

# 2020 OSHA Update

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December 8, 2020

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## Trish Ennis, CSP, ARM, CRIS Executive Director

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The Colorado Safety Association (CSA) has been helping Colorado stay safe since 1968.

- Our classes and other events are now available as virtual sessions to serve companies across the state
  - CSA can provide virtual consulting services to help your company stay on track
- Up coming events from CSA
- Annual Membership Breakfast
  - Webinars on Eye Wellness and Home Office Ergonomics kick off the new year



[www.coloradosafety.org](http://www.coloradosafety.org)



303-373-1937

# OSHA COVID-19 Activities - Complaints

- As of December 2, 2020, federal OSHA has received **11,075** complaints in relation to COVID-19, and an additional **1,452** referrals from other agencies. OSHA has closed **10,565** of these complaints (**84%**).
- State plan states reported to Federal OSHA that they have received **35,387** complaints in relation to COVID-19.

Data discussed can be found here: <https://www.osha.gov/enforcement/covid-19-data>

# OSHA COVID-19 Activities - Complaints

## Complaints in Region 8

- Federal OSHA Region 8 includes Colorado, along with ND, SD, MT, WY\*, and UT\*.
- Of the 12,527 COVID-19 related complaints and referrals received by federal OSHA as of December 2, 2020, only **578** of these occurred in Region 8. This represents less than five percent of the complaints to federal OSHA nationwide.

# OSHA COVID-19 Activities - Complaints

Federal OSHA Complaints by Selected Essential Industry as of 12/02/20:

Healthcare	2,602
Retail Trade	1,296
Grocery Stores	183
Construction	334
General Warehousing and Storage	216
Restaurants and Other Eating Places	662
Automotive Repair	86

# OSHA COVID-19 Activities - Inspections

As of December 2, 2020, federal OSHA has opened 1,277 inspections related to COVID-19 nationwide.



State plan states reported to Federal OSHA that they have opened 3,999 inspections in relation to COVID-19.

# OSHA COVID-19 Activities - Inspections

Inspections in Region 8 . Federal OSHA Region 8 includes Colorado, along with ND, SD, MT, WY\*, and UT\*.

- Of the 1,276 COVID-19 related inspections opened by federal OSHA as of December 2, 2020, only 21 of these occurred in Region 8. This represents less than two percent of the COVID-19 inspections performed by federal OSHA nationwide.

# OSHA COVID-19 Cited Standards

In a Guidance Document OSHA provided examples of requirements that employers have most frequently failed to follow during these inspections:



Provide a medical evaluation before a worker is fit-tested or uses a respirator.



Perform an appropriate fit test for workers using tight fitting respirators.



Assess the workplace to determine if COVID-19 hazards are present, or likely to be present, which will require the use of a respirator and/or other personal protective equipment (PPE).



Establish, implement, and update a written respiratory protection program with required worksite-specific procedures.

# OSHA COVID-19 Cited Standards

In a Guidance Document OSHA provided examples of requirements that employers have most frequently failed to follow during these inspections:



Provide an appropriate respirator and/or other PPE to each employee when necessary to protect the health of the employees (ensuring the respirator and/or PPE used is the correct type and size).



Train workers to safely use respirators and/or other PPE in the workplace, and retrain workers about changes in the workplace that might make previous training obsolete.



Store respirators and other PPE properly in a way to protect them from damage, contamination, and, where applicable, deformation of the facepiece and exhalation valve.

# OSHA COVID-19 Cited Standards

In a Guidance Document OSHA provided examples of requirements that employers have most frequently failed to follow during these inspections:



For any fatality that occurs within 30 days of a work-related incident, report the fatality to OSHA within eight hours of finding out about it.



Keep required records of work-related fatalities, injuries, and illness.

# Reporting COVID-19 In Workplace

Because of the difficulty with determining work-relatedness, OSHA is exercising enforcement discretion to assess employers' efforts in making work-related determinations.

*“It is sufficient in most circumstances for the employer, when it learns of an employee's COVID-19 illness, (1) to ask the employee how he believes he contracted the COVID-19 illness; (2) while respecting employee privacy, discuss with the employee his work and out-of-work activities that may have led to the COVID-19 illness; and (3) review the employee's work environment for potential SARS-CoV-2 exposure. The review in (3) should be informed by any other instances of workers in that environment contracting COVID-19 illness.”*

<https://www.osha.gov/memos/2020-05-19/revised-enforcement-guidance-recording-cases-coronavirus-disease-2019-covid-19>

# Reporting COVID-19 In Workplace

Certain types of evidence considered by OSHA may weigh in favor of work-relatedness, *if there is no alternative explanation*. For instance:

1

COVID-19 illnesses are likely work-related when several cases develop among workers who work closely together.

