

## Environmental and Workplace Health & Safety

# OSHA Issues Immediately Effective COVID-19 National Enforcement Program and Updated Enforcement Guidance: No ETS Yet



By: [Gabrielle Sigel](#)

On March 12, 2021, OSHA took [two significant new actions](#) to enhance its enforcement actions regarding COVID-19 workplace safety: (1) establishing the National Emphasis Program – COVID-19 (the [NEP](#)) targeting higher hazard industries for OSHA enforcement action; and (2) updating and replacing its former Interim Enforcement Response Plan for COVID-19 (the [Enforcement Plan](#)) to prioritize in-person worksite inspections by OSHA Compliance Safety and Health Officers (CSHO). This action is in response to President Biden’s January 21, 2021 *Executive Order on Protecting Worker Health and Safety*, in which he directed OSHA to “launch a national program to focus OSHA enforcement efforts related to COVID-19 on violations that put the largest number of workers at serious risk or are contrary to anti-retaliation principles.” [Executive Order \(EO\) No. 13999](#), § 2(d), 86 FR 7211 (Jan. 26, 2021). Although the Executive Order (§ 2(b)) also required OSHA to consider whether to issue a COVID-19 Emergency Temporary Standard (ETS), and to do so by March 15, 2021 if determined necessary, these two new OSHA policy documents are *not* an ETS. Instead, OSHA has buried in the text of both the NEP and the Enforcement Plan that “in the event that” OSHA issues an ETS, the ETS will be used instead of a General Duty Clause violation as the basis for citations with respect to COVID-19 safety violations, which will be enforced through the new NEP and Enforcement Plan.

A National Emphasis Program is an OSHA enforcement policy procedure, developed in accordance with OSHA’s [Directives System](#), through which OSHA decides how it is selecting sites for enforcement initiatives. An OSHA enforcement response plan informs CSHO how to conduct their enforcement activities, whether in regard to an NEP, a particular hazard, or otherwise. In this case, the NEP and the Enforcement Plan together tell employers *the categories of workplaces and the types of enforcement procedures* that are OSHA’s highest COVID-19 safety priorities.

In the NEP, OSHA is targeting those specified industries whose workers “have increased potential exposure to [a COVID-19] hazard, and that puts the largest number of workers at serious risk.” NEP, p. 1. The NEP also focuses on making sure that “workers are protected from retaliation,” including by referring allegations of retaliation to OSHA’s Whistleblower Protection Program. *Id.* OSHA makes clear that its NEP is to “augment” its continuing enforcement actions at all workplaces where it receives a complaint, severe incident report, or referral involving COVID-19 safety issues.

In the Enforcement Plan, OSHA instructs its Area Directors and CSHOs to “prioritize COVID-19-related inspections involving deaths or multiple hospitalizations due to occupational exposures to COVID-19” and “[w]here practical ... perform on-site workplace inspections.” The Enforcement Plan provides greater detail about how the CSHO should conduct a COVID-19-related investigation and inspection, and the bases for citations issued to employers.

The NEP and Enforcement Plan apply only to workplaces in states subject to federal OSHA enforcement. However, OSHA “strongly encourages” adoption of the NEP by the [28 states/territories](#) that enforce “at least as effective” [state plans](#) for their private sector employers and/or state and local

government workplaces. By May 11, 2021, the state-plan states/territories must submit to OSHA a notice of intent to adopt the NEP.

### ***What Should an Employer Do Now?***

In light of the NEP and the Enforcement Plan, all employers who are not primarily relying on telework or other remote practices for their employees should consider the following:

