

Get right with OSHA on COVID-19 or get fined

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Most employers are familiar with the role of the Occupational Safety and Health Administration (OSHA) in enforcing standards to ensure that the working men and women in the United States have a safe and healthy workplace.

The current COVID-19 pandemic has presented new challenges to OSHA for reviewing how employers are protecting their employees. As of October 2, 2020, OSHA had imposed over \$475,000 in fines against establishments that had violated OSHA's regulations related to coronavirus.

In May 2020, OSHA issued an Enforcement Response Plan for Coronavirus Disease 2019. The plan stated that eliminating hazards from COVID-19 was a top priority for the agency. OSHA provided guidance to its area offices on how to process complaints from workers about an employer's response to the virus, and when inspections or document reviews should take place.

OSHA already had regulations in place for how employers reported work-related fatalities and injuries, but the new plan identified risk levels among workplaces for the purpose of prioritizing OSHA enforcement activities.

The agency categorized businesses into 1) high and very high exposure risk; 2) medium exposure risk; and 3) lower exposure risk. The categories were based on the type of work being done and the likelihood of workers being in contact with either the general public or people suspected of being exposed to the virus.

Fatalities and imminent dangers exposures were to be prioritized for inspections. If there was a report of unprotected exposure to a worker in the high and very high exposure risk category, those were also at the top of the list for inspections.

OSHA based their authority to enforce COVID-19 safety procedures primarily on two standards. The first was the General Duty Clause, Section 5(a)(1) of the Occupational Safety and Health Act of 1970, 29 U.S.C.A. § 654(a)(1).

That clause requires employers to provide each of its employees with "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."

The second standard related to virus protection are the personal protective equipment (PPE) regulations found in 29 C.F.R. § 1910 and 29 C.F.R. § 1926, which require using gloves, eye protection and respiratory protection when job hazards warrant it.

Specifically, if respirators are needed to protect workers from exposure to a dangerous condition, an employer must implement a comprehensive respiratory protection program that meets the requirements of the respiratory protection standard of 29 C.F.R. § 1910.134.

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There also are specific recordkeeping requirements for tallying workplace exposures to COVID-19. If a worker is infected with the coronavirus as a result of performing work-related duties, their employer may have to record that as an injury with OSHA. As part of an inspection, OSHA may also demand access to employee medical records.

Many of OSHA's enforcement actions, including ones related to COVID-19, are triggered by complaints filed by employees. Federal law prohibits an employer from retaliating against an employee for exercising his or her right in reporting a dangerous work environment.

OSHA also has a Whistleblower Protection Program that enforces retaliation protection for numerous specific industries. OSHA

also encourages workers who feel like they have suffered retaliation to file a complaint with OSHA.

OSHA has the power to impose civil penalties for violations of its safety regulations. For a “serious” violation, the penalty can range from \$964 to \$13,494, per violation. For an “other-than-serious” violation, the penalty can be from \$0 to \$13,494 per violation.

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If the violation is deemed “willful or repeated,” the penalty can be from \$9,639 to \$134,937 per violation. If the violation is for an employer failing to abate a hazardous condition, that penalty could be \$13,494 per day. OSHA also has the ability to reduce certain penalties based on the gravity of the violation.

Since the implementation of the OSHA Enforcement Response Plan, OSHA regulators have cited 37 businesses for violations of regulations related to coronavirus.

An inspection of a healthcare facility in New Jersey found that the employer engaged in a “serious” violation by failing to provide respiratory protection equipment to employees who were caring for residents that were showing symptoms of COVID-19.

The employer also failed to conduct respirator fit testing, training on the use of protective equipment, and medical evaluations. OSHA imposed a penalty of \$28,070 for the violations and required the company to change its practices.

In May 2020, OSHA conducted an inspection of a beef processing company in Colorado and found that the company violated the general duty clause by failing to protect its employees from exposure to the virus.

The company also failed to provide injury and illness logs. As a result, the company had to pay penalties in the amount of \$15,615. OSHA also inspected another meat packaging company in South Dakota where over 1,200 workers had contracted the coronavirus, and four of those had died. The company was fined \$13,494.

OSHA also has penalized companies for specific violations of its respiratory protection standards. The agency inspected

three healthcare facilities in Ohio owned by the same company. The company had seven of its own employees hospitalized with the coronavirus.

OSHA found that the company did not have a comprehensive written respiratory protection program and failed to require medical evaluations to determine whether each employee could effectively use a respirator.

OSHA also discovered that the company was having its employees use the same N95 respirator for up to seven days at a time and had not conducted any fit testing of its employees on the respirators. The company was fined \$40,482.

OSHA tracks the COVID-19 penalties it imposes on its website. As noted above, as of the beginning of October, 37 companies have been penalized for a total of \$484,069.

The violations primarily center around failing to provide an adequate written respiratory protection plan; failing to properly train employees on methods to protect them from being exposed to the virus; and failing to keep accurate records on illnesses from the virus. The amount of the penalties to the individual companies range from \$0 to \$25,000.

Employers may already feel overwhelmed with having to deal with employees seeking emergency FMLA or not showing up for work out of fear of contracting the virus. While it is true that business owners cannot put all their employees in a protective bubble, they do need to be mindful of the OSHA requirements.

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As seen by the track record on violations, OSHA is very focused on written respiratory protection plans. If the work being done mandates such a program, be sure that it is available to your employees and that they are trained on it.

If you are part of an industry that has specific OSHA guidance, such as construction or agriculture, be sure that you are aware of the guidance and that you follow it. If there is no specific guidance for your type of work, look to the general guidance on proactive measures you can take to protect workers, such as social distancing, or, when that is not available, using physical barriers, face shields, and face coverings.

Be sure to regularly check the OSHA and CDC websites because the requirements may change. Workplaces should put up signs that remind employees to social distance and wear face coverings. Also be sure to maintain and accurately complete all injury and illness logs.

In general, employers should be sure to enforce their own safety measures. Do this constantly and consistently. Respiratory protection should become as regular as safety goggles and a hard hat.

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