

Employers are Contesting OSHA's COVID-19 Citations

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Frustrated by [constantly shifting guidance](#) and [shortages of respirators](#) and other personal protective equipment experienced in 2020, employers are rejecting Occupational Safety and Health Administration (OSHA) citations for COVID-19 infractions and contesting them like never before.

According to OSHA, 408 workplaces have been cited (with around 1,150 citations issued) for COVID-19-related alleged violations between July 1, 2020, and April 12, 2021. Typically, only eight percent of cited employers contest citations. Not so for COVID-19. Employers cited for COVID-19 concerns have contested the citations at more than quintuple the ordinary contest rate, to a whopping 42 percent. According to OSHA enforcement data, around 85 percent of these contests have been filed by healthcare facilities (not surprising, considering OSHA has taken a special interest in them) and another five percent come from industries in which outbreaks have been registered more commonly, such as food processing plants. Although there has been a wide range of cited violations, most are for respiratory protection violations (with N95 respirator use being at the top of the list) and recordkeeping violations.

There are reasons for the increasing contest rate. During the pandemic, OSHA experienced an unusually large number of employee complaints, which contributed to the increased number of cases subject to contest. Because these cases arose from a novel situation, OSHA applied pre-pandemic standards in novel ways, leading to disputes between the agency and employers over appropriate use and interpretations of standards relating to respiratory protection, sanitation, personal protective equipment, and recordkeeping.

For example, many employers have opted to contest OSHA citations for failure to record or report “work related” instances of COVID-19 exposure because, in many cases, determining whether employee exposures arose out of the workplace or in the community was nearly impossible. When OSHA receives employee complaints of COVID-19 exposures and cites an employer, it effectively places the onus on the employer to prove the employee caught the virus from a family member, in a grocery store, or from dining with friends in a restaurant — an impossible task.

In such a situation, OSHA gives employers few tools to rebut its presumption that employees were infected in the workplace. Employers seeking to enforce responsible activity to avoid COVID-19 exposure have had to rely on employees to self-report their behavior while outside of work in their responses to employee screenings. Alternatively, employers otherwise would impose unenforceable requirements on employees to comply with state and federal restrictions when engaging in personal travel or other activities outside of work.

Employers are pushing back on citations related to COVID-19 for other reasons. Primarily, many employers have attempted in earnest to follow often conflicting and shifting guidance from the U.S. Centers for Disease Control and Prevention, OSHA, state departments of health, and state and local executive orders, exhausting resources at a time when staying

afloat is difficult enough. Secondly, amid unrealistic pressures to obtain sufficient personal protective equipment, supplies, and (especially for healthcare providers) respiratory protection, OSHA has opted to punish employers for failing to meet compliance officers' expectations while employers faced unprecedented demand for personal protective equipment, all-but-exhausted supply chains, and regulatory pressures from a host of local, state, and federal agencies that often impose conflicting expectations.

Traditionally, many employers have sought resolution by going into an informal conference with the agency and accepting the citation with a penalty reduction. Once they make the reduced payment and provide the required documentation of hazard abatement, they hope to close the matter and move on. This short-term solution may provide false hope, especially if the employer waives potential defenses such as employee misconduct, technological infeasibility, or greater hazard. It ignores [the hidden costs](#) of accepting a citation or taking a quick settlement offer during an informal conference that finalizes the citation with monetary or classification reductions (*e.g.*, from "Serious" to "Other Than Serious"). These hidden costs can include exposure to repeated subsequent violations that incur increased monetary penalties; lost business opportunities; and a public record of a violation on display for competitors, news sources, and labor organizations that can irreparably damage reputations.

During the COVID-19 pandemic, employers have made greater use of the ability to contest citations, for good reasons. Employers have a right to do so and should consider their legal options when they are faced with a citation for COVID-19 exposures over which they may not have meaningful control.

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

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