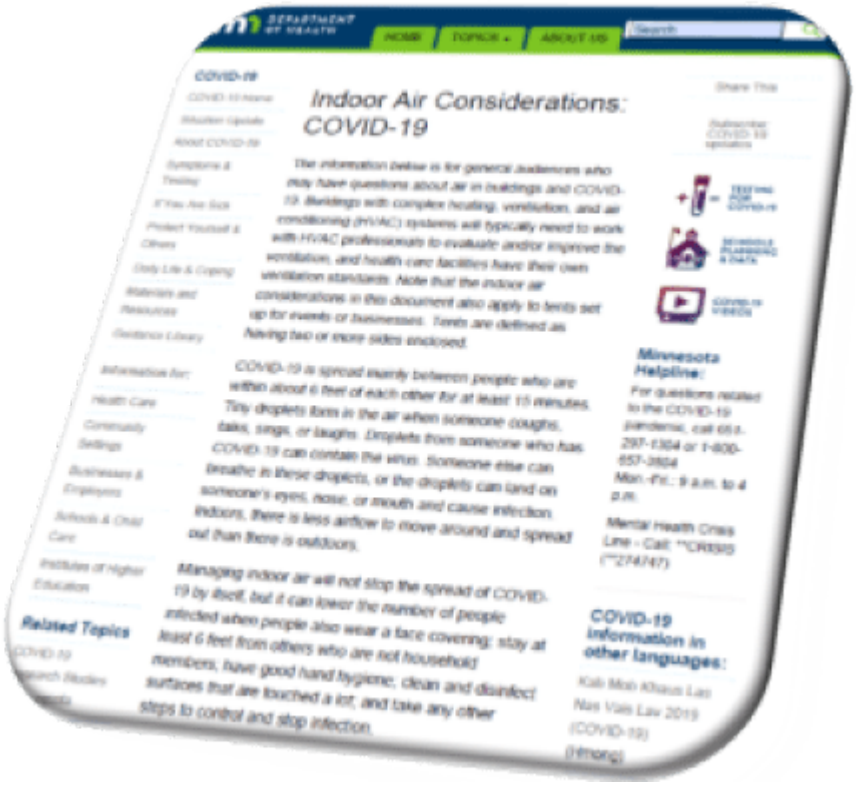
"optimize the amount of outside air circulated through its existing heating, ventilation, and air conditioning (HVAC) system(s), to the extent the system can do so when operating as designed, whenever there are employees in the workplace and the outdoor air quality index remains at either 'good' or 'moderate' levels."

Employers will be pleased to know that the OR-OSHA ETS also does not require installation of new ventilation equipment, nor are employers required to meet the provisions of the ANSI or ASHRAE standards. That said, to the extent that an employer does comply with those standards, it will be deemed to be in compliance with the Oregon ETS. Additionally, the Oregon ETS mandates that employers must ensure that all air filters are maintained and replaced as necessary to ensure the proper function of the ventilation system, and that all intake ports that provide outside air to the HVAC system are cleaned, maintained, and cleared of any debris that may affect the function and performance of the ventilation system in accordance with the HVAC manufacturer's instructions and the design specifics of the HVAC system.

Michigan OSHA, meanwhile, makes a single reference to ventilation in its Emergency COVID-19 Rules which were issued in October, mandating that sports and exercise facilities "[e]nsure that ventilation systems operate properly." There are no general industry requirements regarding ventilation that apply beyond that.

The Minnesota Department of Health has issued guidance on air flow management and ways to improve air circulation. Among them, the Minnesota DOH suggests that employers run the HVAC systems fan for two hours before and two hours after people are in the building. Moreover, MN DOH states that employers should try to

keeping relative humidity between 40% and 60% during the winter. Like federal OSHA, Minnesota suggests installing filters with a MERV rating of 13, or higher, if the system is capable. The DOH also recommends that employers open doors to rooms and hallways and open windows and outer doors when weather and safety permit. To assist with bringing in fresh air, employers may use a window air conditioner that has an outdoor air intake or vent with the vent open. Employers are advised to remember that the more people located in an indoor area the more respiratory droplets will be present which, in turn, necessitates bringing in more outdoor air. Conversely, employers may decrease or limit the number of people in a space to a number that allows at least 50 square feet per person, consider using rooms with high ceilings which allow more space for the air to move around, or use a portable air cleaner or air purifier with a HEPA filter. Employers should use portable fans and ceiling fans with caution. To help reduce the risk of spreading respiratory droplets ceiling fans should be adjusted to pull air up rather than down by tilting the blades upward if possible and place portable fans in windows to pull air out rather than into the building.



Virginia OSHA's Emergency Temporary Standard, which took effect July 27, ties HVAC standards to the risk categorization of the workplace. For example, employers that fall in the medium risk category must, at a minimum, ensure that their ventilation systems are maintained in accordance with the manufacturer's instructions, and comply with specific ANSI/ASHRAE standards, which include requirements for outdoor air ventilation. For additional information on employer's responsibilities under VOSH ETS please refer to our OSHA Defense Report.

Not to be outdone, Cal/OSHA has taken a tiered approach to ventilation in its draft COVID-19 emergency temporary standard, which requires that employers "evaluate how to maximize the quantity of outdoor air and whether it is possible to increase filtration efficiency to the highest level compatible with the existing ventilation system." California's draft standard adds a new wrinkle, requiring employers that have 20 or more positive cases during a 30-day period to:

"filter recirculated air with Minimum Efficiency Reporting Value (MERV) 13 or higher efficiency filters if compatible with the ventilation system. If MERV-13 or higher filters are not compatible with the ventilation system, employers shall use filters with the highest compatible filtering

efficiency… [and] evaluate whether portable or mounted High Efficiency Particulate Air (HEPA) filtration units, or other air cleaning systems would reduce the risk of transmission and shall implement their use to the degree feasible."

Further, employers with 20 or more cases during a 30-day period must evaluate and determine if it needs a respiratory protection program or should make changes to an existing respiratory protection program under to address COVID-19 hazards in its workplace.

With each new standard addressing ventilation in one way or another, it is clear that a consensus is building among regulatory agencies that employers should be paying attention to the air their employees breathe and looking for ways to make it safer. Remember, with the hierarchy of controls, OSHA prefers engineering controls above all other methods of hazard control, including administrative (procedural) controls, safe work practices, or PPE. As such, employers would be well-advised to ensure they take steps to assess their HVAC systems and take feasible steps to optimize the functioning of those systems to mitigate the risk of workplace transmission of COVID-19.

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For additional resources on issues related to COVID-19, please visit Conn Maciel Carey's COVID-19 Resource Page for an extensive index of frequently asked questions with our answers about HR, employment law, and OSHA regulatory related developments and guidance, as well as COVID-19 recordkeeping and reporting flow charts.

Likewise, subscribe to our Employer Defense Report blog and OSHA Defense Report blog for regular updates about the Labor and Employment Law or OSHA implications of COVID-19 in the workplace. Conn Maciel Carey's

COVID-19 Task Force is monitoring federal, state, and local developments closely and is continuously updating these blogs and the FAQ page with the latest news and resources for employers.