COVID-19: NAVIGATING YOUR BUSINESS THROUGH A SHIFTING ENFORCEMENT LANDSCAPE: PRACTICAL ADVICE IN THE TIME OF COVID-19 WORKPLACE SAFETY ENFORCEMENT

Date: 6 July 2020

U.S. Labor, Employment, and Workplace Safety Alert

As COVID-19 restrictions ease in certain parts of the country, businesses around the United States are reopening and welcoming back employees. While employee safety and business continuity are of paramount concern, employers should be mindful of potential state and federal investigations and enforcement actions. Though COVID-19-related investigations and enforcement actions initially focused on essential industries and healthcare facilities that remained open during the height of the pandemic, enforcement agencies appear to be broadening enforcement efforts and expanding their focus to other industries. Indeed, the Occupational Safety and Health Administration (OSHA or the Agency) has already opened hundreds of COVID-19-related inspections at the federal level, and state attorneys general and other state enforcement agencies continue to initiate their own workplace safety inquiries and investigations. This article is the second in a series designed to explore the risks to employers operating during the COVID-19 pandemic and will focus on employers' potential exposure to state and federal investigations and enforcement actions related to COVID-19 workplace health and safety concerns.

COVID-19-RELATED WORKPLACE SAFETY ENFORCEMENT ACTIONS

Initial Enforcement Focus on COVID-19 Clusters and High-Risk Industries (Healthcare)

In the past few months, state attorneys general have focused on COVID-19 clusters in high-risk healthcare settings, such as nursing homes. In Massachusetts, the attorney general is investigating at least one nursing home's actions and response after an outbreak of COVID-19 at the facility killed 76 residents and one employee.[1] Similarly, in New York, the attorney general is investigating allegations that a nursing home failed to provide adequate personal protective equipment to staff and failed to test adequately residents.[2] Such inquiries and investigations are likely to become more prevalent in other industries as employees return to work, especially if COVID-19 infection clusters arise. Indeed, these infection clusters may serve as a potential sign that an employer has failed to take the proper health and safety precautions to protect its workforce and may result in an investigation and/or notice of legal violation.

Enforcement agencies' focus on COVID-19 clusters is already playing out in other industries. For example, Kentucky, which operates an OSHA state plan,[3] is investigating the COVID-19-related death of a Kentucky school system employee that also involved eighteen other school system employees testing positive for the virus.[4] Similarly, the California Division of Occupational Health and Safety (Cal/OSHA) announced an investigation into a cluster of COVID-19 at a food packaging plant where twenty employees tested positive for COVID-19.[5]

OSHA's Enforcement and Interim and Updated Guidance

©2005-2026 K&L Gates LLP. All Rights Reserved.

At the federal level, OSHA initially prioritized investigations and enforcement in high-risk industries, including healthcare, during the early phases of the pandemic. OSHA's enforcement priorities appear to be changing however. Indeed, OSHA has signaled that it is ramping up and broadening its enforcement activities as the pandemic continues and more employers in non-essential industries bring employees back into the workplace. Specifically, OSHA's most recent guidance explicitly targets workplaces with high volumes of complaints and/or COVID-19 infections regardless of industry. Consequently, employers outside the healthcare field should be aware of OSHA's enforcement efforts and ensure compliance with OSHA guidance pertaining to COVID-19.

By way of brief background, in response to the COVID-19 pandemic, OSHA issued enforcement guidance (the Interim Guidance) in April 2020,[6] which outlined OSHA's enforcement priorities. The Interim Guidance prioritized fatalities and imminent danger exposures related to COVID-19, with particular attention given to healthcare organizations and first responders. Then, on May 19, 2020, the Agency issued its "Updated Interim Enforcement Response Plan for Coronavirus Disease 2019 (COVID-19)" (the Updated Guidance),[7] which revised OSHA's then-current enforcement priorities. The Updated Guidance divides OSHA's enforcement priorities based on community spread of the virus. Specifically, the Updated Guidance provides the following enforcement priorities:

- Where community spread of COVID-19 has significantly decreased, OSHA will likely resume inspections that are unrelated to COVID-19, for example, falls, struck-by, caught-in/between, or electrocutions.[8]
- In geographic areas experiencing either sustained elevated community transmission or a resurgence in community transmission of COVID-19, OSHA will continue prioritizing COVID-19 fatalities and imminent danger exposures for inspection, and OSHA will pay particular attention to high-risk workplaces, like hospitals and other healthcare providers treating patients with COVID-19, as well as workplaces with high numbers of complaints or known COVID-19 cases.

