

# OSHA ISSUES UPDATED ENFORCEMENT RESPONSE PLAN AND NATIONAL EMPHASIS PROGRAM ON COVID-19 TO ENHANCE WORKPLACE SAFETY AND PROTECT WHISTLEBLOWERS FROM RETALIATION

*Hodgson Russ OSHA Alert*  
March 17, 2021

On March 12, 2021, the Occupational Safety and Health Administration ("OSHA") launched a new National Emphasis Program ("NEP"), as well as an Updated Interim Enforcement Response Plan, relating to hazards associated with COVID-19. Unlike most NEPs that become effective 90 days after issuance and outreach, this one was effective immediately upon release. This NEP will be operative for an initial duration of twelve months, but could be shortened as the pandemic subsides, or extended if deemed necessary.

## National Emphasis Program on COVID-19

The new NEP targets its enforcement activities toward establishments where workers may face increased exposures to COVID-19 hazards, particularly where large numbers of employees may be at risk at one location. OSHA will continue to prioritize COVID-19 fatalities, complaints and referrals for inspection, but will also target certain high-hazard healthcare and non-healthcare industries for programmed COVID-19 enforcement activities.

The COVID-19 NEP identifies primary and secondary industries for targeted enforcement based on their North American Industry Classification System (NAICS) codes.

## Primary Healthcare Industry NAICS Targets

621111 Offices of Physicians (except Mental Health Specialists)  
621210 Offices of Dentists  
621610 Home Health Care Services  
621910 Ambulance Services  
622110 General Medical and Surgical Hospitals  
622210 Psychiatric and Substance Abuse Hospitals  
622310 Specialty (except Psychiatric and Substance Abuse) Hospitals  
623110 Nursing Care Facilities (Skilled Nursing Facilities)

## Attorneys

Glen Doherty  
Michael Hecker  
Charles H. Kaplan  
Jason Markel  
Michael Zahler

## Practices & Industries

Occupational Safety & Health Act  
(OSHA)

OSHA ISSUES UPDATED ENFORCEMENT RESPONSE PLAN AND NATIONAL EMPHASIS PROGRAM ON COVID-19 TO ENHANCE WORKPLACE SAFETY AND PROTECT WHISTLEBLOWERS FROM RETALIATION

632210 Residential Intellectual and Developmental Disability Facilities  
623311 Continuing Care Retirement Communities  
623312 Assisted Living Facilities for the Elderly

Primary Non-Healthcare Industry NAICS Targets

311612 Meat Processed from Carcasses  
311611 Animal (except Poultry) Slaughtering  
311615 Poultry Processing  
445110 Supermarkets and Other Grocery (except Convenience) Stores  
452112 Discount Department Stores  
493110 General Warehousing and Storage  
561320 Temporary Help Services (\*\*primarily workers at a host facility\*\*)  
722511 Full-Service Restaurants  
722513 Limited-Service Restaurants  
922140 Correctional Facilities

OSHA derived the primary NAICS codes used in the NEP from a review of the agency's enforcement activities in 2020. OSHA developed the NEP's list of secondary industries using information from employers' 2020 OSHA 300A data submissions showing elevated rates of COVID-19 illness. The list of secondary NAICS codes encompasses a much broader spectrum of essential businesses, manufacturing, and critical infrastructure industries in the following general sectors:

Food and Agriculture  
Construction  
Energy  
Chemical  
Transportation and Logistics  
Critical Manufacturing  
Commercial Facilities

Employers with establishments in these business sectors should consult the NEP directly for a more detailed and specific list of the applicable NAICS codes within its scope.

OSHA Area Offices may use either the primary or secondary list, or a combination of the two, to meet their inspection goals. Therefore, any establishment having an NAICS code referenced in the NEP is vulnerable to a programmed COVID-19 inspection. According to the NEP, the overall stated goal is to perform at least 5% of an OSHA Region's total assigned inspection goals under this NEP. In addition, establishments already slated for inspection for other reasons may have a COVID-19 inspection coupled with other programmed or unprogrammed inspection scopes. And establishments that have previously been inspected and issued a citation for a COVID-19 fatality may be subject to a follow-up inspection.

## OSHA ISSUES UPDATED ENFORCEMENT RESPONSE PLAN AND NATIONAL EMPHASIS PROGRAM ON COVID-19 TO ENHANCE WORKPLACE SAFETY AND PROTECT WHISTLEBLOWERS FROM RETALIATION

Inspections that OSHA conducts under the NEP will focus primarily on COVID-19 health and safety hazards in the workplace. But the NEP also notes that other health hazards in the healthcare industry may also be addressed at that time or referred for later inspection. These include, but are not limited to, workplace violence; slips, trips and falls; bloodborne pathogens; ergonomic hazards; tuberculosis; and heat stress. Notably, the NEP does not offer similar statements or lists for non-healthcare industries.

The NEP also includes enhanced whistleblower protections. Where inspections are undertaken based on employee complaint, or an employee complaint is made during the course of investigation, the OSHA Compliance Safety and Health Officer ("CSHO") conducting the inspection must inform the employee of his or her rights and the anti-retaliation protections afforded by Section 11(c) of the Occupational Safety and Health Act. In addition, the CSHO must refer any complaints or allegations of retaliatory activity to the Regional Whistleblower Protection Program.

