



OSHA Issues During the COVID-19 Pandemic

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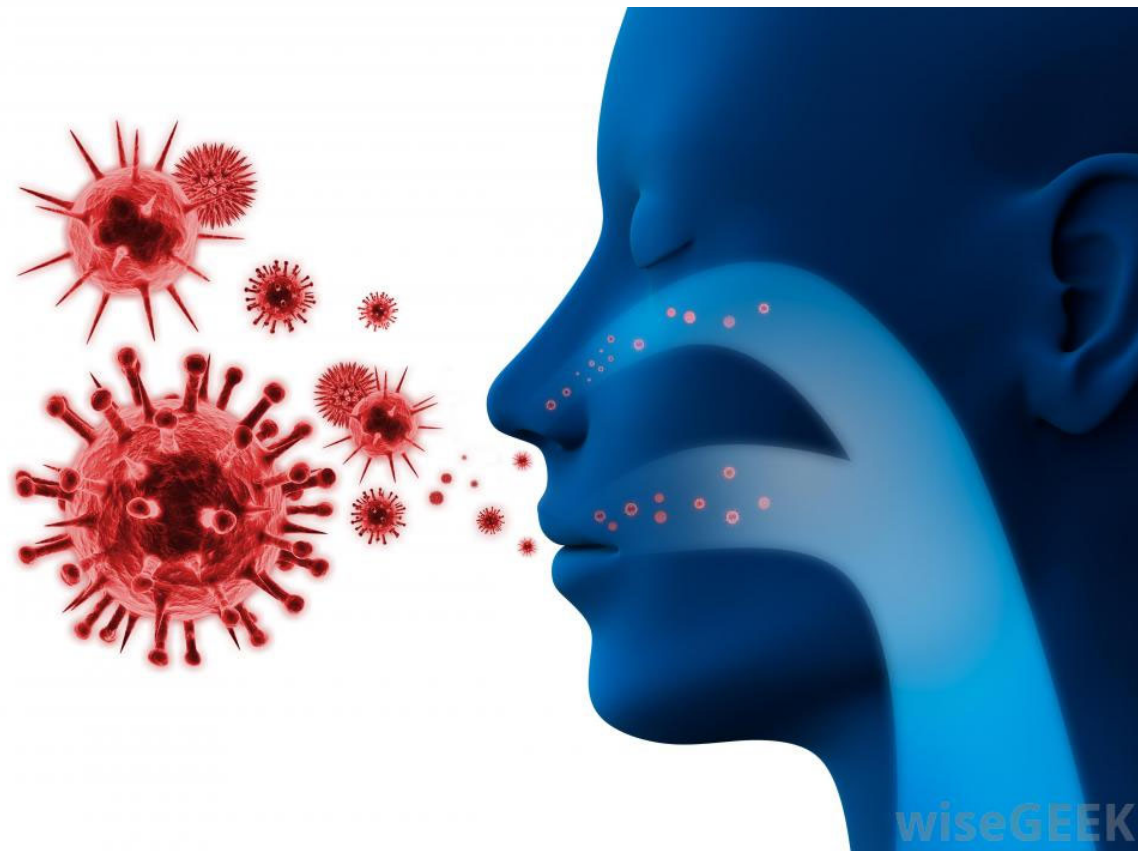
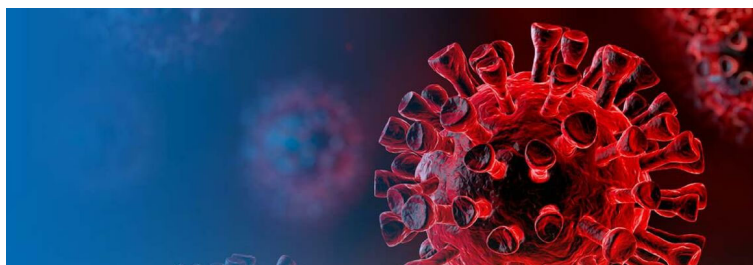


OSHA Remains Active

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

- To review specific OSHA standards that have not changed, but have special meaning or interpretations during the pandemic
- To review OSHA recordkeeping requirements you may need to consider (employee temperatures?)
- Review OSHA's investigative process and how that process has changed during the pandemic
- Review an employer's options when OSHA comes knocking at your door
- 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



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.”

OSHA'S COVID-19 PPE Requirements

OSHA recommends different Personal Protective Equipment and Guidance based on COVID-19 Exposure level and type of work performed.



