

CLIENT ALERT

OSHA Issues Enforcement Guidance

Apr. 16. 2020

The U.S. Occupational Safety and Health Administration (OSHA) has issued an [Interim Enforcement Response Plan](#) for COVID-19 to instruct its area offices, state plan designees, and compliance safety and health officers on how to prioritize and respond to workplace complaints related to the novel coronavirus. Although this enforcement response plan is directed to OSHA personnel, it provides useful additional guidance to employers on OSHA's enforcement priorities and considerations, building on OSHA's previously published guidance to employers for responding to and protecting employees from COVID-19 health and safety concerns in the workplace.

In summarizing the state of play, OSHA reiterates its commitment to enforcement for workplace safety and health hazards related to COVID-19, and notes that initial complaints received since the pandemic's start frequently focused on an employer's failing to provide the necessary personal protective equipment (PPE) or sufficiently addressing suspected cases of COVID-19 illness in the workplace. OSHA then states, as a general matter, that complaints arising outside of healthcare or emergency response employers should be processed as "non-formal" complaints consistent with existing OSHA practice as outlined in OSHA's [Field Operations Manual](#).

The enforcement response plan guidance then directs OSHA to prioritize COVID-19-related enforcement with a sensitivity toward the risk posed in any given workplace. Drawing on OSHA's previously published [Guidance on Preparing Workplaces for COVID-19 \(COVID Guidance\)](#), which we addressed in prior alerts ([OSHA Issues Guidance](#) and [Cal/OSHA Follows Federal OSHA](#)), OSHA notes four categories of occupational risk: (1) very high; (2) high; (3) medium; and (4) low. The high and very high risk categories include jobs such as treating healthcare personnel and first responders. Jobs with medium risk include those in places where there is frequent and close interaction between people but no known cases of infection, such as high-volume retail establishments. Low risk jobs are those where there is infrequent contact with both co-workers and the general public. The enforcement response plan guidance modifies the [Field Operations Manual](#) to mandate for all complaints an initial notification to the employer by phone.

OSHA states that it is treating all COVID-19-related inspections as novel cases. For that reason, it directs that the Directorate of Enforcement Programs must be notified of all proposed citations and notices related to COVID-19 exposure.

Under the enforcement response plan guidance, OSHA directs that fatalities and imminent danger exposures related to COVID-19 will be prioritized for inspection, "with particular attention given to healthcare organizations and first responders." Formal complaints (*i.e.*, written and signed complaints) alleging unprotected exposures to COVID-19 by employees in high or very high risk jobs may warrant an on-site inspection.

For most other workplaces, even formal complaints "will not normally result in an on-site inspection." For those cases, the "non-formal" procedures set out in the [Field Operations Manual](#) will be followed, but if the employer's response is not adequate, an on-site inspection may follow.

The balance of the guidance provides instruction to the OSHA area offices on how to prepare for and organize site inspections that are deemed necessary in light of the agency's identified priorities. The guidance takes care to stress that OSHA compliance officers need to be appropriately trained for inspecting workplaces where COVID-19 exposure may have occurred, and take appropriate precautions, including using the necessary PPE.

OSHA stresses that all possible steps should be taken to hold the opening conference away from any area of suspected or known COVID-19 exposure, including by phone if feasible, and that the opening conference should include the professional responsible for occupational health hazard control. The guidance directs compliance officers to determine whether the employer has a written pandemic plan, as recommended by the CDC, as well as review other applicable procedures in place, including job hazard assessments, PPE protocols, and any respiratory protection program or policies in place. OSHA also directs its compliance officers to review pertinent medical records related to COVID-19 exposures and records of employee training on the employer's relevant pandemic procedures, and to assess whether the employer has implemented a hierarchy of controls as part of its protective measures (*i.e.*, engineering controls, administrative controls, work practices, and PPE).

Also of note, for walkarounds, compliance officers should not enter patient rooms or treatment areas while high-hazard procedures are being conducted. Compliance officers can take photographs and video where practical but should never take photographs or video of patients; in fact, compliance officers must take all precautions to protect patient confidentiality. During inspections, compliance officers must avoid potential exposure to suspected or confirmed COVID-19 patients. And if the compliance officers must conduct private interviews with affected employees, the interviews must be held in uncontaminated areas. Social distancing, frequent hand-washing, and other contamination-reduction techniques are to be followed. In addition to its memorandum, the OSHA enforcement response plan guidance includes:

- [specific enforcement procedures](#);
- [a sample employer letter for COVID-19 activities](#);
- [a sample hazard alert letter](#);
- [a sample alleged violation description for a citation under the general duty clause, Section 5\(a\)\(1\), of the Occupational Safety and Health \(OSH\) Act](#);
- and [additional references](#), including OSHA's prior COVID-19-related enforcement memoranda.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

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