

# BURR ALERT

## A Focus on Good Faith: OSHA's Latest Guidance for Employers during COVID-19

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During the COVID-19 pandemic, many employers have been focused upon employee safety as it relates to the virus. And for good reason: many states are seeing an uptick in the number of employee complaints to the Occupational Safety and Health Administration (“OSHA”) concerning how their employers are handling the virus in the workplace.<sup>1</sup> But employers should also not forget the basic “nuts and bolts” of OSHA compliance, including, but not limited to, attention to safety and health programs and training.

For COVID-19 specific responsibilities, employees should look towards the guidance issued by OSHA on April 13, 2020.<sup>2</sup> This interim guidance notes that employee complaints received during the initial months of the COVID-19 outbreak include employer failure to provide personal protective equipment (“PPE”). The guidance instructs area offices to generally process such complaints as “non-formal phone/fax,” unless the employer is a healthcare provider or some form of emergency responder. For in-person inspections, the applicable Area Director is to assess the level of risk to a compliance safety and health officer (“CSHO”) in visiting the worksite at issue. OSHA is treating COVID-19 inspections as “novel cases,” meaning that they will be subject to additional scrutiny by the Directorate of Enforcement Programs.

As far as specific guidance, employers are categorized into classes of exposure, to include high and very high exposure risk jobs (i.e., hospitals, nursing homes, emergency medical facilities, biomedical laboratories, etc.), medium exposure risk jobs (including those with frequent and/or contact with people known to have been infected by COVID-19 such as those working in schools and/or those in some high-volume retail settings) and low exposure risk jobs (defined as those not having frequent close contact with the general public). Duties and responsibilities of employers differ by category. Whatever the category, fatalities and imminent danger exposures will be prioritized by OSHA for inspections. An inspection may include an electronic or remote review of employer programs, to include those for PPE and any emergency preparedness plans. While walkaround inspections will be limited, they are not outside the range of possibility if a CSHO deems them to be necessary and is approved to conduct the inspection in light of possible risks. The following citations may be issued to employers who are found to have not properly mitigated COVID-19 risks:

- 29 C.F.R. § 1904, Recording and Reporting Occupational Injuries and Illness (recordkeeping)

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<sup>1</sup> See <https://www.businessinsurance.com/article/20200403/NEWS06/912333866/Federal-and-state-OSHAs-overrun-with-COVID-19-complaints> (last visited April 19, 2020).

<sup>2</sup> See <https://www.osha.gov/memos/2020-04-13/interim-enforcement-response-plan-coronavirus-disease-2019-covid-19> (last visited April 19, 2020).

- 29 C.F.R. § 1910.132, General Requirements-Personal Protective Equipment
- 29 C.F.R. § 1910.133, Eye and Face Protection
- 29 C.F.R. § 1910.134, Respiratory Protection
- 29 C.F.R. § 1910.141, Sanitation
- 29 C.F.R. § 1910.145, Specification for Accident Prevention Signs and Tags
- 29 C.F.R. § 1910.1020, Access to Employee Exposure and Medical Records
- Section 5(a)(1), General Duty Clause of the OSH Act

To the extent an employee complaint is made, OSHA has offered sample letters and compliance assistance for employers. Much of this compliance assistance involves advising employers to comply with applicable Centers for Disease Control (“CDC”) guidelines. OSHA’s response to the COVID-19 pandemic has not been without its share of criticism, “OSHA has been totally absent from the response. It is shocking and disheartening because OSHA should be out front leading the federal efforts to protect workers.” So said David Michaels, an epidemiologist and former head of OSHA during President Obama’s administration.<sup>3</sup> Mr. Michaels is not the only one: various organizations, including, but not limited to, the AFL-CIO, have petitioned the Secretary of Labor for more stringent temporary standards governing COVID-19. Employers should stay tuned—and should, within their own workplaces, expect internal complaints from employees and be prepared for complaints by employees to OSHA regarding the company’s COVID-19 response.

While much of the current focus is on COVID-19 compliance, employers must not forget their obligations under applicable OSHA standards. Perhaps recognizing this, OSHA issued another interim enforcement guidance on April 16, 2020.<sup>4</sup> That guidance focuses heavily on an employer’s “good faith” in complying with applicable standards. The memorandum specifically recognizes that certain trainings and screenings (i.e., occupational spirometry testing) may need to be suspended and postponed until a time that the immediate threat of COVID-19 has passed. The guidance states specifically, “During the course of an inspection, OSHA Area Offices will assess an employer’s efforts to comply with standards that require audits, reviews, trainings, or assessments...” The guidance goes on to state that CSHO’s should inquire as to whether the employer thoroughly explored all options to comply with the applicable standard(s), to include efforts to conduct virtual and/or remote training. Specific examples of annual or recurring audits, reviews, training, or assessments that may fall under this “good faith” analysis include:

- Annual audiograms;
- Annual process safety management requirements;
- Hazardous waste operations training;

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<sup>3</sup> See <https://www.usatoday.com/story/news/nation/2020/04/16/coronavirus-osh-covid-occupational-safety-health/2986364001/> (last visited April 20, 2020).

<sup>4</sup> See <https://www.osha.gov/memos/2020-04-13/interim-enforcement-response-plan-coronavirus-disease-2019-covid-19> (last visited April 19, 2020).

- Respirator fit testing and training;
- Maritime crane testing and certification;
- Construction crane operator certification; and
- Medical evaluations.

Employers should not let down their guard, however. OSHA has made clear that this guidance is, in fact, only “interim” in nature and for a short-term period. With up to a six-month window from the date an inspection begins to complete an investigation, OSHA could very well contend that the employer had the duty to apply more than just “good faith” efforts to training applicable to an injury or incident taking place during the COVID-19 pandemic. Therefore, all reasonable efforts should be made to keep certifications, trainings, and assessments up to date in compliance with applicable OSHA standards.

What should employers focus on in light of these two separate, but equally important, pieces of guidance from OSHA? Consider the following:

- Ensure that a thorough emergency preparedness program is in place to deal with actual or potential COVID-19 exposure in the workplace. This plan should designate individuals responsible for dealing with COVID-19 related issues.
- Where possible and/or required, provide PPE as an option to employees, particularly if your workplace is deemed by OSHA to be high or even medium exposure risk.
- Take internal complaints by employees regarding potential COVID-19 exposure seriously. Though in many cases these complaints may not be grounded in scientific fact (and may in reality be based in fear or misinformation), if an employer deals with such concerns head-on, the likelihood that OSHA will receive a complaint from employees will reduce if the employee at issue feels like he/she is being heard.
- Do not overlook upcoming deadlines for OSHA-mandated trainings, audits and assessments.
- If your company cannot comply with such deadlines, it is critical that you document all efforts made to attempt to comply, including, but not limited to, why virtual training may not work or may not be feasible.
- Consider productive use of non-production and/or non-work time. Is this a time when forklift recertification can occur? Could annual lockout-tagout audits take place during these periods of time? Can managers be trained on applicable safety standards? Not only would this help ensure OSHA compliance, but it may provide ways to give employees valid work opportunities during times of slowed work activity.

OSHA compliance during these uncertain times will likely remain... uncertain. It is important that employers balance safety and health as it pertains to COVID-19 with ongoing compliance with applicable OSHA standards. Your Burr & Forman team is here to support you with balancing these seemingly competing obligations and to answer questions as they arise.

Stay up to date by monitoring the latest COVID-19 resources on our [CORONAVIRUS RESOURCE CENTER](#).

**To discuss this further, please contact:**

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