COVID-19: STATE OSHA ENFORCEMENT

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COVID-19 ENFORCEMENT: OVERVIEW

- Federal OSHA 5/19/2020 Update: OSHA is now increasing in-person inspections in all types of workplaces and "will utilize all enforcement tools as OSHA has historically done" – change made because "outbreaks among workers in industries other than healthcare, EMR, or corrections have been identified"
  - https://www.osha.gov/memos/2020-05-19/updated-interim-enforcement-response-plan-coronavirus-disease-2019-covid-19
- Virginia OSHA has enforceable ETS on COVID already in effect – permanent rule under development (ETS expires in 6 mo but can be extended)
- OR-OSHA & MIOSHA (MI) also now have COVID-specific ETS, & CalOSHA is working on one to fill the federal "gap"
- State plan compliance can be imputed to prove federal GDC citations or those in other states – issue is providing disparate protections to workers geographically!

COVID-19: OSHA REPORTING & RECORDING

- ❑OSHA's NEW **Reporting** policy (9/30/2020): Narrows reporting by interpreting the "incident" as initial exposure rather than emergence of symptoms for COVID-19 and because it incubates for more than 24 hrs before requiring hospitalization, do not report
  - ❑If worker dies within 30 days of the "incident" this would remain reportable under the Severe Injury Reporting rule
  - ❑**May conflict with new state OSHA rules!**
- But … OSHA revised its guidance on recording COVID-19 cases in May 2020 – now COVID is a **recordable** by all industry sectors
- Employers **must** record COVID illnesses if there is "objective evidence that a COVID-19 case **may** be work-related, and the evidence was reasonably available to the employer" – **due diligence investigation required**

COVID & WORKER NOTICE

- At this time, federal OSHA does NOT require employers to notify other employees if one of their coworkers gets COVID-19 but must take appropriate steps to protect other workers:
  - cleaning and disinfecting the work environment,
  - notifying other workers to monitor themselves for signs/symptoms of COVID-19, or
  - implementing a screening program in the workplace (e.g., for signs/symptoms of COVID-19 among workers).
- OSHA can still pursue hazard complaints and whistleblower complaints related to work refusals or belief that employer is concealing COVID cases from workers
- The CDC Guidance for Business and Employers recommends employers determine which employees may have been exposed to the virus and inform employees of their possible exposure to COVID-19 in the workplace
- Employers should also reference EEOC's FAQ on medical info, and for provisions in state COVID ETS that relate to worker notification and reporting of illnesses and clusters under state OSHA ETS or reporting rule (see VA, MI, CA, OR)

2020 OSHA FINAL RULE: MEDICAL RECORDS

- 7/31/2020 OSHA issued final rule to preserve worker medical privacy & streamline agency review of medical records during inspections
- Establishes new position of "medical records officer" who will decide when field staff CSHOs will have access to employee med records containing info identifying the worker (previously OSHA Asst Sec made decision)
- OSHA is also prohibited from releasing or sharing worker medical records except in limited circumstances (NIOSH research or enforcement cases where worker health is a concern)

WHISTLEBLOWER PROTECTION PROVISIONS & ILLNESS REPORTING

- Remember: OSHA's 2016 E-Recordkeeping final rule contains provisions -- 29 CFR 1904.35 (Employee involvement) and 1904.36 (Prohibition against discrimination) – intended to encourage complete and accurate reporting of workplace injuries and illnesses:
  - Employers must inform employees of their right to report work-related injuries and illnesses free from retaliation. This obligation can be satisfied by posting the April 2015 (or later) version of OSHA's *Job Safety and Health – It's the Law* poster (www.osha.gov/Publications/poster.html).
  - An employer's procedure for reporting work-related injuries and illnesses must be "reasonable" and must not deter or discourage employees from reporting.
  - An employer may not discharge or otherwise discriminate against employees for reporting work-related injuries or illnesses
  - In next administration, expect greater whistleblower enforcement and scrutiny on employers' safety incentive, discipline & drug testing programs

OSHA: NEW GUIDANCE ON VENTILATION IN WORKPLACE

- 11/5/2020 – Federal OSHA released new guidance to assist employers in ensuring "adequate ventilation throughout the work environment"
- Policy could add specificity to vague ventilation provisions in State OSHA ETS
- Policy is not mandatory … but could be incorporated into future OSHA ETS or infectious disease rule
  - Knowledge or these "best practices" or implementation at certain locations could = GDC citation
- Employers are directed to work with HVAC professionals to consider steps to optimize building ventilation
- Steps recommended:
  - Ensure HVAC systems are fully functional, especially those shut down or operating at reduced capacity during pandemic
  - Remove/redirect personal fans to prevent blowing air from one worker to others
  - Use HVAC system filters with MERV rating of 13 or higher (where feasible)
  - Increase HVAC system's outdoor air intake, and open windows and fresh air sources where possible
  - Use portable high-efficiency HEPA fan/filtration systems to increase clean air
  - When changing filters, wear appropriate PPE (N95 respirator, eye protection, disposable gloves)
  - Make sure exhaust fans in restrooms are fully functional, operating at max capacity, and set to remain ON

