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OSHA Guidance on How It Will Conduct COVID-19 Inspections

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The Occupational Safety and Health Administration (OSHA) issued an Updated Interim Enforcement Response Plan for COVID-19 (Response Plan) to regional administrator and state plan designees on March 12, 2021. Although not directed to employers, the Response Plan offers insight into what employers should expect during OSHA's COVID-19 inspections.

OSHA had announced a new National Emphasis Program (NEP) on the same day. Under the NEP, OSHA will prioritize fatalities, multiple hospitalizations, and formal complaints for onsite inspections when possible (*i.e.,* safe to do so). However, OSHA's Compliance Safety and Health Officers (CSHOs) will "minimize in-person meetings with employers" and encourage employers to provide data and documents electronically. The Response Plan also indicates that area directors may lift the normal prohibition from contacting employers ahead of an onsite inspection to coordinate a CSHO's onsite visit and ensure the maximum protection for CSHOs when doing so.

Information and Documents to be Gathered by CSHOs

Prior to conducting the walkaround, CSHOs are expected to review the employer's safety program and documents. The Response Plan specifically requires CSHOs to evaluate:

- Whether the employer has a written safety and health plan that includes a pandemic plan (for hospitals, this can be an infection control plan and for other employers, this may be contingency planning for emergencies and natural disasters and incorporated into the company's current health and safety plan);
- The employer's procedures for hazard assessment and protocols for personal protective equipment (PPE) use;

- Whether the employer has taken steps to ensure physical distancing and to ensure face coverings are used by employees and others entering the workplace (*e.g.,* customers or the public);

- Medical records related to worker exposure incidents, OSHA-required recordkeeping (*e.g.,* 300 logs), and other relevant documents;

- Respiratory protection program and any modifications to respirator policies related to COVID-19, such as to address shortages;

- Employee training records, including training on COVID-19 exposure prevention or pandemic preparation; and

- Documentation of employer efforts to obtain and provide PPE.

CSHOs also are directed to take additional steps when inspecting healthcare facilities:

- Determine if the facility has isolation rooms or areas and gather information about the use of air pressure monitoring systems and periodic testing procedures (CSHOs are referred to OSHA's Enforcement Procedures and Scheduling for Occupational Exposure to Tuberculosis).

- Review procedures for assigning patients to isolation rooms or areas along with the procedures to restrict access to those areas to employees who are trained and outfitted with adequate PPE;

- Review procedures for transferring patients due to lack of isolation rooms and areas and accepting COVID-19 patient transfers from other facilities;

- Establish the numbers and placements of confirmed and suspected COVID-19 patients under isolation at the time of the inspection, as well as the pattern for such placements in the preceding 30 days;

- Determine whether workers have handled specimens or provided care for patients with suspected or confirmed COVID-19, and review laboratory procedures for handling specimens and procedures of decontamination of surfaces; and

- Determine and document whether the employee has considered or implemented a hierarchy of controls for worker protection.

CSHOs will inspect areas of a facility during its on-site evaluation or walkaround inspection that have been identified as points of interest from a review of documents and interviews. These areas, which should be determined based on risks of being high-hazard areas, may include emergency rooms, respiratory therapy areas, bronchoscopy suites, and morgue in a hospital; kill floor, meat packing floor, locker room in a meat processing facility; or an assembly line in a manufacturing plant.

In healthcare settings, the Response Plan directs CSHOs not to enter patient rooms or treatment areas where high-hazard procedures or procedures likely to generate aerosolized respiratory

droplets, such as intubation, are being performed. The Response Plan further instructs that while CSHOs should document their inspections with photos and videos “such as recording smoke-tube testing of air flows inside or outside an airborne infection isolation room (AIIR).” For healthcare employers concerned with patients’ privacy rights, the Response Plan directs that “under no circumstances shall CSHOs photograph or take video of patients, and CSHOs must take all necessary precautions to assure and protect patient confidentiality.” CSHOs also are instructed not to interfere with ongoing medical services. As part of a COVID-19 inspection, CSHOs may test a room’s ventilation or air flow, such as rooms where aerosol-generating procedures are performed, during the on-site evaluation.

