



# OSHA Implications of COVID-19

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**Eric J. Conn**  
**Chair, OSHA • Workplace Safety Group**  
**Conn Maciel Carey LLP**

# Eric J. Conn

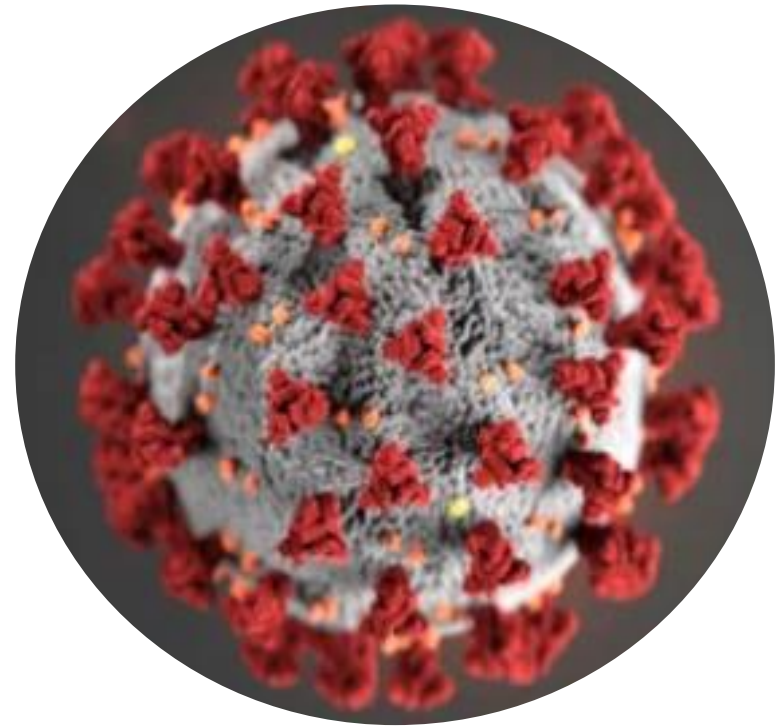
[econn@connmaciel.com](mailto:econn@connmaciel.com) • 202.909.2737

**Eric J. Conn** is a founding partner at **Conn Maciel Carey LLP** and the Chair of the Firm's national OSHA • Workplace Safety Practice Group:

- Practiced for a decade w/ the former first General Counsel of OSHRC
- Focuses on all aspects of occupational safety & health law
- Represents employers in inspections, investigations and enforcement actions involving OSHA, CSB, MSHA, & EPA
- Manages investigations of catastrophic industrial, construction, and manufacturing workplace accidents, explosions, and chemical releases
- Handles all aspects of OSHA litigation, from citation contests to criminal prosecutions, and negotiating settlements to minimize impact of OSHA enforcement on civil actions and operations
- Co-Chair of Conn Maciel Carey's COVID-19 Task Force

# Agenda

- ✓ OSHA Implications of COVID-19 in the Workplace
  - OSHA Guidance about Infection Control
  - Engineering and Administrative Controls and PPE
  - Recording & Reporting COVID-19 Cases
  - Enforcement Discretion Policy re: annual and other regulatory requirements





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# OSHA Implications of Coronavirus