IMPACT OF STATE PLAN ETS

- Multi-state operations with worksites in VA (or California, Michigan or Oregon) where COVID rules are enforceable may have that used to impute knowledge of risk and feasibility of abatement under federal OSHA GDC
- Tort issues in multi-employer worksites (esp. temporary workers) if provide "lesser level of protection" to those at non-VA/OR/CA/MI worksites than to those at state plan worksites
- Potential for state plan OSHA agencies in MD, NC, TN, SC, KY, WA etc. to follow VA, OR-OSHA, MIOSHA and CalOSHA examples
- How might a permanent respiratory infectious disease standards differ from the ETS? Public comment will be taken … and lawsuits will be filed

CAL/OSHA ATD & COVID-19

- Cal/OSHA's regulations require protection for workers exposed to airborne infectious diseases such as COVID-19 - ***California Code, Title 8, Subtitle 5199***
- CalOSHA advises employers to review their own health and safety procedures as well as the recommendations and standards detailed by the agency: https://www.dir.ca.gov/dosh/Coronavirus-info.html
- Aerosol Transmissible Diseases (ATD) standard contains requirements for protecting employees from diseases and pathogens transmitted by aerosols
- Cal/OSHA's ATD Standard applies to:
  - Hospitals, skilled nursing facilities, clinics, medical offices, outpatient medical facilities, home health care, long-term health care facilities, hospices, medical outreach services, medical transport and emergency medical services, correctional facilities, laboratories etc.
  - BUT … can be applied at any other locations when Cal/OSHA informs employers in writing that they must comply with the ATD Standard.

CAL/OSHA ATD RULE

- Cal/OSHA Reporting: A COVID case will be "presumed work-related" if **ANY** workplace exposure is identified, even if the cause of the illness is more likely attributable to a **non-workplace** exposure: look at (1) interactions with people known to be infected; (2) working in same area where people known to carry the virus have been; or (3) sharing tools, materials or vehicles with known carriers
  - Also consider type/extent/duration of contact with other people; physical distancing or other controls impacting likelihood of work-related transmission, and whether there was work-related contact with anyone who had COVID symptoms
  - ➢ *A positive COVID test is NOT required to trigger CalOSHA recording*
- Cal/OSHA's ATD standard requires covered employers to protect employees from airborne infectious diseases & COVID-19 through effective:
  - Written ATD exposure control plan and procedures, Training
  - Engineering and work practice controls, Personal protective equipment
  - Medical services (including vaccination & infection determination & treatment)
  - Laboratory operation requirements

CAL/OSHA COVID-19 ETS IN PROGRESS

- 9/17/20: Cal/OSHA standards board voted to approve union petition for ETS **specific to** COVID that will cover all workplaces – or possibly ETS will protect sectors not covered by the ATD rule. Any adopted rule will be reviewed by CalOSHA standards board at 4 mo intervals
- Gov. Newsom also signed legislation requiring employers to provide a lengthy list of notices to workers who are exposed to COVID-19, and authorizing Cal/OSHA to shot down worksites if conditions present an "imminent hazard" to workers due to COVID
- Cal/OSHA's ETS proposal will be considered by the Board no later than **Nov 19, 2020** – an advisory panel will review the rule which should address:

(1) prevailing guidance for worker protections from COVID-19 exposure in the workplace

(2) notification for affected employers and workers

(3) current industry best practices and guidelines, and

(4) considerations for the most vulnerable/impacted industries and professions

OR-OSHA COVID-19 ETS

- OR-OSHA's ETS rule was adopted 11/6/2020 – will take effect on 11/16/2020 (with certain parts phased in)
- Will continue in effect until May 4, 2021 – and is continuation of state guidance (also enforceable by OR-OSHA) requiring physical distancing, use of face coverings, and sanitation in all workplaces
- Final version reflects changes from the draft after stakeholder meetings with employer/worker reps
- Basic provisions:
  - Employer must ensure 6-foot distancing between all individuals in the workplace through design of work activities and workflow, unless shown infeasible
  - Employer must ensure that face coverings are worn at the workplace by ALL individuals (employees (FT/PT), and customers, as well as at any establishment under employer's control
  - Face masks/coverings/shields must be provided to employees by employer at no cost
  - Whenever employees are transported in a motor vehicle for work purposes, all persons inside must wear a face covering (unless all members of the same household).
  - Employer must maximize the effectiveness of existing ventilation systems, maintain and replace air filters, clean intake ports (but do not have to purchase new ventilation systems)
  - Post COVID-19 Hazards poster (available from state in English/Spanish)