### Updated Interim Response Plan

In conjunction with the NEP, OSHA simultaneously issued an Updated Interim Response Plan for Coronavirus Disease 2019 ("IRP"). The IRP rescinds prior response plan guidance and instructions dated May 19, 2020 for handling COVID-19-related complaints, referrals, and severe illness reports. Some of the IRP summarizes content and procedures outlined in the NEP, with additional supplementation. Pursuant to the new IRP, OSHA will schedule inspections resulting from fatalities, complaints, and hospitalizations for on-site visits to the extent possible. Programmed inspections will occur either through onsite or remote methods, or a combination of the two. OSHA may investigate non-formal complaints, formal complaints relating to non-close-contact work settings, and referrals by non-formal investigative procedures, such as letter inquiry, remote inspection, or Rapid Response investigations.

Prior to an on-site walk-around, CSHOs will review the employer's written safety and health plan and any contingency plans for emergencies, national disasters, and the pandemic. Such review will also include hazard assessments and protocols for PPE use, protocols in use for physical distancing and face coverings, medical records and recordkeeping pertaining to COVID-19 cases, the employer's respiratory protection program, employee training records related to COVID-19 exposure prevention, and documentation and provisions relating to the efforts made by the employer to obtain and provide appropriate PPE.

For healthcare facilities, the CSHO's review will be more involved. The CSHO's activities at such employers will also include review and exploration of: the employer's pandemic plan as recommended by the CDC; procedures for transferring patients; procedures for accepting COVID-19 patients from other facilities; the numbers and placements of confirmed or suspected COVID-19 patients under isolation the pattern of placements for confirmed and suspected COVID-19 patients in the preceding 30 days; procedures for handling of specimens and evaluation or treatment of suspect or confirmed COVID-19 cases; airborne infection isolation rooms and air pressure monitoring systems (and periodic testing of same); procedures for assigning patients and limiting access to and PPE requirements and training for entering such isolation rooms/areas; and the employer's consideration or implementation of a hierarchy of engineering and administrative controls for worker protection from COVID-19 hazards.

## OSHA ISSUES UPDATED ENFORCEMENT RESPONSE PLAN AND NATIONAL EMPHASIS PROGRAM ON COVID-19 TO ENHANCE WORKPLACE SAFETY AND PROTECT WHISTLEBLOWERS FROM RETALIATION

Based on the program and document review, the CSHO will determine what areas of the facility to inspect by walkaround. In healthcare facilities, CSHOs are required to take precautions to protect patient confidentiality, to remain outside of patient rooms and treatment areas where high-hazard procedures are being conducted, and to avoid interfering with ongoing medical services. CSHOs must wear at least an N95-rated filtering facepiece respirator and other PPE appropriate to the worksite conditions, but must don higher order respiratory protection if deemed necessary or appropriate.

For purposes of the inspection, CSHOs will primarily focus on the following standards, although additional regulations may be applicable depending on the hazards existing in a particular establishment:

- 29 C.F.R. Part 1904 Recording and Reporting Occupational Injuries and Illness
- 29 C.F.R. § 1910.132 General Requirements—Personal Protective Equipment
- 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
- 29 C.F.R. § 1910.1030 Bloodborne Pathogens (e.g., vaccine administration)
- Section 5(a)(1) General Duty Clause of the OSH Act

As part of the inspection process, CSHOs will review OSHA 300 logs for cases evidencing COVID-19 symptoms and for compliance with Part 1904. Recording compliance will be determined in accordance with OSHA's previously issued May 19, 2020 guidance memorandum entitled *Revised Enforcement Guidance for Recording Cases of 2019 Coronavirus Disease (COVID-19) on OSHA Injury and Illness Logs*. We discussed that guidance in our prior OSHA alert available [here](#).

With respect to potential General Duty Clause violations, the IRP directs the CSHO to consult current Centers for Disease Control and Prevention ("CDC") guidelines to assess and identify potential workplace hazards and evaluate the adequacy of an employer's protective measures relative to CDC recommendations. As CDC guidelines are updated from time to time, it makes good sense to review existing policies and procedures—which may have been established by the employer earlier in the pandemic—against the most current recommendations.

As the COVID-19 pandemic may be beginning to down with increased vaccine distribution, OSHA's enforcement is ramping up. While many may question the worth of such an enforcement program at this stage of the pandemic, the NEP and IRP are important reminders that employers need to remain vigilant and must continue their efforts to invest time and resources to effectively manage COVID-19 related risks in the workplace.

If you have questions about OSHA recording and reporting obligations, need assistance with making a work-relatedness determination, or have other OSHA-related concerns pertaining to COVID-19 or other general compliance matters, please contact [Jason Markel](#) (716.848.1395), [Glen Doherty](#) (518.433.2433), or [Charles Kaplan](#) (646.218.7513).

Please check our [Coronavirus Resource Center](#) and our [CARES Act](#) page to access information related to both of these rapidly evolving topics.