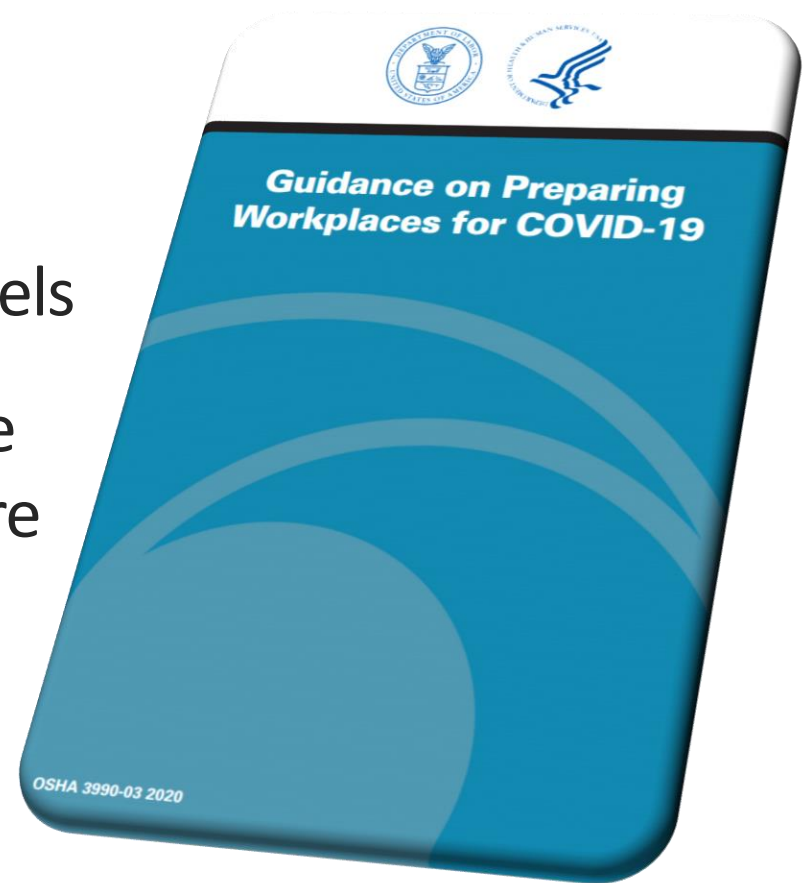
# General Duty Clause

- OSHA lists the General Duty Clause as a relevant standard that may apply to preventing occupational exposure to COVID-19
- Sec. 5(a)(1) of the OSH Act (the General Duty Clause):

“Each employer shall furnish each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.”
- 4 elements necessary to prove a violation:
  1. Hazard exists in the workplace;
  2. Employer or its industry “recognizes” the hazard;
  3. Hazard is like to cause death or serious injury; and
  4. Feasible means exist to eliminate/reduce the hazard

# OSHA Guidance on Preparing Workplaces for COVID-19

- Issued official guidance on preparing workplaces for COVID-19 on March 9, 2020
- Largely follows CDC's guidance
- Divides jobs into risk exposure levels
- Provides steps employers can take to reduce workers' risk of exposure
- Specifies what employers should do to protect workers based on the exposure level of their job



# Job Tasks by Risk Exposure Level

## Very high

- Healthcare / lab workers performing aerosol-generating procedures or handling specimens from known/suspected COVID-19 patients
- Morgue workers performing autopsies on bodies of known/suspected COVID-19 patients

## High

- Healthcare, support, and medical transport exposed to known/suspected COVID-19 patients
- Mortuary workers involved in preparing bodies of known/suspected COVID-19 patients

## Medium

- Those that require frequent and/or close contact (w/in 6 ft.) of people who may be infected w/ COVID-19 patients, but who are not known or suspected COVID-19 patients
- Where there is on-going community transmission, workers in this category may have contact w/ the general public

## Lower

- No required contact w/ people known/suspected of being infected w/ COVID-19, nor frequent close contact (w/in 6 ft.) of general public



# Protections to Consider

- Implement COVID-19 Exposure Control Plan / Response Plan
- Temp. PPE Hazard Assessment (consider gloves, gowns, respirators)
- Signage/communication for employees/guests re: hygiene practices
- ID and require sick employees/guests to stay out of the workplace
- Limit workforce / staggered and rotating shifts
- Provide adequate supply alcohol-based hand sanitizer, cleaning supplies, and hand soap
- Enhance workplace housekeeping program
- Discourage use of other workers' phones, desks, offices, tools and equipment
- Implement engineering and admin. controls

Occupational Risk Pyramid  
for COVID-19





# Protective Measures to Consider

- Engineering controls (e.g., high-efficiency air filters, increasing ventilation rates, installing physical barriers such as sneeze guards, etc.)
- Admin. controls (e.g., require sick workers to stay home, virtual meetings, implement telework if feasible, job rotations/staggered shifts, etc.)
- Safe work practices (procedures to reduce duration, frequency, or intensity of exposures; e.g., requiring regular hand washing)
- Personal Protective Equipment (e.g., face shields, respiratory protection, gloves, gowns, etc.)

# Flexible Work Arrangements

- Employers may need to keep up w/ local social distancing mandates even after government restrictions are eased
- Businesses may opt to change their physical worksite to avoid overcrowding (altering work stations, installing barriers, etc.)
- Businesses may allow employees to stagger shifts or experiment w/ different workweeks
  - Ex: allowing some employees to work 4-day weeks or set different start and end times



