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OSHA Issues Plan Modifying Procedures for Investigations Relating To COVID-19 and Instructs Investigators to Use Discretion in Issuing Citations Based on Employer's Good Faith Efforts

4.23.2020

On Monday, April 13, 2020, the Occupational Safety and Health Administration (OSHA) released its *Interim Enforcement Response Plan for Coronavirus Disease 2019 (COVID-19)* (the "April 13 Memorandum"). The April 13 Memorandum will modify how OSHA investigators (also referred to as Compliance Safety and Health Officers, or "CSHOs") address complaints, and what is expected of employers during an investigation relating to the workplace hazard SARS-CoV-2 (severe acute respiratory syndrome coronavirus 2), the virus causing the current COVID-19 pandemic. The new plan seeks to continue to ensure safe and healthy conditions for the general working public, while also protecting the health and safety of OSHA personnel.

On Thursday, April 18, 2020, OSHA issued a subsequent *Enforcement Memorandum* (the "April 16 Memorandum"), giving Regional Administrators and State Plan Designees discretion in enforcing violations based on an employer's good faith efforts. The April 18 Memorandum recognizes that "some employers may face difficulties complying with OSHA standards due to the ongoing health emergency," including limits on the availability of employees or other consultants who might typically provide training, equipment, etc. As described more fully below, where an employer can show that it made a good faith effort to comply, Area Offices have the discretion to take these efforts into "strong consideration" in determining whether to issue a citation, but must include sufficient documentation to support the decision. Thus, an employer must be able to demonstrate its efforts at compliance.

Notification to OSHA of Reportable Event

Related People

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Labor and Employment

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The clock for an employer to notify OSHA of a reportable event, including one that is COVID-19 related, starts once the employer is made aware. Where the employer is not immediately aware of either a reportable fatality, in-patient hospitalization, amputation, or loss of an eye that was the result of a work-related incident, a report to OSHA must be made as follows from the date that the employer (or its agent(s)) becomes aware that the reportable event was the result of a work-related incident:

- eight (8) hours for a fatality; and
- twenty-four (24) hours for an inpatient hospitalization, an amputation, or a loss of an eye.

Employers must also report a resulting fatality that occurs within 30 days of the work-related incident.

Following receipt of an employer's report of a fatality, in-patient hospitalization, amputation, or loss of an eye as a result of a work-related incident, the Area Director determines whether to conduct an inspection or a Rapid Response Investigation (RRI). An RRI is intended to identify any hazards, provide abatement assistance, and confirm abatement, and are encouraged whenever possible, subject to specific guidance for high-risk worksites is addressed below.

Risk Assessment

OSHA's response will be dictated by the level of risk posed to the employee based on the worksite. The risk level of a worksite will be determined by the respective Area Director using the following categorical guidance, as defined by the Occupational Risk Pyramid described in the OSHA's *Guidance on Preparing Workplaces for COVID-19* publication:

- High and very high-risk jobs: Workplaces considered to have job duties with high risk of exposures to COVID-19, such as hospitals, nursing homes, biomedical laboratories, and those with aerosol-generating procedures.
- Medium exposure risk jobs: those with frequent and/or close contact with, i.e., within 6 feet of, people who may be (but are not known to be) infected with COVID-19, which may include those with frequent contact with travelers returning from international locations, and those who have contact with the general public.
- Lower exposure risk jobs: those that do not require contact with people known to be, or suspected of being, infected with SARS-CoV-2, nor frequent close contact with, i.e., within 6 feet of, the general public. Workers in this category have minimal occupational contact with the public and other coworkers.

Complaints, Referrals, and Rapid Response Investigations (RRIs)

Complaints from employees at worksites that are determined to pose medium to low risk of exposure to COVID-19 will generally be processed, at least those from non-healthcare and non-emergency response establishments, as "non-formal phone/fax" following the non-formal complaint and referral procedures in the Field Operations Manual (FOM), CPL 02-00-163, September 13, 2019. OSHA will forward

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complaint information to federal partners as deemed appropriate.

The April 13 Memorandum modifies some key aspects of the FOM non-formal complaint and referral procedures, as follows:

- OSHA must initially notify the employer of the alleged hazard by phone (not by fax, email, or letter, as previously permitted);
- Fatalities and imminent danger exposures related to COVID-19 will be prioritized for inspections, giving particular attention to healthcare organizations and first responders;
- Formal complaints alleging COVID-19 exposure where employees are engaged in medium or lower exposure risk tasks will not typically result in on-site inspection except unless an employer fails to provide an adequate response to OSHA's phone/fax investigation;
- Non-formal complaints and referrals related to COVID-19 exposure will be investigated using non-formal processing to expedite employers' attention to alleged hazards.
- Employer-reported hospitalizations will in most cases be handled using the RRI in most cases, the procedures of which are outlined here.
- In all phone/fax correspondences, Area Offices will assist employers by directing them to publicly available guidance documents on protective measures.
- Area Offices will document the status and condition of the work operations to the extent possible, including information indicative of the likelihood of exposure.
- Workers requesting inspections, complaining of COVID-19 exposure, or reporting illnesses will be informed of potential coverage under one or more whistleblower statutes.

Inspection Scope, Scheduling, and Procedures

Facilities identified as having high and very high exposure risk jobs, identified above, will typically be the focus of any inspection activities in response to COVID-19-related complaints/referrals and employer-reported illnesses.

Standard OSHA inspection procedures will be followed, with some modifications. These inspections can include on-site "walk arounds", record/document reviews, and employee interviews.

Employer's Good Faith Efforts

As noted above, the latest April 18 Memorandum gives investigators some latitude in issuing citations, in light of the unique challenges posed by the COVID-19 pandemic. Investigators make take into "strong consideration" an employer's adequately demonstrated good faith effort to comply.

OSHA Area Offices and investigators are instructed to consider an employer's good faith efforts to comply with safety standards which require annual or recurring audits, reviews, training, or assessments. Investigators are advised to examine whether the employer thoroughly explored all compliance options, (e.g. use of virtual training or remote communications where possible,

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rescheduling of required annual activity, etc.).

Of course, where an employer cannot demonstrate any efforts to comply, a citation may be issued as appropriate under the existing enforcement policy.

Likewise, where an employer cannot comply with OSHA-mandated training, audit, inspection, assessment, or testing due to site closure, investigators will look to whether employers demonstrate a good faith attempt to meet any of the applicable requirements following the re-opening of the worksite. In order to ensure that corrective actions have been taken once normal activities resume, OSHA announced that it will develop a program to conduct monitoring inspections from a randomized sampling of cases where violations were noted but not cited. OSHA intends to issue additional guidance on monitoring at a later date.

Click the link here to see OSHA's latest recordkeeping requirements for COVID-19.

Butzel Long continues to monitor updates from OSHA. For assistance in properly reporting and responding to OSHA procedures, contact us. We are here to assist you.

And for more information and resources on all COVID-19 related legislation, programs, and orders from both federal and state authorities, see the Butzel Long Coronavirus Resource Center.

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