



OSHA Sends Mixed Signals on Enforcement Related to COVID-19 and Employer Obligations

Over the past week, OSHA has issued three separate enforcement-related guidance memos to its regional offices and field staff regarding how and when to bring enforcement actions against employers for failing to protect worker health and safety amidst the COVID-19 pandemic. The first guidance covers workplace reporting and recording of injury and illnesses associated with exposure to COVID-19, while the other two OSHA guidance documents provide a roadmap to employers on how the agency will enforce violations of the OSH Act.

Enforcement Discretion on COVID-19 as a Recordable Illness

On the topic of whether worked-related exposures to COVID-19 constitute a recordable illness for purposes of 29 CFR Part 1904, [OSHA's April 10 enforcement guidance memorandum](#) allows most employers to essentially assume an employee's sickness is not work-related, unless reasonably available objective evidence indicates that a COVID-19 case may be work-related. To be clear, this OSHA guidance does not exempt employers from the Part 1904 injury and illness recordkeeping and reporting requirements. Rather, it simply provides instruction to OSHA enforcement officers on the types of situations in which discretion is appropriate. And while most business organizations are thereby protected, OSHA's guidance distinguishes and clarifies that employers in the following sectors must continue to make work-relatedness determinations:

- healthcare industry,
- emergency response organizations (e.g., emergency medical, firefighting, and law enforcement services), and

- correctional institutions.

Interim Enforcement Response Plan

On April 13, OSHA published its [Interim Enforcement Response Plan for Coronavirus Disease 2019 \(COVID-19\)](#). Although employers should review the guidance in full, there are a few key takeaways:

- **First** – the guidance indicates that each Area Director must evaluate whether the risk of exposure to OSHA’s own inspection team warrants a physical on-site inspection of an employer’s workplace;
- **Second**– the memo makes clear that OSHA should not interfere with ongoing medical services at facilities treating COVID-19 patients;
- **Third** – businesses and organizations “having high and very high exposure risk jobs, such as hospitals, emergency medical centers, and emergency response facilities, will typically be the focus of any inspection activities in response to COVID-19-related complaints/referrals and employer-reported illnesses.”;
- **Fourth** – the guidance states “The most current CDC guidance should be consulted in assessing potential workplace hazards and to evaluate the adequacy of an employer’s protective measures for workers. Where the protective measures implemented by an employer are not as protective as those recommended by the CDC, the CSHO should consider whether employees are exposed to a recognized hazard and whether there are feasible means to abate that hazard.”; and
- **Fifth** – OSHA’s guidance at Attachment 4 provides a sample allegation of a General Duty Clause (GDC) violation associated with a work-place COVID-19 exposure.

Enforcement Discretion for OSHA Violations

On April 16, OSHA issued a guidance memo entitled [Discretion in Enforcement when Considering an Employer’s Good Faith Efforts](#). The OSHA guidance outlines factors for consideration in whether OSHA inspectors should identify citations and violations of health and safety standards. In particular, the memo states: “In instances where an employer is unable to comply with OSHA-mandated training, audit, assessment, inspection, or testing requirements because local authorities required the workplace

to close, the employer should demonstrate a good faith attempt to meet the applicable requirements as soon as possible following the re-opening of the workplace.” While the memorandum does not provide a blanket exemption from satisfying the [Part 1910 General Industry Standards](#) or the [Part 1926 Construction Standards](#), it does identify specific circumstances in which enforcement discretion would be appropriate. OSHA notes that the enforcement discretion memorandum takes effect immediately until further notice.

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