

# Federal OSHA's New COVID-19 Enforcement Guidance

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**PRACTICES** Labor and Employment, Litigation, OSHA, Employment Litigation

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On April 13, 2020, Federal OSHA implemented its [Interim Enforcement Response Plan for Coronavirus Disease 2019 \(COVID-19\)](#) (“Enforcement Plan”), which provides instructions and guidance to Area Offices and OSHA investigators for handling COVID-19-related complaints, referrals, and severe illness reports.

The Enforcement Plan’s purpose is two-fold: (i) explain how OSHA will allocate its resources for responding to and investigating complaints or other health and safety concerns regarding COVID-19; and (ii) protect its compliance and safety personnel who could be entering workplaces where they risk exposure. OSHA’s enforcement strategy depends on whether a business is considered high/very high or low/medium risk to COVID-19 exposure in the workplace, which is a concept previously relied upon in the agency’s initial [guidance](#).

**What is a low/medium exposure risk employer?** Medium exposure risk jobs include 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. In areas where there is ongoing community transmission, workers in this category, include, but are not limited to, those who have contact with the general public (e.g., in schools, high-population-density work environments, and some high-volume retail settings). Lower exposure risk jobs are those that do not require contact with people known to be, or suspected of being, infected with COVID-19, nor frequent close contact with, i.e., within 6 feet of, the general public. Workers in this “low” category have minimal occupational contact with the public and other co-workers.

**What is a high/very high exposure risk employer?** These are health-care related employers, including, but not limited to, hospitals treating suspected and/or confirmed COVID-19 patients, nursing homes, emergency medical centers, emergency response facilities, settings where home care or hospice care are provided, settings that handle human remains, biomedical laboratories, including clinical laboratories, and medical transport services.

Regarding employers who are in the **low/medium exposure risk category**, the Enforcement Plan provides for, among other things, the following:

- If an employee makes a complaint or another agency refers a COVID-19 concern to OSHA, the agency will not normally respond with an on-site inspection. In such cases, Area Offices will use the non-formal procedures for investigating alleged hazards. OSHA will send the employer a letter outlining the nature of the complaint and requesting the employer’s response. OSHA notes that inadequate responses to a phone/fax investigation could then be considered for an on-site inspection in accordance with OSHA’s procedures. Accordingly, employers should carefully prepare an appropriate response letter in these circumstances.
- If an employer has a reportable COVID-19 case to OSHA, such as a work-related fatality or hospitalization, the agency will continue to utilize its Rapid Response Investigation (“RRI”) process. Here, OSHA will also send a letter, and the employer must respond with the steps it has taken to properly report, if applicable, and address any COVID-19 related concerns.

- Thus, unless an employer has experienced fatalities or imminent danger exposures related to COVID-19, in most instances, OSHA will handle the inspection through this “desk audit” exchange of correspondence. OSHA plans to focus on fatality and imminent danger cases regarding high/very high exposure risk employers in health-care; however, OSHA could still inspect low/medium risk employers, who should be prepared for OSHA’s modified approach to conducting COVID-19 inspections, which is discussed below.

Regarding employers who are in the **high/very high exposure risk category**, this is OSHA’s priority focus regarding COVID-19, which means:

- Complaints by employees alleging unprotected exposures to COVID-19, such as a fatality that is potentially related to exposures to confirmed or suspected COVID-19 patients while performing procedures without adequate PPE, could warrant an on-site inspection. Specifically, hospitals, emergency medical centers, and emergency response facilities will typically be the focus of traditional on-site inspection activities in response to COVID-19.
- In such cases of a traditional on-site inspection, the Enforcement Plan contains numerous instructions for training and safeguarding OSHA’s personnel who might enter a workplace that could be at high risk for COVID-19 exposure.
- Additionally, the traditional on-site inspection process may be modified in various ways, including:
  - The opening conference may be conducted via telephone or conducted in a designated area to minimize exposure to the investigator. An employer should also expect a more focused discussion about the specific COVID-19 health and safety controls being implemented by the employer during this introductory conference.
  - Before a traditional walk-around of the facility, the Enforcement Plan recommends that the investigator collect and review a variety of documents regarding the employer’s pandemic response plan, hazard assessment and use of PPE, medical records of exposed employees, training documents on safety controls, and others. Notably, the investigator is instructed to determine and document whether the employer has considered or implemented a hierarchy of controls for worker protection, e.g., engineering controls, administrative controls, work practices, or PPE (including a respiratory protection program). Such documentation can be in the form of photos or design specifications.
  - The investigator and Area Director will then determine if the traditional walk-around tour of the facility should be conducted. If there is a physical inspection of the workplace, the Enforcement Plan recommends several practices to ensure patient confidentiality in medical care facilities while also minimizing the potential for COVID-19 exposure to the investigator.

While new guidance is provided in the context of an OSHA inspection at a hospital or other high/very high exposure risk employer, the Enforcement Plan notes some important considerations for any employer who may be subject to a “desk audit” or on-site inspection.

First, OSHA refers to the following OSHA Standards that may be implicated:

- 29 CFR § 1904, Recording and Reporting Occupational Injuries and Illness.

- 29 CFR § 1910.132, General Requirements - Personal Protective Equipment.
- 29 CFR § 1910.133, Eye and Face Protection.
- 29 CFR § 1910.134, Respiratory Protection.
- 29 CFR § 1910.141, Sanitation.
- 29 CFR § 1910.145, Specification for Accident Prevention Signs and Tags.
- 29 CFR § 1910.1020, Access to Employee Exposure and Medical Records.
- Section 5(a)(1), General Duty Clause of the OSH Act.

Second, the agency instructs its investigators to rely on the CDC guidance on COVID-19. Specifically, the Enforcement Plan provides that the most current CDC guidance should be consulted in assessing potential workplace hazards and to evaluate the adequacy of an employer's protective measures for workers. Where the protective measures implemented by an employer are not as protective as those recommended by the CDC, the investigator should consider whether employees are exposed to a recognized hazard and whether there are feasible means to abate that hazard. If the employer has failed to implement such feasible means, it will be exposed to, among other things, a General Duty Clause citation from OSHA.

Finally, the Enforcement Plan provides greater detail on how an investigator should review compliance with the specific OSHA standards on Access to Employee Exposure and Medical Records, Recording Occupational Injuries and Illnesses, and Respiratory Protection.

As employers review the Enforcement Plan, they should keep in mind that state OSHA plans may implement different or additional measures. While the enforcement priorities of OSHA to protect those front-line health-care and first responder employees should come as no surprise to the business community, the Enforcement Plan also suggests that employees in other essential businesses may be turning more and more to OSHA to lodge complaints about their safety. Thus, all employers, including those considered to be low or medium risk, should stay diligent in reviewing and updating their hazard assessments and safety controls, particularly when new CDC guidance is issued regarding worker safety.

#### Related Alerts:

- [OSHA Relaxes Requirement for Work-related Assessment for COVID-19 Recordkeeping for Certain Employers](#)
- [CARES Act Relief Checklist: Considerations in Deciding What Relief is Right for Your Business](#)
- [Employers Providing Face Masks Should Review Their Health and Safety Obligations](#)
- [Relief for Employers and Workers under the CARES Act](#)
- [COVID-19 OSHA Guidance: Hazard Assessments at Workplaces Considered Essential Businesses Under Shelter in Place Orders](#)
- [COVID-19 Restructuring and the WARN Act](#)
- [FFCRA - Temporary Non-Enforcement - Employer Payroll Tax Credit](#)
- [Employment Issues under the Families First Coronavirus Act of 2020](#)
- [New York Enacts COVID-19 Sick Leave Act](#)
- [Employer Checklist for Responding to a Positive COVID-19 Test](#)
- [COVID-19 and Discrimination Issues](#)

- [COVID-19 and the American With Disabilities Act](#)
- [COVID-19 and OSHA](#)