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PH COVID-19 Client Alert Series: OSHA Interim Enforcement Response Plan for COVID-19

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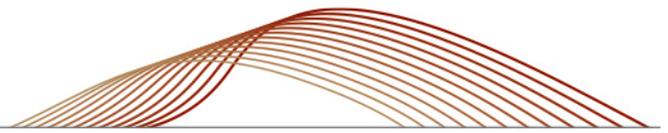
In response to the COVID-19 pandemic, the Occupational Safety and Health Administration (“OSHA”) has issued a memorandum, dated April 13, 2020, setting forth its [Interim Enforcement Response Plan for Coronavirus Disease 2019 \(COVID-19\)](#) (“OSHA Enforcement Guidance”). The OSHA Enforcement Guidance “provides instructions and guidance to Area Offices and Compliance Safety and Health Officers (“CSHOs”) for handling COVID-19-related complaints, referrals, and severe illness reports” covering “all investigations and inspections specifically related to the workplace hazard” of exposure to the virus causing the COVID-19 pandemic. The OSHA Enforcement Guidance does not create a new occupational safety standard for COVID-19. Instead, it is designed to allow for “flexibility and discretion” so that OSHA personnel can enforce existing occupational safety and health standards amidst changing conditions.

Employers should be aware of the following key issues raised by the new OSHA Enforcement Guidance:

I. OSHA Will Prioritize Enforcement Activities Based On Identified Risk Levels

OSHA’s March 2020 [Guidance on Preparing Workplaces for COVID-19, OSHA publication 3990](#), included an [Occupational Risk Pyramid](#) to help employers determine worker risk for occupational exposure to SARS-CoV-2, the virus that causes COVID-19. The four risk levels are:

1. Very high risk (e.g., healthcare workers performing aerosol-generating procedures on known or suspected COVID-19 patients);
2. High exposure risk (e.g., healthcare workers exposed to known or suspected COVID-19 patients);
3. Medium exposure risk (e.g., workers with frequent and/or close contact with people who may, but are not known to, have COVID-19, such as in high-population density work environments, or retail); and
4. Lower exposure risk (e.g., workers with minimal occupational contact with the public and other coworkers).



The OSHA Enforcement Guidance directs staff to prioritize “fatalities and imminent danger exposures related to COVID-19...with particular attention given to healthcare organizations and first responders” for inspection. Facilities with very high and high exposure risk jobs (e.g., hospitals, emergency medical centers, emergency response facilities, biomedical laboratories, etc.) will typically be the focus of inspection activities in response to complaints, referrals, and employer-reported illnesses. Establishments that have a higher degree of occupational exposure to COVID-19, such as healthcare and emergency response, are much more likely to be subject to an OSHA inspection.

II. OSHA Will Rely On “Non-Formal Procedures” at Medium or Lower Exposure Risk Workplaces

Formal complaints related to workplaces that have medium or lower exposure risk “will not normally result in an on-site inspection.” Instead, OSHA will use “non-formal procedures” to investigate alleged hazards.

In practice, “non-formal procedures” means that OSHA enforcement personnel will send a letter to employers indicating that OSHA has been notified of alleged workplace hazards related to COVID-19, and directing the employer to immediately investigate the alleged condition(s), make any necessary corrections or modifications to address the condition(s), and document the results of the investigation and any corrective action in a response. Employers should substantively respond to these letters, as failure to respond could result in an onsite inspection and further enforcement focus.

III. Onsite Inspection Procedures May Be Modified

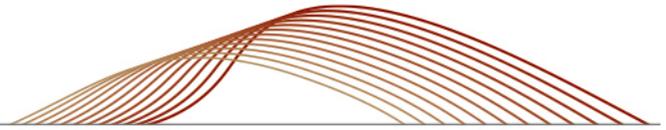
In light of the risk of exposure to OSHA personnel during inspections, enforcement personnel are directed to modify inspection procedures to minimize OSHA personnel’s potential exposure to COVID-19-related workplace hazards. These steps may include conducting opening conferences by phone, electronically or remotely reviewing applicable documents, and conducting interviews by phone. Employers should be prepared to be flexible in the event of an inspection.