PPE Considerations

In general:

- The PPE should be selected based on the results of an employer's hazard assessment and workers' specific job duties;
- Respirators must meet the requirements of OSHA's Respiratory Protection Standard (29 CFR 1910.134) to include medical exams, fit testing and training;
- Respiratory protection must be worn while performing or present for aerosol generating procedures such as CPR and intubation.
- Employers should establish and ensure workers follow standard operating procedures for cleaning (and laundering PPE and items such as lab coats or uniforms intended to function as PPE and SOP's for maintaining, storing and disposing of PPE.
- Whenever PPE is contaminated with human blood, bodily fluids, or other infectious materials, employers must follow the Bloodborne Pathogen Standard (29 CFR 1910.1030 and OSHA's Enforcement Procedure for Occupational Exposure to Bloodborne Pathogens.

PPE for Those Engaged in Employee Health Screenings

- Reliance on social distancing will not be possible if the health screener will be taking temperatures.



- Reliance on barrier/partition controls: during screening, the screener stands behind a physical barrier such as a glass or plastic window or partition that can protect the screener's face and mucous membranes from respiratory droplets that can be produced when an employee sneezes or coughs.

Bloodborne Pathogens Standard

OSHA's Bloodborne Pathogens standard (29 CFR 1910.1030) applies to occupational exposure to human blood and other potentially infectious materials. Although this standard does not include respiratory secretions that may transmit COVID-19 it can provide a framework that may help control some sources of the virus.

Control Measures

The following list provides some example control measures which may be applicable to every organization:

- Engineering controls such as installing high-efficiency air filters, increasing ventilation rates, or installing physical barriers, such as clear plastic sneeze guards.
- Implementing basic infection control measures: hand washing, require sick workers to stay home, encourage employees to cover their coughs/sneezes, routine cleaning and disinfecting.
- Increasing social distancing by staggering breaks/lunches, encouraging employees to work from home, creating flexible work hours, creating additional shifts, or increasing the physical distance between employees.

Bloodborne Pathogens Standard

Control Measures, continued:

- Developing policies and procedures for prompt identification and isolation of sick people.
- Training employees to recognize the signs, symptoms of the virus and precautions they should take to prevent infection. Prompt reporting of any potential infection will help slow the spread of the virus.
- Identifying an isolation area for infected/potentially infected individuals within the worksite or home, to limit contact with other workers or family members.
- Discontinuing non-essential travel.
- Providing resources and a work environment promoting personal hygiene: tissues, no-touch trash cans, hand soap, alcohol-based hand rubs containing at least 60 percent alcohol, disinfectants, and disposable towels for workers to clean their work surfaces.
- Using personal protective equipment such as gloves, goggles, face shields, face masks, and respiratory protection, when appropriate and in accordance with OSHA PPE and respiratory protection standards.

Bloodborne Pathogen Regulation

- In order to minimize the hazards of occupational exposure to bloodborne pathogens, an employer must implement an exposure control plan for the worksite with details on employee protection measures.
- The plan must also describe how an employer will use engineering and work practice controls, personal protective clothing and equipment, employee training, medical surveillance, hepatitis B vaccinations, and other provisions as required by OSHA's Bloodborne Pathogens Standard ([29 CFR 1910.1030](#)). Engineering controls are the primary means of eliminating or minimizing employee exposure and include the use of safer medical devices, such as needleless devices, shielded needle devices, and plastic capillary tubes.
- While performing medical or dental procedures, employers should ensure that appropriate [bloodborne pathogen standards](#) are followed when encountering saliva and blood to help minimize the risk of COVID-19 spread to dental/healthcare workers.

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.
- On this form 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 Log is also 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 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 of 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).

Determining if an employee's infection is work-related

STANDARD EXCEPTIONS:

- 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 log.

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

- All employers are required to notify 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.

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 Standards: General Duty Clause

Section 5(a)(1)

- » Requires each employer to keep the workplace “free from recognized hazards that are causing or are likely to cause death or serious physical harm to employees”
- » An employer can be cited under the General Duty Clause if there are feasible means to abate a serious hazard that it did not use.

