

L&E Live

Workplace Safety Updates and Considerations

September 17, 2020

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What will OSHA enforcement look like?



General Duty Clause

- 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.”
- To what extent will OSHA rely on public health orders?

OSHA Recordkeeping/Reporting

- When is a COVID-19 exposure recordable?
- OSHA now requires that employers investigate employee exposures to determine work-relatedness.
- Employers must make a reasonable determination; exposures are not automatically recordable.
- When does an employer have to notify OSHA of cases?

Other Liability Concerns?

- Negligence.
 - Requires proof of duty owed, breach of that duty, and damages.
 - Again, this is where public health orders come in.
 - How does workers' compensation affect this?

OSHA COVID-19 Enforcement Trends

It's been six months since COVID-19 became an on-the-job threat to U.S. workers

- Why haven't we seen substantial enforcement yet?
 - Six months is the time limit under federal law for OSHA to conduct an inspection and then issue a citation.

OSHA COVID-19 Enforcement Trends

- Why haven't we seen substantial enforcement yet?
 - OSHA has opened **996 inspections involving COVID-19 issues**, including 602 worker fatality or hospitalization cases, according to enforcement records current as of Sept. 10, 2020.
 - Of the 996 OSHA inspections involving COVID-19 issues as of Sept. 10, 2020:

326

occurred in OSHA Region 2, covering New York and New Jersey.

255

occurred in OSHA Region 5, covering upper Midwest states.

Only 14

occurred in OSHA Region 8, covering Colorado.

OSHA COVID-19 Enforcement Trends

- Why haven't we seen substantial enforcement yet?
 - As of Sept. 10, OSHA had issued citations in only a handful of virus-related cases.

Citations to **four Ohio nursing homes** for not adhering to respiratory protection regulations;

Citation to a **Georgia nursing home** for failing to notify OSHA when six staff members were hospitalized for COVID-19;

Citation to a **South Dakota meat processing plant** for not implementing an effective prevention program.

OSHA COVID-19 Enforcement Trends

- Why haven't we seen substantial enforcement yet?
 - OSHA is likely to use most of six month time limit to prepare and issue citations for COVID-19-related cases.
 - They are going to want to be careful, since we are in uncharted territory.
 - Worker advocates will be watching how the agency handles these early cases.
 - Democrats and labor unions have repeatedly voiced concerns that OSHA doesn't have a specific rule requiring employers to protect workers from the coronavirus.

OSHA COVID-19 Enforcement Trends

55

virus-related
inspections
started by
April 20.

- OSHA COVID-19 Enforcement Will Pick Up Soon
 - Based on OSHA's publicly available inspection data, they had 55 virus-related inspections started by April 20, including 45 cases involving a worker's death or hospitalization.
 - Enforcement for all 55 virus-related inspections through April 20, 2020, will be due in the next four weeks (no later than 10/20/20), and will start occurring at a greater rate in coming days.
 - About half of these inspections occurred in OSHA's Region 2, covering New York and New Jersey—states hit hard at the start of the pandemic.

OSHA COVID-19 Enforcement Trends

284

virus-related inspections from April 21-May 20.

- OSHA COVID-19 Enforcement Efforts will Increase
 - From the time period of April 21 to May 20, 2020, had 284 virus-related inspections. Enforcement for these virus-related inspections will occur through mid-November 2020.

Data discussed can be found here:

https://www.osha.gov/enforcement/covid-19-data#complaints_region

How are Companies Prioritizing Employee Safety?

Comply with State
and Local Orders

Consider other
Best Practices

Awareness of
Changing Laws
and Guidelines

Guidelines

- State and Local County and City Orders
- BPs include CDC and AIHA Guidance
 - <https://www.cdc.gov/coronavirus/2019-ncov/index.html>
 - <https://www.backtoworksafely.org/>
- EEOC updates:
 - <https://www.eeoc.gov/coronavirus/>
- OSHA guidance: <https://www.osha.gov/SLTC/COVID-19/>
- MSHA guidance: <https://www.msha.gov/msha-response-COVID-19>

Retaliation Concerns?

- Under Section 11(c) of the federal Occupational Safety and Health Act, it is unlawful for employers to discriminate against employees who make safety-related complaints.
- Since the beginning of the pandemic, OSHA has received well over 2,500 whistleblower complaints.

Retaliation Concerns?

- Most complaints go nowhere due to the DOL's limited resources – only the DOL can bring suit under 11(c).
- Moreover, “refusals to work” are only protected if an employee has a reasonable belief that there is a real and “imminent” danger of death or serious bodily injury.

HB20-1415: Whistleblower Protection Public Health Emergencies

Passed House
and Senate

In Rulemaking Phase
– To Continue
Through the End of
the Year

Similar to OSHA
and MSHA
protections for
Workers who
exercise their rights
to bring up safety
concerns

HB20-1415: Whistleblower Protection Public Health Emergencies

- Prohibits a principal, which includes an employer, certain labor contractors, public employers, and entities that rely on independent contractors for a specified percentage of their workforce, 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

HB20-1415: Whistleblower Protection Public Health Emergencies

- Prohibits a principal, which includes an employer, certain labor contractors, public employers, and entities that rely on independent contractors for a specified percentage of their workforce, from discriminating, retaliating, or taking adverse action against any worker who:
 - Voluntarily wears at the worker's workplace the worker's own personal protective equipment, such as a mask, faceguard, or gloves.

HB20-1415: Whistleblower Protection Public Health Emergencies

A person may seek relief for a violation of the bill by:

Filing a complaint with the division of labor standards and statistics in the department of labor and employment;

Bringing an action in district court, after exhausting administrative remedies; or

Bringing a whistleblower action in the name of the state in district court, after exhausting administrative remedies.

HB20-1415: Whistleblower Protection Public Health Emergencies

Other Highlights

Applicable to independent contractors (if your company has five or more).

The Complaints will be made to the Colorado Department of Labor and Employment and will be investigated by them

Complaints can be made within 2 years of event.

The CDLE may award reasonable attorney's fees. Other Remedies include Reinstatement, Front Pay, Back Pay, and in some cases Compensatory and Punitive Damages.

HB20-1415: Whistleblower Protection Public Health Emergencies

Other Highlights

After 90 days of exhausting administrative remedies, a complainant may kick their claim out to District Court.

Qui Tam actions are allowed where the Whistleblower files a claim on behalf of the workforce, with up to \$1000 awarded for each separate violation. The Whistleblower receives 25% of the judgement, and the state receives 75%. This award is in addition to any attorney's fees accrued.

Questions?

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