



OSHA CONSIDERATIONS IN THE COVID-19 ERA FOR THE HEALTHCARE INDUSTRY

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OSHA Remains Active

It is critical that employers in all businesses remember that, in addition to all of the additional workplace guidance that has been provided during the pandemic, governmental watchdog agencies such as the Occupational Safety and Health Administration remain active.

Today's Focus

- Review OSHA recordkeeping requirements you may need to consider (employee temperatures?)
- Review the number of OSHA COVID-19-related complaints
- Review OSHA's investigative process and how that process has changed during the pandemic
- Review OSHA's informal process after completion of an investigation that results in issuance of citations
- Review OSHA formal process for contesting citations
- Review OSHA's prohibition on retaliation against employees reporting violations and the consequences of engaging in retaliation
- Provide examples of OSHA's current enforcement actions in the healthcare industry and the results that are being achieved

OSHA Standards

There is no specific OSHA standard covering COVID-19.

Key OSHA standards that apply in COVID-19 Era.

- the Personal Protective Equipment (PPE) standard (in general industry, 29 CFR 1910 Subpart I),
- the Respiratory Protection standard (29 CFR 1910.134),
- Bloodborne Pathogens (29 CFR 1910.130)
- Recordkeeping (29 CFR 1904)
- the General Duty Clause, 29 USC 654(a)(1) which requires employers to furnish to each worker “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.”

Recordkeeping Requirements

- OSHA 300 log – this form is used for employers to record all reportable injuries and illnesses that occur in the workplace, where and when they occur, the nature of the case, and the name and job title of the employee who was injured or because ill, and the number of days away from work or on light duty.
- OSHA 301 log is for employers to described the workplace injury or illness and must include each injury or illness that is included in the OSHA 300 log.
- On these forms the employer records all **work-related** fatalities, injuries and illnesses if they involve:
 - Death
 - loss of consciousness
 - days away from work
 - restricted work or transfer to another job
 - medical treatment beyond first aid; or
 - a significant injury or illness diagnosed by a physician or other licensed health care professional

Recordkeeping Requirements

OSHA Form 300 and 301 Logs are used for the employer to record, if **work-related**:

- any needlestick injuries and cuts from sharp objects that are contaminated with another person's blood or other potentially infectious material (must be entered on the 300 log as an injury without the employee's name);
- occupational hearing loss;
- active tuberculosis.

OSHA Form 300-A is the summary of work-related injuries and illnesses which is posted in the workplace annually.

- OSHA Form 300A is posted for period of three months

Determining if an employee's COVID-19 infection is work-related

How does an employer determine if an employee becoming infected with the coronavirus (COVID-19) is work-related?

- **Basic Requirement:** You must consider an injury or illness to be 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. Work-relatedness is presumed for exposures or events occurring in the workplace unless an exception applies.

STANDARD EXCEPTIONS:

- at the time of the injury or illness, the employee was at work as a member of the general public and not as employee such as a visitor;
- the injury or illness surfaces at work, but results solely from a non-work-related event or exposure (for example, an employee has a heart attack at work but has a history or heart disease);
- the injury or illness results solely from voluntary participation in a wellness program (employee injured while working out company gym);
- the injury or illness is the result of eating or drinking or preparing food or drink for personal consumption (such as employee choking while eating lunch);
- the injury is the result of an employee doing personal tasks outside of work hours (e.g., while visiting with co-workers after work hours).
- the injury or illness is solely the result of personal grooming, self-medication for a no-work-related condition, or is intentionally self-inflicted.
- the injury or illness is caused by a motor vehicle accident and occurs on a company parking lot or company access road while the employee is commuting to or from work.
- the illness is the common cold or flu (contagious diseases such as TB, brucellosis, hepatitis A, or the plague are work-related if the employee is infected at work)
- the illness is a mental illness.

When is a POSITIVE COVID-19 test reportable per OSHA Guidance?

OSHA CURRENT GUIDANCE:

- COVID-19 is a recordable illness, and thus employers are responsible for recording cases of COVID-19 if:
 - the case is a confirmed case of COVID-19
 - the case is “work-related” as provided by OSHA
 - the case involved one or more of the general recording criteria (death, days away from work, medical treatment beyond first aid, lack of consciousness, etc.)