IV. OSHA Has Identified Priority Safety and Health Standards for Review

OSHA has not promulgated a specific safety order related to COVID-19. Instead, OSHA has identified several standards that may apply and could be implicated during an investigation, depending on the factual circumstances. These standards include, but are not limited to, the following:

- Recording and reporting occupational injuries and illnesses (29 CFR § 1904 et seq.);
- Personal protective equipment (29 CFR §§ 1910.132 (general requirements); 1910.133 (eye and face protection); and 1910.134 (respiratory protection¹));
- Sanitation (29 CFR § 1910.141); and
- Access to exposure and medical records (29 CFR § 1910.1020).

OSHA further indicates that, if OSHA standards or regulations do not address any identified deficiencies and guidance regarding appropriate procedures is available, enforcement personnel may issue a “General Duty Clause” violation pursuant to §5(a)(1) of the Occupational Safety and Health Act.² Such a citation is appropriate where: (1) the employer failed to keep the workplace free of a hazard to which employees are exposed; (2) the hazard was recognized; (3) the hazard was causing



or likely to cause death or serious physical harm; and (4) there was a feasible and useful method to correct the harm.

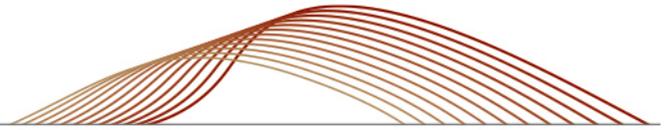
Employers should review and evaluate their workplace for potential exposure hazards, and eliminate or mitigate such hazards according to the hierarchy of controls (i.e., engineering controls, administrative controls, work practices, and personal protective equipment) and OSHA guidance. Employers should also review their practice, policies, and training materials related to these and other potentially applicable standards.

V. Compliance with CDC Guidance and Other OSHA Guidance May Obviate General Duty Clause Violations

With respect to General Duty Clause violations, the OSHA Enforcement Guidance directs enforcement personnel to consider whether guidance is available that addresses any deficiencies not addressed by OSHA standards or regulations. In addition to the March 2020 [Guidance on Preparing Workplaces for COVID-19, OSHA publication 3990](#), OSHA has provided [interim guidance](#) discussing various engineering and administrative controls, safe work practices, and personal protective equipment needs for workers in selected industries, including [healthcare, retail and high customer volume operations, in-home repair services](#), and [environmental \(i.e., janitorial\) services](#).

The OSHA Enforcement Guidance also specifically directs enforcement personnel to consult the most recent Centers for Disease Control (“CDC”) guidance in order to assess workplace hazards and evaluate whether an employer has implemented adequate measures to protect the workforce. The CDC provides a variety of [resources for businesses and employers](#) to consider and implement to ensure that the workplace remains safe. For example, the CDC’s [Interim Guidance for Businesses and Employers to Plan and Respond to Coronavirus Disease 2019 \(COVID-19\)](#) includes specific recommendations targeted at reducing transmission among employees (e.g., encouraging sick employees to stay home, identifying where and how workers may be exposed at work, separating sick employees, and educating employees regarding the spread of COVID-19); maintaining healthy business operations (e.g., identifying a workplace coordinator for COVID-19 issues, implementing flexible policies, and establishing policies and practices for social distancing); and maintaining a healthy work environment (e.g., considering engineering controls, supporting respiratory etiquette and hand hygiene for employees, customers and visitors, and performing cleaning and disinfection). The CDC has also provided specific [cleaning and disinfection guidance](#) for facilities as well as guidance on [Implementing Safety Practices for Critical Infrastructure Workers Who May Have Had Exposure to a Person with Suspected or Confirmed COVID-19](#). Our Client Alert regarding the CDC’s critical infrastructure worker safety guidance is available [here](#). Other pertinent CDC guidance includes the use of [face coverings](#),³ [social distancing](#), and [when to end home isolation](#).

Ultimately, the OSHA Enforcement Guidance directs enforcement personnel to consider current CDC guidance on safety measures to protect employees. In situations where the employer’s protective measures are less stringent than those recommended by CDC guidance, enforcement personnel should consider whether employees are exposed to a recognized hazard and whether there are “feasible means” to abate the hazard. Thus, the OSHA Enforcement Guidance appears to rely upon CDC guidance as the standard for appropriate workplace protections.



Although the OSHA Enforcement Guidance does not state this explicitly, compliance with CDC guidance may obviate any violations of the General Duty Clause.⁴ As a result, employers should frequently review, and endeavor to implement and abide by, applicable CDC (and any other OSHA) guidance.