OR-OSHA COVID-19 ETS

- Employers must develop an infection control plan, with participation and feedback from employees
  - This involves conducting risk assessment to address when workers must use PPE, and a description of other specific hazard controls
- Employers must provide information and training to their employees:
  - Employers must train their employees about PPE/social distancing requirements and how they will be implemented in the workplace, and
  - Employers must provide an opportunity for employee feedback about those practices (through the Social Distancing Officer and through either the Safety Committee, an interactive safety meeting, or both). Such notification must be conducted in a manner and language understood by the affected workers.
- Employers must provide an explanation of the employer's policies and procedures for employees to report signs or symptoms of COVID-19. Such explanations must be conducted in a manner and language understood by the affected workers.
- Employers must notify affected workers with 24 hrs of work-related COVID-19 infection, and cooperate with public health officials if testing within the workplace is necessary.

➢ *Additional measures included for high-ris jobs including: detailed infection control training and planning, sanitation procedures for routine cleaning & disinfecting, "robust" use of PPE, operating ventilation systems according to nat'l standards, use of barriers and isolation rooms, and screening/triaging for C-19 symptomsk*

COVID-19 Requirements for Workplaces

The requirements in the following subsections of this rule apply

OAR 437-001-0744

	3(a)	3(b)	3(c)	3(d)	3(e)†	3(f)**	3(g)‡	3(g)(B)	3(h)‡	3(h)(A)	3(i)*	3(j)	3(k)	3(l)	3(m)	4(a)* & 4(b)	4(c)‡	4(d)	4(e)	4(f)	4(g)	4(h)	4(i)
	Physical Distancing	Mask, face covering, or face shield	Cleaning and Sanitation	Posting Requirements	Building Operators	Ventilation Requirements	Risk Assessment	Written Risk Assessment	Infection Control Plan	Written Infection Control Plan	Employee Information and Training	COVID-19 Infection Notification	COVID-19 Testing	Medical Removal	Mandatory Appendices	Infection Control Training	Additional Infection Control Requirements	Sanitation Requirements	Personal Protective Equipment	Ventilation Requirements	Barriers, Partitions and Airborne Infection Isolation Rooms	COVID-19 Screening	Medical Removal
All Workplaces	✓	✓	✓	✓	✓	✓	✓		✓		✓	✓	✓	✓	✓								
Employers with more than 10 employees statewide	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓								
Exceptional Risk Workplaces	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓

Effective Dates: unless otherwise specified by the rule, the effective date for this rule is November 16, 2020.

† Effective November 23, 2020

‡ Effective December 7, 2020

* Effective December 21, 2020

** Effective January 6, 2021

MICHIGAN COVID-19 ETS

- MIOSHA adopted Emergency Rules for all businesses , with specific requirements for manufacturing, construction, retail, health care
  - Took effect 10/14/2020 and will remain in effect 6 mo.
- Employer must determine exposure for employees (routine and anticipated tasks) and classify as Lower, Medium, High and Very High
- Employer must create a COVID-19 Preparedness & Response Plan (written) including exposure determination, and detailed measures employer will implement including engineering and administrative controls, hand hygiene, PPE, health surveillance (screening protocols and reporting), and employee training
- A COVID-19 "workplace coordinator" must be identified
- Employer must:
  - Consider policies like telework
  - Mandate face coverings as required
  - Employee health screening procedures
  - Procedures for Sick employees to report and self-isolate, and notification of other workers

VIRGINIA OSHA (VOSH) COVID ETS

- Virginia 16 VAC 25-220 – effective 7/27/2020
  - VOSH has issued 43 pages of guidance (so far)!
  - Final provisions took effect 9/25/2020 – to be replaced by permanent standard before expires 2/21
- Provisions:
  - §Sec. 10: Purpose, Scope, Applicability
  - §Sec. 20: Effective Dates
  - §Sec. 30: Definitions
    - Risk Levels – VH, H, M, L
  - §Sec. 40: Mandatory Requirements
  - §Sec. 50: Very high and High Exposure Risk
  - §Sec. 60: Medium Exposure Risk
  - §Sec. 70: Infectious Disease Preparedness and Response Plan
  - §Sec. 80: Training
  - §Sec. 90: Anti-discrimination

