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REGREVIEW SM

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OSHA to Hold Public Meeting on use of Leading Indicators

OSHA asks interested parties to participate in a stakeholder meeting November 7 in Washington, D.C., to share information on their use of leading indicators to improve safety and health outcomes in the workplace. The Agency says it plans to use the information to create additional tools that may help employers with developing and using leading indicators.

Specifically, OSHA seeks feedback on the following questions, and says case studies, real world examples, and any data to support the responses is encouraged.

- To what extent are leading indicators used in your workplace?
- Do you use leading indicators as a preventative tool for fixing workplace hazards, or as a tool for improving performance of your safety and health program?
- What leading indicators are most important in your workplace? Why were these indicators chosen?
- How do you determine the effectiveness of your leading indicators?
- How do you track your leading indicators?
- What leading indicators are, or could be, commonly used in your industry?
- What challenges, if any, have you encountered using leading indicators?
- How many employees are at your facility, and how many are involved in tracking leading indicators?
- How has the use of leading indicators changed the way you manage your safety and health program or other business operations?
- What should OSHA do to encourage employers to use leading indicators in addition to lagging indicators to improve safety management?.

New OSHA Bulletin Focuses on Working Safely with Mobile Ladder Stands

OSHA has released a new Safety and Health Bulletin (SHIB) focused on working safely with mobile ladder stands. The Agency notes that each year, preventable injuries and fatalities occur while using mobile ladders, usually when they are not operated in accordance with the manufacturers' instructions and industry safety standards.

Mobile ladder stands and platforms (i.e., mobile ladders) are used in businesses with warehouses, material storage facilities, merchandise distribution centers, and in home improvement stores. Manufacturing and production facilities are more likely to customize mobile ladder design for specific work activities. The SHIB outlines mobile ladder design, training requirements, safe use of mobile ladders, inspection requirements, and how to incorporate mobile ladders in a workplace safety and health program.

Valley Fever Training Required for Some California Construction Companies

Under a new law signed October 10 by California governor Gavin Newsom, construction employers in 11 counties where Valley Fever is highly endemic must provide training on the disease to employees starting May 1, 2020. Highly endemic, according to the new law, means that the annual incidence rate of Valley Fever is greater than 20 cases per 100,000 persons per year.

Valley Fever is caused by a microscopic fungus which lives in the top two to 12 inches of soil in many parts of California. When soil is disturbed by activities such as digging, driving, or high winds, fungal spores can become airborne and potentially be inhaled by workers. Common signs and symptoms of Valley Fever include fatigue, cough, fever, shortness of breath, headache, muscle aches or joint pain, rash on upper body or legs, and symptoms similar to influenza that linger longer than usual.

The new law requires construction employers engaging in specified work activities or vehicle operation in counties where Valley Fever is highly endemic to provide awareness training on the disease to all employees annually and before an employee begins work that is reasonably anticipated to cause substantial dust disturbance. Substantial dust disturbance means visible airborne dust for a total duration of one hour or more on any day.

Training must cover specific topics as outlined in Section 6709 of California's Labor Code, and can be included in the employer's injury and illness prevention program training or as a standalone training program.

The affected counties include Fresno, Kern, Kings, Madera, Merced, Monterey, San Joaquin, San Luis Obispo, Santa Barbara, Tulare, and Ventura.

Cal/OSHA Reminds Employers to Protect Workers from Wildfire Smoke Hazards

Cal/OSHA has advised employers to take steps to protect workers from the hazards of wildfire smoke. California's protection from wildfire smoke regulations (Title 8, §5141.1) apply to workplaces where the Air Quality Index (AQI) for fine particles in the air is 151 or greater and where workers may be exposed to wildfire smoke.