COVID-19 illnesses are likely work-related:

- a) when several cases develop among workers who work closely together and there is no alternative explanation;
- b) if contracted shortly after a significant length of exposure to a customer or co-worker who tested positive and there is no alternative explanation.

COVID-19 illness likely NOT work-related if :

- a) if he is the only worker to contract COVID-19 in his area and his job duties do not include frequent close contact with the general public
- b) if outside the workplace, he closely and frequently associated with someone who has COVID-19 and is not a co-worker.

When is a POSITIVE COVID-19 test reportable per OSHA Guidance?

If, after considering these factors, the employer cannot determine whether it is more likely than not that exposure in the workplace has a causal rule, the employer does not need to report the positive case on the OSHA 300 and 301 logs.

NOTE: In the healthcare industry, and especially in healthcare settings involving direct patient care, an employee's positive COVID-19 status is much more likely to be considered to have occurred in the workplace as opposed to a non-healthcare setting.

Penalties

- Penalties (unadjusted for inflation) can be \$1,000 for each year the OSHA 300 log was not properly kept, with the same penalty (\$1,000) for each OSHA 301 log that was not filled out at all (up to a maximum of \$7,000), an unadjusted penalty of \$1000 for each OSHA 301 log that was not accurately completed (up to a maximum of \$3,000) and \$1,000 for each year the OSHA 300A Summary is not accurately completed.
- Maximum penalty for violations of OSHA's posting requirements adjusted for inflation is \$13,260.
- Penalties for failure to report an injury or death that is required to be reported are \$5,000-\$7,000 (unadjusted for inflation) and can be as much as \$13,260 adjusted for inflation.

When must OSHA be notified of a work-related death or hospitalization?

- All employers are required to notify OSHA via call to local office, email via OSHA's website at www.osha.gov, or using OSHA's toll-free number at 1-800-321-OSHA when an employee is killed on the job or suffers a work-related hospitalization, amputation, or loss of an eye.
- **A fatality must be reported within 8 hours. An in-patient hospitalization, amputation, or eye loss must be reported within 24 hours.**

Who are your “employees”?

- Even if a worker is classified as an independent contractor, for all OSHA purposes, OSHA uses the “economic realities” test to determine if the worker should be considered your “employee”.
- Economic Realities test:
 - Who the workers consider their employer;
 - Who pays the worker’s wages;
 - Who has the responsibility to control the workers;
 - Whether the employer has the power, versus the responsibility, to control the workers;
 - Whether the employer has the power to hire, fire, or modify the workers’ conditions of employment;
 - Whether the workers’ ability to increase their income depends on efficiency rather than initiative, judgment or foresight;
 - How the workers’ wages are established.

You could be responsible for reporting requirements for someone you believe to be an “independent contractor”.

How long must employee health screenings be maintained?

- An employer who does health screenings (i.e., taking temperature prior to entry into the building) is not required to maintain these records and may simply permit or deny entry based on temperature.
- If a physician, nurse, or other health care personnel, or technician, takes employee temperatures and records these temperatures, they can be considered an “employee medical record” for OSHA purposes which must be maintained by the employer for **the employee’s length of employment plus 30 years.**

OSHA COVID-19 Related Complaints

COVID-19 Related Complaints as of September 17, 2020		
	Federal (OSHA)	State Plans
Complaints:	8,909	26,913
Referrals:	1,196	2,944
Closed:	8,275	19,7263

Complaints by Essential Industry

OSHA COVID-19 Complaints by Essential Industry as of September 17, 2020

Healthcare	2,194
Restaurants	998
Retail	520
Construction	267
Grocery Stores	149

OSHA Enforcement

- Inspection
- Citation
- Informal Conference
- Notice of Contest
- OSHA litigation

Off-site Inspections

- Investigation of complaints not involving significant risk of death or serious injury
- OSHA calls employer and follows up with letter
- Employer must respond within 5 days
 - identify or rebut alleged hazards
 - Identify corrective action taken or planned
- Usually no inspection If OSHA is satisfied with response

On-site Inspections

- Arrival of OSHA Compliance Officer (CO) - usually without notice
- Opening Conference
- Review of records
- Walkthrough
- Closing conference

COVID-19 Inspection Priorities: ↓ in Community Spread

- Normal pre-pandemic selection procedures, except:
 - Prioritize COVID-19 cases
 - Emphasis on non-formal phone/fax inspections to assure effective and efficient use of OSHA resources to address COVID-19 events