Issuing Citations

The Response Plan also identifies the specific standards that are most likely to be applicable to infectious diseases:

- Recording and Reporting Occupational Injuries and Illness (29 CFR Part 1904)
- General Requirements-Personal Protective Equipment (29 CFR § 1910.132)
- Respiratory Protection (29 CFR § 1910.134)
- Sanitation (29 CFR § 1910.141)
- Specification for Accident Prevention Signs and Tags (29 CFR § 1910.145)
- Access to Employee Exposure and Medical Records (29 CFR § 1910.1020)
- General Duty Clause of the OSH Act (Section 5(a)(1))

Interestingly, this may be the first time OSHA has identified the standard for accident prevention signs and tags as the basis of a COVID-19-related violation in published guidance. Additionally, the bloodborne pathogen standard (29 CFR § 1910.1030), which applies to occupational exposures to human blood and other potentially infectious bodily fluids and materials, does not explicitly address exposures to respiratory secretions that may contain SARS-CoV-2. The standard, however, applies to the presence of visible blood and may present an additional standard to cite for workplaces where vaccinations are being administered or where there is vaccination waste.

The Response Plan advises CSHOs that violations of the above standards normally will be classified as serious. Significantly, violations of the general duty clause cannot be classified as other than serious. In order to issue a violation under the general duty clause, OSHA must be able to show evidence that:

1. The employer failed to keep the workplace free of a hazard to which employees of that employer were exposed;
2. The hazard was recognized;
3. The hazard was causing or was likely to cause death or serious physical harm; and

4. There was a feasible and useful method to correct the hazard.

The Response Plan instructs CSHOs to review CDC guidance when determining if there is a feasible means of abatement. Ultimately, before OSHA can issue a general duty clause citation, the case must be reviewed by the regional administrator and OSHA's national office for approval. OSHA also must consult its attorneys in the Office of the Solicitor, who evaluate and advise on the legal sufficiency of the proposed citation before issuance.

Where even just one element of the general duty clause test is not met, OSHA will issue a hazard Alert Letter (HAL) in lieu of a citation. Should OSHA issue a citation or a HAL to an employer at an inspected establishment, OSHA may send the corporate entity a letter if it has other locations with similar operations, informing them of the COVID-19 hazards observed, sending them a copy of the citation or HAL, and recommending they conduct a hazard assessment and abate any COVID-19 hazards in their other locations.

Post-Inspection Communication with Employers

Communications employers receive from OSHA ultimately will depend on the type of complaint and investigation conducted. The Response Plan provides sample letters to CSHOs to use in different situations, including (i) formal complaints that do not result in onsite inspections, (ii) onsite inspections that do not result in citations but may result in a HAL, and (iii) specific sample letters for hospital and meat processing employers.

Non-formal complaints and employer referrals related to COVID-19 exposures may be investigated using non-formal inquiry methods or other established procedures, such as the Rapid Response Investigation (RRI). OSHA also recently updated its field guidance on how to prioritize the handling of complaints and referrals for inspections. To follow up a non-formal complaint, OSHA will telephone and fax or email the employer. In an RRI investigation OSHA will follow up by sending the employer a letter summarizing steps the employer must take to ensure worker safety. Upon completion of the inquiry, OSHA will issue the employer an RRI Closing Letter.

In onsite inspections that do not result in COVID-19-related citations, OSHA may send the employer a COVID-19 letter that directs employers to publicly available guidance documents on additional recommended protective measures employers should take. OSHA also may issue a HAL requiring the employer to take specific steps to address the hazard in its workplace. In either of these situations, OSHA may request a voluntary or mandatory response from employers and may conduct follow-up inspections within six months.

State Considerations

Even though OSHA's Response Plan is directed to regional administrator and state plan designees, state plans can use different inspection procedures and enforcement initiatives. Some states (such as California, Nevada, Oregon, Virginia, and Washington), in fact, have different inspection procedures for COVID-19 cases. California, for example, is prioritizing COVID-19 inspections at facilities with an occupational exposure due to providing care to COVID-19 patients or from a known COVID-19 outbreak (*i.e.,* three or more positive cases within a 14-day period). In these cases, California's Department of Industrial Relations Division of Occupational Safety and Health also is focusing enforcement of its Emergency Temporary Standard and compliance with the state's Aerosol Transmissible Disease Standard.

Employer Takeaways

Employers who are more likely to be targeted for a COVID-19 inspection (*i.e.,* those covered by the NEP) or operating in a state plan state (*i.e.,* California) and in a higher risk industry (*i.e.,* healthcare) may benefit from a self-audit of their COVID-19 exposure risks and related protocols. Employers may also want to evaluate their controls for potential COVID-19 hazards to ensure effective use of OSHA's hierarchy of controls and documentation on rationale for control selection.

In addition, employers should audit their COVID-19-related documents to ensure they are readily available and accurate if OSHA wants to review them when conducting a COVID-19 inspection. At a minimum, employers should have a hazard assessment in place for COVID-19 in the workplace, identify and implement mitigation strategies using the hierarchy of controls and recommendations from the Centers for Disease Control and Prevention and OSHA (COVID-19 Prevention Program), and train employees on the implemented hazard and mitigation strategies, including the use of PPE where appropriate.

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