When wildfire smoke affects a worksite, employers must monitor the AQI for particulate matter in the air, known as PM2.5. If the AQI for PM2.5 is 151 or greater, employers must protect employees by:

- Informing them of the AQI for PM2.5 and the protective measures available to them;
- Training them on the information in §5141.1 Appendix B;
- Implementing modifications to the workplace, if feasible, to reduce exposure;
- Implementing practicable changes to work procedures or schedules; and
- Providing respiratory protection equipment for voluntary use.

If the AQI for PM2.5 exceeds 500, respirator use is required. Employers must implement a respiratory protection program as required in California's respiratory standard and must ensure employees use respirators.

More Overtime Rule Changes Proposed!

On November 4, 2019, the U.S. Department of Labor (DOL) announced a proposed rule that would revise the regulation for computing overtime compensation for salaried, non-exempt employees who work hours that vary each week (i.e., a fluctuating workweek) under the Fair Labor Standards Act (FLSA). It also clarifies, to employers' benefit, that bonus and premium payments on top of fixed salaries are compatible with the fluctuating workweek method of compensation, and that supplemental payments must be included when calculating the regular rate of pay as appropriate under the FLSA.

The use of such a method must be pursuant to an understanding with the employer, that the employee is paid a fixed salary as straight time compensation (apart from overtime premiums) for whatever hours the employee is called upon to work in a workweek, whether few or many.

When an employee's hours of work fluctuate from week to week, the regular rate must be determined separately each week based on the number of hours actually worked each week. The fixed salary must provide pay at a rate not less than the minimum wage rate for every hour worked in those workweeks in which the number of hours the employee works is greatest. Employees must receive overtime compensation, in addition to such fixed salary and any bonuses, premium payments, and additional pay of any kind, for all overtime hours worked at a rate of not less than one-half the employee's regular rate of pay for that workweek.

In the past, the DOL had the option of adopting a similar rule but did not because it felt the issue was not unduly challenging. Since then, courts have struggled with inconsistencies, particularly a dichotomy between "productivity-based" supplemental payments, such as commissions, and "hours-based" supplemental payments, such as night-shift premiums. Such courts hold that productivity-based supplemental payments are compatible with the fluctuating workweek method, but not hours-based supplemental payments. Some supplemental pay, however, does not fall neatly into either category, such as retention bonuses, safety bonuses, and referral bonuses.

The confusion gave DOL the impetus to take up the need for clarification and revise the rules to allow employers who offer both productivity and hours-based bonuses and premium payments to use the fluctuating workweek method of compensation; such consistent treatment of all bonuses and premium payments that are included in the regular rate should help eliminate confusion for employers.

If, for example, Joe Employee's workweek does not exceed 50 hours, and his salary of $600 a week is for all hours worked. During the course of four weeks, Joe works 37.5, 44, 50, and 48 hours; the regular rate of pay in each of these weeks is $16, $13.64, $12, and $12.50, respectively. Since Joe has already received straight time compensation for all hours worked, only additional half-time pay is due. For the first week Joe is owed $600 (fixed salary of $600, with no overtime hours); for the second week $627.28 (fixed salary of $600, and 4 hours of overtime pay at half times the regular rate of $13.64 for a total overtime payment of $27.28); for the third week $660 (salary compensation of $600, and 10 hours of overtime pay at half times the regular rate of $12 for a total overtime payment of $60); for the fourth week $650 (fixed salary of $600, and 8 overtime hours at half times the regular rate of $12.50 for a total overtime payment of $50).

The proposed rule is expected to be published in the November 5 *Federal Register* and is available for public comment for 30 days. If interested, you may submit comments. The DOL estimates that 698,393 workers are paid under the fluctuating workweek method at 35,100 establishments.

Some states do not allow the use of the fluctuating workweek calculation. Industries that might use the method include seasonal ones, paraprofessionals, and even some healthcare positions.

Hazmat Road Blitz Takes Almost 700 CMVs Out of Service

Almost 700 commercial motor vehicles (CMVs) were ruled out-of-service (OOS) for transporting hazardous materials or dangerous goods (HM/DG) during Road Blitz, a North American enforcement event hosted by Commercial Vehicle Safety Alliance member jurisdictions.