2

An employee's COVID-19 illness is likely work-related if it is contracted shortly after lengthy, close exposure to a particular customer or coworker who has a confirmed case of COVID-19.

3

An employee's COVID-19 illness is likely work-related if his job duties include having frequent, close exposure to the general public in a locality with ongoing community transmission.

# Reporting COVID-19 In Workplace

Certain types of evidence considered by OSHA may weigh against work-relatedness. For instance:

1

An employee's COVID-19 illness is likely not work-related if she is the only worker to contract COVID-19 in her vicinity and her job duties do not include having frequent contact with the general public, regardless of the rate of community spread.

2

An employee's COVID-19 illness is likely not work-related if he, outside the workplace, closely and frequently associates with someone who (1) has COVID-19; (2) is not a coworker, and (3) exposes the employee during the period in which the individual is likely infectious.

# CDC New Quarantine Guidance

- Quarantine can end after Day 10 without testing and if no symptoms have been reported during daily monitoring.
- *When diagnostic testing resources are sufficient and available*, then quarantine can end after Day 7 if a diagnostic specimen tests negative and if no symptoms were reported during daily monitoring.
- In both cases, additional criteria (e.g., continued symptom monitoring and masking through Day 14) must be met.
- On a call with industry groups last week, a CDPHE representative indicated the CDPHE had not yet decided whether it was going to deviate from the current recommendation for a 14 day quarantine period based upon the CDC's new guidance.

<https://www.cdc.gov/coronavirus/2019-ncov/more/scientific-brief-options-to-reduce-quarantine.html>

# OSHA COVID-19 Enforcement Trends

## OSHA COVID-19 Enforcement Is Occurring

- A quick view of this list shows that as OSHA has tallied **255 citations** issued to various entities, mostly health care facilities.
- The largest penalty was **\$32,965**.

<https://www.osha.gov/enforcement/covid-19-data/inspections-covid-related-citations>

# Public Health Emergencies Whistleblower Law

Prohibits a principal from discriminating, retaliating, or taking adverse action against any worker who:

- Raises any concern about workplace health and safety practices or hazards related to a public health emergency to the principal, the principal's agent, other workers, a government agency, or the public if the workplace health and safety practices fail to meet guidelines established by a federal, state, or local public health agency with jurisdiction over the workplace; or
- Voluntarily wears at the worker's workplace the worker's own personal protective equipment, such as a mask, faceguard, or gloves.

# Colorado WARNING Rules

Colorado Whistleblower, Anti-Retaliation, Non-Interference, and Notice-Giving Rules

- 7 CCR 1103-11
- Adopted on November 9, 2020, effective January 1, 2021.
- Implements Colorado legislative enactments and accompanying rules protecting against retaliation for, or interference with, the exercise of protected rights, and requiring that employees and other workers receive various forms of notification of their rights.

<https://cdle.colorado.gov/sites/cdle/files/7%20CCR%201103-11%20Colorado%20WARNING%20Rules%20ADOPTED%20%28Clean%29.pdf>

# Colorado WARNING Rules

## Notice and Posting Rights and Responsibilities

- A poster informing all employees and workers of their rights under HEALTHY FAMILIES & WORKPLACES ACT (“HFWA”) and PUBLIC HEALTH EMERGENCY WHISTLEBLOWER LAW (“PHEW”) must be posted, displayed, or otherwise provided by employers and principals, as required by C.R.S. § 8- 13.3-408 (HFWA), and C.R.S. § 8-14.4-103 (PHEW).

# Colorado WARNING Rules

## Notice and Posting Rights and Responsibilities

- A written HFWA notice shall be provided to each employee, in addition to the poster requirement.
- Posters and notices required by these Rules shall be in English and any language that is the first language spoken by at least five percent of the employer's or principal's workforce.

# Colorado WARNING Rules

## Notice and Posting Rights and Responsibilities

- The 2021 Poster can be found here:
  - <https://cdle.colorado.gov/sites/cdle/files/Poster%2C%20Paid%20Leave%20%26%20Whistleblower%20-%202021%20poster.pdf>

# Colorado WARNING Poster



**COLORADO**  
Department of  
Labor and Employment

**Colorado Workplace Public Health Rights Poster:**  
**PAID LEAVE, WHISTLEBLOWING, & PROTECTIVE EQUIPMENT**

Effective January 1, 2021  
*Must be updated annually; new poster available 1st week of each December*

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**THE HEALTHY FAMILIES & WORKPLACES ACT (“HFWA”): Paid Leave Rights**

**Coverage: Employers with at least 16 employees are required to provide paid leave under the HFWA**

- Employees earn 1 hour of paid leave per 30 hours worked (“accrued leave”), up to 48 hours a year.
- Up to 80 hours of supplemental leave applies in a public health emergency (PHE), until 4 weeks after the PHE ends.
- Regular hours and pay set the rate of accrual and compensation for leave, during which benefits continue.
- Up to 48 hours of unused accrued leave carries over for use the next year.
- For details on specific situations (irregular hours, non-hourly pay, etc.), see Wage Protection Rule 3.5, 7 CCR 1103-7.