COVID-19 Inspection Priorities: → or ↑ Community Spread

- Prioritize COVID-19 fatalities and imminent danger cases – especially at high risk workplaces:
 - Hospitals and healthcare providers treating COVID-19 patients
 - Others with known COVID-19 cases or high number of complaints
- Remote inspection if insufficient OSHA resources, followed by on-site when resources become available.
- Random selection of fatality and imminent danger cases for onsite inspection if no prior inspection due to limited resources
- Medium or low exposure risk: on-site inspection unlikely

Preparing for OSHA Inspection

- **Strong safety program**
- OSHA poster in place
- OSHA reports up to date
- Written protocol for OSHA inspections
- Train key managers trained and others who may have initial contact with OSHA.
- Establish relationship with employment attorneys

Citation Contents

- Violation
 - Standard violated
 - Category (by severity)
 - Date/location
- Penalty – based on statute and subject to reduction factors
- Abatement – method of abatement and completion date
- Posting requirement – at least 3 days or until corrected

Citation – Severity Rating

- **Other-than-serious** – relationship to safety/health, but not likely to cause death or serious harm
- **Serious** – substantial probability of death or serious harm
- **Willful** – serious violation + knowledge that conditions violated law OR general indifference to known or obvious hazard
- **Repeat** – employer previously cited for violating same or similar regulation
- **Failure to abate** – failure to correct within time and in manner prescribed in citation

Citation – Penalties

Type	Penalty
Serious	\$13,494
Failure to abate	\$13,494 per day beyond abatement date
Willful* Repeat	\$134, 937
	*possible criminal penalties for violation resulting in death.

Citation – Employer Options

- Pay fine and timely abate violation
- Request Informal Conference
- Timely file Notice of Contest – must be postmarked within 15 working days of receipt of receipt of citation. **Time period not tolled by informal conference.**

Notice of Contest

- If Notice of Contest is not filed, citation becomes “**final order**” and cannot be reviewed by any court or agency.
- If Notice of Contest is filed, citation proceeds to OSHRC litigation.
- Timely filed Notice of Contest suspends obligation to abate violation or pay penalty until contest resolved.

Defenses

- Isolated occurrence/employee misconduct
- Supervisor misconduct
- Impossibility of compliance
- Compliance creates “greater hazard”
- Statute of limitations/reasonable promptness
- Reliance on prior inspection (possible impact on amount of penalty)

Retaliation

OSHA during COVID-19 Related Whistleblower Complaints	
September 17, 2020	2,872
April 21, 2020	733

Retaliation

- Unlawful to discriminate or discharge for protected activity:
 - Filing complaint with OSHA or other state or federal authority authorized to investigate occupational safety
 - Causing proceeding to be instituted (e.g., requesting inspection)
 - Testifying or providing information in judicial or administrative proceeding (e.g., investigation, inspection, interviews, hearing)
 - Requesting information from OSHA
 - **Refusal to Work** (if certain conditions met)

Retaliation Claims – Refusal to Work

OSHA: Employee has right to refuse, if . . .

- Employee asks employer to eliminate danger and employer fails to do so;
- Employee refuses to work in "good faith" (i.e., genuine belief imminent danger exists);
- Reasonable person would agree there is real danger of death or serious injury; **and**
- Not enough time, due to urgency of hazard, to correct through regular enforcement channels (e.g., request for OSHA inspection).

<https://www.osha.gov/right-to-refuse.html>

Examples of Healthcare Work Tasks Associated with Exposure Risk Levels

Employer should assess the hazards to which their workers may be exposed; evaluate the risk of exposure; and select, implement, and ensure workers use controls to prevent exposure.

- Lower ● Performing administrative tasks in non-public areas of healthcare facilities, away from other staff members.
- Medium ● Providing care for the general public who are not known or suspected COVID-19 patients.
- Working at busy staff work areas within a healthcare facility.

Examples of Healthcare Work Tasks Associated with Exposure Risk Levels

- High
- Entering a known or suspected COVID-19 patient's room.
 - Providing care for a known or suspected COVID-19 patient not involving aerosol-generating procedures.
- Very High
- Performing aerosol-generating procedures (e.g., intubation, cough induction procedures, bronchoscopies, some dental procedures and exams, or invasive specimen collection) on known or suspected COVID-19 patients.
 - Collecting and handling specimens from known or suspected COVID-19 patients.

