CONSTRUCTION INDUSTRY SAFETY COALITION

May 19, 2020

VIA ELECTRONIC MAIL

Ms. Loren Sweatt
Principal Deputy Assistant Secretary of Labor
Occupational Safety and Health Administration
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, D.C. 20210

Re: Construction Industry Safety Coalition
COVID-19 Outbreak Guidance/Application of 29 CFR 1910.1020

Dear Ms. Sweatt:

On behalf of the Construction Industry Safety Coalition ("CISC"), we write to request further clarification from the Occupational Safety and Health Administration ("OSHA") regarding application of OSHA's Access to Employee Exposure and Medical Records rule ("Access Rule") to certain employer-conducted COVID-19 health screenings. These screenings have been recommended by the Centers for Disease Control and Prevention ("CDC") and OSHA, and in some circumstances required by state and local authorities.

In recent communications OSHA has suggested that documented temperature screens or written symptom surveys (collectively referred to as "screens") would necessarily be considered covered "records" under the Access Rule and, thus, must be maintained for the duration of the affected employee's employment, plus 30 years. We are seeking clarification of this position, as the plain language of the regulation does not support such a broad interpretation. Specifically, the CISC recommends that OSHA clarify that screens conducted by *non-health care personnel* are not records covered by the Access Rule.

A. Background

As you know, in virtually all states and localities, construction work has been deemed "essential" or "critical" and, thus, throughout the outbreak contractors have largely continued to work. The industry has taken numerous steps to protect employees and the CISC has published guidance documents to assist contractors in their prevention efforts.

One prevention measure that has been recommended by the CDC and OSHA and required by certain state and local jurisdictions is the daily taking of temperatures and performing written symptom surveys. The goal of these measures is to prevent employees who may be experiencing symptoms of COVID-19 – but have not yet been tested – from entering the worksite and potentially spreading the virus to other employees. These preventative measures are also typically

implemented in conjunction with other engineering and administrative controls. The CISC has been supportive of taking temperatures and completing written symptom surveys, in accordance with CDC and OSHA guidance and leading public health authorities.

Notwithstanding the workplace health benefits of these measures, OSHA has recently interpreted the Access Rule as applying to *any* written temperature check or symptom survey, triggering the retention requirements of that regulation. In recent guidance on COVID-19 specific to the meat and poultry processing industries ("Interim Guidance"), OSHA (in partnership with the CDC) stated:

> Employers should evaluate the burdens and benefits of recording workers' temperatures or asking them to complete written questionnaires. These types of written products become records that must be retained for the duration of the workers' employment plus 30 years. See OSHA's Access to Employee Exposure and Medical Records standard (29 CFR 1910.1020). https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/meat-poultry-processing-workers-employers.html.

OSHA also expressed this position on a May 6, 2020 conference call related to its COVID-19 activities.

The CISC does not believe that OSHA's interpretation is supported by the plain language of the rule. Moreover, the CISC is concerned that this interpretation will create bureaucratic hurdles to discourage contractors from performing screens.

B. Analysis

The Access Rule is intended to "provide employees and their designated representatives a right to access to relevant exposure and medical records." 29 CFR 1910.1020(a). Records covered by the rule fall into two categories: exposure records and medical records. An "employee exposure record" is:

> [A] record containing any of the following kinds of information:
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> 1910.1020(c)(5)(i) Environmental (workplace) monitoring or measuring of a toxic substance or harmful physical agent;
>
> 1910.1020(c)(5)(ii) Biological monitoring results which directly assess the absorption of a toxic substance or harmful physical agent by body systems (e.g., the level of a chemical in the blood, urine, breath, hair, fingernails, etc.);
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> 1910.1020(c)(5)(iii) Material safety data sheets indicating that the material may pose a hazard to human health; or
>
> 1910.1020(c)(5)(iv) In the absence of the above, a chemical inventory or any other record which reveals where and when used and the identity (e.g., chemical, common, or trade name) of a toxic substance or harmful physical agent.

An "[e]mployee medical record" is defined as "a record concerning the health status of an employee which is made or maintained by a physician, nurse, or other health care personnel, or technician."

While OSHA does not state explicitly in the Interim Guidance what category it believes the screens fall into, presumably OSHA is considering them to be either "biological monitoring results" (and thus Exposure Records), or some other type of employee medical record. The language of the regulation itself, however, does not support an interpretation that all screens are "records" covered by the rule:

- First, the screens do not "directly assess the absorption of a toxic substance or harmful physical agent" into body systems, thus meeting the criterion for a biological monitoring result. Checking of symptoms and taking temperatures does not "directly assess" the absorption of COVID-19. They are an indicator that someone may have the virus, but they do not constitute a direct assessment.

- Second, the screens do not need to be taken by medical personnel and, thus, they would not *all* be considered employee medical records. The Interim Guidance does not specify that the screens need to be conducted by a healthcare professional or anyone with a medical background or education. Indeed, the Interim Guidance only recommends that the screener be provided with appropriate personal protective equipment while conducting such screenings. An "employee medical record" under 29 CFR 1910.1020 is limited to a record "made or maintained by a physician, nurse, or other health care personnel, or technician." 29 CFR 1910.1020(c)(6)(i). Therefore, if an individual who is not a physician, nurse, or other health care personnel, or technician conducts the screen, such a record would not be an "employee medical record" and would not be subject to the associated retention requirement under the standard.

Given the above, the CISC recommends that OSHA issue additional guidance clearly stating that screens conducted by non-health care personnel are not employee exposure records or medical records and are not subject to the requirements of the Access Rule. This interpretation is consistent with the rule, but will also serve a public health purpose by eliminating a potential bureaucratic obstacle to the widespread implementation of this useful tool.

Thank you in advance for your consideration of this request. As always, the CISC stands ready to support the Agency to protect employees during this difficult time.

Sincerely,

Robert Matuga, AVP, Labor, Safety & Health
National Association of Home Builders

Greg Sizemore
Vice President, HSE and Workforce Development
Associated Builders and Contractors

Kevin Cannon, Senior Director, Safety & Health Services
Associated General Contractors of America

Jeff Buczkiewicz, President/CEO
Mason Contractors Association of America

Howard Marks, VP for Environment, Health, & Safety
National Asphalt Pavement Association

Bradley Sant, SVP, Safety and Education
American Road & Transportation Builders Association

cc: The Honorable Eugene Scalia (*via* Regular Mail)
The Honorable Rachel Mondl (*via* Electronic Mail)
Kelly Tyroler, House Education and Labor Committee