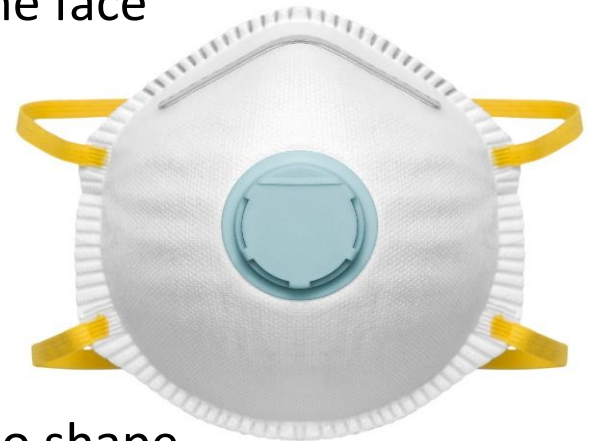
# Pre-Shift Health Screening

- Yes, b/c CDC acknowledges significant community spread and declared this a global pandemic, there is a “direct threat” to the workplace, so employers may take employee body temperatures
- CDC has ID'd 100.4° as a benchmark temp., BUT some people w/ COVID-19 never get a fever, and others can be contagious for multiple days before showing symptoms
- Protect the temperature-taker from exposures
- May also ask employees about their symptoms
- Employers must maintain all personal info about employee illness as a confidential medical record under the ADA (possibly for 30 years under OSHA's 1910.1020)
- Consider having employees self-monitor or fill out questionnaires



# Requiring Employees to Wear Masks

- Employers may require use of face coverings in the workplace:
  - Loose-fitting masks w/ no filtering medium (e.g., surgical masks or other face coverings) are not respirators and also not PPE
  - A face covering is a cloth, bandana, or other type of materials that covers an employee's mouth and nose.
  - The CDC lists five criteria for “cloth face coverings”
    1. Fit snugly but comfortably against side of the face
    2. Be secured with ties or ear loops
    3. Include multiple layers of fabric
    4. Allow for breathing w/out restriction
    5. Be able to be laundered and machine dried without damage or change to shape



# Requiring Employees to Wear Masks

- **What if an employer has distributed face coverings, but an employee fails to bring their face covering to work?**
  - The employee should not be permitted to work on-site until s/he is able to obtain a face covering
- **What if an employee refuses to wear a covering for non-medical reasons?**
  - Employees who decline to wear face coverings without a medical or otherwise protected objection should not be permitted to work and may be disciplined for not following work requirements
- **What if employees want to use their own face coverings?**
  - Make sure the coverings meets the CDC's requirements
  - Employers should provide employees a reimbursement or subsidy for material and cleaning costs
  - Must be work appropriate and cannot feature offensive images or content

# Respiratory Protection Enforcement Relief

- If N95 respirators are required (b/c of a PEL or employer policy), but supplies are unavailable, consider new engineering/admin. controls to lower exposure levels, or consider higher level, reusable respirators
- Also, OSHA issued temp enforcement memoranda that relax respiratory protection enforcement (to extend respirator supply) by permitting:
  - Suspension of Annual Respirator Fit-Tests (instead use alternative non-destructive, qualitative test)
  - Reuse of respirators beyond usual/manufacturer's recommended life
  - Use of non-NIOSH approved N95 respirators certified under other countries' protocols (e.g., China's KN95 respirators)
- OSHA will NOT cite respiratory protection violations if:
  - Perform initial fit tests
  - Reinforce importance of a fit check for adequate seal
  - Train employees in proper storage, cleaning, and inspecting respirators

## ***FAQ: Can we make contractors, visitors, inspectors, etc. comply with our policies?***

- Yes – if your policies are stricter than theirs, you can treat contractors, visitors, inspectors, etc. like your own employees and require them to comply
- Ex: If you require masks at all times at your facility, and a grain inspector refuses to wear one, you can turn him away; alternatively, consider isolating the inspector by prohibiting him from leaving a designated, closed off area where the work will be performed (e.g., lab) and preventing your employees from making any contact w/ him
- Remember, if someone will not have close contact (6' for a prolonged period) with others, CDC, OSHA, and state/local health departments generally do not recommend face masks



