

OSHA COVID-19 Enforcement on the Rise

By

October 2, 2020

Related Services

COVID-19

Workplace Safety and Health

As the Occupational Safety and Health Administration (OSHA) inspections opened in April and May of this year approach their six-month statute of limitations, expect to see an uptick of COVID-19-related enforcement as a result of the pandemic.

OSHA began opening many COVID-19 inspections in April 2020, and it has six months in which to issue citations. The ending of OSHA inspections in these cases and OSHA's inclination toward issuing citations means that all employers, particularly those in the healthcare, personal care, and residential and group living spaces, and other industries such as manufacturing, should be prepared for possible citations.

Criticism

Throughout the COVID-19 pandemic, OSHA has been subjected to intense scrutiny from and criticism by unions and pro-worker groups. They had even sued the agency to try to get it to pass an emergency temporary standard for COVID-19. The agency has repeatedly defended its actions, claiming it has other enforcement tools (such as the respirator standard and the general duty clause) that will give it much-needed flexibility in responding to this novel coronavirus.

COVID-19-Related Citations

OSHA is now publishing information about inspections which have resulted in [COVID-19-related citations on its website](#) for easy review. OSHA has prioritized certain employers for inspections when receiving complaints or reports of hospitalizations or fatalities from COVID-19.

As of October 8, 2020, OSHA reports that approximately 85 inspections have resulted in COVID-19-related citations. The vast majority of these appear to be companies in the healthcare and personal care industries, such as hospitals, dental offices, nursing homes, and other residential living facilities. Citations are related to the selection of respirators, medical evaluations, and fit testing, as well as recording and reporting violations, and even under the general duty clause for failure to follow industry guidance on COVID-19-related precautions. This information appears to be mainly federal OSHA activity, as it does not include most state plan OSHA inspections, such as COVID-19-related citations issued by state OSHA agencies in California, Washington, and elsewhere. In order to locate information about state agency OSHA COVID-19-related citations, you have to use OSHA's database to search by state with a known establishment name or, more generally, by searching the North American Industry Classification System (NAICS) code for a particular industry, such as healthcare, and then look for recent citations involving respirators, the general duty clause, and recordkeeping and reporting violations.

Hidden Costs

Thus far, employers have been settling these citations informally, accepting the violations and, perhaps, obtaining a reduced penalty amount. While it may sound like a good deal, saving several thousand dollars and moving on quickly can cost an employer much more

over the long term.

The federal and state agencies can continue to issue these types of citations, even when employers may have legal arguments the citations are not valid. Employers that settle the citations quickly could be leaving themselves vulnerable to repeat or willful citations in the future, particularly where they have multiple establishments.

Takeaways

OSHA is feeling the pressure to prove it has been responding to the COVID-19 pandemic effectively, even without an infectious disease or emergency temporary COVID-19 standard.

Expect that more citations are coming, particularly given OSHA's recent [guidance on N95 use](#), and the Centers for Disease Control and Prevention's (CDC) recent guidance on the airborne nature of transmission as well as updated definition of "[close contact](#)." In addition, Virginia and Michigan have their own emergency temporary standards (ETS) for COVID-19, creating new compliance obligations for employers, with California and Oregon not far behind.

OSHA says it will use discretion and consider an employer's good faith efforts to obtain respirators, medical evaluations, and fit testing given the global shortage of respirators and challenges with obtaining medical evaluations and fit testing, at least in the early months of the pandemic. However, based on the citations issued thus far, citations are still likely even when employers are trying their best to follow the ever-changing and, in some instances, flip-flopping guidance from OSHA and the CDC. To the extent OSHA is relying on guidance documents to support its citations, guidance documents do not have the force of law (see [Executive Order 13891](#)) and are not binding on employers. Nevertheless, OSHA will try to use such guidance to prove employer recognition of the hazard and feasible means of abatement under the general duty clause.

If you need assistance with an OSHA inspection or defending against OSHA citations, please contact your Jackson Lewis workplace safety and health attorney.

©2020 Jackson Lewis P.C. This material is provided for informational purposes only. It is not intended to constitute legal advice nor does it create a client-lawyer relationship between Jackson Lewis and any recipient. Recipients should consult with counsel before taking any actions based on the information contained within this material. This material may be considered attorney advertising in some jurisdictions. Prior results do not guarantee a similar outcome.

Focused on labor and employment law since 1958, Jackson Lewis P.C.'s 1000+ attorneys located in major cities nationwide consistently identify and respond to new ways workplace law intersects business. We help employers develop proactive strategies, strong policies and business-oriented solutions to cultivate high-functioning workforces that are engaged, stable and diverse, and share our clients' goals to emphasize inclusivity and respect for the contribution of every employee. For more information, visit <https://www.jacksonlewis.com>.