Law enforcement inspected 9,259 CMVs transporting HM/DG during the weeklong event, August 12-16, across the United States, Canada, and Mexico. During those stops, officials inspected 15,197 packages. Of those packages, 8,594 were classified non-bulk packages and 6,603 were classified bulk packages/large means of containment.

A further breakdown of violation/OOS conditions shows:

- 1,156 shipping paper violations, resulting in 226 OOS conditions;
- 432 placarding violations, resulting in 102 OOS conditions;
- 204 violations for loading and securement, all resulting in OOS conditions;
- 181 other packaging violations, resulting in 50 OOS conditions;
- 171 markings violations, 35 OOS conditions; and
- 66 violations for package integrity (leaking) all resulting in OOS conditions.

Data Show Rise in Fatal Chemical Inhalations In the Workplace

The most recent data from the Bureau of Labor Statistics (BLS) show a rise in fatal chemical inhalations in the workplace, from 34 fatalities in 2016 to 41 in 2017. From 2011 through 2017, data show the number varied between 33 and 55 fatal injuries each year, with a total of nearly 300 fatalities during the 7-year span.

Inhaling carbon monoxide led to the most fatalities (116 fatal injuries) during this time period followed by inhaling hydrogen sulfide (46 fatal injuries). Of the fatal single episode inhalations of chemicals and chemical products from 2011 through 2017, 37 percent or 110 fatal injuries, occurred in confined spaces.

OSHA defines a confined space as a space that is not necessarily designed for people but is large enough for workers to enter and perform certain jobs. It also has limited or restricted means for entry or exit and is not designed for continuous occupancy. Examples can be found across numerous industries and include tanks, vessels, storage bins, ductwork, and manholes.

Deaths in confined spaces often occur because the atmosphere is oxygen-deficient, toxic, or combustible. Confined spaces that contain or have the potential to contain a serious atmospheric hazard should be classified as permit-required confined spaces and should be tested prior to entry and continually monitored.

Montana Company Owners Punished in Hazmat Case

The owners of a Montana processing and recycling company are being punished for illegally accepting hazardous materials at one of their facilities.

On December 29, 2012, an explosion occurred at one of the company's facilities when a driver offloaded natural gas condensate, or drip gas, that had been hauled from oil fields. Not only was the facility not designed, constructed, or operated to handle such materials, the shipment's bill of lading misidentified the product as "slop oil and water," which is non-hazardous.

The driver of the truck was pumping the drip gas from the front tank of the truck when a fire ignited, injuring three employees. The tanks burned for eight days until the fire department determined that they contained the drip gas and not slop oil and water, as the bill of lading indicated.

The truck also did not have placards to indicate it carried a flammable liquid.

Two owners were found guilty of crimes for the incident. One was sentenced to two years' probation and given a $5,000 fine for pleading guilty to a violation of the Clean Air Act, Negligent Endangerment due to his involvement in the release of hazardous air pollutant, and other extremely hazardous substances.

The president and CEO of the company was found guilty of conspiracy and violations of the Clean Air Act. He is scheduled to be sentenced in January

$5.2M Price Tag for Failing to Accommodate an Employee

The Americans with Disabilities Act (ADA) sometimes seems to be a sleeper law. When it is woken up, however, it can have a strong bite.

Case in point

A jury recently determined that a large national retailer violated the ADA when it refused to accommodate the disabilities of a longtime employee, and awarded $5.2 million in damages, according to the U.S. Equal Employment Opportunity Commission (EEOC), which enforces the ADA’s employment provision.

The EEOC initiated the lawsuit, which involved an employee who had a developmental disability and was deaf and visually impaired. He worked as a cart pusher in a Wisconsin location for 16 years before a new manager started at the store. In his first month, the new store manager suspended the employee and forced him to resubmit medical paperwork in order to keep his reasonable accommodations. Prior to the suspension, the employee performed his job with the accommodation of assistance from a job coach provided by public funding. The employee's conditions had not changed, the EEOC said. The employer indicated it had concerns about the employee’s safety.