Additionally, the Updated Guidance provides that "formal complaints, such as complaints related to [COVID-19] exposures in meat processing, may also be inspected on-site, based on case-specific facts or resource limitations constraining such investigations."[9] The Updated Guidance is a departure from OSHA's Interim Guidance, which had previously resulted in very few workplace inspections OSHA deemed as low or medium risk.

OSHA's revised enforcement priorities may be an effort to stave off mounting public pressure by labor unions and advocacy groups to issue an emergency temporary standard related to COVID-19. Indeed, on May 18, 2020, the day before publication of the Updated Guidance, the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) sued OSHA and petitioned the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) for a writ of mandamus compelling OSHA to issue an emergency temporary standard for infectious diseases within thirty days.[10] The complaint argued that OSHA was failing to meet its duty of enforcement during the COVID-19 crisis. Indeed, as of May 29th OSHA had issued only one citation related to COVID-19, which involved a Georgia nursing home failing to report timely the hospitalizations of six employees.[11] However, on June 11, 2020 a three-judge panel on the D.C. Circuit Court of Appeals issued an order stating:

> In light of the unprecedented nature of the COVID-19 pandemic, as well as the regulatory tools that [OSHA] has at its disposal to ensure that employers are maintaining hazard-free work environments ... [OSHA] reasonably determined that an ETS [emergency temporary standard] is not necessary at this time.[12]

©2005-2026 K&L Gates LLP. All Rights Reserved.

Thus, employers should not expect OSHA to issue an emergency temporary standard related to COVID-19. Nonetheless, OSHA is under mounting pressure to exercise its enforcement authority to conduct on-site inspections and issue COVID-19-related citations when appropriate. OSHA has stated that it is expanding its inspection efforts to any workplace with high numbers of complaints or known COVID-19 cases. For example, since mid-March 2020, OSHA has initiated at least ten inspections at food processing plants, many of which involve highly-publicized virus outbreaks.[13] Thus, workplaces with high-profile cases or clusters of COVID-19 infections continue to be inspection targets.

Finally, even though OSHA has issued only one COVID-19-related safety citation to date, it still has six months to issue any citation from the date it opens an inspection. Accordingly, just because an employer has not received a citation or been the focus of an investigation, does not mean that it is in the clear.

COVID-19-Related Citations

Employers should also be aware of the types of citations OSHA may issue and how to mitigate liability by complying with OSHA's regulations. Although OSHA has not issued a specific rule that addresses how to control hazards posed by COVID-19 or other airborne diseases, it will likely rely on existing standards to issue citations for violating the Occupational Safety and Health Act (OSH Act), including:

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

In addition to the standards listed above, employers are also required to comply with the general-duty clause of the OSH Act, which requires providing a place of employment “free from recognized hazards that are causing or are likely to cause death or serious physical harm to . . . employees.”[14] Accordingly, when there is not a specific OSHA standard addressing a recognized hazard, OSHA may rely on the general-duty clause to issue a citation. As a result, employers should be aware of and implement the recommendations from OSHA's “Guidance on Preparing Workplaces for COVID-19.”[15]

OSHA's Revised Recording Requirements

In addition to issuing its Updated Guidance, OSHA also recently updated its enforcement position[16] regarding certain recording requirements per 29 C.F.R. Part 1904, which requires all covered employers to record a case of COVID-19, if the case meets all of the following three requirements:[17]

- Is confirmed as COVID-19;
- Is *work-related* as defined by 29 C.F.R. § 1904.5; and

©2005-2026 K&L Gates LLP. All Rights Reserved.

- Involves one or more of the *general recording criteria* in 29 C.F.R. § 1904.7, such as medical treatment beyond first aid or days away from work.

To determine whether an employer has complied with OSHA's recordkeeping requirements, OSHA will consider whether the employer made a reasonable assessment as to whether an incident is work-related.[18] This reasonable assessment includes asking the employee about potential ways she contracted COVID-19 and reviewing the employee's work environment, especially if there are other employees that have contracted COVID-19.[19] A COVID-19 diagnosis is likely to be work related if there is a cluster of infections in the workplace, if the employee had close contact with a confirmed case of COVID-19 in the workplace, or if the employee's job duties include frequent exposure to the general public in a region with community transmission. On the other hand, a COVID-19 infection is likely to be found not work-related if the employee has close contact with an individual outside of work with a confirmed COVID-19 infection. As employees return to the workplace, employers should be mindful of OSHA's recording requirements in the event an employee becomes infected with COVID-19.

CONCLUSION

In sum, OSHA and other federal and state enforcement agency investigations related to COVID-19 will likely continue (and even increase) as employees return to work, especially if infection clusters are connected to workplaces. Employers should continue to be aware of compliance obligations, including the recordkeeping requirements for work-related COVID-19 infections. Furthermore, employers should continue to develop, implement, and monitor the measures discussed above to minimize the risk of enforcement actions and to create a safe working environment for employees.

