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TO: Matthew V. Barrett, JD, MPA, Connecticut Association of Health Care Facilities, Inc.

FROM: Heather O. Berchem, Esq., Salvatore G. Gangemi, Esq., and Madiha M. Malik, Esq.

RE: OSHA Respiratory Protection Program Requirement

Use of N95s or other respirators triggers an obligation by nursing homes to implement a Respiratory Protection Program pursuant to OSHA regulations. Historically, nursing homes did not have to comply with OSHA's respiratory protection standard because respirators were typically not used in the nursing home setting. However, with the widespread use of N-95 masks during the COVID-19 pandemic, all facilities must ensure they have an appropriate Respiratory Protection Program in place as soon as possible. We are seeing an increase in OSHA investigations of nursing homes and facilities are being asked to produce their Respiratory Protection Programs as part of those investigations.

We outline the requirements for the program below.

Overview of OSHA Respiratory Protection Standard

OSHA regulations at 29 C.F.R. § 1910.134 (Respiratory Protection standard) mandate that in any workplace where respirators are necessary to protect the health of the employee or whenever respirators are required by the employer, the employer shall establish and implement a written respiratory protection program with worksite-specific procedures.

In addition, where employees are permitted to use respirators voluntarily, the facility must ensure: 1) that any employee using a respirator voluntarily is medically able to do so; and 2) that the respirators are cleaned, stored and maintained so as not to pose a health hazard.

The Respiratory Protection Program must be administered by a designated trained program administrator who is responsible for overseeing the program and

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conducting required evaluations of program effectiveness. Additional requirements specific to particular elements discussed below are also set forth in the regulations.

In addition, the facility must provide respirators, training and medical evaluations at no cost to the employee.

Note that OSHA regulations also require that an employer base the selection of respirators on certain factors set forth in the regulations. To the extent supplies are currently limited, this is likely not an issue in the short-term for nursing homes using N95s (see below under “Supply Shortages”) however facilities should be familiar with the requirements when selecting respirators going forward.

Respiratory Protection Program Requirements

Below are the requirements for a Respiratory Protection Program, as outlined in 29 C.F.R. § 1910.134(c):

- Must be in writing and address the following elements, as applicable:
 - Procedures for selecting respirators for use in the workplace;
 - Medical evaluations of employees required to use respirators;
 - Fit testing procedures for tight-fitting respirators;
 - Procedures for proper use of respirators in routine and reasonably foreseeable emergency situations;
 - Procedures and schedules for cleaning, disinfecting, storing, inspecting, repairing, discarding, and otherwise maintaining respirators;
 - Procedures to ensure adequate air quality, quantity, and flow of breathing air for atmosphere-supplying respirators; (likely N/A)
 - Training of employees in the respiratory hazards to which they are potentially exposed during routine and emergency situations;
 - Training of employees in the proper use of respirators, including putting on and removing them, any limitations on their use, and their maintenance; and
 - Procedures for regularly evaluating the effectiveness of the program.

COVID-19 Supply Shortages

In a memo issued on August 28th, OSHA acknowledged that shortages of N-95 respirators and fit-testing supplies during the COVID-19 pandemic have made it difficult for facilities to fully comply with the Respiratory Protection standard. (<https://www.osha.gov/SLTC/respiratoryprotection/respiratory-protection-covid19-compliance.pdf>). In response to supply shortages, OSHA has issued temporary enforcement guidance to Compliance Safety and Health Officers, allowing them to exercise discretion when circumstances beyond the employer's control prevent compliance with certain parts of the Respiratory Protection standard and the employer has made objectively reasonable efforts to obtain and conserve supplies of N-95 respirators and fit-testing supplies. However, regardless of supply shortages, employers are required to maintain a fully compliant written Respiratory Protection Program, as outlined above. At least one nursing home provider outside of Connecticut has been alleged to be in violation of OSHA's Respiratory Protection standards and issued a related fine.

Potential CMS Enforcement

CMS previously issued guidance (<https://www.cms.gov/files/document/qso-20-17-all.pdf>) to health care providers including nursing homes, stating that CMS surveyors will consider whether facilities using respirators have a Respiratory Protection Program in place when determining compliance with infection control protocols. To date, we have not seen CMS issuing deficiencies for noncompliance with Respiratory Protection Program standards. However, potential CMS enforcement further highlights the need for facilities to update or implement a Respiratory Protection Program if one does not exist.

Providers who have questions regarding the Respiratory Protection Program or any issues related to OSHA may contact Sal Gangemi at sgangemi@murthalaw.com, Heather Berchem at hberchem@murthalaw.com, or Madiha Malik at mmalik@murthalaw.com.