When the employee and his legal guardian submitted new medical paperwork, requesting the continued accommodation of assistance from a job coach, the store cut off communication and effectively terminated him, the EEOC charged.

After a 3.5-day trial, the jury found in favor of the EEOC and awarded the employee $200,000 in compensatory damages and an additional $5 million in punitive damages.

Large-Truck-Related Crash Fatalities Increased again in 2018

While 2018 highway crash data showed an overall decrease in fatalities, large-truck-related fatalities increased since 2017.

Fatalities for crashes involving large trucks rose 0.9 percent from 2017 to 2018 according to data from the National Highway Traffic Safety Administration's (NHTSA) Fatality Analysis Reporting System (FARS). The increase occurred despite the overall 2.4 percent decline in overall fatalities on U.S. roads - the second straight year of declining overall numbers.

Focusing on fatalities involving large trucks with a gross vehicle weight rating of more than 10,000 pounds, total deaths rose to 4,951 in 2018 from 4,905 in 2017. Among fatalities in crashes involving large trucks:

- Non-occupants had 48 more fatalities, a 9.7-percent increase from 2017;
- Large-truck occupant fatalities in single vehicle crashes rose by 10 people (1.9 percent);
- Large-truck occupant fatalities in multiple-vehicle crashes decreased by three people (0.8 percent); and
- Occupant fatalities in other vehicles decreased by nine people, (0.3 percent).

The 2018 FARS release also clarified previously released data on large trucks involved in fatal crashes. After re-examining supporting material, NHTSA reclassified several light pickup trucks to the large truck category. The reclassification resulted in a previously reported 9 percent increase in large-truck related fatalities for 2017 being revised to 4.9 percent.

Overall, the total number of people killed in highway crashes fell from 37,473 people in 2017 to 36,560 in 2018. The fatality rate per 100 million vehicle miles traveled also decreased by 3.4 percent to 1.13, the lowest rate since 2014.

New Video Provides General Overview of OSHA's Inspection Process

OSHA recently released a short video that provides a general overview of its inspection process and discusses how the Agency is helping to protect workers from hazards in the workplace. The video opens with an explanation of reasons an OSHA inspection may be conducted:

- Imminent danger situations
- Worker fatalities
- Hospitalizations, amputations, or losses of an eye
- Worker complaints
- Referrals
- Targeted inspections of high hazard industries
- Follow-up inspections

The video then outlines what to expect during the opening conference, the walkaround (including questions to commonly asked of employees during this process), and the closing conference, as well as possible steps to take if a citation is issued. A Spanish version of the video also is available.

The company had policies in place to foster equal employment opportunities, provide accommodations in employment for people with disabilities, prevent unlawful discrimination on the basis of a protected characteristic (including disability) and provide for prompt investigation and documentation of reported violations of the policies. The company also trained their employees on the ADA and disability rights, including issues of accommodation and accessibility. Somewhere, something went wrong.

The court took issue with the employer's reasons for requesting new paperwork from the employee, how it approached the employee, and how the employee responded that raised questions about the employer's intent. The court also questions whether the employer followed their policies.

The company is weighing its options.

Many employers shrug off the ADA, in part because the EEOC doesn't go around auditing employers on their compliance. Rather, an employee is taken to task when an employee (or someone on behalf of an employee) files a claim. Many employees may be unaware of their rights under the ADA, which can decrease the sense of risk. When a claim is filed, however, it can be costly.

Fire Prevention Week Focuses on Planning, Practicing Escape Route

According to the National Fire Protection Association (NFPA), today's home fires burn faster than ever, making escape planning critical to home fire safety. While studies show that in the past, people had approximately 17 minutes to escape a typical home fire from the time the smoke alarm sounds, now they may have as little as two minutes to get out safely.