**Employees can use accrued leave for the following safety or health needs:**

- (1) a mental or physical illness, injury, or health condition that prevents work, including diagnosis or preventive care;
- (2) domestic abuse, sexual assault, or criminal harassment leading to health, relocation, legal, or other services needs;
- (3) has a family member experiencing a condition described in category (1) or (2); or
- (4) in a PHE, a public official closed the workplace, or the school or place of care of the employee’s child.

**In a public health emergency (PHE), employees can use supplemental PHE leave for the following needs:**

- (1) self-isolating or work exclusion due to exposure, symptoms, or diagnosis of the communicable illness in the PHE;
- (2) seeking a diagnosis, treatment, or care (including preventive care) of such an illness;
- (3) being unable to work due to a health condition that may increase susceptibility to or risk of such an illness; or
- (4) caring for a child or other family in category (1)-(3), or whose school or child care is unavailable due to the PHE.

During a PHE, employees still earn up to 48 hours of accrued leave and may use supplemental leave before accrued leave.

**Employer Policies (Notice; Documentation; Incremental Use; Privacy; and Paid Leave Records)**

- **Written notice and posters.** Employers must (1) provide notice to new employees no later than other onboarding documents/policies; and (2) display updated posters, and provide updated notices to current employees, by end of year.
- **Notice for “foreseeable” leave.** Employers may adopt “reasonable procedures” in writing as to how employees should provide notice if they require “foreseeable” leave, but cannot deny paid leave for noncompliance with such a policy.
- **An employer can require documentation to show that leave was for a qualifying reason only if leave was taken for four or more consecutive work days** (i.e. days on which an employee would have worked, not calendar days).
- **Documentation is not required to take paid leave**, but can be required as soon as an employee can provide it after returning to work or separating from work (whichever is sooner). **No documentation can be required for PHE leave.**
- **To document leave for an employee’s (or an employee’s family member’s) health-related need**, an employee may provide: (1) a document from a health or social services provider if services were received and document can be obtained in reasonable time and without added expense; *otherwise* (2) the employee’s own writing.
- **To document that an employee (or an employee’s family member) required leave for a need related to domestic abuse, sexual assault, or criminal harassment**, an employee may provide: a document or writing under (1) above (e.g. from a provider of legal or shelter services) or (2) above, or a legal document (e.g., a restraining order or police report).
- **If an employer reasonably deems an employee’s documentation deficient**, the employer must: (A) notify the employee within seven days of either receiving the documentation or the employee’s return to work or separation (whichever is sooner), and (B) give the employee at least seven days to cure the deficiency.

- **Incremental use.** Depending on employer policy, employees can use leave in either hourly or six-minute increments.
- **Employee Privacy.** Employers cannot require employees to disclose “details” about an employee’s (or their family’s) HFWA-related health or safety information; such information must be treated as a confidential medical record.
- **Records must be provided upon request.** Employers must provide documentation of the current amount of paid leave employees have (1) available for use, and (2) already used during the current benefit year, including any supplemental PHE leave. Information may be requested once per month or when the need for HFWA leave arises.

**Retaliation or Interference with HFWA Rights**

- **Paid leave cannot be counted as an “absence”** that may result in firing or another kind of adverse action.
- **An employee can’t be required to find a “replacement worker” or job coverage when taking paid leave.**
- **An employer cannot fire, threaten, or otherwise retaliate against, or interfere with use of leave by**, an employee who: (1) requests or takes HFWA leave; (2) informs or assists another person in exercising HFWA rights; (3) files a HFWA complaint; or (4) cooperates/assists in investigation of a HFWA violation.
- **If an employee’s reasonable, good-faith HFWA complaint, request, or other activity is incorrect**, an employer need not agree or grant it, but cannot *act against* the employee for it. Employees can face consequences for misusing leave.