From a practical standpoint, all employers should consider implementing the following measures, not only to keep pace with the ever-changing legal landscape and related guidelines, but also to keep employees safe and avoid potential government investigations and enforcement actions. Specifically, employers should consider:

- Analyzing federal (e.g., OSHA, Centers for Disease Control), state, and local guidelines frequently (if not daily);
- Adopting corresponding workplace health and safety practices and procedures (e.g., use of personal protective equipment, social distancing) and updating reopening plans and safety procedures, as may be required and appropriate;
- Monitoring workplaces for evidence of COVID-19 infection clusters and instituting additional safety measures, as may be necessary;
- Consulting with external and internal workplace safety experts regarding proper safety procedures for returning to work in that industry, when appropriate;
- Maintaining a record of COVID-19-related safety procedures, including date of implementation and any subsequent updates;
- Regularly training employees on COVID-19-related safety procedures and keeping records of same;
- Developing a process for enforcing COVID-19-related safety procedures;

©2005-2026 K&L Gates LLP. All Rights Reserved.

- Developing an action plan and re-evaluating the same due to changing laws, guidelines, knowledge about COVID-19 transmission and symptoms, and workplace situations; and
- Planning for potential future business shutdowns.

FOOTNOTES

[1] Josh Karalis, *Massachusetts Attorney General Maura Healey announces investigation into coronavirus deaths at Life Care Center in Littleton*, MASS LIVE (May 27, 2020).

[2] Madison Carter, *Orleans DA and state Attorney General looking into Villages of Orleans facility*, WKBW BUFFALO (May 28, 2020).

[3] OSHA and OSHA-approved workplace safety and health programs operated by individual states (known as State Plans) have also launched investigations into employers' potential workplace safety violations with an apparent focus on clusters of COVID-19 infections.

[4] Valerie Honeycutt Spears, *OSHA investigating whether Fayette schools protected workers from COVID-19*, LEXINGTON HERALD-LEADER (May 8, 2020).

[5] Rebecca Plevin, *COVID-19 outbreak at Coachella packinghouse increases to 20 cases, 1 death; California investigating death*, PALM SPRINGS DESERT SUN (Apr. 23, 2020).

[6] OSHA, INTERIM ENFORCEMENT RESPONSE PLAN FOR CORONAVIRUS DISEASE 2019 (COVID-19), April 13, 2020.

[7] OSHA, UPDATED INTERIM ENFORCEMENT RESPONSE PLAN FOR CORONAVIRUS DISEASE 2019 (COVID-19), (May 19, 2020).

[8] *Id*.

[9] *Id*.

[10] *In re: Am. Fed'n of Labor and Congress of Indus. Org.*, D.C. Cir., No. 19-1158, May 18, 2020 (the Complaint).

[11] Brandon Cambell, "OSHA's Critics Seize on New of Lone COVID-19 Citation" (May 29, 2020).

[12] Harper Neidig, "Appeals court rejects AFL-CIO lawsuit over lack of COVID-19 labor protections" (June 11, 2020).

[13] Bruce Rolfson, *OSHA Launches 'Massive' Health-Care COVID-19 Inspection Efforts*, BLOOMBERG LAW (Apr. 28, 2020).

[14] 29 U.S.C. § 654(a)(1).

[15] OSHA, Guidance on Preparing Workplaces for COVID-19.

[16] Previously, OSHA exercised enforcement discretion for the recording of COVID-19 cases only as to employers of workers in the healthcare industry, emergency response organizations (e.g., emergency medical, firefighting, and law enforcement services), and correctional institutions.

[17] OSHA, Revised Enforcement Guidance for Recording Cases of Coronavirus Disease 2019 (COVID-19) (May

©2005-2026 K&L Gates LLP. All Rights Reserved.

19, 2020). Recordkeeping violations may result in a maximum penalty of $13,494.00 per violation. The penalty will be greater if the citation is considered a “repeat” or “willful.” For example, the maximum penalty for a willful citation is $134,937.00. It should be noted that this penalty structure applies to *all* OSHA citations—not just recordkeeping citations.

[18] *Id*.

[19] *Id*.

This publication/newsletter is for informational purposes and does not contain or convey legal advice. The information herein should not be used or relied upon in regard to any particular facts or circumstances without first consulting a lawyer. Any views expressed herein are those of the author(s) and not necessarily those of the law firm's clients.

©2005-2026 K&L Gates LLP. All Rights Reserved.