With these concerns in mind, the NFPA has announced "Not Every Hero Wears a Cape. Plan and Practice Your Escape™!" as the theme for this year's Fire Prevention Week campaign, which runs October 6-12, 2019.

According to the NFPA, a home escape plan includes working smoke alarms on every level of the home, in every bedroom, and near all sleeping areas. It also includes two ways out of every room, usually a door and a window, with a clear path to an outside meeting place (like a tree or mailbox) that's a safe distance from the home. Home escape plans should be practiced twice a year by all members of the household.

Fire safety in the workplace

While Fire Prevention Week focuses on preventing and responding to residential fires, employers can use the campaign to draw attention to fire safety in the workplace. OSHA requires employers to train workers on the fire hazards in the workplace and how to respond in a fire emergency. Employers who want their workers to evacuate must train them on how to escape. Employers who expect workers to use firefighting equipment must train them to use the equipment safely.

OSHA's fire safety regulations address emergency fire exits, portable fire extinguishers, fire prevention plans, and emergency action plans.

EPA Proposes Revisions to 2015 Coal Ash Regulations

On November 4, EPA announced proposed revisions to its 2015 coal ash regulations. Specifically, the proposal includes:

- Establishing a new deadline of August 31, 2020 for all unlined surface impoundments and surface impoundments that are located above an aquifer to stop receiving waste and either close or retrofit.
- Establishing procedures for facilities to obtain additional time to develop alternate capacity to manage their waste streams (both coal ash and non-coal ash) before they must stop receiving waste and initiate closure of their coal ash surface impoundments.
- Changing the classification of compacted-soil lined or clay-lined surface impoundments from "lined" to "unlined."
- Revising the coal ash regulations to specify that all unlined surface impoundments are required to retrofit or close.

EPA says that at present, the majority of the 2015 coal ash rule remains in place and its implementation continues. All units managing coal ash are required to monitor groundwater, publicly report the data, and take action to address exceedances of the groundwater protection standards.

EPA will accept public comments for 60 days once the rule is published in the *Federal Register*. The Agency also will hold a virtual public hearing in early January 2020 for interested parties to present information, comments, or views on the proposed changes.

Trying to Coerce Drivers? A major No-No

Joe walks into the dispatch office after inspecting his vehicle and before heading out in the morning. He reported an issue with his truck's brake system. Because there are no mechanics available to immediately make repairs, the dispatcher asks Joe to head out anyway. The load is an important one to deliver on time and really, after hearing what's wrong, the dispatcher doesn't think it's that serious of an issue. But Joe remains steadfast, refusing to take a vehicle that needs repairs on the road. The dispatcher threatens to suspend Joe without pay or even terminate his employment for disobeying orders. Joe, needing the job with a family to support, climbs in the cab and goes on his way because he felt like he had no choice after the threats.

But the company, and the dispatcher, have not heard the end of this event.

Know the coercion rule
Regardless of the situation, the dispatcher can't threaten Joe with a job action for refusing his request. Drivers are protected from such action by §390.6, better known by motor carriers as the coercion rule.

As a carrier, your management team, shippers, receivers, and brokers should know all about this rule and how it affects driver work assignments. Basically, the rule states that it's illegal to threaten a driver's job, and otherwise take business action against him or her to get the driver to violate safety regulations, as long as the driver makes it clear that driving would be a violation.

Complaint sources
Coercion complaints are likely to occur in three areas, including when drivers are asked to drive when:

1. The driver is ill or fatigued,
2. The driver is out of hours, or
3. The vehicle has a serious defect.

If the driver is told to drive under these circumstances “or else,” he or she has a right to lodge a complaint against the company and the person doing the threatening.

Make sure that employees with the authority to threaten a driver are made aware of this rule. A carrier that can be certain that the driver is not threatened with the loss of future employment or an adverse business action can also be certain that coercion did not occur.