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**THE PUBLIC HEALTH EMERGENCY WHISTLEBLOWER LAW (“PHEW”): Worker Rights to Express Workplace Health Concerns & Use Protective Equipment**

**Coverage: All Employers and Employees, Plus Certain Independent Contractors**

- PHEW covers not just “employers” and “employees,” but all “principals” (an employer or a business with at least 5 independent contractors) and “workers” (employees or independent contractors at a “principal”).

**Worker Rights to Oppose Workplace Health/Safety Violations During Public Health Emergencies:**

- It is unlawful to retaliate against, or interfere with, the following acts during, and related to, a public health emergency:
  - (1) **raising reasonable concerns**, including informally, to the principal, other workers, the government, or the public, about workplace violations of government health or safety rules, or a significant workplace health or safety threat;
  - (2) **opposing or testifying, assisting, or participating** in an investigation or proceeding about retaliation for, or interference with, the above-listed conduct.
- A principal need not address a worker’s PHEW-related concern, but it still cannot fire or take other *action against* the worker for that reason, as long as the concern was reasonable and in good-faith.

**Workers’ Rights to Use Their Own Personal Protective Equipment (“PPE”):**

- A worker must be allowed to **voluntarily wear their own PPE** (mask, faceguard, gloves, etc.) if the PPE (1) provides **more protection** than equipment provided at the workplace, (2) is **recommended** by a government health agency (federal, state, or local), and (3) does not make the worker **unable to do the job**.

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**COMPLAINT RIGHTS (under both HFWA & PHEW)**

- Violations may be reported to the Division as complaints or anonymous tips, or may be filed as in court after exhausting pre-lawsuit remedies.

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This Poster summarizes two Colorado workplace public health laws, SB 20-205 (paid leave) and HB 20-1415 (whistleblowing and personal protective equipment). It does not cover other health or safety laws, rules, and orders, including under the federal Occupational Safety and Health Act (OSHA), from the Colorado Department of Public Health and Environment (CDPHE), or from local public health agencies. Contact those agencies for such health and safety information.

**This poster must be displayed where it is easily accessible to workers, shared with remote workers, provided in languages other than English as needed, and replaced annually.**

For full versions of these laws, more detailed fact sheets, or questions, information, or complaints as to these or other labor laws, contact:  
Division of Labor Standards and Statistics, coloradolaborlaw.gov, cdle\_labor\_standards@state.co.us, 303-318-8441 / 888-390-7936.

# What to Expect from OSHA Under the Biden Administration

- Potential picks for Secretary of Labor:



Sen. Bernie Sanders



Rep. Andy Levin  
(D-Mich.)



Julie Su



Sharon Block



William Spriggs



Seth Harris



Marty Walsh

# What to Expect from OSHA Under the Biden Administration

- Potential picks for Assistant Secretary of Labor for OSHA:



**Jim Frederick**  
Former United Steelworkers'  
Assistant Health and Safety  
Director



**Chris Cain**  
Safety and Health Director  
at North America's Building  
Trades

# What to Expect from OSHA Under the Biden Administration

- Dr. David Michaels has been added to President-Elect Biden's COVID-19 transition team
- Served as Assistant Secretary of Labor for OSHA under the Obama Administration



# What to Expect from OSHA Under the Biden Administration

- Increased number of Compliance Officers and inspections
  - Will depend on budget issues and the outcome of the Georgia runoff elections

# What to Expect from OSHA Under the Biden Administration

- Emergency Temporary Standard (“ETS”) for COVID-19?
  - The OSH Act allows the Agency to issue an ETS when employees are exposed to “grave danger” and the standard is necessary to abate the hazard
  - Earlier this year the AFL-CIO attempted have a court require OSHA to issue an ETS – that effort failed because OSHA has discretion in this area and has enforcement mechanisms
  - An ETS would face considerable legal challenges

# What to Expect from OSHA Under the Biden Administration

- A new COVID-19 standard could be promulgated using normal notice and comment rulemaking
- Would take a great deal of time and could be dependent on status of vaccine
- Could OSHA mandate vaccines?

# What to Expect from OSHA Under the Biden Administration

- Several states have promulgated COVID-19 standards, some on an emergency basis:
  - California, Michigan, Oregon, Virginia

# What to Expect from OSHA Under the Biden Administration

- Potential increased enforcement of anti-retaliation statutes
- OSHA investigates and enforces anti-retaliation provisions under numerous federal statutes (e.g. OSH Act, STAA, FMSEA, AIR21)
- Anti-retaliation regulation (1904.35(b)(1)(iv)) could start to be enforced

# Local Changes at OSHA

- New Area Directors:
  - Denver – Amanda Kupper
  - Englewood – Chad Vivian

# Questions?

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