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OSHA Announces New National Emphasis Enforcement Program on COVID-19

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On January 21, 2021, President Biden issued an Executive Order that, among other things, directed the Secretary of Labor to launch a national program to focus on OSHA enforcement efforts related to COVID-19. The President's Order directed OSHA to address hazardous conditions from COVID-19 that put the largest number of workers at serious risk.

In response, on March 12, 2021, OSHA announced a National Emphasis Program ("NEP") to ensure that employees in high-hazard industries are protected from COVID-19. The NEP augments OSHA's ongoing efforts of responding to complaints, referrals, and severe incident reports, by adding a component targeting specific high-hazard industries or activities where the COVID-19 hazard is considered prevalent. National emphasis programs are nothing new to OSHA as they are commonly used when the agency has identified a trend with a particular hazard that requires heightened enforcement attention.

This new COVID-19 NEP will require OSHA Area Offices to conduct planned/programmed and follow-up inspections in workplaces where employees have a high frequency of close contact exposures as to be at greater risk to COVID-19.

The NEP was effective as of March 12, 2021 and will expire (unless extended) after twelve months. The NEP applies to all states that operate under federal OSHA. OSHA strongly encourages states with state OSHA plans to adopt the NEP, but the agency does not require identical adoption. These state plans must submit a notice of intent indicating whether they already have a substantially similar policy in place, intend to adopt new policies and procedures, or do not intend to adopt the NEP.

Unprogrammed COVID-19-related inspections (e.g., when OSHA responds to a complaint or a report of a fatality or serious injury) will continue to be conducted at worksites where employees have a high frequency of close contact exposures. OSHA anticipates that the majority of the inspections will continue to occur in general industries, particularly in healthcare, based on current OSHA enforcement data showing higher COVID-19-related complaints, referrals and severe incident reports at healthcare worksites.

In each federal OSHA region, the goal of the NEP is to continue performing a high percentage of COVID-19 inspections (at least 5 percent) of a region's total assigned inspection goal (which is approximately 1,600 inspections OSHA-wide), focusing OSHA's resources on workplace exposures to COVID-19 in certain critical industries.

OSHA Area Offices Will Create Targeted Inspection Lists.

Using a list-generation system, OSHA Area Offices will obtain two master targeting lists. Regarding Master List One, each Area Office will generate list of establishments from the industries referenced in Appendices A and B to the NEP, relying predominantly on NAICS codes in Appendix A. Thus, this NEP heavily targets health and non-healthcare industries in Appendix A. These are as follows:

Appendix A Targets in Health Care

Offices of Physicians (except Mental Health Specialists)	Offices of Dentists	Home Health Care Services
Ambulance Services	General Medical and Surgical Hospitals	Psychiatric and Substance Abuse Hospitals
Specialty Hospitals	Nursing Care Facilities (Skilled Nursing Facilities)	Residential Intellectual and Development Disability Facilities
Continuing Care Retirement Communities	Assisted Living Facilities for the Elderly	

Appendix A Targets in Non-Health Care

Meat Processing	Animal (except poultry) Slaughtering	Poultry Processing
Supermarkets and Other Grocery (except convenience) Stores	Discount Department Stores	General Warehousing and Storage
Temporary Help Services	Full Service Restaurants	Limited Service Restaurants
Correctional Institutions		

In addition to these focused industries, the Area Offices will add targets to Master List One through use of Appendix B and these “secondary targets.”