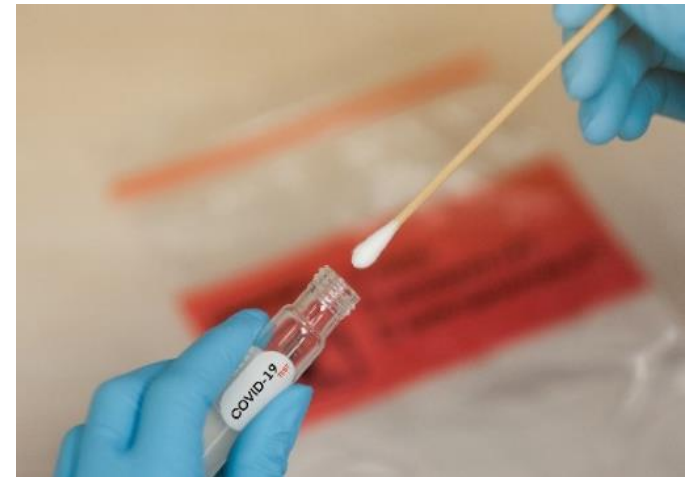
## ***FAQ: Can employees refuse to work if they think our policies are not strong enough?***

- Sec. 11(c) prohibits employers from retaliating against workers who in good faith attempt to exert a protected worker safety-related right
- Ask whether contractor has a good faith basis to believe the work task is unsafe
- Consider whether policies follow CDC, OSHA, and state/local health department recommendations
- Similar rights for contractor employees



# Testing for COVID-19

- Employers can require employees to participate in testing even if they do not exhibit symptoms
  - Note: This is permissible under the “Direct Threat Exemption” of the ADA
- A negative test does not mean an employee will not be infected later, so employers should keep following the guidance of medical and public health authorities



# Responding to Confirmed Cases

- Immediately isolate the employee, remove him/her from the workplace, and direct the employee to self-quarantine
- Conduct deep cleaning and disinfecting of any area(s) where the employee worked or contacted (using EPA-approved chemicals)
- Start contact tracing to identify any other employees or visitors who had close contact w/ the infected employee
- Notify those who may have had potential close contact with the COVID-19 infected individual, maintaining confidentiality
- Those w/ close contact (w/in 6' for more than a few min.), should be isolated, removed, and directed to self-quarantine
- Those w/ minimal contact and no symptoms may remain at work w/ preventive actions (hygiene, masks, monitoring for symptoms)

# When Can a Sick Employee Return to Work?

An employee who **had symptoms** can return to work under either a symptom-based strategy or test-based strategy.

- *Symptom-based strategy*: at least 3 days since recovery (resolution of fever w/out use of fever-reducing medications and improvement in respiratory symptoms); and at least 10 days since symptoms 1<sup>st</sup> appeared
- *Test-based strategy*: resolution of symptoms AND negative results of an Authorized COVID-19 molecular assay test from at least 2 consecutive respiratory specimens collected 24+ hours apart

An employee who **did not have symptoms** can return to work under either time-based strategy or a test-based strategy.

- *Time-based strategy*: 10 days since 1<sup>st</sup> positive COVID-19 diagnostic test
- *Test-based strategy*: negative results of COVID-19 molecular assay test from at least 2 consecutive respiratory specimens collected 24+ hours apart

## ***FAQ: Is a confirmed COVID-19 diagnosis of one of my employees recordable on my 300 Log?***

- Although OSHA's recordkeeping rule exempts cold/flu, OSHA has explicitly stated that COVID-19 can be a recordable illness
- Employers only have to record a COVID-19 case if:
  - It is a **confirmed case** of COVID-19 (at least 1 respiratory specimen that tested positive for SARS-CoV-2 virus)
  - It results in 1 or more **general recording criteria** (treatment beyond 1<sup>st</sup> aid; days away; etc.)
  - It is determined to be **work-related** as defined by 1904.5

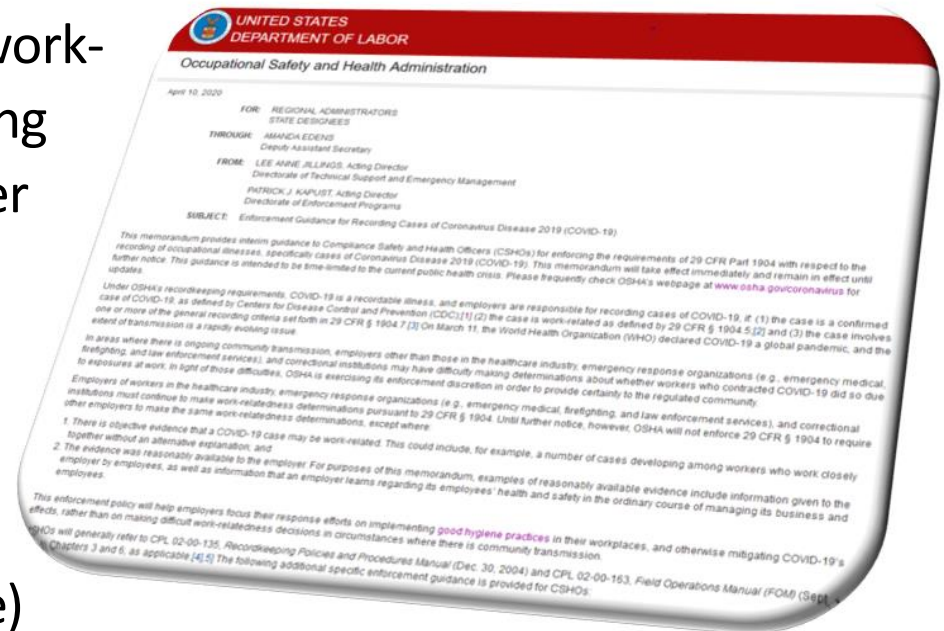
### **Recording workplace exposures to COVID-19**

