

OSHA FLEXES COVID-19 ENFORCEMENT MUSCLE BY ISSUING CITATION AND \$136K PENALTY TO TAX PREPARER FOR FAILURE TO IMPLEMENT COVID-19 SAFEGUARDS

Hodgson Russ OSHA Alert
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As discussed in our recent [alert](#), the federal Occupational Safety and Health Administration (OSHA) released a new National Emphasis Program (NEP) and an Updated Interim Enforcement Response Plan (ERP) on March 12, 2021. The NEP and the ERP target OSHA's enforcement activities toward establishments where workers may face increased exposures to COVID-19 hazards in the workplace. OSHA will also continue its enforcement in response to complaints and referrals regarding COVID-19 hazards. Indeed, a few days after issuing the NEP and ERP, the OSHA Area Office in Boston, Massachusetts opened an inspection against a tax preparation service in response to a referral from the Massachusetts Division of Labor Standards.

OSHA's inspection resulted in the swift issuance of a Citation (on April 8), with proposed penalty of \$136,532, for failing to develop and implement timely and effective measures to mitigate the spread of coronavirus in the workplace. The single-item Citation charges a Willful - Serious violation of Section 5(a)(1) of the Occupational Safety and Health Act, otherwise known as the "General Duty Clause." That statutory provision states that each employer "shall furnish to each of his employees 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 to his employees." The OSHA Citation asserts that a violation occurred because "employees are working in close proximity with each other and customers and are exposed to...the virus that causes COVID-19." The Citation more specifically charged that:

- The employer requires employees, such as tax preparers, to work within 6 feet of each other and customers for multi-hour shifts while not wearing face coverings.
- The employer prohibits employees and customers from wearing face coverings in the workplace despite a state-wide mask order that mandates the business to require employees and customers to wear masks.
- The workplace is not served by adequate means of ventilation.

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- The employer fails to implement administrative or engineering controls such as: enhanced cleaning and disinfecting, pre-shift screening of employees, social distancing, physical barriers, mechanical ventilation, and other methods to reduce the potential for person-to-person transmission of the virus, such as portable HEPA filtration units.
- The combination of these workplace conditions and high rates of COVID-19 in the geographic area places employees at an increased risk of contracting the virus.

As part of the Citation, OSHA outlined twelve feasible and acceptable means to abate the violation, none of which should be surprising recommendations to employers, employees, or customers at this point in the pandemic:

1. Conduct a thorough hazard assessment of the facility to identify potential workplace hazards that could increase risks for COVID-19 transmission.
2. Establish, implement, and enforce a written COVID-19 program which includes requiring everyone in the workplace to wear face coverings (e.g. cloth face coverings).
3. Implement engineering controls such as barriers and partitions. Ensure that the customer waiting area is configured to permit physical distance between customers and employee workstations. Install transparent, impermeable barriers at customer-facing stations in any locations where social distancing is not possible.
4. Implement engineering controls to improve ventilation. Use mechanical ventilation such as portable HEPA filtration units where available. Where mechanical ventilation is not available, use natural ventilation (i.e., open windows or doors where possible and safe to do so) and fans to improve ventilation in consultation with a mechanical engineer, HVAC consultant, or other qualified professional. Check the most recent OSHA and CDC guidance for additional ventilation options.
5. Establish, implement, and enforce social distancing measures to ensure that everyone in the workplace maintains at least six feet of distance between other employees, customers, and visitors (e.g. visual reminders and indicators on the floors and walls). Designate paths and customer waiting area, where feasible, to reduce the frequency and proximity of contact in narrow areas.
6. Implement a “call ahead” type service that allows customers to wait remotely in a safe location such as their vehicles until they are called in order to avoid close contact between employees, customers, and visitors in interior spaces.
7. Provide training on the sources of exposure to COVID-19, the hazards associated with that exposure, and the workplace protocols in place to prevent or reduce the likelihood of exposure, and the signs and symptoms of COVID-19. Train employees on the use and implementation of protective COVID-19 measures, such as, how to maintain a safe distance, and other appropriate workplace methods to prevent and reduce exposure.
8. Revise your COVID-19 plan to include appropriate EPA List N disinfectants. Perform routine cleaning and disinfection, especially high contact surfaces, and provide cleaning supplies and no-touch trash cans.

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9. Provide a place to wash hands or use alcohol-based hand sanitizer containing at least 60% alcohol. Encourage employees and customers to frequently use appropriate hand sanitizing and/or hand-washing procedures throughout the workday and/or after coming into close contact with another individual, objects or other high contact surfaces (e.g. devices, doors, counters).
10. Instruct workers who are sick to stay home. Screen employee(s) for COVID-19 symptoms before they enter the establishment. If they have symptoms before or during work, immediately send them home and encourage them to seek medical attention.
11. Use contact tracing to ensure that employees who have worked near someone who tested positive for COVID-19 and/or developed symptoms of COVID-19 are informed of their potential exposure to the virus, encouraged to quarantine, and excluded from the facility until it is sufficiently demonstrated that they are not a risk to transmit COVID-19.
12. Follow federal, state, and local mandates, guidance, and recommendations to ensure public safety and health related to COVID-19.

The Citation serves as a strong reminder to employers—especially those who operate in an office or customer-service environment—that the COVID-19 pandemic is not over and employers must remain vigilant in reasonably protecting their workers. The Citation is also a warning that where employers are not complying with well-recognized recommendations and government-based directives and orders designed to mitigate the spread of COVID-19 in the workplace, they face the risk of OSHA enforcement and severe financial penalties.

If you have questions about OSHA's COVID-19 NEP or ERP, the recording and reporting of COVID-19 illnesses, or have other OSHA-related concerns pertaining to COVID-19 or other compliance matters generally, please contact [Jason Markel](#) (716.848.1395), [Glen Doherty](#) (518.433.2433), or [Charles Kaplan](#) (646.218.7513).