Appendix B Secondary Targets

Agriculture, Forestry, Fishing and Hunting	Construction of Buildings	Heavy and Civil Engineering Construction
Specialty Trade Contractors	Food Manufacturing	Beverage Manufacturing
Wood Product Manufacturing	Paper Manufacturing	Asphalt Paving, Roofing, and Saturated Materials Manufacturing
Petroleum and Coal Products Manufacturing	Chemical Manufacturing	Plastics and Rubber Product Manufacturing
Nonmetallic Mineral Product Manufacturing	Primary Metal Manufacturing	Fabricated Metal Product Manufacturing
Industrial Machinery Manufacturing	Computer and Electronic Product Manufacturing	Electrical Equipment, Appliance, and Component Manufacturing
Transportation Equipment Manufacturing	Wood Kitchen Cabinet and Countertop Manufacturing	Miscellaneous Manufacturing
Nursery, Garden Center, and Farm Supply Stores	Food and Beverage Stores	General Merchandise Stores, including Warehouse Clubs and Supercenters
Urban Transit Systems	Interurban and Rural Bus Transportation	School and Employee Bus Transportation
Special Needs Transportation	Postal Service	Industrial Design Services
Electronic and Precision Equipment	Commercial and Industrial Machinery and Equipment (except Automotive and Electronic)	

Based on above, the Area Office will then create a Master List Two, using data reported by companies (from these targeted industries) on their Form 300A data, to identify establishments with elevated rates of illness.

Area Offices may add establishments to the generated master lists (whether or not the NAICS of that establishment is listed in the appendices) based on information from appropriate sources (e.g., local knowledge of establishments, commercial directories, referrals from the local health department, or from other federal agencies with joint jurisdictions, such as the Centers for Medicare & Medicaid Services (CMS) and the U.S. Department of Agriculture (USDA), media referrals or previous OSHA inspection history). Area Offices may also delete from their target lists any establishment that has had a comprehensive or partial health inspection that addressed COVID-19 hazards with an Opening Conference date occurring within the twelve (12) previous months, assuming certain conditions are met.

Once an Area Office completes inspections based on these initial targeting lists, subsequent cycles will be created in the same manner until such time that the NEP expires or is cancelled or until all establishments have been assigned to a cycle.

OSHA Area Offices Will Continue to Prioritize COVID-19 Fatality and Employee Exposure Cases.

The creation of this COVID-19 NEP does not change OSHA's inspection priority. The highest priority by Area Offices will be given to fatality inspections related to COVID-19 and then to other unprogrammed inspections alleging employee exposure to COVID-19-related hazards. Area Offices will then schedule follow-up inspections related to COVID-19 hazards to meet the goals of the NEP when unprogrammed activities have decreased enough to allow them to do so. Area Offices will conduct these follow-up inspections for establishments that were previously inspected as a result of a COVID-19-related fatality and cited by OSHA.

In areas where both unprogrammed and follow-up COVID-19-related inspections do not enable Area Offices to meet the goals of the NEP, programmed inspection (using the master targeting lists) will then take priority over follow-up inspections.

The NEP does prioritize OSHA's enforcement activities regarding COVID-19 for any unprogrammed inspections, meaning when OSHA is inspecting due to a complaint, fatality, etc., and not when it is inspecting because a company is on this NEP target list or some other enforcement targeting list. In this regard, the NEP notes that particular attention will be given to workplaces with a higher potential for COVID-19 exposures, such as hospitals, assisted living, nursing homes and other healthcare and emergency response providers treating patients with COVID-19, as well as workplaces with high numbers of COVID-19-related complaints or known cases. These include, but may not be limited to, correctional facilities, and workplaces in critical industries located in communities with increasing rates of COVID-19 transmission, and where workers are in close proximity (i.e., less than six feet) to the public or coworkers, such as meatpacking plants, poultry processing facilities, and grocery stores.

Regarding unprogrammed complaints and referrals, allegations of potential worker exposures to COVID-19 (e.g., insufficient controls in place such as PPE), or involving workers suspected or confirmed positive for COVID-19, or with symptoms of exposure to the virus, shall be treated as having priority for conducting an on-site inspection.

Regarding programmed inspections under the NEP, as discussed above, the target lists will be generated based on the industries referenced in Appendix A and B. Area Offices may begin to initiate inspections under the NEP on the effective date of March 12, 2021, although it will obviously take some time to generate the lists of targeted companies.