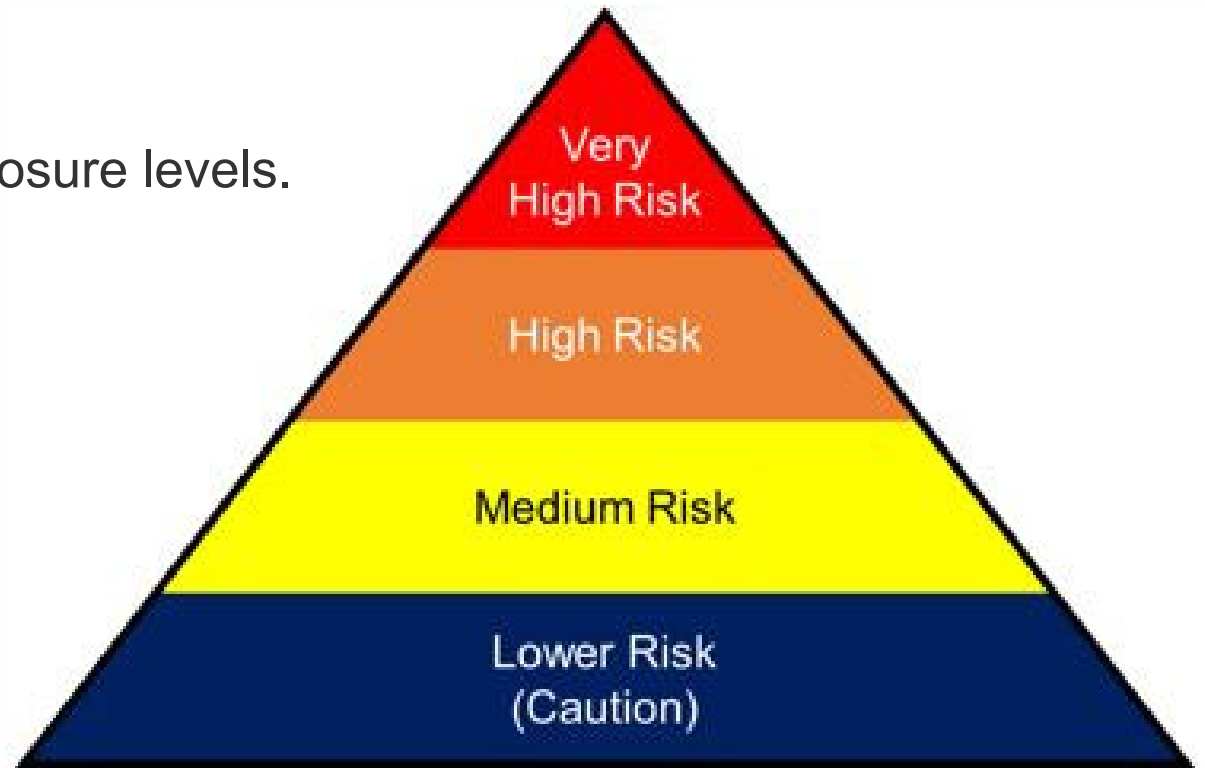
OSHA Standards: General Duty Clause

To issue a General Duty Clause violation, OSHA must prove:

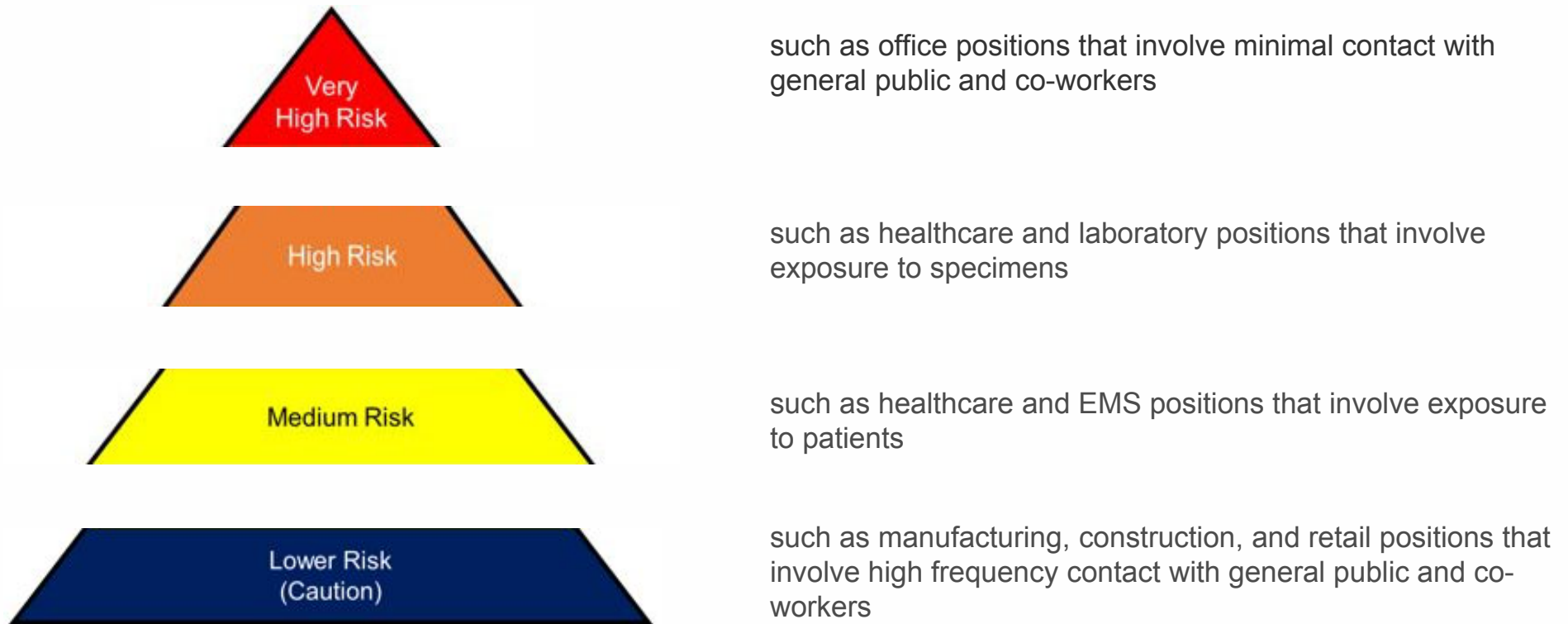
- The employer failed to keep the workplace free of a hazard to which its employees were exposed;
- The hazard was recognized;
- The hazard was causing or was likely to cause death or serious physical harm;
- A feasible and useful method to correct the hazard was available.

OSHA COVID-19 Exposure Level Guidance

- Issued March 9, 2020.
- Divided jobs into four risk exposure levels.



OSHA COVID-19 Exposure Level Guidance



OSHA's COVID-19 Guidance for Everyone

- Avoid touching your eyes, nose, or mouth with unwashed hands;
- Frequently wash hands with soap and water for at least 20 second; when soap and water are unavailable, use an alcohol-based hand rub with at least 60% alcohol.
- Practice good respiratory etiquette, including covering coughs and sneezes;
- Avoid close contact with people who are sick;
- Stay home if sick;
- Recognize personal risk factors such as being older, having underlying conditions such as heart or lung disease or diabetes.



Cleaning and Disinfecting Workplaces

Cleaning and disinfecting public spaces, including a workplace, will require that you:

- Develop your plan;
- Implement your plan;
- Maintain and revise the plan.



Cleaning and Disinfecting Workplaces Develop Your Plan

While most surfaces will need only normal routine cleaning, frequently touched surfaces and objects like light switches and doorknobs will need to be cleaned and then disinfected to further reduce the risk of germs on surfaces and objects.

- First, clean the surface or object with soap and water.
- Then, disinfect using an EPA-approved disinfectant.
- If an EPA-approved disinfectant is not available, you can use 1/3 cup of bleach added to one gallon of water, or 70% alcohol solutions to disinfect.



Cleaning and Disinfecting Workplaces – Develop Your Plan

Examples of frequently touched surfaces and objects that will need routine disinfecting are:

- Tables
- Doorknobs
- Light switches
- Countertops
- Handles
- Desks
- Keyboards
- Toilets
- Faucets and sinks
- Gas pump handles
- Touch screens
- ATM machines



What OSHA Standard Relates to Disinfecting?

- OSHA's hazard communication standard, revised in 2012, requires that the chemical manufacturer or distributor provide Safety Data Sheets (SDS) for each hazardous chemical to downstream users to communicate information on the hazards the chemicals impose.
- The SDS includes information such as the properties of each chemical, the physical, health, and environmental health hazards, protective measures and safety precautions for handling, storing and transporting the chemical.

OSHA requires that an employer, in establishing a Hazard Communication Program:

- 1) Identify Responsible Staff (assign responsibility for both initial and ongoing activities that have to be undertaken to comply with the rule). Site supervisors frequently are responsible for on-the-job training sessions;
- 2) Identify hazardous chemicals in the workplace (the standard requires a list of hazardous chemicals in the workplace as part of the written hazard communication program and then ensure that you have a SDS for each);

Establishing a Hazard Communication Program

OSHA requires that an employer, in establishing a Hazard Communication Program (continued):

- 3) Label, tag, or mark all in-plant containers of hazardous chemicals with the identity of the material and appropriate hazard warnings – the employer can rely on the labels provided by the supplier.