OSHA recordkeeping requirements at **29 CFR Part 1904** mandate covered employers record certain work-related injuries and illnesses on their OSHA 300 log.

While 29 CFR 1904.5(b)(2)(viii) exempts recording of the common cold and flu, **COVID-19 is a recordable illness** when a worker is infected on the job.

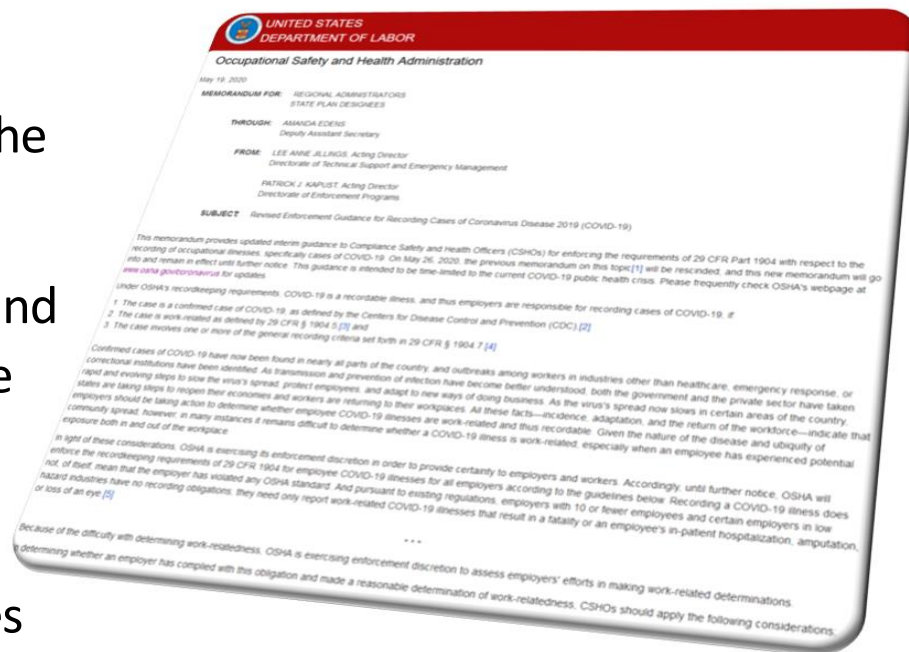
# Work-Relatedness Guidance (April 10)

- Healthcare, emergency responders, and correctional facilities must follow typical work-relatedness analysis (i.e., assess on a case-by-case basis whether it is ***more likely than not that an exposure in the workplace caused the illness***)
- Other employers, need not even assess work-relatedness unless:
  1. There is objective evidence of work-relatedness (e.g., a cluster among those who work closely together w no other explanation); and
  2. Evidence is reasonably available to the employer (e.g., info given by employees, or employer learns of it in the ordinary course)



# Work-Relatedness Guidance (May 19)

- ALL EMPLOYERS must undertake a case-by-case work-relatedness analysis of whether it is *more likely than not that an exposure in the workplace caused the illness*
- Employers are “not expected to undertake extensive medical inquiries, given employee privacy concerns.” It will be sufficient in most cases for employers to:
  - Ask the employee how he believes he contracted the COVID-19 illness
  - Discuss w/ the employee his work and out-of-work activities that may have led to the COVID-19 illness; and
  - Review the employee’s work environment for potential exposures





