

Inspector General Office Report Criticizes OSHA COVID-19 Enforcement, Pushes for COVID-19 Standard

By Catherine A. Cano &

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Meet the Authors



Catherine A. Cano

Principal

(402) 391-1991

Catherine.Cano@jacksonlewis.com

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Criticizing the Occupational Safety and Health Administration's (OSHA) enforcement efforts during the COVID-19 pandemic, the Department of Labor Office of the Inspector General (OIG) pushes for a COVID-19, virus-specific standard in its [report](#) issued on February 25, 2021.

In "COVID-19: Increased Worksite Complaints and Reduced OSHA Inspections Leave U.S. Workers' Safety at Increased Risk," OIG audited the agency to assess plans and guidance OSHA developed to address challenges presented by COVID-19 and the extent to which these challenges affected OSHA's ability to effect workplace safety.

OIG's Conclusions

OIG interviewed OSHA officials and examined and compared 2019 pre-pandemic complaint and inspection data to 2020 pandemic-era data. OIG noted that onsite inspection and travel restrictions led to a dramatic decrease in inspections, from more than 26,000 in an eight-month period in 2019 to approximately 13,000 inspections in the same timeframe in 2020. It also observed that OSHA received 15 percent more complaints, but performed 50 percent fewer inspections in a 10-month period in 2020, as compared to a similar stretch in 2019. The report concluded that these factors led to "an increased risk that OSHA has not been providing the level of protection that workers need at various job sites." It also noted OSHA issued far fewer citations than State Plan states implementing their own workplace safety and health programs.

Another concern is that OSHA's COVID-19 guidance is only advisory and thus, is unenforceable, but the report noted that an OSHA official said the guidance could be used to support violations of the Occupational Safety and Health Act's General Duty Clause, 29 U.S.C. 654(a)(1), by establishing recognized hazards and feasible means to correct them. OSHA made infrequent use of the General Duty Clause for COVID-19 hazards beginning in September 2020, but the agency's COVID-19-related citations more frequently alleged violations of standards relating to personal protective equipment (PPE), respiratory protection, hazard communication, bloodborne pathogens, and sanitation.

OIG's Recommendations

Based on its findings, OIG made several recommendations, which OSHA accepted. These include:

1. Improving OSHA's onsite inspection strategies by prioritizing employers whose employees are at greatest risk of COVID-19 exposure;
2. Tracking remote inspections both retroactively and prospectively;
3. Comparing remote inspections to onsite inspections, including a quantitative

- analysis of frequency and timeliness of hazard abatement; and
4. Adopting an Emergency Temporary Standard to address COVID-19 workplace exposures.

Unsupported Findings

The OIG report recognizes significant internal flaws. First, OIG acknowledged it published its conclusions before OSHA could begin to count and draw numerical comparisons between onsite and remote COVID-19 inspections. Until OSHA provides those numbers, OIG relied on anecdotal statements by anonymous OSHA officials to support its conclusions.

Second, OIG was unable to demonstrate whether or to what extent employers actually abated hazards during the pandemic. One anonymous official reported that the agency required employers to abate hazards in all cases except three, and contended that the agency will not verify hazard abatement until it develops a program to conduct monitoring inspections of employers that generated complaints.

Third, OIG reported the numbers of 2020 complaints without a like comparison to 2019. OIG reported that healthcare facilities, retail stores, and restaurants led in pandemic-era complaints, with the highest numbers of complaints reporting violations of respiratory protection, recordkeeping, and PPE standards. The report declined to provide a pre-pandemic comparison. OSHA's [list of most frequently cited items in 2019](#) painted a very different picture. Before the pandemic, the most common violations were fall protection, hazard communication, scaffolding and "Lockout/Tagout" infractions, hazards not common in hospitals, nursing care facilities, restaurants, or retail stores. It is likely that an apples-to-apples comparison will reveal a dissimilar pre-pandemic industry profile.

Problems With Pandemic-Era Citations

For many industries identified in the audit, pandemic-era citations have not always seemed fitting. For example, many healthcare providers followed OSHA guidelines, and yet were cited for alleged violations of OSHA's respiratory standard. Many healthcare providers have limited the use of N95 respirators to those providers engaged in high-risk procedures (*i.e.*, generating potentially infectious aerosols) to extend the limited supply of N95 respirators. Healthcare providers who followed this guidance were subsequently cited for failing to provide N95 respirators to all healthcare providers, even though the healthcare providers had only enough on-site to last a few days if all healthcare providers wore them. To defeat these citations, healthcare providers have had to demonstrate the effort undertaken to ensure an adequate supply of PPE prior to the onset of the pandemic, inventory levels, burn rates, and similar information. Thus, even though the OIG criticized much of OSHA's guidance as being unenforceable, OSHA has cited employers, particularly in the healthcare industry, even while they followed OSHA's guidance.

Next for Employers

Employers can expect to be subject to more COVID-19-related onsite inspections. Therefore, it is imperative for employers to review guidance documents OSHA provided during the pandemic (in the report's Exhibit 2). If the guidance addresses subjects that affect the employer's business, then incorporate those recommendations into the business's standard operating procedures. Finally, employers should keep an eye out for [a COVID-19 standard](#), which OSHA is expected to promulgate by March 15, 2021. For an

idea what may be included in that standard, see [OSHA's most recent guidance relating to COVID-19](#).

If you have questions or need assistance in an OSHA matter, please reach out to a member of the [Jackson Lewis Workplace Safety and Health Practice](#).

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