Considering ISO 45001 Certification?

A new standard released in 2018, ISO 45001 Occupational health and safety management systems, lays out best practices for developing a health and safety management system and provides guidance on using the system. The goal is to help employers make the workplace safer by proactively evaluating health and safety performance.

ISO 45001 is the first occupational safety and health management system standard to be internationally accepted, providing a framework for employers to improve safety and health and reduce risk. It replaces OHSAS 18001, although organizations conforming to OHSAS 18001 will have a three-year transition period.

Most businesses have implemented some sort of ISO standard in the past, for quality, security, environmental management, or something else. Many businesses decided to implement ISO standards to better compete in their industry sector. Because ISO 45001 is compatible with other ISO standards, organizations that already implemented another standard will have a leg up if they decide to work toward ISO 45001 certification.

The standard helps establish and attain safety and health objectives by documenting legal obligations and then going through a continual improvement process. The standard does not specify particular objectives, but does provide a framework to integrate safety and health with other initiatives such as employee wellness. Organizations of any size could benefit from this process, regardless of industry sector.

Getting certified
To become certified, employers should first purchase the ISO standard and form a steering committee, then conduct a gap assessment looking at where they are now and where they need to get to meet ISO 45001. The standard guides companies in taking a systematic and proactive approach to worker safety. Once the provisions have been implemented, the employer schedules a third-party auditor to come in and determine certification.

The certification process will involve a lot of documentation. For example, an organization must prepare a regulatory matrix of provisions that apply to the company. (This could be a valuable exercise even if the company decides not to go for the certification.) The employer would also undertake a SWOT analysis, looking at strengths, weaknesses, opportunities, and threats.

Various investment entities are looking at sustainable companies, and particularly looking at safety and health as a performance metric before investing in, or even do business with, other companies. For example, potential business partners may ask, “What are you doing for safety and health?” For small- to mid-size companies that don’t have management systems in place, obtaining the ISO 45001 certification could set them apart from their competitors.

CMV Accidents: How do you Respond?

The worst has happened: one of your commercial drivers was involved in a crash. What do you do now? The Federal Motor Carrier Safety Administration (FMCSA) and other government agencies do require certain actions to be taken after certain types of accidents. It’s up to you to learn what’s needed, and when, to comply with post-crash reporting, recording, and testing requirements.

Reporting
It has been more than 25 years since the FMCSA last required motor carriers to report serious crashes to the agency, but reporting might still be needed in the following situations:

- For many states, often depending on the severity or dollar value of the crash;
- According to your company's written policy and procedures for the reporting of crashes to company management and other internal players;
- When certain types and/or quantities of hazardous materials are involved; and,
- When you're operating under a special, temporary exemption from the FMCSA, the terms of the exemption may include a crash reporting requirement.

Recording
When it comes to the recording of crash information in your accident register, think "hearse, nurse, or purse." You must add a crash to your accident register if it involved one of your commercial motor vehicles (no matter who was at fault) and resulted in:

- A fatality (hearse);
- Bodily injury, to anyone, requiring immediate treatment away from the scene (nurse); or
- Disabling damage requiring any vehicle to be towed away (purse, since someone has to pay for a tow truck).

There's no specific deadline for adding a crash to your register, but you have to keep the data in your register for three years.

Testing
The need to record data in an accident register is based on the definition of "accident" in §390.5. The need to have your driver tested for drugs and/or alcohol after a crash, however, is based on the standards in §382.303, which are different.

If a crash is recordable based on the criteria above AND there is a fatality or your CDL driver is cited for a moving traffic violation related to the crash, then post-accident testing is probably required.

A post-accident decision tree can help you decide if a test is needed.

A post-crash alcohol test must be completed within two hours, but definitely no more than eight hours, after the crash. A mandatory drug test must be done within 32 hours after the crash. If you miss a deadline, keep a record explaining why.