# Work-Relatedness Guidance (May 19)

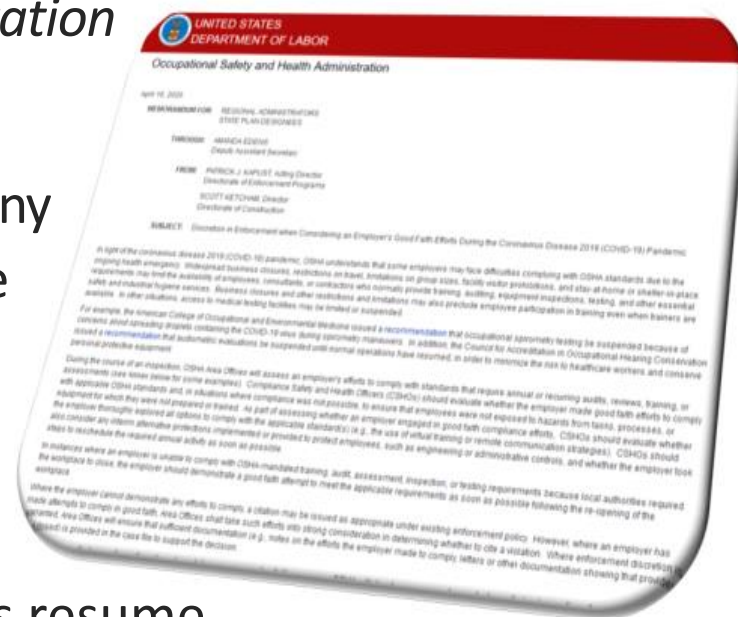
- OSHA also ID'd types of evidence that weighs in favor of work-relatedness; i.e., COVID-19 illnesses “are likely work-related” if:
  - Several cases among workers w/ close contact, *and no alternative explanation*
  - Illness contracted shortly after lengthy, close exposure to another confirmed case, *and no alternative explanation*; and
  - Job duties include frequent, close exposure to the general public in an area w/ ongoing community transmission, *and no alternative explanation*.
- OSHA also ID'd evidence that a COVID-19 case likely is NOT work-related:
  - Only 1 worker in a general vicinity in the workplace contracts COVID-19;
  - Job duties do not include frequent contact w/ general public; and
  - Outside the workplace, the infected employee associated closely and frequently w/ a non-coworker who has COVID-19.

## ***FAQ: Same question, but reporting to OSHA?***

- Same analysis for work-relatedness applies
- Reporting only required where there is a death or in-patient hospitalization
- Hospitalization is reportable only if the employee is formally admitted to the in-patient service of the hospital for treatment ***w/in 24 hours of the work-related exposure*** that caused the illness (extremely unlikely)
- Fatality is reportable only if it occurs w/in 30 days of the work-related exposure (possible)

# Enforcement Discretion Policy

- April 16, 2020 – New OSHA Enforcement Memo, providing relief from enforcement for employers in all industries
- If employer is unable to comply w/ standard that requires annual/ recurring duty (e.g., audit, training, assessment, inspection, or testing) b/c of COVID-19, **AND** employer made good faith attempts to comply, OSHA *“shall take such efforts into strong consideration in determining whether to cite a violation”*
- **BUT** where employer cannot demonstrate any effort to comply, or why complying would be more hazardous, citations may issue
- OSHA also expects employers to make good faith attempts to return to compliance as soon as normal operations resume



# Enforcement Discretion Policy

- To assess whether employer was **unable to comply**, OSHA will look for documentation of efforts to comply, e.g.:
  - Contracts/invoices that show training or audit service had been timely scheduled before the outbreak
  - Communications w/ vendors re: cancellation b/c of the pandemic
  - Efforts to explore other options to comply (e.g., virtual training)
- In assessing employers' good faith efforts to address the hazard, OSHA will look for documentation of:
  - Good faith efforts to implement interim alternative protections (e.g., engineering or administrative controls not normally used in the normal course of day-to-day operations before the pandemic)
  - Other efforts to address the hazard associated with the compliance obligation (e.g., additional training or audits, reduced throughput)

# Enforcement Discretion Policy – Types of Compliance Obligations Covered

- Annex A of memo is a non-exhaustive list of examples of situations where enforcement discretion will be considered:
  1. Annual Audiograms
  2. Annual Hazardous Waste Operations Training
  3. Annual Respirator Fit Testing and Training
  4. Crane Operator Re-Certification or Re-Licensing Examinations
  5. Periodic Medical Evaluation for Respirator Use
  6. PSM requirements (Informative as to Grain Standard requirements):
    - Process Hazard Analysis Revalidations
    - Annual review and certification of Operating Procedures
    - Periodic Refresher Operator Training
    - BUT NOT, Mechanical Integrity

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# QUESTIONS?