- ***Check to see*** if your business is within one of the NEP's targeted industries, listed in NEP Appendix A [Table 1](#) (Targeted Industries in Healthcare by 2017 NAICS) or [Table 2](#) (Targeted Industries for non-Healthcare by 2017 NAICS), the latter of which includes meat and poultry processing facilities, supermarkets, discount department stores, general warehousing and storage, full and limited service restaurants, and certain temporary help agencies.
- ***Check to see*** if your business is within a CISA-listed critical infrastructure industry that OSHA has determined has "the highest frequency of close contact exposures to the public or to coworkers resulting from their on-site work-related duties," as listed in Appendix B, [Table 1](#). These industries include manufacturing, construction, transportation, and merchandising businesses who had essential workers on-site throughout most, if not all, of the pandemic.
- Particularly if you are in one of the targeted industries, and especially if your OSHA 300A logs or other reports include COVID-19-related days away cases, hospitalizations, or fatalities, ***review and update your COVID-19 safety documents, programs, and procedures***, including your:
  - written COVID-19 safety and health plan, including contingency planning for emergencies, such as the pandemic
  - procedures for [hazard assessment](#)
  - procedures for PPE assessment and use (see 29 CFR § 1910.132)
  - face covering measures for employees and all those with whom an employee would come in contact in the work environment, consistent with [CDC guidelines](#) regarding construction, donning, and maintenance of face coverings
  - sanitation practices (see 29 CFR § 1910.141)
  - worker protection actions implemented under the hierarchy of controls (engineering controls, administrative controls, work practices, and PPE), including physical distancing measures; ventilation; stay-home-when-sick and return-to-work procedures for exposed and sick workers; and both routine and case-specific cleaning of surfaces
  - respiratory program and PPE provision, including any modifications made as a result of the pandemic and documented good faith measures when compliance is not possible (see 29 CFR §§ 1910.132, 1910.134)
  - COVID-19 signage (see 29 CFR § 1910.145)
  - training and training records
  - signage, training, and procedures encouraging employees to report symptoms and to raise safety concerns, and protecting employees against retaliation for doing so
  - practices regarding employee access to exposure and medical records (see 29 CFR § 1910.1020)
  - injury/illness recordkeeping and reporting documents and procedures (see 29 CFR Part 1904 and related enforcement memoranda and guidance)
  - OSHA [Hazard Alerts](#) applicable to your industry
- ***Review OSHA's newest COVID-19 Guidance, [Mitigating and Preventing the Spread of COVID-19 in the Workplace](#)*** (Jan. 29, 2021).
- ***Consider the four elements of the General Duty Clause*** violation with respect to COVID-19-related hazards: (1) employer failed to keep the workplace free of a hazard to which employees of that employer were exposed; (2) hazard was recognized; (3) hazard was causing or was likely to cause death or serious physical harm; and (4) there was a feasible and useful method to correct the hazard. CDC guidelines will be used to show a recognized hazard and/or feasible means to abate the hazard.

## ***What Should an Employer Expect if OSHA Conducts an Inspection?***

- OSHA will not tell you in advance that it is starting an investigation and typically arrives on-site without prior warning.
- Opening conferences will be held in a manner consistent with COVID-19 safety precautions, i.e., in an uncontaminated administrative area or outdoors, and will include union/employee representatives and management personnel responsible for COVID-19 safety and for other COVID-19-related programs, such as HR, medical staff, and facilities/physical plant.
- The “walkaround” will occur in areas that CSHO determines he/she wants to see. Note that the CSHO can issue citations for any health or safety hazard observed during the walkaround, even if not related to COVID-19.
- Interviews of management and non-management personnel can be conducted before, during, and after the walkaround. Employees may be contacted by phone and/or the CSHO may ask the employer to set up such calls while on-site. Typically, management cannot be present during the interviews, and an employee can approach the CSHO to speak privately.
- The CSHO’s document review, including of records of programs described above, may occur before a walkaround and/or the CSHO will ask to see or to have sent to the Area Office a copy of specified categories of documents.
- CSHO will be particularly sensitive to indications or complaints of retaliation, including with respect to talking to OSHA representatives at any time, including during an investigation. Actions considered to be retaliation can result in separate Whistleblower enforcement actions, which can result in injunctive or monetary relief to the employee.
- Citations, if issued, will be in the Serious classification, with penalties up to \$13,653 per violation.
- A General Duty Clause violation will not be issued except after approval by the OSHA Regional Administrator and the National Office, with input from the Department of Labor’s Regional Solicitor.
- OSHA may decide to issue a Hazard Alert Letter (HAL) rather than a General Duty Clause or other citation, with recommended actions to be taken and subsequently reported to OSHA.
- If the work establishment is part of a multi-location corporation, and a COVID-19 citation or HAL has been issued, OSHA may send a letter to the corporate entity about the citation or HAL and recommend that the corporation assess and abate COVID-19 hazards at all other locations. If unabated hazards are subsequently found, this notification letter may serve as subsequent bases for OSHA upgrading the amount of penalties or classification of its violations.

In sum, although not (yet) an ETS, OSHA has proclaimed that it intends to take aggressive enforcement measures with respect to a broad range of businesses that have been operating in their usual workplaces during the pandemic. Employers in these businesses should prepare accordingly.

For more information or advice on US and states’ OSHA standards and guidance and enforcement nationwide, please contact [the author](#). Additional information regarding working during the COVID-19 pandemic can be found on [Jenner & Block’s Corporate Environmental Lawyer blog](#) and in the Jenner & Block [COVID-19 Resource Center](#).

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*Conscious of the human, operational and financial strain that coronavirus is placing on businesses and organizations worldwide, Jenner & Block has assembled a multi-disciplinary Task Force to support clients as they navigate the legal and strategic challenges of the COVID-19 / Coronavirus situation.*

*For additional information and materials, please visit our COVID-19 / Coronavirus Resource Center.*

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