Engineering Controls

Use engineering controls to shield healthcare workers, patients, and visitors from individuals with suspected or confirmed COVID-19. This includes physical barriers or partitions in triage areas to guide patients, curtains separating patients in semi-private rooms, and airborne infection isolation rooms (AIIRs) with proper ventilation.

Administrative Controls

- Isolate patients with suspected or confirmed COVID-19 to prevent transmission to other individuals.
- Restrict the number of personnel entering the room of a patient with suspected or confirmed COVID-19.
- Follow CDC guidelines for signs for and labeling of patient room doors when transmission-based precautions (i.e., contact and airborne precautions) are in place.
- Minimize the number of staff present when performing aerosol-generating procedures.

Safe Work Practices

- Perform as many tasks as possible away from patients with suspected or confirmed COVID-19.
- Work from clean to dirty and limit opportunities to touch contamination.
- Differentiate clean areas from contaminated areas.
- Systems in place to handle waste and other potentially infectious materials.
- Clean, disinfect, and maintain reusable equipment and PPE.
- Use caution when handling needles or other sharps and dispose of properly.
- Workers should avoid touching their faces, particularly until after they have thoroughly washed their hands upon completing work and/or removing PPE.
- Train and retrain workers on how to follow established protocols.

Enforcement During the Coronavirus Epidemic

There has been a scarcity of PPE, including N95 masks, during pandemic. OSHA will take that into consideration when conducting inspections.

OSHA has directed its compliance officers to evaluate an employer's good faith efforts to comply with safety and health standards during the coronavirus epidemic.

OSHA will take employers' attempt to comply in good faith into strong consideration when determining whether it cites a violation.

Enforcement During the Coronavirus Epidemic

OSHA has come under strong criticism, particularly from unions and Democrats, for not issuing a COVID-19 standard as opposed to guidance and for an alleged lack of vigorous enforcement.

OSHA expects compliance with applicable standards and that employers will follow OSHA and CDC guidance.

OSHA has six months in which to issue a citation. In the last week or so a spate of citations have been issued. Expect that number to increase in the coming weeks and months.

Recent Healthcare OSHA Citations

- A resident care facility assessed \$28,070 in penalties for failing to protect employees from exposure to the coronavirus. One citation was for a serious violation for failure to provide respirator masks to resident-care employees when they were caring for residents who were exhibiting signs consistent with COVID-19.
- A hospital was cited for violating respiratory standards. It was issued two serious violations with \$9,639 in proposed penalties. The hospital failed to correctly fit test respirators on employees who were required to use them. It also failed to train employees on proper respirator use and to ensure employees understood when to wear one.

Recent Healthcare OSHA Citations

- A hospital was assessed \$13,494 in penalties for serious violations because emergency facility employees often shared used protective gowns or did not have protective gowns to wear while treating patients.
- Cal/OSHA cited a hospital after an employee contracted COVID-19. The hospital had failed to provide proper respiratory protection for its employees when transporting patients suspected of having the disease. The proposed penalty was \$6,750.

Examples of OSHA Complaints in Healthcare Setting

- Failure to provide PPE and have it accessible.
- Failure to have engineering controls, administrative controls and safe practices in place.
- Failure to train employees.
- Failure to adequately protect employees from COVID-19 exposure.
- Lack of contact tracing and failure to notify employees when there has been possible exposure.
- Staff share breakrooms where they remove masks and they share desks, computers, phones, and bathrooms.

Examples of OSHA Document Requests During an Investigation

Requests are by letter, orally or administrative subpoenas.

- Copies of OSHA 300, 300A and 301 forms from 2017 to present.
- Copies of written pandemic plans.
- Copies of documents showing engineering controls, administrative controls, and safe practices implemented to protect workers from COVID-19.
- Copies of documents reflecting efforts to obtain and provide appropriate and adequate supplies of PPE.
- Copies of documents reflecting procedures to disinfect facilities.
- Copies of respirator fit-test records.

Examples of OSHA Document Requests During an Investigation

- Copies of documents reflecting procedures for airborne infection isolation rooms.
- Copies of documents reflecting protocols for staff donning and doffing PPE while working with or near patients suspected or confirmed to have COVID-19.
- Copies of training records for employees related to COVID-19.
- Copies of injury and illness reporting procedures and policies made to respond to hazards associated with COVID-19.

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QUESTIONS?