Establishing a Hazard Communication Program

OSHA requires that an employer, in establishing a Hazard Communication Program (continued):

- 4) Employee Training – Each employee who may be exposed to hazardous chemicals when working must be provided with information and be trained prior to initial assignment to with a hazardous chemical and whenever the hazard changes – this includes all employees who are subjected to a hazardous chemical in the course of employment through any route of entry (inhalation, ingestion, skin contact, or absorption) and includes potential accidental or possible exposure.

OSHA COVID-19 Related Complaints

COVID-19 Related Complaints as of September 3, 2020		
	Federal (OSHA)	State Plans
Complaints:	8,645	25,630
Referrals:	1,153	2,549
Closed:	7,970	17,843

Complaints by Essential Industry

OSHA COVID-19 Complaints by Essential Industry as of September 3, 2020

Healthcare	2,147
Restaurants	490
Retail	968
Construction	263
Grocery Stores	142

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

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

Inspection Do's and Don'ts

Before Inspection

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

Inspection Do's and Don'ts

Arrival of OSHA/Opening Conference/Record Review

- Ask CO for credentials, **search warrant**, reason for inspection, scope of inspection.
- Contact legal counsel.
- Decide whether to require warrant.
- Negotiate scope of inspection (if no warrant).
- Only provide records required by law or specified in warrant. **Do not volunteer records or information.**

Inspection Do's and Don'ts

Walkaround

- Gather inspection team (per established protocol).
 - Safety director or other manager to accompany CO at all times
 - Note taker/photographer
 - Qualified person to correct safety issues identified during inspection
- Tell the truth, but do not volunteer information.
- Do not operate machinery or conduct any operations that would not otherwise be in operation on day of inspection.

Inspection Do's and Don'ts

Walkaround

- Photos
 - Ask for copies of photos taken by OSHA
 - Take photos as similar as those taken by CO and from alternative views
- Sampling
 - Note or photograph sampling devices
 - Ask for calibration information
 - Note operations, locations and, if applicable, persons sampled
 - Record readings of samples
 - If possible, take similar samples with company equipment

Inspection Do's and Don'ts

Employee Interviews

- Ask OSHA to identify employees to be interviewed.
- Designate interview location out of view of production or service area.
- Insist on presence of legal counsel at interviews of managers and supervisors.
- Consider meeting in advance with employees to be interviewed.
- Do not consent to audio or video or recording of interviews.

Inspection Do's and Don'ts

Closing Conference

- Ask OSHA to describe all areas of possible violations.
- Admit nothing
- Be prepared with facts to persuade OSHA to:
 - Issue no citation
 - Designate lesser classification
 - Reduce penalty
 - Adjust abatement or abatement date

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 Other-than-serious Posting	\$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

Informal Conference

- Informal conference – at option of employer in attempt to resolve citation
- Must take place before employer files Notice of Contest. **Informal conference does not stay or otherwise extend deadline to file Notice of Contest.**
- Goals:
 - Withdrawal of all or part of citation
 - Reduction in severity
 - Modification of penalty, abatement or abatement date
- If settlement reached, OSHA will prepare written agreement. Review with experienced employment counsel before signing.

Notice of Contest

- Employer must file Notice of Contest if it wants to challenge any part of citation (violation, penalty or abatement).
- Must filed in writing with OSHA Area Director and postmark no later than **15 working days** of employer's receipt of citation. **Informal conference does not stay or otherwise extend 15 working deadline.**
- Must state employer intends to contest the citation, the proposed penalties and/or the abatement date.

Notice of Contest

- Timely filed Notice of Contest filed in good faith suspends obligation to abate violation or pay penalty until contest resolved.
- If Notice of Contest is not filed, citation becomes “**final order**” of Occupational Safety and Health Review Commission (OSHRC), and cannot be reviewed by any court or agency.

OSHRC Litigation

- After receiving Notice of Contest, OSHA sends file to Regional Solicitor, who has 20 days to file complaint with OSHRC.
- Employer must file answer and defenses within 20 days after receiving complaint.
- OSHRC assigns case to Administrative Law Judge, who sets it for evidentiary hearing.
- After hearing, ALJ issues Recommended Order to OSHRC. Parties can file exceptions. OSHRC issues final order.
- U.S. Courts of Appeals review OSHRC's final order.

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 3, 2020	2,801
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>

QUESTIONS?

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