The absolute worst time to learn about your compliance responsibilities is immediately after a crash. Become familiar with the reporting, recording, and testing requirements in advance so you can save your worrying for much more important things.

Toeboards and Falling Object Protection

While some of OSHA's revised walking-working surface regulations require toeboards as part of a guardrail, they are not mandatory with every guardrail. Before the 2016 revisions, OSHA required guarding "with a standard railing and toe board" so every guardrail needed a toeboard. However, OSHA removed several toeboard references in the 2016 changes.

Still, including them on guardrails may be a good idea if they could be needed in the future to protect workers from falling objects. For instance, a mezzanine might not need a toeboard during normal use, but during repair or ren-ovation work, employees below might be struck by tools or other accidentally dropped items.

Examples of where OSHA explicitly requires toeboards include:

- On a mobile ladder stand or platform over 10 feet,
- Around a ladderway floor hole or platform hole (except at the entrance), and
- Anywhere they are needed to protect employees from falling objects.

The last catch-all provision could become an issue if unanticipated situations arise, or a change in work activities creates a need for falling object protection. Also, remember that OSHA's purpose is protecting employees, not property. To illustrate, consider the rule for work areas over dangerous equipment.

Dangerous equipment
Prior to the 2016 changes, the old rule for protecting workers over dangerous equipment specified guardrails and toeboards. In the preamble to the revised rule, OSHA stated that it does not believe toeboards are necessary over dangerous equipment, since they primarily protect employees from falling objects.

Although toeboards don't protect employees from falling, you might want toeboards over equipment to prevent objects from falling on or into that equipment.

Height and placement
OSHA specifies a minimum toeboard height of 3.5 inches (or 2.5 inches around vehicle repair pits). However, if materials near the toeboard are stacked higher than 3.5 inches, you must take additional steps to prevent objects from falling, such as installing paneling or screening to the midrail (or top rail) of the guardrail.

In addition, when determining where to include toeboards, consider that objects may move or roll before going over an exposed edge, and consider where employees may be working on the lower level. In short, install toeboards where required, but where they aren't required, consider potential future activities in the area. It may be better to have them and not need them, rather than need them and not have them.

Wearing Surgical Masks During Cold and Flu Season

You should know the rules for voluntary versus mandatory use of dust masks, but what about voluntary use of surgical masks? Employees who purchase their own masks for voluntary use might obtain surgical masks, perhaps simply choosing to wear them during the cold and flu season.

In a letter of interpretation dated December 20, 2017 (but only recently posted on OSHA's website), the agency noted that employers may allow employees to voluntarily wear surgical masks when respiratory protection is not required. Employers may even provide surgical masks for voluntary use without creating additional obligations for themselves.

Another letter from April 26, 2018, noted that even if an employer allows the voluntary use of respirators (and agrees to pay for them), OSHA does not consider this to become mandatory use. Paying for voluntary-use products like surgical masks does not obligate the employer to follow the requirements of the respiratory protection standard.

What OSHA says

Surgical masks create a barrier between the mouth and nose of the wearer and potential contaminants. They do not seal tightly to the wearer's face, nor do they provide a reliable level of protection from inhaling smaller airborne particles.

In the 2017 letter, OSHA noted that surgical masks are not considered respirators and are not covered by the respiratory protection standard at 29 CFR 1910.134. This means they cannot be used in place of mandatory respirators.

Surgical masks can protect the wearer from splashes, but may also be worn by people who are ill to protect other employees from infection. They are commonly used in health care settings to protect patients, and to prevent splashes from contacting the face of the wearer.

OSHA pointed out that if a hazard assessment indicates a potential for a combination of splashes and airborne contaminants, employers may want to consider N95 respirators equipped with spray- or splash-resistant facemask material to protect the wearer from splashes.

Regardless of which type or respirator is used, the employees should be informed on the different varieties of protection available, as well as the any cautions, limitations, and restrictions of use.