Two Important Considerations Regarding the Actual OSHA Inspection.

The NEP notes that when the OSHA investigator initiates an inspection, that he/she may choose to verify the employer's assertions regarding workplace conditions or possible existence of worker exposures to COVID-19 by interviewing employee(s) at the site. If it is determined through a review of the injury and illness logs and employer or employee interviews that no such work assignments, recorded cases or reports of positive or suspected COVID-19 exposures resulting in lost work time, hospitalizations or fatalities occurred, and the inspection was initiated as a programmed inspection under the NEP targeting lists, then the investigator is instructed not to proceed with the inspection. In other words, while an employer's industry may be on the Appendix A or B lists, that employer can show that its particular circumstances are devoid of actual COVID-19 exposures, to then avoid an actual inspection.

If an investigation does proceed, the investigator is to review the available guidance on COVID-19, including current CDC recommendations and guidelines, in evaluating whether any OSHA standards or the General Duty Clause, Section 5(a)(1), have been violated and if a citation is warranted. The NEP notes that because the use of respirators or other personal protective equipment may not completely protect against COVID-19, that employers have obligations under the General Duty Clause to take further measures to protect employees. This means that employers should not let their guard down when it comes to implementing the necessary controls to reduce employee exposure to COVID-19.

In summary, while COVID-19 cases throughout the country may be heading downward in the right direction, OSHA has made it clear that the threat to worker safety is not over. It seems prudent for any employer to keep its guard up and ensure that its safety controls remain intact and effective, but this is even more important for those industries listed above that are being targeted in this NEP, as they could end up with an OSHA inspection now even if no employee complains or no serious injuries/fatalities occur that would require notifying the agency.

Related Alerts:

- [OSHA Issues Revised COVID-19 Guidance for Workplaces – 02/02/2021](#)
- [OSHA Reminds Employers to Continue Assessing Employee Safety Regarding COVID-19 Hazards, While Also Not Neglecting Common Workplace Hazards – 6/17/2020](#)
- [COVID-19 and OSHA: Why Employers May See More Inspection Activity and More Injuries and Illnesses Being Recorded as Work-Related – 05/21/2020](#)
- [Checklist Part II: OSHA and Safety Issues Regarding COVID-19 When Returning to Work – 05/09/2020](#)
- [Protecting Your Company from Coronavirus-related Premises Liability Claims – 04/27/2020](#)
- [Checklist for Return to Work \(or Reinstatement\) for Employees Impacted by COVID-19 – 04/21/2020](#)
- [Federal OSHA's New COVID-19 Enforcement Guidance – 04/15/2020](#)
- [OSHA Relaxes Requirement for Work-related Assessment for COVID-19 Recordkeeping for Certain Employers – 04/13/2020](#)
- [CARES Act Relief Checklist: Considerations in Deciding What Relief is Right for Your Business – 04/06/2020](#)
- [Employers Providing Face Masks Should Review Their Health and Safety Obligations – 04/06/2020](#)
- [Relief for Employers and Workers under the CARES Act – 03/29/2020](#)
- [COVID-19 OSHA Guidance: Hazard Assessments at Workplaces Considered Essential Businesses Under Shelter in Place Orders – 03/25/2020; Last Updated – 03/29/2020](#)
- [COVID-19 Restructuring and the WARN Act – 03/25/2020](#)
- [FFCRA - Temporary Non-Enforcement - Employer Payroll Tax Credit – 03/23/2020](#)

- [Employment Issues under the Families First Coronavirus Act of 2020](#) – 03/19/2020
- [New York Enacts COVID-19 Sick Leave Act](#) – 03/19/2020
- [Employer Checklist for Responding to a Positive COVID-19 Test](#) – 03/18/2020
- [COVID-19 and Discrimination Issues](#) – 03/18/2020
- [COVID-19 and the American With Disabilities Act](#) – 03/18/2020
- [COVID-19 and OSHA](#) – 03/18/2020

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