VI. Employers Remain Responsible for Reporting and Recording COVID-19 Cases, Although OSHA May Exercise Discretion Regarding Recording

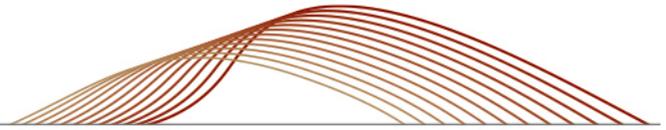
OSHA requires that employers report work-related fatalities within eight hours and report in-patient hospitalization within 24 hours after learning of the incident. 29 CFR § 1904.39(a)(2). Additionally, for fatalities that do not immediately result from a work-related incident, employers must report within 30 days of the work-related incident that contributed to the fatality. 29 CFR § 1904.39(b)(6). The OSHA Enforcement Guidance reiterates that the reporting requirements apply, but does not specifically acknowledge the difficulty in ascertaining work-relatedness for COVID-19 cases in areas with community transmission. As a result, for employers that have employees reporting to work (in other words, not working remotely), it would be prudent to report to OSHA and other public health authorities in the event an employee is hospitalized or succumbs to COVID-19, particularly in workplaces that have a significant risk of exposure.

OSHA has also clarified that COVID-19 is a “recordable” illness for purposes of a facility’s OSHA 300 Log. However, on April 10, OSHA issued [Enforcement Guidance for Recording Cases of Coronavirus Disease 2019 \(COVID-19\)](#). It reiterates that COVID-19 is a recordable illness if: (1) the case is a confirmed case of COVID-19; (2) the case is “work-related” as defined by 29 CFR § 1904.5;⁵ and (3) the case involves one or more of the general recording criteria set forth in 29 CFR § 1904.7.

OSHA has acknowledged that, in areas with ongoing community transmission, it may be difficult to determine whether an employee who contracted COVID-19 did so at work such that the case is “work-related.” As a result, OSHA will not enforce the recordkeeping requirements for employers other than those in the healthcare industry, emergency response organizations (such as firefighting, law enforcement, or emergency medical providers), and correctional institutions, unless (1) there is objective evidence that a COVID-19 case may be work-related (e.g., a cluster of cases among employees that work closely together); and (2) the evidence was reasonably available to the employer. While employers in industries other than healthcare, emergency response, and correctional institutions should evaluate whether any COVID-19 cases among its employees are work-related, OSHA enforcement risk for failing to make such determinations is low, except in the most obvious and egregious cases. Employers should nevertheless critically review reports of COVID-19 among its employees who are reporting to work or are exposed to COVID-19 as part of their work duties (i.e., are not working from home) to determine if they are work-related in order to identify and mitigate potential exposure and transmission hazards in the workplace.

We will continue to monitor for additional guidance from OSHA and other relevant agencies during the COVID-19 pandemic. [Click here](#) to read more from our Coronavirus series.

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- ¹ OSHA has issued multiple memoranda regarding enforcement discretion with respect to compliance with the respiratory protection standard due to equipment shortages, which affects the availability of respirators, the ability to perform fit-testing, and other issues. See, e.g., [Enforcement Guidance for Respiratory Protection and the N95 Shortage Due to the Coronavirus Disease 2019 \(COVID-19\) Pandemic, April 3, 2020](#). The OSHA Enforcement Guidance also sets forth considerations for enforcement discretion related to respiratory protection. Employers subject to this standard should endeavor to comply whenever possible and carefully review OSHA's memoranda regarding enforcement discretion for any compliance shortcomings.
 - ² Section 5(a)(1) of the Occupational Safety and Health Act requires each employer to provide "employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm...". 29 U.S.C. § 654.
 - ³ Face coverings are distinct from respirators, which are subject to the training, fit-testing, and other requirements of the respiratory protection standard. See 29 CFR § 1910.134.
 - ⁴ Although not addressed or discussed in the OSHA Enforcement Guidance, any mandatory state or local orders requiring particular safety precautions (e.g., mandated symptom checks prior to starting work, such as is required by the [Order of the Health Officer No. C19-07b in the City and County of San Francisco](#)) could also conceivably be used as a baseline for a General Duty Clause violation.
 - ⁵ A case is "work-related" if "an event or exposure in the work environment either caused or contributed to the resulting condition or significantly aggravated a pre-existing injury or illness." 29 CFR § 1904.5(a).

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