VOSH ETS SCOPE, APPLICABILITY

- ETS establishes requirements for employers to control, prevent, and mitigate the spread of SARS-CoV-2, the virus that causes coronavirus disease 2019 (COVID-19) to and among employees and employers by addressing assessment of hazard/risk; engineering and administrative and work practice controls; training, and reporting / recordkeeping
- Applies to every employer, employee, and place of employment (POE) in VA within the jurisdiction of the VOSH program as described in 16 VAC 25-60-20 and 30
- Application of this ETS to a POE will be based on the exposure risk level of COVID-19 related hazards present or job tasks undertaken by employees at POE as defined in this ETS (i.e., very high, high, medium and lower risk levels)
- Factors to consider for types of hazards encountered:
  - Exposure to airborne transmission of COVID-19
  - Contact with contaminated surfaces or objects (e.g., tools, workstations, break rooms, locker rooms, and entrances and exits to facilities)
  - Shared work vehicles
  - Employer sponsored shared transportation such as ride-share vans, shuttle vehicle, car-pools and public transportation

WORKPLACE CLASSIFICATIONS: VOSH

- **Very High** – Places of employment with high potential for employee exposure to known or suspected sources of COVID-19, or known or suspected to be infected with COVID-19
  - Group – Special medical, postmortem, or laboratory procedures
- **High** – Places of employment with high potential for employee exposure inside 6 ft with person known or suspected sources of COVID-19, or person known or suspected of being infected with COVID-19
  - Group – Healthcare, first responders, medical transport, mortuary services
- **Medium** – Not classified as Very High or High, that require more than minimal contact inside 6 ft with other employees, persons, or general public or may be but are not known or suspected to be infected with COVID-19
  - Group is large and will capture most non-office plant, manufacturing, and construction jobsites.
- **Lower** – Not classified as Very High, High, or Medium and that does not require contact inside 6 ft with persons known or suspected of being infected with COVID-19 (offices or workplaces that have achieved minimal contact through implementation of engineering, administrative and work practice controls)

VOSH ETS: KEY POINTS

- Employers do not have to conduct contact tracing
- If a CDC recommendation is equal to or more stringent, then compliance with CDC is compliance with VA ETS – but VOSH will not identify which CDC guidance is acceptable (watch for fluctuating guidance)
- If CDC recommendation is not equal to or more stringent, then compliance with CDC is evidence of good faith with VA ETS but citations can still be issued unless affirmative defenses apply (e.g., technical or economic infeasibility)
- Exposure risk level – assessment of the possibility that an employee could be exposed to the hazards associated with COVID-19
  - All modes of transmission includes airborne of asymptomatic and symptomatic persons
  - Risk levels should be based on risk factors present that increase risk exposure to COVID-19 and are present during the course of employment regardless of location
- **Reporting**: Employer shall establish system to receive reports of positive COVID-19 tests by employees and others within 14 days of positive test and employer shall **notify:**
  - Employer's own employees (keep confidential known infected employee)
  - Other employers who had employees present at worksite
  - The building or facility owner (who then must inform tenants who are employers but will not ID the worker)
  - The VA department of health within 24 hours
  - The VA department of health of 3 positives with 14-day period

VOSH ETS – TRAINING REQUIREMENTS

- Employers with hazards or job tasks classified as **VH, H, or M** exposure risk at a POE shall provide training on hazards and characteristics of COVID-19 to all employees working at the POE regardless of risk classification
- ***Training must be given in a language and vocabulary that workers understand, bearing in mind illiteracy issues if using written materials***
- Employees should be able to recognize the hazards of COVID-19 and train employees to minimize these hazards
- Training must include,
  - Requirements of this ETS
  - Mandatory and non-mandatory recommendations of CDC guidelines or VA guidance documents the employer is complying with in lieu of ETS
  - Characteristics and methods of transmission
  - Signs and symptoms of COVID-19 illness and underlying health conditions
  - Awareness of pre-symptomatic and asymptomatic COVID-19 persons to transmit

VOSH ETS – ANTI-DISCRIMINATION

- Cannot discharge or in any way discriminate against an employee
  - who exercises their rights under this ETS
  - who voluntarily provides and wears the employee's own PPE
  - who raises a reasonable concern about infection control related to COVID-19 to the employer, employer's agent, government agency or to the public through print, online, social, or any other media
- Employee can refuse to work if they have a good faith reasonable fear of injury or death
- Employer can follow usual discipline if worker LIES about employer on social media without being charged with discrimination
  - VOSH will look at the mixed motive analysis

QUESTIONS???

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