

Update on OSHA's COVID-19 National Emphasis Program and Enforcement

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PRACTICES OSHA, Employment Litigation, Labor and Employment, Litigation

At the American Bar Association's OSHA Midwinter Meeting, held virtually March 23-26, 2021, OSHA presented updates on expected activities under the Biden Administration, including the COVID-19 National Emphasis Program ("[NEP](#)") that was announced on March 12, 2021. Below are key takeaways for employers with respect to the NEP and the expected COVID-19 and non-COVID-19 OSHA enforcement trends under the new administration.

- **NEP targeted inspections to begin March 26, 2021:** A component of the NEP is the targeted inspections of high hazard industries or activities where the COVID-19 hazard is considered prevalent both in the healthcare and non-healthcare sector as detailed in the NEP. OSHA has announced that the targeted inspections should begin on March 26, 2021. Employers that fall under this category should revisit COVID-19 safety controls in the workplace and ensure compliance with the applicable guidance.
- **Increased enforcement:** OSHA has received supplemental appropriation funds from the Biden Administration and expects to use a substantial portion of these funds for hiring inspectors and to facilitate increased inspections and enforcement. Workplaces with high potential for exposure to COVID-19 will be prioritized for inspections. Inspections will continue to be a mix of on-site and the virtual format. OSHA announced that it expects to take a "collaborative" approach with employers on COVID-19 safety. Employers should continue to document their good faith efforts to maintain a safe workplace.
- **Focus on whistleblower complaints:** Anti-retaliation is expected to be a focus under the Biden Administration. OSHA indicated that there will be a renewed emphasis on inspections related to whistleblower complaints both in COVID-19 (including via the NEP) and non-COVID-19 cases. Employers should ensure that employees are aware of their right to raise safety concerns without fear of reprisal, have a policy in place to allow for such complaints to be received by the employer, and ensure that managers and supervisors are trained on the proper handling of employee complaints.
- **States to adopt the federal NEP or a similar program by May 12, 2021:** OSHA has strongly encouraged states to adopt the federal NEP. Otherwise, states are essentially required to have their own substantially similar program in place by May 12, 2021. Employers covered by a state OSHA plan should monitor for developments in this area in their respective state.
- **Expect a federal COVID-19 emergency temporary standard:** While OSHA did not commit to a federal COVID-19 emergency temporary standard ("ETS"), it indicated that such a standard was imminent. OSHA declined to comment on whether it would take a dual approach on the ETS, one for the healthcare and another for the non-healthcare sector, but the agency indicated that this possibility exists. Employers should continue to monitor for a

COVID-19 ETS.

- **A COVID-19-vaccinated workforce may not justify relaxing COVID-19 safety measures:** OSHA indicated that while the NEP does not address enforcement under situations where employees in a particular workplace have been vaccinated, investigators could evaluate the effect of such vaccinations. However, OSHA expressed concerns about the uncertainties of vaccinated individuals exposing others and about exposures due to new COVID-19 strains. Employers should continue to impose COVID-19 safety measures in the workplace until further guidance is available on this issue.
- **Implied obligation to monitor the OSHA website:** OSHA continues to publish frequent COVID-19 updates on its webpage. OSHA stressed the importance of employers monitoring and staying up to date with the current guidance. OSHA also encouraged employers to use the COVID-19 training and education tools on OSHA's website. Employers should continue to monitor for OSHA updates and, to the extent feasible, use training tools provided by OSHA or ensure that similar procedures are in place for safety training in the workplace.
- **Continue to monitor for updates on pre-emption of tort claims by OSHA:** Currently, as to COVID-19 lawsuits based on failure to comply with COVID-19 safety guidance or failure to provide a workplace free from COVID-19 hazards, courts have been divided on whether such claims can be brought in court, or whether they are the exclusive domain of OSHA. The agency declined to comment as to whether a federal COVID-19 ETS would pre-empt such tort claims. To effectively defend against these claims, employers should continue to monitor for updates on this issue.

In summary, employers should continue to monitor for updates from OSHA with respect to a federal ETS, COVID-19 safety guidance, and enforcement initiatives. Moreover, it remains prudent to continue to follow the applicable COVID-19 rules, regulations, and guidance, particularly while COVID-19 remains a focus area for OSHA.

Related Alerts:

- [OSHA Announces New National Emphasis Enforcement Program on COVID-19](#) – 03/15/2021
- [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